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*A Reformatory Approach to State Regulation of
Insolvency Law in South Africa*

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PART I

INTRODUCTION

SUMMARY

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CHAPTER 1: GENERAL INTRODUCTION

1.1 INTRODUCTION

If one considers what need people have of an external regulation to constrain and steady them, how compulsion, slavery in a higher sense, is the sole and final condition under which the person of weaker will can prosper; then one understands the nature of conviction, “faith”.¹

The regulation² of an insolvency system is essential to assure the competence of office holders and other participants, to ensure the efficiency and effectiveness of the system, and to maintain the integrity of, and public confidence in, the system.³ This thesis follows a reformatory approach to state regulation of South African insolvency law within the context of global norms and standards, and our unique domestic social and economic environment. This study aims not only ultimately to propose a general framework within which law reform in the field of insolvency regulation can best be attained, but also to underscore the critical importance of a policy-based reform process. As such, through examining the general character of insolvency regulation, this study wants to provide a fresh approach to the field of regulation in our insolvency law – one that would constitute a more accurate reflection of the legal, socio-political and economic environment in South Africa.⁴

After a long period of prosperity and steady economic growth, the world’s leading economies are now in crisis, and although there are numerous debates about its origin, the scale and seriousness are in no doubt.⁵ The current global crisis has shown that after more than two decades of economic and legal disciplines being stuck in a deregulatory⁶ mindset, the

¹ Friedrich Nietzsche (1844-1900).

² “Regulation” in the *Oxford English Dictionary* means: “a rule or directive made and maintained by an authority; noun – the action or process of regulating or being regulated.” See *The Oxford Dictionary of English* (revised edition) (2005).

³ Uttamchandani *The Case for a Strong Regulatory Framework: The World Bank Principles in Asia* (2006) unpublished paper presented at the Forum on Asian Insolvency Reform V, China (hereafter referred to as Uttamchandani) on file with the author.

⁴ Although it is classified as an emerging market economy, South Africa has a fairly sophisticated and evolved credit market. South Africa might be more correctly seen as having a two-tier economy – an advanced economy of sophisticated consumers and firms that are investing all over the world, and a rural economy, with only the most basic infrastructure. The South African credit economy is complex, however, with credit extended in obvious ways to a large number of sophisticated lenders and corporate entities. In contrast, a large portion of the economy is represented by the informal sector, not yet drawn into the credit environment (Werker “Foreign Direct Investment and South Africa” (2007) *Harvard Business School Case* 707-019).

⁵ Niemi “Introduction” in Niemi *et al. Consumer Credit, Debt and Bankruptcy* (2009) (hereafter referred to as Niemi *Consumer Credit, Debt and Bankruptcy*).

⁶ Deregulation means setting an activity or an industry free of the legislative controls and constrains previously attached to it, or at least loosening the regulatory controls. See Hoexter *Administrative Law in South Africa* (2006) (hereafter referred to as Hoexter).



pendulum has apparently begun to swing back towards government regulation.⁷ From all parts of the world, calls for effective government action, long subdued, have grown louder and more numerous. The prevailing academic view in respect of the concept of regulation embraces the notion that vigorous regulatory governance, when well conceived and implemented, can effectively redress various shortcomings on an economic as well as on a broader societal level.⁸ The following statement underscores the significance of financial regulation within a global context:

So the question is, what do we do now? We did not choose how this crisis began, but we do have a choice in the legacy this crisis leaves behind. So today, my administration is proposing a sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression.⁹

The question may be asked how the concept of regulation in general fits in with our perception of a modern insolvency law system. The key factors that influence a country's insolvency system on an economic, social and political level join forces to create the so-called "cornerstones" or "building blocks" identified as essential to an effective insolvency system. These cornerstones consist of the legal framework, which represents the various areas of law impacting on the system,¹⁰ the institutional cornerstone, which is generally thought to be the courts, and the regulatory cornerstone, which consists of both the establishment and implementation of a regulatory body that has oversight and responsibility for implementing the regulatory procedures as well as the content of the regulations applicable to office holders responsible for the administration of the insolvent estate. The entire insolvency system rests on the proper functioning of all three cornerstones.¹¹

The nation of South Africa has since 1994 undergone a dramatic political transformation. The dismantling of apartheid, the adoption of a new and modern constitution by a multi-racial parliament and the reform of the national political structure have had far-reaching economic and social effects.¹² Foreign investment has risen steadily and, as one observer notes, South

⁷ For a more detailed discussion of this topic see generally: Moss *New Perspectives on Regulation* (2009).

⁸ Balleisen "Introduction" in Balleisen *Government and Markets: Towards a New Theory of Regulation* (2009) 1-3 (hereafter referred to as Balleisen).

⁹ Statement by Barack Obama "Remarks by the President on 21st Century Financial Regulatory Reform" (2009-06-17).

¹⁰ *Inter alia* insolvency law, corporate law, tax law and labour law.

¹¹ Uttamchandani 1.

¹² See generally: Hoexter 26; Burns *Administrative Law under the 1996 Constitution* (2003) 1 (hereafter referred to as Burns).

Africa “offers the sophistication of an established market and the growth potential of an emerging market”.¹³ From an economic perspective it is clearly in the interests of society that the insolvency system works efficiently.¹⁴ The social and economic landscape has evolved during the past decade to such a degree that a fresh approach to insolvency law reform has become essential in South Africa’s quest to become an investment destination of choice.¹⁵

With the recognition of the Constitution¹⁶ as the supreme law of the land, the legal community in South Africa have had to adapt from the old concept of parliamentary sovereignty to a new model of constitutional democracy.¹⁷ In *Holomisa v Argus Newspaper Ltd*¹⁸ Cameron J summarised this principle very well: “The Constitution has changed the ‘context’ of all legal thought and decision-making in South Africa”.¹⁹ The foundation of constitutionalism is that the power of the state is defined and circumscribed by law to protect the interests of society.²⁰ The aim and purpose of any state regulation in South Africa should thus be to ensure compliance with the underlying values of the Constitution, which include the protection of societal interests and of individual rights and freedoms.

The thesis will not attempt to deal with the philosophical and economic principles with regard to the ongoing globalisation and financial regulation of capital and financial markets in general, but will instead aim to identify the parameters of an effective regulatory model within the South African insolvency law. While the primary focus of the reform process of insolvency law and institutions should be on how best to serve the needs and interests of society, it is unrealistic to ignore the wider global context in which trade and commerce take place. The significance of a modern insolvency system as a key foundation of sustainable economic development has also been widely acknowledged and documented by international

¹³ See Wiggins “Rethinking the Structure of Insolvency Law in South Africa” (1997) *New York Law School Journal of International and Comparative Law* 509 (hereafter referred to as Wiggins).

¹⁴ Milman *Personal Insolvency Law, Regulation and Policy* (2005) 5 (hereafter referred to as Milman).

¹⁵ Wiggins 509.

¹⁶ Constitution of South Africa, 1996. Hereafter referred to as the Constitution. In terms of s 1(2) of the Citation of Constitutional Laws Act 5 of 2005 which came into operation on 2005-06-27 all references to the Constitution of the Republic of South Africa Act 108 of 1996, have been replaced by the Constitution of South Africa, 1996.

¹⁷ Hoexter “‘Administrative Action’ in the Courts” (2006) *Acta Juridica* 303 (hereafter referred to as Hoexter “‘Administrative Action’ in the Courts”).

¹⁸ 1996 6 BCLR 836 (W) at 836J.

¹⁹ Botha “Administrative Justice and Interpretation of Statutes: A Practical Guide” in Lange *The Right to Know* (2004) 14 (hereafter referred to as Lange *The Right to Know*).

²⁰ Burns 28.

institutions such as the World Bank²¹ and the United Nations Commission on International Trade Law.²² Wood has argued cogently that insolvency law is the most crucial indicator of attitudes of a legal system and arguably the most important of all legal disciplines.²³ The clear message sent by the international community is that insolvency laws and systems are increasingly being recognised as a fundamental institution, essential for the development of credit markets and entrepreneurship in developing countries, and, in turn, those insolvency systems depend on the existence of sound and transparent institutional and regulatory frameworks and of individuals with the required competence, independence, impartiality and integrity working within those frameworks.²⁴

In many international jurisdictions the last three decades have witnessed a continuing cycle of procedural reforms with the aim of addressing consumer over-indebtedness as well as insolvency in the corporate sector.²⁵ The system of insolvency law has an impact on parties and interests at every level of society. In developed and developing societies, the legal device of incorporation acts as a conduit for a substantial proportion of business activity through which the wealth of the national economy is generated.²⁶ Economies worldwide experienced a significant and unprecedented slowdown in economic activity during late 2008 and early 2009 as credit tightened and international trade declined.²⁷ Due to *inter alia* the global financial meltdown personal insolvency also experienced an explosive growth and consumer

²¹ See World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*) available at http://www.worldbank.org/ifa/ipg_eng.pdf (last visited at 09-11-30).

²² Hereafter referred to as “UNCITRAL”. See in general Wessels *Cross-Border Insolvency Law – International Instruments and Commentary* (2007) (hereafter referred to as Wessels *Cross-Border Insolvency Law*). See eg, UNCITRAL *Legislative Guide on Insolvency Law* (2005) 10 (hereafter referred to as “UNCITRAL *Legislative Guide*” or “*Legislative Guide*”) available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (last visited at 09-11-30).

²³ Wood *Law and Practice of International Finance: Principles of International Insolvency* (1995) 1.

²⁴ Joyce *The Role of Insolvency Regulators in the Past and in the Future* 4 (2003) unpublished paper delivered at the International Insolvency Conference, Singapore, (hereafter referred to as Joyce “The Role of Insolvency Regulators in the Past and in the Future”) on file with the author. Cf Mistelis “Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform—Some Fundamental Observations” (2000) *The International Lawyer* 1055 at 1057. See World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*) Available at http://www.worldbank.org/ifa/ipg_eng.pdf (last visited at 09-30-11).

²⁵ Ramsay “Comparative Consumer Bankruptcy” (2007) *University of Illinois LR* 241 (hereafter referred to as Ramsay “Comparative Consumer Bankruptcy”); Ziegel “The Challenges of Comparative Consumer Insolvencies” (2005) *Pennsylvania State International LR* 639; Ziegel “Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies” (2006) *Theoretical Inquiries in Law* 299 (hereafter referred to as Ziegel “Facts on the Ground”).

²⁶ Johnson “Toward International Standards on Insolvency: The Catalytic Role of The World Bank” (2000) *Law in Transition* 71 (hereafter referred to as Johnson).

²⁷ See generally: Culp *et al. Corporate Aftershock: The Public Policy Lessons from the Collapse of Enron* (2003); *World Economic Outlook* (International Monetary Fund (hereafter referred to as “IMF”)) April (2009).

bankruptcy filings surged to record highs.²⁸ It is submitted that the overall objective of a well-designed and effective regulatory system should be to operate from a coherent and consistent set of principles in order to manage the risk with regard to both corporate and consumer bankruptcy, while at the same time keeping in touch with the wider social goals of the legal system as a whole.²⁹

“As society itself is dynamic and constantly evolving, so insolvency law, as part of the wider legal context of by which society is regulated, cannot be static in nature”.³⁰ With reference to insolvency law reform, the modification of the United States³¹ bankruptcy system in the mid-seventies and the reform of the English insolvency system in the eighties can virtually be set down as the advent of modern bankruptcy law reform.³² Since its core insolvency legislation hails from 1936, policy-makers as far back as 1987 embarked on an extensive study of South African insolvency law with the view to substituting the Insolvency Act of 1936³³ and have been suggesting a unified Insolvency Act incorporating the winding-up provisions of companies and close corporations.³⁴ The primary function, however, was to revise and consolidate the law rather than to deal excessively with the consideration of policy matters.³⁵

²⁸ Seager “Explosion in Number of Bankrupts” *The Guardian* (United Kingdom (hereafter referred to as “UK”)) (2004-08-07); The Insolvency Service figures showed bankruptcies up 23.4% in the first quarter of 2009 on the same period last year and 0.5% higher than in the last quarter of 2008. See Osborne “Bankruptcies Rise to Record High” *The Guardian* (UK) (2009-05-01). “Consumer Bankruptcy Filings up Nearly 37% through first half of 2009” press statement by American Bankruptcy Institute (hereafter referred to as “ABI”) (2009-06-02) available at <http://www.abiworld.org> (last visited at 09-30-11).

²⁹ Johnson 71.

³⁰ Johnson 71.

³¹ Hereafter referred to as the “US”.

³² See Report of the Review Committee *Insolvency Law and Practice* (Report of the Review Committee Insolvency Law and Practice Cmnd 8558 (1982) (hereafter referred to as the *Cork Report*), in the UK and the *Report of the Commission on the Bankruptcy Laws in the United States* HR Doc no 93-137 (1973) 71 in the US. See Ramsay “Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales” (2006) *Theoretical Inquiries in Law* 625 at 659 (hereafter referred to as Ramsay “Functionalism and Political Economy”); Fletcher *The Law of Insolvency* (2009) 6-7 (hereafter referred to as Fletcher).

³³ Act 24 of 1936. Hereafter refer to as the Insolvency Act or Insolvency Act of 1936. While it primarily deals with the sequestration of individuals, partnerships and other entities that cannot be wound up under the provisions of the Companies Act 61 of 1973 (hereafter referred to as the Companies Act), it applies *mutatis mutandis* to insolvent companies and close corporations by virtue of s 339 of the Companies Act and s 66 of the Close Corporations Act 69 of 1984 (hereafter referred to as the Close Corporations Act) respectively.

³⁴ For a general discussion see: Burdette *Framework for Corporate Insolvency Law Reform in South Africa* (2002) LLD dissertation University of Pretoria ch 3 (hereafter referred to as Burdette); Key “To Unify or not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals” (1999) *DJ* 62-79; Boraine “The Draft Insolvency Bill – an Exploration (Part 1)” (1998) *TSAR* 621, where reference is made to this uniformity. See also Havenga “Simplification and Unification in Corporate and Insolvency Law – Are we Making any Progress?” (2001) *SA Merc LJ* 408 (hereafter referred to as Havenga); Loubser “An International Perspective on the Regulation of Insolvency Practitioners” (2007) *SA Merc LJ* 123 (hereafter referred to as Loubser).

³⁵ Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) LLD dissertation University of Pretoria 430 (hereafter referred to as Evans).



The recurring theme of this study is that having good domestic insolvency laws means little if they cannot be enforced efficiently. Insolvency reforms must therefore encompass not only the substantive laws, but also the institutional arrangements needed to ensure that the laws are applied effectively.³⁶ Finally, it is submitted that although the current legal and political climate is conducive to change in the field of South African insolvency regulation, the importance of a policy-driven approach, based on lessons learned and insights gained from research conducted into the historical context, global norms and standards as well as the pre-existing local conditions surrounding this field of law, cannot be over-emphasised.

1.2 RESEARCH STATEMENT

The broad problem statement of this thesis is to investigate certain aspects of state regulation in the South African insolvency law with the view ultimately to proposing a framework within which the legislator could pursue legal reform based on comprehensive policy objectives in this field of law.

1.3 RESEARCH OBJECTIVES

In order to delimit and define the scope of this study in view of the area of research envisaged in the previous paragraphs, the following research objectives have been formulated:

- 1 An insolvency system profoundly reflects the historical, legal, and cultural context of the country within which it operates.³⁷ In exploring the historical roots of regulation in South African insolvency law, this study endeavours to establish a pattern of state regulation in our law and in the process attempts to explain the unique regulatory system presently in place.
- 2 There is at present general international recognition that sound, transparent and predictable insolvency and creditor rights systems are an essential part of national and international financial architectures. By studying the regulatory methodology within the English, American and Dutch bankruptcy systems as well as the principles and guidelines issued by

³⁶ Hockey, Minister for Financial Service and Regulation, Australia, (1999) unpublished paper presented at Insolvency Systems in Asia: An Efficiency Perspective Conference, Sydney, on file with the author.

³⁷ Martin "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation" (2005) *Boston College International and Comparative LR* 3.

- international organisations, this study seeks to establish whether the global norms identified as such could provide domestic policy and law-makers with persuasive and digestible solutions and policy considerations.
- 3 The supreme law of the land, the Constitution, has changed the face of our law dramatically in that legislation may now be tested by the courts in order to establish its constitutionality.³⁸ This study argues that it should be contemplated whether the values reflected in the Constitution are mirrored within our insolvency system, and if not, the positive challenge lies in absorbing the general Constitutional ethos, and specifically the right to administrative justice entrenched in the Constitution, into the legislative and institutional reform envisaged.
 - 4 In order to determine whether it is attainable, or even desirable, to bring about law reform in regard to the regulatory discipline within our insolvency law, it is necessary to examine the present provisions in our insolvency law as they relate to the regulation of insolvency, and to identify problem areas within the system. The problems and pitfalls within the regulatory system in our insolvency law cannot be fully understood without an appreciation of the legal regimes that govern the regulatory structures. In order to justify a change in law, it is necessary as a starting point to have a clear understanding of the present legal environment and subsequent reform recommendations by the South African Law Reform Commission. Then an effort must be made to identify possible limitations within the system and consider potential legal and strategic outcomes and solutions.
 - 5 The theme that underlies all topics relating to regulation is the need to instil trust and confidence in an insolvency law system, in order for insolvency law to act as a pillar for both fiscal and social policy considerations.³⁹ It is submitted that a critical and policy-driven approach is essential on the grounds that it is impossible to evaluate areas of the law, suggest reforms or develop the law with a sense of purpose, unless there is clarity concerning the objectives and values sought to be furthered.⁴⁰ The final phase of this study would be to move beyond an appraisal of current laws and processes and to consider a

³⁸ Dlamini “The Right to Administrative Justice in South Africa” (2000) *TSAR* 697 at 701 (hereafter referred to as Dlamini).

³⁹ “Insolvency Law Reform: Promoting Trust and Confidence” *New Zealand Law Commission Study Paper* 11 Wellington (2001) 33-35 (hereafter referred to as *New Zealand Law Commission Study Paper*).

⁴⁰ Finch *Corporate Insolvency Law* (2002) 1 (hereafter referred to as Finch).



fresh approach to regulatory procedures and institutions.⁴¹ The broad research field of this thesis has to do with the fact that the current Insolvency Act hails from 1936 and that in view of current local reform initiatives a rethink of the role of the Master relating to insolvency matters is also required – especially since no thorough investigation has been carried out in this regard. This study will argue the importance of integrating our insolvency law into the broader legal, socio-political and commercial context of our country, while at the same time attempt to make recommendations for a regulatory framework in the South African insolvency law which would foster international and local confidence in our insolvency law system.

1.4 OVERVIEW OF CHAPTERS

- 1 Part I sketches the background to the study and outlines the problem statement and research objectives to be addressed in the chapters that follow.
- 2 In Part II a historical overview of the development of South African insolvency law, with particular reference to the regulatory aspects of our insolvency law, is included. This firstly entails an overview of Roman-Dutch law; Roman law and English law, and, secondly, a discussion of the development of state regulation within the context of the South African insolvency law.
- 3 Part III entails a comparative study of certain jurisdictions which may serve as a valuable benchmark. The common law jurisdictions of England and Wales, the US as well as the civil law jurisdiction of the Netherlands will be included. The study will follow the historical development of the regulatory features in each jurisdiction and will include an outline of the substantive law as well as the philosophy underpinning the regulatory procedures within each system. In addition, the regulatory and institutional components of the insolvency systems within each jurisdiction will briefly be explained. Finally, the insolvency initiatives by the World Bank and UNCITRAL containing the key elements of an effective insolvency law system also form part of the discussion, with the aim of shedding light on international best practice to be used as a guideline for creating a sound regulatory regime.

⁴¹ Finch 2.



- 4 The new political dispensation has changed the face of South African law dramatically. Given the prominent role of the South African Constitution, and subsequently the administrative law, in all legal disciplines, part IV considers the impact of constitutional and administrative law on the regulatory aspects of our insolvency system, and in particular to ascertain its impact on the role of the Master of the High Court⁴² as an “organ of state”.⁴³
- 5 Part V is concerned with the status of the existing South African insolvency law in relation to the regulatory procedures within our system, and in particular the role and function of the Master. The aim of this part of the study is twofold. The first aim is to provide a broad outline of the legal, regulatory and institutional frameworks within the South African insolvency law system, with the emphasis on the powers and duties of the Master *via* the Insolvency Act of 1936. The second aim is to examine the 2000 insolvency law reform proposals envisaged by the South African Law Reform Commission, in an effort to assess whether the proposals provide any policy-based solutions to the problems and pitfalls identified in our regulatory system.
- 6 The formulation of proposals for a new regulatory framework in South African insolvency law suggests a change in the philosophy underpinning the traditional role of the state in the regulatory regime. In order to remain on the path of sound law reform, part VI considers whether an existing policy on state regulation is in place, and explores certain aspects related to the regulation of insolvency law which should be considered in determining the parameters of a comprehensive policy in this area of insolvency law.
- 7 Finally, Part VII contains some concluding remarks and recommendations for a regulatory framework that would provide a conceptual foundation for future research on law reform in an attempt to eradicate problem areas in this area of our insolvency law. It is argued that this elusive goal could be reached by incorporating the principles that have crystallised in the research undertaken in this thesis, challenging the assumptions that underpin the present insolvency regime, and changing and adopting new perspectives with regard to insolvency law reform in general.

⁴² Hereafter referred to as the Master.

⁴³ S 239 of the Constitution.



1.5 SCOPE OF RESEARCH

Throughout the thesis the Insolvency Act of 1936, as primary source of our insolvency law, will form the platform for discussion, and although *ad hoc* reference to various provisions relating to the winding-up of companies will be incorporated, preference is given to principles as they relate to the insolvent individual. Burdette states that: “despite the piecemeal development of winding-up law, it developed very much in the same way as South African insolvency law did. The parallel development of winding-up and company law with 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 late in the twentieth century.”⁴⁴

During the late 80s the South African Law Reform Commission embarked on a reform programme which has as its aim the complete reform of South African insolvency law.⁴⁵ Where relevant, the suggested reform proposals as envisaged in the 2000 draft Insolvency Bill will form part of this study. The process of reforming South African corporate law has materialised in new legislation and literature, notably the King III Report⁴⁶ and the new Companies Act 2008.⁴⁷ Due to the constraints involved in publishing a thesis of such magnitude, the reform of South African company law will not be included in the scope of this study. While it is not part of the scope of the thesis, mention will nevertheless be made of certain particular aspects with regard to the reform process.

1.6 TERMINOLOGY

For the purposes of this study the following concepts, frequently used in this study, are briefly clarified:

⁴⁴ Burdette 63.

⁴⁵ South African Law Commission (as it was then known) *Review of the Law of Insolvency* Project 63 (2000) Report, vol I Explanatory Memorandum, and vol II Draft Bill (hereafter referred to as 2000 draft Insolvency Bill or draft Insolvency Bill). See also Evans 431.

⁴⁶ The revised *King Code of Governance for South Africa 2009* (“King III”) was launched on 2009-09-01. It will come into effect and replace the existing *King II Code and Report on Corporate Governance* (“King II”) on 2010-03-01.

⁴⁷ Companies Bill 61 of 2008 has been signed by the President as Act 71 of 2008 published in GG no 32121 (2009-04-07).

1.6.1 “INSOLVENCY” AND “BANKRUPTCY”

Worldwide, the word “insolvency” is the more common term for such proceedings where a business debtor is involved, while “bankruptcy” would refer to the procedures to be applied to individuals.⁴⁸ Rajak states that in England and Wales the terms “insolvency” and “bankruptcy” both describe the same condition – the inability to pay the debts owing in full – but each has become closely associated with a different type of debtor.⁴⁹ In the US the term “bankruptcy” refers to the legal procedure for dealing with debt-related problems of individuals and businesses, and in particular any case filed under the chapters of title 11 of the US Code.⁵⁰ In South Africa, in common parlance the word “insolvency” refers to both individuals and corporate entities.⁵¹ In this study the terms “insolvency” and “bankruptcy” are used interchangeably when referring to the general principles arising from a particular jurisdiction.

1.6.2 “INSOLVENCY PRACTITIONER” AND “OFFICE HOLDER”

“Insolvency practitioner” is the generic term used in this study to denote the appointment of both trustees⁵² and liquidators.⁵³ Internationally the term “office holder” means a person who is appointed to administer an insolvency estate, and includes a trustee, liquidator, administrator, reorganiser and so forth. The term is increasingly being employed in international literature, following the practice of international organisations such as the World Bank.

⁴⁸ Fletcher (2009) 3.

⁴⁹ See also Rajak “Creditors and Debtors – The Background to the Insolvency legislation of 1986” (1990-1991) *King’s College LJ* 17 (hereafter referred to as Rajak).

⁵⁰ Also referred to as the Bankruptcy Code; Code; 1978 Act or Bankruptcy Reform Act of 1978. (Pub l no 95-598, 92 Stat 2549 (1978) 11 USC par 101 *et seq* which was signed into law on 1978-11-06 and became effective on 1979-10-01)

⁵¹ The terms winding-up and liquidation generally indicate the provisions relating to the liquidation of a company and close corporation.

⁵² Appointed in an individual debtor sequestrated in terms of the Insolvency Act.

⁵³ Appointed in estate of corporate entities liquidated in terms of the Company Act or Close Corporations Act.



1.6.3 “GOVERNMENT” AND “STATE”

The terms “government” and “state” are used interchangeably in this study. “State” is generally a more neutral, abstract term, while “government” refers to a political entity.⁵⁴

1.7 REFERENCE TECHNIQUES

- 1 For the sake of convenience I use the masculine form throughout this thesis to refer to a natural person.
- 2 When I refer to court judgments, the full citation appears in the footnotes as well as in the table of cases. Books are referred to in the footnotes by way of short title, while I supply the full title in the bibliography. Only the first author of a journal article is cited in the footnotes, while the complete list of authors will appear in the bibliography. In the case of a source drawn from the internet the website and date it was last accessed is given in the footnote and the bibliography.
- 3 The law as stated in this thesis reflects the position as on 31 August 2009. However, reference will be made to certain statements in address made by the Deputy Minister for the Department of Justice and Constitutional Development, at a recent International Association of Insolvency Regulators Conference.⁵⁵

1.8 LIMITATIONS ON THE STUDY

The general field of insolvency law is far too comprehensive to address in one thesis. For this reason, certain limits have been placed upon the scope of the research undertaken. Although the Insolvency Act of 1936, as primary source of our insolvency law, provides the conceptual foundation for the study’s research, the final recommendations and conclusions are intended to have equal effectiveness in matters of individual as well as corporate insolvency law.

⁵⁴ Hoexter 5.

⁵⁵ Keynote address by Deputy Minister of Justice and Constitutional Development, Mr A Nel, MP, at the International Association of Insolvency Regulators (“IAIR”) annual general meeting and conference, Sandton, 2009-10-12. Available at http://www.justice.gov.za/m_speeches/sp2009.html (last visited at 09-11-30).



A Reformatory Approach to State Regulation of Insolvency Law in South Africa

PART II

A HISTORICAL OVERVIEW

SUMMARY

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CHAPTER 1: HISTORICAL OVERVIEW OF STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW

1.1 INTRODUCTION

You ask what is the good of knowledge of the ancient law? What is the use of studying an ancient jurisprudence dead and buried? Why disturb its ashes and waste the precious hours? Forsooth, these are questions asked by those who are ignorant of the fragments of the ancient jurisconsults, and who know not how to draw from the fountains of clear water, but who resort to the turbid pools of the commentaries of the so called doctors.¹

South African insolvency law is neither pure Roman-Dutch law, nor pure English law, its legal tradition having been shaped both in substance and methodology by a fusion of influences deriving from periods of Dutch and British colonial domination in the Cape of Good Hope.² When endeavouring to make suggestions on law reform with the aim of eradicating certain problems areas in respect of our regulatory procedures, it is necessary to return to the early foundations of our insolvency law. In an effort to explain the distinctive features of our present system, the historical roots of regulation in South African insolvency law have to be unearthed. This is undertaken in an attempt to establish a pattern of regulation in our insolvency law. As aptly recognised by the Cork Committee³: “the roots of insolvency law are embedded deep in our legal, social and economic history.”⁴

The chapter is divided into two parts. The subject of the first is a brief discussion of the history of insolvency law in general followed by a historical survey of the evolution of state regulation in the Roman, Roman-Dutch and English law. The latter is of particular importance in the context of this study, as South African insolvency legislation is deeply rooted in English law, resulting in South African and English laws reflecting to a certain extent similar legal philosophies and principles.⁵ The remainder of the chapter explores the

¹ The answer given by Bijnkershoek when questioned by students as to the reason why they should concern themselves with the study of Roman law. Cornelius Bijnkershoek (1673-1743) was one of the most eminent Dutch jurists of the eighteenth century. He was the President of the Supreme Court of Holland, Zeeland and West-Friesland from 1724 until his death. See Wessels *History of the Roman-Dutch Law* (1908) 661 (hereafter referred to as Wessels).

² Hereafter referred to as the Cape or Cape of Good Hope. Lubbe *Three Aspects of South African law* (2007) unpublished paper presented at IALS Conference, China, on file with the author.

³ The full title of this committee’s work is *Cork Report of the Review Committee Insolvency Law and Practice* Cmnd 8558 (1982) (hereafter referred to as the *Cork Report*).

⁴ Martin “The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation” (2005) *Boston College International & Comparative LR* 1 (hereafter referred to as Martin “The Role of History and Culture”).

⁵ See generally: Wessels 661; Smith *Insolvency Law* (1988) 5 (hereafter referred to as Smith); Bertelsmann *et al Mars, The Law of Insolvency in South Africa* (2008) 1-2 (hereafter referred to as Mars); Sharrock *et al*

development of state regulation in South African insolvency law and the subsequent insolvency statutes that found application.

It falls beyond the scope of this study to include a detailed discussion of each aspect of the historical development of our insolvency law, and emphasis will repeatedly be laid upon the development of the basic principles underlying the regulation of insolvency law. It is anticipated that a brief glance at the historical roots of our legal system would ensure that certain practices are not taken for granted and enterprises are not sustained long after their reason for existing has disappeared.⁶

1.2 HISTORICAL OVERVIEW OF INSOLVENCY LAW IN GENERAL

Although we find that general works on the history of law and procedure make scant mention of the history of bankruptcy, it has a very long history – being known in the Middle Eastern and Roman worlds as long as there has been a recorded history of commerce and trade.⁷ Credit sales and indebtedness were practically unknown and in early primitive societies there were no laws protecting creditors or regulating the distribution of a debtor's estate.⁸ Payment was seldom delayed and creditors who performed their part of a transaction had little cause to fear default on the part of the debtor. Sanctions varied from being religious in character to a severe form of the primitive procedure of execution.⁹ It is interesting to note that in ancient Egypt payment of debt was for example often forced by a spiritual sanction. In the event of default by the debtor, it was almost a universal custom for the debtor to pledge the body of

Hockly's Insolvency Law (2006) 11 (hereafter referred to as Hockly); Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) LLD dissertation University of Pretoria (hereafter referred to as Evans); Stander *Die Invloed van Sekwestrasie op Onuitgevoerde Kontrakte* (1994) 8-16 LLD dissertation Potchefstroom University for Christian Higher Education (hereafter referred to as Stander); Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* vol 1 (1986) 1-1-1-17 (hereafter referred to as Dalhuisen); Visser "Romeinsregtelike Aanknopingspunte van die Sekwestrasieproses in die Suid-Afrikaanse Insolvensiereg" (1980) *DeJure* 42 (hereafter referred to as Visser); Stander "Geschiedenis van die Insolvensiereg" (1996) *TSAR* 371 (hereafter referred to as Stander "Geschiedenis van die Insolvensiereg"); Levinthal "The Early History of Bankruptcy Law" (1918) *University of Pennsylvania LR* 223-250 (hereafter referred to as Levinthal); Burdette *Framework for Corporate Insolvency Law Reform in South Africa* (2002) LLD dissertation University of Pretoria (hereafter referred to as Burdette); Roestoff 'n *Kritiese Evaluasie van Skuldverligtingsmaatreëls vir die Individu in die Suid Afrikaanse Insolvensiereg* (2002) LLD dissertation University of Pretoria.

⁶ Duns *Insolvency Law and Practice* (2002) 25 (hereafter referred to as Duns).

⁷ Omar *European Insolvency Law* (2004) 4 (hereafter referred to as Omar).

⁸ See Omar 6; Levinthal 223.

⁹ Levinthal 229.

his nearest deceased relative, especially that of his father, and the creditor was given the right to remove the mummy.¹⁰

Much of the medieval laws of European insolvency¹¹ arose from the customs of the Italian cities which enacted laws and developed rules to govern the conduct of trade by citizens and foreigners and to deal with the absconding debtor's assets.¹² This phenomenon probably arose as a result of the absence of sufficient procedures in early Roman law to deal the more sophisticated commercial climate. The etymology of the word bankruptcy is said to be *banca rota* (broken bench) and was derived from the ceremony whereby an insolvent trader was punished by being forced to break his bench, thereby denying him the ability to continue trading.¹³ Certain writers hold the view that the word "bankruptcy" is derived from the French words *banque* (bank) and *route* (road or path) or the Italian word *bancorupto*.¹⁴ Then again, Blackstone preferred the Italian lineage: "The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone ..."¹⁵

Principles of modern bankruptcy law in both common and civil law countries matured from a uniform origin.¹⁶ The "Law Merchant"¹⁷ was a distinct body of law developed by a network of medieval courts scattered across Europe which would exercise their jurisdiction in the locations where they resided over the dealings of merchants and commercial issues in general. The Law Merchant became a body of common European usage, drawing extensively

¹⁰ Levinthal 229.

¹¹ The word "insolvency" derives from the Latin "in" (against) and "solvere" (dissolve or release) and therefore indicated that the insolvent was a person not released from debt. See Omar 5.

¹² Omar 6.

¹³ Jackson *The Logic and Limits of Bankruptcy Law* (1986) 2 (hereafter referred to as Jackson). For an alternative derivation see Levinthal "The Early History of English Bankruptcy" (1919) *University of Pennsylvania LR* 67 (hereafter referred to as Levinthal on English Law). See also Rajak "The Culture of Bankruptcy" 4 (hereafter referred to as Rajak "The Culture of Bankruptcy") in Omar *International Insolvency Law: Themes and Perspectives* (2008); Omar 4.

¹⁴ Latin: *Bancus Ruptus*.

¹⁵ Blackstone *Commentaries on the Laws of England*, (1765-1769); Herbermann *et al The Catholic Encyclopedia, volume II, Civil Aspect of Bankruptcy* (1907).

¹⁶ See Rajak "The Culture of Bankruptcy" 5; Levinthal 229.

¹⁷ See Baker "The Law Merchant and the Common Law before 1700" (1979) *Cambridge LJ* 295 (hereafter referred to as Baker); in *Jacobson v Nitch* (1889-1890) 7 SC at 174 De Villiers J mentioned:

There is no doubt a danger against which English or Scotch judges, administering the law of this Colony, have to be constantly on their guard; the danger, I mean, of adopting decisions or statements of the text writers, as laying down general principles of the Roman-Dutch law, which on a closer examination may prove to be merely decisions or statements as to the customs of particular districts or as to the law merchant as interpreted by particular Courts, and to constitute deviations from rather than illustrations of the general law of the Netherlands.



upon the customs and practices which had become established among merchants in their dealings with one another but based principally upon the mercantile law of Italy, which itself was derived from Roman law.¹⁸

With regard to the regulation of early bankruptcy law, it is not apparent how far the general law of the day took any notice of trading disputes, and it seems probable that for the most part the supervisory function was left to special local tribunals in towns and markets across Europe.¹⁹ With the improved conditions of the eleventh century, trade and commerce in England revived, and, after the Norman Conquest, the guild merchant made his appearance. This development not only widened the horizons of trade in England, but the new transactions of merchants also progressed beyond the scope of the old folk-law in the market. The Law Merchant gradually became more influential across Europe and especially in England as undoubtedly a body of cosmopolitan law akin in status to civil or canon law.²⁰ Although a parallel cannot be drawn between the institution of the Law Merchant and modern insolvency regulators, the former most certainly did represent a crystallisation of principles previously left to the general knowledge and common sense of jurists and as such could be regarded as one of the earliest regulatory sources in mercantile law.

1.3 ROMAN LAW

Roman law itself evolved together with the Roman civilisation over a period of more than a thousand years. The earliest documented evidence of Roman civilisation and Roman law appears to date back to approximately 450 BC.²¹ The fall of the Western Roman Empire in 476 AD led to the general decline in the influence of Roman law in Western Europe, although it did not disappear completely. Some regions in Italy,²² France²³ and Spain²⁴ that took over from the Romans permitted the Romans and Gallic-Romans to continue the maintenance and codification of Roman law.²⁵ With the rediscovery of the *Digests of Justinian*²⁶ in the

¹⁸ Fletcher *The Law of Insolvency* (2009) 8 (hereafter referred to as Fletcher).

¹⁹ Baker 296.

²⁰ Levinthal on English Law 67.

²¹ See Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) 1 (hereafter referred to as Van Zyl); Evans 17.

²² Lombards in Northern Italy.

²³ Frankish tribes in France.

²⁴ The Visigoths in Spain.

²⁵ Dalhuizen par 2.01 [1] 1-20.

²⁶ Studied by Irenus at the University of Bologna. See Dalhuisen par 2.01 [2] 1-21.

eleventh century in Pisa, a new era of development of law followed and with it the eventual revival of insolvency laws.²⁷

Most writers²⁸ seem to agree that the origin of South African insolvency law is to be found in Table III of the Twelve Tables, which dealt with the execution of judgments.²⁹ In the law of Rome as set forth in the Twelve Tables³⁰ the borrower was said to have pledged himself as *nexus*³¹ to his creditor – that is, he pledged his own person for the repayment of the loan.³² The law not only made provision for the imprisonment of the debtor, but also provided that the debtor could be sentenced to death or sold as a slave in a foreign country (*manus injectio*).³³ This mode of execution was performed directly and with relentless rigidity against the person of the debtor.³⁴

In terms of Table III of the Twelve Tables, which applied from approximately 451 BC, a creditor could enforce his judgment with the process known as *legis actio per manus injectionem*.³⁵ This was a form of private force whereby the debtor was given a period of grace of 30 days within which to comply with a judgment and failure to do so resulted in the debtor being brought before the *Praetor*.³⁶ The judicial process commenced with the creditor placing his hand upon the debtor while reciting the prescribed *formula*.³⁷ The placing of his hand on the debtor served as a primarily symbolic seizure by force.³⁸ Although provision was made for a *vindex* to intervene in these proceedings, this was done at great risk and was not a general occurrence, as he could have been awarded double payment if he lost the proceedings.³⁹ Where no successful intervention by a *vindex* was present, and the debt remained outstanding, the debtor was adjudged to the creditor as debtor-slave.⁴⁰

²⁷ Dalhuisen par 2.01 [2] 1-21.

²⁸ See, eg, Mars 6, Stander 8; Stander “Geschiedenis van die Insolvensiereg” 371; Dalhuisen par 1.02 [1] 1-4-1-5.

²⁹ See Evans 9; Mars 6; Stander 8; Stander “Geschiedenis van die Insolvensiereg” 371.

³⁰ 451-450 BC. *Lex XII Tabularum*, a set of laws dating from about 450 BC and was the first known codification of Roman law. See Dalhuisen par 1.02 [1] 1-4.

³¹ Literally “fettters”. See Dalhuisen par 1.02 [1] 1-4-1-5.

³² See Wenger *Institutes of the Roman Law of Civil Procedure* (1940) 230 (hereafter referred to as Wenger); Stander “Geschiedenis van die Insolvensiereg” 371; Levinthal 251.

³³ See Stander 8; Stander “Geschiedenis van die Insolvensiereg” 371; Wenger 230.

³⁴ Smith 5.

³⁵ See Visser 41; Mars 1; Wenger 230; Dalhuisen par 1.02 [1] 1-4-1-5

³⁶ See Visser 41; Burdette 5.

³⁷ Burdette 5.

³⁸ Wenger 223.

³⁹ See Wenger 227; Burdette 5.

⁴⁰ See Visser 43; Wenger 227.

The creditor could now detain the debtor in prison for sixty days.⁴¹ During this time it was possible for the debtor to enter into an arrangement with the creditor.⁴² The debtor also remained a free man and owner of his property.⁴³ On three consecutive market days the creditor had to bring the debtor before the *Praetor*, to announce in public the outstanding amount for which the debtor was liable.⁴⁴ In instances where the two parties were unable to reach an agreement with the creditor, and the debt remained outstanding, the creditor could, on the third market day, either take the debtor's life or sell him into slavery.⁴⁵ This was also the case when there was more than one creditor in this final stage and each creditor had a right to a portion of the debtor's body.⁴⁶

Between 326 BC and 313 BC the right to sell or sentence a debtor to death was repealed by the *Lex Poetelia*, which prohibited the sale of the debtor into slavery in execution of a judgment debt and in the later Republic it became clear that imprisonment had taken the place of sale into slavery as a punishment for a debtor's inability to pay his debts.⁴⁷ In 320 AD even such imprisonment was abolished save in the case of debtor who continuously refused to pay.⁴⁸ During early Roman law the right to execution was mainly aimed at the person of the debtor and the right to execute against the property of a debtor was very limited.⁴⁹ As a result the development of insolvency procedures did not receive much attention and moreover no particular mention is made of any form of state regulation during the insolvency process.

In roughly 104 BC a *Praetor* named Publius Rutilius⁵⁰ introduced a process of general execution against the property of a debtor, known as the *bonorum emptio* or the *bonorum venditio*.⁵¹ The *bonorum venditio*⁵² afforded the creditors the opportunity to receive

⁴¹ Visser 43.

⁴² Visser 43.

⁴³ Visser 43.

⁴⁴ See Burdette 29; Visser at 43 also points out that this practice had a dual purpose: firstly it was intended to persuade the debtor's friends to pay the debt in sympathy with the degradation that the debtor was suffering, and in the second place it was intended to allow the debtor's other creditors to state their claims. See also Stander "Geschiedenis van die Insolvensiereg" 371.

⁴⁵ See Ledlie *Sohm's Institutes of Roman Law* (1907) 286 (hereafter referred to as Ledlie); Burdette 30; Visser 44; Stander "Geschiedenis van die Insolvensiereg" 371.

⁴⁶ According to Milman *Personal Insolvency Law, Regulation and Policy* (2005) 148 (hereafter referred to as Milman), this scenario may have been the inspiration for Shakespeare's *The Merchant of Venice* (1596).

⁴⁷ See Stander 8; Mars 6.

⁴⁸ Mars 6.

⁴⁹ Stander "Geschiedenis van die Insolvensiereg" 371.

⁵⁰ *Praetor* in 118 BC.

⁵¹ See Buckland *A Manual of Roman Private Law* (1947) 387 (hereafter referred to as Buckland); Dalhuizen par 1.02 [2] 1-4; Wegner 235; Visser 45; Mars 2; Stander "Geschiedenis van die Insolvensiereg" 371-372.



possession of the debtor's estate (*missio in possessionem*)⁵³ and the procedure entailed that the *Praetor* had to issue three decrees, each marking a distinct stage in the proceedings. The first publicly advertised the sale of assets and gave notice to the non-petitioning creditors to put in their claims. One or more of the creditors of the debtor were authorised to take possession of the debtor's property *rei servandae causa*.⁵⁴ If the debtor remained unwilling to pay, a judgment was rendered against him within thirty days for double the money and the money was subsequently recovered by means of a sale (*venditio bonorum*).⁵⁵

The second decree empowered creditors to call a meeting and choose from their number a manager or *Magister bonorum*,⁵⁶ the equivalent of a trustee, to supervise the sale of the assets.⁵⁷ The *Magister* was thus one of the creditors and represented the creditors by whom he was selected. The task of the *Magister* was to sell the property of the debtor *en bloc* on a public auction to the person offering the largest dividend to creditors.⁵⁸ The *Magister* was also responsible for compiling a *lex bonorum vendendorum*,⁵⁹ which represented an account with details relating to the sale of the assets. Included in the account was a list of assets sold, a list of preferences which existed as well as the amount of the sale.⁶⁰ The *Magister* was thus one of the creditors and acted merely as an agent to those who elected him. He did not become owner of the estate and was in no sense a public officer entrusted by the *Praetor* with the conduct of the bankrupt's affairs. The responsibility of the elected *Magister* was primarily to sell the assets *en bloc* at a public action.⁶¹ The second decree is of particular interest to this study as it may represent the first encounter during early Roman law with the phenomenon of "stewardship" in regard to the management or administration of the property of others.

See also Levinthal at 232-233 for a discussion of the historical development regarding execution against the debtor's person, and execution against the debtor's property.

⁵² Ankum *De Geschiedenis de "Actio Pauliana"* (1962) 29 (hereafter referred to as Ankum) is of the opinion that the *bonorum venditio* should not be credited to the *Praetor* Rutilius, that the development was more gradual and that one should rather revisit the time of Augustus to find the fundamental development of this legal figure. See also Boraine *Die Leerstuk van Vernietigbare Regshandelinge in die Insolvensiereg* (1994) 115 LLD dissertation University of Pretoria.

⁵³ *Missio in possessionem* is similar to the English "receiving order".

⁵⁴ Visser 45. According to Dalhuizen the debtor could remain in possession of his estate though supervised by the creditor or if there were more than one creditor a *curator bonorum* was appointed. He acted as a trustee but with limited powers of preservation.

⁵⁵ Dalhuizen par 1.02 [2] 1-7.

⁵⁶ See Stander 9; Visser 45.

⁵⁷ Stander "Geschiedenis van die Insolvensiereg" 372.

⁵⁸ *Bonorum emptor*.

⁵⁹ *Een programma van de verkoop*.

⁶⁰ See Ankum 29; Stander 9.

⁶¹ Levinthal 240.

The third decree authorised the sale a few days later and the complete estate or *universitas iuris* was sold and transferred *en bloc* to the person who offered creditors the largest dividend on their claim.⁶² This process was known as the *bonorum emptio*.⁶³ The buyer (*bonorum emptor*) became the legal successor⁶⁴ of the debtor and accepted all his assets and his liabilities.⁶⁵ The procedures as discussed were primarily aimed at protecting the creditors, and no provision was made for a debtor to avoid the strict consequences of not being able to pay his debt. This apparent shortcoming was addressed by the *lex Iulia de bonis cedendis* of 17 AD, and allowed a debtor to renounce his rights to his property in favour of his creditors instead of incurring an execution against his person.⁶⁶ This procedure was known as *cessio bonorum* and thereafter the procedure was similar to the *bonorum emptio*.⁶⁷

The *modus* of sale of *bonorum emptio* was gradually replaced by the *bonorum distractio* which provided that instead of selling the estate *en bloc* a *curator bonorum* was appointed, disposing of the assets piecemeal, with creditors receiving *pro rata* payments from the proceeds.⁶⁸ Any property acquired by the debtor under the *cessio bonorum* was also liable to be sold in order to pay for his debts.⁶⁹ Under the *bonorum distractio* the *Praetor* committed the management of the debtor's estate to a *curator*, whose duty it was to dispose of the estate in separate lots and distribute payment to creditors. The estate was thus not sold by a *Magister* chosen by the creditors, but by a *curator* chosen by the *Praetor*. As a result it could be debated that at this point the state to a certain degree became involved in the regulatory process. Under this system the bankrupt was not dispossessed of his whole property. The creditors were paid by the debtor himself through the medium of the *curator*. We could probably refer to the appearance of the *curator* as administrator of the insolvent estate as the next phase in the development of the principle of stewardship during the Roman period.

The old *Magister* was never anything more than a creditor acting in the selfish interests of himself and his electors, whereas the *curator*, appointed by the *Praetor*, represented to a limited extent the principle of the public interest which requires that bankruptcy proceedings

⁶² Hockly 10.

⁶³ See Stander 10; Smith 5.

⁶⁴ Analogy can be made with *bonorum possessor successor*.

⁶⁵ Dalhuisen par 1.02 [2] 1-8.

⁶⁶ See Visser 46; Mars 7; Dalhuisen par 1.03 1-13; Stander "Geschiedenis van die Insolvensiereg" 372.

⁶⁷ See Stander "Geschiedenis van die Insolvensiereg" 373; Mars 7; Smith 5.

⁶⁸ A different procedure was invoked where the debtor was a person of high standing or rank (*clarae personae*). See also Stander 11.

⁶⁹ Mars 7.

shall be conducted on a uniform plan and that all the creditors shall obtain an equitable satisfaction of their claims.⁷⁰ It seems, however, as if the Romans never developed this principle to its full potential because, as pointed out, the *curator* never attained the position of a public officer charged with the conduct of a state-regulated procedure in bankruptcy and consequently we still do not see any outright state regulation taking place.⁷¹

There is no doubt that in the development of creditor's remedies Roman law was conscious of, and responsive to, the need to leave the debtor with the necessities of life. This emerges under the earlier harsher regime laid down by the Twelve Tables regarding the treatment of a debtor committed in person to the creditor. But it appears that the idea of a discharge from unpaid debt never became part of the Roman law.⁷² Rajak is of the opinion that this should not surprise us, as the permanent discharge was a comparatively novel idea even in nineteenth-century England. He also remarks that it might be suggested that the failure of the Roman society to develop a form of relief for unfortunate and oppressed debtors may at least be excused by the fact that the society did not have the example of the limited liability company which perforce provides a full and permanent discharge from personal debt.⁷³

The *bonorum emptio* and *distractio* constituted the Roman system of bankruptcy, a system that is in fact viewed by many to be the origin and source of all bankruptcy systems.⁷⁴ Swart⁷⁵ is of the opinion that the *bonorum distractio* also represents the origin of the South African insolvency system, as it signifies the first signs of a collective debt-collecting system.⁷⁶

1.4 ROMAN-DUTCH LAW

The common law of South Africa – the old Roman Dutch law – is like some stately cathedral or like some beautiful continental hotel *de ville* or town hall: every part of the structure has been made to harmonise with every other part and the whole inspires one with reverence: whereas the statute law is often like some botched building raised in a hurry with inadequate materials by an amateur who thought himself a Michael Angelo or a Christopher Wren...⁷⁷

⁷⁰ See Levinthal 241; Stander 12.

⁷¹ As cited by Ledlie 304. See also Levinthal 241; Visser 374; Stander 12.

⁷² Rajak "The Culture of Bankruptcy" 11.

⁷³ Rajak "The Culture of Bankruptcy" 11.

⁷⁴ Levinthal 236.

⁷⁵ Swart *Die Rol van 'n Concursus Creditorum in Suid Afrikaanse Insolvensiereg* (1990) 281 LLD dissertation University of Pretoria.

⁷⁶ As opposed to an individual debt collecting procedure. See Stander 12.

⁷⁷ Wessels "The Future of Roman-Dutch Law in South Africa" (1920) *South African LJ* 265 (hereafter referred to as Wessels "The Future of Roman-Dutch Law in South Africa").

The broad basic layer of modern South African law remains the Roman-Dutch law as was introduced in the southern part of Africa approximately four centuries ago.⁷⁸ The amalgamation of the Roman and Dutch systems resulted in what was then styled the *Rooms-Hollands-Recht*, a phrase first used by Van Leeuwen.⁷⁹ Roman-Dutch law is a system of customary law and as the name indicates has been largely influenced by Roman law.⁸⁰ It was a combination of what was best in each system and where there was a definite established rule in the Netherlands, which conflicted with the Roman law, the former prevailed.⁸¹

Already between 1245 and 1412 *Handvesten* given by the Dutch counts to their towns provided that if the debtor was unable to pay his creditors he should be handed over to the latter until such time as the debt was paid.⁸² The first legislation in Holland dealing with bankruptcy was enacted in 1531 by Charles V of Spain.⁸³ The legislation mentioned the great stimulus trade had received, and debtors had to be compelled to pay their debts and be prevented from evading their liabilities.⁸⁴ Until the introduction of the *cessio bonorum*⁸⁵ the law of Holland apparently only knew of attachment of the person of the debtor in satisfaction of debt and to obtain such an action was a difficult and costly procedure.⁸⁶

By all accounts it appears that the Roman law procedure of *cessio bonorum* was in its main features introduced into Holland in approximately the last part of the fifteenth century.⁸⁷ A petition had to be presented to court together with a list of his property and accounts of creditors. The list and petition was then referred to the governing authority of the debtor's place of domicile

⁷⁸ It should be noted that Roman-Dutch law is not the only system applied in South Africa. In certain fields indigenous African law is to be applied under certain circumstances to certain persons. See Van Warmelo "The Function of Roman-Law in South African Law" (1958-1959) *Tulane LR* 565 (hereafter referred to as Van Warmelo). See, eg, *Fairlee v Raubenheimer* 1935 AD at 136; *Swadif (Pty) Ltd v Dyke* 1978 1 SA 928 (A) 938; *Millman v Twiggs* 1995 3 SA 674 (A) 679 at 680.

⁷⁹ Van Leeuwen employed it as the sub-title of his work entitled *Paratitla Juris Novissimi* (1652) published for as part of his work *Het Rooms-Hollandsde Recht: Paratitla Juris Novissimi* (1664); See also Wille's *Principles of South African Law* (1991) 22 (hereafter referred to as Wille's).

⁸⁰ Van Warmelo 565.

⁸¹ Roman-Dutch law is derived from two sources: Germanic custom and Roman law. See Lee *An Introduction to Roman-Dutch Law* (1953) 3 (hereafter referred to as Lee).

⁸² See Wessels 218; Levinthal 245.

⁸³ Wessels 664. See Levinthal 246.

⁸⁴ Levinthal 246.

⁸⁵ *Boedelafstand*. See also Stander 12.

⁸⁶ Wessels 664.

⁸⁷ See Burton *Observations on Insolvent Law of the Colony* (1829) 6 (hereafter referred to as Burton); Roestoff "Skuldverligtingsmaatreëls vir Individue in die Suid Afrikaanse Insolvensiereg: 'n Historiese Ondersoek" (Deel II) 2005 *Fundamina: A Journal of Legal History* 78 (hereafter referred to as Roestoff "Skuldverligtingsmaatreëls vir individue in die Suid Afrikaanse Insolvensiereg"); Dalhuisen par 2.02[5] 1-35; Wessels 664; Mars 8; Stander "Geskiedenis van die Insolvensiereg" 374.



in order for them to compile a report. The court upon receipt of the report granted a *rule nisi* calling upon persons interested to show cause before the judge why a *writ of cessio bonorum* provisionally issued should not be made final. The writ of *cessio* did not discharge the insolvent from his debts. The only benefit it conferred upon the insolvent was to free him from personal arrest and the concern of being sued.⁸⁸ The effect of granting the rule was to free the petitioner from future arrest whilst the effect of its confirmation was to stay all execution and to place his property in the hands of a *curator*.⁸⁹ It seems that the *curator* under Roman-Dutch law did not become owner of the insolvent estate but only took over the control of the estate. Van der Linden states that with the grant of the *cessio*: “word door het Gerecht met te decerneeren eene *Curateele in des Cessionants boedel, voor de bewaarding der goederen gezorgt*”.⁹⁰

The benefit of *cessio* was virtually a voluntary surrender by an insolvent of all his estate for benefit of creditors.⁹¹ The action was also exclusively granted to the insolvent who became insolvent due to misfortune.⁹² The *cessio bonorum* or voluntary surrender was not a pleasant experience and some writers⁹³ even refer to a rule in Rotterdam and Leyden to the effect that the debtor had to stand for an hour on three consecutive days before the town house “in his undermost clothes”.⁹⁴

During the seventeenth century the insolvent estates of deceased persons were administered by commissioners under the supervision *schout* and *schepenen*.⁹⁵ As chambers for abandoned estates were gradually established in the various towns, the insolvency commissioners were subsequently chosen from the members of these bodies. Besides the insolvent estates of deceased persons these chambers with time in many towns came to be charged with the administration of the estates of persons who had obtained *cessio bonorum*, so that instead of appointing a private person to administer the estate of the insolvent, it became a custom during the eighteenth century to place all insolvent estates under the administration of boards called *Desolate Boedelkamers*.⁹⁶

⁸⁸ Wessels 665.

⁸⁹ Stander “Geschiedenis van die Insolvensiereg” 374-375.

⁹⁰ Estate is placed under the control of the *Curator*. See Van der Linden *Verhandeling over de Judicieele Practijcq* (Leiden 1744) 399 as cited in Stander at 13.

⁹¹ Wessels 665.

⁹² Wessels 667.

⁹³ See Burton 6; Smith 6.

⁹⁴ See Wessels 665; Roestoff “Skuldverligtingsmaatreëls vir Individue in die Suid Afrikaanse Insolvensiereg: ’n Historiese Ondersoek” 78.

⁹⁵ Mars 8.

⁹⁶ Wessels 668.

Subsequently the *Desolate Boedelkamers* were also entrusted with the administration of, among other things, the insolvent estates of so-called *bankroeters* or *bankbreekers* (bankrupts). Unlike debtors who became insolvent through misfortune and basically voluntary handed over their estates, bankrupts were debtors who fled the country to escape their creditors or who acted fraudulently and were considered akin to thieves.⁹⁷ The estates of such persons were originally handed over to a *curator* appointed by the court, but later they were placed in the hands of the commissioners of the *Desolate Boedelkamers*.⁹⁸

During the eighteenth century there appears to have been a large number of local ordinances, but that of Amsterdam passed in 1777⁹⁹ is of great importance, for it has to a large extent been the foundation of much of the subsequent South African law of insolvency and has also been widely accepted as the origin of the South African insolvency law.¹⁰⁰ The passing of this ordinance is an important milestone in South African insolvency law, as it was also the source of the insolvency practice of the Cape of Good Hope at the time of annexation.¹⁰¹ The main principles of the ordinance were introduced into the various colonial ordinances, and still form the basis of our bankruptcy practice.¹⁰²

According to the Ordinance of 1777 the insolvent or any of his creditors could apply to the commissioners of the *Desolate Boedelkamers* to take over control of the debtor's estate.¹⁰³ The commissioners first attempted to make an arrangement with the creditors but if the latter refused the commissioners proceeded to make an inventory of assets and to examine the insolvent.¹⁰⁴ The following step in the proceedings was to call a meeting of creditors and to appoint a provisional *sequestrator*. The debtor was given a month to enter into a composition with his creditors and if not successful was then adjudged to be insolvent. The *sequestrator* was then appointed as the official *curator* of the estate. It is unclear whether the *curator* received ownership of the estate and a noteworthy fact was that the estate was administered according to the resolutions of creditors. After the creditors were allowed the opportunity to prove their claims the *curator* had to

⁹⁷ Evans 44.

⁹⁸ Wessels 667.

⁹⁹ Ordinance 1777 (Amsterdam) *Nederlandsche Jaarboeken* 291.

¹⁰⁰ See, eg, *Fairlee v Raubenheimer* (n 78) at 146. Mars 9; Stander "Geschiedenis van die Insolvensiereg" 376; Smith 5. See also Hockly 11.

¹⁰¹ Wessels 668.

¹⁰² See *Fairlee v Raubenheimer* (n 78) at 146; De Villiers 19.

¹⁰³ See Stander "Geschiedenis van die Insolvensiereg" 367; Wessels 668.

¹⁰⁴ Wessels 669.



proceed to liquidate the estate and distribute the proceeds of the estate to the creditors.¹⁰⁵ In cases where it was pronounced that the insolvent acted honestly, a percentage of the proceeds were paid to him.¹⁰⁶ Upon receipt of a certificate the insolvent could obtain a discharge from all debts due prior to his insolvency.¹⁰⁷ In the context of this study a significant detail of the 1777 Ordinance was that it recognised the principle that the administration of the insolvent estate should be the responsibility of a trustee under the directions of creditors.¹⁰⁸

In summary, the development of insolvency law in the Netherlands appears to have progressed somewhat slowly from the relatively late period of the fifteenth century.¹⁰⁹ The establishment of the *Desolate Boedelkamers* was a significant development in the historical evolution of state regulation in insolvency law, as it represents the logical need in a new age to institutionalise. As will be shown later, it is also a pioneering institution that served as a precursor to the Master of the High Court.¹¹⁰

1.5 ENGLISH LAW

1.5.1 Early History of Insolvency Law in England

The word “bankrupt” first appeared in the English language in the early part of the sixteenth century, and has been a distinctive feature of the English law and society for centuries since then.¹¹¹ Bankruptcy in England should however not be perceived to have attracted legal attention only in the sixteenth century, as there are numerous recorded instances dating back to medieval England.¹¹²

¹⁰⁵ Stander “Geschiedenis van die Insolvensiereg” 376.

¹⁰⁶ Stander “Geschiedenis van die Insolvensiereg” 376.

¹⁰⁷ Wessels 669.

¹⁰⁸ It will also be noticed from the nature of the estates committed to the administration of this Chamber that a debtor could obtain the sequestration of the estate either by obtaining *cessio bonorum* or by stopping payment, a dual form of relief, which subsequently existed in the early South African law. See Mars 9; Wessels 672.

¹⁰⁹ Evans 47.

¹¹⁰ Hereafter referred to as the Master or Master’s office.

¹¹¹ The *Oxford English Dictionary* identified its initial usage in 1533 and it first featured in statutory language in 1542. See Tabb “The History of Bankruptcy Laws in the United States” (1995) *American Bankruptcy Institute LR 5* (hereafter referred to as Tabb); Milman 1.

¹¹² Earlier public figures to have fallen foul of bankruptcy are Johann Gutenberg, who invented the printing press in the 1450s, and Daniel Defoe, famous author of *Robinson Crusoe* (declared bankrupt in 1692). Incidentally, William Shakespeare’s father was also a bankrupt. See Milman 2-6.



The common law of England in the twelfth and thirteenth centuries was not as severe as the earlier Anglo-Saxon law had been.¹¹³ There was no imprisonment for debt, and, as one writer observes: “it is not a little remarkable that the common law knew no process whereby a man could pledge his body or liberty for payment of a debt.”¹¹⁴ It is interesting to note that in early common law there was an initial reluctance to allow creditors remedies against the person of the debtor – in contrast to early Roman law, which allowed creditors to imprison the debtor if he did not pay (Roman law also provided for him to be killed or sold into slavery).¹¹⁵ It was only at the end of the thirteenth century that proceedings for arresting and imprisonment of debtors were introduced into English law and gradually extended. By the end of the thirteenth century the legal position of the debtor was worsening and procedures for arresting and imprisoning judgment debtors had been introduced.¹¹⁶

The first Act that introduced attachment of the person and that had civil imprisonment as a result was the Statute of Marlbridge of 1267.¹¹⁷ Various other statutes were introduced which eventually resulted in a creditor being entitled to imprison the debtor for nearly all cases of the non-payment of debt.¹¹⁸ Imprisonment for the non-payment of debt was abolished only in 1869 by the Debtors Act, subject to certain exceptions contained in section 4 of that Act. As a result, debtors designed all sorts of means to avoid civil imprisonment.¹¹⁹

One of the first recorded pieces of legislation which allowed for the attachment of a debtor’s property is to be found in the Statute of Westminster II of 1285.¹²⁰ The common law writs of *capias* authorised “body execution” – that is, seizure of the debtor, to be held until payment of debt.¹²¹ From the fourteenth century onwards the centralised jurisdiction exercised by the ordinary common law courts progressively superseded that of the courts Merchant and a lengthy process followed whereby a considerable part of the Law Merchant was absorbed into the

¹¹³ Rose *Lewis’ Australian Bankruptcy Law* (1967) 7 (hereafter referred to as Rose).

¹¹⁴ Rose 7.

¹¹⁵ Smith 5.

¹¹⁶ Dickens’s father had in the early 1820s been imprisoned for debt. For an example of the treatment of debtors in early England see Dickens’s *Little Dorrit* (1857), a story concerning a father and his family living in the Swansea debtor’s prison. See Rose 8; Milman 6-8.

¹¹⁷ Boraïne 230.

¹¹⁸ See Boraïne at 230 where the Act of Burnell of 1283 or 1285 and the Statute of Merchants of 1285 are referred to. See also Burdette 27.

¹¹⁹ For a discussion of some of these methods, see Boraïne 231; Burdette 28.

¹²⁰ See Dalhuisen par 2.02[8] 1-39; Boraïne 229.

¹²¹ Tabb 7.

common law on the premise that it was “part of the laws of realm”,¹²² until by the close of the seventeenth century the courts were regularly taking judicial notice of the mercantile custom.¹²³

Writers who deal with the history of English bankruptcy¹²⁴ almost unanimously regard the Act of Parliament by Henry VIII in 1542¹²⁵ as the earliest legislation on the subject. It was entitled “An act against such persons as do make bankrupts”,¹²⁶ and the preamble to the Act was as follows:

Where divers and sundry persons craftily obtaining into their hands great substance of other men’s goods do suddenly flee to parts unknown or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but at their own will and pleasure consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience ... the Lord Chancellor ... shall have power and authority by virtue of this Act to take ... imprisonment of their bodies or otherwise, as also with their [real and personal property however held] and to make sale of said [real and personal property however held] for true satisfaction and payment of the said creditors, that is to say; to every of the said *creditors a portion, rate and rate like, according to the quantity of their debt* (emphasis added).¹²⁷

This first Bankruptcy Act of 1542 contained a form of compulsory sequestration, designed to apply to a dishonest and absconding debtor.¹²⁸ This statute viewed debtors as quasi-criminals (also called “offenders”), and placed additional remedies in the hands of creditors.¹²⁹ The 1542 Act also provided for the appointment of a body of commissioners to whom it gave wide powers to proceed with action on receipt of application by a creditor against a trading debtor who fled from country, barricaded himself in his house, neglected to pay his debts or otherwise defrauded his debtors.¹³⁰ Of particular importance for the purposes of this study is the fact that even at this early stage we encounter the fundamental principle of stewardship, which over the centuries became a constant feature of English bankruptcy law.¹³¹

The fundamental principle of the Act of Henry VIII was that in the case of the fraudulent debtor there should be a compulsory administration and distribution on the basis of a equality amongst all the creditors and thus in this Act we encounter the two fundamental principles on

¹²² Goode *Commercial Law* (2004) 8 (hereafter referred to as Goode). See also Fletcher 8.

¹²³ Fletcher 8.

¹²⁴ It is interesting to note that the first time the word was used in English legislation it did not apply to a person but to an act or a thing. See Levinthal on English Law 104; Burdette 9.

¹²⁵ (34 and 35 Hen VIII, c. 4)

¹²⁶ See Levinthal on English Law 104; Tabb 7.

¹²⁷ *Pari passu* principle. See Goode 8.

¹²⁸ See Burdette 9; Dalhuisen par 2.02[8] 1-41-1-42; Boraine at 231 and the authority cited by him in (n 18).

¹²⁹ Tabb 7.

¹³⁰ Such acts were called “acts of bankruptcy”. See Rose 13.

¹³¹ Milman 80.

which modern English insolvency laws are based: collectivity of participations of creditors and *pari passu* distribution among them.¹³² The provisions of the Act dealing with the administration and distribution of the assets of the debtor were quite adequate and provided for a quorum of high officials to administer the estate and to distribute the proceeds amongst creditors.¹³³ The first feature of the Act, namely the realisation of the assets, was however mostly undefined, especially whose responsibility it was to execute this part of the Act.¹³⁴ It is possibly for this reason that the influence of this Act on English Law is not as noticeable as one would imagine.¹³⁵

English law followed more or less the same pattern as that followed on the continent, in the sense that individual debt collection procedures preceded the development of formal insolvency law.¹³⁶ A more comprehensive bankruptcy law was passed in 1570 during the reign of Queen Elizabeth I and was known as the Act of Elizabeth.¹³⁷ This was also the first law to be designed as a true bankruptcy statute rather than as a fraud prevention law.¹³⁸ The Act filled out the basic parameters of the English bankruptcy system by also providing additional acts of bankruptcy, lacking only the discharge provisions that were only introduced in the early part of the eighteenth century.¹³⁹

Of significance was that the provisions in this 1570 Act also transferred jurisdiction of the supervision of the estate from the previously mentioned commissioners introduced under the Bankruptcy Act of 1542 to the Lord Chancellor. On application of the creditor the Lord Chancellor had the power to order the seizure of the assets of an absconding trader and subsequently provided for the distribution of the proceeds of sale amongst the creditors.¹⁴⁰ The Act also made provision for the erection of the tribunal of commissioners of bankrupts for carrying into execution the several statutes of bankruptcy.¹⁴¹ The ground for commencing a bankruptcy proceeding by the creditor was the commission of an “act of bankruptcy” by the

¹³² See Fletcher 7; Levinthal on English Law 107.

¹³³ Levinthal on English Law 108.

¹³⁴ Levinthal on English Law 108.

¹³⁵ See Martin “Common Law Bankruptcy Systems: Similarities and Differences” (2003) *American Bankruptcy Institute LR* 368-371 (hereafter referred to as Martin “Common Law Bankruptcy Systems”); Tabb 5.

¹³⁶ Dalhuisen par 2.02[8] 1-39.

¹³⁷ Act of Elizabeth (13 Eliz 1 c 7); See also Burdette 10; Fletcher 7-8.

¹³⁸ Lewis “Can’t Pay Your Debt Mate? A Comparison of the Australian and American Personal Bankruptcy Systems” (2001-2002) *Bankruptcy Development Journal* 297 at 299 (hereafter referred to as Lewis).

¹³⁹ Tabb 8.

¹⁴⁰ See Cork *Report* 16.

¹⁴¹ Burton 14.



debtor.¹⁴² Upon the occurrence of an act of bankruptcy creditors could petition the Lord Chancellor to convene a bankruptcy meeting.¹⁴³ The Chancellor would then appoint bankruptcy commissioners to supervise the process.¹⁴⁴ The commissioners had substantial powers originally somewhat similar to those of a bankruptcy judge.¹⁴⁵

The commissioners examined the debtor about his or her dealings and property, and he or she was obligated to transfer his or her property to the commissioners.¹⁴⁶ They also had the power to summon persons to appear before them and could also commit people to prison.¹⁴⁷ Although appointed by the Chancellor, commissioners were not subject to his jurisdiction; recourse was to the common law courts. By the eighteenth century, however, the Chancellor had largely taken over direct jurisdiction of bankruptcy matters.¹⁴⁸ For the purposes of this study it is important to note that this was an early manifestation of the principle of regulation of insolvency law akin to the role of the present-day official receiver.

An important development in the history of bankruptcy law came *via* the Statute of Ann 1705.¹⁴⁹ It is said that the modern period of English law begun with the advent of the facility of discharge *via* the 1705 Act.¹⁵⁰ The discharge was not an automatic entitlement and the commissioners had to confirm that the debtor had “conformed” and had cooperated during the proceedings.¹⁵¹ Most of the principles introduced by these acts have remained part of modern bankruptcy.¹⁵² During the next few decades, having introduced a formal bankruptcy system by legislation, the institution quickly fell under the control of courts of equity, with the formal transfer of jurisdiction to the Lord Chancellor being affected by the 1732 Act.¹⁵³

Since the enactment of the Elizabethan Statute in the late sixteenth century, the actual management of the bankrupt estates was in the hands of commissioners appointed by the

¹⁴² An act of bankruptcy was a form of conduct that indicated that the debtor was attempting to prevent creditors from recovering debts. See Tabb 8.

¹⁴³ Tabb 9.

¹⁴⁴ Rose 13.

¹⁴⁵ Tabb 9.

¹⁴⁶ Plank “The Constitutional Limits of Bankruptcy” (1995-1996) *Tennessee LR* 487 (hereafter referred to as Plank).

¹⁴⁷ Tabb 9.

¹⁴⁸ Tabb 9.

¹⁴⁹ Statutes of Anne, c. 17 (1705), and 10 Anne, c. 15 (1711).

¹⁵⁰ Levinthal on English Law 108. Milman 6.

¹⁵¹ Tabb 11.

¹⁵² See Duffy “English Bankrupts, 1571-1861” (1980) *American Journal of Legal History* 283 (hereafter referred to as Duffy); Rose 13.

¹⁵³ Act 5 George II of 1732. See Milman 7.

Lord Chancellor from lists submitted by creditors. To prevent the appointment of unsuitable characters, Lord Harcourt, who became the Lord Chancellor in 1731, abolished this practice and replaced it with a list of commissioners he chose himself.¹⁵⁴ This 1732 Act consolidated the law and also introduced the institution of the “assignee” appointed by the commissioners at first and later by the creditors.¹⁵⁵ Thus began the process of delegating day-to-day stewardship from public bodies (in the form of commissioners) to assignees.¹⁵⁶ The reason for this was that it was possible for the assignee to give closer attention to the affairs of the bankrupt than was possible for the commissioners.¹⁵⁷

1.5.2 The Introduction of “Officialism” during 1831-1856

The government had to some extent been involved in the supervision and administration of insolvent estates since the introduction of the concept of bankruptcy in England in the sixteenth century. The rationale for this was that the creditors needed an impartial umpire to referee the equitable distribution of insolvent estates.¹⁵⁸ The turning point came with a relatively unknown statute, Lord Brougham’s¹⁵⁹ Act of 1831.¹⁶⁰ The dominant role of creditors in the administration of insolvent estates was reduced by the introduction of officers known as “Official Assignees”,¹⁶¹ who were attached to the London Bankruptcy Court. With the creation of the office of the Official Assignee *via* the Act of 1831, the virtually complete control enjoyed by creditors over their debtors was thus reduced, signalling the beginning of some form of public control over the fate of the debtor.¹⁶² The Act also introduced strict qualifications, as the “Official Assignees” had to be “Merchants, Brokers, or Accountants, or a person who have been engaged in Trade in the Cities of London or Westminster”.¹⁶³

¹⁵⁴ For a detailed discussion of the history of the English bankruptcy commissions, see Hicks “Law, Order and the Bankruptcy Commissions of the Early Nineteenth Century England (1987) *Tijdschrift voor Rechtsgeschiedenis* at 123. See also Lester *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and the Company Winding-Up in the Nineteenth Century England* (2003) 18 (hereafter referred to as Lester).

¹⁵⁵ Levinthal on English Law 109.

¹⁵⁶ Milman 7.

¹⁵⁷ Rose 16.

¹⁵⁸ Lester 40.

¹⁵⁹ Lord Brougham (1778-1868) not only sponsored this Act but was also responsible for writing many subsequent bankruptcy bills and had an illustrious career in law which ended with his term as Lord Chancellor. See Ellis *Lord Brougham considered as a Lawyer* (1868) for an autobiographical description of his life.

¹⁶⁰ Lester 41.

¹⁶¹ Also Registrars and Deputy Registrars of Bankruptcy.

¹⁶² Rajak “The Culture of Bankruptcy” 14.

¹⁶³ Lester 45.



The structure of the bankruptcy system under the 1831 Act differed drastically from its predecessors and introduced the rationalisation of the system of bankruptcy commissioners. At the centre of the new system were the six permanent full-time commissioners appointed by the Lord Chancellor, although with the same powers as the commissioners under the previous system. They had the power to determine if a debtor was indeed bankrupt, seize assets, accept or reject creditor's claims and otherwise supervise the administration of the estate.¹⁶⁴ Despite the similarity in the profile of the old and new commissioners the fundamental difference came in with the newly appointed commissioners having been full-time employees of the state, paid with a salary rather than a system of fees.¹⁶⁵

The 1831 statute marked the end of the Chancery Court's 250-year jurisdiction over bankruptcy matters.¹⁶⁶ Under the new dispensation the Court of Bankruptcy was erected with the sole jurisdiction to deal with bankruptcy cases and with the power to give binding decisions on all points of law arising in the course of a bankruptcy.¹⁶⁷ A Chief Judge and three judges were appointed with a staff of Registrars and the Official Assignees. In 1847 jurisdiction of District Bankruptcy Courts were transferred to County Courts and in 1847 the Court of Bankruptcy was abolished and the jurisdiction transferred to a Vice-Chancellor.¹⁶⁸

1.5.3 The History of English Insolvency law, 1856 to the present

During the 1860s the reform of bankruptcy law shifted significantly from judicial involvement in the administration of estates to the return of a creditor-controlled system of regulation. By the end of the decade, parliament completely dismantled the reform brought about in the 1830s and 1840s and replaced it with a creditor-managed administration.¹⁶⁹ During this period the policy consideration behind both major statutory reform projects, the Bankruptcy Act of 1861 and the Bankruptcy Act of 1869, was to emphasise creditor control and the diminished role of government as well as the judiciary in the administration of the insolvent estate.¹⁷⁰

¹⁶⁴ Lester 81.

¹⁶⁵ Lester 82.

¹⁶⁶ Lester 45.

¹⁶⁷ Rose 17.

¹⁶⁸ Rose 17.

¹⁶⁹ Lester 123.

¹⁷⁰ Lester 123.



The concept of some form of official control over insolvent estates was re-examined during the period of 1869 to 1883. This was the consequence of various scandals which were associated with the administration of bankrupt estates during this period.¹⁷¹ The Bankruptcy Act of 1883 was the direct response to public dissatisfaction with the administration of bankruptcy estates and the realisation that the creditor controlled milieu was open to abuse and mismanagement.¹⁷² In another swing of the pendulum the law reintroduced the concept of “officialism” in a more extreme form by placing “the administration of the insolvent’s estate under the control of the Board of Trade, which it arms with the powers necessary to protect the interests of the creditors and to vindicate public morality”.¹⁷³ The system enacted in 1883 was thus an administrative managed system in which the Board of Trade appointed a receiver to conduct most administrative functions in a case, leaving the process free of most judicial interaction. This format is still the defining feature of present-day English bankruptcy law.¹⁷⁴

A new figure, namely the official receiver, was also introduced in 1883 with the responsibility of administering the debtor’s estate before the beginning of the bankruptcy procedure or of the friendly agreement with creditors. The 1883 Act initiated another important element, a new phase: the so-called “public examination” was added to the bankruptcy procedure, and it later on became a fundamental step in the bankruptcy procedure. During the public examination the creditors and the court could question the debtor on the state of affairs and on the causes of bankruptcy. It is evident that the 1883 law put emphasis on an analysis of debtors’ conducting of affairs and on official supervision of the entire procedure.¹⁷⁵

An important development on the way to the return to “officialism” in the late part of the nineteenth century had been the appointment of Joseph Chamberlain as president of the Board of Trade in 1881.¹⁷⁶ Chamberlain set forth three principles essential to good bankruptcy law.¹⁷⁷ The first principle held that the assets of the debtor in each insolvency belonged to the creditors and therefore they should have the fullest control subject to the least possible interference. The

¹⁷¹ Cork Report 18.

¹⁷² Lester 195. See also Cork Report 18.

¹⁷³ Martino *Approaching Disaster: A Comparison between Personal Bankruptcy Legislation in Italy and England (1883-1930)* (2002) unpublished paper presented at the Association of Business Historians Annual Conference, England, (hereafter referred to as Martino) on file with the author. See also Holdsworth *The Bankruptcy Act of 1883 with Introduction and Notes an Appendix Containing the Debtors’ Act, 1869 and an Index* (1884) (hereafter referred to as Holdsworth).

¹⁷⁴ Martin “Common-law Bankruptcy Systems” 367.

¹⁷⁵ Martino 8.

¹⁷⁶ Lester 170.

¹⁷⁷ Heath “Insolvency Law Reform: The Role of the State” (1999) *New Zealand LR* 569 (hereafter referred to as Heath).



underlying principle behind this statement also had a strong political motivation, as the business community still had a strong hold on many areas of the commercial laws in England.¹⁷⁸

The second principle held that “the trustee should be subject to official supervision and control as regards his pecuniary administration ... and his accounts should in every case be audited by authority”.¹⁷⁹ And finally he called for an independent examination of the debtor’s conduct and circumstances leading to his insolvency.¹⁸⁰ Chamberlain argued that the only way to secure honest administration of bankrupt estates and to improve the general tone of commercial morality was to ensure that there was an independent and impartial examination into the circumstances of each case.¹⁸¹ For this reason Chamberlain was of the opinion that it was necessary to have a public officer examine the circumstances of each bankruptcy.¹⁸²

Another essential feature of the Act of 1883 was that although insolvency was not necessarily a crime, it indicated a state of affairs which required public inquiry and explanation.¹⁸³ The law of 1883 is viewed by certain writers as the foundation of the present system of English bankruptcy law with the aim of the Act being a fair procedure with adequate supervision and means to discourage dishonesty.¹⁸⁴ The machinery for dealing with bankruptcy matters created by the Act of 1883 essentially remains in force in present-day insolvency law.¹⁸⁵

The basic philosophy and approach of the 1883 English Act was not challenged for most of the twentieth century and it retained its influence right up to the period of the comprehensive review of bankruptcy law under the Cork Committee in 1977. Over the years various committees¹⁸⁶ were established whose main task was to review certain aspects pertaining to English insolvency law.¹⁸⁷ In the early 1970s the UK’s accession to the membership of the EEC demanded that it negotiate with other member states concerning a draft EEC Bankruptcy Convention. In order to advise the Department of Trade and Industry, an

¹⁷⁸ Lester 194

¹⁷⁹ Lester 194.

¹⁸⁰ Lester 195.

¹⁸¹ Heath 569.

¹⁸² Heath 569.

¹⁸³ *Cork Report* 19.

¹⁸⁴ Dalhuisen par 3.08[2] 1-89.

¹⁸⁵ *Cork Report* 20.

¹⁸⁶ The committees that were formed to look into aspects of individual insolvency law were the MuirMackenzie Committee (1906 Cd 4068); the Hansell Committee (Cmnd 2326, 1925); and the Blagden Committee (Cmnd 221, 1957). See Fletcher 13; Burdett 84.

¹⁸⁷ Fletcher 13. See also Burdette 85-90 for a brief discussion of the *Cork Report*.

advisory committee under the chairmanship of Mr Kenneth Cork, as he then was, was appointed.¹⁸⁸ Cork's resulted first report emphasised that a comprehensive review of the insolvency law¹⁸⁹ was required and in January 1977 the Review Committee on Insolvency Law and Practice, again with Cork as chairman, was established.¹⁹⁰ The *Cork Report* in its final form produced a set of "aims of a good modern insolvency law".¹⁹¹ The *Report* made out a vigorous case for fundamental reforms regarding the law of insolvency,¹⁹² resulting in many of the recommendations finding their way into the Insolvency Act of 1986.¹⁹³

If we examine the development of state regulation in English bankruptcy law it is clear that there had been a much stronger lead to follow than was the case in early Roman and Roman-Dutch law. Even as far back as the 1880s senior staff members of the Board of Trade in England realised that the conceptual key to bankruptcy legislation is directly related to the state's role in the administration of insolvent estates.¹⁹⁴ The connection between the role of the state in protecting the public interest and the administration of bankruptcy estates is clearly illustrated via the strong administrative features of the English regulatory framework and the institutional support of bankruptcy law in general.¹⁹⁵ Of significance in the context of this study was the presence of Lord Chamberlain, who understood the important role which the state has to play both in protecting the public interests as well as in the administration of smaller insolvent estates in order for such an estate is to be managed in the most cost-effective manner and one that would yield the largest dividend to creditors.¹⁹⁶

¹⁸⁸ Finch *Corporate Insolvency Law* (2002) 11 (hereafter referred to as Finch).

¹⁸⁹ Similar reviews and reforms were taking place in other European and Commonwealth countries: Austria (1982); Denmark (1977); France (1984 and 1985); Italy (1979). Cf Aminoff "The Development of American and English Bankruptcy Legislation – from a Common Source to a Shared Goal" (1989) *Statute LR* 128 at 129.

¹⁹⁰ For a discussion of the events that led to the appointment of the Cork Committee, see Fletcher 14-15. The Cork Committee was given a very wide brief:

- a To undertake a total review of the law of insolvency, bankruptcy, liquidation and receiverships, and to consider reforms that are necessary or desirable;
- b To examine the possibility of formulating a comprehensive insolvency system, including the possibility of harmonising and integrating procedures;
- c To investigate the possibility of formulating less formal procedures as alternatives to bankruptcy and winding-up; and
- d To make recommendations.

¹⁹¹ Finch "The Measures of Insolvency Law" (1997) *Oxford Journal of Legal Studies* 227. For a detailed discussion of the Cork recommendations read Fletcher 14-20.

¹⁹² Fletcher 65.

¹⁹³ Fletcher 66.

¹⁹⁴ Lester 304.

¹⁹⁵ Milman 80.

¹⁹⁶ Lester 304.



1.6 SOUTH AFRICAN LAW

1.6.1 Early Cape law

Two renowned trading companies operating in the East and the West, the Dutch East India Company incorporated in 1602 and the Dutch West India Company incorporated in 1621, eventually carried Roman-Dutch law into their settlements.¹⁹⁷ The Cape Colony was founded on a very modest scale in 1652 by Jan van Riebeeck as a halfway refreshment station for the ships of the Dutch East India Company on their way to and from the East Indies, and it is in this way that the Roman-Dutch law was introduced into South Africa.¹⁹⁸ Consequently the Roman-Dutch law was mostly followed in South Africa, which meant that from an early stage the *cessio bonorum* and *missio in possessionem* as dual forms of relief available to the debtor also existed in the Cape, and certainly did so after the year 1803.¹⁹⁹

As a result of the *Vredestraktaat van Amiens* of 1802, after being under British control for almost seven years the Cape of Good Hope again came under control of Holland.²⁰⁰ The *Batavian Republic*²⁰¹ immediately requested that the *Asiatische Raad* prepare a report making suggestions for the post of Governor-General as well as the eventual management of the Cape with consideration of the new *Volksplanting* in the Cape.²⁰² The person responsible for compiling this report was a Mr Jacobus Abraham de Mist, who had been a member of the *Asiatische Raad* since 1795. With the enactment of the *Vrede of Amiens* in March 1802 the *Batavian Republic* had its arrangements regarding the governing of the Cape prepared, and the first task was to appoint De Mist as Commissioner-General of the Cape.²⁰³ De Mist had to act according to a formal instruction²⁰⁴ issued by the *Batavian Republic*, which had as its

¹⁹⁷ The East India Company in England founded in 1599 traded in the East Indies until the Amboyna massacre in 1623. Other examples of chartered trading companies include the Muscovy (later Russia) Company (1565), the Eastland Company (trading in the Baltic) (1579) and the African Royal Company (1672). See Omar 6; Lee 7.

¹⁹⁸ De Vos “Roman-Dutch Law in South Africa at the end of the Century – and Thereafter” (hereafter referred to as De Vos) in Anghie *et al Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (1998).

¹⁹⁹ Stander 16.

²⁰⁰ De Villiers *Die Ou-Hollandse Insolvensiereg en die Eerste Vaste Insolvensiereg van de Kaap De Goede Hoop* (1923) 77 LLD dissertation University of Leiden (hereafter referred to as De Villiers).

²⁰¹ *Batavian Republic* was the name for the Netherlands in the years (1795-1806) following the conquest by the French during the French Revolutionary Wars.

²⁰² De Villiers 78.

²⁰³ De Villiers 78.

²⁰⁴ De Mist *Instructie voor den Commissaris General naar de Kaap de Goede Hoop* (1803).

basis the original report compiled by the *Asiatiese Raad* and together with the instruction issued by the Republic formed the basis of the Batavian rule between 1803 and 1806.²⁰⁵

After settling in the Cape, De Mist, on 24 March 1803, wrote a letter to the Justice Council²⁰⁶ in Holland and for the first time his idea of establishing the institution of the *Desolate Boedelkamers* in the Cape was mentioned.²⁰⁷ Although he had complete authority to act, De Mist compiled a report to the *Asiatiese Raad* setting out the necessity of creating a *Desolate Boedelkamer* in the Cape, and in this report he also mentions the fact that all insolvent estates were at that stage administered by a *Sequester*, who was also the temporary Secretary of Justice. The *Sequester* was responsible for the administration of between 300 and 400 estates, the execution of civil sentences and, as a member of the Justice Council, this office also formed part of the judiciary. As a result it was therefore responsible for both the administration of justice and the enforcement of the law.²⁰⁸

De Mist established that one person was unable to administer all the tasks mentioned, and the execution of justice²⁰⁹ was therefore hampered by this situation.²¹⁰ On 30 March 1803 he appointed the first members²¹¹ and secretary²¹² of the *Desolate Boedelkamer*. De Mist had the foresight to see that the *Desolate Boedelkamers* should operate according to an official Ordinance. However, with the erection of the *Boedelkamers* the Ordinance was not yet finalised and as a temporary measure on 22 April 1803 De Mist issued a so-called provisional instruction²¹³ to the members specifying the procedures and jurisdiction of the *Boedelkamers*.²¹⁴

In May 1804 De Mist received a concept of the Ordinance²¹⁵ prepared on his request by the Justice Council and soon afterwards the official Ordinance²¹⁶ regulating the functions and

²⁰⁵ De Villiers 80.

²⁰⁶ Raaden van Justitie.

²⁰⁷ De Villiers 84.

²⁰⁸ De Villiers 90.

²⁰⁹ *Juris effectus in executione consistit.*

²¹⁰ De Villiers 90.

²¹¹ Olaf Marthinus Bergh; Abraham de Smit; Watse Sebius van Andringa.

²¹² Reiner D'Ozy.

²¹³ *Instructie voor de Commissarissen van de Desolate Boedels.*

²¹⁴ De Villiers 96.

²¹⁵ *Die Concept Ordonnantie op de gerechtelijke beheering van boedels en op de executie van civiele vonnissen 1804.* See De Villiers 96.

²¹⁶ Ordinance known as *Provisionele Instructie voor de Commissarissen van de Desolate Boedelkamer van 1804* (hereafter referred to as *Provisionele Instructie voor de Commissarissen van de Desolate Boedelkamer*). See De Villiers 105.

procedures of the *Desolate Boedelkamer* was published.²¹⁷ This Ordinance, known as the *Provisionele Instruksie*, represented the first real and substantial insolvency law in the Cape of Good Hope.²¹⁸ The Ordinance²¹⁹ issued by De Mist was largely based on the principles found in the 1777 Ordinance of Amsterdam.²²⁰ It is interesting to note, however, that although the instructions of the *Desolate Boedelkamers* were founded on the Amsterdam ordinance, they differed in two important respects: firstly, creditors did not feature in the administration of the insolvent estate; and, secondly, creditors could not apply for the sequestration of the debtor.²²¹ It should be noted that under the Ordinance the charge of the insolvent estates was granted to *curators* or trustees chosen by the creditors themselves, acting under the supervision of the *Desolate Boedelkamer*.²²²

In 1806 the Cape was again under British power, but this had no immediate effect on the legal developments in the Cape.²²³ The Ordinance issued by De Mist stayed unchanged and for the next 14 years it remained the main source of insolvency law in the Cape.²²⁴ This state of affairs continued until 1818, when the *Desolate Boedelkamers* was abolished and a *Sequestrator* was appointed, who was vested with the same jurisdiction and functions formerly exercised by the *Desolate Boedelkamers*.²²⁵ Burton mentions that it was regrettable that the Commissioner-General departed from the Dutch principles and especially by removing the administration of the insolvent estates from the creditor's nominees and to transfer it to a single body.²²⁶ In 1819 instructions were issued to the *Sequestrator* and other functionaries of his department, and an Ordinance²²⁷ was promulgated for the judicial administration of estates. To this department was entrusted all estates that were insolvent, unadministered or placed under curatorship as well as the execution of all civil sentences except those entrusted specially to the boards of *landdrost* and *heemraden*.²²⁸ As was anticipated, the *Sequestrator's* office proved not to be a success, and on 31 December 1827 the office of the *Sequestrator* was abolished. The office of the *Sequestrator* was

²¹⁷ De Villiers 105.

²¹⁸ De Villiers 107.

²¹⁹ *Provisionele Instructie voor de Commissarissen van de Desolate Boedelkamer*.

²²⁰ *Nederlandse Jaarboeken* (1777) 291.

²²¹ Burton 8.

²²² Burton 27.

²²³ De Villiers 105.

²²⁴ De Villiers 105.

²²⁵ Stander 16.

²²⁶ Burton 27.

²²⁷ GG (1818-12-04). See Proclamation 2 of September 1819. See also Stander 16.

²²⁸ Wessels 669.

replaced by a commissioner whose duty it was to wind up the *Sequesterator's* department and to assess all matters associated with the *Sequesterator's* office.²²⁹

Another important historical event occurred in 1828, when under the second British occupation in the Cape the Charter of Justice was introduced with the intention of reorganising the judiciary. The Charter resulted in the complete overhaul of the judicial system and made provision for the establishment of an independent “Supreme Court”,²³⁰ consisting of a Chief Justice and three judges.²³¹ *Inter alia* the Charter also declared that the Supreme Court had to make provision for the post of a “Master of the Supreme Court”.²³² Although the literature confirms the founding of the Master’s office, this study recovered no publication or evidence indicating any preceding research or policy consideration underpinning the decision to incorporate the functions of the Master into the court system. It is submitted that this decisions appeared to have been based on practicality more than any in-depth policy consideration or research undertaking. As a result of the Charter of Justice and the changes introduced there under, the administration of justice in South Africa thus assumed its English characteristics.²³³ The changes resulted in the complete separation of the executive and the judicial powers and the introduction of the jury system, but, far more significant in the context of this study, the Charter of Justice established the office of the Master as part of the South African legal establishment.

Another significant event took place with the passing of Ordinance 46 of 1828,²³⁴ where it was mentioned for the first time that in future all insolvent estates had to be administered by an official referred to as the “Master of the Supreme Court”. The Master took over the functions of the official *sequesterator* and also possessed many of the functions of the

²²⁹ Ordinance 88 of 1831 was passed merely to provide for the abolition of the office of the commissioner. See Burton 27; Mars 10.

²³⁰ Currently known as the High Court.

²³¹ The first Charter of Justice came into operation on 1828-01-01, spurred by the Proclamation of 1822-07-05, which made January 1827 the effective date for the use of English in the courts. The first Charter was subsequently followed by a Second Charter, constituted by letter patent of 1832-05-04, and coming into operation on 1834-02-13, which superseded and modified it in certain aspects. See Theal *Records of the Cape Colony* (1898) (hereafter referred to as Theal); Van der Walt *Geskiedenis van Suid-Afrika* (1961) 167 (hereafter referred to as Van der Walt). See also Kahn *A Review of the Recess System in the High Court* (2003) report prepared for the Department of Justice, Pretoria (hereafter referred to as Kahn) on file with the author.

²³² *Inter alia*, the Charter provided for: circuit courts; trial by jury; the right of appeal to the Privy Council; the sheriff; the registrar; the Master; minor officers in the court; legal practitioners; appointment and financial arrangements. See Kahn ch 2; Van der Walt 167.

²³³ Van der Walt 167.

²³⁴ Hereafter referred to as the Ordinance of 1828.

Amsterdam commissioners serving in the *Desolate Boedelkamers* in Holland.²³⁵ These two events, namely the introduction of the Charter of Justice and the passing of the Ordinance of 1828, represent two important milestones in the history of state regulation in South African insolvency law, as it signifies the origin of the Master of the High Court as it is known today.

Subsequently, the Cape Ordinance 64 of 1829²³⁶ followed, representing the first South African Insolvency Act, reflecting certain detailed provisions as they are known today. Although English law formed the basis of this new Ordinance, a substantial number of Dutch principles were woven into the particular legislation and established most of the principles of our present insolvency practice.²³⁷ Of significance was that the principle of transfer of ownership was established by this Ordinance, which stated that subsequent to the granting of the sequestration order the insolvent was divested of his estate, which afterwards vested in the Master and thereafter in the trustee.²³⁸ According to Stander this was the first occasion where it was clearly indicated that in time the trustee became the owner of the estate assets, and this development was probably due to the influence of English law.²³⁹

The Ordinance recognised the principles that a person could surrender his estate voluntarily and that creditors could obtain an order for sequestration if certain acts of insolvency were committed.²⁴⁰ As mentioned, the order of sequestration had the effect in law of divesting the insolvent of his estate and vesting this in the Master,²⁴¹ and subsequently the Master called a meeting of creditors and a trustee was elected by whom the remainder of the administration was carried out. At the meeting of creditors a trustee was chosen by creditors by voting that took place at the meeting and if no complaint had been lodged within two days of the election then the trustees themselves had to move for a decree of the court confirming the election. It is noteworthy that according to the Ordinance of 1829 the court was thus responsible for the appointment of the trustee.²⁴²

²³⁵ Wessels 670.

²³⁶ Hereafter referred to as the Ordinance of 1829. It is interesting to note that the Ordinance of 1829 coincided with a commission of inquiry into the Orphan Chamber. See Master's Office, Pretoria *Report on the Functions of the Office of the Master of the Supreme Court* (1990) on file with the author. *Inventories of the Orphan Chamber Cape Town Archives Repository, South Africa* available at <http://www.tanap.net> (last visited at 09-11-30). See also Burton 30; Mars 11.

²³⁷ See Stander "Geschiedenis van Insolvensiereg" 376; Wessels 673; De Villiers 107.

²³⁸ Stander "Geschiedenis van Insolvensiereg" 376.

²³⁹ Stander "Geschiedenis van Insolvensiereg" 376.

²⁴⁰ Wessels 670.

²⁴¹ Wessels 670.

²⁴² Section 48 of Ordinance 64 of 1829. See Burton 103.

It is interesting to note that the Ordinance of 1929 coincided with a commission of inquiry into the Orphan Chamber. The Board of the Orphan Masters was established at the Cape circa 1673. The Orphan Chamber (*Weeskamer*) functioned as one of the sections that were introduced into the administrative system employed at the Cape at the time, and had to report to the Council of Policy regarding the execution of its responsibilities. The establishment of the Orphan Chamber at the Cape of Good Hope arose out of the need to provide for the collection and administration of the property of persons who died intestate and left heirs who were absent from the Colony or who were under age. After the devastating effect of the smallpox epidemic of 1713, the Council of Policy empowered the Orphan Chamber to protect the transfer of property of all free individuals at the Cape. According to the provisions of the Ordinances²⁴³ of 1833, the Orphan Chamber was abolished and its duties were transferred to the newly appointed office of Master of the Supreme Court.²⁴⁴

The Ordinance of 1929 regulated the administration of insolvent estates until repealed by a new consolidating Ordinance 6 of 1843,²⁴⁵ which established the bankruptcy procedure for the whole South Africa and may rightly be regarded as a landmark in the South African law of insolvency.²⁴⁶ Both consolidated and changed the law. From a historical point of view one of the main changes was the abolition of the practice of granting a *cessio bonorum* as well as the right of *surgeance of betaalinge*.²⁴⁷ Noteworthy for this study is the fact that the responsibility of appointing the provisional trustee and final trustee remained with the court.

The Ordinance of 1843 also served as the foundation of the law of insolvency in South Africa and was also adopted in Natal as Ordinance 24 of 1846, which remained the law of the colony until repealed by law 47.²⁴⁸ In the Orange Free State the Ordinance was also largely

²⁴³ Ordinances 104 and 105 of 1833. Hereafter referred to as Ordinance 1833.

²⁴⁴ See *Report on the Functions of the Office of the Master of the Supreme Court*.

²⁴⁵ Hereafter referred to as the Ordinance of 1843.

²⁴⁶ See Stander 16; Mars 11.

²⁴⁷ Mars 9.

²⁴⁸ Mars at 11 as well as Stander “Geskiiedenis van die Insolvensiereg” at 377 acknowledges that this Ordinance determined modern South African insolvency law. This point of view cannot be disregarded, especially in light of the fact that it had effect in Natal (the Cape Ordinance was adopted as Ordinance 24 of 1846, and which was repealed in 1884), the Orange Free State (the Cape Ordinance and Amendment Act 15 of 1859 formed the basis of Ordinance 9 of 1878, which ordinance was inserted into chapter 104 of the Statute Law of the Orange Free State) and the Transvaal (the Cape Ordinance as amended by the Cape Act 15 of 1859 was largely built into Transvaal Ordinance 21 of 1880). This latter Ordinance was replaced by Act 13 of 1895, which was an adapted version of the Cape Ordinance of 1843. For a discussion of the position in the Transvaal before 1880, see Kotze 17. See also Buchanan *Buchanan’s Decisions in Insolvency* (1906); Wessels 669; Burdette 33.



taken over as Ordinance 9 of 1878, which was subsequently known as Chapter 104 of the Statute Law of Orange Free State.²⁴⁹

In Transvaal the Cape Ordinance was also largely superseded by some amending provisions of the Cape Act 15 of 1895, as Ordinance 21 of 1880. This was in turn repealed by the Transvaal Insolvency Act 13 of 1895. This statute was merely an adaptation of the Cape Ordinance 6 of 1843, and in effect Ordinance 6 was rearranged, abridged and in some instances amended.²⁵⁰ Although over time some amendments to the procedures of the 1846 Ordinance were introduced, the main principles and details remained the same in all the South African colonies.²⁵¹

1.6.2 Union Legislation

A few statutory developments followed the Ordinance of 1828 until the Master was firmly established in its current form by the Insolvency Act of 1916,²⁵² the predecessor to the current Insolvency Act.²⁵³ The parliament of the Union of South Africa in 1916 repealed all of the existing statutes of the law of insolvency previously in force in the four provinces and substituted these with the Insolvency Act of 1916, which represented a uniform statute and was assigned throughout the (then) Union of South Africa.²⁵⁴ The Insolvency Act of 1916 was amended by Act 29 of 1926 and Act 58 of 1934.²⁵⁵

Under the Insolvency Act of 1916 the appointment of a provisional trustee was done by way of a petition by the Master or a creditor to the court, and was contained in the petition for sequestration of the debtor's estate.²⁵⁶ The court had a discretion to appoint a provisional trustee, and was not bound to have regard to the wishes of any of the creditors. In fact, in some instances the court disregarded the person nominated by the creditors and appointed a person

²⁴⁹ Mars 11.

²⁵⁰ See, eg, *Kirkland v Romyn* 1815 AD 327 at 330. See also Evans 55; Mars 11.

²⁵¹ Wessels 670.

²⁵² Act 32 of 1916. Hereafter referred to as the 1916 Insolvency Act.

²⁵³ As far as can be determined, it was also during this period that the first reference was made to the Master taking over supervision of companies, which were wound up (*Wet op het Liquideeren van Maatschappijen* (Act 1 of 1894)). The main purpose of this Act was to provide for the supervision of the winding-up of companies by the Master. See Burdette 63.

²⁵⁴ See Mars 6; Stander "Geschiedenis van die Insolvensiereg" 377.

²⁵⁵ For a useful commentary on the 1916 Insolvency Act and the impact of the 1926 amendments, see Nathan *South African Insolvency Law* (1928) (hereafter referred to as Nathan).

²⁵⁶ Section 57 of 1916 Insolvency Act. See Nathan 196.



chosen by itself.²⁵⁷ Generally, however, the wishes of the majority of creditors prevailed²⁵⁸ and the court appointed the nominated applicant if such person was supported by a substantial body of creditors.²⁵⁹ Where the circumstances revealed urgency and the application was supported by none of the creditors, or an insignificant number of them, the court made the appointment but reserved leave to the creditors to have the appointment set aside.²⁶⁰

The final trustee was elected at the first meeting of creditors.²⁶¹ The appointment was confirmed by the court and the Master issued a certificate which was of force throughout the Union.²⁶² The Act also made provision for the event that should no trustee be elected and the estate was not vested at the time of the meeting in a provisional trustee, the Master may appoint a trustee or apply at the cost of the estate to the Court to set aside the sequestration order.²⁶³ This procedure was a step closer to the current procedure, where the sole responsibility and discretion to appoint a trustee in an insolvent estate lies with the Master.²⁶⁴

1.6.3 Legislation now in force

On 1 July 1936 the 1916 Insolvency Act was replaced by the current Insolvency Act of 1936, now in force as the principal Act.²⁶⁵ The Insolvency Act of 1936 conferred the power to appoint a provisional trustee on the Master,²⁶⁶ but failed to state how such an appointment should be made. This effectively conferred on the Master an unfettered discretion to appoint a person of choice as the provisional trustee of an insolvent estate. The Act of 1936 also firmly established the Master as supervisory authority in our insolvency law and became the main source of South African insolvency law.

²⁵⁷ Nathan 197.

²⁵⁸ See, eg, *Ex Parte Reid* 1922 CPD 62.

²⁵⁹ Nathan 197.

²⁶⁰ Nathan 197.

²⁶¹ Sections 52-53 of the 1916 Insolvency Act.

²⁶² Nathan 187.

²⁶³ Section 53 of the 1916 Insolvency Act. See Nathan 187-189.

²⁶⁴ As discussed in Part V below.

²⁶⁵ It is important to note that however complete the Insolvency Act of 1936 may be, it did not totally repeal the common law in respect of South African insolvency law, and English law also played an important role in the development of our insolvency law. See Burdette 15.

²⁶⁶ Section 18(1) of the Insolvency Act.



The Act should however not be regarded as a complete statement of the law of insolvency and does not interfere with any common law right consistent with its provisions.²⁶⁷ Mention must be made of the fact that to a considerable extent our various acts relating to insolvency law are declaratory of the common law.²⁶⁸ In this regard the court remarked:

It should be remembered that, to a large extent, our successive statutes relating to insolvency were declaratory of the common law; they served to create machinery for the realization and distribution of insolvent estates and to regulate the proceedings to that end, rather than to alter the basic concept of a *concursum creditorum*.²⁶⁹

Although the Insolvency Act is regarded as the principal source of our insolvency law, it is not the only source, as the Companies Act²⁷⁰ and the Close Corporations Act²⁷¹ also contain provisions for the winding-up²⁷² of a company or close corporation and furthermore there is also other legislation applicable to the winding-up of other legal entities such as banking institutions and insurance companies.²⁷³ Apart from these statutory enactments, judgments of our high courts, including the Constitutional Court,²⁷⁴ and as discussed in the preceding section, our common law principles, are also important sources of our insolvency law.²⁷⁵

²⁶⁷ Such as the *Actio Pauliana* – action available to creditors defrauded by alienation. For a comprehensive discussion of the *Actio Pauliana* see Boraine at 77-142.

²⁶⁸ Smith 7.

²⁶⁹ See, eg, *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209 at 223. See also Smith 8; Stander 17.

²⁷⁰ Act 61 of 1973. Hereafter referred to as the Companies Act.

²⁷¹ Act 69 of 1984. Hereafter referred to as the Close Corporations Act.

²⁷² In the case where a company or close corporation is being wound up, one has to turn to the Companies Act or Close Corporations Act in order to find the provisions relating to these entities. These latter Acts are then “connected” to the Insolvency Act by means of “connecting provisions” in s 339 of the Companies Act and s 66 of the Close Corporations Act, which make insolvency law applicable also to these types of entities. For further reading on the subject see Burdette ch 5; see also Boraine “The Draft Insolvency Bill – an Exploration (Part 1)” (1998) *TSAR* 621, where reference is made of this uniformity.

²⁷³ See s 68 of the Banks Act 94 of 1990 and Part VI of the Long-Term Insurance Act 52 of 1998 and Part VI of the Short-Term Insurance Act 53 of 1998 respectively. See also Mars 16; Burdette ch 7.

²⁷⁴ Act 108 of 1996. Hereafter referred to as the Constitution. The Constitution is the supreme law of the land and provides the basis for the reform of all South African law.

²⁷⁵ Mars 18. See Burdette ch 12 for a detailed discussion of this topic.



CHAPTER 2: CONCLUSION

History with its flickering lamp stumbles along the trail of the past, trying to reconstruct its scenes, to revive its echoes, and kindle with pale gleams the passion of former days.²⁷⁶

These words of Winston Churchill underpin the notion that we often have a romantic view of history combined with a naïve belief that we will find the answers to our questions written somewhere in the past. Of course, many jurists and scholars have been fortunate to experience that “Eureka!” moment while studying the wisdoms of the ancient writers. Although the development of the concept of state regulation in our insolvency law has not received much attention in the main historical surveys of our insolvency law, nevertheless, drawing from the study of our common law, some pattern of state regulation did emerge. The establishment of the *Desolate Boedelkamers* and subsequent founding of the office of the Master of the Supreme Court could perhaps be classified as significant events in the history of this field of law. If not as dramatic, it could at the very least provide us with added insight into the unique regulatory system within the current South African insolvency law.

If we attempt to pinpoint only the most significant developments in the occurrence of regulation in insolvency law, we find that during the period of Roman law probably the most noteworthy event had been the first encounter with the phenomenon of “stewardship” with regard to the management or administration of the property of others. Initially the *Magister* was never anything more than a creditor acting in his own selfish interests and those of his electors, whereas the *curator*, which later entered the scene, characterised to a limited extent the principle of the protection of the public interest due to the requirement that bankruptcy proceedings had to be conducted according to a uniform plan and all the creditors obtained an equitable satisfaction of their claim.²⁷⁷

During the period of Roman-Dutch law, the establishment of the *Desolate Boedelkamers* and the 1777 Ordinance, introducing the practice of the *Desolate Boedelkamers* to Amsterdam, stand out as significant milestones. During 1777 an insolvency Ordinance was granted to the city of Amsterdam, which, significantly, had been responsible for the introduction of the *Desolate Boedelkamers* charged with the administration of the estate of all insolvent debtors. This important innovation in the Roman-Dutch law represented the first acquaintance with the concept

²⁷⁶ Winston Churchill.

²⁷⁷ The general notion of “equality among all creditors”. See Mars 9.



of state regulation in the form of a regulatory authority overseeing the insolvency procedure. It is submitted that this development in favour of greater state regulation indicated a significant shift from a creditor-controlled system to a system of a more administrative nature.

The historical development of the English law provides a much more evident exposition of state regulation of bankruptcy law. The earliest *ad hoc* models had the King's Council taking control of a bankrupt's assets, and this in time evolved into a system in which the Lord Chancellor, acting through bankruptcy commissioners, held sway. Creditors' assignees were subsequently permitted to act under the watchful eyes of the commissioners. The state reassessed the supervisory jurisdiction with the endorsement of a more balanced model in the Bankruptcy Act of 1883. The Bankruptcy Act of 1883 devised a new system of joint official and creditor control. This approach established what are still the basic parameters of English bankruptcy law today.

The basic philosophy and approach of the English Act of 1883 were not challenged for most of the twentieth century and retained their influence right up to the period of the comprehensive review of bankruptcy law under the Cork Committee in 1977, which ultimately led to the current Insolvency Act of 1986. The process of administrative oversight established in 1883 was carried over to the present 1986 Act and is still the defining feature of English insolvency law.²⁷⁸ The public administrator, and not the court, is responsible for virtually all the important decisions and establishes the detailed interpretation of statutory rules.²⁷⁹ Of significance is the recognition of the constant theme of protecting the interest of the public through the role of the state in the administration of bankruptcy estates as illustrated *via* the strong administrative features of the English regulatory framework and the institutional support of bankruptcy law in general.²⁸⁰

If we direct our attention back to early South African insolvency law, the founding of the *Desolate Boedelkamers* during the eighteenth century played a significant role in shaping the future character of the regulatory process in South African insolvency law. To a large extent the *Desolate Boedelkamers* operated according to principles influenced by the 1777 Ordinance of Amsterdam. This state of affairs continued until the *Desolate Boedelkamers*

²⁷⁸ Martin "Common-law Bankruptcy Systems" 373.

²⁷⁹ Niemi-Kiesiläinen "Introduction" 11.

²⁸⁰ As will be discussed in Part III hereafter.

was abolished and replaced with a *Sequestrator*, vested with basically similar jurisdiction and functions as the *Desolate Boedelkamers*. The *Sequestrator*'s office proved not to be a success, and was subsequently done away with and substituted with a commissioner whose duty it was to shut down the *Sequestrator*'s department.²⁸¹

Two significant events occurred in 1828. The first occurred under the second British occupation, when a Charter of Justice was issued in order to revise the judicial system, which made provision for the establishment of an independent "Supreme Court" and also *inter alia* confirmed that the court had to make provision for the post of a "Master of the Supreme Court". The second noteworthy event occurred with the passing of Ordinance of 1828, when for the first time it was mentioned that in future all insolvent estates had to be administered by an official referred to as the "Master of the Supreme Court". The Master possessed many of the functions of the commissioners serving in the *Desolate Boedelkamers* in Holland. These two events signify the origin of the Master of the High Court as it is known today.²⁸² During the same period the Orphan Chamber, which had been mainly responsible for the administration of deceased estates and the interests of orphans, was abolished and its duties transferred to the newly appointed office of Master of the Supreme Court.²⁸³ Although the amalgamation of these two institutions had been documented in literature, very little information could be found on the actual integrating process or aftermath of said merger. It could be argued that at the stage adequate attention had not been paid to the implications of the merger and especially the difference in objectives and viability of the two organisations.

If we ask the question what this study can draw from this brief excursion with the history of our insolvency, it is evident that no robust or evident evolution of the regulatory principles in both Roman and Roman-Dutch law can be revealed. It is submitted that the establishment of the *Desolate Boedelkamers*, as the predecessor to our current Master's office, and the incorporation of the office of the Master into the formal court structure, sets a pattern that has characterised our regulatory practice for centuries.

This leads us to the further question of whether the historical development of state regulation in English law delivered any meaningful contribution. Although the English regulatory

²⁸¹ As discussed in par 1.6.1.

²⁸² As discussed in par 1.6.1.

²⁸³ Wessels 674.



framework may not suit the current South African economic and social conditions in a strict sense, it is concluded that there are adequate similarities in their historical and legal elements to enable law-and policy-makers to borrow fruitfully from the English system and in particular the development of the role of the state in English insolvency law. The answer may lie in the words of Joseph Chamberlain while moving the second reading of the 1883 Bill:

Every good bankruptcy law must have in view two main, and at the same time, distinct objects. First, the honest administration of bankrupt estates, with a view to the fair and speedy distribution of the assets among the creditors whose property they were; secondly, following the idea that prevention was better than cure, to do something to improve the general tone of commercial morality, to promote honest trading, and to lessen the number of failures. In other words, Parliament had to endeavour as far as possible, to protect the salvage and also to diminish the wrecks.²⁸⁴

There is little doubt that institutional law reform has internationally been a major innovation in the legal world since the 1960's: "At their best, they provide principled and imaginative new law, and are catalysts of change, responsive to the world around them and to the public they serve."²⁸⁵ Although the historical survey of the South African regulatory regime does not provide any clear illumination to the unique regulatory system presently in place, it does provide a conceptual foundation for future law reform proposals. In an exceedingly competitive global economy, institutions need to develop and adapt continuously and proactively. The challenge will be to identify particular problems relating to the current insolvency regime, and propose suggestions which would add clarity to this field of law which would assist in eradicating many of the problem areas in respect of insolvency regulation in South African insolvency law.

²⁸⁴ As cited in Rajak "The Culture of Bankruptcy" 22.

²⁸⁵ Sayers "Co-operation across Frontiers" in Opeskin *et al The Promise of Law Reform* (2005) 243.

CHAPTER 1: INTRODUCTION

Our foreign policy has therefore recognised the reality that our country is and must be integrated within the global community of nations. We have never accepted notions of autarky, the pretence that our country could ever be an island, sufficient unto itself. Indeed, in our political practice we have recognised the critical importance of human and international solidarity.¹

This part of the study contains a brief comparative outline of the basic regulatory features within the insolvency laws of certain selected jurisdictions.² In determining whether it is feasible to bring about regulatory and institutional changes to the South African insolvency law,³ reference to other jurisdictions may serve as a valuable benchmark. As will be illustrated in the following discussion the economic, social and political development of a country directly influences the demands on its insolvency law.⁴ Consequently, the issues at stake in highly developed market economies may differ considerably from those of transitional and emerging economies. However, some current developments and reform discussions, as well as the historical development of the regulatory aspects in these developed economies, might be of particular relevance in order to identify certain key elements that should form the basis of any insolvency regime. In doing so, one of the main functions of comparative law, namely to inform domestic law reform by evaluating the experience of foreign systems, will be utilised.⁵

¹ Thabo Mbeki in “Letter from the President” *ANC Today* of January 2004.

² Reference will also be made to the insolvency systems of England; United States (hereafter referred to as the “US”) and the Netherlands.

³ Worldwide the word “insolvency” is the more common term for such proceedings where a business debtor is involved, while “bankruptcy” would refer to the procedures to be applied to individuals. In South Africa in common parlance, the word “insolvency” refers to both individuals and corporate entities, while in the US the term “bankruptcy” is used to refer to all procedures. See also Rajak “Creditors and Debtors – The Background to the Insolvency legislation of 1986” (1990-1991) *King’s College LJ* 17 (hereafter referred to as Rajak), who states that the terms “insolvency” and “bankruptcy” both describe the same condition – the inability to pay the debts owing in full – but each has become closely associated with a different type of debtor. The former is used when the debtor is a company incorporated by registration under the provisions of the Company Act, while the latter is used for all other debtors. Insolvency is thus an economic condition that may lead to bankruptcy (which is a formal status). In this article the words “insolvency” and “bankruptcy” are used interchangeably when the particular law of a certain jurisdiction is being referred to.

⁴ Falke *Insolvency Law Reform in Transition Economies* (2003) 27 LLD dissertation Humboldt University of Berlin (hereafter referred to as Falke).

⁵ Falke 27.



A comparative study of different legal jurisdictions is often driven by an interest in the convergence and divergence of legal systems and is generally employed to decide either on the compatibility of foreign legal concepts or on the merits of foreign legal systems. Such works also intend to provide for an anthology of foreign legal ideas.⁶ An accurate comparative study would *inter alia* include examining and understanding the historical, social, and economic environment of foreign legal systems as a stage set to the study of one central subject. All comparative research should however bear a caveat. One mechanism might operate perfectly well in one jurisdiction but due to differences in cultural, social, economic and legal factors, fail abysmally in another. Having issued the warning one should however not be discouraged from examining one's own procedures in a comparative light as such a study may yield useful dividends in the revelation of details about how particular legal regimes approach certain common challenges.⁷

There is at present general international recognition that sound, transparent and predictable insolvency and creditor rights systems are an essential part of the national and international financial architectures needed to encourage enterprise, support investment and economic growth and minimise the adverse impact of actual or potential financial failure.⁸ Insolvency laws and systems are also increasingly being recognised as a fundamental institution necessary for the growth of credit markets and entrepreneurship in developing countries and, in turn, those insolvency systems depend on the existence of strong and transparent institutional and regulatory frameworks.⁹

⁶ Ramsay "Comparative Consumer Bankruptcy" (2007) *University of Illinois LR* 241 at 255 (hereafter referred to as Ramsay "Comparative Consumer Bankruptcy"); Mistelis "Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform – Some Fundamental Observations" (2000) *The International Lawyer* 1055 (hereafter referred to as Mistelis).

⁷ Milman *Personal Insolvency Law, Regulation and Policy* (2005) 147 (hereafter referred to as Milman).

⁸ Joyce *The Role of Insolvency Regulators in the Past and in the Future* (2003) 4 unpublished paper presented at the International Insolvency Conference, Singapore (hereafter referred to as Joyce) on file with the author. For a discussion of the role of insolvency law in financial societies refer to Johnson "Towards International Standards on Insolvency: The Catalytic Role of the World Bank" (2000) *Law in Transition* 69 (hereafter referred to as Johnson).

⁹ See Joyce 2; Mistelis 1057.

Regulatory frameworks have been developed in different ways in different jurisdictions, reflecting the divergence in history, tradition and culture.¹⁰ Internationally, various regulatory and institutional models have emerged in order to provide the necessary checks and balances against the misuse of an insolvency system.¹¹ Regulation of insolvency administration and insolvency practitioners¹² may be undertaken or overseen by a government department or agency or a public body, one or more private-sector professional bodies or a combination of government and professional bodies. In brief, there is no single model or guideline applicable, but the different systems are all directed at securing and assuring public confidence in the system of regulation and the process of insolvency.¹³

The aim of this part of the study is not to provide a detailed exposition or thoroughgoing comparative study of the general insolvency laws in the respective legal jurisdictions, but rather to include an overview of the general principles and substantive law *vis-à-vis* their institutional and regulatory frameworks. In order to contextualise the significant features of the relevant jurisdictions, a brief overview of the historical development of the various regulatory systems will also be included. The justification for considering these international jurisdictions is twofold: firstly, it is necessary to examine the regulatory methodology of other international jurisdictions in order to facilitate a critical assessment of the regulatory aspects of South African insolvency law. The challenge will be to assess the selected foreign legal systems' compatibility and the merit of certain regulatory features, in order to decide whether any valuable lessons or contributions can be identified. Secondly, an attempt will be made to highlight certain common denominators within the regulatory frameworks of certain developed jurisdictions in order to assist

¹⁰ Martin "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation" (2005) *Boston College International & Comparative LR* 1 (hereafter referred to as Martin "The Role of History and Culture").

¹¹ See Wessels *Cross-Border Insolvency Law – International Instruments and Commentary* (2007) (hereafter referred to as Wessels *Cross-Border Insolvency Law*). See, eg, United Nations Commission on International Trade Law (hereafter referred to as "UNCITRAL") *Legislative Guide on Insolvency Law* (2005) 10 (hereafter referred to as "UNCITRAL *Legislative Guide*" or "*Legislative Guide*").

¹² "Insolvency practitioner" is the generic term used in this study to refer to the appointed person in office responsible for the administration of the insolvent estate.

¹³ Joyce 4.



domestic lawmakers in making informed decisions when they draft new insolvency laws and to do so within a global mindset.

An overview of selective aspects of the regulatory systems of the common law jurisdictions of the US, England and Wales,¹⁴ as well as the civil law jurisdiction of the Netherlands will be included. These three countries have been chosen on account of certain unique features and characteristics relevant to the aim of this thesis. The English law can to some extent be considered the foundation of the insolvency law of South Africa and although the English regulatory framework operates in a highly progressive society and business climate and may not fit the South African conditions in a strict sense, there are enough similarities between the two countries' historical, legal and cultural background to constitute a distinct and identifiable process.¹⁵ As the historical development of English law has already been dealt with in Part II of this study, only a brief discussion on the topic will be included. On the other end of the continuum, the US bankruptcy system forms part of the discussion due to its judicially oriented approach and highly developed bankruptcy court system.¹⁶ Thereafter, a brief overview of the relatively lenient regulatory system of the Dutch civil law jurisdiction will also be included.

Lastly, in the quest to identify global principles and standards, mention will be made of a series of programmes that have been conducted under the auspices of UNCITRAL, the International Monetary Fund¹⁷ and the World Bank.¹⁸ Each of these projects has given rise to a document setting out, in varying degrees of detail, a systematic blueprint for use

¹⁴ The United Kingdom (hereafter referred to as the "UK") consists of three separate jurisdictions or law districts: (i) England and Wales; (ii) Scotland; and (iii) Northern Ireland. The term UK in this chapter is used generically to refer to the district of England and Wales.

¹⁵ South Africa has "inherited" most of its insolvency legislation from England. See Burdette *Framework for Corporate Insolvency Law Reform in South Africa* (2002) 77 LLD dissertation University of Pretoria (hereafter referred to as Burdette); Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (2009) 2 LLD dissertation University of Pretoria (hereafter referred to as Evans). See discussion in Part II above.

¹⁶ Niemi-Kiesiläinen "Introduction" (hereafter referred to as Niemi-Kiesiläinen "Introduction") in Niemi-Kiesiläinen *et al Consumer Bankruptcy in Global Perspective* (2003) 11 (hereafter referred to as Niemi-Kiesiläinen *Consumer Bankruptcy in Global Perspective*).

¹⁷ Hereafter referred to as the "IMF".

¹⁸ See generally: Wessels *Cross-Border Insolvency Law 2*.



by policymakers and legislators around the world, describing the suggested levels of “best practice” relating to the regulatory aspects of insolvency law.



CHAPTER 2: THE UNITED STATES

2.1 INTRODUCTION

The US is a leading and influential force in all aspects of global insolvency law.¹⁹ Its liberal “fresh start”²⁰ approach to bankruptcy has undoubtedly influenced the development and insolvency law reform of many other jurisdictions, and the general US bankruptcy law model has subsequently served as a template for several developing bankruptcy jurisdictions.²¹ When the present US system is compared with that of emerging nations one notices that the relatively advanced US economy seems to offer the country the luxury of a bankruptcy system in which the government typically plays a passive role.²² The recent heightened interest and focus on insolvency law in the US is mirrored in jurisdictions worldwide and this interest has in turn led to insolvency law increasingly being the subject of international scholarly articles, reflection and debate.²³

Although the US and English bankruptcy systems had the same point of origin, the US bankruptcy law adopted its own distinct flavour in the final decades of the nineteenth century.²⁴ Firstly, the US economy diverged from English law in becoming more capitalistic,

¹⁹ Ramsay “Comparative Consumer Bankruptcy” 242. Countries such as Brazil are considering introducing measures to address over-indebtedness and are considering the comparative advantages of adopting the US approach.

²⁰ A fundamental goal of the American federal bankruptcy laws enacted by Congress is to give debtors a financial “fresh start” from burdensome debts. The Supreme Court made this statement about the purpose of the bankruptcy law in the decision of *Local Loan Co v Hunt* 292 US 234 at 244 (1934):

[I]t gives to the honest but unfortunate debtor ... a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.

For an in-depth discussion of the “fresh start” principle see Roestoff ’n *Kritiese Evaluasie van Skuldverligtingsmaatreëls vir die Individu in die Suid-Afrikaanse Insolvensiereg* (2002) LLD dissertation at the University of Pretoria (hereafter referred to as Roestoff).

²¹ Ramsay “Comparative Consumer Bankruptcy” 250.

²² Braucher “Harmonizing the Business Bankruptcy System of Developed and Developing Nations: Some Issues” (1997) *New York Law School Journal of International and Comparative Law* 376.

²³ The following are recent publications on comparative consumer insolvency law: Niemi-Kiesiläinen “Introduction”; Ziegel *Comparative Consumer Insolvency Regimes – A Canadian Perspective* (2003) (hereafter *Ziegel Comparative Consumer Insolvency*). See also Calitz “Developments in the United States’ Consumer Bankruptcy Law: A South African Perspective” (2007) *Obiter* 397 (hereafter referred to as Calitz “Developments in the United States’ Consumer Bankruptcy Law”).

²⁴ See Tabb “The History of the Bankruptcy Laws in the United States” (1995) *American Bankruptcy Institute LR* 5 (hereafter referred to as Tabb “The History of Bankruptcy Laws”); Martin “Common-



and embracing debt forgiveness as critical to a competitive market economy, and, secondly, during this period the US developed a very different cultural attitude towards debt forgiveness.²⁵ Various European countries have cautiously moved towards the US model, although fears have been expressed about the effects of the liberal discharge procedures on the norm of *pacta sunt servanda*²⁶ and social solidarity.²⁷ Nonetheless, many of the conservative “creditor-friendly” jurisdictions²⁸ have since adopted debt adjustment policies providing for various forms of debt relief to over-indebted debtors, thereby shifting towards a more liberal consumer insolvency system.²⁹

The US bankruptcy system did not emerge randomly, but developed as a result of conscious and modern historical decisions regarding the role of credit and money in the US society.³⁰ Subsequently the current US bankruptcy system grew directly from the US’s unique capitalist system, which rewards entrepreneurialism as well as extensive consumer spending.³¹ The American emphasis on economic conditions, consumerism, and material interests defines the difference in societal views and cultural background between the US bankruptcy system and that of other common law countries.³² Ironically, with the recent enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act³³ the US has

Law Bankruptcy Systems: Similarities and Differences” (2003) *American Bankruptcy Institute LR* 367 at 403 (hereafter referred to as Martin “Common-Law Bankruptcy Systems”).

²⁵ See Martin “Common-Law Bankruptcy Systems” 403; Martin “The Role of History and Culture” 3.

²⁶ The principle of *pacta sunt servanda*. Traditionally, civil law jurisdictions in continental Europe had a very conservative attitude towards debtor relief to consumer debtors, which has as its foundation the deep moral commitment to the sanctity of contracts in the civil law. Cf Niemi-Kiesiläinen “Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?” (1999) *Osgoode Hall LJ* 473 (hereafter referred to as Niemi-Kiesiläinen “Consumer Bankruptcy in Comparison”).

²⁷ Ramsay “Comparative Consumer Bankruptcy” 256.

²⁸ Eg, Germany; France; Austria; the Netherlands; Belgium and Luxembourg. In Wood *Principles of International Insolvency* (2007) 4-5 (hereafter referred to as Wood), a pro-creditor jurisdiction is described as a jurisdiction which allows a creditor to protect itself against insolvency eg, by security or set-off. For a more detailed illustration of the global differentiation between insolvency laws that are pro-debtor or pro-creditor refer to Wood 4-6. See also Ziegel “Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies” (2006) *Theoretical Inquiries in Law* 299 at 301 (hereafter referred to as Ziegel “Facts on the Ground”).

²⁹ Calitz “Developments in the United States’ Consumer Bankruptcy Law” 3. See also Evans at 135-197 for a detailed discussion of certain aspects of the US bankruptcy law.

³⁰ Martin “The Role of History and Culture” 35.

³¹ Martin “The Role of History and Culture” 35.

³² Ziegel “Facts on the Ground” 321.

³³ The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Hereafter referred to as “BAPCPA” or Bankruptcy Reform Act. On 2005-04-20, President Bush signed into law section 256



adopted a stance considerably more conservative in its underlying philosophy than was previously the case. The recent reforms introduced into the US bankruptcy law have resulted in bankruptcy being a less attractive option to debtors. The initiative seems to have been based partly on the belief that bankruptcy law should be more supportive of the sanctity of contracts.³⁴ The sweeping and controversial changes to the Bankruptcy Code³⁵ have been widely criticised by *inter alia* the Bench, academics scholars and other role-players.³⁶ These dramatic changes did not occur in an economic and social vacuum but were inspired instead by the dismantling of usury barriers and other credit restrictions, the rapid growth of consumer credit, and the equally rapid and disturbing increase in the number of over-indebted consumers.³⁷ This shift towards a more conservative bankruptcy policy has perceptibly narrowed the ideological gap between the US and other common law jurisdictions.³⁸

The regulatory framework of the American bankruptcy system stands in contrast with most other common law jurisdictions such as the UK, Canada and Australia.³⁹ Although both

entitled the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005”. The great majority of provisions became effective on 2005-10-17. For a detailed discussion of the legislative path and history of BAPCPA see Neustadter “2005: A Consumer Bankruptcy Odyssey” (2005) *Creighton LR* 225 at 226 (hereafter referred to as Neustadter).

³⁴ Ramsay “Comparative Consumer Bankruptcy” 256.

³⁵ Also referred to as the Bankruptcy Code; Code; 1978 Act or Bankruptcy Reform Act of 1978 (Pub L no 95-598, 92 Stat 2549 (1978) 11 USC par 101, *et seq* which was signed into law on 1978-11-6 and became effective on 1979-10-01)

³⁶ Schlecter “Before and after the Bankruptcy Abuse Preventions and Consumer Protection Act of 2005 Examined Under Recent Case Law: A Curse in Disguise for Consumers?” (2005) *Whittier LR* 787 at 788 (hereafter referred to as Schlecter “Before and after the Bankruptcy Abuse Preventions and Consumer Protection Act of 2005”). For a summary of papers presented at a recent symposium at the University of Illinois, where leading scholars were brought together to assess the new legislation, see Brubaker “Consumer Credit and Bankruptcy: Assessing a New Paradigm” (2007) *University of Illinois LR* 1.

³⁷ Ziegel “Facts on the Ground” 302.

³⁸ See Ramsay “Comparative Consumer Bankruptcy” 250; Ziegel “Facts on the Ground” 302; Tabb “The Death of Consumer Bankruptcy in the United States?” (2001) *Bankruptcy Development Journal* 18 (hereafter referred to as Tabb “The Death of Consumer Bankruptcy in the United States?”).

³⁹ It is important to note in the context of this study that, like the English insolvency system, the Australian system is also based on the principle of a non-interventionist court, an administrator who would typically be a professional *persona* and largely creditor-oriented proceedings. For a further discussion of the Australian regulatory system see generally: Martin “Common-Law Bankruptcy Systems” 397; Mason “Insolvency Law in Australia” 463 (hereafter referred to as Mason “Insolvency Law in Australia”) in Tomasic *Insolvency Law in East Asia* (2006). In theory Canada’s insolvency laws and legal model of the individual bankruptcy process are creditor-driven subject to administrative and judicial regulation. For a further discussion of the Canadian regulatory system see generally: Ramsay “Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of Canadian Trustee in Bankruptcy” (2000) *American Bankruptcy LJ* 399 (hereafter referred to as Ramsay “Canadian Trustee in Bankruptcy”); Ziegel

Canada and Australia embraced the less forgiving and highly administrative English bankruptcy process, the US's regulatory model developed in the opposite direction.⁴⁰ In contrast to the English regulatory concept at the time, during the late nineteenth century the US adopted a minimalist approach towards bankruptcy administration, by not providing for any government administrator or permanent supervisory officials of any kind to oversee the process. This approach subsequently also laid the foundation for the development of a key feature of the US bankruptcy model, namely the development of the bankruptcy bar and the prominent role in the US bankruptcy scenario played by the legal profession.⁴¹ In addition, the 1978 Bankruptcy Code changed the philosophy underlying lawyer's fees from a "spirit of economy" to a standard of "the cost of comparable services".⁴² In theory this insertion, resulting in the creation of a lucrative source of work, should have attracted interest from other professions such as accountants. The formation of the US bankruptcy system nevertheless acted as a shield protecting lawyers against such competition. Because the US system places the courts in a far more central role than many other common law systems, lawyers have exclusive access to courts and their jurisdictional monopoly has kept other professions from entering this lucrative market.⁴³ Since lawyers also represent the vast bulk of insolvency practitioners in the US, they have played a key role in shaping the legal culture in the American bankruptcy system.

At present the US bankruptcy law features a mainly judicially oriented bankruptcy system with the judiciary fulfilling an active role in the bankruptcy process. This distinctive characteristic can be attributed to the US federal court system, which includes a specialist court for bankruptcy matters. The US bankruptcy regime remains a largely privatised system

"Comparative Consumer Insolvency" 13; Ziegel "What can the United States learn from the Canadian Means Testing System?" (2007) *University of Illinois LR* 195 (hereafter referred to as Ziegel "What can the United States learn from the Canadian Means Testing System?").

⁴⁰ Martin "Common-Law Bankruptcy Systems" 367.

⁴¹ Skeel *Debt's Dominion: The History of Bankruptcy Law in America* (2001) 43 (hereafter referred to as Skeel *Debt's Dominion*).

⁴² Carruthers "Professionals in Systemic Reform of Bankruptcy Law: The 1978 US Bankruptcy Code and the English Insolvency Act 1986" (2000) *American Bankruptcy LJ* 35 at 53-54 (hereafter referred to as Carruthers). In place of the principle that suppressed lawyer's fees in order to preserve more assets of the estate, a provision was inserted stating that judges "were to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services than in a case under title 11".

⁴³ Carruthers 54.



and the prominent role played by the private bankruptcy lawyer represents another unique feature of the American system.⁴⁴ It is also well known that historically and especially during the reform debate of the 1970s, the US bar and the judiciary vigorously opposed the creation of an executive agency that would exercise control over the bankruptcy process.⁴⁵ The role of the United States Trustee⁴⁶ acting as government agency and insolvency regulator is thus far less significant than that of most other common law regulators.⁴⁷

Another intriguing aspect of the US bankruptcy system is the considerable legislative reform and development that took place during the past century.⁴⁸ The US bankruptcy law has been described as a dynamic field of law, ever-changing to meet the needs of the society it serves.⁴⁹ This is reflected not only in the early divergence from conservative English law in the mid-nineteenth century, but also in the recent controversial amendments to the 1978 Code⁵⁰ in 2005. The following chapter contains a brief outline of the historical development of the US bankruptcy law and in particular the regulatory aspects thereof, including the recent law reform initiatives within the legal system of the US. The remaining part of the discussion will revolve around the US Trustee, the bankruptcy court system and the Bankruptcy Administrator as part of the regulatory and institutional framework.

⁴⁴ Martin “The Role of History and Culture” 3.

⁴⁵ Ramsay “Comparative Consumer Bankruptcy” 271.

⁴⁶ Hereafter referred to as the US Trustee.

⁴⁷ Ramsay “Comparative Consumer Bankruptcy” 271.

⁴⁸ Evans 13.

⁴⁹ Burdette 124.

⁵⁰ See (n 35). See Evans 135.



2.2 HISTORICAL OVERVIEW OF THE AMERICAN BANKRUPTCY LAW

Early independent America had no bankruptcy laws.⁵¹ Although the US Constitution gave Congress the power to establish uniform bankruptcy laws⁵² neither the Articles of Confederation nor the Constitution itself contained specific provisions to deal with insolvent debtors.⁵³ Prior to 1800, English law had a huge influence on the US bankruptcy laws and legal culture and early attempts to secure a Federal Bankruptcy Act leant heavily on the experience in the UK.⁵⁴ Certain practical considerations contributed to this imitation, as creditors' commercial interests in the US were unlikely to differ much from their English counterparts, and in addition close connections between merchants in both countries were likely to exist.⁵⁵ When the framers of the US Constitution included the Article I power to enact "uniform laws on the subject of bankruptcies"⁵⁶ as part of the powers of the legislative branch of the Constitution, they did so with the English bankruptcy system in mind.⁵⁷ The

⁵¹ For a discussion of the historical development of the US bankruptcy law see generally: Skeel "The Genius of the 1898 Bankruptcy Act" (1999) *Bankruptcy Developments Journal* 321 (hereafter referred to as Skeel "The Genius of the 1898"); Skeel *Debt's Dominion*; Tabb "A Century of Regress or Progress? A Political History of Bankruptcy" (1999) *Bankruptcy Developments Journal* 343 (hereafter referred to as Tabb "Regress or Progress?"); Evans "Bankruptcy the American Way" (2003) *Juta's Business Law* 173 (hereafter referred to as Evans "Bankruptcy the American Way"); Klee "Legislative History of the New Bankruptcy Code" (1980) *American Bankruptcy LJ* 275-297 (hereafter referred to as Klee); Kennedy "An Historical Analysis of Insolvency Laws and their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and its Judicial Officers" (2000) *Journal of Bankruptcy Law and Practice* 165 (hereafter referred to as Kennedy); Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* (1986) (hereafter referred to as Dalhuisen) par 3.09 1-94-1-117; Herbert *Understanding Bankruptcy* (1995) ch 3 and ch 4 (hereafter referred to as Herbert); Jackson *The Logic and Limits of Bankruptcy* (1986) 1-19 (hereafter referred to as Jackson); Albergotti *Understanding Bankruptcy in the US: A Handbook of Law and Practice* (1992) 1-3 (hereafter referred to as Albergotti). For a detailed exposition of the history of US bankruptcy laws, see Coleman *Debtors and Creditors in America* (1974); Warren *Bankruptcy in United States History* (1935); White *Cases and Materials on Bankruptcy* (1996) 53 (hereafter referred to as White).

⁵² US Const art 1 par 8, cl 4 US Constitution.

⁵³ *Hood v Tennessee Student Assistance Corp (In re Hood)* 319 F 3d 755 (6th Cir 2003).

⁵⁴ In the Federal Bankruptcy Act of 1800 the English legislation was followed. See Rajak "The Culture of Bankruptcy" 18 (hereafter referred to as Rajak "The Culture of Bankruptcy") in Omar *International Insolvency Law: Themes and Perspectives* (2008); See also Tabb "The History of Bankruptcy Laws" 7; Martin "Common-Law Bankruptcy Systems" 1.

⁵⁵ Rajak "The Culture of Bankruptcy" 19.

⁵⁶ According to Olmstead the Bankruptcy Clause was added late in the proceedings of the Constitutional Convention of 1787 and could be generally credited to Charles Pinckney of South Carolina. See Olmstead "Bankruptcy a Commercial Regulation" (1902) *Harvard LR* 829 at 831 (hereafter referred to as Olmstead).

⁵⁷ See Tabb "The History of Bankruptcy Laws" 6; Dalhuisen par 3.09[1] 1-94.



“Bankruptcy Clause” or the “Uniformity Clause”, as it is often referred to by the bankruptcy community, bestows on Congress the power to enact uniform bankruptcy laws.⁵⁸

US laws thus had their conceptual origins in English bankruptcy laws and as a result the earliest American bankruptcy procedures were mere extensions of the older English practices, which in turn had evolved from the earlier Roman law procedures.⁵⁹ The 1542 Act of Henry VIII⁶⁰ is generally regarded as the first bankruptcy statute in England and its procedures also took root across the Atlantic. Despite the fact that for a number of years the bankruptcy laws in the US had a distinctly pro-creditor orientation, a more liberal approach to bankruptcy had established itself by the middle of the eighteenth century. This was largely due to the changing attitudes to credit and commerce that were brought about by the industrial revolution.⁶¹ In 1800, by one vote, the US Congress passed the first federal American bankruptcy statute, the Bankruptcy Act of 1800.⁶²

The 1800 Act closely followed the model of the 1732 Statute of George II,⁶³ which represented the English bankruptcy law at the time – most notably, in allowing for complete creditor control of the bankrupt’s estate.⁶⁴ The Act provided for the appointment of up to three commissioners who were good citizens and who were resident of the district in which the debtor resided.⁶⁵ These commissioners had similar powers and duties to that of English commissioners at the time and were required to assess the evidence against the debtor and if insolvency was proven to their satisfaction, they could declare him bankrupt. Upon declaration of bankruptcy the commissioners were required to take possession of the debtor’s property and call a meeting of creditors, at which the creditors would choose an assignee of the debtor’s estate and effects. The commissioners would assign the debtor’s

⁵⁸ Alexander “Non-Uniform Bankruptcy Laws after BAPCPA” (2007) *Southern Illinois University LJ* 549 at 550 (hereafter Alexander “Non-Uniform Bankruptcy Laws”).

⁵⁹ White 53.

⁶⁰ (34 and 35 Hen VIII, c 4).

⁶¹ See Burdette 173; Tabb “The History of Bankruptcy Laws” 11.

⁶² Chapter 19, 2 Stat 19.

⁶³ (5 Geo II, c 30). See Tabb 14; Kennedy 171.

⁶⁴ Honsberger “Bankruptcy Administration in the United States and Canada” (1975) *California LR* 1516 (hereafter referred to as Honsberger “Bankruptcy Administration in the United States and Canada”).

⁶⁵ Honsberger “Bankruptcy Administration in the United States and Canada” 1516.



assets to the assignee, who also had the responsibility of administering and effecting the liquidation and distribution of the estate.⁶⁶

The Act of 1800 lasted only three years and in the absence of permanent federal bankruptcy legislation the states individually took over responsibility for the regulation of relations between debtors and creditors.⁶⁷ The abolishment of debtors' prisons⁶⁸ in the US and the depression of 1837 led to the passing of the US Bankruptcy Act of 1841.⁶⁹ Because of its establishment of a voluntary bankruptcy proceeding, the Bankruptcy Act of 1841 was perceived to be a watershed event in US and international bankruptcy history.⁷⁰ For the first time the law made provision for a voluntary entrance into the system of bankruptcy, as the debtor could file for bankruptcy and receive a discharge.⁷¹ The new Act was also not restricted to granting debt relief to merchant debtors only, but to "all persons whatsoever ... owing debt ..."⁷²

Significantly, the Bankruptcy Act of 1841 did not adopt a system of official administrative control over bankruptcy proceedings as had been introduced by England during the same period,⁷³ and instead preferred a system of court control.⁷⁴ The Act also made provision to replace the commissioners appointed under the previous Acts with

⁶⁶ The Act was the first actual federal legislation in American bankruptcy. See ch 19 par 7, 2 Stat at 23; ch 19 par 6, 2 Stat at 23. See also Tabb "The History of Bankruptcy Laws" 14; Tabb "The Historical Evolution of the Bankruptcy Discharge" (1991) *American Bankruptcy LJ* 325 at 345 (hereafter referred to as Tabb "The Historical Evolution of the Bankruptcy Discharge"); Honsberger "Bankruptcy Administration in the United States and Canada" 1516; Evans 139.

⁶⁷ State relief was limited and in two decisions of the US Supreme Court complicated matters for debtors. The first case, namely *Sturges v Crowninshield*, 17 US (4 Wheat) 122 (1819) held that states could not constitutionally discharge pre-existing debts. In the second case, namely *Ogden v Saunders*, 25 US (12 Wheat) 213 (1827) the court held that states could discharge future debts against citizens of the same state, but not against citizens of another state. See Burdette 174; Tabb "The History of Bankruptcy Laws" 17.

⁶⁸ The practice of imprisonment for debt came to an end with the general abolishment on federal level in 1833.

⁶⁹ Chapter 9, 5 Stat 440, repealed by Act of Mar 3, 1843, ch 82, 5 Stat 614. Hereafter referred to as Bankruptcy Act of 1841. See Dalhuisen par 3.09[1] 1-94.

⁷⁰ See Kilborn "Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy" (2003) *Ohio State LJ* 858 (hereafter referred to as Kilborn "Mercy, Rehabilitation, and Quid Pro Quo"); Tabb "The History of Bankruptcy Laws" 17.

⁷¹ Tabb "The History of Bankruptcy Laws" 16-17.

⁷² Chapter 9 par 1, 5 Stat at 441. See Tabb 17.

⁷³ The English Act of 1831.

⁷⁴ Honsberger "Bankruptcy Administration in the United States and Canada" 1517.



court-appointed assignees.⁷⁵ The 1841 Act made no provision for creditors' meetings or committees, and creditors had very little control or influence over the bankruptcy matters.⁷⁶ Moreover, all conveyances of the debtor's property held by the assignee had to be approved by the court, and the court was also responsible for collecting the assets of the bankrupt and distributing them to creditors.⁷⁷

The 1841 Bankruptcy Act's main contribution to present US bankruptcy law was the introduction of a system of court administration, which was, ironically, the source of much of its unpopularity during its period of influence.⁷⁸ Similar to the 1800 Act, the Act of 1841 was again short-lived and was repealed in 1843.⁷⁹ The end of the Civil War and the subsequent economic crisis resulted in the demand for the development of another federal bankruptcy law and led to the enactment of the Bankruptcy Act of 1867.⁸⁰ The 1800, 1841 and 1867 Acts were all administered by the federal district courts. These courts were located in urban areas only, making it especially inconvenient for potential debtors, and, together with costliness of the administration process itself, this contributed to these three Acts being hugely unpopular not only with debtors but with lawmakers themselves.⁸¹

A key feature of the 1867 Act was to allow both merchant and non-merchant debtors to enter into voluntary and involuntary proceedings, and subsequently its powers were not limited to traders.⁸² Another contribution was that in anticipating the English Bankruptcy Act of 1869⁸³ the Act returned the right to nominate assignees of their own choice to the

⁷⁵ Chapter 9 par 1, 5 Stat at 447. See Honsberger "Bankruptcy Administration in the United States and Canada" 1517.

⁷⁶ Tabb "The History of Bankruptcy Laws" 18.

⁷⁷ Honsberger "Bankruptcy Administration in the United States and Canada" 1517.

⁷⁸ Honsberger "Bankruptcy Administration in the United States and Canada" 1517.

⁷⁹ Honsberger "Bankruptcy Administration in the United States and Canada" 1517.

⁸⁰ Chapter 176 par 11, 14 Stat at 521-522. See Dalhuisen par 3.09[1] 1-94; Tabb "The History of Bankruptcy Laws" 19.

⁸¹ Skeel *Debt's Dominion* 27.

⁸² White 55.

⁸³ (32 and 33 Vict, c 71).

creditors. This provision, however, did not translate into a system of direct creditor control, as the choice of the creditors remained subject to the approval of a judge.⁸⁴

Under the 1867 Act the judicial machinery for dealing with bankruptcy cases began to reveal a system much closer to the present US judicial system.⁸⁵ District courts were granted jurisdiction as “courts of bankruptcy”, and had the power to appoint one or more “registers in bankruptcy, to assist the judge in the district court with his duties”.⁸⁶ Of relevance is that the registers appointed under the 1867 Act were the predecessors of the twentieth-century referee and bankruptcy judge.⁸⁷ From the outset the 1867 Act met with general dissatisfaction. The disapproval was directed at the system’s ineffective supervisory procedures, which failed to protect creditors and to secure the honesty of the persons responsible for administration of the estate.⁸⁸ As a result of abuse by debtors, which in turn resulted in little benefit for creditors, the Act was repealed after only 11 years.⁸⁹

The next important phase in American bankruptcy history was the enactment of the Bankruptcy Act of 1898⁹⁰ and its subsequent amendments.⁹¹ With the Bankruptcy Act of 1898 the previous era marked by episodic lawmaking and a long period of instability came to an end and was replaced by a permanent law.⁹² In England the bankruptcy law pendulum had just swung back to a system of official control with the enactment of the Act of 1883.⁹³ Shortly after England adopted a strong administrative approach to bankruptcy, the US moved in precisely the opposite direction to a system of judicial oversight, and subsequently the framework adopted by US Congress in 1898 bore little

⁸⁴ Honsberger “Bankruptcy Administration in the United States and Canada” 1517.

⁸⁵ Tabb “The History of Bankruptcy Laws” 19.

⁸⁶ Chapter 176 par 1, 14 Stat at 517. See Tabb “The History of Bankruptcy Laws” 19.

⁸⁷ Tabb “The History of Bankruptcy Laws” 19.

⁸⁸ Honsberger “Bankruptcy Administration in the United States and Canada” 1517.

⁸⁹ White 55.

⁹⁰ Chapter 541, 30 Stat 544 (repealed 1978).

⁹¹ Tabb “The History of Bankruptcy Laws” 23 to 32; Kennedy 174-178. For a detailed discussion of the 1898 Bankruptcy Act, see Skeel “The Genius of the 1898” 321-341; Tabb “Regress or Progress?”; Evans 141.

⁹² See Skeel *Debt’s Dominion* 23; Evans 141.

⁹³ (46 and 47 Vict, c 71).



resemblance to that of the English system.⁹⁴ The 1898 Act also signalled the advent of the modern era of liberal pro-debtor treatment in the US.⁹⁵

In an important regulatory development, the 1898 Act allowed for the Supreme Court to become vested with the powers to prescribe rules, forms and orders for procedures.⁹⁶ According to the Act the federal district courts remained the “courts of bankruptcy” and a particular innovation was the creation of “referees in bankruptcy” to replace the commissioners and registrars of earlier Acts.⁹⁷ The referees were responsible for both judicial and administrative functions⁹⁸ and in years to come these referees would become known as bankruptcy judges.⁹⁹

The underlying theme of the 1898 Act was that of increased creditor control over the bankruptcy process.¹⁰⁰ Initially the creditors were given an unrestricted right to appoint their own trustee¹⁰¹ (no longer called an assignee) and the court had no right to interfere with this appointment.¹⁰² This provision was afterwards amended by a General Order¹⁰³ issued by the Supreme Court in 1933 which provided that the appointment of trustees should be subject to the approval of the court.¹⁰⁴ By rationalising the administrative machinery, the 1898 Act

⁹⁴ The 1898 Act also allowed for the voluntary and involuntary filing of bankruptcy and also removed most barriers for a full discharge of the debtor’s debts. See Skeel “The Genius of the 1898” 328; Dalhuisen par 3.09[2] 1-97-1-98.

⁹⁵ For a discussion of the most important aspects of this Act, see Kennedy 175. See also Skeel “The Genius of the 1898” 322; Dalhuisen par 3.09[2] 1-95-1-98; Jackson 1.

⁹⁶ See Dalhuisen par 3.09[2] 1-97-1-98; Tabb “The History of Bankruptcy Laws” 25.

⁹⁷ Chapter 541 par 34, 30 Stat at 555.

⁹⁸ See White 55; Olmstead at 843 cites Addison Brown J in a decision under the 1898 Act as follows:

The object of the bankruptcy act is declared to be ‘to establish uniform system of bankruptcy throughout the United States.’ The most fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt’s property among his creditors, and to do this by means of the agencies created by the act.

⁹⁹ In 1973. See Tabb “The History of Bankruptcy Laws” 25.

¹⁰⁰ Rather than a creditor collection device, as most previous laws had been, the first permanent US law would be as sympathetic to debtors’ interests as it was to those of creditors. See Honsberger “Bankruptcy Administration in the United States and Canada” 1520.

¹⁰¹ Chapter 541 par 44, 30 Stat at 557. See Tabb “The History of Bankruptcy Laws” 25.

¹⁰² Tabb “The History of Bankruptcy Laws” 25. See Honsberger “Bankruptcy Administration in the United States and Canada” 1520.

¹⁰³ Amendments and Additions to the General Orders in Bankruptcy and Additions to the Official Forms, 288 US 621, 624 (1933).

¹⁰⁴ Amended in 1933. See Tabb “The History of Bankruptcy Laws” 25.

introduced the adversarial judicial process into the US bankruptcy system.¹⁰⁵ Under the 1898 Act the referees had little incentive to get actively involved in the administration process, and the parties themselves were left mainly in charge of the process. This state of affairs led to an enormous demand for a bankruptcy bar, which lawyers subsequently responded to, signalling the beginning of the era of the bankruptcy lawyer.¹⁰⁶

The 1898 Act thus represents a turning point in the history of regulation in the American bankruptcy law. The most important distinction between the 1898 Act and the English system of the time was the lack of official supervision and administration of bankrupt estates as well as the absence of an equivalent to the English “Official Receiver”.¹⁰⁷ With the enactment of the 1898 Act, Congress accepted as a foregone conclusion that the recently adopted English system of “officialism”¹⁰⁸ was not agreeable to the US’s socio-economic conditions and the alternative route taken by the legislature established the foundation for the present judicially oriented regulatory system.¹⁰⁹

This 1898 Act was amended a number of times and as a result of the Great Depression was extensively revised by the Chandlers Act of 1938.¹¹⁰ In a significant shift the 1938 Act *inter alia* gave the Supreme Court, and not the creditors, the right to appoint a trustee in cases where the trustee appointed by the creditors failed to qualify according to the specified standards in the Act.¹¹¹ This development illustrated a general trend. Ever since the enactment of the 1898 Act, there had been a progressive deterioration of the authority of the creditors and trustees, and this has been accompanied by an increase in the

¹⁰⁵ Skeel *Debt’s Dominion* 43.

¹⁰⁶ Skeel *Debt’s Dominion* 43.

¹⁰⁷ Lester *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and the Company Winding-Up in the Nineteenth Century England* (2003) 298 (hereafter referred to as Lester).

¹⁰⁸ For a detailed discussion of the system of “officialism” refer to Lester chapter 2.

¹⁰⁹ Lester 298. According to Congressman Doliver:

It is not necessary to critically examine the operation of the present English bankruptcy law, since whatever success it enjoys more than was secured by former enactments comes from the employment of such machinery of the government as is wholly impractical in the United States.

See US Congress, *Congressional Record* 55th Cong 31 Pt 2 (17 Feb 1898), 1856.

¹¹⁰ Chapter 575 par 2a (17), 52 Stat 843. See Honsberger “Bankruptcy Administration in the United States and Canada” 1520; Tabb “The History of Bankruptcy Laws” 29; Kennedy 176; Evans 141.

¹¹¹ Honsberger “Bankruptcy Administration in the United States and Canada” 1520.



administrative functions and responsibilities of the court as well as the influence and authority of lawyers.¹¹²

In the early 1970s Congress appointed a “Federal Commission on Bankruptcy Laws of the United States”¹¹³ charged with recommending a comprehensive overhaul of the bankruptcy laws which existed under the former Bankruptcy Act of 1898.¹¹⁴ As the 1970 Commission explained in its report, issued in 1973:

The Commission was charged with considering the basic philosophy of bankruptcy, its causes, possible alternatives to the present system of bankruptcy administration, the applicability of advanced management techniques to administration of the Act, and such other matters as the Commission should deem relevant to its assigned mission.¹¹⁵

The Commission filed its report in 1973¹¹⁶ and after extensive hearings in both chambers Congress approved the Bankruptcy Reform Act of 1978.¹¹⁷ The 1978 Act represented the first major overhaul of the federal bankruptcy laws in forty years, and repealed the law that had been in operation for almost eighty years. The Bankruptcy Code remains the most important source of present US bankruptcy law.¹¹⁸ Of relevance to this study is the

¹¹² Honsberger “Bankruptcy Administration in the United States and Canada” 1520.

¹¹³ Hereafter referred to as the Commission.

¹¹⁴ Act of July 24, 1970, Pub L no 91-354, 84 Stat 468. Tabb “The History of Bankruptcy Laws” 31-33.

¹¹⁵ *Report of the Commission on the Bankruptcy Laws of the United States* HR DOC NO 93-137 (1973) at 1 (hereafter 1973 *Commission Report*). See also the *Report of the National Bankruptcy Review Commission, Bankruptcy: the Next Twenty Years* Final Report (1997-10-20) 50-51 (hereafter referred to as the *NBRC Report*) available at <http://govinfo.library.unt.edu/nbrc/report/01title.pdf> (last visited at 09-11-30).

¹¹⁶ See (n 115). See also the *NBRC Report* 50.

¹¹⁷ See (n 35). See Ziegel “Comparative Consumer Insolvency” 57; Tabb “The History of Bankruptcy Laws” 34.

¹¹⁸ The Bankruptcy Code provides for six basic types of bankruptcy cases each traditionally given the names of the chapters that describe them. The Code provides the consumer debtor with a dual portal system consisting of mainly two bankruptcy procedures available to debtors and each of these options follows a different procedure and is designed to suit a different kind of debtor. The main issues that were addressed by reforms brought about by the Bankruptcy Code were the status of bankruptcy judges; improvement of the administration process; merging of all the provisions relating to reorganisation into one chapter of the Bankruptcy Code (ch 11); the encouraging of greater use of the ch 13 procedure relating to the adjustment of debts of individuals; and a better balance being achieved between the rights of debtors and creditors in bankruptcy proceedings. See also 1973 *Commission Report* ch 4-9; Evans “Bankruptcy the American Way” 173; Burdette 187; Tabb “The History of Bankruptcy Laws” 34; Klee 280; Kennedy 178-179; See Landry “Consumer Bankruptcy Reform: Debtor’s Prison without Bars or ‘Just Deserts’ for Deadbeats?” (2006) *Golden Gate University LR* 95 at 96 (hereafter referred to as Landry). For a discussion of the main features of the 1978 Act, see Kennedy 178-180.

fact that the Code was a clear attempt to improve and streamline the process of administering bankruptcy cases.¹¹⁹ Bankruptcy courts once more regained exclusive jurisdiction over bankruptcy proceedings, the debtor's property and other related litigation,¹²⁰ and special judges, whose status would subsequently become problematic, were appointed for these courts.¹²¹ One of the weaknesses of the previous 1898 Act was the splintered jurisdictional scheme in which bankruptcy referees (renamed judges in 1973) could hear only certain core matters.¹²² Subsequently, a key aspect of the 1978 Code was the substantial extension of bankruptcy court jurisdiction, which resulted in bankruptcy judges being able to hear virtually any matter arising in or related to the bankruptcy case.¹²³

Another important innovation introduced by the Bankruptcy Code was the establishment of the US Trustee Program.¹²⁴ Until the enactment of the 1978 Bankruptcy Code a distinctive feature of the US system was the absence of a government official with powers akin to that of the UK's official receiver. During the 1930s the Donovan and Thatcher reports, which summarised the findings of an extensive investigation into bankruptcy practice, both strongly recommended the creation of a bankruptcy administrator based on the English model.¹²⁵ During the subsequent hearings some support from a small group of creditors was noted, yet the bankruptcy bar was strongly opposed to the suggestion of an administrative government official and managed to derail the process.¹²⁶ It was not until the National Bankruptcy Commission's report in 1973 once again recommended that

¹¹⁹ Tabb "The History of Bankruptcy Laws" 35.

¹²⁰ Aminoff 127.

¹²¹ Aminoff 127. See *Northern Pipeline Constr Co v Marathon Pipeline Co* 102 S Ct 2585, 458 US 50 (1982).

¹²² Tabb "The History of Bankruptcy Laws" 34-36.

¹²³ Tabb "The History of Bankruptcy Laws" 34.

¹²⁴ Hereafter referred to as US Trustee Program. See Calitz "The Role of the Master of the High Court as Regulator in a Changing Liquidation Environment: A South African Perspective" (2005) *TSAR* 728 at 734 (hereafter referred to as Calitz "The Role of the Master of the High Court").

¹²⁵ See *Strengthening of Procedure in the Judicial System: The Report of the Attorney-General on Bankruptcy Law and Practice* S Doc no 72-65 (1932) 104-107 (*Thatcher Report*); *Staff of House Comm on the Judiciary 71st Cong Report on Administration of Bankrupt Estates* (Comm Print 1931) (*Donovan Report*). Skeel *Debt's Dominion* 54.

¹²⁶ Skeel "Bankruptcy Lawyers and the Shape of American Bankruptcy Law" (1998) *Fordham LR* 497 at 514 (hereafter referred to as Skeel "Bankruptcy Lawyers").



lawmakers consider the creation of an independent administrator that the US Trustee was incorporated into the Code of 1978.¹²⁷

In 1994, as a result of developing pressure by the US credit industry, Congress sanctioned the creation of the National Bankruptcy Review Commission, as part of the Bankruptcy Reform Act of 1994.¹²⁸ The Commission received a considerably narrower mandate than that of its predecessor in 1973.¹²⁹ The Commission was created as an independent commission to investigate and study issues relating to the Bankruptcy Code, to solicit conflicting views on the operation of the bankruptcy system, to evaluate the advisability of proposals, and to prepare a report to be submitted to Congress.¹³⁰ Congress therefore made it clear that it was generally satisfied with the basic framework of the current law and that the Commission should be focusing on “reviewing, improving and updating the Code in ways which did not disturb the fundamental tenets of current law”.¹³¹

The signing into law of the Bankruptcy Reform Act in 2005 signalled a new era in the history of bankruptcy law and practice in the US and represented the most significant overhaul of the Bankruptcy Code since the major amendments introduced in 1978.¹³² The new law has fundamentally changed the character of the US consumer bankruptcy law and the sweeping and controversial changes to the Bankruptcy Code have become a prominent topic of bankruptcy conversation.¹³³ At the heart of the new law lies a range of provisions aimed at

¹²⁷ Skeel “Bankruptcy Lawyers” 514.

¹²⁸ Bankruptcy Reform Act of 1994 Pub L no 103-394 pars 601-610, 108 Stat 4106, 4147-50 (1994) (hereafter National Bankruptcy Review Commission Act). See NBRC *Report 47*.

¹²⁹ Ziegel *Comparative Consumer Insolvency* 57.

¹³⁰ NBRC *Report 47*. See National Bankruptcy Review Commission Act par 603, 108 Stat 4107, 4147 (1994).

¹³¹ NBRC *Report 47-49*. See Ziegel *Comparative Consumer Insolvency* 57.

¹³² Tabb “Top Twenty Consumer Bankruptcy Issues” (2007) *University of Illinois LR* 12 (hereafter referred to as Tabb “Top Twenty Issues”). The great majority of provisions became effective on 2005-10-17. For a detailed discussion of the legislative path and history of BAPCPA see Neustadter 225-226. See also Schlecter “Before and after the Bankruptcy Abuse Preventions and Consumer Protection Act of 2005” 787.

¹³³ Adler *Foundations of Bankruptcy Law* (2005) iii (hereafter referred to as Adler); Schlecter “Before and after the Bankruptcy Abuse Preventions and Consumer Protection Act of 2005” 788. For a summary of presentations presented at a recent symposium at the University of Illinois where leading scholars were brought together to assess the new US legislation refer to Brubaker “Consumer Credit and Bankruptcy: Assessing a New Paradigm” (2007) *University of Illinois LR* 1 (hereafter referred to as Brubaker).

reaching the Act's public policy goal of preventing abuse, disallowing debts obtained through fraud or crime and disallowing loopholes that previously existed.¹³⁴

The extensive amendments introduced to the Bankruptcy Code cover both consumer and corporate bankruptcies.¹³⁵ From a consumer bankruptcy perspective the most significant amendment introduced by the new legislation is the so-called "means-testing"¹³⁶ provision and the introduction of a mandatory financial education programme.¹³⁷ BAPCPA retained both chapter 7¹³⁸ and chapter 13¹³⁹ personal bankruptcy procedures, but the most important conceptual change wrought by BAPCPA is the introduction of a mandatory means test for all new bankruptcy filers.¹⁴⁰ In turn, this test will trigger denial

¹³⁴ Schlecter "Before and after the Bankruptcy Abuse Preventions and Consumer Protection Act of 2005" 787.

¹³⁵ BAPCPA introduces a new ch 15 into the Bankruptcy Code that incorporates the UNCITRAL Model Law. Ch 15 now governs US law and procedure in multinational cases and par 304 has been repealed. Ch 15 is designed to encourage cooperation between the US and other countries in cross-border bankruptcy cases. See in general Westbrook "Chapter 15 at Last" (2005) *American Bankruptcy LJ* 713 (hereafter referred to as Westbrook).

¹³⁶ 11 USC par 704(b)(1).

¹³⁷ 11 USC pars 727(a)(11) and 1328(g).

¹³⁸ Chapter 7 entitled "Liquidations", governs what used to be known as "straight bankruptcy", and contemplates an orderly, court-supervised procedure.

¹³⁹ 11 USC pars 307; 308; 322. A typical arrangement under ch 13 is designed for an "individual with a regular income" to enter into a plan of mostly partial repayment to creditors by using disposable income to fund the plan. For this reason the ch 13 procedure is often referred to as the "wage-earner's plan". At a confirmation hearing, the court either approves or disapproves the debtor's repayment plan, depending on whether it meets the Bankruptcy Code's requirements for confirmation. Unlike ch 7, the ch 13 debtor does not receive an immediate discharge of debts and is forced to complete the payments required under the plan before a discharge is received. Chapter 13 is often preferable to a ch 7 application, as it enables the debtor to retain valuable assets such as the family dwelling and pay creditors out of post-petition income, as opposed to the ch 7 procedure which entails liquidation of the debtor's assets. See White 61; Tabb "The History of Bankruptcy Laws" 5.

¹⁴⁰ Instead of proposing their own repayment plans, debtors undergo the new "means test" to determine their "disposable income". They are then required to utilise all of it over five years to repay the creditor. The means test is primarily a tool to determine if a debtor has sufficient disposable income to preclude a ch 7 proceeding and entails that the trustee is compelled to review every ch 7 application and file a statement confirming whether the debtor "passes" the means test. A presumption of abuse arises if the review is negative. If the debtor's "current monthly income" is more than the state median, the Bankruptcy Code requires application of a "means test" to determine whether the ch 7 filing is presumptively abusive. Abuse is presumed if the debtor's aggregate current monthly income over five years, net of certain statutorily allowed expenses, is more than (i) \$10,000, or (ii) 25% of the debtor's non-priority unsecured debt, as long as that amount is at least \$6,000. The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income. Unless the debtor overcomes the presumption of abuse, the case will generally be converted to ch 13 (with the debtor's consent) or will be dismissed. See 11 USC pars 101(41), 109(b) and 11 USC pars 701, 704. For a detailed discussion of the US bankruptcy process see also <http://www.uscourts.gov/bankruptcycourt/bankruptcybasic/process.html> (last visited at 09-11-30).



to chapter 7 of the Code to those filers with median state incomes or better, whose net disposable income after deduction of recognised expenses is deemed sufficient to enable them to enter into a chapter 13 debt adjustment plan with creditors.¹⁴¹ Another significant amendment to the bankruptcy process is the introduction of mandatory credit counselling¹⁴² as prerequisite for entering the bankruptcy process and the post-petition financial management education¹⁴³ as a condition to subsequently file for relief.¹⁴⁴

Apart from the introduction of a significant number of new responsibilities, the Bankruptcy Reform Act of 2005 has not significantly affected the general substance and prominent features of the regulatory and institutional framework of the US bankruptcy system, and a detailed discussion of the amendments brought about by the Act is not necessary here.

Another unique feature of the US bankruptcy system is the political atmosphere in which changes to bankruptcy laws have occurred and the pivotal role played by certain role-players such as the bankruptcy bar.¹⁴⁵ Historically, bankruptcy professionals have effectively controlled the legislative debate, and since 1898 have been the single most important influence on the development of US bankruptcy law.¹⁴⁶ The same forces that melded together

¹⁴¹ See Hynes “Why (Consumer) Bankruptcy?” (2004-2005) *Alabama LR* 128 (hereafter referred to as Hynes); Calitz “Developments in the United States’ Consumer Bankruptcy Law” 397; White “Abuse or Protection? Consumer Bankruptcy Reform under BAPCPA” (2006) 8 unpublished paper presented at the Forum for Economic Policy, Marseille, (hereafter referred to as White “Abuse or Protection?”) on file with the author. See also Landry 95.

¹⁴² 11 USC par 727(a)(11). As a matter of legislative intent the new required “credit counselling” may represent a *sub silentio* alternative to formal bankruptcy proceedings in the form of out-of-court repayment plan negotiations. See Kilborn “The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the US Law from Unexpected Parallels in the Netherlands” (2006) *Vanderbilt Journal of Transnational Law* 114 at 115 (hereafter referred to as Kilborn “The Hidden Life of Consumer Bankruptcy Reform”).

¹⁴³ 11 USC par 1328(g). The Government Accountability Office (GAO) issued a report on its study of the implementation of the credit counselling and debtor education requirements under BAPCPA, including the approval process for providers. Report available at <http://www.gao.gov/new.items/d07203.pdf> (last visited at 09-11-30).

¹⁴⁴ 11 USC par 727(a)(11) (2005). Kilborn “The Hidden Life of Consumer Bankruptcy Reform” 114.

¹⁴⁵ The backdrop of the 1898 Act was Republican lawmakers favouring bankruptcy, with Democrats being more hostile. Republican control assured the enactment of the 1898 Act. The formation of local chambers of commerce, boards of trade, and other merchant organisations provided a nationwide base of support for bankruptcy law and eventually persuaded Congress to enact the 1898 Act. See Skeel *Debt’s Dominion* 46.

¹⁴⁶ For a detailed discussion of the influence of the bankruptcy bar refer to Skeel ch 5-6; Skeel “Bankruptcy Lawyers”; see also Warren “The Changing Politics of American Bankruptcy Reform”

to create the significant 1898 Act – organised creditors, and the pro-debtor ideologies strengthened by American federalism – have continued to set the basic parameters for US bankruptcy laws.¹⁴⁷

2.3 REGULATORY FRAMEWORK: THE UNITED STATES TRUSTEE

2.3.1 Introduction

In 1970 the National Bankruptcy Conference went on record as approving the establishment of a special court of bankruptcy whose jurisdiction would be limited to juridical business. A report¹⁴⁸ of the Brookings Institute in 1971 found that in most cases the bankruptcy system is not an actual judicial enterprise but rather a large-scale example of routine administrative machinery. The report further argued that the system's shortcomings – such as outdated procedures, high costs and unwarranted delays – were the natural result of using a judicial system to try to solve problems that have little or no adversary interest and are by nature purely administrative. The report suggested that there was a major need for a bankruptcy agency within the executive branch of government which would be entrusted with the work done by the courts at the time.¹⁴⁹

The Bankruptcy Reform Act of 1978 established the US Trustee Program on a pilot basis in order to field-test an entirely new concept of administration.¹⁵⁰ As previously mentioned, the main intention was the demarcation of the bankruptcy court's judicial and administrative functions in order to relieve the bankruptcy judges of their administrative

(1999) 189 *Osgoode Hall LJ* (hereafter referred to as Warren “The Changing Politics of American Bankruptcy Reform”).

¹⁴⁷ Skeel *Debt's Dominion* 47; Warren “The Changing Politics of American Bankruptcy Reform” 189.

¹⁴⁸ D Stanley and M Girth, *Bankruptcy: Problem, Process, Reform* (1971) (hereafter referred to as *Brookings Report*) as cited by Honsberger “Bankruptcy Administration in the United States and Canada” 1523.

¹⁴⁹ Honsberger “Bankruptcy Administration in the United States and Canada” 1523.

¹⁵⁰ Tabb “The History of Bankruptcy Laws” 35. See generally Alexander “A Proposal to Abolish the Office of the United States Trustee” (1996) *University of Michigan Journal of Law Reform* 1 (hereafter referred to as Alexander “A Proposal to Abolish the Office of the United States Trustee”); Stanton “The United States Trustee System: A Time for Assessment” (1985) *Commercial LJ* 90 (hereafter referred to as Stanton).



duties, thus enabling them to serve more exclusively in a judicial role.¹⁵¹ During the parliamentary debates preceding the 1978 Code, Congress expressed considerable concern over the involvement of bankruptcy judges in the administrative proceedings of bankruptcy estates. The general belief was that this state of affairs led to a conflict of interest, which in turn had an affect on their judicial decision-making.¹⁵²

In the 1973 Reform *Report* the Commission recommended that the administration of the US bankruptcy system be turned over to a new government agency, namely the “United States Bankruptcy Administration”, which in turn had to be an independent establishment forming part of the executive branch of government.¹⁵³ The effect of this recommendation, if implemented, would be to provide a system of official administration that would in part parallel and in part replace the system of private administration in place at the time.¹⁵⁴ The report reads as follows:

These considerations have led the Commission to recommend the severance of administrative from judicial functions within the bankruptcy system. Under the proposed Act, administrative responsibilities would be carried out by an agency established by Congress for the purpose. Judicial functions would be performed by bankruptcy judges appointed to bankruptcy courts also established by the Act.¹⁵⁵

The report then went on to make the following recommendation:

The counterpart of the courts described above would be a Bankruptcy Administration empowered to handle almost all matters in proceedings under the Act which do not involve litigation. The Administration’s jurisdiction, then, would encompass the routine cases initiated in its offices which involve no litigation, as well as all administrative matters in cases where litigable issues do arise.¹⁵⁶

Although the 1978 Code did not adopt the 1973 Commission’s original reform recommendations *per se*, it nonetheless established the US Trustee Program within parts

¹⁵¹ See Stanton 90. In the non-pilot areas of the country, responsibility for the supervision of bankruptcy administration remained with the court, although much of the actual administrative work was delegated to and performed by personnel within the clerk’s office rather than the bankruptcy judge himself. See Treister *et al Fundamentals of Bankruptcy Law* (2006) 95 (hereafter referred to as Treister).

¹⁵² 1973 *Commission Report* 18; Stanton 90; Tabb “The History of Bankruptcy Laws” 35.

¹⁵³ 1973 *Commission Report* 18.

¹⁵⁴ Honsberger “Bankruptcy Administration in the United States and Canada” 1526.

¹⁵⁵ 1973 *Commission Report* 18.

¹⁵⁶ 1973 *Commission Report* 18.

of seventeen of the US states.¹⁵⁷ Congress created the US Trustee Program as a pilot programme under the supervision of the Attorney-General to perform the administrative duties which were removed from the judges.¹⁵⁸ The main justification for the project was to alleviate the bankruptcy judges of the administrative burden concerning the administration of the bankruptcy estates in order for them to focus on their judicial role.¹⁵⁹ The legislative history indicated that achieving this separation of powers represented a principal goal of the 1978 Reform Act and as stated:

Bankruptcy judges administer the present bankruptcy system, and are responsible for the administration of individual bankruptcy cases. Their administrative, supervisory, and clerical functions in these matters are in addition to their judicial duties in bankruptcy cases. . . . [T]he inconsistency between the judicial and administrative roles of the bankruptcy judges . . . places him [sic] in an untenable position of conflict, and seriously compromises his impartiality as an arbiter of bankruptcy disputes.¹⁶⁰

In January 1984, the Attorney-General issued a report which concluded that the pilot programme had been successful,¹⁶¹ and in 1985 an additional study confirmed the earlier findings and recommendations.¹⁶² Finally, with the restructuring of the jurisdiction of the bankruptcy courts completed in the 1984 legislative amendments, the executive branch prepared legislation to establish a national US Trustee system and Congress turned its attention to the US Trustees. In 1986, the Bankruptcy Judges, US Trustees, and Family Farmer Bankruptcy Act of 1986¹⁶³ was signed into law and provided for the national and permanent expansion of the US Trustee system to 48 states, Puerto Rico, the US Virgin

¹⁵⁷ See Document 42 of the 95th 1st session of the Congress, HR, Report No. 95-595.

¹⁵⁸ In 1986 the US Trustee system was established nationwide (except in Alabama and North Carolina). See Tabb “The History of Bankruptcy Laws” 35; Aminoff 127. See also NBRC *Report* 848.

¹⁵⁹ Calitz “The Role of the Master of the High Court” 734.

¹⁶⁰ H.R. REP. NO. 95-595, at 88-89 (1977). See NBRC *Report* 848.

¹⁶¹ *United States Department of Justice, Report of the Attorney General on the United States Trustee System Established in the Reform Act of 1978 for the Period October 1, 1979 to December 31, 1983*, 53-55 (1984). See NBRC *Report* 848.

¹⁶² See the report by Abt Associates, Inc., *An Evaluation of the US Trustee Pilot Program for Bankruptcy Administration: August 1985 Update* (1985). See NBRC *Report* 848.

¹⁶³ Hereafter referred to as Bankruptcy Judges, US Trustee, & Family Farmer Bankruptcy Act of 1986 (pub L 99-554, 100 Stat 3088, reprinted in pt at 28 USC & 581). See Tabb “The History of Bankruptcy Laws” 35; NBRC *Report* 84.



Islands, and Guam.¹⁶⁴ This development signified a distinct demarcation in the judicial and administrative functions in the US bankruptcy system.¹⁶⁵

The US Trustee Program, a component of the US Department of Justice, is responsible for overseeing the administration of bankruptcy cases and private trustees and is the federal official charged with enforcing civil bankruptcy laws in the US.¹⁶⁶ The US Trustee Program consists of three major organisational units: the Executive Office for US Trustees, 21 regional offices each headed by a US Trustee, and 95 field offices headed by an Assistant United States Trustee.¹⁶⁷ The Executive Office provides general policy and legal guidance to the regional and field offices in their implementation of federal bankruptcy laws, and also oversees the US Trustee Program's general operations. The Executive Office is also responsible for providing administrative and management support in regard to *inter alia* the implementation of the federal bankruptcy laws to individual US Trustee Offices throughout the US.¹⁶⁸

The primary role of the US Trustee Program is to serve as the “watchdog over the bankruptcy process”,¹⁶⁹ which includes being responsible for the supervision of bankruptcy cases as well as the panel of standing trustees and professionals retained in bankruptcy cases.¹⁷⁰ In addition to its supervisory function, the US Trustee may “appear and be heard on any issue in any case or proceeding” under the Bankruptcy Code.¹⁷¹ The US Trustee Program's formal mission statement reads as follows:

¹⁶⁴ Paragraph 111; 28 USC par 581. All federal judicial districts were placed under the jurisdiction of the US Trustee system except those in North Carolina and Alabama.

¹⁶⁵ 1973 *Commission Report*, Pt I, ch 5, par 1.

¹⁶⁶ The applicable federal law is found at 28 USC par 586 and 11 USC par 101, *et seq.* See Dalhuisen par 1.03[4] 2-61.

¹⁶⁷ See overview of US Trustee Program available at http://www.justice.gov/ust/eo/public_affairs/factsheet/docs/fs02.htm (last visited at 09-11-30).

¹⁶⁸ 28 USC pars 581-589a.

¹⁶⁹ House Report no 989, 95th Cong 2d Sess at 88 (reprinted in 1978 US Code Congressional & Admin. News at 5787, 5963, 6049).

¹⁷⁰ 28 USC par 586. Section 586 outlines the responsibilities of the US Trustee. See NBRC *Report* 844.

¹⁷¹ 11 USC par 307 (1994). The only restriction on a US Trustee under this section is the inability to file a plan pursuant to section 1121(c). See NBRC *Report* 844.

The US Trustee Program's mission is to promote integrity and efficiency in the nation's bankruptcy system by enforcing bankruptcy laws, providing oversight of private trustees, and maintaining operational excellence.¹⁷²

The US Trustee Program views the uncovering and detecting of bankruptcy fraud and abuse as a fundamental means of achieving this goal. In 2003 the Executive Office established a "Criminal Enforcement Unit"¹⁷³ which aims to identify and refer possible criminal conduct and to assist federal law enforcement agencies with bankruptcy-related investigations and prosecutions.¹⁷⁴ As part of recent law reform initiatives, new provisions enacted require the US Trustee as well as judges and private trustees to refer possible crimes to the US Attorneys' office.¹⁷⁵ It is thus evident that, apart from the role of overseeing the general administration and supervising private trustees, a key policy goal of the US Trustee is the investigation and enforcement efforts relating to bankruptcy in general.

2.3.2 Duties of the US Trustee

Except in cases where the Bankruptcy Code expressly requires a court order, the current legislative arrangement amounts to the US Trustee taking responsibility for all administrative matters relating to the bankruptcy administration. The outcome of this arrangement is that the court's involvement is limited to that of an arbiter of disputes.¹⁷⁶ The duties of the US Trustee include the appointment and supervision of private trustees as well as other administrative relevant functions which previously were the responsibilities of the bankruptcy judges.¹⁷⁷ In this sense the US Trustee acts as a substitute for the bankruptcy judge in supervisory and administrative matters relating to

¹⁷² US Trustee Program Strategic Plan FY 2005-2010 (hereafter referred to as Strategic Plan FY 2005-2010) available at the official website of the US Trustee Program http://www.usdoj.gov/ust/eo/ust_org/about_ustp.htm#FT1 (last visited at 09-11-30).

¹⁷³ See White "Bankruptcy Law Provides New Tools to Combat Fraud and Abuse" (2006) *US Attorney's Bulletin* 1 (hereafter referred to as White "Bankruptcy Law Provides New Tools"); Byrne "Criminal Bankruptcy Fraud and the Role of the US Trustee" (2006) *US Attorney's Bulletin* 1 (hereafter referred to as Byrne "Criminal Bankruptcy Fraud").

¹⁷⁴ White "Bankruptcy Law Provides New Tools" 4.

¹⁷⁵ 28 USC par 586 (2005) and 18 USC par 3057 (2005).

¹⁷⁶ Treister 95.

¹⁷⁷ NBRC Report 844.



the administration of the estate, rather than as a substitute for the trustee, as the case may be in certain of the other common law jurisdictions.¹⁷⁸

The US Trustee responsibilities and duties include, *inter alia*:

- a Taking legal action to enforce the requirements of the Bankruptcy Code and to prevent fraud and abuse;
- b Referring matters for investigation and criminal prosecution when appropriate;¹⁷⁹
- c Ensuring that bankruptcy estates are administered promptly and efficiently, and that professional fees are reasonable;
- d Reviewing disclosure statements and applications for the retention of professionals;
- e Advocating matters relating to the Bankruptcy Code and rules of procedure in court; and
- f Appointment and oversight of private trustees and creditor committees.¹⁸⁰

As a result of the different types of bankruptcies available to a debtor under the US Bankruptcy laws, the duties of the US Trustee may vary depending on the specific chapter in the Code under which the debtor seeks relief.¹⁸¹ In chapter 7 and chapter 13 cases – the most common bankruptcy filings – the US Trustee performs primarily a supervisory function over the officers (known as “panel trustees” in chapter 7 cases and

¹⁷⁸ The US Trustee is also involved in other schemes such as financial education to assist consumers to improve their money management skills and the collection and storage of bankruptcy data.

¹⁷⁹ 18 USC par 3057 (2005). 28 USC par 586 (a)(3)(F) requires each US Trustee to notify the US Attorney of “matters which relate to the occurrence of any action which may constitute a crime” and if requested to assist the US Attorney in “carrying out prosecutions based on such actions”. See Byrne “Criminal Bankruptcy Fraud” 4.

¹⁸⁰ Strategic Plan FY 2005-2010 2.

¹⁸¹ Six basic types of bankruptcy cases are provided for under the Bankruptcy Code, and are traditionally given the names of the chapters that describe them. See Evans 173-177.

“standing trustees” in chapter 13 cases) managing those cases.¹⁸² Chapter 7¹⁸³ of the Bankruptcy Code involves a process where the debtor’s non-exempt assets are collected and realised in order to distribute the proceeds among the creditors.¹⁸⁴ An eligible debtor may receive a “discharge” from his or her debts under chapter 7, except for certain debts that are prohibited from discharge by the Bankruptcy Code.¹⁸⁵ In cases filed under chapter 7, each US Trustee selects, trains, and maintains a panel of private individuals eligible under the Department of Justice regulations¹⁸⁶ to serve as trustees.¹⁸⁷ In cases where a chapter 7 petition is filed, the US Trustee is subsequently responsible for appointing an impartial private trustee to administer the estate and liquidate the debtor’s non-exempt assets.¹⁸⁸ The principal officer in a chapter 7 case is thus the bankruptcy trustee who acts as representative of the bankruptcy estate and is charged with managing the assets of the debtor and protecting the rights of creditors.¹⁸⁹ The liquidation of the assets is conducted according to the Bankruptcy Rules which pertain to the statutory requirements of a chapter 7 case, and the trustee does not have discretion or flexibility with regard to the manner in which the proceeds of the liquidation will be distributed to creditors.¹⁹⁰

Chapter 11 represents the principal chapter of reorganisation in the Bankruptcy Code and is available to most entities, including corporations and individuals.¹⁹¹ In most chapter 11 cases the debtor remains in possession of his or her business or assets while attempting to develop a reorganisation plan acceptable to his or her creditors.¹⁹² Unless according to the Act a trustee has to be appointed, the “debtor in possession” may generally continue his

¹⁸² 28 USC par 586 (a) (1994). See Alexander “A Proposal to Abolish the Office of the United States Trustee” 6.

¹⁸³ 11 USC par 707 (b)(1). See (n 138).

¹⁸⁴ 11 USC pars 701-704. For additional information on the ch 7 procedure, see the official website of the US Trustee Program available at http://www.usdoj.gov/ust/eo/ust_org/about_ustp.htm (last visited at 09-11-30).

¹⁸⁵ 11 USC pars 523 and 727.

¹⁸⁶ 28 USC par 586 (d).

¹⁸⁷ 28 USC par 586 (a)(1); 11 USC par 1302 (a). See Stanton 91.

¹⁸⁸ 11 USC pars 701-704 read with pars 321-331.

¹⁸⁹ Baird *The Elements of Bankruptcy* (2006) 12 (hereafter referred to as Baird).

¹⁹⁰ Albergotti 20.

¹⁹¹ Albergotti 11.

¹⁹² 11 USC par 1107 (1994).



or her business operations pending reorganisation.¹⁹³ Consequently, the US Trustee's role and functions differ substantially from those in other cases and are confined to a supervisory role overseeing all aspects of the administration of the estate from initial review of the petition to a review of the final plan of reorganisation.¹⁹⁴ The debtor in possession must report regularly to the US Trustee, and, in addition, the US Trustee has the power to appoint committees to assist the debtor's reorganisation effort.¹⁹⁵

A petition according to chapter 13 of the Code is also often referred to as a "wage-earner's plan" and deals specifically with the adjustment or reorganisation of debts of an individual with regular income.¹⁹⁶ To be eligible for chapter 13 relief, a consumer must have a regular income and may not have more than a certain amount of debt, as set forth in the Bankruptcy Code. A "standing trustee" appointed by the US Trustee typically serves as the trustee of the debtor's estate pending fulfilment of the debtor's repayment obligations under a plan confirmed by the US Bankruptcy Court where the case was filed.¹⁹⁷ Unlike the immediate discharge of debts afforded to the chapter 7 debtor, the chapter 13 debtors only become eligible for discharge when they have completed the payments as set out in their plans of reorganisation.¹⁹⁸ In chapter 13 cases the US Trustee is also responsible for monitoring the debtor's reorganisation plans.¹⁹⁹

As previously stated, the US Trustee is generally responsible for overseeing the administration of all chapter 7 liquidations and chapter 11, 12, and 13 rehabilitation cases as well as supervising the actions of the private trustees serving in those cases.²⁰⁰ Initially, the US Trustee bears the responsibility of appointing the members of a panel of

¹⁹³ 11 USC par 1104 read with pars 321-331.

¹⁹⁴ 11 USC par 1102 (a) (1) (1994); 11 USC par 1107 (1994). See Alexander "A Proposal to Abolish the Office of the United States Trustee" 6.

¹⁹⁵ 28 USC par 586 (a)(3)(D); 11 USC par 1102 (a) (1) (1994).

¹⁹⁶ 11 USC par 1322 (d). See Evans 175; Albergotti 12-13.

¹⁹⁷ 28 USC par 586 (b). See http://www.usdoj.gov/ust/eo/ust_org/about_ustp.htm (last visited at 09-11-30) for additional information on the US Trustee Program.

¹⁹⁸ 11 USC par 1328. See Treister 97.

¹⁹⁹ 28 USC par 586(a)(3)(C).

²⁰⁰ Treister 97.



trustees from the private sector, to administer the bankruptcy cases, in fact.²⁰¹ Although all trustees appointed by the US Trustee have to meet certain eligibility requirements, no formal licensing system exists.²⁰² Qualifications for membership to these panels are prescribed by the Attorney-General and subsequently the US Trustee appoints persons from this panel to serve as trustees in all chapter 7 liquidations (unless creditors elect another party to act as trustee).²⁰³ The US Trustee also has the duty to act as trustee in instances where no private-sector trustee is available or desires to serve.²⁰⁴

If the court orders that a private trustee should be appointed in a chapter 11 case, the US Trustee is also responsible for the appointment, and the appointed person need not a member of the panel.²⁰⁵ Unlike chapter 7 proceedings, neither the US Trustee nor staff member may serve in the capacity of trustee in the case of a chapter 11 reorganisation. In chapter 13 proceedings the US Trustee may choose to act as trustee or may leave this role to a private standing trustee.²⁰⁶ The qualifications for serving as a private standing trustee are also prescribed by the Attorney-General. In a chapter 13 case, however, the Attorney-General does not prescribe that the person appointed be an attorney in order to qualify for an appointment.²⁰⁷

The US Trustee is intended to be self-supporting organisation and to this end according to the Bankruptcy Code a US Trustee System Fund was established as part of the Treasury of the US.²⁰⁸ The US Trustee Program presently has two principal sources of revenue. Firstly, each debtor pays a filing fee in an amount set by the Code, and, according to a statutory formula, the fees are allocated among the Program, the US Treasury, the court system and the chapter 7 trustees.²⁰⁹ Secondly, the Program receives quarterly fees from each chapter 11 case the amount of which is determined *via* a sliding scale of charges

²⁰¹ 28 USC par 586 and 11 USC par 1302(a). See Treister 95.

²⁰² Ziegel “Comparative Consumer Insolvency” 61.

²⁰³ 28 USC par 586(d); 11 USC pars 701(a)(1); 702. See also Treister 95.

²⁰⁴ 11 USC par 701(a)(2).

²⁰⁵ 11 USC par 1104(a). See Treister 97.

²⁰⁶ 11 USC pars 1202(a); 1302(a) and 28 USC par 586(b). See Treister 97.

²⁰⁷ 28 USC par 586(d)(1).

²⁰⁸ 28 USC par 589(a). See Treister 99.

²⁰⁹ 28 USC par 1930(a)(1)-(5). See Treister 99.



according to disbursements made in the case. “The amount of the quarterly fee [is] calculated according to a graduated scale based on the total sum of disbursements”,²¹⁰ and “disbursements” include all pre- and post-confirmation payments made by or on behalf of the debtor, including routine operating expenses.²¹¹

Significantly, the US Trustee does not possess his own enforcement powers, and incidentally he is therefore unable to issue orders similar to that of a court or even an administrative agency.²¹² As such the US Trustee also has no power to issue directives with statutory force and plays no active role in the drafting of bankruptcy regulations.²¹³ Instead the authority of the US Trustee is demonstrated through his or her administrative responsibilities in terms of the Bankruptcy Code, and through his standing to file an appropriate motion, compliant or objection on such matter of administration to which there has been no voluntary compliance.²¹⁴ The US Trustee in some circumstances also has standing to be heard on behalf of the “public interest” in matters relating to the US Trustee’s ability to enforce a bankruptcy law. However, it has been found that the US Trustee’s “public interest” standing only arises in “cases and proceedings”.²¹⁵

Generally, the US Trustee thus provides a monitoring function, opposing breaches of fiduciary duty and eliminating corruption in the bankruptcy system.²¹⁶ Some courts, however, have described the mission of the US Trustee as more expansive than merely that of a monitor: “the US Trustee is the representative of the public interest, ensuring that the letter and spirit of the law are followed in all bankruptcy cases.”²¹⁷

²¹⁰ 28 USC par 1930(a)(6).

²¹¹ 28 USC par 1930(a)(6). See Treister 99 eg, *Tighe v Celebrity Home (In re Celebrity Home Entertainment Inc)* 210 F 3d 995 (9th Cir April 21, 2000). See also http://www.usdoj.gov/ust/eo/ust_org/about_ustp.htm (last visited at 30-11-09) for additional information.

²¹² Treister 99.

²¹³ Ziegel “Comparative Consumer Insolvency” 61.

²¹⁴ 11 USC par 307. See Treister 99. See also *In re Crosby*, 93 B R 798 (Bankr SD Ga 1988).

²¹⁵ *In re Attorneys at Law and Debt Relief Agencies* 2006 WL 2925199 (SD Ga 8/25/06). See 11 USC 307.

²¹⁶ Alexander “A Proposal to Abolish the Office of the United States Trustee” 8.

²¹⁷ See *In re Columbia Gas Sys Inc* 33 F3d at 296 (noting that Congress has stated that the US Trustee are responsible for protecting the public interest.); *In re Clark* 927 F 2d 793 795 (4th Cir 1991) (labelling the US Trustee as “watchdog” who must see that the bankruptcy laws are enforced). See also Alexander “A Proposal to Abolish the Office of the United States Trustee” 8.



2.3.3 Additional duties of the US Trustee under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Under the Bankruptcy Reform Act of 2005, the US Trustee Program received a number of additional responsibilities.²¹⁸ One of the major reforms includes the implementation of a new “means test”²¹⁹ to determine whether a debtor is eligible for chapter 7 (liquidation)²²⁰ or is required to file under chapter 13 (wage-earner repayment plan).²²¹ According to the new provision the US Trustee is responsible for filing a statement with the court as to whether, according to the information filed by the debtor, the debtor’s case would be presumed to be an abuse under the provisions of the Code.²²² The new test will allow the US Trustee to identify those petitions that intend to defraud or abuse the system.²²³

The introduction of a financial education programme is another significant feature of the reform provisions, and it is the responsibility of the Executive Office of the US Trustee to provide a list of legitimate services and courses and also to develop procedures to ensure compliance by debtors.²²⁴ In this regard the US Trustee is in charge of the certification process of entities responsible for providing financial education.²²⁵

The Bankruptcy Reform Act 2005 also directs a new regime for debtor audits to determine whether a chapter 7 debtor’s bankruptcy documents are accurate.²²⁶ According to the provisions the US Trustee is to arrange for random and targeted audits of debtors to determine the accuracy of the financial information provided in the documents filed with

²¹⁸ White *Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act* statement presented on 2006-12-06, before the Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, US Senate (hereafter referred to as White “Oversight of Implementation”) on file with the author.

²¹⁹ See (n 136).

²²⁰ See (n 138).

²²¹ See (n 135).

²²² 11 USC par 707(b) (2005).

²²³ White “Bankruptcy Law Provides New Tools” 4.

²²⁴ 11 USC pars 111(b)(c) (2005). White “Oversight of Implementation” 9.

²²⁵ 11 USC pars 111(b)(c) (2005). Statutory requirement for an individual prior to filing for bankruptcy and for an individual to receive a discharge from debts.

²²⁶ 11 USC par 704(b)(1)(A) (2005). White “Bankruptcy Law Provides New Tools” 2.



the court.²²⁷ The new provision will assist in identifying wrongdoers who may be referred for criminal prosecution, and it will also assist in identifying possible fraudulent applications.²²⁸ As mandated in the Bankruptcy Reform Act of 2005, the US Trustee Program established procedures for independent audit firms to audit petitions, schedules, and other information in consumer bankruptcy cases filed on or after October 20, 2006.²²⁹ The US Trustee subsequently contracted with independent accounting firms to perform audits in cases designated by the US Trustee.²³⁰

2.4 REGULATORY FRAMEWORK: THE BANKRUPTCY ADMINISTRATOR

The Bankruptcy Administrator Program in 1986 was established as a programme entirely separate from that of the US Trustee.²³¹ The Bankruptcy Administrator Program is accommodated in the Judicial Branch, as opposed to the US Trustee Program, which is situated within the Executive Branch of the Department of Justice.²³² Designed and developed in response to complaints and dissatisfaction with the US Trustee Program, the Bankruptcy Administrator Program was instituted in the six federal judicial districts in the states of Alabama and North Carolina.²³³ In fact, the Northern District of Alabama represents one of the eighteen (18) pilot US Trustee districts from 1978 to 1986, and subsequently rejected the US Trustee Program when it was expanded nationwide in 1986.²³⁴

The US Bankruptcy Administrator Program replaced the US Trustee Program in the six federal judicial districts in Alabama and North Carolina. The Bankruptcy Administrator is a non-judicial independent officer of the Judiciary who operates with a full-time staff and is

²²⁷ Paragraph 603 (a) of Public Law 109-8.

²²⁸ White "Bankruptcy Law Provides New Tools" 2.

²²⁹ Paragraph 603 (a) of Public Law 109-8.

²³⁰ 28 USC par 586(f).

²³¹ Alexander "Non-Uniform Bankruptcy Laws" 550.

²³² See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act 1986 par 302(d)(3)(I).

²³³ See official website of the US Bankruptcy Administrator Northern Alabama district available at <http://www.alnba.uscourts.gov/about.html> (last visited at 09-11-30).

²³⁴ Alexander 550.

completely independent of the bankruptcy and district courts and the clerks of those courts.²³⁵ The primary distinction between the programs of the Bankruptcy Administrator and the US Trustee is that the former operates under the auspices of the judicial rather than the executive branch of the federal government. Because the Bankruptcy Administrator Program is under the control of the judicial branch, the Bankruptcy Administrators are not restricted by federal guidelines, as is the US Trustee.²³⁶ Apart from being situated in different branches of government, the US Trustee Program and Bankruptcy Administrator Programs perform nearly identical functions.²³⁷ The Bankruptcy Administrator offices in the six judicial districts of Alabama and North Carolina mainly oversee the administration of bankruptcy cases, maintain a panel of private trustees, and monitor the transactions and conduct of parties in bankruptcy.²³⁸

In the past one key difference between the programmes of the US Trustee and the Bankruptcy Administrator concerned the payment of user fees, something that had been required by the US Trustee Program districts,²³⁹ but were not collectable in Bankruptcy Administrator districts. In *St Angelo v Victoria Farms Inc*²⁴⁰ the debtor challenged the constitutionality of the US Trustee's requirement that chapter 11 debtors had to pay quarterly administrative fees. *Victoria farms* argued that because the US Trustee Program was not available in every jurisdiction and debtors were thus not required to pay these quarterly fees in every jurisdiction, the bankruptcy oversight scheme was not uniform and thus not constitutionally valid.²⁴¹ The court agreed that the existence of both the US Trustee and the Bankruptcy Administrator caused a Uniformity Clause violation; however, the court struck down the statutory provisions that enabled the federal courts in Alabama and North Carolina to opt out of the US Trustee Program.²⁴²

²³⁵ NBRC Report 1039.

²³⁶ Alexander "A Proposal to Abolish the Office of the United States Trustee" 10.

²³⁷ NBRC Report 1039.

²³⁸ NBRC Report 1039.

²³⁹ Pursuant to 28 USC par 1930 (6). See NBRC Report 1039.

²⁴⁰ 38 F 3d 1525 (9th Cir 1994).

²⁴¹ Alexander 550.

²⁴² 38 F 3d 1525 (9th Cir 1994) at 1533. Alexander argues that the ninth circuit decision has no practical effect as it has no authority over the Bankruptcy Administrator Programs in the Fourth and Eleventh Circuit. See Alexander 553. See also Alexander "A Proposal to Abolish the Office of the US Trustee" 1.



Subsequent to the *St Angelo* ruling, Congress has now amended the laws to permit the Bankruptcy Administrator to collect quarterly fees as well.²⁴³

The dual system was considered by the 1994 National Bankruptcy Review Commission, which in turn rejected the conversion of the Bankruptcy Administrator Program into the US Trustee Program. The justification for this was that when in future the decision has to be made, the Commission would be confident that Congress would realise that both the Bankruptcy Administrator and US Trustee Programs were mainly responsive, efficient and cost-effective and should therefore be left undisturbed.²⁴⁴

2.5 INSTITUTIONAL FRAMEWORK: ROLE OF THE COURTS

The institutional framework of the US bankruptcy system consists of specialised bankruptcy courts, which in turn are supported by the US Trustee. At the centre stage of the bankruptcy proceedings we find the person known as the “Bankruptcy Judge”, whose status and tenure have been among the more controversial bankruptcy issues considered by Congress in recent years.²⁴⁵

One of the major weaknesses of the 1898 Act had been the fractured jurisdictional scheme in which bankruptcy referees (renamed judges in 1973) could only hear certain core matters in bankruptcy.²⁴⁶ As the organic bankruptcy court had up to 1978 simply evolved without legislative definition it simply became inadequate. Originally it was contemplated that the referee in bankruptcy would be an administrative assistant to the US district judge and would consequently conduct the administration of bankruptcy cases under the supervision of the district judge.²⁴⁷ Following the amendments introduced by the Chandler Act of 1938, the role of the referee was expanded and he became a “bankruptcy judge” who virtually took over all

²⁴³ 28 USC par 1930(a)(7) (2000).

²⁴⁴ NBRC *Report* 1039.

²⁴⁵ White 61.

²⁴⁶ Tabb “The History of Bankruptcy Laws” 34.

²⁴⁷ Treister 7.

the original jurisdiction of the bankruptcy court.²⁴⁸ The bankruptcy judge had come to exercise the judicial power to decide disputes as a court of original jurisdiction but was still also responsible for the supervision of the administration of bankruptcy cases.

In the 1978 legislation a bankruptcy court system that was intended *inter alia* to upgrade the judicial office was established. The 1978 Code explicitly granted jurisdiction to the federal district court: “the bankruptcy court is given *in personam* jurisdiction as well as *in rem* jurisdiction to handle everything that arises in the bankruptcy case”.²⁴⁹ The 1978 Code thus established a bankruptcy court system with a substantially enlarged bankruptcy court jurisdiction, enabling bankruptcy judges to hear virtually any matter arising in, or related to, bankruptcy cases.²⁵⁰ The Code, however, was not clear on the status of the bankruptcy judges responsible for exercising this enlarged jurisdiction.²⁵¹

Although the Code bestowed upon bankruptcy judges substantial jurisdiction over bankruptcy matters as “adjuncts”²⁵² of the district court, the constitutional status and protection of Article III, which *inter alia* includes the enjoyment of life tenure and compensation protection, were not bestowed on them.²⁵³ Consequently, in *Northern Pipeline Construction Co v Marathon Pipeline Co*²⁵⁴ in response the Supreme Court swiftly ruled *vis-à-vis* the power of bankruptcy judges. In the *Northern Pipeline* ruling the court held that the granting of the broad jurisdiction to bankruptcy courts in the 1978 Act violated Article III of the Constitution, by vesting non-Article III judges with too much of the “judicial” power in the US.²⁵⁵ The Supreme Court was particularly concerned with bankruptcy judges having the

²⁴⁸ See former Bankruptcy Rule 901 (7). See Treister 5.

²⁴⁹ HR Rep 595 95th Cong 1st Sess 445 (1977). See White 94.

²⁵⁰ Treister 29. Former 28 USC par 1471(b).

²⁵¹ Tabb “The History of Bankruptcy Laws” 34.

²⁵² Bankruptcy courts are nominally referred to as adjuncts of the district courts but in fact are virtually independent of them. The concept of “adjunct” was never defined or explained. See Treister 29.

²⁵³ Which also includes a life time appointment to the Bench. See Albergotti 3.

²⁵⁴ 458 US 50, 102 S Ct 2858 (1982).

²⁵⁵ 458 US 50, 102 S Ct 2858 (1982) at 61, 78, 87. The Constitution itself confers this authority (certain implied powers) upon all Article III courts as an incident to “The Judicial Powers”. See Tabb “The History of Bankruptcy Laws” 38; Albergotti 4; Ahart “The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity” (2005) *American Bankruptcy LJ* 1 (hereafter referred to as Ahart).



power to rule on state law issues.²⁵⁶ Although the *Northern Pipeline* decision invalidated the entire grant of jurisdiction, a stay was granted (twice) in order to permit Congress time to resolve the matter.²⁵⁷ The courts themselves devised a desperate solution and, as imposed by emergency rule, jurisdiction was assigned to the district court in anticipation that jurisdiction would typically be exercised by the bankruptcy judge.²⁵⁸ The Supreme Court's decision subsequently forced Congress to restructure the bankruptcy court system and, with the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984,²⁵⁹ the bankruptcy courts were established on a more certain footing.²⁶⁰

The jurisdictional and court scheme established by Title 1 of the BAFJA established the bankruptcy courts as units of the district courts and as a result bankruptcy courts are able to hear cases and proceedings relating to bankruptcy on referral from the district courts.²⁶¹ At present the bankruptcy courts serve as Article 1 courts²⁶² or in other words are attached to the US federal courts, which in turn delegate their bankruptcy powers to bankruptcy courts.²⁶³ The BAFJA made a distinction between “core”²⁶⁴ bankruptcy matters, in which the bankruptcy court can enter a final order, and “non-core” matters, which are *de novo* reviewable by the district courts.²⁶⁵ The current state of affairs implies that, when requested

²⁵⁶ White 61.

²⁵⁷ See Tabb “The History of Bankruptcy Laws” 38; Treister 31.

²⁵⁸ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L no 98-353, 98 Stat 333. Tabb “The History of Bankruptcy Laws” 38.

²⁵⁹ Hereafter referred to as “BAFJA”.

²⁶⁰ Pub L no 98-353, 98 Stat 3 33. Signed into law on 1984-07-19 (codified as amended in scattered sections of 11 and 28 USC). See Herbert 49.

²⁶¹ 28 USC par 151 (1988). See Tabb “The History of Bankruptcy Laws” 39. For a detailed discussion of the bankruptcy court's jurisdiction refer to Daley “Bankruptcy Court Jurisdiction” (2004) *DePaul Business and Commercial LJ* 383.

²⁶² 28 USC pars 151-152 (1988). In providing for the establishment of a federal judiciary, Article III, par 1 of the Constitution appears to require Congress to grant Federal judges life tenure and undiminishable salaries. As bankruptcy court judges serve in Article 1 courts, they are given only limited status and are appointed for 14-year terms – as opposed to Federal Court judges, who are given life tenure.

²⁶³ There is a right of appeal from the Bankruptcy Court to the District Court, and from the District Court to the Circuit Court of appeals for the district. Finally, from there cases can be referred to the US Supreme Court. (State courts have no jurisdiction over bankruptcy matters that are based on the Bankruptcy Code since it is part of federal legislation.)

²⁶⁴ A list of core proceedings is contained at 28 USC par 157 (b)(2). Core matters are generally thought to be the sort of work normally done by a bankruptcy judge concerning restructuring the relationship between a debtor and its creditors which are at the core of the federal bankruptcy power even if resolution requires reference to state law. See Albergotti 5.

²⁶⁵ 28 USC par 157(b) and (c). Tabb “The History of Bankruptcy Laws” 39.

to do so, US federal courts (district courts) can “withdraw the reference” to the bankruptcy court and suggests that if necessary they may take back control of a particular case.²⁶⁶

As the Fifth Circuit observed sixty years ago, “[w]hile a court of bankruptcy often applies equitable principles, and may sometimes entertain a controversy in equity arising out of bankruptcy in which it will follow the precedents and practice of a court of equity, yet as respects the original bankruptcy proceeding it is not strictly a court of equity, but a statutory court created by the Bankruptcy Act, and governed by it”.²⁶⁷ A bankruptcy judge therefore acts as a statutory court and not as a court of equity.²⁶⁸ Bankruptcy courts only have those equitable powers that Congress can grant them pursuant to the Bankruptcy Clause of the US Constitution.²⁶⁹ A bankruptcy judge’s powers thus stem virtually exclusively from statutes, and he or she has no inherent powers similar to that of a federal court judge arising from Article III of the Constitution.²⁷⁰

In essence the bankruptcy judges act as judicial officers of the district court and are appointed by the US Courts of Appeals for their respective circuits for 14-year terms.²⁷¹ It appears that in the normal course of events, the judges do not become involved in chapter 7 consumer petitions, unless there is an objection to the otherwise automatic discharge. However, the court’s approval is necessary for a chapter 13 repayment plan and, since the Code confers no judicial powers on the registrars, all interlocutory applications must be heard by a bankruptcy judge.²⁷²

²⁶⁶ Usually they are requested to do so because of special circumstances or if a bankruptcy judge is acting unsatisfactorily. See Ahart 1.

²⁶⁷ *Berry v. Root*, 148 F.2d 945, 946 (5th Cir. 1945). See Ahart 50; Plank “The Erie Doctrine and Bankruptcy” 2004 *Notre Dame LR* 633 at 688 (hereafter referred to as Plank “The Erie Doctrine and Bankruptcy”).

²⁶⁸ 11 USC par 105. See Ahart 2.

²⁶⁹ Plank “The Erie Doctrine and Bankruptcy” 688. See Ahart 2.

²⁷⁰ 11 USC par 105. 28 USC pars 151-152; 1334 (a) and (b). See Ahart 2. See also *Celotex Corp v Edwards* 514 US 300, 307 (1995).

²⁷¹ 28 USC par 152(a)(1). While federal court judges are appointed for life. See Neier “Post-Confirmation Jurisdiction in the Bankruptcy Courts: Does It Ever End?” (1999) *The Business Lawyer* 81 (hereafter referred to as Neier).

²⁷² Ziegel *Comparative Consumer Insolvency* 61.



With the enactment of the 1978 Code the stated intention of Congress was that bankruptcy judges were to be relieved of administrative, clerical and supervisory duties so as to focus primarily on their judicial function: the resolution of disputes. In turn, legislation instructs judges to provide a hearing only when specifically required to do so or where there is a contested matter.²⁷³ It is safe to conclude that that the specialisation of the US bankruptcy judges and the degree of their daily involvement in bankruptcy cases gives them a better feel for the complexities of consumer bankruptcy than is enjoyed by a generalist judge in a jurisdiction without specialist bankruptcy courts.²⁷⁴ The US has developed great expertise through its bankruptcy courts, and this can be attributed to the US federal court system and the increasingly common judicial specialisation in the US.²⁷⁵ It is thus evident that bankruptcy judges do not become actively involved in the daily administration of bankruptcy cases: instead, they act as key role-players in a specialist court division which forms part of the increasingly common trend of judicial specialisation in the US.²⁷⁶

²⁷³ Stripp “An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time” (1993) *Seton Hall LR* 1330; Albergotti 16.

²⁷⁴ Milman 149.

²⁷⁵ Alexander “A Proposal to Abolish the Office of the United States Trustee” 10.

²⁷⁶ Rachlinski “Inside the Bankruptcy Judge’s Mind” (2006) *Boston University LR* 1227 at 1228.

CHAPTER 3: UNITED KINGDOM

3.1 INTRODUCTION

The general development of the English insolvency law,²⁷⁷ and especially of the administrative nature and character of the English regulatory system, is of particular relevance to this study. This is because South African insolvency legislation is deeply rooted in English law, resulting to a certain extent in similar legal philosophies and principles being reflected in both jurisdictions.²⁷⁸ Significantly, during the past few centuries the regulatory powers of the state in England endured extensive reformatory changes prior to the regulatory system in its present form finally being established.

Unlike the US, the English commercial economy developed over a long period of time, with continuous growth from the beginnings of the industrial revolution to the present. Since the unhappy early years of English bankruptcy laws there seems to have been a harmonious progression from the stigmatisation of debtors to a recognition that creditors' interests would be best served by affording the debtor a "fresh start" rather than an interminable battle with debt.²⁷⁹ From a formal perspective the main source of the English bankruptcy law is to be found in the Insolvency Act of 1986.²⁸⁰ The Insolvency Act of 1986 was a significant piece

²⁷⁷ Although the terms "insolvency" and "bankruptcy" are used interchangeably throughout this chapter, it is important to point out the origin of these two terms in an English context. Fletcher indicates that the distinction between the two terms arose as a result of the uncoordinated development of the rules relating to debt and bankruptcy. Fletcher then distinguishes between the two terms by stating that "insolvency" was used to describe a factual position (i.e. liabilities exceeding the assets) while "bankruptcy" was used to describe a legal condition or status. It is interesting to note that the first time the word was used in English legislation it did not apply to a person but to an act or a thing. For a discussion of the distinction between these two terms, see Fletcher *The Law of Insolvency* (2009) 6-7 (hereafter referred to as Fletcher); Levinthal "The Early History of English Bankruptcy" (1934) *University of Pennsylvania LR* 104 (hereafter referred to as Levinthal "The Early History of English Bankruptcy"); Milman *Corporate Insolvency Law and Practice* (1999) 2 (hereafter referred to as Milman *Corporate Insolvency Law and Practice*) and Burdette 78.

²⁷⁸ See Burdette 78; Evans 83.

²⁷⁹ Rajak "The Culture of Bankruptcy Law" 18-19. See Ramsay "Bankruptcy in Transition: The Case of England and Wales – the Neo-liberal Cuckoo in the European Nest?" in Niemi-Kiesiläinen *Consumer Bankruptcy in Global Perspective* 225 (hereafter referred to as Ramsay "Bankruptcy in Transition").

²⁸⁰ Insolvency Act of 1986. Hereafter referred to as the Insolvency Act 1986 or the Insolvency Act of 1986. Although it received the Royal Assent and became law on 1985-10-30, the government decided to delay implementation of all but a few of its provisions and to draw up a new Act, consolidating its provisions with



of new legislation, implementing the most comprehensive review of bankruptcy law in over a century.²⁸¹ Its provisions were largely based on the recommendations contained in the *Report*²⁸² of the Insolvency Law Review Committee,²⁸³ which resulted in a sweeping renovation of the law relating to both personal and corporate insolvency.²⁸⁴ The Insolvency Act of 1986 has since been substantially amended,²⁸⁵ and Part Ten of the Enterprise Act²⁸⁶ has probably had the largest impact.²⁸⁷ The Enterprise Act introduced a number of reforms to personal insolvency law intended to reduce the severity and stigma of bankruptcy for the honest unfortunate debtor and to promote entrepreneurialism.²⁸⁸ As a result of the recent amended provisions it is now possible for an individual consumer to apply for bankruptcy and receive a discharge within one year or even earlier.²⁸⁹ This recent development serves as evidence that English insolvency law are moving swiftly towards a more liberal model of bankruptcy law.²⁹⁰

those parts of the Companies Act 1985 dealing with receivership and winding-up. This became the Insolvency Act 1986. The Act received Royal Assent on 1986-07-25 and was brought into force on 1986-12-29. See Milman 23.

²⁸¹ Sealy *Annotated Guide to the Insolvency Legislation* (2004) 1 (hereafter referred to as Sealy).

²⁸² Hereafter referred to as the *Cork Report. Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982.

²⁸³ Hereafter referred to as the Cork Committee.

²⁸⁴ For a detailed discussion of the recommendations included in the *Cork Report* (n 282) see Fletcher 18-21.

²⁸⁵ Eg, the Insolvency Act 1994; the Insolvency (no 2) Act 1994; the Insolvency Act 2000.

²⁸⁶ Enterprise Act 2002. Hereafter referred to as the Enterprise Act. The Bill was introduced in the House of Commons in the spring of 2002 and received Royal Assent on 2002-11-07. Debt Relief Orders (hereafter referred to as DROs) were also introduced by the Tribunals, Courts and Enforcement Act 2007 and appear at s 108 of this Act read with schedule 17 onwards. They were laid before Parliament on 2009-03-04 and were introduced on 2009-04-06. The Insolvency Service is working on a project aimed at the modernisation and consolidation of secondary legislation which will reduce the regulatory and administrative burdens that currently exist for users of insolvency legislation. The project began with the advertising amendment changes (the Insolvency (Amendment) Rules 2009) which came into effect in April 2009. One of the key facets of the modernisation reforms is to facilitate the delivery of documents electronically. Further “Insolvency Modernisation Rules” amending the Insolvency Rules 1986 will come into force in April 2010.

²⁸⁷ See Walters “Personal Insolvency Law after the Enterprise Act: An Appraisal” (2005) *Journal of Corporate Law Studies* 65 (hereafter referred to as Walters “Personal Insolvency Law after the Enterprise Act”). The amended provisions resulted in the restriction of the use of the procedure of administrative receivership and provide for streamlined administration proceedings, the eventual abolition of administrative receiverships, and the abolition of the preferential claims of the State (Crown) in respect of certain taxes.

²⁸⁸ Ramsay “Bankruptcy in Transition” 223.

²⁸⁹ Section 279(1) of Insolvency Act 1986 as substituted by s 265 of the Enterprise Act.

²⁹⁰ See Ramsay “Bankruptcy in Transition” 225.

Until recently, English insolvency law had remained largely untouched by legal developments in Europe. However, the impact of the Human Rights Act of 1998²⁹¹ is now an additional factor to be considered in any account of the current working of English insolvency law.²⁹² In addition, as far as the European Union is concerned, a significant breakthrough was achieved when the European Council Regulation²⁹³ on Insolvency Proceedings took effect in 2002.²⁹⁴ Essentially the EC Regulation determines jurisdiction in cases where cross-border insolvency principles apply, and since 2002 there have been a number of English cases in which its impact has been felt.²⁹⁵

3.2 HISTORICAL OVERVIEW OF ENGLISH INSOLVENCY LAW

Although common law, stretching back to medieval times, also made provision for the management of debtors, English bankruptcy law has an ancient history dating back to the sixteenth century.²⁹⁶ Scholars of English bankruptcy law almost unanimously regard the Act of Parliament by Henry VIII in 1542²⁹⁷ as the earliest legislation on the subject.²⁹⁸ Despite its title, the Bankruptcy Act of 1542 was not concerned with bankruptcy as it is presently experienced but was primarily aimed at punishing debtors, who were referred to, significantly, as “offenders”.²⁹⁹

As far as the concept of regulation in English insolvency law is concerned, the most significant contribution during the period of the sixteenth and seventeenth century was the introduction of the bankruptcy commissioners into the bankruptcy system *via* the

²⁹¹ Came into force in October 2001.

²⁹² Fletcher 27.

²⁹³ Hereafter referred to as the EC Insolvency Regulation. Council Regulation (EC) no 1346/2000, of 2000-05-29.

²⁹⁴ EC Regulation took effect on 2002-05-31.

²⁹⁵ Milman 24.

²⁹⁶ Murray Key's *Insolvency Personal and Corporate Law and Practice* (2005) 5.

²⁹⁷ (34 and 35 Hen VIII, c 4).

²⁹⁸ See Levinthal “The Early History of English Bankruptcy” 104.

²⁹⁹ Key *Insolvency Law Corporate and Personal* (2003) 8 (hereafter referred to as Key). It would be a mistake to perceive bankruptcy as a new phenomenon that first attracted legal attention in 1542. There are numerous recordings of English law going back to medieval times. See Nightingale “The Bankruptcy of the Scali of Florence in England 1326-1328” in Britnell and Hatcher *Progress and Problems in Medieval England* (1996) ch 6. See also Milman 6.



1571 Elizabethan statute.³⁰⁰ The Act made provision for the management of the bankruptcy system to be vested in bankruptcy commissioners, and the Lord Chancellor was first given the power to appoint bankruptcy commissioners from candidates proposed by creditors.³⁰¹ Having introduced a formal system by legislation during the seventeenth century, the institution gradually fell under the control of the courts of equity.

During the eighteenth century the jurisdiction in bankruptcy was conferred upon the Court of Chancery, with cases often heard by the Lord Chancellor in person.³⁰² With the enactment of the Act of 1732³⁰³ the transfer of jurisdiction to the Lord Chancellor was formally affected.³⁰⁴ The 1732 Act was also notable for instituting the process of delegating the day-to-day stewardship and the management of the affairs of the insolvent from a public body (in the form of the commissioners) to assignees appointed by the creditors in the estate.³⁰⁵ Up until the eighteenth century the English system thus resembled mainly a creditor-oriented system.

During the nineteenth century a series of bankruptcy statutes laid the foundation of the modern law of bankruptcy, as we know it today. This century also witnessed a struggle for the conscience of bankruptcy law. Merchants, politicians, intellectuals and popular writers all contributed to the debate over the future of bankruptcy.³⁰⁶ Parliament's first attempt at a thorough investigation of the insolvency law was the Select Committee set up in 1817-1818.³⁰⁷ Since much of the substantive bankruptcy law was already in place and generally accepted by 1800, most of those concerned with bankruptcy law reform during the Victorian period focused on amending bankruptcy administration.³⁰⁸ One of the major subjects of debate was the

³⁰⁰ (13 Eliz I, c 7)

³⁰¹ Lester 18.

³⁰² In 1676 Lord Nottingham, the then Lord Chancellor, set a precedent by hearing bankruptcy cases personally. See Milman 7.

³⁰³ (5 Geo II, c 30).

³⁰⁴ The Lord Chancellor was first given the power to appoint Bankruptcy commissioners in 1571.

³⁰⁵ See Milman 7; Lester 19.

³⁰⁶ Dicey *Law and Public Opinion in England during the Nineteenth Century* (1930) (Lecture V) as cited in Milman 9.

³⁰⁷ Lester 19. Other reforms to the law of bankruptcy were brought about by the Bankruptcy Act 1824 (4 Geo IV, c 98) and were consolidated in the Bankruptcy Act 1825 (5 Geo IV, c 16). See also Dalhuisen par 3.08[1] 1-86.

³⁰⁸ Lester 12.



question of control and regulation of the insolvency process.³⁰⁹ During this period, the practice developed whereby commissioners in bankruptcy would appoint one or more creditors as assignees over the assets. Although they were presumed to be under the supervision of the commissioners, creditors therefore had virtually full control over the administration of the bankrupt estates. In time the system became marred by frequent manipulation and abuse by both creditors and debtors.³¹⁰

Until the establishment of the first bankruptcy courts in 1831, bankruptcy fell within the province of the Courts of Chancery and in particular the jurisdiction of the bankruptcy commissioners.³¹¹ These commissioners had the power to commence the bankruptcy proceedings through the issue of a *fiat* and to conduct public hearings. In essence, they fulfilled an administrative function. As the jurisdiction to hear disputes remained situated within the Courts of Chancery, the commissioners could not be regarded as fully fledged courts of record.³¹² The prevailing view at the beginning of the nineteenth century was thus that the creditors should be at the helm of proceedings by not only having the power to appoint an assignee of their own choice, but also by controlling the fate of the debtor through exercising a veto over his discharge.³¹³ The abusive actions of private assignees were notorious, however, and this lamentable state of affairs was challenged by several reformers.³¹⁴

The infamous delays with which proceedings in the Courts of Chancery were beset also rendered the system unpopular, and, with the view to providing more efficient and expeditious judicial service, a bankruptcy court was set up in London in 1831. For the first time government became directly involved in the management aspects of

³⁰⁹ Milman 7.

³¹⁰ Tolmie *Corporate & Personal Insolvency* (2003) 38 (hereafter referred to as Tolmie).

³¹¹ For an example of the ambit of the commissioners' discretion and the reluctance of the courts to intervene see *Ex Parte King* (1805) 11 Ves Jun 417, (1806) 13 Ves Jun 181 and (1808) Ves Jun 127. See also Milman 7.

³¹² For example, disputes arising during the administration process were referred to the Courts of Chancery. See Milman 7.

³¹³ Milman 9.

³¹⁴ Such as Bentham and Brougham, who in particular argued for state control. See Milman 9.



bankruptcy.³¹⁵ The court of bankruptcy was set up, with a chief and three other judges and a staff of six commissioners acting under the *fiat* of the court rather than the Lord Chancellor. This ended the independence of the commissioners.³¹⁶ The Act of 1831³¹⁷ replaced creditor control, with a government official attached to the London bankruptcy court – and, for the time being, this marked the end of the court of Chancery’s 250-year jurisdiction over bankruptcy.³¹⁸ In effect, it would now be the courts that in the past had been responsible only for the settling of disputes that, instead of the creditors, would be in charge of appointing “Official Assignees” charged with the responsibility of administering the estate.³¹⁹ The 1831 Act replaced creditor control with a government official who would administer the bankruptcy system, and this official, rather than individual creditors, would be the principal overseer of the bankruptcy process.³²⁰ Although originally scheduled to merge with the Supreme Court of Judicature the bankruptcy court operated independently until the merger was finally effected by the Bankruptcy Act of 1883.³²¹

The next Act to consider is the English Bankruptcy Act of 1861.³²² Based on favourable reports regarding the success of the creditor-dominated system in Scotland, creditor groups started to lobby for reform. In response, government dismantled the official system of administration and with the Act of 1861 the creditor groups agreed to a compromise reform.³²³ However, with the enactment of the 1869 English Bankruptcy

³¹⁵ Lester 2.

³¹⁶ Hicks 124 (n 3).

³¹⁷ (1 and 2 Will IV, c 56).

³¹⁸ See Duns *Insolvency: Law and Policy* (2002) 25 (hereafter referred to as Duns); Skeel “The Genius of the 1898” 326.

³¹⁹ Lester 3.

³²⁰ Skeel “The Genius of the 1898” 326.

³²¹ In the meantime, outside of London, a Statute of 1842 removed the jurisdiction over bankruptcy from the county commissioners, who were the counterparts of the original bankruptcy commissioners in London. Initially the bankruptcy jurisdiction was vested in the district courts, but under the Bankruptcy Court Act of 1847, certain county courts acquired exclusive control over bankruptcy outside London. This jurisdiction has been retained ever since: all bankruptcy proceedings that take place outside the area formerly known as the London Bankrupt District are heard by county courts. In 1986 the London Bankrupt District was renamed the London Insolvency District. See Fletcher 30.

³²² (24 and 25 Vict, c 134).

³²³ Skeel “The Genius of the 1898” 326.

Act³²⁴ the pendulum swung in the opposite direction and “officialism”³²⁵ again gave way to creditor control. Creditors once more took direct control over the bankruptcy process³²⁶ and the court’s official assignees were replaced by a trustee appointed by creditors and supervised by a creditor’s committee of inspection.³²⁷

In 1883 the pendulum swung once again. The foundation of the modern system of regulation of insolvency law in England was established when Joseph Chamberlain³²⁸ came to be the new president of the Board of Trade.³²⁹ Chamberlain was of the opinion that the law had to provide for the administration of the estate of the bankrupt, but he also saw that it was in the public interest that a thorough and independent investigation into the causes of insolvency was conducted, rather than leaving matters in the hands of creditors.³³⁰ He was convinced that there was a public role to be played in the administration of bankruptcy and went ahead with developing the proposals for a Bill that eventually became the landmark Act of 1883.³³¹

With the Bankruptcy Act of 1883 insolvency law, and especially the regulatory aspects of insolvency, took on a form still recognisable in English law today.³³² The 1883 Act affected a compromise based upon a combination of creditor and public control and also resulted in the subsequent removal of administrative functions from the courts. The 1883 Act also lay the foundation of many of the other features in present-day English law – *inter alia*, an investigation into the affairs of the debtors, punishment for bankruptcy offences, strict investigations of proof of debt and general supervisory proceedings.³³³

³²⁴ (32 and 33 Vict, c 71).

³²⁵ A notion injected into the English system whereby the government for the first time became directly involved in the management of bankrupt estates. See Lester ch 2 for a detailed discussion of this era.

³²⁶ See Skeel “The Genius of the 1898” 327; Lester 2.

³²⁷ See Hicks 124; Skeel “The Genius of the 1898” 327; Lester 2.

³²⁸ Joseph Chamberlain (1836-07-08 – 1914-07-02) was a British statesman. In his early years he was a successful businessman, a radically minded Liberal, and a campaigner for educational reform. Later on he became President of the Board of Trade. See Tolmie 11.

³²⁹ Tolmie 39; Skeel “The Genius of the 1898” 327.

³³⁰ Tolmie 39.

³³¹ (46 and 47 Vict, c 71). Hereafter referred to as the Bankruptcy Act of 1883.

³³² Dalhuisen par 3.08[2] 1-88. Fletcher 10.

³³³ Frieze *Personal Insolvency Law – In Practice* (2004) 1-2 (hereafter referred to as Frieze).



With the return to the concept of greater state participation in the system of bankruptcy the 1883 Act's proponents envisaged two main goals for the government in its new role. The first task was the proper examination, through the Board of Trade, of the bankrupt's financial affairs and the circumstances surrounding his insolvency.³³⁴ The second key feature of the official system was the efficient management of smaller bankrupt estates. The Bankruptcy Act of 1883 provided for cases with relatively few assets to be administered in a summary manner, with the official receiver serving as permanent trustee unless creditors preferred to nominate a non-official trustee.³³⁵ The legislature recognised that the official machinery was not required in larger estates, where creditors took control, and where often the estate was managed by privately appointed administrators assisted by a solicitor. Moreover, when dealing with smaller estates the "public good" was at stake. By collecting the receipts of smaller estates, the "public good" was better served. This was because the administration of smaller estates was not profitable if carried out by one individual, but could be made profitable if performed by a collective action such as a government agency.³³⁶

Also of significance was that the 1883 Act was designed to ensure that an independent and impartial examination took place into the causes of each bankruptcy, as well as the conduct of each bankrupt. The public official responsible for the examination process was to be the official receiver. It recognised that bankruptcy should be regarded as a public matter, affecting the community at large. The public official responsible for the examination process was to be the official receiver. The Act was also intended to deal more effectively with misconduct by introducing a range of bankruptcy offences.³³⁷

The Bankruptcy Act of 1883 represents a defining era in modern bankruptcy administration by *inter alia* separating the judicial and administrative functions in

³³⁴ Lester 290.

³³⁵ Lester 292.

³³⁶ Lester 292.

³³⁷ Insolvency Service, UK *Bankruptcy: A Fresh Start*" (2001) consultation document. Document is available on the Insolvency Service website at www.insolvency.gov.uk (last visited at 09-11-30).

bankruptcy and reasserting the state's supervisory role.³³⁸ As such the judiciary duties remained vested in the High Court as well as county courts and the administrative functions were transferred to a new department entitled the Department of the Board of Trade.³³⁹ This Department's purpose was to exercise a general supervisory role over all the administrative aspects and bankruptcy matters, including control over the appointment and the actions of trustees in bankruptcy.³⁴⁰ In order for the Board of Trade to execute its statutory functions it was necessary to appoint officials, called "Official Receivers", to carry out the supervisory actions.³⁴¹ The immediate management of the insolvency system was vested in trustees, who themselves operated under tight regulation from a burgeoning bankruptcy department within the Board of Trade. These officers were not only regulated by the bankruptcy department situated in their respective districts, but were also invested with the status of officers of the courts to which they were attached.³⁴² To a large extent the practice that developed under the auspices of the Bankruptcy Act of 1883 still resembles the basic legislative structure of present-day bankruptcy law.³⁴³

Subsequently, this particular legislative model persisted for six decades until the passing of the Insolvency Act of 1976, which included innovative provisions such as automatic discharge after five years.³⁴⁴ While Parliament was concluding the process of enacting the Insolvency Act of 1976, the *Report* prepared by the Cork Advisory Committee was published and served as an important catalyst in the process towards undertaking a comprehensive review of the insolvency law of England and Wales.³⁴⁵ The final *Report*³⁴⁶ of the Cork Committee was eventually submitted in 1982, and it made a vigorous case for fundamental

³³⁸ See Martin "Common-law Bankruptcy Systems"; Frieze 1.

³³⁹ Which was set up under the Inspector-General in Bankruptcy. The Department for Business, Enterprise and Regulatory Reform (BERR) was created on 2007-06-28 upon the disbanding of the Department of Trade and Industry (DTI). However, the BERR was itself disbanded on 2009-06-06 with the creation of the Department of Business, Innovation and Skills (DBIS).

³⁴⁰ Frieze 2.

³⁴¹ Frieze 2.

³⁴² See Frieze 2; Milman 10.

³⁴³ Milman 10.

³⁴⁴ Further minor reforms were introduced in regard to discharge in the 1890 Act (53 and 54 Vict, c 71) and the 1913 Act (3 and 4 Geo V, c 34) which were consolidated in the Bankruptcy Act of 1914 (4 and 5 Geo V, c 59); Milman 10.

³⁴⁵ Fletcher 13.

³⁴⁶ Cork *Report* (n 282).



reforms regarding the law of insolvency.³⁴⁷ Consequently, many of its recommendations found their way into the Insolvency Act of 1986.³⁴⁸

Further reforms³⁴⁹ have since been implemented, including the Insolvency Act 2000³⁵⁰ and the Enterprise Act.³⁵¹ Most of the reforms introduced were intended to reduce the stigma of bankruptcy for entrepreneurial business debtors.³⁵² The new provisions included in the Enterprise Act enable an individual to be discharged from debt after twelve months, and a discharge can be obtained even earlier if the official receiver considers that investigation of the debtor's conduct and affairs is unnecessary, or has been concluded, and files a notice with the court to that effect.³⁵³ Further provisions of the Enterprise Act also provide for streamlined administration proceedings, the eventual abolition of administrative receiverships, and the abolition of the preferential claims of the state (Crown) in respect of certain taxes.³⁵⁴

3.2.1 Insolvency Regulation as Envisaged by the *Cork Report*

Over time, various committees³⁵⁵ were established whose main task it was to review certain aspects pertaining to English insolvency law.³⁵⁶ In the early seventies the UK's accession to the membership of the EEC demanded that it negotiate with other member states concerning a draft EEC Bankruptcy Convention. In order to advise the then

³⁴⁷ Fletcher 17.

³⁴⁸ Although it received the Royal Assent and became law on 1985-10-30, the government decided to delay implementation of all but a few of its provisions and to draw up a new Act, consolidating its provisions with those parts of the Companies Act 1985 dealing with receivership and winding-up. This became the Insolvency Act 1986. The Act received Royal Assent on 1986-07-25 and was brought into force on 1986-12-29.

³⁴⁹ Eg, the Insolvency Act 1994; the Insolvency (no 2) Act 1994; the Insolvency Act 2000 and the Human Rights Act 1998.

³⁵⁰ Insolvency Act 2000, which received Royal Assent on 2000-11-30.

³⁵¹ See (n 286).

³⁵² Ramsay "Bankruptcy in Transition" 225.

³⁵³ Insolvency Act 1986 s 279(2).

³⁵⁴ McKenzie-Skene "Reforming Insolvency Law: A Comparative Study of Scotland and South Africa" (2005) *Nottingham LJ* 17.

³⁵⁵ The committees that were formed to look into aspects of individual insolvency law were the MuirMackenzie Committee (1906 Cd 4068); the Hansell Committee (Cmnd 2326 1925); and the Blagden Committee (Cmnd 221 1957). See also Fletcher 15.

³⁵⁶ Fletcher 15. See also Burdette 85-90 for a discussion of the *Cork Report*.



Department of Trade and Industry, an advisory committee under the chairmanship of Sir Kenneth Cork was appointed.³⁵⁷ Cork's resultant first *Report* emphasised the need for a comprehensive review of the insolvency law³⁵⁸ and in January 1977 the Review Committee on Insolvency Law and Practice,³⁵⁹ again with Cork as chairman, was established.³⁶⁰

The work of the Committee was considerably affected by the change in government in May 1979, when the incoming administration embarked on a mission to cut public expenditure.³⁶¹ In August 1979 the government approached the Committee and requested an early indication of its recommendations. The Committee's response took the form of an Interim *Report* submitted to the Secretary of State in October 1979 and published in July 1980.³⁶² At the same time as the Cork Committee's Interim *Report* was published, the government issued a consultative document in the form of a Green Paper.³⁶³ The recommendations of the latter dealt almost exclusively with the manpower implications of the operation of the Insolvency Service and contained radical proposals for the effective privatisation of insolvency procedures and the virtual elimination of the close involvement of the official receiver.³⁶⁴ The proposals were severely criticised, and the most trenchant criticisms were those later included in the Cork Committee's final *Report*.³⁶⁵

The Cork *Report* in its final form was published in June 1982 and produced a set of "aims of a good modern insolvency law".³⁶⁶ The 460-page document provided a sustained

³⁵⁷ Finch *Corporate Insolvency Law* (2002) 11 (hereafter referred to as Finch).

³⁵⁸ Similar reviews and reforms were taking place in other European and Commonwealth countries: Austria (1982); Denmark (1977); France (1984 and 1985); Italy (1979). See Aminoff 129.

³⁵⁹ Hereafter referred to as the Cork Committee.

³⁶⁰ For a discussion of the events that led to the setting up of the Cork Committee, see Fletcher 14-15.

³⁶¹ Fletcher highlights the fact that the Law Commission of England and Wales did not take part in the reform process, and the Cork Committee also had limited resources. Therefore little or no specially commissioned research or empirical studies were undertaken except those that the members themselves were responsible for.

³⁶² Cmnd 7968: *Bankruptcy: Interim Report of the Insolvency Law Review Committee*. See Fletcher 17.

³⁶³ Cmnd 7967: *Bankruptcy: A Consultative Document*.

³⁶⁴ Fletcher 17.

³⁶⁵ See also the remarks regarding the Cork *Report* in Dalhuisen par 3.08[4] 1-93.

³⁶⁶ Finch "The Measures of Insolvency Law" (1997) *Oxford Journal of Legal Studies* 227 (hereafter referred to as Finch "The Measures of Insolvency Law"). For a detailed discussion of the recommendations see Fletcher 14-20.



critique of contemporary law, and contained a set of recommendations that would come to constitute the foundations of modern English insolvency law.³⁶⁷ Some of the main recommendations pertaining to the regulation of insolvency law were the following:

- a Unified insolvency courts should be created to administer the law;³⁶⁸
- b The role of the official receiver should be maintained, and his or her powers and responsibility should be sharpened;³⁶⁹
- c All insolvency practitioners belonging to the private sector should be subject to professional regulation to ensure appropriate standards of competence and integrity.³⁷⁰

The Cork Committee was *inter alia* strongly opposed to proposals mentioned in the government's Green Paper relating to the withdrawal of the official receiver. The writers criticised the recommendations made by the government's Green Paper, arguing that the withdrawal of the official receiver from all personal bankruptcy responsibilities was motivated by one thing only: saving costs and lowering public expenditure.³⁷¹ It was also emphasised that this would signal a return to the system of creditor control, which had been a part of English law until 1883 and had ended in a dismal failure. The *Report* made the following statement in this regard:

... while the method of control over the administration of bankruptcy varies from country to country, in almost all bankruptcy systems creditors were originally given the primary responsibility for administering the process. In country after country however, this had led to scandal and abuse, and exclusive control has been progressively removed from creditors and varying degrees of official control have been introduced as it has increasingly accepted that the public interest is involved in the proper administration of the Bankruptcy system.³⁷²

³⁶⁷ Finch 12-13.

³⁶⁸ Cork *Report* ch 20.

³⁶⁹ Cork *Report* ch 14.

³⁷⁰ Cork *Report* chs 15-16.

³⁷¹ Cork *Report* ch 14 paras 695-701.

³⁷² Cork *Report*, ch 14 par 702.



At the time of the Cork Committee's study, insolvency practitioners were not required to have particular qualifications and this aspect was identified by many as a major weakness in the system.³⁷³ The *Cork Report* also recommended a change in attitude towards the regulation of insolvency practitioners and proposed that the insolvency practice be subject to strict professional regulation.³⁷⁴ The writers argued that an improvement of "the standard of administration of insolvent estates" could only be achieved if minimum qualifications were set for individuals acting as insolvency practitioners.³⁷⁵ The justification for introducing the statutory regulation of insolvency practitioners was to reduce court involvement in certain areas of insolvency practice.³⁷⁶

An interesting aspect of the reform process was the subdued role played by the English judiciary. The Lord Chancellor's department nevertheless did comment on the Cork Committee's particular proposal to create a specialised Insolvency Court.³⁷⁷ The recommendations of the Committee amounted to the redirection of as much insolvency work as possible from the courts, although the courts would still be involved in the more complicated cases.³⁷⁸ The newly proposed rationalised system had been aimed at ensuring that when a case was heard by the courts, the jurisdiction was clear, judges were competent, and the action was swift.³⁷⁹ English judges would subsequently wage a campaign to maintain the court system they preferred, and in turn the Lord Chancellor merely informed his colleagues in cabinet, and the then Department of Trade and Industry, that he rejected the proposal for a new insolvency court and the subject was closed.³⁸⁰

Of further significance is that although the *Cork Report* did conclude that it envisaged a greatly reduced role for the official receiver in view of the *Report's* own proposals for a Debt

³⁷³ Key 34.

³⁷⁴ Carruthers 59.

³⁷⁵ *The Times* (1982-04-04) at 49 as cited in Carruthers 59.

³⁷⁶ *Cork Report* par 1003. See Tolmie 198.

³⁷⁷ *Cork Report* par 1003.

³⁷⁸ *Cork Report* par 1003. See Milman 19.

³⁷⁹ *Cork Report*, paras 980, 985-88, 994.

³⁸⁰ Carruthers 64.



Arrangement Order, it did support the idea of a state regulated system.³⁸¹ The Cork Committee viewed the institution of the official receiver as vital to the protection of the public interest and maintaining public confidence in the law of bankruptcy.³⁸² As a result the cogent case argued in favour of the role of the official receiver most certainly influenced the present-day administrative and regulative provisions contained in the Insolvency Act 1986.³⁸³

3.3 REGULATORY FRAMEWORK: THE INSOLVENCY SERVICE

3.3.1 General

The most comprehensive review of English insolvency laws in over a century was introduced via the Insolvency Act of 1986.³⁸⁴ As noted above, the provisions of the Act were largely based on the recommendations contained in the *Cork Report* and entailed a far-reaching reconstruction of the law pertaining to both personal and corporate insolvency.³⁸⁵ The Insolvency Act 1986 was also responsible for introducing a number of watershed innovations to the regulatory model in place at the time and established the foundation for the regulatory and legislative framework of present-day bankruptcy law in England.³⁸⁶

At present the overall responsibility for the administration of insolvency law in England and Wales rests with the Department for Business, Innovation and Skills.³⁸⁷ Within the Department this responsibility is discharged by members of the Insolvency Service under the overall direction of the Inspector-General of the Insolvency Service.³⁸⁸ The latter is responsible for exercising a controlling and supervisory function with regard to all

³⁸¹ *Cork Report*, ch 14 paras 714-726, and ch 6. The *Report's* proposals for a Debt Arrangement Order did not subsequently form part of the following enacted legislation.

³⁸² *Cork Report* par 716. See Milman 20.

³⁸³ For a discussion of the events that led to only some of the *Cork Report* recommendations being implemented, see Fletcher 17-20.

³⁸⁴ Sealy 1.

³⁸⁵ For a detailed discussion of the recommendations included in the *Cork Report*, see Fletcher 20.

³⁸⁶ Fletcher 31.

³⁸⁷ See (n 339). Throughout this chapter, however, reference will be made to the Department of Business, Enterprise and Regulatory Reform (BERR) where applicable, as it had been the responsible department through most of the reporting period of this study.

³⁸⁸ Fletcher 32.



official receivers and insolvency practitioners.³⁸⁹ The Insolvency Service, an executive agency³⁹⁰ of the Department for Business, Innovation and Skills,³⁹¹ mainly acts as the interface between government and the various stakeholders in insolvency law, and although the ultimate responsibility rests with the Secretary of State for the Department for Business, Innovation and Skills, the day-to-day responsibility of supervision and control of the insolvency system is delegated to the Insolvency Service.

The Service is organised into two main branches: the official receivers operating from local offices throughout England and Wales, and the Service Headquarters, which is divided into a number of Directorates.³⁹² Accordingly, the Insolvency Service in its representative capacity administers the system of official receivers along with the control and supervision of all official receivers and private insolvency practitioners.³⁹³ The Insolvency Service thus delivers a wide range of often complex services in the fulfilment of its statutory objectives, and the bankruptcy system as a whole is affected by the role played by the Insolvency Service in which the official receiver is based.³⁹⁴

³⁸⁹ Fletcher 32.

³⁹⁰ The concept of an executive agency is part of the new public management initiatives that were introduced in many *Organisation of Economic Cooperation and Development* (OECD) countries in the 1990s according to which government should be run like a business, with a focus on outputs and quantification and a more competitive basis for providing public service. See Ramsay “Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales” (2006) *Theoretical Inquiries in Law* 625 at 659 (hereafter referred to as Ramsay “Functionalism and Political Economy”).

³⁹¹ The Insolvency Service’s staff is based in a network of 38 official receiver offices throughout England and Wales; the Enforcement Directorate and Headquarters in London, Birmingham, Manchester and Edinburgh; the Banking Section in Birmingham; and the Redundancy Payments offices in Edinburgh, Birmingham and Watford. As of 1 April 2006 the Companies Investigation Branch of DBERR transferred to the Service and is based in offices in both London and Manchester. See also <http://www.insolvency.gov.uk> (last visited at 09-11-30) for the official homepage of the Insolvency Service.

³⁹² Situated in London, Manchester, Leeds, Birmingham, Watford and Edinburgh.

³⁹³ Fletcher 32.

³⁹⁴ Milman 20.



3.3.2 Office of the Official Receiver

One of the principal focuses of the Insolvency Service is the administration of insolvencies undertaken by official receivers throughout England and Wales.³⁹⁵ The system of creditors' control of bankruptcy cases that existed from 1706 to 1831 and from 1869 to 1883 was replaced by a system of joint control, or creditor participation.³⁹⁶ Since the passage of the Bankruptcy Act of 1883 the conduct and in particular the administration of bankruptcy has been the province of either officials (civil servants) or private practitioners. The official receiver, as civil servant, was thus brought into existence by the Act of 1883. Official receivers act as statutory office-holders who have, in discharging their office as official receivers or trustees in relation to insolvency cases, a legal personality separate from the crown and the Secretary of State of the Department for Business, Innovation and Skills.³⁹⁷

The official receiver acts under directions, instructions and guidance from the Inspector-General of the Insolvency Service, and less often the Secretary of State, and as such the Insolvency Act 1986 indicates that the official receiver's functions are to be performed by persons appointed for this purpose by the Secretary of State.³⁹⁸ Section 400(2) of the Insolvency Act 1986 confers upon the official receivers the status of officers of court in relation to which they exercise the functions of their office.³⁹⁹ Thus, whenever statutory provisions specify that certain actions are to be performed by the official receiver, in practice this means that the official receiver attached to the court with jurisdiction in the case in question will undertake the requisite functions.⁴⁰⁰

³⁹⁵ Insolvency Act 1986 s 399(2).

³⁹⁶ Flynn *Administrative Support to the Judiciary in the UK Insolvency System* (2001) 1 unpublished paper presented at the Forum for Asian Insolvency Reform, Indonesia, (hereafter referred to as Flynn) on file with the author.

³⁹⁷ See Flynn 5; Fletcher 32.

³⁹⁸ The statutory provisions relating to the official receivers are contained in Pt XIV of the Insolvency Act 1986. See Insolvency Act 1986 s 399. See also Fletcher 32. See also *Guide to the Insolvency Service* available at <http://www.insolvency.gov.uk/guidanceleaflets/guides.htm#6> (last visited at 09-11-30) (hereafter referred to as the *Guide to the Insolvency Service*).

³⁹⁹ Section 400(3) provides that in any event where the receiver is succeeded in relation to his current functions, any property vested in the former receiver will automatically be transferred to his successor.

⁴⁰⁰ Fletcher 32.



The official receiver performs a variety of functions of which the most significant, in regard to individual debtors, is serving as trustee in bankruptcy cases in the event that a private-sector practitioner is not appointed or a vacancy in office occurs,⁴⁰¹ as well as performing an important investigatory function.⁴⁰² In practice the official receiver is also often appointed as provisional liquidator after the presentation of a winding-up petition, and here the primary object is to preserve the assets and to maintain the status quo.⁴⁰³ The dual status of the official receivers (statutory office-holders and officers of court) enjoys further practical recognition in the fact that, uniquely in insolvency proceedings, official receivers are able to make reports to the court and the law provides that such reports are *prima facie* evidence of the matters or facts contained in them. All other parties including any other office-holder seeking the court's intervention must adduce evidence by way of affidavit or statement of truth.⁴⁰⁴

Due to the fact that it has not been possible to service this market profitably, the English insolvency profession has shown little interest in the administration of estates of consumer debtors, and the overall majority of individual bankruptcy estates are processed by the Insolvency Service *via* a system of official receivers.⁴⁰⁵ Following the making of a bankruptcy order the official receiver becomes the receiver and manager of the bankrupt's estate and has the duty of protecting and preserving it for the benefit of the creditors.⁴⁰⁶ In due course the estate may become vested in a trustee in bankruptcy appointed by the creditors from among the ranks of the insolvency practitioners belonging to the private sector, but in the absence of such appointment the official receiver will himself become the trustee in

⁴⁰¹ See especially Insolvency Act 1986 ss 131-133; 136; 287; 288-291; 295 and 300. See also Company Directors Disqualification Act 1986 ss 6; 7(1)(b). See Fletcher 32.

⁴⁰² The official receiver also recently became involved in a new procedure of Debt Relief Orders (DROs). Pt 7 of the Insolvency Act 1986, inserted by the Tribunals, Courts and Enforcement Act 2007, s 108 together with Schedule 17. The aim is to provide a debt remedy aimed at the financially excluded, who have relatively low liabilities, little surplus income and few assets. Upon the receipt of an application the official receiver will be able to make the DRO administratively, without the involvement of the court.

⁴⁰³ Insolvency Act 1986 s 135(2). See Fletcher 694.

⁴⁰⁴ See Flynn 1; Milman 22; Fletcher 32.

⁴⁰⁵ There are presently 43 official receiver managing offices at 33 sites, organised into seven regional groups under a regional director. See *Guide to the Insolvency Service* 10. See also Ramsay "Functionalism and Political Economy" 658.

⁴⁰⁶ Insolvency Act 1986 section 287(1).



bankruptcy.⁴⁰⁷ The official receiver has similar powers to those of a court-appointed Receiver and is entitled to sell or dispose of any perishable goods or goods likely to diminish in value.⁴⁰⁸ While acting as manager of the estate the official receiver will take all necessary steps to protect the property of the estate.⁴⁰⁹

Initially the bankrupt has a statutory duty to hand over information to the official receiver regarding his affairs, dealings and transactions. The latter may also require the personal attendance of the bankrupt for a private examination and inquiry at all reasonable times.⁴¹⁰ Depending on the nature of the estate and the monetary value of the assets, the official receiver will consider convening a meeting of creditors to consider appointing a private-sector insolvency practitioner.⁴¹¹ In forming his or her judgment the official receiver will be guided by the information obtained in the bankrupt's statement of affairs, which the debtor must prepare.⁴¹² If the official receiver is of the opinion that such a meeting is unnecessary, he or she will notify the court as well as all creditors in the estate and the official receiver will automatically become the trustee *ex officio*.⁴¹³

The official receiver will also act as trustee in other matters where no private insolvency practitioner has been appointed, which may include cases where creditors fail to nominate a trustee at the first meeting of creditors or where the assets in the estate are insufficient to bear the cost of a private-sector appointment.⁴¹⁴ An important and indispensable requirement relevant to all cases where a person other than the official receiver has been appointed to act as trustee is that the person at date of appointment must be qualified to act as an insolvency practitioner.⁴¹⁵

⁴⁰⁷ Fletcher 47.

⁴⁰⁸ Insolvency Act 1986 s 287(2)(a) and (b).

⁴⁰⁹ Insolvency Act 1986 s 287(3).

⁴¹⁰ Insolvency Act 1986 s 291(4).

⁴¹¹ Insolvency Act 1986 s 293. The official receiver will make a decision within 12 weeks beginning with the day the bankruptcy order was made, to summon a general meeting of creditors for this purpose.

⁴¹² Insolvency Act 1986 s 288(1).

⁴¹³ Insolvency Act 1986 s 292(5).

⁴¹⁴ Insolvency Act 1986 s 293(3).

⁴¹⁵ Pt XIII of the Insolvency Act 1986.

On the making of a winding-up order the official receiver by virtue of his office also becomes liquidator of a company and continues in office until such time as another person becomes liquidator in accordance with the prescribed procedures.⁴¹⁶ Immediately after the making of the winding-up order the responsibilities of the official receiver are particularly substantial, and form a vital part of the winding-up process. After carrying out the initial duties with regard to the service and notification of the winding-up order, the official receiver must perform a series of tasks relating to the investigation of the company's affairs, and the preparation of information to be placed at the disposal of the creditors and shareholders at their meetings to be convened in due course.⁴¹⁷ He must also exercise a judgment as to whether these meetings should be convened, or whether an alternative course should be adopted.⁴¹⁸

The Enterprise Act has also made a number of significant administrative and procedural changes, which subsequently affected the role of the official receiver. Firstly, the oversight role of the receiver has been reduced in more mundane bankruptcy cases as the statutory duty to investigate is reduced to a mere discretion.⁴¹⁹ However, the official receiver is expected to have a key input into the operation of the bankruptcy restrictions order regime, which has been introduced as a mechanism to deal with abusive bankrupts.⁴²⁰ The Enterprise Act also reflects a new approach in that the management of the post-bankruptcy Individual Voluntary Arrangements,⁴²¹ or so-called fast-track IVAs,

⁴¹⁶ Insolvency Act 1986 ss 136(2); 137; 139; 140.

⁴¹⁷ Insolvency Act 1986 s 139.

⁴¹⁸ Insolvency Act 1986 s 136(4) confers upon the official receiver the discretion to decide whether meeting to elect a private-sector practitioner should take place. Section 137(1) enables the official receiver to make direct application to the Secretary of State for the appointment of a person as liquidator. See Fletcher 724.

⁴¹⁹ Enterprise Act 2002 s 258 replacing Insolvency Act 1986 s 289.

⁴²⁰ Enterprise Act 2002 s 257 inserting s 281A and Schedule 4A into Insolvency Act 1986. See Milman 114. See below for further discussion.

⁴²¹ Hereafter referred to as IVAs. See Pt VIII of Insolvency Act 1986; see Schedule 22 of Enterprise Act inserted ss 263A-G after Insolvency Act 1986 s 263 and inserted s 389B after Insolvency Act 1986 s 389A. In the UK, the IVAs are formal alternatives for individuals wishing to avoid petitioning for their own bankruptcy. The IVA was established by the Insolvency Act 1986 and constitutes a formal repayment proposal presented to a debtor's unsecured creditors *via* an insolvency practitioner. The proposal is presented to the debtor's unsecured creditors versus the debtor opting to petition for bankruptcy. The Enterprise Act 2002 also introduced the so-called Fast-Track Voluntary Arrangement, a new streamlined arrangement for debtors who are already bankrupt. A debtor can submit a proposal to

is to be vested exclusively in the hands of the official receiver.⁴²² The idea behind the creation of this monopoly is that the official receiver is a public agency, is already in possession of the information relating to the debtor, and will be able to deliver a more cost-effective and faster service than a private insolvency practitioner.⁴²³

Another innovative procedure introduced by the Enterprise Act is the so-called early discharge.⁴²⁴ The Act provides for an automatic discharge of debts no later than one year after the commencement of the bankruptcy case, which represents a reduction from the previous period of three years.⁴²⁵ A discharge may be obtained even earlier than one year if the official receiver considers that an investigation into the conduct and affairs of the debtor is unnecessary, or has already been concluded, and files a notice with the court to this effect.⁴²⁶ The discharge releases the bankrupt from certain restriction in bankruptcy but does not terminate the powers of the trustee *vis-à-vis* the estate.⁴²⁷ The trustee may continue to finalise the administration of the estate and the bankrupt will receive the benefit of being relieved of the stigma of bankruptcy.⁴²⁸

3.3.3 Functions of the Insolvency Service

3.3.3.1 *General*

The Insolvency Service operates under a statutory framework – mainly the Insolvency Acts 1986 and 2000, the Company Directors Disqualifications Act 1986, the Employment Rights Act 1996 and more recently the Enterprise Act of 2002.⁴²⁹ The

the official receiver, who must consider whether there is a reasonable prospect of it being approved. The official receiver will act as nominee and supervisor of the proposal. See Fletcher ch 4.

⁴²² See Milman 20; Fletcher ch 4.

⁴²³ Ramsay “Bankruptcy in Transition” 219.

⁴²⁴ Section 256 of Enterprise Act read with Insolvency Act 1986 s 279.

⁴²⁵ With effect from 2004-04-01, Insolvency Act 1986 s 279.

⁴²⁶ Insolvency Act 1986 s 279(2). See Milman 123.

⁴²⁷ Milman 125.

⁴²⁸ Milman 124.

⁴²⁹ See also the Insolvency Service’s *Annual Report and Accounts* (2008-2009) presented to Parliament pursuant to s 7 of the Government Resources and Accounts Act 2000 (hereafter referred to as *Annual Report and Accounts* (2008-2009)).

Insolvency Service describes itself as existing “to ensure that financial failure is dealt with fairly and effectively, encouraging enterprise and deterring fraud and misconduct”.⁴³⁰ The operational areas of the Service can generally be divided into investigations and enforcement, insolvency regulation, and maintaining and developing the framework of insolvency legislation.⁴³¹ In its *Annual Report and Accounts*⁴³² the Service summarises its functions as follows:

The Insolvency Service:

- a administers and investigates the affairs of bankrupts, of companies and partnerships wound up by the court, and establish why they became insolvent;
- b acts as trustee/liquidator where no private sector insolvency practitioner is appointed;
- c acts as nominee and supervisor in fast-track individual voluntary arrangements;
- d acts on reports of bankrupts’ and directors’ misconduct;
- e deals with the disqualification of unfit directors in all corporate failures;
- f deals with bankruptcy restrictions orders and undertakings;
- g authorises and regulates the insolvency profession;
- h assesses and pays statutory entitlement to redundancy payments when an employer cannot or will not pay its employees;
- i provides estate accounting and investment services for bankruptcy and liquidation estate funds;
- j conducts confidential fact-finding investigations into companies where it is in the public interest to do so.
- k advises BERR⁴³³ [sic] ministers and other government departments and agencies on insolvency, redundancy and related issues; and
- l provides information to the public on insolvency and redundancy matters via our website, leaflets, Insolvency Enquiry Line and Redundancy Payments Helpline.⁴³⁴

The Minister of the Department for Business, Innovation and Skills determines the policy framework under which the Service operates and in turn the Inspector-General and Agency Chief Executive of the Insolvency Service report to the Minister on the execution

⁴³⁰ Tolmie 205.

⁴³¹ The Service also deals with redundancy payments and estate accounts. Certain payments owing to employees of an insolvent employer are guaranteed by the state and will be met out of the National Insurance Fund by the Redundancy Payments Office (this is a requirement of the EC Insolvency Directive EEC 80/987), which forms part of the Insolvency Service. Under pt 12 of the Employment Rights Act of 1996 (Employment Rights Act), Redundancy Payments Offices pay certain entitlements (within limits) owed to former employees of insolvent companies. This legislation guarantees a basic minimum payment to employees of insolvent employers, as they would otherwise have to wait some considerable time for payment, or get no payment, as creditors in the insolvency proceedings. See also *Annual Report and Accounts* (2008-2009) 52.

⁴³² *Annual Report and Accounts* (2008-2009) 9.

⁴³³ See (n 339).

⁴³⁴ *Annual Report and Accounts* (2008-2009) 3.



of such policy. Ministers do not generally become involved in the administration of individual cases that fall under the court's jurisdiction.⁴³⁵

3.3.3.2 *Investigations and Enforcement*

The Insolvency Service carries out a range of investigation and enforcement activities aimed at supporting fair and open markets and, where necessary, taking steps to remove individuals whose conduct has not been in the public interest.⁴³⁶ In every bankruptcy and compulsory liquidation the official receiver has a duty to investigate the affairs and causes of failure of the bankrupt or company and the conduct of the bankrupt or directors.⁴³⁷ The principle of a thorough and independent investigation into the causes of bankruptcy in English law was first introduced by the Bankruptcy Act of 1883.⁴³⁸ The Cork Committee was also a strong advocate for having robust investigation procedures linking the investigative duty with the idea of maintaining public confidence in the ability of the bankruptcy system to weed out abuse.⁴³⁹ The Insolvency Service also declares that "Our enforcement regime aims to ensure that dishonest, reckless or irresponsible people are identified and dealt with in a timely manner. We rigorously pursue directors and bankrupts where there is evidence of financial misconduct or criminality."⁴⁴⁰

After the making of the bankruptcy order the official receiver undertakes a series of duties. In the first place it is the duty of the official receiver to undertake an investigation into the conduct and affairs of every bankrupt, and to make any reports to the court which he or she deems necessary.⁴⁴¹ Whether or not the official receiver acts as the final trustee in the estate, he or she remains responsible for the investigation.⁴⁴² Previously it was

⁴³⁵ *Annual Report and Accounts* (2008-2009) 4.

⁴³⁶ *Annual Report and Accounts* (2008-2009) 22.

⁴³⁷ *Guide to the Insolvency Service* 12.

⁴³⁸ Tolmie 32.

⁴³⁹ See Milman 88; Fletcher 48; *Cork Report* par 238.

⁴⁴⁰ *Annual Report and Accounts* (2008-2009) 22.

⁴⁴¹ Tolmie 207.

⁴⁴² See *Guide to Insolvency Service* available at <http://www.insolvency.gov.uk/pdfs/guidanceleafletspdf/guidetoIS.pdf> (last visited at 30-11-09).

expected of the official receiver to launch an investigation in regard to all bankrupts, but this requirement was quite sensibly moderated by the Enterprise Act, which bestowed on the official receiver a discretion to carry out investigations only where these were deemed necessary.⁴⁴³ This judgment will rest on bureaucratic guidelines, as the legislation is silent on the criteria to be applied.

This initial investigation by the official receiver will be supported by the statutory obligation of the bankrupt to supply the official receiver with information in the form of *inter alia* a statement of affairs.⁴⁴⁴ The bankrupt is also under an obligation to hand over to the Receiver all books, papers and records which relate to his estate and affairs.⁴⁴⁵ The official receiver may also require that accounts relating to the three years prior to bankruptcy be submitted.⁴⁴⁶ Where a winding-up order has been made or a provisional liquidator appointed, the official receiver may require certain persons to submit to him a statement of the company's affairs as prepared in the prescribed form and verified by affidavit.⁴⁴⁷ The purpose of the investigation into the bankrupt's or company's conduct and affairs is mainly to ascertain the reasons for his insolvency and also to establish the value and whereabouts of all assets of the bankrupt estate and the validity and amount of all alleged liabilities. The official receiver's report of his or her findings becomes an important part of the record and may be referred to for a variety of purposes, including at the time when the bankrupt's discharge is under consideration.⁴⁴⁸

A more immediate purpose for which the official receiver's findings are employed is in relation to the decision whether or not to apply for the holding of a public examination of the

⁴⁴³ Insolvency Act 1986 s 289. Milman 88.

⁴⁴⁴ Insolvency Act 1986 ss 272 and 288 read with rr 6.41; 6.68; 6.58-63 of Insolvency Rules 1986. Those made bankrupt on their own petition will have submitted a statement of affairs with the petition and a bankrupt made bankrupt on a creditor's petition is required to submit a statement within 21 days.

⁴⁴⁵ Tolmie 225. See s 291 of Insolvency Act.

⁴⁴⁶ Regulations 6.64-65; 6.69-71 of Insolvency Rules 1986. The court may even on application of the official receiver order that the bankrupts mail be re-directed for up to three months. In *Foxley v United Kingdom* (2001) 31 EHRR 25 the European Court of Human Rights held that while the interception of correspondence was capable of breaching Art 8 of European Convention an order under s 371 of Insolvency Act would not in principle be a breach since it would be granted accordance with the law and in furtherance of the protection of the "rights of others" for the purposes of par 2 of Art 8.

⁴⁴⁷ Insolvency Act 1986 ss 131(1), (3), Insolvency Rules rr 4.32, 4.33; Forms 4.16, 4.17. See Fletcher 705.

⁴⁴⁸ Fletcher 189.



bankrupt at a duly convened sitting in the court.⁴⁴⁹ The protection of the public by the gathering of as much information about the debtor and his or her affairs as possible has traditionally been regarded as one of the most important aspects of the bankruptcy process.⁴⁵⁰ The interrogation may be carried out by the official receiver, the trustee in bankruptcy, and the creditors who have tendered proof of debts, and questions may also be put by the court itself. Debtors must answer all questions which the court allows to be put to them and cannot avoid doing so even though their answers may incriminate them.⁴⁵¹ In the case of a winding-up of a company the provisions in regard to a public examination are in all material aspects the same as those provisions in relation to the examination of a bankrupt. The official receiver has again been allocated the primary responsibility to exercise a judgment as to the appropriateness of conducting such an examination.⁴⁵²

Apart from the proceedings relating to a public examination, the court may also carry out a private investigation and there are wide statutory powers available to both the trustee of the estate and the official receiver to support this process.⁴⁵³ The court may on application by the official receiver or trustee summons before it the bankrupt, the bankrupt's spouse and anyone else thought to be in possession of property making up the bankrupt's estate or to be indebted to the bankrupt or otherwise able to give information concerning the bankrupt, his or her dealings, affairs or property.⁴⁵⁴ As a result of the cost of the procedure, private examinations tend to be the last resort for office-holders, except where it is critical to obtain evidence under oath.⁴⁵⁵

⁴⁴⁹ For a detailed discussion of the public examination proceedings refer to Keay 361-366 and Fletcher 189-190. Prior to the enactment of the Insolvency Act 1986 the public examination was obligatory except in cases where the court dispensed with the requirement. See s 15 of Insolvency Act 1914 and s 15 of Insolvency Act 1976 (both repealed).

⁴⁵⁰ *Re Cronmire* [1894] 2 QB 246. See also Fletcher 189.

⁴⁵¹ Tolmie 230-233. For a detailed discussion regarding the right to privacy and element of incrimination see Fletcher 165-166. See also *Bishopsgate Investment Management Ltd v Maxwell, Cooper* [1992] 2 All ER 856 for a summary of the process.

⁴⁵² The Insolvency Act 1986 ss 290, 133. See *Casterbridge Properties Ltd, Re* [2003] EWCA Civ 1246, [2003] 4 All ER 1041.

⁴⁵³ The Insolvency Act 1986 s 366. For a detailed discussion of the public examination proceedings refer to Keay 361-366; Fletcher 182-183; Milman 88.

⁴⁵⁴ Tolmie 227.

⁴⁵⁵ Keay 367.



The investigative process whereby an official receiver scrutinises the company's management and affairs may also be reinforced through the use of the procedure relating to private examinations of officers of the company.⁴⁵⁶ This procedure enables the officeholder to apply to court for the summoning before it of any officer of the company, or of various persons who may have relevant information regarding the formation, promotion, business, dealings, affairs or property of the company, or who may have in their possession any property of the company or who are supposed to be indebted to the company.⁴⁵⁷ There has been a vigorous exploration of the principles of application of section 236 of the Insolvency Act of 1986 in the courts and a fresh wave of contested proceedings has been generated since the entry into force of the Human Rights Act.⁴⁵⁸ Fletcher summarises the approach of the courts in his observation that the courts have been conscious of the need to balance a variety of different principles and divergent interests. These include the public interest in maintaining the confidence of society at large in the integrity and effectiveness of the legal mechanisms by which corporate behaviour is regulated. This in turn is seen to require the maintenance of credible and proportionate sanctions against those who abuse the privilege of limited liability.⁴⁵⁹

The investigative practice aims to ensure that the insolvency system is not abused and further aims to pursue dishonest bankrupts and directors. The discovery of any traces of misconduct during the investigation may have several consequences and the process could lead to further restrictions to which a bankrupt may be subjected. If the official receiver is of the opinion that the conduct of a bankrupt has been dishonest or blameworthy in some way, he will report the facts to the court and request a “bankruptcy restriction order”.⁴⁶⁰ The Enterprise Act introduced two forms of post-discharge restrictions – namely, the bankruptcy restriction order and a “bankruptcy restriction

⁴⁵⁶ The Insolvency Act 1986 s 236.

⁴⁵⁷ The Insolvency Act 1986 s 236(2).

⁴⁵⁸ *Joint Administrators of Cleverbay Ltd v Bank of Credit and Commerce International SA (Cleverbay Ltd (no 2) Re)* [1991] Ch 90; [1990] 3 WLR 574 (CA). See Fletcher at 710 for a detailed discussion of the case.

⁴⁵⁹ Fletcher 710.

⁴⁶⁰ Section 281 A together with schedule 4A was inserted into the Insolvency Act 1986 with effect from 2004-04-01 by the Enterprise Act.



undertaking”.⁴⁶¹ The essential difference is that a bankruptcy restriction order is imposed by an order of the court, whereas a bankruptcy restriction undertaking is based on an undertaking offered by the bankrupt to the Secretary of State and the subsequent formal acceptance by the latter.⁴⁶²

In the case of a bankruptcy restriction order an application to court will be made by the Insolvency Service, where on the basis of the report of the official receiver, in the opinion of the Secretary of State it appears expedient to the public interest that such an order should be made.⁴⁶³ In practice the application is made by the official receiver and must be made within one year of the commencement of the bankruptcy order.⁴⁶⁴ The court shall grant an application for a bankruptcy restrictions order if it believes it to be appropriate having regard to the conduct of the bankrupt (whether before or after the making of the bankruptcy order).⁴⁶⁵ The consequences of the bankruptcy restriction order will be that the bankrupt cannot be involved in the management of limited companies without the leave of the court, cannot obtain credit of £500 without disclosing that he is subject to a restriction order, and if he trades in a name other than that in which he was declared

⁴⁶¹ Insolvency Act 1986 schedule 4 A par 2(1).

⁴⁶² The effect of s 257 of and the schedule 20 of the Enterprise Act is to insert s 281A into the Insolvency Act. Section 281 A provides that schedule 4A to this Act (bankruptcy restrictions order and bankruptcy restrictions undertaking) shall have effect. See Tolmie 240

⁴⁶³ Tolmie 240. See schedule 4 A paras 4-7.

⁴⁶⁴ The application must be made either by the Secretary of State or the official receiver. The bankruptcy restriction order falls squarely within the public law dimension of English insolvency law. See Milman 85.

⁴⁶⁵ When making the bankruptcy restriction order the court will in particular take into account the following: failing to keep records which account for a loss of property by the bankrupt, or by a business carried on by him, where the loss occurred in the period beginning two years before petition and ending with the date of the application; failing to produce records of that kind on demand by the official receiver or the trustee; entering into a transaction at an undervalue; giving a preference; making an excessive pension contribution; failing to supply goods or services which were wholly or partly paid for which gave rise to a claim provable in the bankruptcy; trading at a time before commencement of the bankruptcy when the bankrupt knew or ought to have known that he was himself to be unable to pay his debts; incurring, before commencement of the bankruptcy, a debt which the bankrupt had no reasonable expectation of being able to pay; failing to account satisfactorily to the court, the official receiver or the trustee for a loss of property or for an insufficiency of property to meet bankruptcy debts; carrying on any gambling, rash and hazardous speculation or unreasonable extravagance which may have materially contributed to or increased the extent of the bankruptcy or which took place between presentation of the petition and commencement of the bankruptcy; neglect of business affairs of a kind which may have materially contributed to or increased the extent of the bankruptcy; fraud or fraudulent breach of trust; or failing to cooperate with the official receiver or the trustee. See also Insolvency Act 1986 schedule 4 A par 2(2).



bankrupt, the earlier name must be disclosed.⁴⁶⁶ A breach of the terms will be a criminal offence punishable by a fine and/or imprisonment.⁴⁶⁷

A bankruptcy restriction undertaking offers the bankrupt the option of entering into an undertaking on terms agreed between the bankrupt and those acting on behalf of the Secretary of State, whereby the bankrupt accepts that for an agreed time he or she shall be subject to certain restrictions identical to those imposed under a bankruptcy restriction order.⁴⁶⁸ In considering the offer the Secretary of State would be seeking to achieve the same level of protection for the public interest as is the aim of the court in deciding the terms of a bankruptcy restriction order.⁴⁶⁹

Under the Company Directors Disqualification Act⁴⁷⁰ a statutory obligation is cast upon every office-holder in insolvency proceedings relating to companies to report forthwith to the Secretary of State any evidence which amounts to the demonstration of unfitness to be concerned in the management of a company.⁴⁷¹ If the official receiver is of the opinion that the court is likely to make a disqualification order, a detailed report will be forwarded to the Service's Enforcement Directorate. The Directorate will subsequently decide whether it is in the public interest to apply for such a disqualification order. Procedural changes to streamline the operation of the disqualification process have been brought about by legislative amendments imported by the Insolvency Act 2000.⁴⁷² The Company Directors Disqualification Act now enables the Secretary of State to accept a disqualification

⁴⁶⁶ Insolvency Act 1986 s 360 as amended by the Enterprise Act.

⁴⁶⁷ These consequences are imposed for a minimum of two years to a maximum of fifteen years.

⁴⁶⁸ See par 7 of Insolvency Act 1986 schedule 4A. See also Fletcher 377.

⁴⁶⁹ Fletcher 375.

⁴⁷⁰ Company Directors Disqualification Act 1986 c.46. Hereafter referred to as the Company Directors Disqualification Act.

⁴⁷¹ Section 6 of Company Directors Disqualification Act.

⁴⁷² Section 1A imported into the Company Directors Disqualification Act by s 6 of the Insolvency Act 2000. See Fletcher 880; Walters "Director's Disqualification after the Insolvency Act 2000: the New Regime" (2001) *Insolvency Lawyer* 86 (hereafter referred to as Walters "Director's Disqualification after the Insolvency Act 2000").



undertaking through a procedure which avoids the need for a formal court hearing, but has the same consequences as though a disqualification order has been made by the court.⁴⁷³

The Service's Enforcement Directorate also considers reports by the official receivers and insolvency practitioners with regard to possible criminal offences committed by bankrupts or directors of insolvent companies. If the allegations are considered serious enough, it refers the case to a prosecuting or investigatory authority such as the Department's Legal Services Directorate or the Serious Fraud Office. If enough admissible and reliable evidence exists these authorities would decide whether it is in the public interest to prosecute such an individual.⁴⁷⁴

3.3.3.3 *The Regulation and Supervision of Insolvency Practitioners*

Despite the fact that the principal impetus for the bringing into being of the official receiver was the large number of scandals during the period of 1830-1860 involving bankruptcy trustees in particular, private-sector insolvency practitioners have always played a major role in the administration of insolvencies.⁴⁷⁵ English law does not recognise the "debtor in possession" model which permits debtors who have become subject to the bankruptcy process to retain control of their assets.⁴⁷⁶ The law instead requires that in bankruptcy cases some independent person of proven professional ability undertake this task having been appointed by the court to act as such.⁴⁷⁷ The *Cork Report* argued vigorously for the introduction of a system of centralised, ministerial control over all persons who are appointed to hold office in insolvency proceedings.⁴⁷⁸ The reform of the insolvency practice and the formation of a new insolvency practitioner's profession was a cornerstone of the *Cork Committee's Report*.⁴⁷⁹

⁴⁷³ See Fletcher at 880 for a detailed discussion of the procedures relating to a disqualification order and undertaking.

⁴⁷⁴ *Guide to Insolvency Service* 12.

⁴⁷⁵ Flynn 1.

⁴⁷⁶ As is the case in a ch 11 proceedings in US law. See ch 11, title 11, US Code. See Milman 67.

⁴⁷⁷ Milman 67.

⁴⁷⁸ Fletcher 23.

⁴⁷⁹ Carruthers 68.



Most of the recommendations were subsequently implemented by the Insolvency Act of 1986, and the mandatory licensing of all persons wanting to be recognised as insolvency practitioners was instated.⁴⁸⁰ The reformers and government chose the classic approach of licensing professionals through statutory mandate. But since this was a government wary of professional monopolies, it created a hybrid of a profession that kept the government's hand in the formulation and enforcement of professional ethics, and maintained its capacity to adjust the rate of admissions into the profession.⁴⁸¹

In relation to an individual, a person will be acting as an insolvency practitioner when appointed as a trustee in bankruptcy,⁴⁸² interim receiver⁴⁸³ of a property, as permanent or interim trustee in the sequestration of an estate or as supervisor⁴⁸⁴ of a voluntary arrangement.⁴⁸⁵ It should at this stage be noted that as private practitioners lawyers play a very limited role, mainly because personal insolvency work is not seen to be very profitable and for this reason the insolvency profession has mainly been dominated by the accounting profession.⁴⁸⁶ This compares dramatically to the position in the US, where the lawyer has always occupied a central position.⁴⁸⁷

⁴⁸⁰ Fletcher 28.

⁴⁸¹ Ramsay "Professionals in Systemic Reform of Bankruptcy Law: The 1978 US Bankruptcy Code and the English Insolvency Act 1986" (2000) *American Bankruptcy LJ* 35 at 71 (hereafter referred to as Ramsay "Professionals in Bankruptcy Reform").

⁴⁸² Insolvency Act 1986 ss 292 and 293. Where a bankruptcy order has been made and no certificate for the summary administration of the bankrupt's estate has been issued, it is the duty of the official receiver, as soon as practicable in the period of 12 weeks beginning with the day on which the order was made, to decide whether to summon a general meeting of the bankrupt's creditors for the purpose of appointing a trustee of the bankrupt's estate.

⁴⁸³ Insolvency Act 1986 s 286. The court may, if it is shown to be necessary for the protection of the debtor's property, at any time after the presentation of a bankrupt's petition and before making a bankruptcy order, appoint the official receiver to be the interim receiver of the debtor's property.

⁴⁸⁴ The Insolvency Act 2000 inserted a new s 389A into the Insolvency Act 1986, which authorises the Secretary of State to recognise bodies that are not licensed insolvency practitioners to act as nominees or supervisors of voluntary arrangements.

⁴⁸⁵ Insolvency Act 1986 ss 252 and 253. Application to the court for an interim order may be made where the debtor intends to make a proposal to his creditors for a composition in satisfaction of his debts, or a scheme of arrangement of his affairs. The proposal must provide for some person ("the nominee") to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation. This procedure makes provision for a moratorium for the insolvent debtor pending the implementation of a proposal to creditors.

⁴⁸⁶ The licensing framework for Insolvency Practitioners is set out in Insolvency Act 1986, Pt XIII. See Milman 21; Ramsay "Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy" (2000) *American Bankruptcy LJ* 399 (hereafter referred to as Ramsay "Market Imperatives").

⁴⁸⁷ Milman 21.



As mentioned, the Insolvency Service is within the present statutory framework responsible for authorising and regulating the insolvency profession and thus the Insolvency Service exercises the licensing function of the Secretary of State.⁴⁸⁸ The scheme of regulation is therefore that of government-monitored self-regulation and the regulatory structure consists of the following:

- a The Secretary of State for Department for Business, Innovation and Skills has powers to authorise practitioners directly or to delegate that power to professional bodies;⁴⁸⁹
- b The Insolvency Service as an agent of the Secretary of State directly monitors authorised insolvency practitioners;⁴⁹⁰
- c The Insolvency Service has jurisdiction to authorise insolvency practitioners who wish to provide services in Great Britain – that is, England, Wales and Scotland – according to the European Union Directive;⁴⁹¹

⁴⁸⁸ Norris *Insolvency Practitioner Regulation in the United Kingdom* (2004) unpublished paper presented at the Academics' Meeting of the INSOL Congress, Cape Town (hereafter referred to as Norris "Insolvency Practitioner Regulation") on file with the author.

⁴⁸⁹ To date, seven such professional bodies have been recognised by the Secretary of State. See Norris "Insolvency Practitioner Regulation" 4; see Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK* (2006) unpublished paper presented at the INSOL Europe Annual Conference, Romania (hereafter referred to as Walters "The Licensing, Regulation and Supervision of Insolvency Practitioners in the United Kingdom") on file with the author.

⁴⁹⁰ Insolvency Act 1986 s 393(1) contains the power to grant or refuse the authorisation to act as an insolvency practitioner. Where the Secretary of State refuses an application, or withdraws a holder's authority to act, the applicant or holder will be notified in writing, setting out the reasons for the refusal or withdrawal, and informing the interested party of the date the action will take effect. Insolvency Act 1986 s 396 introduces a more substantial procedure, which involves referring the case to the Insolvency Practitioners Tribunal (IPT). The Insolvency Practitioners Tribunal was established as an independent statutory body by the Insolvency Act, and its function is to deal with cases referred by the Secretary of State regarding whether or not an individual should be an authorised insolvency practitioner. See Insolvency Act 1986 ss 396-397. See also Fletcher 33.

⁴⁹¹ In the context of insolvency practitioners, the EU Directive The European Communities (Recognition of Professional Qualifications) Regulations 2007 SI 2781 /2007 implemented in part EU Directive 2005/36 provides that practitioners who have acquired professional qualifications in one relevant state (members of EEA and Switzerland) shall have access to that profession in the other relevant states. In practical terms an applicant from a relevant state who wishes to become established in another state (the host state) will be able to apply for authorisation to a competent authority and that authority will be required to recognise equivalent professional qualifications obtained in the applicant's home state or other relevant state where he or she is authorised to act in that state. The Insolvency Service has jurisdiction



- d The Insolvency Service as an agent of the Secretary of State accredits those professional bodies which license their members;⁴⁹² and
- e The professional bodies are responsible on terms agreed in memoranda of understanding (MoU) with the Secretary of State to oversee the professional and ethical standards, monitoring and discipline of those members who practise as insolvency practitioners.⁴⁹³

The present regulation of insolvency practitioners is derived from an inbuilt requirement within the Insolvency Act 1986 whereby eligibility to act as an office-holder in an insolvency proceeding is restricted to persons who are “qualified” within the meaning of the Act.⁴⁹⁴ The Act provides that a person is qualified to act as an insolvency practitioner only where he or she is authorised so to act by virtue of membership of a recognised professional body being permitted so to act by, or under the rules of, that recognised body or if he or she holds an authorisation granted by a competent authority.⁴⁹⁵ At present, the Secretary of State for the Department of Business, Innovation and Skills is the only recognised competent authority.⁴⁹⁶

To achieve the status of a recognised professional body, a professional body must satisfy the criteria in the Insolvency Act 1986, which provide that a body may be recognised if:

... it regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules act as insolvency

to authorise insolvency practitioners who wish to provide services in Great Britain (GB) – that is, England, Wales and Scotland.

⁴⁹² Insolvency Act 1986 s 391(2) if the Insolvency Act provides that the Secretary of State may declare a body to be a recognised Professional Body if it:

regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules to act as insolvency practitioners

a are fit and proper persons to act, and

b meet acceptable requirements as to education and practical training and experience.

⁴⁹³ Norris “Insolvency Practitioner Regulation” 4.

⁴⁹⁴ Fletcher 33. Insolvency Act 1986 s 389 makes it an offence to act as insolvency practitioner when he is not qualified to do so. The word “qualified” refers not only to a professional qualification but to a complex set of requirements.

⁴⁹⁵ Insolvency Act 1986 s 390(2). See Walters “The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK” 1-2.

⁴⁹⁶ Norris “Insolvency Practitioner Regulation” 4.



practitioners – (a) are fit and proper persons so to act, and (b) meet acceptable requirements as to education and practical training and experience.⁴⁹⁷

Any applicant wanting to act as an insolvency practitioner may thus obtain a licence to be authorised to act as such in one of two alternative manners, *viz* by virtue of membership of a recognised professional body, or by direct application to the Secretary of State.⁴⁹⁸ In both instances a licence will only be granted if a person has proved that he or she is a “fit and proper”⁴⁹⁹ person, and has satisfied the prescribed requirements for education⁵⁰⁰ and practical training and experience⁵⁰¹ within the meaning of the Insolvency Act of 1986.⁵⁰² The direct licensing of insolvency practitioners by the Secretary of State is governed by eligibility criteria similar to those which the recognised professional bodies are required to impose in relation to fitness and propriety and education and training requirements.⁵⁰³

The UK recently introduced new Insolvency Regulations with regard to the regulation of insolvency practitioners.⁵⁰⁴ The Insolvency Regulations represent a set of secondary legislation which makes detailed provision for the authorisation of insolvency practitioners

⁴⁹⁷ Insolvency Act 1986 s 391(2). The relevant order is the Insolvency Practitioners (Recognised Professional Bodies) Order 1986 (SI 1986/1764) under which the following bodies are recognised: the Chartered Association of Certified Accountants; the Institute of Chartered Accountants of England and Wales; the Institute of Chartered Accountants of Scotland; the Institute of Chartered Accountants of Ireland; the Insolvency Practitioners Association; the Law Society of Scotland; and the Law Society.

⁴⁹⁸ The concept of acting as an insolvency practitioner is dealt with in Insolvency Act 1986 s 388. Section 389(1) of the Act also makes it criminal offence punishable by imprisonment and/or a fine to act as an insolvency practitioner in relation to a company or individual when not qualified to do so. See Walters “The Licensing, Regulation and Supervision of Insolvency Practitioners in the United Kingdom” 1.

⁴⁹⁹ According to Reg 6 of Insolvency Practitioners Regs 2005.

⁵⁰⁰ Have passed the Joint Insolvency Examination set by the Joint Insolvency Examination Board.

⁵⁰¹ A common standard among the accountancy bodies is at least 600 hours of insolvency experience over a period of three years.

⁵⁰² Insolvency Act 1986 s 393(2).

⁵⁰³ Insolvency Act 1986 s 396-398.

⁵⁰⁴ Statutory Instrument 2005 no 524, the Insolvency Practitioners Regs 2005, which came into force on 2005-04-01. The UK recently introduced new Insolvency Regulations (Statutory Instrument 2005 no 524, the Insolvency Practitioners Regs 2005) in regard to the regulation of insolvency practitioners, and these came into force on 1 April 2005. Regulation 6 sets out the matters to be taken into account by a competent authority in deciding whether an individual is a fit and proper person to act as an insolvency practitioner. Regulations 7 and 8 set out prescribed requirements regarding education and training in relation to insolvency practitioners seeking an authorisation from a competent authority. A person will therefore not be able to accept an appointment as an insolvency practitioner if he or she is not authorised to do so by virtue of membership of a professional body recognised under the Insolvency Act 1986.



by the Secretary of State under the direct licensing alternative.⁵⁰⁵ In practice, the Insolvency Service and the recognised professional bodies have sought to achieve consistency through institutional mechanisms such as a memorandum of understanding⁵⁰⁶ entered into and the formation of a Joint Insolvency Committee,⁵⁰⁷ which acts as a forum for discussion and coordination.⁵⁰⁸

This obligation of “stewardship” is a common facet of English law in which one person is selected to oversee the assets of another. Clearly one consequence of this status is that trustees should not profit from handling the estate assets over and above their agreed remuneration. It should be noted further that any person in office in an insolvency proceeding appointed by the court is acting as an officer of court, and as such becomes subject to the duty to act honourably as laid down by the court in *Ex parte James*.⁵⁰⁹ The principle was stated as:

I am of the opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given to him by the Court and the Court regards him as its officer and he is to hold money in his hands upon trust for its equitable distribution among creditors. The Court, then finding that he has in his hands money which in equity belongs to someone else, ought to set example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.⁵¹⁰

⁵⁰⁵ Regulation 6 sets out the matters to be taken into account by a competent authority in deciding whether an individual is a fit and proper person to act as an insolvency practitioner. Regulations 7 and 8 set out prescribed requirements regarding education and training in relation to insolvency practitioners seeking an authorisation from a competent authority. See Calitz “The Role of the Master of the High Court” 735.

⁵⁰⁶ Available at www.insolvency.gov.uk/freedomofinformation/memorandum%20of%20Understanding.doc (last visited at 09-11-30).

⁵⁰⁷ Formation in 1999.

⁵⁰⁸ Walters “The Licensing, Regulation and Supervision of Insolvency Practitioners in the United Kingdom” 6.

⁵⁰⁹ (1874) LR 9 Ch App 609. It is often been said that the principle requires trustees to behave fairly and honourably, although, in practice, it seems to operate in favour of parties at whose expense the insolvent estate has been unjustly enriched in circumstances where assets have been handed over to the trustee on the mistaken assumption that the estate was entitled to them. See Walters “The Licensing, Regulation and Supervision of Insolvency Practitioners in the United Kingdom” 12. See also *Re Collins & Aikman Europe SA* [2006] EWHC 1343 (Ch).

⁵¹⁰ *Ex parte James* (1874) LR 9 Ch App at 614.



The Insolvency Practitioner Unit is responsible for all policy matters relating to the authorisation and regulation of insolvency practitioners, including the regulation of the Recognised Professional Bodies. The unit issues guidance to insolvency practitioners and provides advice to Ministers, officials and the public on the regulation of insolvency practitioners.

While the system of regulation in the UK is fairly well developed, it has not been without criticism. It has been suggested that the Insolvency Service's dual role of "regulator of regulator" and that of authorising body for the Secretary of State could result in a potential conflict of interest. This allegation has been denied by the Inspector-General of the Service and explained on the basis that the Service does not actively promote its power to license insolvency practitioners and in practice only does so in relation to a small number of individuals, currently totalling 92.⁵¹¹ The English licensing model has at times also been criticised as overly complex and fragmentary, and it has been objected that the number of recognised professional bodies causes confusion and leads to a duplication of resources and costs.⁵¹² In his response, the Inspector-General explained that this was due to the way in which the regulation of the insolvency profession has evolved. He argued that the real issue was whether the regulation was consistent, which he believed it to be.⁵¹³

3.3.3.4 Policy

The Ministerial responsibility for policy matters relating to insolvency law falls under the Department for Business, Innovation and Skills. In turn, the responsibility for the development and implementation of policy and of securing compliance with the

⁵¹¹ See Business and Enterprise Committee *The Insolvency Service: Sixth Report of Session (2008-09)* – House of Commons, April 2009 22 (hereafter referred to as *Business and Enterprise Committee Report*) on file with the author.

⁵¹² See Walters *First Report: Complaints Handling in the Insolvency Practitioner Profession* (Jan 2008) available at <http://ssrn.com/abstract=1094757> (last visited at 09-11-30) and *Second Report: Complaints Handling by the Regulators of Insolvency Practitioners: A Comparative Study* (Jan 2009) available at <http://ssrn.com/abstract=1310791> (last visited at 09-11-30) on file with the author.

⁵¹³ Business and Enterprise Committee *Report 22*.

insolvency legislation has been delegated to the Insolvency Service.⁵¹⁴ The Service is able to amend and modernise secondary insolvency legislation and issue new Insolvency Rules⁵¹⁵ to replace the current rules, which had been in force since 1986.

A distinctive feature of the Insolvency Service is the role it plays in the evaluation and development of insolvency law policy, procedures, and legislation as well as acting in an advisory capacity to Ministers and other government department and agencies on insolvency and related matters.⁵¹⁶ The extensive liaison with officials from HM Treasury in relation to the new modified insolvency regimes for banks, enacted through the Banking Act of 2009, serves as an example of the strategic and technical assistance provided by the Service to other departments. The project assisted in ensuring that the new legislation delivers appropriate variations from normal insolvency law required for financially distressed banks.⁵¹⁷

To meet its goal of ensuring that the legislative framework for insolvency is up to date, fit for its purpose and serves the needs of its users, the Service is involved in several evaluation and consultation projects and also undertakes and commissions research projects to further assist with policy-making and evaluation.⁵¹⁸ Several instances can be mentioned where the Insolvency Service has either been directly involved or has influenced the development of insolvency legislation or policy.⁵¹⁹

⁵¹⁴ Goode *Principles of Corporate Insolvency Laws* (2005) 17 (hereafter referred to as Goode).

⁵¹⁵ *Annual Report and Accounts* (2008-2009) 28.

⁵¹⁶ *Guide to Insolvency Service* 18.

⁵¹⁷ *Annual Report and Accounts* (2008-2009) 9.

⁵¹⁸ *Annual Report and Accounts* (2008-2009) 8. The Insolvency Service recently commissioned Michael Green, a Research Fellow of the University of Wales, to carry out research into IVAs, over-indebtedness and the insolvency regime. Report on file with the author.

⁵¹⁹ Following consultation and published information, the proposals for DRO were incorporated into the recent Tribunals, Courts and Enforcement Act 2007. The main effects of the Act are to introduce a package of measures to help those who are willing and able to pay off their debts over time and a new personal insolvency procedure for some people who have fallen into debt and have no foreseeable way out of it. The Act has its basis in a number of White Papers and consultation papers commissioned by the Service including “Relief for The Indebted – An Alternative to Bankruptcy”, on file with the author. The Service has also been directly involved in the development of new rules relating to pre-pack administrations. The new rules (Statement of Insolvency Practice number 16) will require administrators to explain to the creditors the background to their appointment and the reasons why they consider that a “pre-pack” sale would be the best outcome. Following consultation and published information, the proposals for debt relief orders were incorporated into the recent Tribunals, Courts and Enforcement Act 2007. The Insolvency Service established a stakeholder working group in 2004 to consider how the IVA regime could be improved. See



3.4 INSTITUTIONAL FRAMEWORK: ROLE OF THE COURTS

In many ways the courts are at the apex of the system, as they are, either on their own volition or upon applications made by interested parties, able to direct how an insolvency administration is to be conducted. They can also decide on contentious issues which may arise during the course of an insolvency administration. It is important to note that courts do not, as a matter of necessity, have to be involved in the daily process of administration except where they ought to be involved in the initiation of the process.⁵²⁰ With the view to providing a more efficient and expeditious judicial service, a bankruptcy court was established in London in 1831.⁵²¹ Although originally scheduled to merge with the Supreme Court of Judicature, the bankruptcy court in London functioned separately until finally merging with the High Court under the Bankruptcy Act of 1883. Under this Act the High Court acquired jurisdiction in bankruptcy, which it retains to the present day.⁵²²

The administration of personal and corporate insolvency matters has remained largely distinct, with bankruptcy matters being allocated in the first instance to the High Court Registrars sitting in court rooms designated as “bankruptcy courts”, while company winding-up proceedings are heard by judges or Registrars of the Chancery Division either in chambers or in the company court.⁵²³ It is thus only on appeals – either to a single judge of the Chancery Division or to the Court of Appeal – that cases from the two branches of insolvency law are likely to be heard or considered by judges from the same group.⁵²⁴

Initially, jurisdiction in bankruptcy outside London was vested in a system of District Bankruptcy Courts, but with the creation of county courts under the County Courts Act of

Roestoff “Debt Relief for Consumers – The Interaction between Insolvency and Consumer Protection Legislation (Part II)” 2005 *Obiter* 99 for a discussion of the alternative debt relief measures and proposals in the UK. The Service is also undertaking to modernise the insolvency legislation (Insolvency Rules Modernisation Project) and the first phase came into force in April 2009.

⁵²⁰ Keay 30.

⁵²¹ (1&2 Will 4, c 56): “An Act to establish a Court in Bankruptcy”. See Fletcher 31.

⁵²² Insolvency Act 1986 s 373(3)(a). See Fletcher 31.

⁵²³ Fletcher 31.

⁵²⁴ Fletcher 31.



1846 it became feasible to rationalise the administrative arrangements.⁵²⁵ Thus it came about that under the Bankruptcy Act 1847 certain county courts acquired exclusive control over bankruptcy matters outside London. This jurisdiction has been retained ever since in the bankruptcy proceedings taking place outside the area formerly known as the London Bankruptcy District, and renamed the London Insolvency District in 1986.⁵²⁶

At present no specialist insolvency court exists as part of English laws, and this state of affairs has attracted a mixed reaction by role-players.⁵²⁷ The Cork Committee in its final commentary was in favour of such an innovation, and called for the establishment of a new insolvency court with exclusive jurisdiction in all insolvency matters.⁵²⁸ It also recommended the introduction of a new institution with the objectives of giving consistency to decisions in insolvency matters and allowing judges to acquire a detailed knowledge of the subject for the benefit of the users of the system.⁵²⁹ Some of the judges were, however, opposed to such a development and viewed it as being pigeon-holed into a court with a specific jurisdiction. The Lord Chancellor simply informed his cabinet colleagues and the then Department of Trade and Industry that he rejected the *Cork Report's* proposal for a new insolvency court and the matter went no further.⁵³⁰ Over the years there have been certain writers who have also advocated the promotion of specialist judicial skills in the insolvency field.⁵³¹

⁵²⁵ Fletcher 31.

⁵²⁶ Insolvency Act 1986 s 374(4)(a) and Schedule 3 to the Civil Courts Order 1983 as amended. See Fletcher 26.

⁵²⁷ Milman 19.

⁵²⁸ *Cork Report* par 1003. Milman 19.

⁵²⁹ *Cork Report* par 1003. See also Aminoff 131.

⁵³⁰ Carruthers 63.

⁵³¹ Green *Individual Voluntary Arrangements: Over-indebtedness and the Insolvency Regime* (2002) on file with the author. See Milman 20.



CHAPTER 4: THE NETHERLANDS

4.1 INTRODUCTION

The basic origin of modern South African law remains the Roman-Dutch law as it was introduced in the southern part of Africa approximately four centuries ago.⁵³² In 1803 the establishment of the institution of the *Desolate Boedelkamers* in the Cape of Good Hope was a significant development in the historical evolution of state regulation in South African insolvency law, and also laid the foundation for the institution of the Master of the High Court.⁵³³ Although Dutch bankruptcy laws of today differ substantially from the days of the *Desolate Boedelkamers*⁵³⁴ it nevertheless seems appropriate to conclude this part with a brief discussion of the Dutch bankruptcy law as it functions today.

“It took from the English law of bankruptcy the provisions regarding the proof of debts, accounts and their confirmation and the rehabilitation and discharge of the debtor, and from Roman-Dutch law the rules relating to the vesting of ownership and preferences.”⁵³⁵

The legislation which established the principles of South African insolvency law, the 1843 Cape Ordinance,⁵³⁶ was a mixture of English and Roman-Dutch law.⁵³⁷ Thus in response to an argument by counsel about the relevance of an English case, in *Mills and*

⁵³² It should be noted that Roman-Dutch law is not the only system applied in South Africa. In certain fields indigenous African law is to be applied under certain circumstances to certain persons. See Van Warmelo “The Function of Roman Law in South African Law” (1958-1959) *Tulane LR* 565 (hereafter referred to as Van Warmelo). See, eg, *Fairlee v Raubenheimer* 1935 AD at 136; *Swadif (Pty) Ltd v Dyke* 1978 1 SA 928 (A) at 938; *Millman v Twiggs* 1995 3 SA 674 (A) 679 at 680.

⁵³³ The title of Master of the High Court (then Master of the Supreme Court) was bestowed in legislation of the Cape of Good Hope enacted during English rule in 1828. Stander “Geschiedenis van die Insolvensiereg” (1996) *TSAR* 371 (hereafter referred to as Stander “Geschiedenis van die Insolvensiereg”); De Villiers *Die Ou- Hollandse Insolvensiereg en die Eerste Vaste Insolvensiereg van de Kaap De Goede Hoop* (1923) 77 LLD dissertation University of Leiden (hereafter referred to as De Villiers).

⁵³⁴ See discussion in part II of this study.

⁵³⁵ Hahlo *The Union of South Africa: The Developments of its Laws and Constitution* (1960) 22 (hereafter Hahlo and Kahn).

⁵³⁶ See Bertelsmann *et al. Mars: The Law of Insolvency in South Africa* (2008) 11 (hereafter referred to as Mars); Stander “Geschiedenis van die Insolvensiereg” (1996) *TSAR* 377 (hereafter referred to as Stander “Geschiedenis van die Insolvensiereg”).

⁵³⁷ Also adopted in Transvaal, Natal and the Orange Free State in the nineteenth century. See Palmer *Mixed Jurisdictions Worldwide* (2001) 112 (hereafter referred to as Palmer).

Sons v Trustees of Benjamin Bros,⁵³⁸ De Villiers CJ noted that the terms of the 1843 Ordinance which define the rights vested in the trustee in insolvency “differ materially from those of the English law with regard to the assignee in bankruptcy”.⁵³⁹ The current insolvency statute, the Insolvency Act of 1936, is strongly influenced by the 1777 Ordinance of Amsterdam, as also noted in *Fairlie v Raubenheimer*.⁵⁴⁰ While Roman-Dutch law in its proper form ceased to be applied in the Netherlands as early as the beginning of the nineteenth century, it is still to be consulted by South African courts in questions on which the insolvency statute is silent.⁵⁴¹

The present Dutch civil code can be found in the *Nieuwe Burgerlijk Wetboek*⁵⁴² of 1992, the successor to the previous *Burgerlijk Wetboek* of 1938. While the present Code was substantially influenced by the French *Code Civil* supplemented with former Dutch law, it did adopt many Dutch innovations. A considerable part of the Code is based on joint roots of both French and Dutch law, as a result of their shared origin in Roman law.⁵⁴³ The main source of Dutch bankruptcy law is the Netherlands Bankruptcy Act 1896,⁵⁴⁴ and although the Act has been amended from time to time it has remained nearly unchanged.⁵⁴⁵ The Act consists of three different procedures of which the most important are the procedures relating to the suspension of payment (*surséance van betaling*)⁵⁴⁶ and bankruptcy proceedings (*faillissementsprocedure*).⁵⁴⁷ In 1998 as subtitle to the Dutch Bankruptcy Act, the Consumer Bankruptcy Act⁵⁴⁸ was enacted.⁵⁴⁹ At present the

⁵³⁸ (1876) 6 Buch 115 at 121.

⁵³⁹ As cited in Palmer 112.

⁵⁴⁰ 1935 AD 136 at 146.

⁵⁴¹ Palmer 112.

⁵⁴² Meijer “Influence of the Civil Code in the Netherlands” (2002) *European Journal of Law and Economics* 1 (hereafter referred to as Meijer).

⁵⁴³ Meijer 2.

⁵⁴⁴ Also referred to as *Faillissementswet* or *Fw*.

⁵⁴⁵ Declercq “Restructuring European Distresses Debt: Netherlands Suspension of Payment Proceeding ... The Netherlands Chapter 11?” (2003) *American Bankruptcy LJ* 377 at 384 (hereafter referred to as Declercq “Restructuring European Distresses Debt”).

⁵⁴⁶ Titel II art 213-283 *Fw*

⁵⁴⁷ Titel I art 1-213 *Fw*.

⁵⁴⁸ Also referred to as *Wet schuldsanering natuurlijke personen* or “Wsnp” (Act Debt Restructuring Private Individuals). Entered into force on 1 December 1998. See Title III art 213-283 *Fw*.

⁵⁴⁹ Declercq “Restructuring European Distresses Debt” 384. See also Huls “Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law” (hereafter



Netherlands is in the process of reviewing the 1896 *Faillissementswet*, with a preliminary draft for a new Dutch Insolvency Act⁵⁵⁰ recently presented to the Minister of Justice.⁵⁵¹ Due to the civil law nature of the Dutch bankruptcy law any reference to the underlying principles of their Code is of limited use to this study. However, when two jurisdictions that belong to markedly different legal cultures are compared, this recent statement in the House of Lords is particularly relevant: “The discipline of comparative law does not aim at a poll of solutions in different countries. It has the different and inestimable value of sharpening our focus on the weight of competing considerations”.⁵⁵² This means that the influence of comparative law in this type of study is that of finding inspiration in the process of weighing the arguments in favour or against a particular solution.⁵⁵³ At the same time, comparing countries with a similar legal history that nonetheless adopted different approaches to the development of insolvency law, and more specifically the regulatory aspects of the law, may be illuminating.

This chapter includes a brief overview of the historical development of Dutch bankruptcy law and a discussion of the Dutch regulatory framework in general. The three different bankruptcy proceedings available under the *Faillissementswet* will be discussed independently in order to illustrate the application of the Dutch regulatory provisions in practice.

4.2 HISTORICAL OVERVIEW OF THE DUTCH BANKRUPTCY LAW

Prior to 1799 no uniform bankruptcy legislation existed in the Netherlands. In 1799 a uniform Code of Civil Procedures was introduced which contained a chapter on

referred to as Huls) in Niemi-Kiesiläinen *Consumer Bankruptcy in Global Perspective*. For a detailed discussion of the Dutch bankruptcy law see Roestoff at 243-313.

⁵⁵⁰ Also referred to as *Voorontwerp Insolventiewet*.

⁵⁵¹ *Voorontwerp Insolventiewet* as compiled by the *Commissie insolventierecht* under the chairmanship of Professor Kortmann delivered to the Minister of Justice on 2007-11-01. See Kortmann *Geschiedenis van de Faillissementswet: Voorontwerp Insolventiewet* (2007) (hereafter referred to as Kortmann “Geschiedenis van de Faillissementswet”) on file with the author.

⁵⁵² Lord Steyn in *McFarlane v Tayside Health Board* 2000 SC (HL) 15.

⁵⁵³ Smits “Comparative Law and its Influence on National Legal Systems” 477 (hereafter referred to as Smits). in Reimann *The Oxford Handbook of Comparative Law* (2006).



bankruptcy law based on the 1777 Amsterdam Ordinance.⁵⁵⁴ In 1809 the Netherlands was occupied by the French and an amended version of the French Commercial Code was subsequently adopted.⁵⁵⁵ With French rule came a French way of running the state, which included a new system of positive law – the *Code Civil*.⁵⁵⁶ This practice remained in place for almost three decades and even though the Dutch legislators opted for a different approach, the *Burgerlijk Wetboek* of 1838 as well as the present-day Dutch civil code retains its strong French influence.⁵⁵⁷

Soon after the defeat of Napoleon and the regaining of independence in 1813, a new Dutch state was created comprising the Netherlands and Belgium. The French Codes were revised and adapted to suit the circumstances prevailing in the Netherlands and Belgium at the time.⁵⁵⁸ With regard to bankruptcy law certain draft proposals were presented in 1815 and onwards with the aim of returning to a system based on the Amsterdam Ordinance 1777.⁵⁵⁹ However, due to the dominant French influence as well as the fading desire to return to old Dutch traditions, none of the drafts were ever enacted.⁵⁶⁰ As a result the new draft Codes prepared in 1825 had a distinctly French flavour and were intended to apply only to merchants, while non-merchants were extensively dealt with in Book 11 of the Code of Civil Procedure, referred to as the *Staat van Kennelijk Onvermogen*.⁵⁶¹

Finally, with the introduction of the *Burgerlijk Wetboek* in 1838 provision was made for insolvency procedures which included both merchants and non-merchants, even though a different test for insolvency for each had been incorporated. The difference between the two procedures was finally abolished with the preparation and enactment of a new Act in 1893

⁵⁵⁴ Nederlandse Jaarboeken (1777) 291. See Dalhuisen par 3.03 [1] 1-68; Roestoff 246.

⁵⁵⁵ Dalhuisen par 3.03 [1] 1-68.

⁵⁵⁶ Roestoff 246.

⁵⁵⁷ Roestoff 246.

⁵⁵⁸ Dalhuisen par 3.03 [1] 1-68.

⁵⁵⁹ Dalhuisen par 3.03 [1] 1-68.

⁵⁶⁰ See Roestoff 247; Dalhuisen par 3.03 [1] 1-68.

⁵⁶¹ Dalhuisen par 3.03 [1] 1-69.



and in 1896 the *Faillissementswet*⁵⁶² was promulgated and remains in force today.⁵⁶³ Like other jurisdictions, the volume of consumer credit in the Netherlands grew exponentially from the late sixties to the late eighties, along with a growing incidence of excessive debt for some. The rising indicator of consumer economic distress became a cause for concern to policymakers who sought a legislative solution to the crisis. A report⁵⁶⁴ to the State Secretary of Justice caught the government's attention and subsequently the Mijnsen commission was appointed to investigate certain aspects of the Dutch bankruptcy laws.⁵⁶⁵ In October 1989 the commission issued a report containing a recommendation to introduce the concept of debt relief through voluntary debt settlement, which represented an important shift in the Dutch bankruptcy policy. The report was positively received and in 1992 a Government Reform Bill was introduced which subsequently became effective on 1 December 1998.⁵⁶⁶ The *Wet schuldsanering natuurlijke personen*⁵⁶⁷ added a new third and final title to the Dutch Bankruptcy Act of 1896.⁵⁶⁸

4.3 REGULATORY FRAMEWORK

4.3.1 General

The Dutch court plays a leading role in the regulation and interpretation of the bankruptcy laws, and although there is no system of specialised bankruptcy courts, each district court has a separate bankruptcy division. The judges acting in these divisions deal *inter alia* with petitions for suspension of payments and as *Rechter-commissaris* also acts

⁵⁶² Staatsblad 9.

⁵⁶³ Dalhuisen par 3.03 [1] 1-70. Roestoff 250.

⁵⁶⁴ Prepared by Prof NJH Huls. See Huls *Van Liquidatie tot rehabilitatie, Een beleidsgerichte verkenning naar de toepassingsmogelijkheden van het Amerikaanse faillissementsrecht voor particulieren* (November 1988). See also Verschoof *Schuldsaneringsregeling Voor Natuurlike Personen* (1998-12-17) (hereafter referred to as Verschoof).

⁵⁶⁵ Verschoof 12.

⁵⁶⁶ TK 1992-1993 22969, *Wijziging van de Faillissementswet in verband met de sanering van schulden van natuurlijke personen*. See Verschoof 13.

⁵⁶⁷ Also referred to as "WSNP".

⁵⁶⁸ Roestoff 250-255.

in a supervisory and advisory role to the trustee in bankruptcy.⁵⁶⁹ The Dutch regulatory framework consists of a system of court control whereby the districts court appoints a *Rechter-commissaris* entrusted with the supervision of the trustee's administrative actions. In the same judgment an administrator (*bewindvoerder*) or trustee (*curator*) is appointed and is charged with the administration and liquidation process. In the Netherlands usually an attorney at law is appointed.⁵⁷⁰

Relevant to this study is that the Netherlands law, and more specifically the current *Faillissementswet*, does not contain any formal requirements that have to be met for eligibility to act as a trustee. In practice, however, a certain selection process could be argued, as the courts almost always appoint a lawyer and in turn the *Advocatenwet*⁵⁷¹ sets forth certain statutory requirements in order to qualify for admission as a member of the bar.⁵⁷² In essence a person will approach the court with the request to be enrolled for appointment as trustee and each court will compile its own list of potential trustees. In recent years a tendency has arisen for courts to require successful attendance and completion of a specialised course developed by the *Grotius Academie*⁵⁷³ and the *Vereniging Insolventierecht Advocaten* (Insolad) or similar training as measurable entrance qualification.⁵⁷⁴ It remains clear, however, that no statutory guidelines, criteria or secondary legislation for the appointment or regulation of the Dutch trustee exist, and during the process of appointing a trustee the bankruptcy judge is not compelled to act according to any statutory limitations. A distinct feature of the Netherlands insolvency

⁵⁶⁹ Bekkers "Van Faillissementsrecht en Insolventie Recht naar het Recht Inzake Continuïteit- en Discontinuïteit-vraagstukken" (2005) *Kroniek van het Insolventierecht* (hereafter referred to as Bekkers) on file with the author.

⁵⁷⁰ Vriesendorp "The Righteous Trustee: The Influence of Creditors on the Appointment of a Bankruptcy Trustee from a Netherlands Perspective" (2008) *Potchefstroom Electronic LJ* (hereafter refer to as Vriesendorp "The Righteous Trustee"). Art 14 *Fw* en art 223a *FW*.

⁵⁷¹ A law was adopted on 1952-06-23 establishing the Bar of the Netherlands and laying down the internal regulations and the disciplinary rules applicable to *advocaten* and *procureurs* (the *Advocatenwet*, the Law on the Bar).

⁵⁷² Vriesendorp "The Righteous Trustee" 5

⁵⁷³ An institution for postgraduate legal education in the Netherlands.

⁵⁷⁴ Aimed at promoting uniformity among courts, the joint *Rechters-commissarissen* (*Recofa: Rechters-commissarissen in faillissementen*) recently published a set of bankruptcy guidelines regarding the provisions of *faillissementen* and *surseances van betaling*. See *Rechters-commissarissen in Faillissementen – Richtlijnen voor faillissementen en surseances van betaling* (2004), *bijlage bij TvI*, jaargang 11, januari 2005.



law is the lack of creditor participation in the appointment procedure and regulation process of the insolvency practitioner.

4.3.2 Bankruptcy (*Faillissement*)

The purpose of the Dutch bankruptcy proceedings is ultimately to liquidate all the debtor's assets for the benefit of his or her creditors.⁵⁷⁵ The debtor can voluntarily petition his or her own bankruptcy or creditors can file for a compulsory bankruptcy.⁵⁷⁶ For reasons of public order the public prosecutor can also file for bankruptcy of a debtor.⁵⁷⁷ The court will only proceed to declare a bankruptcy if the debtor "is in the situation of having stopped his payments".⁵⁷⁸ This will be considered the case if at least two creditors exist, and the debtor cannot, refuses to or simply does not pay one of the claims which has become due.⁵⁷⁹

Once the bankruptcy proceedings are confirmed the debtor loses the right to manage and dispose of his or her assets. In the judgment by which the debtor is declared bankrupt the court appoints a *Rechter-commissaris* (one of the members of the bench) and in the same judgment will appoint one or more independent persons to act as trustee(s) (*curator*) in the insolvent estate.⁵⁸⁰ As mentioned above, it is usually an attorney at law who is appointed.⁵⁸¹ The trustee is charged with the administration and liquidation of the bankruptcy estate and has the exclusive right to manage and dispose of the assets of the estate.⁵⁸² Simultaneously the district court will also appoint a *Rechter-commissaris*, who supervises the administration

⁵⁷⁵ Van Wijmen *Bankruptcy and a Fresh Start: Stigma on Failure and Legal Consequences of Bankruptcy, The Dutch Report 4* (2002-02-04) (hereafter referred to as the *Dutch Report*). See also Declercq "Restructuring European Distresses Debt" 384.

⁵⁷⁶ Artikel 1 *Fw*. Declercq "Restructuring European Distresses Debt" 384.

⁵⁷⁷ Artikel 1 *Fw*. Wessels *Insolventierecht I, Faillietverklaring* (2009) 107. See also Declercq "Restructuring European Distresses Debt" 384.

⁵⁷⁸ *Verkeert in de toestand dat hij heft opgehouden te betalen*. See Cork *European Insolvency Practitioners' Handbook: the AEPPC Compendium of Insolvency Law and Practice* (1984) 197 (hereafter referred to as *Cork European Insolvency Practitioners' Handbook*).

⁵⁷⁹ Declercq "Restructuring European Distresses Debt" 384.

⁵⁸⁰ Cork *European Insolvency Practitioners' Handbook* 199. See Declercq "Restructuring European Distresses Debt" 386.

⁵⁸¹ *Dutch Report 4*. Declercq "Restructuring European Distresses Debt" 384.

⁵⁸² Declercq "Restructuring European Distresses Debt" 386.



and liquidation of the estate and approves most of the legal steps the trustee undertakes.⁵⁸³ He or she is also responsible for convening creditors meetings for the proof of creditors' claims and will preside at these meetings.⁵⁸⁴ The *Rechter-commissaris* is also responsible for supervising the debtor. If the debtor refuses to co-operate with the trustee the *Rechter-commissaris* will request him to do so and could also sentence the debtor to detention. Creditors may also address the *Rechter-commissaris* with a request to hand certain orders down to the trustee.⁵⁸⁵

4.3.3 Suspension of Payments (*Surséance van Betaling*)⁵⁸⁶

The purpose of the suspension of payment proceedings is to give the debtor an opportunity to reorganise and to search for alternatives means of financing his or her debts and in order to continue his or her business. The proceedings are intended where the enterprise of the debtor is still viable, but are in temporary financial difficulties. The suspension of payment proceedings, however, is quite often only a gateway to ultimate bankruptcy.⁵⁸⁷

The petition for a suspension of payments will only be instituted at the request of the debtor him or herself. The criterion is that he or she foresees that he or she will no longer be able to pay his or her debts as they become due and payable.⁵⁸⁸ If at the same time both a petition for bankruptcy and a suspension of payment are pending before the court, the court will first deal with the latter. This is one of the reasons why debtors will make

⁵⁸³ Dutch Report 4-5.

⁵⁸⁴ Artikel 69 *Fw* Cork *European Insolvency Practitioners' Handbook* 198.

⁵⁸⁵ Cork *European Insolvency Practitioners' Handbook* 205.

⁵⁸⁶ The MDW Project, consisting of representatives of various Ministries under the chairmanship of Professor Raaijmakers, may have an effect on suspension of payment (*Surséance van Betaling*) procedures. The MDW project consists of two stages and the aim is investigate whether or not it is possible to enhance the "reorganisation ability" of the *Fw*. The first stage was completed in July 2000, with the submission of Bill 27 244 to the Second Chamber of Parliament. The Bill has not yet been adopted. The second stage is still ongoing and consists of in-depth consultations with all interested parties involved in the field of insolvency law. See Declercq "Netherlands Insolvency Law" 50-55.

⁵⁸⁷ See Dutch Report 4-5; Declercq "Restructuring European Distresses Debt" 385.

⁵⁸⁸ Cork *European Insolvency Practitioners' Handbook* 221.



use of these proceeding as a defence mechanism against a compulsory bankruptcy petition filed against their estate.⁵⁸⁹

In a suspension of payment process an independent third person, who will usually be an attorney at law, is appointed by the court to act as administrator(s) (*bewindvoerder*).⁵⁹⁰ The role of the *Rechter-commissaris* is however different from that of the *Rechter-commissaris* during bankruptcy proceedings as he or she acts in an advisory role only, and only at the specific request of the administrator.⁵⁹¹ The *Rechter-commissaris* does have the power to recommend the dismissal of an administrator.⁵⁹² After the suspension of payment is adjudicated, which occurs when the suspension of payment is granted in a court order, the administrator and the debtor are only allowed to continue with the business of the debtor with each other's consent.⁵⁹³ The administrator and debtor will therefore have to co-operate with each other. As Declercq remarks: "the debtor and administrator operate as Siamese twins in this regard".⁵⁹⁴

4.3.4 Debt Restructuring Private Individuals (*Schuldsaneringregeling Natuurlijke Personen*)

The debt-restructuring proceedings are regulated by the *Wet schuldsanering natuurlijke personen* and the aims of the Act are to offer a fresh start to over-indebted debtors who acted in good faith and to encourage more voluntary debt settlements by making judicial debt-adjusting financially less attractive to creditors.⁵⁹⁵ The Act applies to private individuals with or without a business. The core of the act is to provide private indebted individuals with the possibility of a fresh start (*schone lei*) and to prevent a lifelong debt responsibility.⁵⁹⁶

⁵⁸⁹ Dutch Report 5.

⁵⁹⁰ Artikel 215 par 2 *Fw*. See Dutch Report 6; Declercq "Netherlands Insolvency Law" 45.

⁵⁹¹ Artikel 223a *Fw*. See Declercq "Restructuring European Distresses Debt" 289. See also Dutch Report 6.

⁵⁹² Artikel 224 par 2 *Fw*.

⁵⁹³ Declercq "Restructuring European Distresses Debt" 386.

⁵⁹⁴ See Dutch Report 5- 6; Declercq "Netherlands Insolvency Law" 42.

⁵⁹⁵ Huls 303.

⁵⁹⁶ Roestoff 244.



To obtain the fresh start the debtor may approach the court with a debt-restructuring plan and if such plan is accepted an automatic stay will take effect and creditors will no longer have the right to claim outstanding debt.⁵⁹⁷ One of the requirements the court imposes before ordering the debt adjustment is that a debtor should previously have approached a debt management agency to negotiate a voluntary settlement and this negotiation should have failed.⁵⁹⁸ As part of the adjustment order the court will decide on the length of the payment period, the amount to be discharged and goods accruing to the estate. The debtor's entire capital and income above a certain legal minimum subsistence level is deposited into an estate account. At the end of more or less three years the proceeds are divided between creditors and as much of the debt as possible will be repaid to creditors.⁵⁹⁹

The court appoints a *Rechter-commissaris* and an administrator to supervise the debtor and to monitor the adjustment process.⁶⁰⁰ Any person may be appointed as an administrator and in some cases the court may even appoint a debt-relief social worker.⁶⁰¹ Only in the more complicated cases will an attorney be appointed. In order to be appointed as administrator, a debt-relief social worker will have to complete a training programme in the legal aspects of debt adjustment and will after successful completion be included in a register reserved for such purpose at court.⁶⁰²

The administrator is responsible for managing the debtor's assets and ensuring that he or she meets his or her obligations. He or she is also responsible for the success of the adjustment plan.⁶⁰³ It should be mentioned that the administrator may at some level be involved in drawing up the adjustment plan but it is important that he or she is not

⁵⁹⁷ Roestoff 244.

⁵⁹⁸ Huls 305.

⁵⁹⁹ Huls 305. On 2008-01-01 an amendment came into force which includes two new instruments – the so-called moratorium and the compulsory composition.

⁶⁰⁰ Huls 307. See also Verschoof 109.

⁶⁰¹ Verschoof 109. See also Dutch *Report 7*.

⁶⁰² Verschoof 109.

⁶⁰³ Artikel 316 *Fw*. See also Verschoof 107-108.



perceived to be a representative of the debtor, as he or she will have to at some stage express an independent opinion in regard to the merit of the plan.⁶⁰⁴

In contrast to the suspension of payment proceedings a *Rechter-commissaris* is appointed in each debt-restructuring case.⁶⁰⁵ The role of the *Rechter-commissaris* relates to the liquidation aspects of the estate as well as control over the decision-making process of the administrator.⁶⁰⁶ The *Rechter-commissaris* also has an additional duty to that of his colleague appointed in a bankruptcy case – that of supervising the successful execution of the court-approved adjustment plan.⁶⁰⁷ As a result the *Rechter-commissaris* in a debt-restructuring case will have periodic contact with the administrator in order to exercise his or her control over the estate.⁶⁰⁸ The new procedure therefore combines legal, economic and social aspects.⁶⁰⁹

4.4 VOORONTWERP INSOLVENTIEWET

The main source of the Netherlands bankruptcy law dates back to 1893 and during the past decade there have been various appeals for substantial changes to the *Faillissementswet*.⁶¹⁰ In April 2003 the *Commissie insolventierecht* was appointed, under chairmanship of Professor Kortmann, to advise government on legislation in the field of insolvency law and the appropriateness of law reform. Between 2003 and 2006 the *Commissie* issued various recommendations and concluded its mandate with the publication of the *Voorontwerp Insolventiewet* in November 2007.⁶¹¹

The foreword to the *Voorontwerp Insolventiewet* mentions that the launching of a new Insolvency Act does not suggest the introduction of an entirely new insolvency system.

⁶⁰⁴ Verschoof 110.

⁶⁰⁵ Verschoof 103.

⁶⁰⁶ Artikel 314 *Fw*. Verschoof 103.

⁶⁰⁷ Verschoof 104.

⁶⁰⁸ Verschoof 104.

⁶⁰⁹ Huls 312.

⁶¹⁰ See Vriesendorp *Wetgever: De Hoogste Tijd voor een Insolventiewet* (2000) TvI; Declercq *Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts* (2002) (hereafter referred to as Declercq “Netherlands Insolvency Law”).

⁶¹¹ Kortmann “*Geschiedenis van de Faillissementswet*” IX.



Important principles of the present legislation have been retained, and the updated legislation does not represent a new approach or philosophy towards insolvency law.⁶¹² One of the most important amendments to the present state of affairs is the introduction of a single insolvency procedure valid to both corporate and private individuals. As a result of this single-gateway approach the present regulatory framework and relationship between the administrator, creditors and the *Rechter-commissaris* would have to be adjusted to adapt to the recommended procedure.⁶¹³

From the available information it can with reasonable certainty be assumed that the fundamental principles of the Dutch regulatory model will not be fundamentally altered and the positions of both the *Rechter-commissaris* and *bewindvoerder* have essentially been retained. Nevertheless, the instances in which the *bewindvoerder* needs to obtain permission from the *Rechter-commissaris* have been significantly scaled down and as such there is a distinct shift in emphasis. The role of *bewindvoerder* has been extended so that this person becomes a central figure in the process of administering the estate in all different types of procedures and in this capacity acting first and foremost to the advantage of the collective group of creditors.⁶¹⁴ Apart from taking charge of the liquidation and the distribution of proceeds of the estate, the *bewindvoerder* has also been given strict and extensive information and consultation responsibilities towards the creditors. Additionally, the administration of the estate will now also include certain social responsibilities – *inter alia*, exploring the possibility of maintaining the debtor’s employment status.⁶¹⁵

⁶¹² Kortmann “*Geschiedenis van de Faillissementswet*” X.

⁶¹³ Vriesendorp “*Het Voorontwerp Insolventiewet afgezet tegen de Faillissementwet*” in Faber *De Bewindvoerder, Een Octopus* (2008) 15 (hereafter referred to as Vriesendorp “*Het Voorontwerp Insolventiewet afgezet tegen de Faillissementwet*”).

⁶¹⁴ Vriesendorp “*Het Voorontwerp Insolventiewet afgezet tegen de Faillissementwet*” 15.

⁶¹⁵ The management and supervision of the estate are dealt with in title 4 of the *Voorontwerp Insolventiewet*. See Kortmann “*Geschiedenis van de Faillissementswet*” 142; 272-309.



CHAPTER 5: INTERNATIONAL ORGANISATIONS

5.1 INTRODUCTION

In a world driven by credit, developing the means to effectively respond to default conditions is essential to foster commercial confidence and predictability. If properly designed, insolvency and creditor rights laws can contribute to the economic health of countries by providing a safety valve in the event of financial distress, reducing asset deterioration, and restoring balance to commercial relationships.⁶¹⁶

When considering global lawmaking, legal debate and literature is generally dominated by “public” or “hard law” matters based on state rights and obligations.⁶¹⁷ Hard law models and principles commonly take the shape of conventions, treaties, or any form of national legislation.⁶¹⁸ However, parallel to the continued development of traditional international law, a system of “private” or “soft law standards”⁶¹⁹ and obligations have been emerging. Generally, soft law is understood to mean a method of regulating certain issues in a non-enforceable way. It is created by participants directly involved in a certain sector or field by means of mutual discussion and agreement.⁶²⁰ In legal theory such uniform rules or codes are also presented as “new international law”.⁶²¹

Soft law can materialise in *inter alia* precedents, standards, principles, guides or guidelines, codes and records of certain customs. Since it is commonly accompanied by practical and efficient recommendations, which are based on broad support in the respective sector or group of interested parties, soft law in general advances and

⁶¹⁶ See introduction to the World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*) available at http://www.worldbank.org/ifa/ipg_eng.pdf (last visited at 09-11-30).

⁶¹⁷ Mistelis 1061.

⁶¹⁸ Mistelis 1061.

⁶¹⁹ Wessels *International Insolvency Law* (2006) 51 (hereafter referred to as Wessels *International Insolvency Law*).

⁶²⁰ Wessels “Insolvency Law” 294 (hereafter referred to as Wessels “Insolvency Law”) in Smits *Elgar Encyclopedia of Comparative Law* (2006).

⁶²¹ A convention takes the form of a multilateral treaty. Countries accede to a single standard. See Block-Lieb “Harmonization and Modernization in UNCITRAL’s Legislative Guide on Insolvency Law” (2007) *Texas International LJ* (hereafter referred to as Block-Lieb “Harmonization and Modernization”). See Mistelis 1061.

simplifies mutual communication and predictability of actions.⁶²² The development of soft standards also attempts to establish a form of harmonisation or international regulation of commercial law.⁶²³ This drive towards harmonisation also provides for a flexible and effective convergence of different legal systems and may also serve as a preliminary step towards the development of hard law.⁶²⁴

In the past few decades a number of national agencies along with international (inter-governmental or non-governmental) organisations have emerged.⁶²⁵ These organisations all employ different processes in promulgating rules and standards and operate independently from individual states and enjoy either acquired expertise in legislative drafting or have international experience by virtue of their membership.⁶²⁶ Although there is always the possibility that the formulating organisation's particular visions of insolvency law could be in conflict with national policies, interests and traditions of individual countries, the work produced by organisations such as UNCITRAL and the World Bank serves as a foundation for jurisdictions to apply as a benchmark in order to ensure that any law reform initiative complies with international best practice in this regard.⁶²⁷

Two dimensions to global financial systems exist. On the one hand national financial systems operate autonomously responding to domestic needs and on the other hand they are also tied to a day-to-day interaction with the systems of their international trading partners.⁶²⁸ In order for emerging market economies to participate and benefit from the global economy, they

⁶²² Wessels *International Insolvency Law* 50-51.

⁶²³ Wessels *International Insolvency Law* 3.

⁶²⁴ See Mistelis 1055; Wessels *International Insolvency Law* 51.

⁶²⁵ International organisations able to develop both "hard law" and "soft law" are "UNCITRAL"; the International Institute for the Unification of Private Law (also referred to as "UNIDROIT"); The Hague Conference on Private International Law and the World Trade Organisation (also referred to as "WTO"). The non-government organisations are the International Chamber of Commerce (also referred to as "ICC"); International Law Association (also referred to as "ILA") and the International Bar Association (also referred to as "IBA"). Other organisations developing standards and guidelines of a private law nature include the World Bank, the European Bank for Reconstruction and Development (also referred to as "EBRD"); the Asian Development Bank (also referred to as "ADB") and the International Monetary Fund (also referred to as "IMF"). See Wessels *International Insolvency Law* 52.

⁶²⁶ Mistelis 1061.

⁶²⁷ See Ramsay "Functionalism and Political Economy" 625; Johnson 70.

⁶²⁸ Wessels *International Insolvency Law* 3.



need to strengthen and stabilise their institutions and take note of international economic trends and best practices.⁶²⁹ The drafting of UNCITRAL's *Legislative Guide on Insolvency Law*,⁶³⁰ approved in 2004, can be mentioned as an example of the administering and aligning or streamlining of the consequences of financial insolvency by making available a comprehensive set of recommendations to national legislators.⁶³¹ Other examples of soft law and the codification of "best practices" is to be found in the *Revised Principles for Effective Insolvency and Creditor Rights System*⁶³² developed by the World Bank, UNCITRAL's *Model Law on Cross Border Insolvency*⁶³³ and the IMF's *Orderly and Effective Insolvency Procedures*.⁶³⁴ These models all strive towards setting certain standards and benchmarks which might assist *inter alia* practitioners, judges or legislators with their law and policymaking activities.⁶³⁵

This chapter considers the contribution to the global insolvency lawmaking process by the World Bank and UNCITRAL. It is not intended that a detailed exposition of the various works be given here. The purpose, rather, is to refer to the suggested legal principles and guidelines in respect of institutional and regulatory frameworks.

5.2 UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW

5.2.1 General

⁶²⁹ Wessels *International Insolvency Law* 3.

⁶³⁰ *Legislative Guide* (n 11). See also Wessels *International Insolvency Law* 3.

⁶³¹ Wessels *International Insolvency Law* 3.

⁶³² Revised Draft Creditor Rights and Insolvency Standard, Based on the World Principles and for Effective Creditor Rights and Insolvency Systems and UNCITRAL Legislative Guide on Insolvency Law, Revised Draft, (2005) (also referred to as *Revised Principles*) available at <http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRPrinciples-March2009.pdf> (last visited at 30-11-09). Also Wessels *International Insolvency Law* 3.

⁶³³ Adopted by UNCITRAL on 1997-05-30, the Model Law is designed to assist states to their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency. See Wessels *Cross-Border Insolvency Law* for a detailed discussion of the UNCITRAL Model Law.

⁶³⁴ Available at <http://www.imf.org/external/pubs/ft/orderly/index.htm> (last visited at 09-11-30). Developed by the IMF's Legal Department in 1999, this book outlines the key issues involved in designing and implementing orderly and effective insolvency procedures.

⁶³⁵ Wessels *International Insolvency Law* 3.



UNCITRAL was established in 1966⁶³⁶ by the United Nations⁶³⁷ General Assembly with the aim of providing the UN with a more active role in managing differences of national legal systems in the domain of international trade.⁶³⁸ The General Assembly acknowledged that disparities in the national laws governing international trade created obstacles to the flow of international trade. UNCITRAL was established as a support mechanism to enable the UN to play a more active role in reducing or removing these obstacles. The General Assembly gave UNCITRAL a general mandate to further the progressive harmonisation and unification of the international law of trade and it has since become the core legal body of the UN system in the field of the international law of trade.⁶³⁹

In 2000 UNCITRAL gave a mandate to one of its Working Groups (Working Group on Insolvency Law)⁶⁴⁰ to prepare a comprehensive statement of key objectives and core features for a strong insolvency regime and to embrace a more pragmatic approach to the implementation of such objectives and features.⁶⁴¹ The Working Group concluded this five-year project in late 2004, with the release of the UNCITRAL *Legislative Guide on Insolvency Law*.⁶⁴² The work produced a stand-alone, principles-oriented product to address the diversity of insolvency laws among states. The *Guide* sets out global standards on insolvency law for national legislators within the wider focus of aligning, harmonising or unifying international commercial law.⁶⁴³ The aim of the project is to

⁶³⁶ Resolution 2205 (XXI) of 1966-12-17.

⁶³⁷ Hereafter referred to as the “UN”.

⁶³⁸ Wessels *International Insolvency Law* 61.

⁶³⁹ UNCITRAL describes itself as a “legal body with universal membership specialising in commercial law reform worldwide for over 40 years. UNCITRAL’s business is the modernisation and harmonisation of rules on international business”. See the official website of UNCITRAL available at <http://www.uncitral.org/> (last visited at 09-11-30). See also <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited at 09-11-30) for a more detailed discussion of the origin of UNCITRAL. See also Block-Lieb “Legitimation and Global Lawmaking” (2006) *Fordham Law Legal Studies Research Paper no 952492* available at <http://ssrn.com/abstract=952492> (last visited at 09-11-30) (hereafter referred to as Block-Lieb “Legitimation and Global Lawmaking”). See also Loubser “Aiding the Development of a New Insolvency Law in South Africa: The UNCITRAL *Draft Legislative Guide on Insolvency Law*” (2003) *SA Merc LJ* 396.

⁶⁴⁰ Also referred to as Working Group V.

⁶⁴¹ Wessels “Insolvency Law” 305.

⁶⁴² See (n 11).

⁶⁴³ Block-Lieb “Harmonization and Modernization” 5.



present a comprehensive exposition of the core objectives and the structures of an effective and efficient insolvency system.⁶⁴⁴

The *Guide* is intended to be used by national authorities and legislative bodies as a reference when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. It is intended merely to provide recommendations regarding substantive insolvency law.⁶⁴⁵ The content and structure of the *Guide* exemplifies the formal ability of a broad diversity of actors and interests to achieve agreement in a contentious policy domain.⁶⁴⁶ While UNCITRAL had in the past adopted conventions and model laws it changed course with the promulgation of the Legislative Guide, which contains a variety of topics – objects, purposes, a glossary, commentary and recommendations.⁶⁴⁷

The *Guide* is divided into two parts. Part one examines the broad policies and purposes common to all insolvency laws and includes the nine “key objectives” which serve as a point of reference for the remainder of the *Guide*. Part two specifies the core provisions for an effective and efficient insolvency law and sums up each section with a set of *Recommendations*. The *Recommendations* are derived from the lengthier commentary that precedes them and are intended to be used as a reference by legislative bodies when preparing new laws and reviewing existing laws and structures.⁶⁴⁸ Finally, every key provision which is recommended to be included in a national law is discussed and the possible treatment evaluated.⁶⁴⁹

The *Guide* does not provide a single set of model solutions to address the central issues to an effective and efficient insolvency law, but assists the reader in evaluating different methodologies in order to decide on the most suitable scenario in the national or local context.⁶⁵⁰ For the purpose of this study only a brief summary of Part One: Section III of

⁶⁴⁴ See Wessels “Insolvency Law” 305; Block-Lieb “Legitimation and Global Lawmaking” 49.

⁶⁴⁵ Wessels *Cross-Border Insolvency Law* 11.

⁶⁴⁶ Block-Lieb “Legitimation and Global Lawmaking” 49.

⁶⁴⁷ Block-Lieb “Harmonization and Modernization” 6.

⁶⁴⁸ *Legislative Guide* 1.

⁶⁴⁹ Wessels “Insolvency Law” 305.

⁶⁵⁰ *Legislative Guide* 1-2. See Wessels *Cross -Border Annex* 3.



the *Guide*, which sets out the objectives and recommendations in respect of Institutional Frameworks, will be included.⁶⁵¹

5.2.2 UNCITRAL *Legislative Guide on Insolvency Law: Regulatory and Institutional Aspects*

The introduction to *Section III: Institutional Frameworks* submits that insolvency law is part of an overall commercial legal system and is heavily reliant for its proper application not only on a well-developed commercial legal system, but also on a well-developed institutional framework for the administration of the law.⁶⁵² It is stated that when law reform takes place the choices made will be closely linked to the capacities of existing institutions.⁶⁵³ It is recommended that if the institutional capacity does not already exist, it is highly desirable that reform of the insolvency law be accompanied by institutional reform. The costs of establishing and maintaining the necessary institutional framework should be weighed against the benefits of providing a system that is efficient and effective and in which the public has confidence.⁶⁵⁴

The *Guide* then continues to formulate general observations which mainly place emphasis on the role of the court and the judiciary. It mentions that in most jurisdictions insolvency proceedings are administered by a judicial authority, often through commercial courts or courts of general jurisdiction or, in a few cases, through specialised bankruptcy courts. It is also recognised that in a few jurisdictions, non-judicial or quasi-judicial institutions fulfil the role that, in other jurisdictions, is fulfilled by the courts.

The *Guide* demonstrates that in order to reduce the functions to be performed by the court under an insolvency law, but at the same time provide the necessary checks and balances, specific functions in insolvency law could be assigned to other participants, such as the insolvency representative and creditors, or to some other authority, such as an insolvency

⁶⁵¹ *Legislative Guide* 33-35 par 1-7.

⁶⁵² *Legislative Guide* 33.

⁶⁵³ *Legislative Guide* 33 par 1.

⁶⁵⁴ *Legislative Guide* 33 par 1.



regulator.⁶⁵⁵ An insolvency law may also provide that an insolvency representative is authorised to make decisions on a number of issues, such as the verification and admission of claims, the need for post-commencement funding, surrender of encumbered assets of no value to the estate, sale of major assets, commencement of avoidance actions and treatment of contracts, without the court being required to intervene, except in the case of dispute resolution. The *Guide* states further that the use of this approach depends upon the availability of a body of suitably qualified professionals to serve as insolvency representatives.⁶⁵⁶

It is recognised that the court's capacity to deal with sometimes complex commercial issues in insolvency law cases is often not only a question of knowledge and experience of a specific law but also includes an updated and current knowledge. It is recommended that in order to address the issue of judicial capacity a special focus should be placed on the education and ongoing training of court personnel (including the judiciary). This, it is argued, will assist in supporting an insolvency regime that has the ability to respond efficiently and effectively to its insolvency caseload.⁶⁵⁷ A further consideration related to the court's capacity to supervise insolvency cases is the balance between the mandatory and discretionary components of the insolvency law. It is suggested that where the law requires the discretion of the decision-maker such as the court, adequate guidance as to the proper exercise of that discretion is included in order to assure the transparency and predictability of the insolvency proceedings.⁶⁵⁸

Finally, the section concludes that it is clear that the implementation of an insolvency system depends not only on the court, but also on the professionals involved in insolvency proceedings and the adoption of certain professional standards and training may assist in developing capacity. The important assumption is made that it may be appropriate to assess which insolvency functions are truly public of nature and should therefore be performed in the public sector in order to ensure public trust and confidence

⁶⁵⁵ *Legislative Guide* 34 paras 2-3.

⁶⁵⁶ *Legislative Guide* 34 par 4.

⁶⁵⁷ *Legislative Guide* 34 par 5.

⁶⁵⁸ *Legislative Guide* 34 par 6.



in the system. A different set of functions would then be performed by private-sector representatives such as insolvency practitioners.⁶⁵⁹

5.3 WORLD BANK “*PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEM*”

5.3.1 General

In the aftermath of the Asian financial crisis in the late part of the previous century, the World Bank launched an initiative to improve the future stability of international financial systems.⁶⁶⁰ Although effective and efficient insolvency and creditor rights systems were already widely recognised as important elements in the drive for a stable international financial system, no internationally recognised benchmarks or standards to evaluate the effectiveness of domestic insolvency systems existed.⁶⁶¹ As a result, in 1999 the IMF published a survey of the most important policies to consider when a system of insolvency law is designed.⁶⁶² In the same period the World Bank also embarked on a project to identify certain principles and guidelines for sound insolvency systems and for the strengthening of related debtor-creditor rights in emerging markets.⁶⁶³ Subsequently a “Status Report”⁶⁶⁴ was compiled and deliberation took place with representatives from various countries at four regional workshops.⁶⁶⁵ In consensus with international partner organisations and experts from some 75 countries the *Principles and Guidelines for Effective Insolvency and Creditor Rights System* transpired and was approved in 2001.⁶⁶⁶

⁶⁵⁹ *Legislative Guide* 34 par 7.

⁶⁶⁰ Wessels “Insolvency Law” 305.

⁶⁶¹ Wessels “Insolvency Law” 305. The *Global Insolvency Law Database* (“GILD”) represents the World Bank’s legal portal for insolvency and creditor rights matters and is maintained by the World Bank’s Legal Vice-Presidency.

⁶⁶² *Orderly and Effective Insolvency Procedures* composed by the Legal Department, IMF 1999. See Wessels *Cross-Border Insolvency Law* 2.

⁶⁶³ Wessels *Cross-Border Insolvency Law* 2.

⁶⁶⁴ Based on the initial papers assembled in the report “*Building Effective Insolvency Systems:*” (Washington 1999). See Wessels *International Insolvency Law* 63.

⁶⁶⁵ Wessels *International Insolvency Law* 63.

⁶⁶⁶ See (n 616).



In the introductory discussion in the 2001 *Principles* which leads up to the proposed key principles several fundamentally important submissions are made. First, effective systems respond to national needs and problems and as such must be rooted in the country's broader cultural, economic, legal and social context. Second, transparency, accountability and predictability are fundamental to sound credit relationships on both a national and international level. And thirdly, legal and institutional mechanisms must align incentives and disincentives across a broad spectrum of market-based systems – commercial, corporate, financial and social. This calls for an integrated approach to reform, taking into account a wide range of laws and policies in the design of insolvency and creditor rights systems.⁶⁶⁷ In the executive summary of the 2001 document the compilers also make the following important statement:

Strong institutions and regulations are crucial to an effective insolvency system. The institutional framework has three main elements: the institutions responsible for insolvency proceedings, the operational system through which cases and decisions are processed and the requirements needed to preserve the integrity of those institutions. A number of fundamental principles influence the design and maintenance of the institutions and participants with authority over insolvency proceedings.⁶⁶⁸

As previously mentioned, the *Principles* approved by the World Bank in 2001 cover a wide range of commercial themes, including the institutional and regulatory aspects of these commercial law systems. They lay down fundamental principles with the intention that these are applied flexibly in the diverse systems that obtain in various countries.⁶⁶⁹ The UNCITRAL *Legislative Guide* consequently focuses more deeply on the key elements of an effective insolvency system to assist the establishment of an efficient and effective legal framework. Given the complementary nature and the international consensus on best practices reflected in both the *Principles* and the *Recommendations* included in the *Legislative Guide*, the members of staff of both the World Bank and IMF proposed to their respective Executive Boards that these *Principles* and *Recommendations* be recognised as the unified standard for insolvency and creditor rights systems for the purpose of assessments under the IMF-World Bank programme and initiative on Standards and Codes. The result of

⁶⁶⁷ *Principles* 2.

⁶⁶⁸ *Principles* 5.

⁶⁶⁹ Wessels *Cross-Border Insolvency Law* 14.

the initiative is that Insolvency and Creditor Rights ROSC assessments are currently conducted on the basis of a unified standard on insolvency and creditor rights systems, in which both documents have been consolidated.⁶⁷⁰

While the Bank's *Principles* and UNCITRAL's *Legislative Guide* had been devised according to their own governance process and structures, staff and experts from both institutions have joined forces to ensure consistency in these complementary products. The *Principles* cover a wider range of commercial law systems, including regulatory and institutional aspects of these systems and elaborate fundamental principles that are intended to be applied flexibly in the diverse systems of the various countries. In contrast to the *Legislative Guide*, which discusses issues central to the design of an efficient and effective system, the *Principles* are designed to serve as a broad-spectrum assessment tool to assist countries in efforts to evaluate and improve core aspects of their insolvency systems.⁶⁷¹ In December 2005 the integration of the *Principles* and the *Guide* into a combined document resulted in the *Revised Draft Creditors Rights and Insolvency Standards*.⁶⁷² The World Bank's *Principles* and the UNCITRAL's *Legislative Guide* function in a complementary way and together serve as important reference points for countries to evaluate and strengthen their insolvency systems in line with generally recognised standards of good practice.⁶⁷³

The document specifying the *Revised Principles* is arranged into an "Introduction" and "Executive Summary", followed by the key principles each divided into different parts alphabetically numbered.⁶⁷⁴ Only the principles and guidelines dealing with the regulatory and institutional aspects will be considered briefly.

⁶⁷⁰ *Revised Principles* (n 632). See Wessels *Cross-Border Insolvency Law* 15.

⁶⁷¹ See introduction to the *Principles* (n 616).

⁶⁷² Wessels *Cross-Border Insolvency Law* Annex 4.

⁶⁷³ Wessels *Cross-Border Insolvency Law* 3.

⁶⁷⁴ Wessels *Cross-Border Insolvency Law* 3.



5.3.2 *Creditors' Rights and Insolvency Standards, based on the World Bank Principles for Effective Creditor Rights and Insolvency Systems and UNCITRAL's Legislative Guide on Insolvency Law, Revised Draft December 2005*

In the context of this research it is important to take note of principles D1 and D7 as they converge on the implementation of basic insolvency principles by way of institutional and regulatory frameworks as well as the role of the supervisory body.⁶⁷⁵ As mentioned above, the important aspects for this study are addressed in part D of the document with the heading *Implementation: Institutional & Regulatory Frameworks*. The suggested principles are specified as follows:

D1 Role of the Courts

D1.1 Independence, Impartiality and Effectiveness. The system should guarantee the independence of the judiciary. Judicial decisions should be impartial. Courts should act in a competent manner and effectively.

D1.2 Role of Courts in Insolvency Proceedings. Insolvency proceedings should be overseen and impartially disposed of by an independent court and assigned, where practical, to judges with specialized insolvency expertise. Non-judicial institutions playing judicial roles in insolvency proceedings should be subject to the same principles and standards applied to the judiciary.

D1.3 Jurisdiction of the Insolvency Court. The Court's jurisdiction should be defined and clear with respect to insolvency proceedings and matters arising in the conduct of these proceedings.

D1.4 Exercise of Judgment by the Court in Insolvency Proceedings. The court should have sufficient supervisory powers to efficiently render decisions in proceedings in line with the legislation without inappropriately assuming a governance or business administration role for the debtor, which would typically be assigned to the management or the insolvency representative.

⁶⁷⁵ *Revised Principles* 20-22.

D1.5 Role of Courts in Commercial Enforcement Proceedings. The general court system must include components that effectively enforce the rights of both secured and unsecured creditors outside of insolvency proceedings. If possible, these components should be staffed by specialists in commercial matters. Alternatively, specialized administrative agencies with that expertise may be established.

D7 Role of Regulatory Supervisory Bodies

The bodies responsible for regulating or supervising insolvency representatives should:

- Be independent of individual representatives;
- Set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability; and,
- Have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively.

D8 Competence and integrity of insolvency Representatives

- Criteria as to who may be an insolvency representative should be objective, clearly established and publicly available;
- Insolvency representatives be competent to undertake the work to which they are appointed and to exercise the powers given to them;
- Insolvency representatives act with integrity, impartiality and independence; and
- Insolvency representatives where acting as managers be held to director and office standards of accountability, and be subject to removal for incompetence, negligence, fraud or other wrongful conduct.⁶⁷⁶

To summarise, it is evident when drawing from international instruments such as the *Legislative Guide* and the World Bank's *Principles* that while the primary focus of any law reform project should be on how to serve the needs and interests of society, it would be unrealistic to ignore wider global trends and the international environment in which

⁶⁷⁶ *Revised Principles* 20-22.



trade and commerce takes place. However, the UNCITRAL's *Legislative Guide* states that irrespective of which insolvency law design is chosen it should:

be complementary to, and compatible with, the legal and social values of the society in which it is based and which it must ultimately sustain. Although insolvency law generally forms a distinctive regime, it ought not to produce results that are fundamentally in conflict with the premises upon which laws other than the insolvency laws are based.⁶⁷⁷

In the World Bank's *Principles* the call for an integrated approach to law reform, taking into account a wide range of laws and commercial, corporate, financial and social aspects in the design of an insolvency and creditor rights systems, is prominent.⁶⁷⁸ Consequently, in the important regulative guidelines in UNCITRAL's *Legislative Guide* the need for a well-developed institutional framework as a part of insolvency law is emphasised. It is also submitted by the compilers that when law reform takes place the decision-making will be greatly influenced by the capacities of existing institutions.⁶⁷⁹ The recommendation is made that the reform of insolvency law should also be accompanied by institutional reform. The *Guide* further points out that in most jurisdictions, insolvency proceedings are administered by a judicial authority, but this role could also be fulfilled by non-judicial or quasi-judicial institutions.⁶⁸⁰

In order to reduce the functions to be performed by the court, and at the same time provide the necessary checks and balances, the *Guide* suggests that specific functions in insolvency law may be assigned to insolvency representatives and creditors, or to some other authority, such as an insolvency regulator. In order to build capacity, the prominent role of education, the adoption of certain professional standards and the training of role-players (for instance, the insolvency representative and the judiciary) are mentioned.⁶⁸¹ Lastly, the important point is made that it may be appropriate to assess which insolvency functions are truly public of nature and should therefore be performed in the public sector

⁶⁷⁷ *Legislative Guide* 10. See Mason "Where Private International and Insolvency Law Meet" 35 (hereafter referred to as Mason "Where Private International and Insolvency Law Meet") in Omar *International Insolvency Law: Themes and Perspectives* (2008).

⁶⁷⁸ *Principles* 2.

⁶⁷⁹ *Principles* 20-22.

⁶⁸⁰ *Legislative Guide* 33-35.

⁶⁸¹ *Legislative Guide* 34-35.



in order to ensure public trust and confidence in the system, and which functions could be performed by private-sector representatives such as insolvency practitioners.⁶⁸²

⁶⁸² *Legislative Guide* 34 par 7.



CHAPTER 6: CONCLUSION

Globalization is causing, and being reinforced by, a world-wide convergence of economic and political values that portend a possible, though distant, future world in which human beings will look upon themselves as part of a single humane civilization comprised of a single human race.⁶⁸³

In an era of the globalisation of law that will inevitably accompany the globalisation of the world economy, we enter a phase in history where legal certainty and predictability are definite virtues. It is submitted that the provision of an effective and internationally comparable insolvency system is an essential component in ensuring that South Africa maintains its role as a competitive emerging market. The establishment of a modern legal framework for the regulation of commercial and economic activity is not only fundamental to the development of a competitive market economy, but is also a precondition to the sustainable flow of foreign capital to the South African economy. In determining whether it is attainable to bring about a new regulatory regime in South African insolvency law it is thus vital to stay abreast of international trends and standards and to determine what the internationally recognised principles and characteristics of a regulatory model in insolvency law are, so as to ensure that our system does not lag behind the international norm.⁶⁸⁴

The recognition that a modern insolvency system should be the cornerstone of sustainable economic development is also reflected in the extensive research carried out by international institutions in this area. The World Bank, with the assistance of international financial institutions such as UNCITRAL, leading insolvency organisations and international insolvency experts, has developed comprehensive principles and guidelines that underpin sound insolvency and creditors' rights around the world. An analysis of the various "soft law" principles reveals that the establishment of a modern and effective institutional and regulatory framework is fundamental to the development of an efficient and effective insolvency law system, and that the latter is crucial to the fostering of local

⁶⁸³ Seita "Globalization and the Convergence of Values" (1997) *Cornell International LJ* 429 at 429 as cited in Mistelis 1055.

⁶⁸⁴ For a more comprehensive discussion of these issues, see Mistelis at 1055-1069.

and international commercial confidence in South Africa.⁶⁸⁵ It has been established that although the underlying philosophies and principles differ from one jurisdiction to another, the regulation of insolvency law is a major policy objective in all developed jurisdictions. The dynamics of the relationship of state agencies to the various actors in the bankruptcy system may vary, but certain similar influences and key elements can be recognised.

The English regulatory system can be classified as an administrative system, typified by the pervasive character of the government agency, as represented by the Insolvency Service.⁶⁸⁶ At present, the public administrator is responsible for virtually all the key administrative decisions as well as for establishing detailed interpretations of statutory rules in bankruptcy law.⁶⁸⁷ This is a consequence of the English lawmakers having a shared vision that bankruptcy law is not just the concern of creditors but affects the wider society. This has resulted in the acceptance that government has a supervisory role to play, and that bankruptcy law is a public policy measure.⁶⁸⁸ The core functions of the English public administrator have been identified as the administration of the insolvent estate by government-employed officials in the absence of a private-sector practitioner; focusing of resources on discharging the public interest functions of investigating and prosecuting the conduct of individual debtors and directors of failed companies; and, finally, authorising and regulating the insolvency profession. These features of a regulator are universal in almost all common law systems, to a greater or lesser degree.

In view of the objectives of this thesis and drawing from the comparative study done here, it is appropriate to state that South African law and policymakers will probably draw the greatest benefit from the development and philosophy underlying the English regulatory model. Although the English regulatory framework may not suit the South African economic conditions in a strict sense, there are adequate similarities between the jurisdictions' historical, legal and cultural aspects.

⁶⁸⁵ See Mistelis 1057; Loubser 396.

⁶⁸⁶ Insolvency Act 1986 ss 399-401 and Pt 10 of Insolvency Rules 1986.

⁶⁸⁷ See Martin "Common-Law Bankruptcy Systems" 376; Niemi-Kiesiläinen "Introduction" 11.

⁶⁸⁸ Martin "Common-Law Bankruptcy Systems" 397.



In contrast to the English regulatory system, the US represents the other end of the continuum. It has a framework consisting of a specialised system of bankruptcy courts to reach judgments and to make decisions in the event of conflict. But the important precedents that provide the detailed interpretations of statutory rules – that set the local legal culture – are also made by the bankruptcy judge. While early bankruptcy law followed in the footsteps of the English law, the tenor of the 1898 Bankruptcy Act was rather to downsize the administrative machinery and set up an adversarial judicial process as the US model for bankruptcy. As a result the US never adopted the highly administrative bankruptcy process evident in the English insolvency law.

The US system has no equivalent for the public official receiver's office and instead the present governing philosophy favours direct negotiation between debtors and creditors. This in turn paves the way for the prominent role of the private attorney in the US bankruptcy process. The US Trustee as public administrator had been established in order to lessen the administrative burden on the bankruptcy judges thereby enabling them to serve more exclusively in a judicial role. The US Trustee acts in a general supervisory role regarding bankruptcy proceedings and private trustees, and furthermore also views the investigation and detection of fraud and bankruptcy abuse as a main policy objective.⁶⁸⁹

Although it is safe to conclude that the specialisation of the US bankruptcy judges and the degree of their daily involvement in bankruptcy cases gives them a better feel for the complexities of consumer bankruptcy than is enjoyed by a generalist judge in a jurisdiction without specialist bankruptcy courts, it is submitted that the precise mechanics of the US system cannot easily be imported into a country that does not make use of a federal system of government and a federal court system.⁶⁹⁰ 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

⁶⁸⁹ See generally, Skeel *Debt's Dominion*; Milman 149-151; Niemi-Kiesiläinen 11.

⁶⁹⁰ Milman 149.



implemented in its precise form by a country which has only a developing economy.⁶⁹¹ It is for this reason that the content and proceedings of the American system is of limited use to South African policy- and lawmakers in designing a regulatory framework in insolvency law.

The position in regard to state regulation under the Netherlands laws is fundamentally different to that of the mentioned common law jurisdictions, and the underlying principles of their Code are therefore only of limited use in a South African context. Although there is no system of specialised bankruptcy courts in the Netherlands, the Dutch courts play a leading role in the regulation and interpretation of the bankruptcy laws. The Dutch regulatory framework consists of a system of court control whereby the district court appoints a *Rechter-commissaris* entrusted with the supervision of the trustee's administrative actions. In the same judgment a *bewindvoerder* or *curator* is appointed and is charged with the administration and liquidation process. In the Dutch insolvency practice, no formal statutory requirements have to be met before a person can be appointed as a trustee. However, the courts almost always appoint lawyers who are members of the bar as trustees, and hence a certain selection can be reached along this detour, because not everyone is admitted to the bar. The Dutch civil law system is so fundamentally different in the basic conception and operation of its bankruptcy law, however, that it would be misleading to compare any aspects of this system to other common law jurisdictions.⁶⁹²

Without entering into the widespread academic debate on the merits of legal transplantation, it could be argued that the undesirability of the Dutch system's regulatory experience as a "legal transplant" could serve to further the argument that even when countries share similar legal backgrounds, they may evolve and develop along completely independent paths, resulting in different legal cultures and conceptions of the role of

⁶⁹¹ In this regard see Braucher "Harmonizing the Business Bankruptcy Systems of Developed and Developing Nations: Some Issues" (1997) 17 *New York Law School Journal of International and Comparative Law* 473-480. Braucher states that a country's bankruptcy reorganisation system should be viewed as part of its law and policy of economic development, but that this does not necessarily mean that a country's stage of development is or should be the predominant concern a business bankruptcy system is designed. See Burdette 186.

⁶⁹² See generally: Declercq "Netherlands Insolvency Law" 45; Vriesendorp "The Righteous Trustee".



bankruptcy law. Historical development and background do however play some part in shaping legal culture. This would explain the different attitudes to regulatory proceedings in common law systems (which all have an English legal basis) and in the Dutch civil bankruptcy system, which is influenced by the French *Code Civil* complemented with Roman and earlier Roman-Dutch law.⁶⁹³

Despite the historical and philosophical differences between jurisdictions – and especially the differences between the common law-based and civil European systems – it is important not to present these jurisdictions as if they were cast in stone. There are signs of some convergence between the common law and European approaches and even more so between the common law jurisdictions themselves.⁶⁹⁴ When the international experience is considered, certain assumptions can be made:

- 1 One of the main policy issues to emerge from the study of the various regulatory models is the choice between an administrative system and a judicial system responsible for the implementation of the law. Although different systems for the regulation of bankruptcy law have emerged in different countries, a general regulatory framework has been implemented, ranging in various degrees in nature from an administrative to a judicial system.
- 2 The profession of insolvency practitioners is consistently regulated throughout the continuum, ranging from the UK's intense and complicated licensing system to the judicial supervision of the trustee in the Dutch bankruptcy law system.
- 3 Legal history should not be the only factor influencing the choice of the bankruptcy system and philosophy a country develops. If it were, the US and England would have adopted similar laws, as they both drew on the same English legal history. Yet each reflects certain unique bankruptcy characteristics – in particular the role of the state in the

⁶⁹³ Meijer 1.

⁶⁹⁴ Ziegel *Comparative Consumer Insolvency* 148.



regulation of bankruptcy law. This is presumably the result of cultural and economic influences.

- 4 Historical development and background do however play some part in shaping legal culture. This would explain the different attitudes to regulatory proceedings in the common law systems, on the one hand, and the Dutch civil bankruptcy culture, on the other.⁶⁹⁵

Academic literature is increasingly recognising the central importance of “local legal culture” in the actual operation and effective implementation of any legal system.⁶⁹⁶ Therefore, while the input and comparison with the other international jurisdictions and institutions is beneficial, the content of the laws of these jurisdictions is of secondary importance. The process of law reform and the compatibility of the new framework with the local pre-existing legal, economic and social environment are paramount.⁶⁹⁷ Consequently, while certain questions relating to the current policies and law reform proposals will be asked, it is submitted that the choices made in reforming the South African regulatory system must be informed by the capacities of existing legal institutions. Reforms must also be compatible with the insolvency law system in general. As correctly stated in the literature, “legislation on insolvency is a crossroads where all the elements of the legal system in question meet”.⁶⁹⁸

⁶⁹⁵ Meijer 1.

⁶⁹⁶ See generally: Tabb “Lessons from the Globalization of Consumer Bankruptcy” 2005; Ziegel “The Challenges of Comparative Consumer Insolvencies” (2005) *Pennsylvania State International LR* 639.

⁶⁹⁷ Pistor “The Standardization of Law and its Effect on Developing Economies” (2000) *American Journal of Comparative Law* 97 (hereafter referred to as Pistor).

⁶⁹⁸ Braun “German Insolvency Act: The Special Provisions of Consumer Insolvency Proceedings and Discharge of Residual Debts” 2006 *German LJ* 59.

*A Reformatory Approach to State Regulation of Insolvency Law in
South Africa*

PART IV

**CONSTITUTIONAL AND ADMINISTRATIVE LAW ASPECTS OF
STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW**

SUMMARY

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CHAPTER 1: INTRODUCTION

The South African Constitution is different: it ... represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and a commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.¹

In the case of *Pharmaceutical Manufacturer's Association of South Africa: In re Ex Parte President of the Republic of South Africa*² Chaskalson P confirmed that there is only one system of law in South Africa and that all law, including the common law, derives its force from the Constitution of the Republic of South Africa.³ As the supreme law of the land the Constitution has changed the face of our law dramatically in that legislation may now be tested by the courts in order to establish its constitutionality.⁴ From this it also follows that any attempt at law reform in any specific field of South African law must take cognisance of the supremacy principle.⁵

The Constitution featuring a Bill of Rights⁶ was not in place when the Insolvency Act⁷ came into force. Consequently, the values and principles entrenched in the Constitution in many instances differ radically from the values, principles and policies that formed the foundation of the Insolvency Act.⁸ Since the central concern of this thesis is to investigate certain aspects of state regulation in South African insolvency law with the view to ultimately proposing a framework within which further law reform can take place, it will be necessary to refer also to the applicable constitutional and administrative law aspects. The aim is to ensure that any recommendations that are eventually proposed would constitute a more accurate reflection of the current legal, socio-political and economic environment in South Africa.⁹

¹ *S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC) at 262.

² 2000 2 SA 674 (CC). See Davis "To Defer and then When? Administrative Law and Constitutional Democracy" (2006) *Acta Juridica* 23 (hereafter referred to as Davis).

³ Constitution of South Africa, 1996. Hereafter referred to as the Constitution. In terms of s 1(2) of the Citation of Constitutional Laws Act 5 of 2005 which came into operation on 2005-06-27 all references to the Constitution of the Republic of South Africa Act 108 of 1996, have been replaced by the Constitution of South Africa, 1996. See Hoexter *Administrative Law in South Africa* (2006) 29 (hereafter referred to as Hoexter).

⁴ Dlamini "The Right to Administrative Justice in South Africa" (2000) *TSAR* 697 at 701 (hereafter referred to as Dlamini).

⁵ Burns *Administrative Law under the 1996 Constitution* (2003) 1 (hereafter referred to as Burns).

⁶ The Bill of Rights is set out in ch 2 of the Constitution. See generally: Currie *The Bill of Rights Handbook* (2005) (hereafter referred to as Currie).

⁷ Act 24 of 1936. Hereafter referred to as the Insolvency Act or Insolvency Act of 1936.

⁸ See Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) 379 LLD dissertation University of Pretoria (hereafter referred to as Evans).

⁹ Davis 23.

This part of the study commences with a few general remarks on the impact of the Constitution on insolvency law and in particular the regulation of insolvency law as conducted by the Master. The focus then shifts to a brief discussion of certain aspects of administrative law, in particular the Promotion of Administrative Justice Act¹⁰ as it relates to the powers and functions of the Master. It must be stated here that the aim of this study is not to provide a detailed exposition or comprehensive overview of constitutional and administrative law, but rather to highlight the relevance and potential impact of these branches of South African law on the functioning and day-to-day operation of a regulatory institution in South African insolvency law. The overall intention is to ensure that when proposals for future law reform are made this is done within the spirit of the Constitution.

¹⁰ Act 3 of 2000. Hereafter referred to as “PAJA”. This Act came into force on 2000-11-30, except ss 4 and 10 which came into force on 2001-07-31.



CHAPTER 2: CONSTITUTIONAL LAW ASPECTS REGARDING STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW

2.1 INTRODUCTION

With the recognition of the Constitution as the supreme Act of the land, the legal community in South Africa had to adapt from the old concept of parliamentary sovereignty to a new model of constitutional democracy.¹¹ In *Holomisa v Argus Newspaper Ltd*¹² Cameron J (as he then was) summarised this principle very well: “The Constitution has changed the “context” of all legal thought and decision-making in South Africa”.¹³ Although the Constitution must inform the way legislation is interpreted by the courts, there is currently no constitutional court decision or secondary source which deals directly with the application of the Constitution to state regulation in South African insolvency law.¹⁴ Despite the lack of a thorough treatment of the subject of the constitutional aspects of the role of the Master in general, it is clear that the law of insolvency cannot possibly escape the reach of the Bill of Rights, given the contentious nature of an insolvency status and the various conflicting interests involved.¹⁵

¹¹ Hoexter “‘Administrative Action’ in the Courts” 2006 *Acta Juridica* 303 (hereafter referred to as Hoexter “‘Administrative Action’ in the Courts”).

¹² 1996 6 BCLR 836 (W) at 836J.

¹³ Botha “Administrative Justice and Interpretation of Statutes: A Practical Guide” 14 in Lange *The Right to Know* (2004) (hereafter referred to as Lange *The Right to Know*).

¹⁴ Thus far most of the constitutional cases pertaining to South African insolvency law have either dealt with constitutionality in general, or with certain aspects of the legal concept of interrogations within the context of South African insolvency law. See, eg, *De Lange v Smuts* 1998 3 SA 785 (CC); *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC); *Ferreira v Levin NO* 1996 1 SA 984 (CC). Other insolvency-related aspects which have been subject to judicial scrutiny include s 21 of the Insolvency Act in the case of *Harksen v Lane* 1998 1 SA 300 (CC). See also part 4 in Evans for a detailed discussion of s 21 of the Insolvency Act.

¹⁵ An interesting aspect of the development of regulation in South African insolvency law is the question of how the insolvency profession came to be one of the only unregulated professions in the country. The answer could perhaps be found in the implementation of the previous government’s *apartheid* policy, which in particular formed the basis of a vast system of institutionalised segregation and oppression and few areas of life in South Africa were left untouched (see *President of the RSA v SARFU* 2000 1 SA 1 (CC) at 33). The *apartheid* policy also infiltrated the world of insolvency. The reason for the insolvency industry being largely unregulated is probably due to the fact that until 1994, the insolvency industry consisted of only more or less 200 insolvency practitioners countrywide. They in turn consisted of a small group of white men who had very little competition. Accordingly for decades the industry existed as a closed monopoly. As a direct result the view had always existed that due to the exclusivity and size of the industry, regulation did not seem practical or economically viable. Due to the transformation efforts of government based on the fundamental right against unfair discrimination embedded in the Constitution, the state of affairs in the insolvency industry has gradually been changing and there has been a dramatic increase in the number of practitioners. In certain spheres of the industry the negative attitude towards regulation however still exists and recent attempts to introduce some form of statutory regulation had been unsuccessful. See Calitz “The Appointment of Insolvency Practitioners in South Africa: Time for Change?” (2006) *TSAR* 721; Burdette

It is unrealistic to assume that the demise of *apartheid* has diminished the extent of state intervention in the lives of South Africans. If anything, the present government's commitment to social and economic transformation implies an even greater degree of regulation and state intervention.¹⁶ Another important feature of the new dispensation in South Africa is the concept of "constitutionalism".¹⁷ Currie states that:

Modern constitutionalism is thus a prescriptive doctrine in that it indicates how state power should be exercised and does not simply describe how governments exercise their authority in practise. It is also normative, in that it sets out the values that should be upheld in the governing process.¹⁸

The foundation of constitutionalism is that the power of the state is defined and circumscribed by law to protect the interests of society.¹⁹ The aim and purpose of any state regulation in South African insolvency law should thus be to ensure compliance with the underlying values of the Constitution which includes the protection of societal interests and of individual rights and freedoms.

Law and the constitution do not exist in a vacuum, but rather exist in, and aim to serve society.²⁰ Moreover, given South Africa's past, it is obvious why the Constitution's articulated vision is to protect individuals, and especially vulnerable categories of people, and to safeguard against any abuse of power by organs of state²¹ – hence the constitutional emphasis on the establishment of a public administration that is governed by the principles of

Reform, Regulation and Transformation: The Problems and Challenges Facing South African Insolvency Industry (2005) unpublished paper presented at the Commonwealth Law Conference, London (hereafter referred to as Burdette "Reform, Regulation and Transformation") on file with the author. See Stander "Invloed van die Grondwet op die Aspekte van die Handelsreg" (2000) *SA Merc LJ* 291.

¹⁶ Hoexter 11.

¹⁷ For a detailed discussion of the concept of "constitutionalism" see Barnett *Constitutional and Administrative Law* (2004) 5 (hereafter referred to as Barnett).

¹⁸ Currie *The New Constitutional and Administrative Law: Vol 1 Constitutional Law* (2001) 10 (hereafter referred to as Currie *The New Constitutional and Administrative Law*).

¹⁹ Burns 28.

²⁰ James "The Judiciary and the Emerging Principle of Interest and Spirit of the Constitution" (2003) *Melanesian LJ* 29.

²¹ Section 8(1) of the Constitution. The definition of "organ of state" in s 239 in the Constitution reads as follows:

'Organ of state' means –

- (a) Any department of state or administration in the national, provincial or local sphere of government; or
- (b) Any other functionary or institution –

- (i) Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

- (ii) Exercising a public power or performing a public function in terms of any legislation,

But does not include a court or a judicial officer.



the Constitution and that is accountable, transparent, impartial and efficient.²² For this reason, the inclusion in the Bill of Rights of a right to just administrative action is of great importance.²³ One practical outcome of this provision is that service to the people has become a guiding principle of the public service in South Africa.²⁴ A responsive administration is thus one which is alert to the needs of its people and which effectively addresses these needs.²⁵

The growth of the administrative state has also not been without its negative consequences and many countries, including South Africa, have realised that the public administration has become overburdened, cumbersome and inefficient.²⁶ In assessing our current insolvency legislation and specifically its regulatory aspects, it is thus important to ensure that the regulation of insolvency law takes place in an environment conducive to optimal service delivery and the protection of the public interest. The aim of any law reform proposal therefore should ultimately be to create a streamlined administration capable of delivering an efficient and effective public service rather than a complex, inefficient and unsustainable bureaucracy that becomes too costly to maintain.

The twentieth century has also seen the emergence in many countries of the world of the social welfare or benefactor state, a model of governance in which the state is expected to play a positive and interventionist role in socio-economic regeneration and the welfare of its citizens.²⁷ Although the South Africa state cannot be regarded as a typical social welfare state it still pervades many aspects of the lives of its citizens, in particular through the planning of the social and economic life of its inhabitants. It is also clear that our Constitution is committed to an “efficient, equitable and ethical public administration which respects

²² See *inter alia* s 195 of the Constitution and the following: *Ngxusa v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 12 BCLR 1322 (E) at 1329B. See Beukes “The Constitutional Foundation of the Implementation and Interpretation of the Promotion of Administrative Justice Act 3 of 2000” 6 (hereafter referred to as Beukes) in Lange *The Right to Know*. See also *Transnet Ltd v Chirwa* 2007 2 SA 198 (SCA) for a detailed discussion of the nature of “public power”. See also Hoexter 192 for a detailed discussion of the nature of “public powers”.

²³ Section 33 of the Constitution. See Beukes 4.

²⁴ The idea of service to the people is aptly summarised in the opening statement of the “*Batho Pele* - ‘People First’: White Paper on Transforming Public Service Delivery”; See Beukes 7. See also s 195(1)(e) of the Constitution.

²⁵ Beukes 7.

²⁶ Hoexter 12.

²⁷ Although there is no specific reference to a benefactor state in ss 195 and 196 of the Constitution which deals with public administration, it is clear that the basic values and principles embodied in these sections represent the ethos of the benefactor state. See Burns 11; Hoexter 10.

fundamental rights and is accountable to the broader public”.²⁸ When assessing our current regulatory system the question should therefore be asked if the Master as the key role-player and supervisory authority in insolvency matters conforms to the principles of efficiency, equitability, social responsibility and accountability. It is therefore also important that these basic principles should form the underlying theme of any law reform proposal for South African insolvency law.

In moving from a culture of authority to a culture of justification and accountability²⁹ it must be clear that the Constitution, and especially the Bill of Rights, has fundamentally changed the way any state authority or administration is supposed to function. For instance, it is precisely because of the principle of accountability that the Master is drawn into the discussion on the constitutional aspects of insolvency law. This is particularly so since some of the most important specific provisions flowing from the principle of accountability are part of the Bill of Rights and include, most significantly, the right to access to information in section 32 and the right to just administrative action in section 33.³⁰ Both of these provisions are aimed at ensuring transparency and accountability in the public administration,³¹ which are among the main themes of the Constitution and which form an integral part of the constitutional foundation of administrative justice.³² With regard to the role and function of the Master as well as any future formation of state regulation in insolvency law, certainly the most significant development within the context of the Constitution is the enactment of PAJA which gives effect to the principles envisaged in section 33 of the Constitution and which will form the subject-matter of the next chapter.

²⁸ See *President of the RSA v SARFU* (n 15) at par 133; Hoexter 14.

²⁹ Burns 49.

³⁰ Currie 17.

³¹ Section 195 of the Constitution.

³² Devenish *The Constitution of South Africa* (2005) 372 (hereafter referred to as Devenish).



CHAPTER 3: ADMINISTRATIVE LAW ASPECTS OF STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW

3.1 INTRODUCTION

Before discussing the general powers and duties of the Master as the existing supervisory authority in South African insolvency law in the following part of this study, it is necessary to pause at the potential relevance of the Constitution via the administrative law provision for the Master as public body or institution.³³ Administrative law can broadly be described as a branch of public law that regulates the way in which public authorities – and in certain instances also private entities – perform their powers and functions when implementing or giving effect to statutory and other empowering provisions.³⁴ Hoexter is of the opinion that in present-day South Africa it is more accurate to regard administrative law as regulating the activities of bodies that exercise public powers or perform public functions, irrespective of whether those bodies are public authorities in a strict sense.³⁵ The question what it is that makes a power or a function “public” has not yet been clearly answered by our courts, but such a power could essentially be described as a power inevitably associated with a duty to act in the public interest as opposed to a private interest.³⁶

The development of modern administrative law jurisprudence under the Constitution should not be taken to mean that the Constitution has done away with the common law principles on administrative law. Rather, section 33 and other relevant provisions must be seen as both incorporating and expanding on the established principles of our common law.³⁷ In *Bato Star Fishing (Pty) v Minister of Environmental Affairs*³⁸ O’Regan J cautioned that the continuing relevance of the common law should be worked out on a case-by-case basis.³⁹ In practice,

³³ Cf *President of the RSA v SARFU* 2000 (n 15) at 142. See *Mittalsteel SA Ltd (previously known as Iscor Ltd) v Hlatshwayo* 2007 1 All SA 1 (SCA) for a detailed discussion of the meaning of “public body”.

³⁴ See Hoexter 2; Beukes 3.

³⁵ Hoexter 2.

³⁶ In *POPCRU and Others v Minister of Correctional Services* [2006] 12 BLLR 1212 (E) at 53, Plasket J observed that “the elusive concept of public power is not limited to exercise of power that impacts on the public at large. Indeed, many administrative acts do not”. See also *Transnet Ltd v Chirwa* (n 22); Hoexter 3.

³⁷ Hoexter 28.

³⁸ 2004 4 SA 490 (CC).

³⁹ *Bato Star Fishing (Pty) v Minister of Environmental Affairs* (n 38) at 22.

however, the common law is proving to be a significant aid to the courts in their interpretation of the Constitution and PAJA.⁴⁰

Constitutional and administrative law are both extensive and specialised subjects and worthy of a study on their own. The aim of this chapter is thus not to provide an in-depth discussion of the ambit of the administrative law in general but rather to discuss some of the basic principles of administrative law and in particular PAJA, in order to determine their relevance to state regulation in South African insolvency law. In order to develop a better understanding of the purpose and operation of PAJA it will be essential to initially discuss certain important concepts such as “organ of state”; “administrative action” and “judicial review”. Finally, reference will briefly be made to the impact of Promotion of Access to Information Act⁴¹ on the Insolvency Act.

3.2 THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

3.2.1 General

The Insolvency Act was enacted in the 1930s. Consequently, at the time it could not embrace the notion of accountability as currently understood and regulated in terms of the new Constitution and the new administrative law regime. In proposing an innovative and efficient regulatory framework for South African insolvency law, it is therefore important to acknowledge the impact and effect of current legislation such as PAJA on the role of a supervisory body in insolvency law. The Bill of Rights contains several provisions of significance for administrative law, and for the purposes of this study the right to just administrative action in particular represents the most important provision. In terms of section 33(1)⁴² of the Constitution everyone has the right to administrative action that is

⁴⁰ Hoexter 28.

⁴¹ Act 2 of 2000. Hereafter referred to as “PAIA”.

⁴² S 33 provides as follows: Just administrative action -

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must -
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.



lawful, reasonable and procedurally fair. Section 33(3) thereof requires the enactment of national legislation to give effect to such right, and this requirement was given effect to by the enactment of PAJA.⁴³

Although administrative justice is not a novel concept, its constitutionalisation is undoubtedly a recent and important innovation in South African law.⁴⁴ According to Boule administrative justice is:

...justice emanating from a non-judicial arm of Government, namely, permanent administrative departments, including their political heads, as well as statutory tribunals, boards and para-statal. It denotes the fair and effective performance of its tasks by the administration in an age when justice is as much the province of this branch as it is of the courts.⁴⁵

The purpose of PAJA is thus to give effect to section 33 and to provide greater detail of the scope and application of the explicit constitutional right to administrative justice. It is a truism that the exercising of public power in a modern state depends fundamentally on discretionary decision-making by state officials at all levels of government and in this context the Master is no exception.⁴⁶ It is equally trite that if a state is to meet the requirements of a constitutional democracy, those seeking benefits from the state, and those against whom the state seeks to enforce its powers, must have avenues to seek redress or at least a relatively independent regulation of such discretionary procedures in law.⁴⁷

⁴³ In *Kiva v Minister of Correctional Services and Another* [2006] JOL 18512 (E) the Court held that, because PAJA gives effect to a constitutional right, the provisions thereof must be generously interpreted. See *Kunst et al Meskin, Insolvency Law and its Operation in Winding-up* (1990) (loose-leaf edition) par 1.8 (hereafter referred to as *Meskin*).

⁴⁴ Dlamini 697.

⁴⁵ Boule “Administrative Justice in American and South African Law” in Hund *Law and Justice in South Africa* (1988) 46. See Dlamini 697.

⁴⁶ Apart from the Master, other officers may make decisions in terms of the Insolvency Act, eg, a magistrate issuing a search warrant in terms of s 69(3) of the Insolvency Act. In *Le Roux v Magistrate, Mr Viana* 2006 JDR 0562 (W) the Court held that the issuing of a warrant by a magistrate amounted to a judicial and not an administrative function. It may also occur that procedural prerequisites regarding specific administrative actions may be more onerous on the parties than those imposed by the provisions of the PAJA. In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others* [2007] JOL 19542 (SCA) at par 13, the SCA took the view that if the legislature chose to afford a party affected by particular administrative action greater procedural protection by means of the specific provisions of the Act, those provisions cannot be ignored in favour of less onerous prescriptions in general legislation such as the PAJA. See *Meskin* par 1.8.

⁴⁷ See Corder “Reviewing Review: Much Achieved, Much More to Do” (hereafter referred to as Corder “Reviewing Review”) in Corder *Realising Administrative Justice* (2002) 1 (hereafter referred to as Corder *Realising Administrative Justice*).

3.2.2 Administrative Action

The first phase in determining whether PAJA is applicable to the conduct of a public institution such as the Master is to determine whether the powers and functions of the Master can qualify as “administrative action”.⁴⁸ Section 33(1) of the Constitution determines that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. However, this provision does not define administrative action. Instead this function has been left to PAJA⁴⁹ and the following definition in section 1 of PAJA will apply:⁵⁰

- ‘administrative action’ means any decision taken, or any failure to take a decision, by –
- (a) an organ of state, when
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation;
 - or
 - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ...

Accordingly for an action or function to be classified as an administrative action in terms of the above definition, it has to comply with certain distinctive elements built into the definition of administrative action.⁵¹ One of these elements would be what constitutes a “decision”.⁵² A decision, for the purposes of PAJA:

- means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –
- (a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
 - (d) imposing a condition or restriction;
 - (e) making a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article; or
 - (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.⁵³

⁴⁸ See the definition of “administrative action” in s 1 of PAJA.

⁴⁹ Burns 6.

⁵⁰ South African legal academics have however expressed concerns about the definition of administrative action in the Act and the overall view is that the definition is too narrow when read against the minimum requirements of the right to administrative justice in s 33 of the Constitution. Hoexter “‘Administrative Action’ in the Courts” 303.

⁵¹ For a detailed discussion of these elements refer to Hoexter 163-221 and Burns 19-31.

⁵² Section 1(v) of PAJA.

⁵³ Definition in s 1 of PAJA.



The examples included in the definition do not constitute a complete list and it should be noted that the Act makes it clear that an administrative action should not be limited to administrative actions or decisions only, but may also include the failure to act.⁵⁴ The definition of a “decision” also introduces two additional elements contained in the phrase “of an administrative nature”⁵⁵ and the requirement that the decision must be taken in terms of an “empowering provision”.⁵⁶ Firstly, it is apparent that the purpose of the phrase “of an administrative nature” is to ensure that private law matters such as the conclusion of a contract are excluded from the ambit of the definition.⁵⁷ The decision at issue should be of a public law nature involving a relationship of inequality or subordination between the government and the individual or entity.⁵⁸

In terms of section 1 of the Act, “empowering provision” means a law, a rule of the common law, customary law, or an agreement, instrument or any other document in terms of which an administrative action was purportedly taken.⁵⁹ The essence of this provision is the requirement that the exercise of administrative power must have an authoritative basis and that any public power must derive almost exclusively from some or other statutory measure or other empowering provision. The definition of “empowering provision” is exceptionally wide and extends beyond a law, a rule of the common law or customary law to include an agreement, instrument or other document in terms of which administrative action was purportedly taken.⁶⁰

⁵⁴ In *Vulindlela Furniture Manufacturers v MEC, Department of Education and Culture* 1998 4 SA 908 (Tk) the court found that the words “lawful administrative action” contained in s 24(a) of the Interim Constitution are wide enough to include an omission to take administrative action where such a duty had been imposed; see Burns 21. In *Standard Bank of SA Ltd v The Master of the High Court and others* 2009 5 SA 13 (E) at par 90 the Court stated that “[w]hile it is so that a failure to take a decision is a ground for review, a logical precondition is that the decision-maker is either under a legal duty to decide or that a duty to decide has been activated, for example by a request for a decision to be taken by a person with the standing to make such a request”. See Meskin par 1.8.

⁵⁵ See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) Chaskalson CJ regarded the phrase “of an administrative nature” as bringing regulation-making within the scope of the definition of “decision”. See Meskin par 1.8.

⁵⁶ Hoexter 187.

⁵⁷ Burns 22.

⁵⁸ Burns 22.

⁵⁹ Burns 22.

⁶⁰ PAJA excludes from the operation of the Act certain executive functions and powers. See s 1 of PAJA on the definition of “administrative action” and the exclusions listed there.

A further element built into the definition of administrative action is that the decision has to be taken by an organ of state or by a private person exercising a public power or performing a public function. In the context of PAJA an organ of state bears the meaning assigned to it in section 239 of the Constitution.⁶¹ For purposes of this study it is important to note that the Supreme Court of Appeal held that any institution exercising a public power or performing a public function in terms of legislation is an organ of state.⁶² Although the case of *Mittalsteel South Africa v Hlatshwayo*⁶³ was not decided under section 33 of the Constitution but dealt with the right of access to information under section 32 of the Constitution, it clearly sets out the current approach to the term “organ of state”.⁶⁴ The court’s approach to the definition places the focus on a functional rather than a control test. The question is therefore not whether the particular decision-maker is under the control of the state, but whether it performs a public function in terms of legislation.⁶⁵ The concept of “organ of state” therefore plays a decisive role in determining whether an action is classified as an administrative action and whether it is subject to the application of the principles of just administrative action.⁶⁶ Evidently, the Master does qualify as an organ of state, as it often exercises a public power or public function in terms of legislation⁶⁷ with the result that its decisions will be subject to the provisions of PAJA.⁶⁸

The final requirements of the definition of an administrative action are that the decision has to adversely affect someone else’s rights and must have a direct, external legal effect. These elements are taken to mean that a decision will qualify as an administrative action if it has the capacity to impact directly and immediately on individuals.⁶⁹ The court held in *Grey’s Marine*⁷⁰ that the phrase indicating that the action has to have an affect on a person’s rights should be read to mean that the decision should have the capacity to adversely affect rights.⁷¹

⁶¹ (n 21).

⁶² *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA).

⁶³ See (n 33).

⁶⁴ Quinot *Administrative Law Cases and Materials* (2008) 202 (hereafter referred to as Quinot).

⁶⁵ *Mittalsteel South Africa v Hlatshwayo* (n 33) at par 7. See Quinot 202.

⁶⁶ Burns 14.

⁶⁷ The examples will be examined in a later chapter.

⁶⁸ Meskin par 1.8.

⁶⁹ Rudolph *Student Manual: Applying the Promotion of Administrative Justice Act in Practise* (2009) 138 (hereafter referred to as *Rudolph Student Manual*) on file with the author.

⁷⁰ *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) at 23.

⁷¹ *Rudolph Student Manual* 139.



With regard to the direct, external legal effect requirement, it was held in *Van Zyl v New National Party*⁷² that the decision must be a final decision by an administrative decision-maker that constitutes a legally binding determination of another legal entity's rights.⁷³ A "direct effect" would indicate that the decision is final, not in the sense of being irreversible, but simply that the decision has been made. The phrase "an external effect" indicates that the effect of the decision will be felt by someone other than the decision-maker.⁷⁴ The final requirement, namely that it must have a "legal effect" could, according to *Hoexter*, be taken from the German rule that the decision must at least entail a determination of someone's rights, covering deprivations as well.⁷⁵

The above discussion on the meaning of the concept of "administrative action" is by no means all-inclusive or complete. It should be clear that PAJA originates from section 33 of the Constitution and the definition of administrative action in the Act, although pieced together through various elements, should as far as possible be reconciled with the meaning that has been attributed thereto in the Constitution, so as to avoid constitutional invalidity.⁷⁶ It is also apparent that every action to be incorporated under the scope of PAJA should first meet the requirements of the concept of administrative action as defined in the Act, and this would certainly entail an appraisal of the action measured against all the various elements built into the definition.⁷⁷

In the *New Clicks*⁷⁸ case the Constitutional Court struggled with the concept of "administrative action" in terms of section 1 of PAJA and the four divergent approaches taken by the Court in this case are revealing.⁷⁹ The divergence underscores the sheer difficulty of deciding what is considered to be an administrative action and what is not in

⁷² 2003 10 BCLR 1167 (C).

⁷³ *Van Zyl v New National Party* (n 71) at par 86. See Currie *The Promotion of Administrative Justice Benchbook* (2001) 2 (hereafter referred to as *Currie Benchbook*); Burns 147.

⁷⁴ Hoexter 209.

⁷⁵ Hoexter 204.

⁷⁶ Hoexter 222.

⁷⁷ Burns 28. In *Oosthuizen's Transport (Pty) Ltd and Others v MEC, Road Traffic Matters, Mpumalanga and Others* 2008 2 SA 570 (T) the court held that "administrative action" was action that had the capacity to affect legal rights (at 575I-J).

⁷⁸ See (n 55).

⁷⁹ A majority of two judges agreed that the recommendations and regulations did not qualify as administrative action under PAJA and thus could not be reviewed under PAJA. They then held that review remained available in terms of the principle of legality and that the recommendations and regulations could also be reviewed under s 33 of the Constitution or under the common law. It is not clear from the judgement precisely which of these avenues was relied on in its subsequent review of the regulations. See Hoexter 125.

terms of PAJA. In the words of *Hoexter*: "... for if the Constitutional Court is defeated by section 1 of PAJA, what hope is there for the rest of us?"⁸⁰

Once it has been determined that an action constitutes "administrative action" the next phase will be to determine whether such action complies with the necessary requirements in terms of section 33 (1) of the Constitution, namely whether the action can be classified as "lawful, reasonable and procedurally fair".⁸¹

3.2.3 The Three Requirements of Section 33

As mentioned above, section 33 states that everyone has the right to administrative action that is *lawful, reasonable and procedurally fair*. A "lawful" administrative action means in essence that administrative actions and decisions must be duly authorised by law and that any statutory requirement or precondition linked to the exercising of the power must be complied with.⁸² The requirement of "lawfulness" in relation to an "administrative action" as mentioned in both the Constitution and PAJA, is closely linked to the principle of legality as an important aspect of the rule of law, which in turn forms the basis of just administrative action in general.⁸³

The element of lawfulness covers all grounds generally associated with authority, jurisdiction and abuse of discretion. The important principle is that any exercise of power must be authorised by law. The Constitutional Court explained that it is "central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."⁸⁴ It is thus clear that administrators have no inherent powers and every incident of public power must be inferred from a lawful source, usually legislation.

The concept of "reasonableness" is one of the most elusive and variable concepts in our jurisprudence. It is impossible to assign a static and definitive meaning to it and the concept will

⁸⁰ Hoexter "Administrative Action' in the Courts" 324.

⁸¹ As stated in s 33(1) of the Constitution.

⁸² Hoexter 224.

⁸³ Hoexter 225. For a case dealing with the lawfulness of an administrative action see *Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others* 2006 5 SA 291 (T) in which the Court stated that lawfulness lies at the heart of administrative justice, and underpins the whole of the South African Constitution. See *Meskin* par 1.8.

⁸⁴ *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) at par 58. See Hoexter 226.



no doubt develop as it is considered in a variety of circumstances.⁸⁵ However, it is important to note that unlike the common law position,⁸⁶ reasonableness in terms of the new constitutional dispensation is a self-standing ground for the review of administrative action. The essence of the test now concerns an enquiry as to the presence of a rational connection between the decision made, the facts on which such decision is based and the reasoning provided for the decision.⁸⁷ In *Bato Star*⁸⁸ O'Regan J ruled that reasonableness must be determined on a case-by-case basis, depending on the circumstances of each case and taking into account the following: the nature of the decision; the identity and expertise of the decision-maker; the range of factors relevant to the decision; the reasons given for the decision; the nature of the competing interest involved and the impact of the decision on the lives of those affected.⁸⁹

Generally it is accepted that the reasonableness test is often accompanied by an enquiry into the rationality of the decision as well as the proportionality of its outcome.⁹⁰ *Rationality* relates primarily to preventing an abuse of discretionary power or arbitrary decision-making and is considered to be the *minimum* threshold requirement for a valid exercise of public power.⁹¹ This test is now codified in section 6(2)(f)(ii) of PAJA and requires that an administrative action be rationally connected to the purpose for which it was taken; the purpose of the empowering provision; the information before the administrator; or the reasons given for it by the administrator. One consequence of this minimum threshold is that once complied with by the decision-maker a court will be reluctant to interfere with the decision merely because the court holds a different view. Such reasoning upholds the doctrine of the separation of powers and allows for rational choices to be made by the executive on matters that fall primarily within the domain of the executive.⁹²

⁸⁵ Govender “Administrative Law as a Surrogate for Human Rights Law” 45 (hereafter referred to as Govender “Administrative Law as a Surrogate for Human Rights Law”) in Corder *Realising Administrative Justice* (2002).

⁸⁶ Under the common law unreasonableness alone was not enough. The courts required an additional element such as *mala fides* or failure by the decision-maker to apply his or her mind to the matter. See *Union Government v Union Steel Corporation* 1928 AD 220 at 236.

⁸⁷ See *Carephone (Pty) Ltd v Marcus NO and Others* 1998 10 BCLR 1326 (LAC); *Nieuwoudt v Chairman, Amnesty Committee, Truth and Reconciliation Committee* 2002 2 SA 143 (C) at 155.

⁸⁸ See (n 38).

⁸⁹ Hoexter 315.

⁹⁰ See also Hoexter “Unreasonableness in the Administrative Justice Act” 149 (hereafter referred to as Hoexter “Unreasonableness in the Administrative Justice Act”) in Lange *The Right to Know* (2004).

⁹¹ *Pharmaceutical Manufacturers Association of South Africa In Re: Ex Parte Application of the President of the RSA* 2000 3 BCLR 241 (CC) at par 85.

⁹² See also *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC) at par 45.

Proportionality on the other hand means trying to avoid an undue imbalance between the adverse and the beneficial effects or consequences of an action.⁹³ Essentially, this is about establishing proportionality between the means and the ends and by comparing and weighing the advantages and disadvantages of the measures against each other.⁹⁴ Where appropriate the administrator should therefore be sensitised to use less restrictive or oppressive means to achieve the purpose of the administrative action.⁹⁵

Apart from the requirements of lawfulness and reasonableness, section 33(1) of the Constitution guarantees everyone a right to administrative action that is “procedurally fair”. Section 3(1) of PAJA also states that “administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair”.⁹⁶ The concept of procedural fairness is flexible and the range of situations to which it may apply is extensive.⁹⁷

For current purposes it would suffice to point out some of the essential features of this requirement. At common law, procedural fairness was associated with the rules of natural justice which were based on the *audi alteram partem* and *nemo iudex in sua causa* principles. In terms of these principles an affected person was entitled to be afforded an opportunity to be heard, to be informed about all relevant information relating to the decision and to be granted a hearing that was unbiased and impartial.⁹⁸ By virtue of section 3 of PAJA the common law position has now become part and parcel of the statutory requirements for procedural fairness.

⁹³ Hoexter “Unreasonableness in the Administrative Justice Act” 154. See also Hoexter 310.

⁹⁴ Hoexter 310.

⁹⁵ In recent years the courts have moved towards adopting a more objective approach to reasonableness. For example, in *Standard Bank of Bophuthatswana Ltd v Reynolds* [1995] 3 BCLR 305 (B), 1995 3 SA 74 (B), the court departed from the test of “gross unreasonableness” and found that the less stringent test of “unreasonableness” should be adopted. It should however again be stated that “reasonableness” has a wide range of variation and no single meaning can be attributed to it. See *Nel NO v The Master* 2005 1 SA 276 (SCA) for a consideration of “reasonableness” in the context of the Master’s power to reduce or increase the “reasonable remuneration” of a liquidator. See also Hoexter 306; Burns 151; Hoexter “Unreasonableness in the Administrative Justice Act” 154.

⁹⁶ See Hoexter 326. For a case dealing with procedural unfairness, see *Dunn v Minister of Defence and Others* 2006 2 SA 107 (T).

⁹⁷ *Du Preez v Truth and Reconciliation Commission* 1997 3 SA 204 (A); *Mose v Minister of Education, Western Cape* 2009 2 SA 408 (C). See also Burns 206.

⁹⁸ See for instance *South African Roads Board v Johannesburg City Council* 1991 4 SA 1 (A); 71992 4 SA 532 (A).



Section 3 provides for three categories of rules aimed at ensuring procedural fairness. In the first category *mandatory* procedures are specified⁹⁹ which require the decision-maker to give adequate notice¹⁰⁰ of the *nature* and *purpose* of the action; a reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right to review or appeal; and adequate notice of the right to request reasons in terms of section 5 of PAJA. In the second category,¹⁰¹ additional procedural safeguards of a *discretionary nature* are provided for, such as the right to legal representation, the right to present and dispute information and the right to appear in person. In the third and last instance section 3 of PAJA follows the dubious approach of allowing for a departure from the mandatory requirements if it is reasonable and justifiable in the circumstances. The only consolation is that the envisaged departure from the mandatory prescriptions must be justifiable with reference to a range of factors listed in the provision itself.¹⁰² The effect of allowing a decision-maker to depart from the mandatory fair procedure requirements is that a limitation of the right to procedural fairness becomes permissible *ex lege*. To the extent that such a limitation may interfere with the general guarantees in section 33 of the Constitution, section 36 of the Constitution will have to be complied with.

In the final analysis two related issues warrant attention. The first is that the remedy available to an affected person remains a procedural as opposed to a substantive one. This is the essence of section 33 of the Constitution which provides for *procedural* fairness only. Equally, it will also be the case with regard to the second issue, namely the protection of a *legitimate expectation* (as opposed to a *right*) in terms of section 3(1) of PAJA. As the law currently stands, the violation of a legitimate expectation does not entitle the affected person to claim specific performance and the courts will limit their enquiry to what is procedurally the most appropriate remedy.¹⁰³ However, it may be argued that the time has come to consider the right to a substantive remedy in this instance, especially in view of the courts' obligation to provide *appropriate* relief in terms of section 38 of the constitution in the case

⁹⁹ Section 3(2)(b).

¹⁰⁰ On adequate notice see *Bushula v Permanent Secretary, Dept of Welfare, Eastern Cape* 2000 7 BCLR 728 (E); *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 2 SA 67 (C).

¹⁰¹ Section 3(3).

¹⁰² Section 3(4)(a) and (b).

¹⁰³ See for instance *Administrator Transvaal v Traub* 1989 4 SA 731 (A); *Bushbuck Ridge Border Committee and Another v Government of the Northern Province and Others* 1999 2 BCLR 193 (T); *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA).

of a violation of a right in the Bill of Rights and the vast material in general on the duty of a state to provide for *effective* remedies in response to the violation of a right.¹⁰⁴

3.2.4 Judicial Review and Remedies under PAJA

In order to set the stage for a discussion of the accountability of a supervisory authority in insolvency law, it is necessary to mention that apart from the most popular route of statutory review, the introduction of the Constitution now also presents alternative measures of relief. The Insolvency Act makes provision for the Master's decisions, rulings and orders to be reviewed by a court of law and the bulk of review proceedings and body of case law still represents actions taken under this procedure.¹⁰⁵ However, apart from the statutory relief presented by the Insolvency Act the law relating to judicial review has undergone a fundamental change by virtue of the introduction of the new constitutional dispensation.¹⁰⁶

There are different types of review proceedings in South African law, including the review of the proceedings of inferior courts;¹⁰⁷ automatic review¹⁰⁸ and judicial review in the constitutional sense;¹⁰⁹ judicial review in the administrative law sense¹¹⁰ and special statutory review.¹¹¹ It should also be noted that there are now also five different pathways to administrative review, namely common-law review;¹¹² review proceedings in terms of PAJA; review in terms of section 33 of the Constitution; the constitutional principle of legality; and special statutory review.¹¹³ From a South African perspective judicial review remains the most significant remedy against maladministration, as is evident from the vast administrative law literature available on the subject. This part of the study will offer only a brief overview of the most important principles regarding judicial control over the administrative powers and

¹⁰⁴ See also *Fose v Minister of Safety and Security* 1997 1 BCLR 851 (CC).

¹⁰⁵ Section 151 of the Insolvency Act of 1936. See *Nel and Another NNO v The Master* (n 95).

¹⁰⁶ The judicial review of administrative actions arising from PAJA as well as direct constitutional review under s 33 of the Constitution are now also available to the ordinary citizen seeking relief.

¹⁰⁷ Section 24 of the Supreme Court Act 59 of 1959.

¹⁰⁸ Certain statutes make provision for the decisions of magistrates to be reviewed "automatically" by judges.

¹⁰⁹ Power of the courts to scrutinise and declare unconstitutional any type of legislation, original or delegated, or state conduct that infringes on the rights in the Bill of Rights or otherwise offends against provisions of the Constitution. See Hoexter 109.

¹¹⁰ "Judicial review" according to administrative law refers more specifically to the power of the courts to scrutinise and set aside administrative decisions or rules on the basis of certain grounds of review. Hoexter 109.

¹¹¹ The legislature may and often does confer on the courts a statutory power of review.

¹¹² Hoexter 465.

¹¹³ Hoexter 112.



functions of the Master, which includes review in terms of PAJA and constitutional review in terms of the principle of legality.

PAJA provides for the most immediate justification for judicial review, based on the constitutional mandate in section 33(3) to give effect to the administrative justice rights in the Constitution and to provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.¹¹⁴ PAJA does not replace section 33 of the Constitution but in effect now provides for the primary or default pathway to review.¹¹⁵ Since PAJA provides the most immediate source of review, the direct constitutional review under section 33 is available only infrequently – typically in cases where original legislation is challenged on the basis that it unjustifiably limits the rights in section 33, or where the decision-maker has acted outside the scope of the constitutional powers assigned to him or her.¹¹⁶ Direct constitutional review will also be appropriate where PAJA itself is impugned for failure to “give effect to” the administrative justice rights.¹¹⁷ The limited application of section 33 accords with the principle of avoidance first expressed in *S v Mhlungu*,¹¹⁸ which requires resort to be had to a specific statutory remedy or the common law before constitutional remedies are sought.¹¹⁹

Critically, however, it should be kept in mind that the application of both PAJA and section 33 is confined to the category of “administrative action”.¹²⁰ This implies that in every case of judicial review it is necessary to initially establish whether the action qualifies as an administrative action which may in review proceedings act as a limiting device in both cases. As a limiting factor, this qualification does not mean that the particular action is altogether unreviewable. In *POPCRU and Others v Minister of Correctional Services and Others*¹²¹ the court held that the fact that some forms of administrative action may be excluded from the limited statutory definition does not mean that these actions are not reviewable in terms of the High Court’s inherent and constitutional jurisdiction.¹²² The court also found that judicial

¹¹⁴ Section 33 of the Constitution; Hoexter 114.

¹¹⁵ Hoexter 115.

¹¹⁶ Hoexter 115

¹¹⁷ Hoexter 463.

¹¹⁸ 1995 3 SA 867 (CC).

¹¹⁹ See *Jayiya v MEC for Welfare, Eastern Cape Provincial Government* 2004 2 SA 611 (SCA).

¹²⁰ Hoexter 115.

¹²¹ See (n 36).

¹²² Meskin par 1.8

review is not limited to administrative acts that impact on the public at large, but extends to public functionaries who are required to act in the public interest.¹²³

The first stage on the road to just and lawful administrative action would thus be to determine whether such action qualifies as an “administrative action” in accordance with PAJA. It will then be evident that apart from certain exceptions,¹²⁴ the action or decision will be controlled by the legal machinery of general administrative law consisting of the constitutional right to administrative justice and the legislative provisions in PAJA.¹²⁵ The extent to which the right to lawful, reasonable and procedurally fair administrative action in the Constitution guarantees the state’s accountability and transparency cannot be underestimated, and is reflected in the right of an individual affected by the administrative action to request written reasons and ultimately to challenge the action by way of judicial review.¹²⁶

3.2.4.1 *The Right to Request Reasons*

In terms of section 5 of PAJA a person whose rights have been *materially and adversely affected* by an administrative action and who has not been provided with reasons for the action, may within 90 days after the date he or she became aware of it, or may reasonably be expected to have become aware of it, request that the administrator furnish written reasons for having taken the relevant action.¹²⁷ The administrator is required to respond to such a request within 90 days.¹²⁸ If the administrator fails to furnish adequate reasons,¹²⁹ or does not inform the party requesting reasons that he or she is departing from the requirements on the basis that it is reasonable and justifiable in the circumstances,¹³⁰ it is presumed that the administrative action in question was taken without adequate reasons.¹³¹

¹²³ Meskin par 1.8

¹²⁴ See definition in s 1 of PAJA. See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* (n 55); Hoexter 210.

¹²⁵ Hoexter 9.

¹²⁶ See in general ss 5 and 6 of PAJA.

¹²⁷ Section 5(1) of PAJA.

¹²⁸ Section 5(2) of PAJA.

¹²⁹ On adequate reasons see *Commissioner of South African Police Service v Maimela* 2004 1 BCLR 47 (T).

¹³⁰ Section 5(4) of PAJA.

¹³¹ Section 5(3) of PAJA. See also *Sidorov v Minister of Home Affairs* 2001 4 SA 202 (T) at 207I and 209B.



Following the reasoning with regard to the right to be given reasons in *Transnet Ltd v Goodman Brothers (Pty) Ltd*¹³² one can argue that the right to be given reasons will automatically apply to anyone to whom section 33(1) of the Constitution applies. In other words, since a section 33 (1) right will always be adversely affected by the failure to give reasons, the right to lawful, reasonable and procedurally fair administrative action inevitably entitles one to the right to ask for reasons.¹³³ Although section 5 only refers to a right, a section 5 remedy will equally apply in the case of a legitimate expectation by virtue of section 3 (1) of PAJA.

3.2.4.2 *Judicial Review of Administrative Action*

Although judicial review is not the only method of control of administrative actions, it is conceded to be the most effective. The new constitutional dispensation has fundamentally changed the role of the courts and the courts are now required to give content and meaning to the values and principles as contained in the Constitution.¹³⁴ A clear distinction should be made between judicial appeal where the court is interested in the merits of the case and whether the administrator's decision was correct or incorrect,¹³⁵ and judicial review where the function of the court is purely to examine the legality of the administrative actions in the context of section 6 of PAJA, which is an enquiry into the way in which the decision was taken.¹³⁶

Extensive grounds¹³⁷ are provided for the judicial review¹³⁸ of administrative actions, and these include actions that are not rationally connected to the purpose for which they were taken,¹³⁹ the information at the disposal of the administrator¹⁴⁰ or the reasons furnished by the

¹³² 2001 1 SA 853 (SCA).

¹³³ Wessels "Adequate reasons' in terms of the Promotion of Administrative Justice Act" in Lange *The Right to Know* (2004) 121 (hereafter referred to as Wessels "Adequate reasons").

¹³⁴ Burns 284.

¹³⁵ Burns 285.

¹³⁶ Burns 285.

¹³⁷ Section 6(2) of PAJA. For a case dealing with reviews in terms of s 6(2) of the Act, see *Dunn v Minister of Defence and Others* (n 95).

¹³⁸ As to the test to be applied in such review proceedings, see *Trinity Broadcasting, Ciskei v Independent Communications Authority of SA* 2004 3 SA 346 (SCA).

¹³⁹ In *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* (n 138) it was held that the review threshold for administrative action is rationality. In this case the Court held that, in requiring reasonable administrative action, the Constitution did not intend that in review proceedings the action had to be tested against the reasonableness of the merits of the action in the same way as an appeal, and as the test for rationality was an objective one, it was immaterial whether the functionary acted in the belief, in good faith, that the action had been rational. For more on the requirement of rationality, see *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others* 2007 1 SA 576 (SCA). See Meskin par 1.8.

administrator.¹⁴¹ Such review proceedings must be instituted without unreasonable delay,¹⁴² but not later than 180 days after the conclusion of the internal remedies, or, where no internal remedies exist, within 180 days after the person who was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of it and the reasons for that.¹⁴³ The periods of 90 and 180 days may be extended by agreement between the parties, or where the interests of justice so require, by the Court.¹⁴⁴

The requirements for administrative legality are laid down in section 6(2) of PAJA, which reads as follows:

- (2) A court or tribunal has the power to judicially review an administrative action if –
- (a) the administrator who took it –
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;
 - (d) the action was materially influenced by an error of law;
 - (e) the action was taken –
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;

¹⁴⁰ In accordance with the principle of *audi alteram partem*, fairness may dictate that a person who may be adversely affected by a decision should be afforded the opportunity to make representations. Such representations should be capable of being made before or after a decision, or both before and after a decision; see *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 5 SA 186 (C). See Meskin par 1.8.

¹⁴¹ In the *Kiva* case (n 43), the Court held that the applicant was entitled to reasons, not only because his rights had been affected, but also because without reasons he was unable to exercise his right of review. The Court also stated that in law “reasons” are statements that explain *why* a decision was taken.

¹⁴² In *PG Bison Ltd v Johannesburg Glassworks (Pty) Ltd (In Liquidation) and Others* 2006 4 SA 535 (W) the Court, in deciding a point *in limine*, held that an application for the review of the Master’s decision to expunge a claim brought some thirteen months after the applicant became aware of the expungement constituted an unreasonable delay in bringing the review proceedings. Although the application was dismissed on different grounds, the Court held that the application fell to be dismissed solely on the ground of the applicant’s unreasonable delay in bringing the application, taking into account s 7(1)(a) and (b) of the PAJA. See Meskin par 1.8.

¹⁴³ Section 7(1) of PAJA. In *Sasol Oil (Pty) Ltd and Another v Metcalfe NO* 2004 5 SA 161 (W) it was held that the period of 180 days provided for in PAJA overrides the provisions of conflicting earlier legislation providing for shorter timeframes. In this case the relevant legislation provided for a period of 30 days within which to bring review proceedings. The court found that because PAJA was constitutional legislation, the timeframe of 180 days had to prevail over the earlier legislation providing for a timeframe of 30 days. See Meskin par 1.8.

¹⁴⁴ Section 9 of PAJA.



- (f) the action itself –
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to –
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
- (g) the action concerned consists of a failure to take a decision;
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.¹⁴⁵

The grounds for review listed in section 6 of PAJA can therefore be divided into four different categories. The first ground of review manifests itself in the absence of authority. An absence of authority is present when the administrator who took the decision was not authorised to do so by an empowering provision;¹⁴⁶ acted under a delegation of power that was not authorised by the empowering provision;¹⁴⁷ was biased or reasonably suspected of bias;¹⁴⁸ or the action itself contravened a law or was not authorised by the empowering provision.¹⁴⁹ Combined, these grounds for review place an obligation on an administrator to ensure that he or she had the necessary legal authority to make a decision and that the prescribed powers were exercised within the scope of the empowering provision.¹⁵⁰

The second category deals with the way in which the decision was taken and the factors or circumstances taken into consideration by the decision-maker.¹⁵¹ In this instance the grounds for review relate to non-compliance by the decision-maker with a mandatory and material procedure or condition prescribed by an empowering provision; the taking of a decision in a procedurally unfair manner, under the influence of an error of law, for an unauthorised reason or for an ulterior purpose or motive. Also belonging to this category are decisions based on irrelevant considerations or taken under the unauthorised dictates of another person, in bad faith or arbitrarily or capriciously.

¹⁴⁵ Section 6 of PAJA.

¹⁴⁶ Section 6(2)(a)(i) of PAJA.

¹⁴⁷ Section 6(2)(a)(ii) of PAJA.

¹⁴⁸ Section 6(2)(a)(iii) of PAJA.

¹⁴⁹ Section 6(2)(f)(i) of PAJA.

¹⁵⁰ Rudolph *Student Manual* 199.

¹⁵¹ Section 6(2)(b)-(e).

The third category relates to the rationality requirement, which was dealt with above.¹⁵²

In the fourth category, a combination of common law grounds for review and a catch-all possibility can be found. The common law grounds relate to the instance where the decision-maker has failed to take the decision or where the exercise of the power or the performance of the function was so unreasonable that no reasonable person could have so exercised the power or performed the function. In terms of this category an administrative action can be reviewable when it is *otherwise* unconstitutional or unlawful.¹⁵³ Section 6 should also be read with section 7 of PAJA. According to section 7, review proceedings are only possible once all internal remedies provided for in any other law have been exhausted.¹⁵⁴ The court is thus obliged to turn the applicant away if it becomes apparent that the internal remedies available to the applicant have not been exhausted.¹⁵⁵ The court may only grant an exception to this rule in exceptional circumstances and where it is in the interest of justice to do so.¹⁵⁶ The duty to exhaust internal remedies refers only to remedies specifically provided for in the legislation with which the case is concerned. In *Reed v Master of the High Court*¹⁵⁷ Plasket J laid emphasis on the fact that this provision does not place an obligation on a person to deplete all possible avenues of redress such as an application to the Public Prosecutor prior to resorting to judicial review.¹⁵⁸ An example of such an internal remedy is to be found in section 57(7) of the Insolvency Act. The section reads as follows:

Any person aggrieved by the appointment of a trustee or the refusal of the Master to confirm the election of a trustee or to appoint a person elected as a trustee, may within a period of seven days from the date of such appointment or refusal request the Master in writing to submit his or her reasons for such appointment or refusal to the Minister.¹⁵⁹

¹⁵² Section 6(2)(f)(ii).

¹⁵³ Section 6(2)(g)-(i).

¹⁵⁴ Section 7(2)(a) of PAJA. In *Nichol and Another v Registrar of Pension Funds and Others* 2008 1 SA 383 (SCA) the SCA held that PAJA made it compulsory for an aggrieved party to exhaust the internal remedies, unless exempted from doing so by way of an application under s 7(2)(c). This will be the case if the Court is satisfied that there are exceptional circumstances requiring immediate intervention by the court rather than recourse to an internal remedy (such as where the available internal remedy would not provide the applicant with effective redress) (par 18 at 391A-B), and if it is in the interest of justice that the exemption be granted (par 15 at 390B-C). Such exceptional circumstances must exist before or at the time of the institution of the review proceedings (par 16 and 17 at 390C-G). See *Meskin* par 1.8.

¹⁵⁵ Hoexter 480.

¹⁵⁶ Section 7(2)(C) of PAJA.

¹⁵⁷ 2005 2 ALL SA 429 (E).

¹⁵⁸ Hoexter 480. See also *Reed v Master of the High Court* (n 157) at par 20.

¹⁵⁹ Section 57(7) of the Insolvency Act.



In summary, the grounds for review relate to requirements that an administrative action should be lawful, reasonable and procedurally fair. The proper extent of judicial control over the administration is a question of recurrent interest in administrative law, no doubt because it can never be answered absolutely. Judicial review will always be characterised by a continuous tension between the two essential aims of administrative law: to empower officials and give them the necessary freedom to do their work, and to control those powers and to limit their freedom in order to protect the rights of those affected by their decisions.¹⁶⁰

3.2.5 Insolvency Act or PAJA?

One of the questions that may arise when the impact of PAJA on South African insolvency law is examined, and in particular the role of the Master, is which Act will prevail if a complainant has a choice between redress through proceedings provided for in the Insolvency Act, on the one hand, and PAJA, on the other. Section 111 of the Insolvency Act could serve as an example of such a predicament.¹⁶¹ According to section 111 of the Insolvency Act:

- (1) The insolvent or any person interested in the estate may, *at any time* before the confirmation of the trustee's account, in terms of section one hundred and twelve, lay before the Master in writing any objection, with the reasons therefore, to that account.
- (2) If the Master is of the opinion that any such objection is well founded or if, apart from any objection, he is of the opinion that the account is in any respect incorrect or contains any improper charge or that the trustee acted *mala fide*, negligently or unreasonably in incurring any costs included in the account and that the account should be amended, he may direct the trustee to amend the account or may give such other direction in connection therewith as he may think fit: Provided that –
 - (a) any person aggrieved by any such direction of the Master or by the refusal of the Master to sustain an objection so lodged, may apply by motion to the court *within fourteen days* as from the date of the Master's direction, or as from the date of intimation to the objector of the Master's refusal to sustain his objection, after notice to the trustee, for an order to set aside the Master's decision and the court may thereupon confirm the account or make such order as it thinks fit (*emphasis added*).

If the Master is of the opinion that the objection is well founded he or she will direct the trustee to amend the account or otherwise reject the objection and proceed to confirm the account according

¹⁶⁰ It should be noted that in an appropriate case “as a matter of public interest in the finality of administrative decisions and the exercise of administrative functions, considerations of pragmatism and practicality” may compel the court to exercise its discretion to decline to set aside an invalid administrative act. See *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 2 SA 638 (SCA) at 649J and 650E. See also Hoexter 128.

¹⁶¹ Sections 107-112 of Insolvency Act. See also Bertelsmann *et al Mars: The Law of Insolvency in South Africa* (2008) 513-545 (hereafter referred to as Mars).

to section 112 of the Insolvency Act. A person who feels aggrieved by the decision of the Master may approach the court within 14 days for relief. After the expiry of the 14-day period the Master, if he or she has not received notice of the application to court, will proceed to confirm the account. It should be noted that the confirmation “shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it.” It should be noted that if a trustee has according to the distribution account paid out dividends to creditors, a dividend once paid under a confirmed account cannot be disturbed or reclaimed.¹⁶²

The Insolvency Act therefore includes a provision attached to a time-scale in order for an aggrieved person to approach the High Court and it is clear according to *South African Bank of Athens v Sfier*¹⁶³ that it was undoubtedly the intention of the legislator that the objector should follow this route laid down by section 111. It should also be noted that the outcome of the statutory review procedure is final and cannot be reversed by any other remedy. Where the offending action qualifies as an “administrative action” an applicant may be in the position to choose between the remedies offered by the regime of statutory review as mentioned here in section 111, or those available under PAJA.¹⁶⁴

Consequently, the situation sometimes occurs that enabling legislation stipulates its own requirements relating to the timeframe for review, and the question then is whether such a stipulation prevails over section 7(1) of PAJA or *vice versa*.¹⁶⁵ This point arose in *Sasol Oil (Pty) Ltd v Metcalfe NO*.¹⁶⁶ While the maxim *generalialia specialibus non derogant* suggests that the special time limit for review would override PAJA, Willis J took the opposite view in light of the extraordinary status of PAJA as constitutional and “universal” legislation.¹⁶⁷ On appeal the court found it unnecessary to decide the point relating to the formal supremacy of PAJA, noting merely that it was a novel one and had been the subject of academic debate.¹⁶⁸

¹⁶² Section 112 of the Insolvency Act. See Mars 537.

¹⁶³ 1991 3 SA 534 (T) 539. See also *Gilbey Distillers & Vintners (Pty) Ltd v Morris* 1991 1 SA 648 (A) at 655.

¹⁶⁴ Hoexter 527.

¹⁶⁵ Hoexter 527. See Plasket “The exhaustion of Internal Remedies and Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000” (2002) *South African LJ* 50.

¹⁶⁶ See (n143).

¹⁶⁷ *Sasol Oil (Pty) Ltd v Metcalfe NO* (n 143) at 166C. See Hoexter 527.

¹⁶⁸ See *MEC for Agriculture v Sasol Oil* 2006 5 SA 483 (SCA). In *Sasol Oil (Pty) Ltd and Another v Metcalfe* (n 143) it was held that the period of 180 days provided for in PAJA overrides the provisions of conflicting earlier legislation providing for shorter timeframes. In this case the relevant legislation provided for a period of 30 days within which to bring review proceedings. The court found that because PAJA was constitutional legislation, the timeframe of 180 days had to prevail over the earlier legislation providing for a timeframe of 30 days. See Meskin par 1.8.



In *Sidumo & Another v Rustenburg Platinum Mines Ltd*¹⁶⁹ the Supreme Court of Appeal dealt with the question whether PAJA was applicable to review of a Commission for Conciliation, Mediation and Arbitration¹⁷⁰ arbitration award and confirmed that the only tension that arises in view of the importation of PAJA was the difference in timeframes in relation to reviews under section 145 of the Labour Relations Act¹⁷¹ and PAJA respectively.¹⁷² The court stated that the difference is but one of the symptoms of a lack of cohesion between the provisions of PAJA and the Labour Relations Act.¹⁷³ On appeal to the Constitutional Court the court concluded: “that nothing in section 33 of the Constitution precludes specialised legislative regulation of administrative actions such as section 145 of the Labour Relations Act alongside general legislation such as PAJA. Of course, any legislation giving effect to section 33 must comply with its prescripts.”¹⁷⁴ Ngcobo J indicated in *Zondi v MEC for Traditional and Local Government Affairs*¹⁷⁵ that: “decision-makers who are entrusted with authority to make administrative decisions by any statute are ... required to do so in a manner that is consistent with PAJA.” In other words, unless the legislation is actually inconsistent with PAJA, the provisions in the enabling legislation will be applicable and where feasible PAJA will be read into the enabling legislation. Hoexter is of the opinion that the idea that PAJA automatically prevails over all other more specific legislation is a drastic one and would surely be difficult to justify on practical grounds. It would be easier to think of reasons why it may be desirable or necessary for the enabling legislation to impose special requirements in relation to particular statutory regimes.¹⁷⁶ In the context of the tension between the time limit set according to section 111 and the 180 days time limit in PAJA, it could be submitted that the clear intention of the legislature was to ensure a speedy finalisation of the administration of the insolvent estate, as it would not be to the advantage of the South African economy if the administration were to be unduly delayed.¹⁷⁷

¹⁶⁹ 2008 2 SA 24 (CC).

¹⁷⁰ Hereafter referred to as the “CCMA”.

¹⁷¹ Act 66 of 1965. Hereafter referred to as Labour Relations Act.

¹⁷² Van Niekerk *et al Law@work* (2009) 49.

¹⁷³ The same principles could therefore also be applied to the difference in time-scales between PAJA and the Insolvency Act.

¹⁷⁴ *Sidumo & Another v Rustenburg Platinum Mines Ltd* (n 169) at par 91.

¹⁷⁵ 2005 3 SA 589 (CC).

¹⁷⁶ Hoexter 526.

¹⁷⁷ Hoexter 527.

In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others*,¹⁷⁸ the Supreme Court of Appeal took the view that if the legislature chose to afford a party affected by particular administrative action greater procedural protection by means of the specific provisions of the Act, those provisions cannot be ignored in favour of less onerous prescriptions in general legislation such as PAJA. It should also be borne in mind that PAJA is in the first instance an Act of general nature. In other words, it prescribes how the powers given to administrators by other laws within a specific area of administration (insolvency legislation) must be exercised. It lays down uniform, system-wide rules about how administrative action authorised by a particular law must be carried out by administrators, and gives members of the public the right to challenge these actions if they do not follow the rules. Any administrative action should therefore comply with the general requirements in PAJA.¹⁷⁹ The more beneficial view would thus be that special provisions will ordinarily prevail over the more general provision in PAJA, provided of course that they do not unjustifiably infringe on the constitutional rights of the applicant.¹⁸⁰ In *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration*¹⁸¹ Cameron JA:

The Constitution does not require that the legislation enacted to give effect to the right to administrative justice must embody any particular time periods. This is therefore a question on which the legislature may be expected to legislate differently in different fields, taking into account particular needs.¹⁸²

3.3 PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000

In terms of section 32 of the Constitution, everyone has the right of access to information held by the state, or by another person, which may be required¹⁸³ for the exercise or

¹⁷⁸ [2007] JOL 19542 (SCA) at par 13.

¹⁷⁹ Currie “Bill of Rights Jurisprudence” (2000) *Annual Survey of South African Law* 27.

¹⁸⁰ As set out in s 33 of the Constitution.

¹⁸¹ See (n 139).

¹⁸² *Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration* (n 139) at par 27.

¹⁸³ As to what is meant by “required”, in *Unitas Hospital v Van Wyk and Another* 2006 4 SA 436 (SCA) the Court held that in order for information to be considered to be “required” within the meaning of s 50(1)(a) of the Act, it had to be information that would be of assistance for the applicant’s stated purpose, and that the mere fact that information would be of assistance did not mean that it was “required” (444E). The court was reluctant to formulate a generally applicable definition of “require”, stating that whether or not information was required depended on the facts of each particular case, and concluded that “reasonably required” connoted a “substantial advantage or an element of need” (444G-I). See Meskin par 1.8.



protection of any right.¹⁸⁴ In terms of item 23 of Schedule 6 to the Constitution, the similarly worded provision in section 23 of the Interim Constitution¹⁸⁵ were to apply pending legislation to give effect to the section 32 right of the 1996 Constitution.¹⁸⁶ Such legislation was subsequently promulgated in the form of the Promotion of Access to Information Act.¹⁸⁷ PAIA does not replace the constitutional right to information but rather gives effect thereto in view of the fact that parties must generally assert their right to access to information via the Act.¹⁸⁸ Offering citizens access to state-held information is one of the most effective ways of upholding the constitutional values of transparency, openness, participation and accountability.¹⁸⁹

Access to records of public bodies is governed by Part 2 of the Act. A public body is defined in section 1 to include all departments of state or administration at the national, provincial and local levels, as well as any other functionary or institution acting in terms of the constitution or “exercising a public power or performing a public function in terms of any legislation.”¹⁹⁰ As the Master is a creature of statute performing a public function in terms of legislation, it is clear that for purposes of PAIA the Master qualifies as a public body and therefore the provisions of the Act would be applicable. Public bodies, and as such the Master, are required to designate information officers in order to render the body as accessible as reasonably possible for requests for its records.¹⁹¹

PAIA is applicable to a “record” – ie any recorded information, regardless of form or medium – of a public body or private body regardless of when the record came into existence.¹⁹² According to section 155(2) of the Insolvency Act the Master has to act as office of record of

¹⁸⁴ The provisions of the 1996 Constitution differ from the Interim Constitution in that s 32 does away with the qualification that the right to information is merely enforceable against the state where the applicant requires the information for the protection of his or her records.

¹⁸⁵ Act 200 of 1993. Hereafter referred to as Interim Constitution.

¹⁸⁶ Section 23 of the Interim Constitution provides that every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights. See *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 433 (SEC), where the court gave what it regarded as being the correct interpretation of s 23 of the Interim Constitution. See Meskin par 1.8.

¹⁸⁷ Act 3 of 2000. Hereafter referred to as “PAIA”. This Act came into operation on 2001-03-09, with the exception of ss 10, 14, 16 and 51, which came into operation on 2002-02-15. See Meskin par 1.8.

¹⁸⁸ Hoexter 93.

¹⁸⁹ Hoexter 91.

¹⁹⁰ Part b(ii) of the definition of “public body” is, in fact, identical to the wording in s 1(a)(ii) of the PAJA, and both are based on the definition of “organ of state” in s 239 of the Constitution. See Hoexter 95.

¹⁹¹ Section 17(1) of PAIA.

¹⁹² Section 3 of PAIA. See Hoexter 94.

all documents relating to an insolvent estate for a period of at least five years from date of rehabilitation of the insolvent.¹⁹³ Having regard to the provisions in PAIA in accordance with section 32 of the Constitution, the Master may be obliged to make records or information in his possession available, whether such records were created by him or not. This would appear to be the position even if other legislation provides that the proceedings in terms of which the information was recorded or obtained is confidential or secret.¹⁹⁴

A person requesting a record from a public body need not indicate that the record is required for the exercise or protection of any right.¹⁹⁵ The Act contains a number of exceptions which render the disclosure of information not mandatory, for instance where disclosure would entail the unreasonable disclosure of personal information regarding a third party,¹⁹⁶ or would constitute a breach of a duty of confidentiality owed to a third party in terms of a confidentiality agreement or other agreement not to disclose information supplied to it by another in confidence;¹⁹⁷ or where the information sought relates to records which are privileged from production in legal proceedings unless there is a waiver of the privilege.¹⁹⁸

¹⁹³ Section 155 (2) of the Insolvency Act.

¹⁹⁴ Meskin par 1.8.

¹⁹⁵ Cf s 32 of the Constitution; and see *Cape Metropolitan Council v Metro Inspection Services CC* 2001 3 SA 1013 (SCA), s 11 of PAIA, dealing with records of public bodies, and s 50, dealing with records of private bodies. See Meskin par 1.8.

¹⁹⁶ Section 34 of the Constitution.

¹⁹⁷ Section 37 of PAIA. For a case dealing with the prohibition of the disclosure of information relating to a third party in terms of a confidentiality agreement, see *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 6 SA 285 (SCA). Under the Interim Constitution the matter was more complicated. *Jeeva v Receiver of Revenue, Port Elizabeth* (n 188) held that a proper interpretation of s 23 of the Interim Constitution gives a person the right of access to information whether or not that information is the subject of a legal professional privilege and whether or not it is information covered by the legislative provisions which preserves the secrecy of information held by the South African Revenue Service. The court upheld the legal professional privilege in terms of s 33(1) of the Constitution because it is part of the common law which is a limiting law of general application, it does not negate the essential content of the s 23 right of access to information and because it is reasonable and justifiable in an open and democratic society based on freedom and equality. In another instance the court exercised its discretion to order disclosure of information held by the South African Revenue Service (which it was not otherwise at liberty to disclose) where there was no realistic possibility of that information coming to the knowledge of third parties or that it might have been used by third parties to the prejudice of the taxpayer. (The applicants were persons associated with the insolvent in his business who asked to have access to the documents in the possession of the South African Revenue Service to prepare for an examination.). See also *Ferela v Commissioner for Inland Revenue* 1998 4 SA 275 (T); *Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2000 2 SA 934 (T); *Sackstein NO v South African Revenue Service* 2000 2 SA 250 (SE). There is also no reason why the contents of a file of the revenue authorities in an application for a warrant have to be withheld from the parties affected by it. See *Ferela v Commissioner for Inland Revenue* 1998 4 SA 275 (T). In *Hyundai Motor Distributors (Pty) Ltd v Smit* the court prohibited the Commissioner and officials from making known any information regarding taxpayers except for purposes of prosecution of offences relating to the Income Tax Act and Value-Added Tax Act. In *Sackstein NO v South African Revenue Service* 2000 2 SA 250 (SECLD) the court refused, because of insufficient cause shown, to exercise its discretion in favour of overriding the secrecy provision and stated that the decision whether to communicate information should be taken by the revenue official. With reference to s 6(1) of the Value-Added Tax Act 89 of 1991, it would be



There are two separate requirements that have to be satisfied before the public body is justified in refusing access to personal information, namely the disclosure must invade the privacy of a third party who is a natural person, and disclosing the information must be unreasonable in the circumstances.¹⁹⁹ In *Bernstein v Bester*²⁰⁰ it was stated that the test to determine whether there had been an invasion of a person's privacy is that the person has a subjective expectation of privacy and that society has recognised that expectation as objectively reasonable.²⁰¹ Section 34 (2) of the Act articulates a list of grounds in respect of which there could be no legitimate expectation of privacy, for example if a person has handed over information knowing that it would become available to the public.²⁰²

A public body may also refuse a request for access to a record in its possession if disclosure thereof could reasonably be expected to jeopardise the effectiveness of a testing, examining or auditing procedure or method used by a public body,²⁰³ or when the request for information is manifestly frivolous or vexatious, or where the work involved in processing the request would substantially and unreasonably divert the resources of the public body.²⁰⁴ Despite these exceptions, section 46 of the Act provides that the appointed information officer must grant a request for access if the disclosure would reveal evidence of a substantial contravention of, or failure to comply with, the law and the public interest in such disclosure clearly outweighs the harm contemplated by the relevant provision.²⁰⁵

According to the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996*²⁰⁶ the entrenchment of the right to access to information in the Constitution was "directed at promoting good

wholly artificial to hold that a liquidator of a debtor is not entitled to access to all the debtor's records in the possession of the Commissioner and to disclose such records to the court – *Shrosbree NO v Klerck NO* 2000 4 SA 457 (SECLD).

¹⁹⁸ Section 40 of PAIA.

¹⁹⁹ Devenish 203.

²⁰⁰ See (n 14).

²⁰¹ *Bernstein v Bester* (n 14) at par 75.

²⁰² Devenish 204.

²⁰³ Section 44(2)(a) of PAIA.

²⁰⁴ Section 45 of PAIA. For an example of a case where a public body unsuccessfully refused access to certain information based on s 44 of the PAIA, see *Minister, Provincial and Local Government, RSA v Unrecognised Traditional Leaders of the Limpopo Province (Sekhukhuneland)* [2004] JOL 13034 (SCA).

²⁰⁵ Meskin par 1.8.

²⁰⁶ 1996 4 SA (CC).

government²⁰⁷ and it follows that PAIA, which gives effect to this right, is centrally concerned with good government.²⁰⁸ The notion of an accountable government is thus made impossible if government has a monopoly over the information that informs actions and decisions, and public access thereto is made impossible or unjustifiably excluded.²⁰⁹

²⁰⁷ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* (n 206) at par 85.

²⁰⁸ Currie 692.

²⁰⁹ Currie 692.



CHAPTER 4: CONCLUSION

The Constitution, which embodies fundamental human rights, has changed the face of our law dramatically in that legislation may now be tested by the courts in order to establish its constitutionality – the Constitution being the supreme law of the land.²¹⁰ In keeping with the salient features of constitutionalism the objective of any state regulation in South Africa should be to conform to the broad philosophical values of the Constitution. Perhaps the most powerful motivation for a dynamic form of administrative justice permeating all types of public power is the determination to avoid any recurrence of instances of oppression and injustices of the past. As the Insolvency Act was in place long before the new constitutional dispensation, it is important that the aim of any law reform proposal regarding state regulation in insolvency law should be to create an environment of accountability and justification and to bring the regulatory principles of our law in line with the values expressed in modern administrative and constitutional law.

When examining the effect of the Constitution on state regulation in South African insolvency law, it becomes apparent that not a great deal of research, case law or other sources exist on this topic. Despite the lack of any elaborate treatment of the subject, it remains a reality that the Constitution has laid a new foundation in South African law by providing for a multi-faceted right to administrative action. In the context of this study the enactment of PAJA is certainly the most relevant and significant constitutional development. As a public body and organ of state the Master is henceforth bound by the provisions of PAJA, with the result that every administrative action performed by the Master is made subject to the requirements for valid administrative conduct and the grounds for review specified therein.

One of the most effective ways of upholding the underlying constitutional values of transparency, openness, participation and accountability is the access to state-held information offered to citizens in terms of section 32 of the Constitution and PAIA. As the Master is a creature of statute performing a public function in terms of legislation, it is clear

²¹⁰ See ch 1 above.

that for purposes of the latter Act that the Master qualifies as a public body and must therefore comply with the provisions of the Act.

Concern is sometimes raised regarding the impact of the procedural constraints in the Constitution and other relevant legislation applicable to the Master in that these could have the effect of impeding the efficient, effective and swift finalisation of an insolvent estate. However, it must be noted that in redefining the role of the law as well as of any public institution, tension will always exist between the procedural fairness and rationality advocated by the Constitution and PAJA, on the one level, and the need for effective, efficient and expeditious public administration, on the other.²¹¹

With regard to the purpose of this study, namely to make proposals for a professional and effective regulatory framework in South African insolvency law, the principle of constitutional supremacy is critical to the outcome. In other words, in the interpretation and application of every law, the Constitution must be taken as a point of departure. The positive challenge therefore lies in absorbing the right to administrative justice and the access to information entrenched in the Constitution, into the development of a regulatory framework with the aim of securing and assuring public confidence in the insolvency process within the current socio-economic circumstances in South Africa.

²¹¹ Corder 18.

*A Reformatory Approach to State Regulation of Insolvency Law in
South Africa*

PART V

**STATE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW
AND EARLIER LAW REFORM PROPOSALS**

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CHAPTER 1: INTRODUCTION

If we lawyers tend to overlook the evolution of substantive law, then we can be downright unconscious about legal institutions and legal practice. Practices are all too often taken for granted and we too often repeat rituals and sustain enterprises long after their reason for being has evaporated.¹

The aim of this part of the study is to provide a theoretical framework for regulatory insolvency law, in order to develop a sense of the basic nature and philosophy of the regulatory environment within South African insolvency law. A critical approach is perceived to be essential on the grounds that it is not viable to evaluate areas of the law, identify policy objectives or suggest reforms, with a sense of purpose, unless there is clarity concerning the objectives and values that are being advanced.² A constant theme throughout the discussion of the current laws and processes will in the first instance be to assess the extent to which our system needs to be reformed in order to measure up to international norms and modern developments elsewhere, and secondly to evaluate whether our present system reflects the foundational values of our own society.³ Moseneke J very aptly articulated this principle when he said:

I am not overstating the character of our democratic transition when I say it is a constitutional revolution. It is the outcome of a collective, but solemn pact to transform our society in a fundamental way. Our aspirations of a good and socially just society stand proudly in our highest law. As our nightmarish past gave way to our idyllic future, the very process of the transition was carefully scripted. Law sanctioned every step of the revolution. The bad and the ugly were to be jettisoned and the good to be kept and nourished with the new found rules and foundational values of the Constitution.⁴

In order to contextualise the chief purpose of this thesis (namely, ultimately to propose a framework within which the law- and policymakers can pursue legal reform based on comprehensive policy objectives in this field of law), a broad outline of the legal, regulatory and institutional frameworks within the South African insolvency law system, with the emphasis on the powers and duties of the Master of the High Court⁵ via the Insolvency Act of

¹ Shepard “The Importance of Legal History for Modern Lawyering” (1997) *Indiana LR* 3.

² Finch *Corporate Insolvency Law* (2009) 3.

³ See part III and part IV above.

⁴ Moseneke *Transformative Constitutionalism: Its Implications for the Law of Contract* (2008) unpublished public lecture delivered at University of Stellenbosch, on file with the author. See also Moseneke “Transformative Adjudication in Post Apartheid South Africa – Taking Stock After a Decade” (2007) *Speculum Juris* 2.

⁵ Hereafter referred to as the Master. Section 1 of the Administration of Estates Act 66 of 1965 (hereafter referred as Administration of Estates Act) defines “Master” in relation to any matter, property or estate, as the Master, Deputy Master or Assistant Master of the High Court who has jurisdiction in respect of the matter, property or estate.

1936,⁶ will be provided. Given the vastness of the Master's influence on our insolvency law, this part of the study does not present an exhaustive exposition of all existing statutory rules and case law, but through considering certain key duties and functions aims to provide a character sketch of the Master.⁷ In addition, an overview of the legal and institutional frameworks present within the South African insolvency law will be included. Finally, the study offers a critical review of the earlier law reform proposals by the South African Law Reform Commission.⁸

⁶ Act 24 of 1936. Hereafter referred to as the Insolvency Act or the Insolvency Act of 1936.

⁷ See generally: Bertelsmann *et al Mars: The Law of Insolvency in South Africa* (2008) (hereafter referred to as Mars); see also Kunst *et al Meskin, Insolvency Law and its Operation in Winding-up* (loose-leaf edition) (hereafter referred to as Meskin); Smith *The Law of Insolvency* (1988) 3 (hereafter referred to as Meskin); Sharrock *et al Hockly's Insolvency Law* (2006) (hereafter referred to as Hockly). See also Burdette *Framework for Corporate Insolvency Law Reform in South Africa* (2002) LLD dissertation University of Pretoria

⁸ The South African Law Reform Commission is an independent statutory body established by the South African Law Reform Commission Act 19 of 1973. See South African Law Commission (as it was then known) *Review of the Law of Insolvency* Project 63 (2000) Report, vol I Explanatory Memorandum (hereafter referred to as the Explanatory Memorandum), and vol II Draft Bill (hereafter referred to as 2000 draft Insolvency Bill or draft Insolvency Bill). See also Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) 430 LLD dissertation University of Pretoria (hereafter referred to as Evans); Evans "Aspects of the Draft Insolvency Bill" (1999) *SA Merc LJ* 210.



CHAPTER 2: LEGAL FRAMEWORK OF SOUTH AFRICAN INSOLVENCY LAW

The main source of South African insolvency law is the Insolvency Act, which also serves as the foundation of our regulatory procedures. The Insolvency Act is also supplemented by the common law,⁹ the Constitution of the Republic of South Africa,¹⁰ as well as precedents set by the High Courts.¹¹ However, the Insolvency Act specifically states that it applies only to individuals and partnerships,¹² and not to companies or other bodies corporate that can be wound up in terms of the Companies Act. Historically, South African insolvency law has been structured around the individual debtor. Certain scholars attribute this phenomenon to the fact that the concept of a separate legal entity complete with its own legal personality as provided for in company law legislation, developed only a considerable time after insolvency law had already become established.¹³ The provisions relating to the winding-up¹⁴ of

⁹ Modern insolvency legislation clearly bears the imprint of both Dutch practices and earlier English bankruptcy laws, most notably on aspects such as rehabilitation and the discharge of debts. See Palmer *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001) 168; Wessels *History of the Roman Dutch Law* (1908) 661; It is important to note that however complete the Insolvency Act may be, it did not repeal the common law in respect of South African insolvency law. Several common law principles and procedures are still applicable eg, *Actio Pauliana*. See Boraine *Die Leerstuk van Vernietigbare Regshandelinge in die Insolvensiereg* (1994) LLD dissertation University of Pretoria (hereafter referred to as Boraine); Boraine “Towards Codifying the *Actio Pauliana*” (1996) *SA Merc LJ* 213 for a detailed discussion of the principles of the *Actio Pauliana*. See *Fairlee v Raubenheimer* 1935 AD 135 at 136. For a more comprehensive discussion of the history of South African insolvency law, see part II above.

¹⁰ Constitution of South Africa, 1996. Hereafter referred to as the Constitution. In terms of s 1(2) of the Citation of Constitutional Laws Act 5 of 2005, which came into operation on 2005-06-27, all references to the Constitution of the Republic of South Africa Act 108 of 1996 have been replaced by the Constitution of South Africa, 1996. The Constitution, which embodies fundamental human rights, has changed the face of South African law dramatically in that legislation may now be tested by the courts in order to establish its constitutionality – the Constitution being the supreme law of the land. See *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC). See part IV ch 2 above.

¹¹ For a detailed discussion of South African insolvency law see generally: Mars; Hockly 1-12; Stander *Die Invloed van Sekwestrasie op Onuitgevoerde Kontrakte* (1994) LLD dissertation Potchefstroom University for Christian Higher Education; Cronje *et al Study Notes: Diploma in Insolvency Law and Practice* (2009) (hereafter referred to as *Study Notes: Diploma in Insolvency Law and Practice*).

¹² See the definition of “debtor” in s 2 of the Insolvency Act. It is to be noted that the definition of “debtor” has been given an extended meaning to include trusts (see *Magnum Financial Holdings (Pty) Ltd (in liquidation) v Summerly* 1984 1 SA 160 (W)), insolvent deceased estates and estates under curatorship (see s 3(1) of the Insolvency Act) and other entities that are not capable of being wound up in terms of the Companies Act 61 of 1973 (hereafter referred to as the Companies Act), or the Close Corporations Act 69 of 1984 (hereafter referred to as the Close Corporations Act). Examples of the latter would be clubs and other associations of persons that do not have juristic personality. See Burdette 4.

¹³ The first company legislation in South Africa had its origins in the Cape in the form of the Joint Stock Companies Limited Liability Act 23 of 1861. See Burdette ch 3, where this aspect is discussed in more detail. See also Keay “The Unity of Insolvency Legislation: Time for a Re-think?” (1999) *Insolvency Law Review* 5 (hereafter referred to as Keay “The Unity of Insolvency Legislation”).

¹⁴ The terms “winding-up” and “liquidation” will be used as synonyms throughout this study. It is interesting to note that the South African Law Reform Commission has used the term “liquidation” and not

companies are contained in the Companies Act, and the provisions relating to the winding-up of close corporations in the Close Corporations Act. These latter Acts are subsequently “connected” to the Insolvency Act, the central piece of legislation, by means of “connecting provisions”¹⁵ that make insolvency law applicable also to these types of entities.¹⁶

Given that South Africa became a constitutional democracy after 1994, the final Constitution is now viewed as the superior law of the land, and is the yardstick by which all other laws are judged.¹⁷ It should therefore be taken into account that when exercising administrative powers and discretions, the Master will be bound by sections 32 and 33 of the Constitution, which give effect to the right to information and fair administrative action respectively.¹⁸ As demonstrated earlier in this study,¹⁹ these rights are augmented by further legislation such as the Promotion of Access to Information Act²⁰ as well as the Promotion of Administrative Justice Act.²¹

It is inevitable that any approach to substantive law is influenced by one’s view of a larger policy direction. South African insolvency law proceeds from the premise that once a sequestration order is granted, a *concursum creditorum*²² comes into being and the interests of the creditors as a group enjoy preference over the interests of individual creditors.²³ The

“sequestration” in the Draft Insolvency Bill; Boraine “The Draft Insolvency Bill – An Exploration (Part 1)” (1998) *TSAR* 621 at 623 where reference is made to this uniformity. See Burdette 4-5.

¹⁵ Section 339 of the Companies Act and s 66 of the Close Corporations Act. See Burdette 134-136.

¹⁶ There are also a myriad of other Acts which also provide for the winding-up of specific types of entities. See eg, part VI of the Long Term Insurance Act 52 of 1998; part VI of the Short Term Insurance Act 53 of 1998; s 29 of the Pension Funds Act 24 of 1956; s 35 of the Friendly Societies Act 25 of 1956; s 18C of the Medical Schemes Act 72 of 1967; ss 27, 28 and 39 of the Unit Trusts Control Act 54 of 1981; ch X of the Co-Operatives Act 91 of 1981; s 33 of the Financial Markets Control Act 55 of 1989; s 68 of the Banks Act 94 of 1990; and ch VIII of the Mutual Banks Act 124 of 1993. See Burdette ch 7.

¹⁷ See (n 10). See part IV ch 2 above. See generally: *S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC) at 262; Hoexter *Administrative Law in South Africa* (2006) 29 (hereafter referred to as Hoexter); Burns *Administrative Law under the 1996 Constitution* (2003) 1 (hereafter referred to as Burns); The Bill of Rights is set out in ch 2 of the Constitution. See generally: Currie *The Bill of Rights Handbook* (2005) (hereafter referred to as Currie); Evans 379.

¹⁸ Nagel *et al Commercial Law* (2006) 402 (hereafter referred to as Nagel). See part IV above.

¹⁹ Part IV ch 3 above.

²⁰ Act 2 of 2002. Hereafter referred to as “PAJA”.

²¹ Act 3 of 2002. Hereafter referred to as “PAIA”. See part IV above.

²² cf Swart *Die Rol van ’n Concursum Creditorum in Suid-Afrikaanse Insolvensiereg* (1990) LLD dissertation University of Pretoria; In *Walker v Syfret* 1911 AD 141 at 166 the court explained the key concept of *concursum creditorum* as follows:

The sequestration order crystallises the insolvent’s position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.

²³ The main aim of the South African insolvency process is to provide for a collective debt-collecting procedure that will ensure an orderly and equitable distribution of the debtor’s assets where the assets are

concursum creditorum is regarded as one of the key concepts of the South African law of insolvency. The object of the Insolvency Act is to ensure a due distribution of assets among the general body of creditors.²⁴ It is important to note that it is not a primary object of the Insolvency Act to grant relief to debtors.²⁵ South African insolvency law has traditionally been classified as a pro-creditor system,²⁶ mostly due to the fact that our insolvency law exists primarily for the benefit and protection of creditors²⁷ and not at assisting a debtor unable to pay his debts. The requirement of “advantage to creditors” in section 4 of the current Insolvency Act, which serves as prerequisite for sequestration applications, is confirmation of this.²⁸ It is in this domestic legal environment that the regulatory model of South African insolvency law operates.

insufficient to satisfy all the creditor's claims. The law of insolvency can therefore broadly be defined as the totality of rules regulating the situation where a debtor cannot pay his debts, or where his total liabilities exceed all his assets. See *Richter NO v Riverside Estates (Pty) Ltd* 1946 OPD 209 at 223. See Smith 4; Hockly 5; See Mars 6; Evans 198.

²⁴ Mars 3.

²⁵ *R v Meer* 1957 (3) SA 614 N at 619. See Mars 3.

²⁶ According to Wood *Principles of International Insolvency* (1995), South Africa is a pro-creditor country, leaning towards pro-debtor (Wood scores South Africa at 6 on a scale where 1 is extremely pro-creditor and 10 extremely pro-debtor). The above classification is however omitted from the new edition of this work. For a more detailed illustration of the global differentiation between insolvency laws that are pro-debtor or pro-creditor refer to Wood *Principles of International Insolvency* (2007) 4-6 (hereafter referred to as Wood). South Africa still has the requirement of an “advantage for creditors” that has to be proved before a court will grant a sequestration order – see ss 6(1) and 12(1)(c) of the Insolvency Act.

²⁷ *Cf Ex Parte Pillay* 1955 2 SA 309 (N) at 311.

²⁸ In *R v Meer* (n 25) at 619 the court confirmed: “[T]he Insolvency Act was passed for the benefit of creditors and for the relief of harassed debtors”. The requirement of “advantage to creditors” does not apply in the case of companies and is not common in other legal systems. See also Boraine “Vriendskaplike sekwestrasies – ’n produk van verouderde beginsels? (Deel 1)” (1993) *De Jure* 230; Rochelle “Lowering the Penalties for Failure: Using the Insolvency Law as a Tool for Spurring Economic Growth; The American Experience, and Possible Uses for South Africa” (1996) *TSAR* 315; Roestoff “Skuldverligtingsmaatreëls vir Individue in die Suid-Afrikaanse Insolvensiereg: ’n Historiese Ondersoek (deel II)” (2004) *Fundamina* 115; Loubser “Ensuring Advantage to Everyone in a Modern South African Insolvency Law” (1997) *SA Merc LJ* 326 (hereafter referred to as Loubser “Ensuring Advantage to Everyone in a Modern South African Insolvency Law”). See Mars 3.

CHAPTER 3: REGULATORY FRAMEWORK OF SOUTH AFRICAN INSOLVENCY LAW

3.1 INTRODUCTION

International principles and guidelines portray the regulatory framework within an insolvency law system as dealing with the qualification and regulation of office-holders²⁹ as well as the establishment and implementation of the regulatory body that has oversight and responsibility for implementing the regulatory procedures.³⁰ Accordingly, the regulatory body providing regulatory oversight and the insolvency profession responsible for affecting the insolvency procedure represent the two key components of any effective regulatory framework. It is quite a challenge to discuss and define in general terms the character of the regulatory model in South African insolvency law, bearing in mind that when considering the basic international concept of insolvency regulation, it would be tempting to make the observation that the South African insolvency system does not possess any regulatory features of substance whatsoever. This remark will become clearer as we proceed with the discussion. In the *Revised Draft Creditor Rights and Insolvency Standard*³¹ the profile of an international insolvency regulator is described as follows:

The bodies responsible for regulating or supervising insolvency representatives should:

- Be independent of individual representatives⁷;
- Set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability; and, Have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively.³²

If we align the institution of the Master with international norms and standards, it is particularly difficult to clearly define the role of the Master within the context of an international insolvency regulator. From a strategic point of view, we may say that the Master's identity is that of regulator, as it does possess certain regulatory powers, such as applying its powers to compel an insolvency practitioner to act in the interests of the

²⁹ See discussion in part I par 1.6 above. Includes eg, trustees, liquidators, judicial managers.

³⁰ Johnson "Towards International Standards on Insolvency: The Catalytic Role of the World Bank" (2000) *Law in Transition* 73 (hereafter referred to as Johnson).

³¹ Revised Draft Creditor Rights and Insolvency Standard, Based on the World Principles and for Effective Creditor Rights and Insolvency Systems and UNCITRAL Legislative Guide on Insolvency Law, Revised Draft, (2005) (also referred to as *Revised Principles*). Available at <http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRPrinciples-March2009.pdf> (last visited at 30-11-09). See Part III ch 7 above. See also Wessels *International Insolvency Law* (2007) annex 4 (hereafter referred to as Wessels *International Insolvency Law*).

³² *Revised Principles* 20-22.

creditors.³³ As a “creature of statute” the Master possesses only the powers the statute accords, whether expressly or by necessary implication.³⁴ Notwithstanding the suggestion in the Master’s title that there is an association with the courts, the Master is not part of the formal court structure and as such not appointed as an officer of the High Court.³⁵ The Master is appointed in terms of the Administration of Estates Act,³⁶ which includes the definition of the “Master” as follows:

[I]n relation to any matter, property or estate, means the Master, Deputy Master or Assistant Master of a High Court appointed under section 2, who has jurisdiction in respect of that matter, property or estate and who is subject to the control, direction and supervision of the Chief Master.³⁷

The Administration of Estates Act also makes provision for the appointment of a Chief Master who shall act as the executive officer of the Master’s offices and exercises supervision over all the Masters as may be necessary to bring about uniformity in their practice and procedure.³⁸ The Master is appointed by the Minister of Justice and Constitutional

³³ Section 60 (a)-(e) of the Insolvency Act. Section 379 of the Companies Act regulates the removal of a liquidator. See also Hockly 116. Rudolph *Student Manual: Applying the Promotion of Administrative Justice Act in Practice* (2009) 67 (hereafter referred to as *Rudolph Student Manual*).

³⁴ Cf Mars 29. *Die Meester v Protea Assuransiematskappy Bpk* 1981 2 SA 685 (T) 690; *De Lange v Smuts* 1998 3 SA 785 (CC) 853; *The Master v Talmud* 1960 1 SA 236 (C) at 238.

³⁵ Section 34(1)(a) of the Supreme Court Act 59 of 1959 provides for the appointment of officers of the Supreme Court (now High Court) but does not refer to the Master. See Mars 29.

³⁶ See s 2(2) of the Administration of Estates Act. The office of the Master is staffed by civil servants in the employ of the Department of Justice and Constitutional Development (hereafter referred to as the Department of Justice). Only persons with prescribed legal qualifications can be appointed as Master, Deputy Master or Assistant Master. The institutional structures are the following: the Chief Master heads the national office and is responsible for co-ordinating all the activities of the Masters’ offices; there are currently Masters’ offices situated in Bisho, Bloemfontein, Cape Town, Durban, Grahamstown, Johannesburg, Kimberley, Mafikeng, Polokwane, Port Elizabeth, Pietermaritzburg, Pretoria, Thohoyandou and Mthatha; sub-offices are located in places where the High Court does not have a seat, but where workloads require the presence of at least one Assistant Master. At service points, officials attached to the Department of Justice Branch: Court Services deliver services on behalf of, and under the direction of, the Master. Each magistrate’s court is a service point. Each service point has at least one designated official who is the office manager or a person of equal rank. Masters’ representatives are appointed only in intestate estates of R125 000 or less, in terms of s 18(3) of the Administration of Estates Amended Act 47 of 2002. The Master is self-sustainable and achieves this status by charging a fee on every estate administered by the Insolvency Act. The Third Schedule to the Insolvency Act provides for the payment of Master’s fees in all insolvent estates under final sequestration on the total gross value of assets according to the trustee’s account.

³⁷ Definition of “Master” substituted by s 1(d) of Administration Of Estates Laws Interim Rationalisation Act 20 of 2001 and by s 2 of Judicial Matters Amendment Act 22 of 2005.

³⁸ Section 2(1)(b) of Administrative of Estates Act. Section (1) was substituted by s 14 of Judicial Matters Amendment Act 16 of 2003 and by s 3 of Judicial Matters Amendment Act 22 of 2005. Section 2(1) of the Administration of Estate Act now provides that, subject to subs 2(2) (ie relevant degree required or Minister placing temporary Master in vacated position) and the public service laws, the Minister appoints a Chief Master of the High Courts; appoints a Master of the High Court for the area of jurisdiction of each High Court; and may, in respect of each area, appoint one or more Deputy Masters and Assistant Masters, who may, subject to the control, direction and supervision of the Master, do anything which may lawfully be done by the Master. The Chief Master is subject to the control, direction and supervision of the Minister; is the executive officer of the Masters’ offices; and shall exercises control, direction and supervision over all the Masters.

Development for the area of jurisdiction of a provincial division of the High Court. Each Master has an office at the seat of the High Court in respect of whose area of jurisdiction he has been appointed.³⁹ The Master who has jurisdiction under the Insolvency Act in relation to any matter is “the Master of the Supreme Court within whose area of jurisdiction that matter is to be dealt with and includes an Assistant Master”.⁴⁰

It should also at this stage be noted that although the Master is generally responsible for the supervision of South African insolvency law, this is not the only discipline it has to contend with. In addition to the regulation of insolvency law, the Master has, inter alia, the following functions: supervising the administration of estates of deceased persons,⁴¹ including the registration of wills; registration of trusts;⁴² supervising the administration of estates of minors and legally incapacitated persons and the administration of the “Guardian’s Fund”, where unclaimed monies and certain funds of minors and incapacitated persons are held in reserve.⁴³

The aim of the remaining part of this chapter is to provide a delineation of the duties and functions of the Master as stipulated in the Insolvency Act, by roughly following the timeline of the procedures as they appear in the Act. The study does not provide a detailed exploration of each of the duties and functions pertaining to the Master, although an attempt will nevertheless be made to set out the rules and producers in sufficient detail as to facilitate an understanding of the framework and operation of the Master within South African insolvency law. Additionally, in order to provide a complete image, the provisions under previous insolvency legislation will also be considered in instances where the role of the Master varied in character and nature.

3.2 POWERS AND DUTIES OF THE MASTER

3.2.1 Commencement of the Sequestration Process

³⁹ Section 3(1) of the Administration of Estates Act.

⁴⁰ Section 2 of the Insolvency Act. See also s 4 of the Administration of Estates Act.

⁴¹ See Administration of Estates Act and Wills Act 7 of 1953.

⁴² Trust Property Control Act 57 of 1988.

⁴³ See ss 76 (1) (b) and 86-93 of Administration of Estates Act; Mental Health Care Act 17 of 2002. In terms of the Prevention of Organised Crime Act, 121 of 1998, where the court has authorised the attachment of such assets by the Asset Forfeiture Unit, it appoints a curator to administer the assets. The appointed curator, however, has no authority to act as such until duly authorised by the Master.



Besides the principles of *cessio bonorum*, which originated from the Roman-Dutch law, there was no generally applicable insolvency law coordinating the commencement of the insolvency process in the early Cape until 1803.⁴⁴ Under the leadership of Governor De Mist, the then Commissioner-General at the Cape, an Ordinance largely based on the 1777 Amsterdam Ordinance was issued in 1804.⁴⁵ The system applied in cases where the debtor had ceased payment of his debts, or where the debtor had surrendered his estate by means of *cessio bonorum*.⁴⁶ During the early nineteenth century the Ordinance 64 of 1829 had been adopted and provided for the voluntary surrender of an estate by the debtor, as well as the compulsory sequestration of the debtor's estate if the debtor had committed certain specified acts of insolvency.⁴⁷ A significant aspect of this Ordinance had been that following the granting of the sequestration order, the estate of the insolvent vested in the Master, and subsequently in the trustee.⁴⁸ The administration of the estate was dealt with by a trustee under the supervision of the Master.⁴⁹

The subsequent Insolvency Act of 1916⁵⁰ made provision as well for two means in which the estate of an insolvent debtor could have been placed under sequestration, namely the voluntary surrender of the debtor's estate by the debtor himself, and the compulsory sequestration of the debtor's estate on receipt of a petition from a creditor.⁵¹ The 1916 Act also made provision for a debtor to assign his estate in order to avoid the consequences of sequestration. Under this provision of the Act an assignment indicated an agreement whereby a debtor agreed to transfer his property to an assignee for the benefit of creditors. An estate assigned under this provision was not considered to be an insolvent estate and the debtor did

⁴⁴ See De Villiers *Die Ou-Hollandse Insolvensiereg en die Eerste Vaste Insolvensiereg van de Kaap De Goede Hoop* (published Doctoral Thesis, Leiden, 1923) (hereafter referred to as De Villiers); Wessels 669; Mars 4. See part 11 above.

⁴⁵ The De Mist Ordinance was named the *Provisioneele Instructie voor de Commissarissen van de Desolate Boedelkamer* of 1804. See Stander "Geschiedenis van die Insolvensiereg" 1996 *TSAR* 376 (hereafter referred to as Stander "Geschiedenis van die Insolvensiereg").

⁴⁶ Creditors could however not directly sequester the estate of a debtor, and the creditors basically did not participate in the administration of the insolvent estate. See Stander "Geschiedenis van die Insolvensiereg" 376; Mars 8.

⁴⁷ De Villiers 107; Wessels 670 and Stander "Geschiedenis van die Insolvensiereg" at 376 are of the opinion that this Ordinance established the true foundation of the South African insolvency law.

⁴⁸ Stander "Geschiedenis van die Insolvensiereg" at 376 is of the opinion that this was the first time that it had become apparent that the trustee received ownership of the assets of the estate. See also Evans "Who Owns the Insolvent Estate?" 1996 *TSAR* 719.

⁴⁹ This Ordinance introduced English insolvency law principles into our legal system. See Wessels 670.

⁵⁰ Act 32 of 1916. Hereafter referred to as the Insolvency Act of 1916 or the 1916 Insolvency Act.

⁵¹ Sections 3-7 of the 1916 Insolvency Act.

not suffer any diminution in capacity.⁵² After the date of assignment the estate was administered and distributed by the assignee under the supervision of the Master, having powers and duties similar to a trustee in an insolvency matter.⁵³ The existing 1936 Insolvency Act repealed the 1916 Insolvency Act, and currently regulates the process to declare an individual debtor's estate bankrupt, subsequently referred to as the sequestration process.⁵⁴ Although the consequences of the different methods described within in the Act are similar, the procedure and requirements for each process differ in certain material respects, and the role of the Master therefore also varies.

3.2.1.1 Voluntary surrender

One of the methods of sequestration involves the debtor applying to the court for the acceptance of the surrender of his estate for the benefit of creditors.⁵⁵ The Act makes provision for certain formalities to be complied with prior to an applicant applying for a voluntary surrender of an estate.⁵⁶ Preceding the date of application, the applicant has to publish a notice of surrender in the *Government Gazette* and in a newspaper circulating in the magisterial district where he resides, or where he has traded, or in the district where he had his principal place of business.⁵⁷ The debtor is also required to send a copy of the notice of

⁵² Sections 115-128 of the 1916 Insolvency Act. See Nathan 359.

⁵³ Nathan xxv.

⁵⁴ Sequestration is initiated by an application to the High Court made by the debtor himself known as voluntary surrender *or* by a creditor or creditors, which in turn is referred to as a compulsory sequestration. Section 343 of the Companies Act states the three modes in which a company may be wound up, namely, by the court, creditors' voluntary winding-up and members' voluntary winding-up. See McKenzie-Skene "Reforming Insolvency Law: A Comparative Study of Scotland and South Africa" (2005) *Nottingham LJ* 48 (hereafter referred to as McKenzie-Skene); Roestoff "Debt Relief for Consumers – The Interaction between Insolvency and Consumer Protection Legislation (Part II)" (2005) *Obiter* 99.

⁵⁵ Section 3(1) of the Insolvency Act. See *Ex parte Harmse* 2005 1 SA 323 (N) for the effect of publication more than 30 days before the date of the application. See also Roestoff "Premature Publication of a Notice of Surrender of an Insolvent Estate – Is it Fatal to the Application?" *Ex parte Harmse* 2005 1 SA 323 (N)" (2005) *THRHR* 681. *Study Notes: Diploma in Insolvency Law and Practice* 22.

⁵⁶ Section 4 of the Insolvency Act.

⁵⁷ Section 4(1) of the Insolvency Act. *cf Ex parte Viviers et uxor (Sattar intervening)* 2001 3 SA 240 (T) which deals with an application for surrender after a previously aborted application. Such a notice may be recalled, with the consent of the Master, at a later stage by publishing a notice to that effect in the *Government Gazette (GG)* as well as in the local newspaper. The notice may also expire if the court rejects the application or if the debtor does not continue with the surrender. The latter, on the other hand, constitutes an act of insolvency which could enable the creditors to apply for compulsory sequestration of the estate. They could bring such an application within 14 days from date of application for voluntary surrender. See *Study Notes: Diploma in Insolvency Law and Practice* 23.

surrender to all known addresses of possible creditors within seven days from date of publication.⁵⁸

A notice of surrender published in the *Government Gazette* may not be withdrawn without the written consent of the Master. If it appears to the Master that the notice was published in good faith, and that there is good cause for its withdrawal, the Master will provide written consent thereto. A notice of withdrawal together with the Master's consent will have to be published at the expense of the applicant and the notice of surrender will thereafter be deemed to be withdrawn.⁵⁹ Under certain circumstances the Master (where the value of the goods is less than R5 000), or the court (where the value of the goods exceeds R5 000) may authorise the sheriff to continue with a sale in execution.⁶⁰ As a rule the court will order the sheriff to hand over the proceeds of the sale to the Master pending the outcome of the application to surrender.⁶¹

The debtor must also prepare a statement of affairs and all assets and liabilities have to be listed,⁶² and two copies must be sent to the Master's office in the district where the debtor resides or does business.⁶³ The purpose of this procedure is to notify the creditors that an application is to be brought to enable them to object to such an application. The statement of affairs must confirm the assets and liabilities of the debtor and it must be confirmed by a sworn statement. In practice the Master will on receipt of the statement of affairs open a file

⁵⁸ Sections 4(1) and 4(2)(b) of the Insolvency Act. Compare *Standard Bank of SA Ltd v Sewpersadh* 2005 4 SA 148 (C), where it was decided that compliance with the similar requirements in s 9(4A) are peremptory. The debtor must also in terms of s 4(2)(b) of the Act furnish a copy of the notice to registered trade unions, employees (in the prescribed manner), and the South African Revenue Service. In terms of s 197B of the Labour Relations Act 66 of 1995 (hereafter referred to as Labour Relations Act), an employer that applies to be sequestrated must provide a consulting party in terms of s 189(1) of the Labour Relations Act, with a copy of the application. An employer that is facing financial difficulties that may reasonably result in sequestration must advise a consulting party.

⁵⁹ Sections 5; 6(1) and (2) of the Insolvency Act. Notice to appear in the *GG* and in newspaper in which notice of surrender appeared. Such a publication for a voluntary surrender also has the consequence that all sales in execution (not attachments) are stayed. The sheriff may not, from date of publication of the notice, hand over any proceeds from such sales to judgment creditors of the estate.

⁶⁰ Section 5(1) of the Insolvency Act.

⁶¹ See Smith 24; *Study Notes: Diploma in Insolvency Law and Practice* 23.

⁶² In accordance with Form B in the First Schedule to the Insolvency Act. The statement of affairs will lie open for inspection for 14 days from date of notice of surrender at the Master's or local magistrate's offices.

⁶³ Section 4(3) of the Insolvency Act. Where no local Master's office exists, two copies must be sent to the provincial Master's office and one to the magistrate's office of that specific district. The statement of affairs must be drawn up shortly before the application is brought, it must confirm the assets and liabilities of the debtor according to Form B, it must be confirmed by a sworn statement, and it must lie open for inspection for 14 days from date of notice of surrender at the Master's or local magistrate's offices. See *Study Notes: Diploma in Insolvency Law and Practice* 23.

in the name of the insolvent debtor, and at this stage allocate an estate number to the file.⁶⁴ Subsequently the applicant must prove that all the mentioned preliminary formalities as prescribed by the Act had been complied with.⁶⁵ Once the court has accepted the surrender of the debtor's estate the administration process of the estate commences and results in consequences similar to those of a compulsory sequestration order.

3.2.1.2 Compulsory Sequestration

Apart from the voluntary surrender of a debtor's estate, the Insolvency Act also makes provision for an application by a creditor for the compulsory sequestration of the debtor's estate.⁶⁶ In this type of application the role of the Master differs only marginally from the previous application.⁶⁷ The first stage entails the applicant lodging security with the Master to defray all sequestration costs pending the appointment of a trustee. The Master subsequently issues a certificate not more than 10 days before the application confirming that sufficient security has been received.⁶⁸ The proceedings leading to the creditor's compulsory application is divided into two distinct stages.⁶⁹ The first phase would be to apply for a provisional order of sequestration by *prima facie* proving that he has met the following requirements:⁷⁰ the applicant has established a claim entitling him to apply for the sequestration of the debtor's estate;⁷¹ the debtor has committed an act of insolvency or is insolvent⁷² and that there is reason to believe that it will be to the advantage of the creditor or creditors of the debtor if the estate is sequestrated.⁷³

⁶⁴ Section 4(6) of the Insolvency Act of 1936. See *Study Notes: Diploma in Insolvency Law and Practice* 28.

⁶⁵ Section 6(1) of the Insolvency Act. See *Commissioner, SARS, v Hawker Air Services (Pty) Ltd* 2006 4 SA 292 (SCA); *Lynn & Main Inc v Naidoo* 2006 1 SA 59 (N).

⁶⁶ Section 9(1) of the Insolvency Act. Proceedings may be instituted by a single creditor whose claim is not less than R100 or by two or more creditors whose claims in the aggregate are not less than R200. See Mars 103-107.

⁶⁷ See s 9(4A) of the Insolvency Act. See *Standard Bank of SA Ltd v Sewpersadh* (n 58). There is a peremptory requirement when an application is presented to court to furnish a copy of the application to registered trade unions, to employees, in the prescribed manner, to the South African Revenue Service, to the debtor, unless the court dispenses with this, and to file an affidavit by the person who furnished a copy of the application which sets out the manner in which copies were furnished.

⁶⁸ Sections 9(3), (4), (5) and 14(1) of the Insolvency Act. *Study Notes: Diploma in Insolvency Law and Practice* 28.

⁶⁹ See Smith "How Not to Seek a Compulsory Sequestration Order" (2006) *Juta's Business Law* 94 (hereafter referred to as Smith "How Not to Seek a Compulsory Sequestration Order").

⁷⁰ Section 10 of the Insolvency Act.

⁷¹ Sections 9(1) and 10(a) of the Insolvency Act.

⁷² Section 10(b) of the Insolvency Act. The Act makes provision for certain acts of insolvency and if the sequestrating creditor can prove to the satisfaction of the court that the debtor committed one of these acts the creditor need not prove *de facto* insolvency. Section 8 of the Insolvency Act. Friendly sequestrations are



Before an application can be adjudicated on by a court, a copy of the notice of motion and the founding affidavits must be lodged with the Master.⁷⁴ The Master may on receipt of such documents issue a written report to the court, indicating any facts which would appear to him to justify the court in postponing or dismissing the hearing.⁷⁵ The practice of reporting to court on a notice of motion received varies from one Master's office to another, with smaller offices such as Bloemfontein and Cape Town issuing a report to court on a regular basis, and the office of the Master in Pretoria hardly ever issuing such report.

Should the applicant prove on the return day of the rule *nisi* on a balance of probabilities that he has a liquidated claim;⁷⁶ the debtor is insolvent or committed an act of insolvency; and that there is reason to believe that the sequestration would be to the advantage of the creditors, the court may grant a final sequestration order.⁷⁷ After the requirements have been satisfied the

a form of compulsory sequestration where the application is brought on grounds that the debtor in giving notice in writing to a creditor of his inability to any of his debts, has committed an act of insolvency (s 8(g)). The debtor deliberately notifies a "friendly" creditor who in turn then applies for the sequestration of the debtor. Friendly sequestrations are resorted to mostly so the debtor can evade the more stringent requirements of the voluntary surrender proceedings as well as the different degree in proof of the "advantage to creditors" requirement. Section 6 of the Insolvency Act states that in case of the voluntary sequestration the application "will be" to the advantage of creditors and in return ss 10 and 12 of the Insolvency Act require only a "reason to believe" the sequestration will be to the advantage of the creditor(s). See Evans "Unfriendly Consequences of a Friendly Sequestration" (2003) *SA Merc LJ* 437 (hereafter referred to as Evans "Unfriendly Consequences of a Friendly Sequestration") and sources referred to at 437; Mars ch 4.

⁷³ He must also state that the sequestration is to the advantage of the creditors as a group, together with all other relevant facts and circumstances s 10(c) of the Insolvency Act. *Commissioner SARS, v Hawker Air Services (Pty) Ltd* 2006 4 SA 292 (SCA); *Lynn & Main Inc v Naidoo* 2006 1 SA 59 (N). Boraine "Vriendskaplike sekwestrasies – 'n produk van verouderde regsbeginsels?" (1993) *De Jure* 229; (1994) *De Jure* 31.

⁷⁴ Section 9(4) of the Insolvency Act. If there is no such Master at the seat of the court, the Master will designate an officer of the public service (usually a magistrate) for this purpose in the GG. Ss 9(4A)(a)(i)-(iv) and 11(2A)(a)-(c) of the Insolvency Act. When bringing this application the applicant must also furnish a copy of the application to the debtor, registered trade unions, employees of the debtor and the South African Revenue Services. In terms of s 197B of the Labour Relations Act, an employer that receives an application for sequestration must provide a consulting party in terms of s 189(1) of that Act with a copy of the application. An employer that is facing financial difficulties that may reasonably result in sequestration must advise a consulting party. See Smith "How Not to Seek a Compulsory Sequestration Order" for a detailed discussion of this case. See *Standard Bank of SA Ltd v Sewpersadh* (n 58). *cf Lindhaven Meat Market CC v Reyneke* 2001 1 SA 454 (W), which deals with an application based on a disputed claim. Sequestration is not an appropriate procedure to enforce a disputed claim – *Investec Bank Ltd v Lewis* 2002 2 SA 111 (C) at 116C. In terms of s 197B of the Labour Relations Act 66 of 1995, an employer that receives an application for sequestration must provide a consulting party in terms of s 189(1) of that Act with a copy of the application. An employer that is facing financial difficulties that may reasonably result in sequestration must advise a consulting party. *Study Notes: Diploma in Insolvency Law and Practice* 28.

⁷⁵ Sections 9(4) and (5) of the Insolvency Act.

⁷⁶ Section 9(1) of the Insolvency Act. See Mars 109.

⁷⁷ Section 12 of the Insolvency Act. See *Ganes v Telecom Namibia Ltd* 2004 3 SA 615 (SCA).

court will on the return day of the *rule nisi* issue a final sequestration order.⁷⁸ According to the Act, the registrar of the High Court has the responsibility of sending an original of every sequestration order and of every other order relating to an insolvent estate, trustee or an insolvent, made by the court, to the Master.⁷⁹ This aspect of the procedure has important practical consequences, as the Master on receipt of such notice opens a file in the name of the debtor and allocates a file number to the file. Upon receipt of a sequestration order or an order setting aside a provisional sequestration order, the Master shall also give notice in the *Government Gazette* of such an order.⁸⁰ When an appeal against a final sequestration order has been noted, the administration of the estate shall continue provided that no property of the estate shall be realised without the written consent of the insolvent.⁸¹

3.2.2 Custody and Control of the Insolvent Estate

The main objective of the Insolvency Act is to provide for the liquidation of the insolvent's estate and to secure an even distribution of his assets among creditors in accordance with the order of preference provided for by the Act.⁸² It is the duty of the trustee to fulfil this objective and he does so by collecting and realising the assets, and distributing the proceeds among creditors. In order to render it possible for the trustee to ensure these duties and simultaneously ensure that the assets are preserved, the Act provides that one of the effects of the sequestration order is to divest the debtor of his estate and to transfer ownership to the trustee.⁸³

Thus one of the immediate consequences of the granting of the sequestrating order is divesting the insolvent of his estate and vesting the estate in the Master until trustee is appointed.⁸⁴ In practice there is little tangible evidence of the estate of an insolvent passing to

⁷⁸ Section 12(1) of the Insolvency Act.

⁷⁹ Section 17 of the Insolvency Act. See Hockly 46.

⁸⁰ Section 17(4) of the Insolvency Act. See Hockly 46.

⁸¹ Section 150(3). In terms of s 339 of the Companies Act, s 150(3) applies to a company in liquidation unable to pay its debts so that an appeal against the winding-up order does not suspend the operation of the order – see *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd* 2001 (2) SA 768 (W). See Delpont “The Noting of an Appeal against a Winding-up Order: Suspension or continuation?” (2002) *THRHR* 632; *Slabbert, Verster & Malherbe v Die Assistent-Meester* 1977 (1) SA 107 (NC).

⁸² Smith 81.

⁸³ Section 20(1) of the Insolvency Act. See Smith 81; Mars 181. *Study Notes: Diploma in Insolvency Law and Practice* 52.

⁸⁴ Sections 20(1)(a) and 20(2) of the Insolvency Act. Section 20(2) provides that all of an insolvent's assets vest in his trustee upon sequestration. In terms of s 361(1) of the Companies Act, all the property of a company in liquidation is deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. In *Legh v Nungu Trading 353 (Pty) Ltd* 2008 2 SA 1

the Master, as the provision resulting in the estate of an insolvent passing to the Master does not require any positive action from the Master with respect to the property.⁸⁵ As a rule a provisional trustee will be appointed to manage the estate and release the Master of the responsibility of ensuring the security of the assets.⁸⁶

Upon receipt of the sequestration order the sheriff is required to attach and draw up an inventory of the movable property of the estate within his district and is not in the possession of a person who claims to be entitled to retain it under a right of pledge or a right of retention.⁸⁷ He must surrender any cash which he collects to the Master and must make arrangements for the safekeeping of the movable property at a suitable place or appoint some suitable person to hold the property.⁸⁸ Immediately after making the attachment, the sheriff must report, in writing, to the Master that the attachment has been completed and must also send a copy of the inventory to the Master.⁸⁹

After receiving notice of the final sequestration order, the insolvent is obliged to tender all documents and records pertaining to his affairs and which have not yet been taken into the custody to the sheriff.⁹⁰ Within seven days of service he must also lodge a statement of affairs with the Master.⁹¹ At any time before the second meeting of creditors, the insolvent is also obliged if required to assist the trustee in collecting and taking charge of any property

(SCA) the court concluded, ss 20 (1) (a) and 20 (2) (a) of the Insolvency Act, in so far as they vested the property of the insolvent in the liquidator, were not applicable to a company in liquidation. Thus, s 339 of the Companies Act was not applicable to either of the sections. See Evans ch 7 for a detailed discussion of the effect of sequestration on the property of the insolvent. See also Stander “Die Eienaar van die Bates van die Insolvente Boedel” (1996) *THRHR* 388; Evans “Who owns the Insolvent Estate” (1996) *TSAR* 719. See also s 20(1)(c) of the Insolvency Act; Boraine “Unexecuted Contract or Merely a Stay of Execution?: *Warricker v Senekal*” (2008) *SA Merc LJ* 544. See Smith 81; *Mears v Rissik* 1905 TS 303.

⁸⁵ Or custody and control of a company’s property. See s 361 of the Companies Act provides that in any winding-up by the court all the property concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. At all times while the office of liquidator is vacant or he is unable to perform his duties, the property of the company is deemed to be under the control of the Master. See Burdette part 4B.

⁸⁶ The first mention of the practice of transferring the assets of the insolvent to the Master was detected in the Ordinance 64 of 1929, which stated the effect in law to divest the insolvent and to vest in the Master of the Supreme Court. See Burton 39; De Villiers 107.

⁸⁷ Section 19(1) of the Insolvency Act.

⁸⁸ *Rennie v The Master; Glaum v The Master* 1980 2 SA 600 (C).

⁸⁹ Section 19(3)(a) and (b) of the Insolvency Act.

⁹⁰ Section 16(2) of the Insolvency Act.

⁹¹ Section 16(2) of the Insolvency Act.

belonging to the estate. In return the Master may approve an allowance in money or goods as the Master considers necessary to support the insolvent and his dependants.⁹²

An additional effect of the sequestration of the separate estate of one of two spouses shall be to vest in the Master, and upon his appointment in the trustee, all the property of the spouse whose estate has not been sequestrated (the “solvent spouse”) as if it were property of the sequestrated estate.⁹³ Where the solvent spouse claims property as his own, the burden of proving that he is entitled to property in terms of section 21(2) is on the solvent spouse, and on successfully proving ownership the assets in question will be released.⁹⁴

3.2.3 Appointment of *Curator Bonis*, Provisional Trustee and Trustee

The international standards and guidelines on best practice recognise that in order to exercise powers and discharge functions, duties, responsibilities and accountabilities effectively, an office-holder should be suitable (or, in terms of some legislation, “fit and proper”); and by his conduct foster public confidence in the insolvency system.⁹⁵ Together with the implementation of the regulatory agency, the qualification and regulation of office-holders represent one of the three building blocks underpinning an effective and efficient insolvency law system.⁹⁶ The insolvency profession is, and always has been, one of the few unregulated⁹⁷ professions in South Africa.⁹⁸ The role of the Master in this field of insolvency law has also over the years prove to be a enthusiastic point of discussion for those involved in

⁹² Section 23(12) of the Insolvency Act.

⁹³ The position in respect of a marriage out of community of property is dealt with in s 21 of the Insolvency Act. *Study Notes: Diploma in Insolvency Law and Practice* 70. The Constitutional Court has decided with a majority of five to four that s 21 did not constitute unfair discrimination and did not amount to expropriation, consequently that ss 64(2), 65(1) and 65(2) were not unconstitutional (*Harksen v Lane* 1998 1 SA 300 (CC)). Cf Evans “A Critical Analysis of section 21 of the Insolvency Act 24 of 1936” (1996) *THRHR* 613-625 and 1997 *THRHR* 71-83.

⁹⁴ Section 21(2)(a)-(e) of the Insolvency Act. See Evans ch 10 for a comprehensive discussion of this topic.

⁹⁵ Johnson 72.

⁹⁶ Johnson 71.

⁹⁷ By “unregulated” is meant that there is no legislation regulating admission to, or participation in, the insolvency profession. Requirements such as minimum qualifications, practical experience, registration, codes of conduct, *etc.*, are non-existent.

⁹⁸ Loubser “An International Perspective on the Regulation of Insolvency Practitioners” (2007) *SA Merc LJ* 123 (hereafter referred to as Loubser “An International Perspective on the Regulation of Insolvency Practitioners”); Calitz “The Appointment of Insolvency Practitioners in South Africa” 721.

this field of the law – proof of this is to be found in the variety of comments that were received by the South African Law Reform Commission on the 1996 Draft Insolvency Bill.⁹⁹

Although the term “insolvency practitioner” is not used or defined in any South African legislation it is increasingly being used internationally and nationally by professional organisations and interested parties in the field of insolvency to refer to a fairly diverse group of officers. Such officers could include the provisional trustee and final trustee of estates under sequestration,¹⁰⁰ provisional liquidators and final liquidators of close corporations¹⁰¹ and companies being wound up,¹⁰² possibly also a *curator bonis*¹⁰³ and judicial managers¹⁰⁴ of companies under judicial management.¹⁰⁵ The nearest that South African lawmakers came to introducing a collective term was in the Draft Insolvency Bill where the term liquidator was employed to replace the term “trustee” in order to make provision for the possibility that the insolvency of both a natural and a juristic person would at some point in the future be regulated by a unified piece of legislation.¹⁰⁶

In 2003 the Minister of Justice and Constitutional Development, reacting to persistent allegations of corruption in the appointment of insolvency practitioners, introduced a Judicial Matters Amendment Act.¹⁰⁷ This amendment to the current Act authorises the Minister of Justice and Constitutional Development¹⁰⁸ to determine a policy for the appointment of insolvency practitioners by the Master.¹⁰⁹ The stated aim of the legislation was first to create uniform procedures in all Masters’ offices for the appointment of these functionaries and thus to promote the image of the insolvency practitioners and of the Master’s division, and secondly to promote consistency, fairness, transparency and the achievement of equality in these appointments by the

⁹⁹ See (n 8).

¹⁰⁰ Sections 18; 6 or 57 of the Insolvency Act.

¹⁰¹ Section 74 of the Close Corporations Act.

¹⁰² Sections 368 or 369 of the Companies Act.

¹⁰³ Section 5 of the Insolvency Act.

¹⁰⁴ Sections 429 or 431 of the Companies Act.

¹⁰⁵ Section 427(1) of the Companies Act.

¹⁰⁶ Loubser “An International Perspective on the Regulation of Insolvency Practitioners” 123. See Burdette part 4B; Keay “The Unity of Insolvency Legislation” 5. See discussion in Part I par 1.6 above.

¹⁰⁷ Act 16 of 2003. In *Beinash & Co v Nathan (Standard Bank of SA Ltd Intervening)* 1998 3 SA 540 (W), Flemming DJP confirmed the view that some liquidators acted dishonestly when he stated that liquidators and trustees were regarded by many as ineffective and “even sometimes disrespected in regard to integrity” at 545D. See Loubser “An International Perspective on the Regulation of Insolvency Practitioners” 123.

¹⁰⁸ Hereafter referred to as the Minister or the Minister of Justice.

¹⁰⁹ The relevant power was inserted into s 158(2)-(3) of the Insolvency Act, s 15(1A) of the Companies Act and s 10 of the Close Corporations Act, respectively.

various Masters.¹¹⁰ The objective behind the amendment of the Act was thus to incorporate the principles of a previous “informal” policy document into legislation.¹¹¹

The restraint on the Master’s discretion in both the informal as well as the statutory policy can be questioned. It has been stated that the Master has an unfettered and exclusive administrative discretion to appoint a provisional trustee of his choice.¹¹² In *Dawood and another v Minister of Home Affairs and others*¹¹³ Parliament had given officials of the Department of Home Affairs extensive powers to grant or extend residence permits, but legislation had not provided any criteria to guide the exercise of the discretionary powers.¹¹⁴ O’Regan J in dealing with discretionary powers created in terms of legislation, stated that “[d]iscretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner.”¹¹⁵ In both the *Dawood* case and *Janse van Rensburg NO v Minister of Trade and Industry NO*¹¹⁶ the court expressed the view that wide discretionary powers capable of infringing on fundamental rights ought to be accompanied by criteria or guidelines to guide their exercise. The lack of criteria regarding the Master’s discretion is therefore clearly vulnerable to Constitutional claims.

¹¹⁰ *Memorandum on the Objects of the Judicial Matters Amendments Bill* (2003) at par 2.2. See Loubser “An International Perspective on the Regulation of Insolvency Practitioners” 125.

¹¹¹ It is not clear when the policy document was implemented for the first time. The original policy document is termed *Policy: Strategy on/procedures for appointment of liquidators and trustees*, and is undated. The document would appear to have been implemented in 1998 or 1999. The document deals not only with the appointment of trustees and liquidators, but also *inter alia* with topics such as the training and the lodging of requisitions. On file with the author. One concern is that the legislative amendments provide for the application of a policy document that has been accepted and approved of by Parliament. To date this has not been done, although the Master continues to apply what seems to be a revised policy document making provision for the appointment of historically disadvantaged individuals in all estates (not only those in excess of R5M), and which does not recognise white women as historically disadvantaged individuals. Other attempts to finalise the Minister’s policy document include certain “drafts documents” which from time to time had been made available to certain role players in the industry and include: Department of Justice and Constitutional Development *Division: Master of the Court Policy: Strategy on/procedures for the Appointment of Liquidators and Trustees* (June 2001); Chief Masters Directive – The appointment of Liquidators (2007); *Minister’s Policy Guideline on the Appointment of Liquidators, Curator Bonis, Trustees and Judicial Managers* (2007) on file with the author.

¹¹² *Lipschitz v Watrus NO* 1980 1 SA 662 (T) at 671. See also Meskin par 4.1 4-1. Considering the fact that the exercising of such a discretion amounts to an administrative action by the Master, it is doubtful whether the Master still has an “unfettered discretion” in view of the provisions of s 5(1) of the PAJA. At the very least the Master may be compelled to provide reasons for appointing a specific person, or refusing to appoint a specific person, as provisional trustee.

¹¹³ 2000 3 SA 936 (CC).

¹¹⁴ Hoexter 234.

¹¹⁵ *Dawood and another v Minister of Home Affairs and others Parliament* (n 113) at par 53.

¹¹⁶ 2001 1 SA 29 (CC).



A trustee appointed to administer an insolvent estate assumes certain statutory responsibilities and occupies a position of trust, not only towards creditors but also to the insolvent himself.¹¹⁷ Nonetheless, South Africa currently lacks any form of statutory regulation of insolvency practitioners, and they are also not appointed as officers of court.¹¹⁸ Furthermore there is also no statutory recognition of a private or public body, and no statutory system of licensing of individuals or any entry-level requirements or qualifications required for people to practise as insolvency practitioners in South Africa.¹¹⁹ Although, as will be discussed, there are certain statutory and non-statutory procedures that the Master follows when appointing a provisional or final trustee, these fall short of a complete regulatory model.

Section 59 of the Insolvency Act confirms that on the application of any interested person the court may either before or after the appointment of a trustee declare the appointed person disqualified from holding the office of trustee. According to section 59 the Court may remove or disqualify a person if:

- (a) he has accepted or expressed his willingness to accept from any person engaged to perform any work on behalf of the estate in question, any benefit whatever in connection with any matter relating to that estate; or
- (b) in order to induce a creditor to vote for him at the election of a trustee or in return for his vote at such election, or in order to exercise any influence upon his election as trustee, he has –
 - (i) wrongfully omitted or included or been privy to the wrongful omission or inclusion of the name of a creditor from any record by this Act required; or
 - (ii) directly or indirectly given or offered or agreed to give to any person any consideration; or
 - (iii) offered to or agreed with any person to abstain from investigating any previous transactions of the insolvent concerned; or
 - (iv) been guilty of or privy to the splitting of claims for the purpose of increasing the number of votes.¹²⁰

Prior to 1965 the removal of a trustee could only be affected by the Court. In 1965 the Insolvency Amendment Act¹²¹ transferred certain of the court's powers to the Master, and the Master is at

¹¹⁷ *Jacobs v Hessles* 1984 3 SA 601 (T). See Mars 293.

¹¹⁸ *James v Magistrate Wynberg* 1995 1 SA 1 (C). See Mars 293.

¹¹⁹ According to the Act the High Court has the power to remove or disqualify a person as representative of the estate. Apart from the grounds for removal by the Master the Court also has the additional authority to not only remove a trustee from office but also declare him incapable of being appointed trustee of an insolvent estate for whatever period it deems fit. Section 57 of the Insolvency Act.

¹²⁰ Section 59 of the Insolvency Act. Under the 1916 Act it was decided in *Master of the Supreme Court v Griffith's Trustee* 1909 T.S 984 that the Master is not "a person interested" within the meaning of this section and had no *locus standi* to apply for an order for removal of the trustee under this section. The Court pointed out that other sections (ss 60 and 61) afford the Master a *locus standi*. See Nathan 204.

¹²¹ Act 99 of 1965. See Smith 201.

present empowered to remove a trustee on any grounds mentioned in the provision. Section 60 of the Insolvency Act provides the following grounds for removal by the Master:

The Master may remove a trustee from his office on the ground –

- (a) that he was not qualified for election or appointment as trustee or that his election or appointment was for any other reason illegal, or that he has become disqualified from election or appointment as a trustee or has been authorized, specially or under a general power of attorney, to vote for or on behalf of a creditor at a meeting of creditors of the insolvent estate of which he is the trustee and has acted or purported to act under such special authority or general power of attorney; or
- (b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master; or
- (c) that he is mentally or physically incapable of performing satisfactorily his duties as trustee; or
- (d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors has requested him in writing to do so; or
- (e) that, in his opinion, the trustee is no longer suitable to be the trustee of the estate concerned.¹²²

The Companies Act specifically sets out the role of the Master in relation to the conduct of the liquidator in general. Section 381(1) expressly states that the Master is bound to “take cognisance of” the liquidator’s conduct and to investigate and take action “as he may think expedient” in any situation where there is reason to believe, or an interested party complains, that the liquidator is in default in relation to the administration of the winding up.¹²³

3.2.3.1 *Appointment of a Curator Bonis*

After the publication of a notice of surrender in the *Government Gazette* the Master has a discretion to appoint a *curator bonis* to take control of the debtor’s estate.¹²⁴ As mentioned elsewhere, the effect of the sequestration of the estate of an insolvent debtor will be that the estate will vest in the Master until a trustee has been appointed.¹²⁵ As a result of the right of ownership (or custody and control of the assets)¹²⁶ the Master also has the duty to protect the assets.¹²⁷ In cases where the Master is of the opinion that the particular assets in the debtor’s

¹²² Section 60 (a)-(e) of the Insolvency Act. See also Hockly 116. Section 379 of the Companies Act regulates the removal of a liquidator.

¹²³ Meskin par 15.2.6.3.

¹²⁴ Section 5(2) of the Insolvency Act.

¹²⁵ Section 20(1)(a) of the Insolvency Act.

¹²⁶ In terms of s 361(1) of the Companies Act, the assets of a company in liquidation fall under the custody and control first of the Master, and then of the liquidator (once one has been appointed).

¹²⁷ Mars 29.

estate are at risk as the case would be when the estate contains perishables, the Master will urgently appoint a *curator bonis* to take control of the assets or business of the insolvent.

The duty of the *curator bonis* would be to take the estate into custody and take over the control of any business or undertaking of the debtor subject to the Master's directions.¹²⁸ The function of the *curator bonis*, who is in the position of a caretaker, is strictly an interim one and his duty is to safeguard the interest of the estate until a provisional or final trustee has been appointed. There is no provision for the sale of assets by the *curator bonis* other than in the ordinary course of business. However, after the court has ordered the sequestration of the estate and prior to the first meeting at which a trustee is elected, the Master may appoint a provisional trustee and authorise him to sell assets urgently.¹²⁹

The purpose of the appointment of a *curator bonis* would be to control the estate, and the Master has a discretion to decide on which person would be suitable to appoint.¹³⁰ Although there is no explicit provision that security should be lodged by a candidate before his appointment as *curator bonis*, the Master in practice regularly insists on security.¹³¹ Once a provisional trustee or final trustee has been appointed the *curator bonis* is expected to transfer control of the assets to the appointed trustee. The *curator bonis* is obliged to keep proper record of estate transactions and must frame an account and lodge this with the Master. The *curator bonis* would be entitled to a reasonable remuneration for his services to be determined by the Master.¹³² Such remuneration is taxable by the Master and is included in the costs of sequestration of the estate.¹³³

3.2.3.2 Appointment of a Provisional Trustee

¹²⁸ Smith 175.

¹²⁹ It is respectfully submitted that the *obiter* remark by Gautschi AJ in *Storti v Nugent* 2001 3 SA 783 (W) at 787F-G, that the Master cannot make a provisional appointment when a final order has been issued without a provisional order, is incorrect. *Study Notes: Diploma in Insolvency Law and Practice* 138.

¹³⁰ Smith 176.

¹³¹ *Study Notes: Diploma in Insolvency Law and Practice* 138.

¹³² The Master may for good cause reduce or increase the fee or disallow it either wholly or in part. See s 63(1) of the Insolvency Act. See *Nel v The Master* 2005 1 SA 276 (SCA).

¹³³ Section 97(2)(c) of the Insolvency Act. See *Study Notes: Diploma in Insolvency Law and Practice* 138.

The 1916 Insolvency Act granted the Court a discretion to appoint a provisional trustee before a final trustee is appointed or when the trustee has been removed, or is not acting as such.¹³⁴ According to the Act the appointment of a provisional trustee was done by way of a petition by the Master or a creditor to the court, and was contained in the petition for sequestration of the debtor's estate.¹³⁵ The provisional trustee had the powers of a final trustee, but was unable to take legal action without the court's permission and could not realise any of the estate assets without the permission of the Court or the Master.¹³⁶ The court had a discretion to appoint a provisional trustee, and was not bound to have regard to the wishes of any of the creditors.¹³⁷ Generally, however, the wishes of the majority of creditors prevailed,¹³⁸ and the court appointed the nominated applicant if such person was supported by a substantial body of creditors.¹³⁹

With the enactment of the current 1936 Insolvency Act¹⁴⁰ the responsibility to appoint a provisional trustee was removed from the courts and the Master at present possesses the power to appoint a provisional trustee.¹⁴¹ However, the Insolvency Act fails to state the criteria for making such an appointment and states in the negative the qualifications of a trustee by declaring which persons are disqualified from acting as a trustee.¹⁴² This effectively confers on the Master a discretion as to the method and the identity of the person appointed as the provisional trustee of an insolvent estate.¹⁴³

¹³⁴ Section 57 of the 1916 Insolvency Act.

¹³⁵ Nathan 196.

¹³⁶ Section 57(3) of the 1916 Insolvency Act.

¹³⁷ Nathan 197. See Calitz "The Appointment of Insolvency Practitioners in South Africa" 721.

¹³⁸ *Ex Parte Reid* 1922 CPD 62.

¹³⁹ Nathan 197. See Calitz "The Appointment of Insolvency Practitioners" 723.

¹⁴⁰ It is important to note that however complete the Insolvency Act may be, it did not totally repeal the common law in respect of South African insolvency law, and that English law played an important role in the development of our insolvency law.

¹⁴¹ Section 18(1) of the Insolvency Act. Calitz "The Appointment of Insolvency Practitioners" 723. See *Study Notes: Diploma in Insolvency Law and Practice* 141.

¹⁴² Section 55 of the Insolvency Act.

¹⁴³ In *Krumm v The Master* 1989 3 SA 944 (D) reference was made to a Master's Instruction which stated that because of possible bias a wide range of candidates may not be considered for appointment. The court stated that the exercise of a discretion by the Master to appoint a provisional liquidator could only be attacked on review on the basis that the Master failed to exercise his discretion at all, that he acted *mala fide*, or was motivated by improper considerations. The court held that it was not grossly unreasonable for the Master to issue and apply a directive such as the one which he did in the matter. The court concluded with the following (952F-G): "His (the Master's) approach may be said to be over-cautious, but is it not better that, if he should err, he should do so on the side of caution?" It is submitted that this decision may be influenced by s 33 of the Constitution, which provides that administrative action should be justifiable in relation to the reasons given for it. A court may order the Master to exercise his discretion properly, but will only in exceptional circumstances substitute its own decision for that of the Master. Cf *UWC v MEC for Health and Social Services* 1998 3 SA 124 (C) at 130F. See also *Study Notes: Diploma in Insolvency Law and Practice* 138.

In 1977 the then Master of the Supreme Court in Pretoria issued a directive¹⁴⁴ stating that due to the fact that the estate vested (or fell under his custody and control) in the Master,¹⁴⁵ and due to the fact that the Master could not sufficiently protect the interests of creditors until such time as a trustee or liquidator had been appointed at the first meeting of creditors, the Master was implementing a system whereby a provisional trustee would be appointed, as far as possible, in all insolvent estates. By making such an appointment the Master would be divested of the estate and the subsequent risk involved and the appointed insolvency practitioner could proceed to take the necessary steps to protect the interests of creditors in that particular estate.¹⁴⁶ The reality in practice, however, is that in recent times commerce has become more sophisticated, and it has become impractical to leave the active decision-making in the administration process of an insolvent estate until after a first meeting of creditors had been convened.¹⁴⁷

Section 18(1) of the Insolvency Act makes provision for the appointment of a provisional trustee by the Master.¹⁴⁸ Section 18(1) reads as follows:

- (1) As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the Master *may*, in accordance with policy determined by the Minister, appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional trustee and shall hold office until the appointment of a trustee (*emphasis added*).¹⁴⁹

From the wording of this subsection it is clear that the legislature intended that the appointment of a provisional trustee should be an extraordinary appointment, the word “may” indicating that it

¹⁴⁴ The “directive” was sent to all insolvency practitioners by the Master in the form of a letter, informing them that the Master would in future ask for nominations from creditors prior to making a provisional appointment.

¹⁴⁵ In terms of s 20(1)(a) of the Insolvency Act, the estate of an insolvent vests first in the Master and then in the trustee (once one has been appointed). In terms of s 361(1) of the Companies Act, the assets of a company in liquidation fall under the custody and control first of the Master, and then of the liquidator (once one has been appointed).

¹⁴⁶ The making of an appointment is the most effective means of protecting the interests of creditors, which of course is what was intended by the legislature. See Meskin par 4.1 4-1 and the authority quoted therein in (n 6) 4-3. See Calitz “The Appointment of Insolvency Practitioners” 728.

¹⁴⁷ Calitz “The Appointment of Insolvency Practitioners” 725.

¹⁴⁸ Section 368 of Companies Act makes provision for the appointment of a provisional liquidator in the case of a company being wound up by the court or by resolution. One important difference between the wording of s 368 of the Companies Act and s 18(1) of the Insolvency Act is that s 368 requires the appointment of a “suitable person” as provisional liquidator. By “suitable” is meant an independent person who is able to discharge the responsibilities of such office competently, honestly and impartially. See, eg, *Murray v Edendale Estates Ltd* 1908 TS 17 22; *In re Greatrex Footwear (Pty) Ltd (II)* 1936 NPD 536 at 537-539; *Wolstenholme v Hartley Farmers Agricultural Co-operative Co Ltd* 1965 4 SA 73 (SR); *Ex parte Clifford Homes Construction (Pty) Ltd* 1989 4 SA 610 (W) 614; *Krumm and Another v The Master and Another* (n 143).

¹⁴⁹ As amended by s 3 of Judicial Matters Amendment Act 16 of 2003.

was not the intention that such an appointment should be made in all cases but rather that the Master has a discretion to decide whether such appointment is deemed necessary.¹⁵⁰ Unfortunately, this section also does not provide for any criteria which should be applied by the Master when making the appointment, and for this reason the making of provisional appointments is solely at the discretion of the Master. It should be noted that the Master has the discretion to appoint a co-trustee at any time if he deems it appropriate in the circumstances.¹⁵¹

Considering the rather detailed provisions relating to the appointment of a final trustee as set out in section 54 of the Act, it is rather surprising to find an absolute lack of rules relating to the appointment of provisional trustees.¹⁵² This further supports the view that the appointment of provisional trustees were meant to be extraordinary appointments made by the Master. It is also worth mentioning the provisions of section 18(4) of the Insolvency Act, which provide for the appointment of the provisional trustee as final trustee when no person has been elected as the final trustee at the first meeting of creditors.¹⁵³ Section 18(4) reads as follows:

- (4) When a meeting of creditors for the election of a trustee has been held in terms of section forty and no trustee has been elected, and the Master has appointed a provisional trustee in the estate in question, the Master shall appoint him as trustee on his finding such additional security as the Master may have required.

Although the Insolvency Act sets out certain disqualification criteria for the appointment of trustees,¹⁵⁴ it does not categorically state who should be appointed by the Master as a provisional or final trustee. In order to circumvent the lack in statutory guidelines the Master, of his own accord, commenced the use of a register to which he could add the names of

¹⁵⁰ See also Meskin par 4-1. See Burdette *Reform, Regulation and Transformation: The Problems and Challenges facing South African Insolvency Industry* (2005) unpublished paper presented at the Commonwealth Law Conference, London (hereafter referred to as Burdette “Reform, Regulation and Transformation”); See Calitz “The Appointment of Insolvency Practitioners” 728.

¹⁵¹ Section 57(5) of the Insolvency Act. It has in the past been mentioned that the Master has an unfettered and exclusive administrative discretion to appoint a provisional trustee of his choice. This discretion has however been curbed by the amendments to the Act granting the Minister the power to advise the Master on the method of appointment by means of a policy document. *Lipschitz v Watrus NO* (n 112). See also Meskin par 4.1 4-1. Considering the fact that the exercising of such a discretion also amounts to an administrative action by the Master, it is doubtful whether the Master still has an “unfettered discretion” in view of the provisions of s 5(1) of PAJA. At the very least the Master may be compelled to provide reasons for appointing a specific person, or refusing to appoint a specific person, as provisional trustee.

¹⁵² Although there are no legislative rules for the appointment of provisional trustees, the Master has developed a set of criteria for this purpose.

¹⁵³ See Calitz “The Appointment of Insolvency Practitioners” 728.

¹⁵⁴ See s 55 of the Insolvency Act for a list of these disqualifications.

persons who, in his view, qualified as persons suitable for appointment as trustees. Over time this became known as the “Master’s panel”. In order for one’s name to be added to the register, or in order to be placed on the “Master’s panel”, prospective trustees have to make application to the relevant Master’s office. Although each Master’s office has a different *modus operandi* when it comes to the placement of prospective trustees on the panel, the procedure usually consists of the submission of certain documentation to the Master, and a subsequent interview of the candidate by a panel consisting of personnel from the Master’s office, and one or more practising practitioners who represent either Association of Insolvency Practitioners of Southern Africa¹⁵⁵ or Association for the Advancement of Black Insolvency Practitioners¹⁵⁶ (or both).¹⁵⁷ The main point of concern, however, is that the Master’s professed panel has no legal status whatsoever and is vulnerable to any litigation challenging its constitutionality.¹⁵⁸

As mentioned, after the granting of the sequestration order the Master may appoint a provisional trustee to take control of the estate until the appointment of the final trustee at the first meeting of creditors. In order to assist the Master in appointing a person as the provisional trustee who would in all probability also be elected as the final trustee, the Master introduced what is known today as the “requisition system”.¹⁵⁹ The requisition system entails the submission of nominations by the creditors of the estate as to who should be appointed as the provisional trustee or liquidator of the estate.¹⁶⁰

¹⁵⁵ Hereafter referred to as “AIPSA”. AIPSA is a voluntary member organisation representing the interests of insolvency practitioners.

¹⁵⁶ Hereafter referred to as “AABIP”. AABIP is a voluntary member organisation that provides for the needs of black insolvency practitioners.

¹⁵⁷ Criteria as mentioned on official webpage of the Master available at www.doj.gov.za/master (last visited at 09-11-30).

¹⁵⁸ Burdette “Reform, Regulation and Transformation” 8.

¹⁵⁹ For a discussion of the reasons for the introduction of the requisition system, see Meskin par 4.1 4-2. In the unreported decision in *Prosch v Standard Bank of South Africa Limited* unreported case no 14279/1990 (WLD), Roux J stated that he simply could not accept that the Master blindly appointed the person recommended by the majority in value of creditors as this was at odds with the Master’s unfettered discretion to appoint a suitable person. He further held, assuming that such a practice existed, that a creditor who overstated his claim in a requisition or failed to disclose that he was disqualified from voting in terms of s 365(2)(a) of the Companies Act could not be held liable for damages by a person who alleged that he should have been appointed as provisional liquidator. Such a person’s loss resulted from not being selected by the Master and his remedy was to review the decision by the Master to appoint another person. Cf Van Rensburg “The Appointment of Provisional Liquidators and Trustees – Let Commerce Decide” (1998) *De Rebus* 70. *Study Notes: Diploma in Insolvency Law and Practice* 138.

¹⁶⁰ *Study Notes: Diploma in Insolvency Law and Practice* 141.

In order to allow the creditors sufficient time to lodge their nominations, the Master will usually not make a provisional appointment until 48 hours have elapsed from the granting of the sequestration or liquidation order by the court.¹⁶¹ The requisitions (nominations) lodged by the creditors are then scrutinised and in most cases, but not always, the person or persons with the majority of votes in number and value are then appointed as the provisional trustee.¹⁶² The Master is not bound by the requisitions and has a discretion to appoint any person as the provisional trustee.¹⁶³ In some cases the Master would even appoint a person or persons who received no nominations from creditors at all, once again in terms of the unfettered discretion granted to the Master in terms of the provisions of the various Acts.¹⁶⁴

Once the Master has decided on the appointment of a particular person as provisional trustee, that person will be called upon by the Master to lodge security and “an affidavit of non-interest”, the form of which may differ from one Master to another.¹⁶⁵ The phrase “non-interest” refers in particular to *inter alia* that he is not related to the insolvent within the specified degree;¹⁶⁶ that he has no interest opposed to the general interest of the insolvent estate¹⁶⁷ and that he has not during the twelve months preceding sequestration acted as bookkeeper, accountant or auditor of the insolvent.¹⁶⁸

It is usually required from the provisional trustee to investigate the value of the assets after his appointment and to report it to the Master. The Master may call for security for the full amount of the assets or for an amount specified by him.¹⁶⁹ The bond of security must be countersigned by a bank or insurance company acceptable to and on record with the Master. The Master may remove a trustee from his office if, *inter alia*, he was not qualified for

¹⁶¹ This is the practice in the office of the Master in Pretoria. Other offices of the Master do not necessarily follow this *modus operandi*, eg, the Cape Town office, which will make an appointment as soon as possible after the granting of a sequestration order.

¹⁶² Section 54 (2) of the Insolvency Act.

¹⁶³ Even if the Master has a discretion he is in terms of s 5 of PAJA obliged to furnish reasons for the exercise of this discretion and in terms of s 6 the reasons must be rational and the action must, amongst other things, not be taken arbitrarily or take irrelevant considerations into account. See s 33(2) of the Constitution. See part IV above.

¹⁶⁴ *Study Notes: Diploma in Insolvency Law and Practice* 142; See Calitz “The Appointment of Insolvency Practitioners” 729.

¹⁶⁵ *Study Notes: Diploma in Insolvency Law and Practice* 142.

¹⁶⁶ Section 55(b) of the Insolvency Act.

¹⁶⁷ Section 55(e) of the Insolvency Act.

¹⁶⁸ Section 55(l) of the Insolvency Act. The provisions in s 372 of the Companies Act in respect of the disqualification of a liquidator are almost identical to the provisions of s 55 of the Insolvency Act.

¹⁶⁹ Section 18(1) of the Insolvency Act.



appointment, or has become disqualified from appointment, or has acted on authority or a power of attorney to vote on behalf of a creditor, or if in the opinion of the Master the trustee is no longer suitable to be the trustee of the estate concerned.¹⁷⁰

Ordinarily, the provisional trustee is also appointed as final trustee following the first meeting. In such cases the liquidation and distribution accounts of the trustee deals with his administration as provisional and final trustee. If the provisional appointee is not appointed finally, he should account to the final appointee.¹⁷¹ If the provisional appointee is appointed finally, he charges remuneration for his administration as a whole when the liquidation and distribution accounts are lodged. If the provisional appointee is not appointed finally (whether another person is appointed or the provisional or final order is set aside) the provisional appointee is entitled to reasonable remuneration determined by the Master, but not to exceed the rate of remuneration of a final appointee.¹⁷² While this non-statutory arrangement no doubt goes a long way towards ensuring that suitable persons are appointed to act as practitioners, the system is far from perfect and it is submitted that the system still lacks the structure, transparency and certainty which a statutory framework will provide.

3.2.3.3 *Appointment of the Final Trustee*

At this point it is important to mention that a distinction should be made between the making of provisional and final appointments by the Master. Section 54 of the Insolvency Act contains the rules for the election of a final trustee at the first meeting of creditors. In terms of section 54(2) of the Insolvency Act, any person who has obtained a majority in number and in value of the votes of the creditors entitled to vote, and who voted at such meeting, shall be elected as the trustee of that estate. It bears mentioning that subsection (1) of section 54 states that the creditors may elect one or two trustees at the first meeting of creditors.¹⁷³

¹⁷⁰ Section 60 of the Insolvency Act; s 379 of the Companies Act.

¹⁷¹ In order to have his security bond reduced to nought the provisional appointee will usually lodge a certificate by the final appointee with the Master that the provisional appointee has accounted to the final appointee to his satisfaction. In order to hold the guarantor liable for past indiscretions by the provisional appointee, the security bond will not be cancelled.

¹⁷² Tariff B in the Second Schedule to the Insolvency Act. *Study Notes: Diploma in Insolvency Law and Practice* 145.

¹⁷³ The reason for this is that the voting rules in s 54 are taken a step further due to the fact that it may happen that no one person has the majority of the votes in both number and value. It frequently occurs that one person obtains the majority of the votes in value (especially those trustees who enjoy the support of the larger creditors such as banks), while another person obtains the majority of the votes in number. In such a

South African insolvency law is categorised as a creditor-driven insolvency system, and one of the grounds on which this conclusion is based is the input of creditors allowed in the administration of insolvent estates.¹⁷⁴ A principle conclusion of the IMF is that “[t]he law should enable creditors to play an active role in the insolvency proceedings. To that end, it should allow for the formation of a creditors’ committee, with the cost of such a committee being an administrative expense.”¹⁷⁵ The first meeting of creditors grants the opportunity to creditors to nominate and elect a person of their choice as final trustee. Although South African law does not provide for the creation of a creditor’s committee, to a certain extent the voting system at creditor’s meeting provide them with the opportunity to protect their rights.

When a person has been elected as trustee at the first meeting of creditors the Master will proceed to appoint him as such unless he was not properly elected; or he is disqualified under section 55 from being elected or appointed a trustee; or he has failed to give security within seven days or within such further period as the Master may allow; or in the opinion of the Master he should not be appointed trustee.¹⁷⁶ If the Master declines to appoint the elected person as trustee for one of the reasons stated in section 55, he shall give notice in writing to the interested party of his refusal and include the reason therefore. However, if the reason is that the Master is simply of the opinion that the applicant should not be appointed for a reason other than mentioned in section 55, the Master need not, in terms of section 57(1),¹⁷⁷ provide further particulars.¹⁷⁸

There is a special procedure for persons aggrieved by the appointment of a trustee by the Master or his refusal to appoint a person as trustee to appeal to the Minister of Justice and provision is made for a further meeting to elect a trustee.¹⁷⁹ This procedure does not apply to appointments

case both persons will be elected as trustees of the estate in question. See Calitz “The Appointment of Insolvency Practitioners” 780.

¹⁷⁴ See Wood *Principles of International Insolvency* (2007) 4-5 (hereafter referred to as Wood); Evans at 453 proposes that South Africa adopt a more liberal debtor friendly approach.

¹⁷⁵ *Orderly and Effective Insolvency Procedures* (1999) prepared by the Legal Department, IMF.

¹⁷⁶ Sections 56(2) and 57(1) of the Insolvency Act. See also ss 375 and 370 of the Companies Act.

¹⁷⁷ See s 370 of the Companies Act.

¹⁷⁸ Hockly 114. It is highly questionable whether this section is in line with the present Constitutional dispensation. See s 33(2) of the Constitution given effect by s 5 of PAJA. See Hoexter *Administrative Law in South Africa* (2006) (hereafter referred to as Hoexter) ch 8 for a detailed discussion of the right to written reasons.

¹⁷⁹ Section 57 of the Insolvency Act and ss 370 and 371 of the Companies Act. No new claims can be submitted for proof at this meeting. In terms of s 57(3) of the Insolvency Act and s 370(2)(d) of the Companies Act this meeting is deemed to be the continuation of a first meeting held after an adjournment thereof. In terms of s 44(3) of the Insolvency Act creditors must submit their claims 24 hours or more before the time advertised

outside the nomination process at meetings, such as provisional appointments¹⁸⁰ or joint appointments by the Master in the exercise of his discretion.¹⁸¹ The opportunity to appeal to the Minister when aggrieved by the Master's decision not to appoint a certain person as trustee represents an example of an internal remedy provided for by legislation. Before someone can apply to a court to review an administrative action, there is an important rule in PAJA that must be complied with – the rule of exhaustion of internal remedies.¹⁸² This indicates that, where the law sets out procedures allowing someone to review or appeal a decision of the administrator, these must be exhausted before an affected person can approach a court. A person can therefore refer to judicial review as a last resort.¹⁸³ The Master's decision not to appoint a person as trustee will thus not be reviewed by a court unless this internal remedy has been exhausted.¹⁸⁴

It would be fair to state that the appointment of insolvency practitioners in insolvent estates in South Africa is a controversial subject to deal with. This is not due to the complexity of the legislative provisions or their practical application, but due to the obvious shortcomings in the regulatory process. A review of the regulation of insolvency practitioners in other jurisdictions reveals that South Africa lacks a sufficient and effective regulatory framework.¹⁸⁵ Any regulation of the insolvency profession, however, needs to take cognisance of the socio-economic realities that prevail in South Africa. In addition, any such regulation needs to be sensitive towards an industry that is in dire need of transformation. However, any regulatory measures need to be of an international standard so that foreign investors will have the peace of mind that their affairs will be conducted in an impartial and regulated environment.¹⁸⁶

for the commencement of the meeting. In *Minister of Justice v Firstrand Bank Ltd* 2003 6 SA 636 (SCA) court held s 371 of the Companies Act does not apply to provisional liquidators.

¹⁸⁰ *Minister of Justice v Firstrand Bank Ltd* (n 179).

¹⁸¹ *Janse Van Rensburg v The Master* 2004 5 SA 173 (T).

¹⁸² See <http://www.doj.gov.za/paja/about/review.htm> (last visited at 09-11-30)

¹⁸³ This is dealt with in s 7(2) of the PAJA. See Hoexter 478.

¹⁸⁴ In *Koyabe and Others v Minister for Home Affairs and Others* (CCT 53/08) [2009] ZACC 23 the applicants sought leave to appeal to the Constitutional Court against the judgment of the High Court. They urged the Court to accept that a lapsing of the time-period for them to seek a ministerial review means that the internal remedy as required under PAJA had been exhausted. The High Court held that s 7(2)(a) of PAJA requires the exhaustion of internal remedies prior to approaching a court for judicial review. The Court found that the applicants had not exhausted their internal remedy and that there were no exceptional circumstances that would allow it to exempt them from doing so.

¹⁸⁵ Calitz "The Appointment of Insolvency Practitioners" 780.

¹⁸⁶ In terms of the World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*) and United Nations Commission on International Trade Law¹⁸⁶ *Legislative Guide on Insolvency Law* (2005) (hereafter referred to as "UNCITRAL *Legislative Guide*" or "*Legislative Guide*") the bodies responsible for regulating or supervising insolvency practitioners should be independent of individual representatives, set standards that reflect the requirements of the legislation and public expectations of fairness,

3.2.4 Powers and Duties of the Master relating to the Effects of the Sequestration Order

Although the Master is not actively involved in the administration process of the estate and only acts in a supervisory capacity, a number of the powers of the trustee are subject to the Master's direction. A few of these powers are *inter alia* the entering of a caveat in the Deeds Office,¹⁸⁷ application to set aside directions by creditors,¹⁸⁸ resignation by the trustee or absence from the Republic for a period longer than 60 days,¹⁸⁹ payment of an allowance to the insolvent and his family before the second meeting,¹⁹⁰ sale of property before the second meeting¹⁹¹ and the destruction of documents.¹⁹²

The following provisions of the Insolvency Act expressly provides that the powers in question may be exercised only with the authority of creditors (obtained at a meeting) or the Master: obtaining legal advice,¹⁹³ the compromise of debts of more than R1 000 due to the estate, submission to arbitration, admission of claims¹⁹⁴ and the continuation of a business.¹⁹⁵ A few of the more significant matters in which the Master acts in a supervisory role will now be discussed.

3.2.4.1 Continuation of a Business

The Insolvency Act makes provision for the Master to consent to certain urgent matters such as the urgent sale of assets¹⁹⁶ or the continuation of a business.¹⁹⁷ A provisional or final trustee may continue a business¹⁹⁸ only with the authority of creditors, or, in the absence of

impartiality, transparency and accountability, and have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively – *See Revised Principles*.

¹⁸⁷ Section 18B of the Insolvency Act.

¹⁸⁸ Section 53(4) of the Insolvency Act. A creditor can also apply to set directions aside and this includes an unproved creditor with a “contingent” claim – *Pine Village Home Owners Association Ltd v The Master* 2001 2 SA 576 (SECLD).

¹⁸⁹ Section 61 of the Insolvency Act.

¹⁹⁰ Section 79 of the Insolvency Act.

¹⁹¹ Section 80 bis of the Insolvency Act.

¹⁹² Section 155 of the Insolvency Act. *Study Notes: Diploma in Insolvency Law and Practice* 156.

¹⁹³ Section 73 of the Insolvency Act.

¹⁹⁴ Section 78 of the Insolvency Act.

¹⁹⁵ Section 80 of the Insolvency Act.

¹⁹⁶ Section 80bis of the Insolvency Act.

¹⁹⁷ Section 80(1) of the Insolvency Act.

¹⁹⁸ Meskin is of the opinion that by its reference to “business” in this context the legislature intends to refer exclusively to a business which can be operated independently of the insolvent's participation. See Meskin par 5.25.1.

their instructions, the Master.¹⁹⁹ In the case of the provisional trustee, the authority of creditors envisaged is one given at a meeting of creditors duly convened under the Insolvency Act, and thus until the first meeting of creditors the only source of authorisation would be the Master, and, if he refuses, the court.²⁰⁰ In practice, the Master will generally require that the views of the creditors be ascertained by the trustee and based on the received input by creditors the Master will determine whether to grant his permission.²⁰¹ The main consideration influencing the decision of the creditors as well as the Master would generally be whether the continuance would be to the advantage of the creditors.

3.2.4.2 *Urgent Sale of Assets*

A provisional trustee has the powers and duties of a trustee, except that he may not without the authority of the court bring or defend legal proceedings and he may not without the authority of the Master or the court sell property of the estate.²⁰² Subject to this provision, the Master may before the first meeting give such directions to the provisional trustee as could be given to a trustee by creditors at a meeting.²⁰³ Following the first meeting the Master may at any time before the second meeting of creditors authorise the sale of property on such conditions and in such manner as he may direct.²⁰⁴ The Master will in practice upon a properly substantiated and motivated application by the trustee, give authority to realise assets and give specific instructions as to the manner and the terms and conditions of such realisation.²⁰⁵

¹⁹⁹ Section 80 (1) read with s 18(1) of the Insolvency Act.

²⁰⁰ Meskin par 5.25.1.

²⁰¹ Meskin par 5.25.1.

²⁰² Section 18(3) of the Insolvency Act.

²⁰³ Section 18(2) of the Insolvency Act.

²⁰⁴ See s 80 bis of the Insolvency Act and s 386(2A) and (2B) of the Companies Act.

²⁰⁵ Sections 80(1); 82 and 83 (11) of the Insolvency Act. After the final trustee has been appointed the creditors may prescribe the manner of and the conditions for the sale of property at the second meeting of creditors and must consent if the trustee takes over security at the value placed thereon by the creditor when proving his claim. Section 82 of the Insolvency Act provides that subject to the provisions of s 83 (realisation of securities for claims) and s 90 (rights of the Land Bank), the trustee shall, as soon as he is authorised to do so at the second meeting, sell all the property of the estate in such manner and upon such conditions as creditors may direct. According to *Janse van Rensburg & 'n Ander NNO v Land- en Landboubank van SA* 2003 5 SA 228 (T) at 237F in terms of s 339 of the Companies Act, s 90 of the Insolvency Act apply to companies. See also *Land and Agricultural Development Bank of South Africa t/a Land Bank v The Master & others* 2005 4 SA 81 (C). See Kelly-Louw "The Land Bank – out with the old and in with the new!" (2006) *Juta's Business Law* 69; Kelly-Louw "Investigating the statutory preferential rights the Land Bank requires to fulfil its developmental role" (2004) *SA Merc LJ* 378.

If directions by the creditors have not been received during the second meeting of creditors, the Master may alternatively issue directions as he sees fit.²⁰⁶ The Insolvency Act provides further that if creditors have not given any directions by the final closing of the second meeting of creditors, the trustee shall after notice in the *Government Gazette* realise the property by public auction or public tender.²⁰⁷

3.2.5 Meetings of Creditors

South African insolvency law does not provide for creditors' committees as found in various other jurisdictions and makes use of the meeting of creditors in an insolvent estate to afford creditors the opportunity to protect their interests and participate in the general administration of the estate. There are four types of meetings: the first and second meetings, which are compulsory in each estate, and the special and general meetings, which are convened when required.²⁰⁸ The meeting of creditors provides an interactive forum for discussion and debate to enable creditors to receive information on the course of insolvency proceedings and provide an opportunity to the trustee to consult with creditors on various issues.²⁰⁹ Although the purpose of the various meetings varies, claims can be proved²¹⁰ and interrogations held²¹¹ at any of the indicated meetings.

Meetings of creditors must, in terms of section 39(2) of the Act, be presided over by the Master, and although the proceedings may on the surface appear judicial in nature, they are in administrative in essence.²¹² Section 39(1) of the Insolvency Act provides that the Master must convene any meeting at such place as he considers to be most convenient for all parties

²⁰⁶ Section 81(3) of the Insolvency Act.

²⁰⁷ Section 82 (1) of the Insolvency Act. *Muller v De Wet NO 2001 2 SA 489 (W)* decided that notice of a public auction must be given in the *GG*, whether the creditors have given directions as to the manner of the sale or not. See also See Hockly 160; *Study Notes: Diploma in Insolvency Law and Practice* 174.

²⁰⁸ In general, the provisions of the Insolvency Act or similar provisions of the Companies Act or Winding-up Reg 7-15 apply to meetings held during the winding-up of companies. If an insolvent individual submits an offer of composition it is considered at a meeting which is convened in a manner similar to a general meeting. See s 364 of Companies Act.

²⁰⁹ The trustee may at any time convene a general meeting and must convene it if required to do so by the Master or creditors representing at least a quarter of the proved claims in value. See s 41 of the Insolvency Act and ss 386(1)(d) and 412 of the Companies Act and Winding-up Reg 10.

²¹⁰ Section 44(3) of the Insolvency Act. See s 366 of the Companies Act.

²¹¹ Section 65(1). See s 415 of the Companies Act.

²¹² Mars 374.

concerned.²¹³ The Master as a rule convenes the first meeting in the district where the insolvent resided or had his main place of business.²¹⁴ The trustee should convene all subsequent meetings at the same venue where the first meeting was held or get the permission of the Master to convene a meeting elsewhere, especially if the first meeting was not held before the Master.²¹⁵ In a district in which there is a Master's office, meetings are held before him or a public servant designated by him. Where there is no Master's office in a district, meetings are held before the magistrate or a public servant designated by him.²¹⁶

3.2.6 Proof of claims

As a general rule any creditor who wishes to share in the distribution of the proceeds of the assets in the estate must prove a claim against it at a meeting of creditors.²¹⁷ A claim may be proved at any of the various types of meetings of creditors to the satisfaction of the presiding officer at such meeting.²¹⁸ One of the most important functions of a presiding officer at a meeting of creditors is to examine and afterwards accept or reject a claim. The presiding officer must examine the claim carefully but it is not required to adjudicate upon a claim as if

²¹³ *Steelnet (Zimbabwe) Limited v Master of the High Court Johannesburg and Others* [2008] ZAGPHC at 185 the court held: "Neither the Insolvency Act, nor the Companies Act, provide for meetings in an insolvent estate to be held "independent of the offices of" the relevant Master. The power and duty regarding the meetings of creditors is granted to the Master in terms of s 364(1) of the Companies Act. s 364(2) further provides that meetings of creditors under s 364 of the Companies Act shall be summoned and held as nearly as may be in the manner provided by the law relating to insolvency. In addition, s 39(2) of the Insolvency Act provides that "all meetings of creditors held in the district wherein there is a Master's office shall be presided over by the Master or an officer in the public service, designated, either generally or specially, by the Master for that purpose". Therefore, meetings of creditors must, in terms of s 39(2) be presided over by the Master or by any officer in the public service designated either generally or specially by the Master for that purpose. The section does not make reference to or permit for such meetings to be held independent of the office of the Master".

²¹⁴ Section 39(1) of the Insolvency Act.

²¹⁵ Section 39(2) of the Insolvency Act.

²¹⁶ Section 39(2) of the Insolvency Act. See Winding-up Reg 7(2).

²¹⁷ Section 44 of the Insolvency Act and s 366 of the Companies Act deal with the proof of claims. There is a clear implication that claims can be proved at any meeting of creditors. Proof of claims is the first matter dealt with at any meeting if claims have been submitted for proof. The affidavit, claim form and documents submitted in support of the claim must be delivered at the office of the presiding officer not later than 24 hours before the advertised time of the meeting, failing which the claim shall not be admitted to proof at that meeting, unless the presiding officer is of the opinion that through no fault of the creditor he has been unable to deliver the documentation within the prescribed period. The late lodgement of documents cannot be overcome by lodging the claims more than 24 hours before an adjourned meeting. In *Slabbert, Verster & Malherbe v Die Assistent-Meester* 1977 1 SA 107 (NC), the Assistant Master held the erroneous view that a meeting would not proceed as a result of an appeal against the sequestration order. He advised a creditor accordingly. The Assistant Master discovered his mistake and the meeting proceeded. The court confirmed the decision by the Master to condone the late delivery of the claim. *Study Notes: Diploma in Insolvency Law and Practice* 191.

²¹⁸ Section 44(1) of the Insolvency Act.

it were a court of law.²¹⁹ A long line of decisions have indicated that the presiding officer may admit a claim upon *prima facie* proof.²²⁰ In deciding whether to admit a claim the presiding officer performs a quasi-judicial function and he must exercise his judgment independently.²²¹ No rigid rule exists as to when a presiding officer should be satisfied with the claim and each case must be decided on its own merits.²²² In the case of *Steelnet v The Master*²²³ the court confirmed that it is not in dispute that the presiding officer's adjudication of a claim constituted an "administrative action" as envisaged by PAJA that was therefore reviewable in terms of section 6 of PAJA and section 33 of the Constitution.²²⁴

For individual insolvents section 44(1) of the Insolvency Act provides that no claim shall be proved after the expiration of three months from the conclusion of the second meeting except with the leave of the court or the Master and payment of the cost occasioned by the late proof of the claim.²²⁵ Section 366(2) of the Companies Act and not the provisions of section 44(1),²²⁶ or section 104(1),²²⁷ or, it is submitted, section 104(2) of the Insolvency Act applies to companies. The liquidator may apply to the Master to establish a time or times within which creditors are to prove their claims in order to participate in a distribution under an account lodged with the Master before such proof. In practice the Master may insist that the liquidator must give notice in the *Government Gazette* of the proposed fixing of times for the proof of claims. Once an account has been lodged, claims proved after the fixed date are excluded from the distribution under such account, unless the Master extends the date.²²⁸

²¹⁹ *Cachalia v De Klerk* 1952 4 SA 672 (T) at 675.

²²⁰ *Ben Rossouw Motors v Druker* 1975 1 SA 816 (T); *Chappel v The Master* 1928 CPD 289 at 291; *Ilsley v De Klerk NO* 1934 TPD 55. *Study Notes: Diploma in Insolvency Law and Practice* 191. See Mars 390. In *Marendaz v Smuts* 1966 4 SA 66 (T) Rabie J said the following about ss 44(4) and 44(7) of the Insolvency Act: "The decided cases referred to show, in my view, that each case must be decided on its own merits and that no hard and fast rule can be laid down as to when a presiding officer ought to be satisfied with the proof of a claim as provided in s 44(3) of the Act, or as to when he resort to the calling of evidence as provided for in s 44(7)". *Study Notes: Diploma in Insolvency Law and Practice* 191.

²²¹ *Aircondi Refrigeration (Pty) Ltd v Ruskin* 1981 1 SA 799 (W) 804.

²²² *Marendaz v Smuts* (n 220). See Mars 409; Hockly 106.

²²³ *Steelnet (Zimbabwe) Limited v Master of the High Court Johannesburg* (n 213).

²²⁴ *Steelnet (Zimbabwe) Limited v Master of the High Court Johannesburg* (n 213).

²²⁵ Section 366(2) of the Companies Act applies to a Company. See the case of *Stone & Stewart v Master of the Supreme Court* unreported case no 8828/1987 (TPD).

²²⁶ See the unreported case of *Stone & Stewart v Master of the Supreme Court* (n 225). Meskin disagrees – par 9.5 (n 2).

²²⁷ *Townsend v Barlows Tractor Co (Pty) Ltd* 1995 1 SA 159 (W).

²²⁸ *Study Notes: Diploma in Insolvency Law and Practice* 191.

A creditor²²⁹ who has not proved his claim before the date when the trustee lodged his account is not entitled to share in the distribution under that account unless the Master, before the confirmation of the account, is satisfied that the creditor has a reasonable excuse for the delay in proving his claim and permits the creditor to share in the distribution under the account.²³⁰ A creditor who has not been permitted to share in an account lodged before the proof of his claim is entitled to an equalising dividend under a further account if sufficient funds are available and the Master is satisfied that the creditor had a reasonable excuse for delaying the proof of his claim.²³¹

The rejection of a claim at a meeting does not bar the creditor from proving his claim at a subsequent meeting or from establishing his claim by legal action before the time for such actions has expired in terms of section 75.²³² Any person aggrieved by the decision of the presiding officer to reject or admit a claim can in terms of section 151 approach the court to have the decision reviewed, provided that the court shall not re-open a duly confirmed account otherwise than provided in section 112.²³³ A person does not have *locus standi* to review the proof of a creditor's claim merely because he does not wish to be interrogated by the creditor.²³⁴ The court may take into account evidence which had not been available to the presiding officer at the meeting.²³⁵

The presiding officer, the trustee (or provisional trustee) or his agent, or a creditor who has proved his claim or his agent may interrogate under oath any person present at the meeting who wishes to prove a claim or has proved it.²³⁶ If the person is not present he may be summoned to appear.²³⁷ If he fails without reasonable excuse to appear, be interrogated under oath or answer fully and satisfactorily any lawful question put to him, his claim, if already proved, may be expunged by the Master, and if not yet proved, may be rejected at the meeting.²³⁸

²²⁹ Except certain salary claims (s 98A (3) of the Insolvency Act) and a creditor whose claim is secured by a mortgage bond over immovable property (s 95 of the Insolvency Act).

²³⁰ Section 104(1) of the Insolvency Act.

²³¹ *Study Notes: Diploma in Insolvency Law and Practice* 191.

²³² Section 44(3) of the Insolvency Act.

²³³ A more comprehensive discussion follows below.

²³⁴ *Jeeva v Tuck NO 1998 1 SA 785 (SECLD)*.

²³⁵ *Marendaz v Smuts* (n 220).

²³⁶ Section 44(7) of the Insolvency Act.

²³⁷ Section 44(8) of the Insolvency Act.

²³⁸ Section 44(9) of the Insolvency Act.

After the meeting the presiding officer must hand over the proved claims to the trustee.²³⁹ The trustee must examine all available books and documents to ascertain whether the estate in fact owes the claimant the amount claimed.²⁴⁰ If the trustee disputes a claim he must report it to the Master stating his reasons.²⁴¹ The trustee must furnish the creditor with a copy of the reasons and notify him that he has 14 days or a longer period allowed by the Master to give reasons why the claim should not be disallowed or reduced. The trustee must certify that he has complied with this requirement and the creditor must furnish the trustee or liquidator with a copy of documents submitted to the Master and the trustee or liquidator must submit his remarks on the matter to the Master.²⁴² The Master may confirm the claim or reduce or disallow it and inform the creditor accordingly.²⁴³

3.2.7 Interrogations

During the process of administering an insolvent estate the need for information about the affairs of the insolvent before or after the estate was sequestrated may arise. The Insolvency Act affords the process of obtaining such information by way of interrogations (enquiries) of the insolvent or other interested parties.²⁴⁴ The relevant sections in the Companies Act are also touched upon in so far as they relate to the role and performance of the Master. Interrogation as part of insolvency law is an extensive and specialised subject and worthy of a study on its own. However, as the objective of this part of the study is to gain a bird's-eye view of the South African regulatory framework, a detailed discussion of interrogations in general falls beyond the scope of this chapter.

Historically, one of the subjects of a general interrogation in South African insolvency law was the cause of the insolvency. Both the 1843 Ordinance and the 1916 Insolvency Act included the phrase “cause and ground of his insolvency”²⁴⁵ in case of the former and “concerning the cause of insolvency”²⁴⁶ in the latter case. Although our present Insolvency

²³⁹ Section 45(1) of the Insolvency Act.

²⁴⁰ Section 45(2) of the Insolvency Act.

²⁴¹ Section 45(3) of the Insolvency Act. See *Caldeira v The Master of the Supreme Court* 1996 1 SA 868 (N).

²⁴² Regulation 3. Winding-up Reg 18 contains similar provisions, but not the sensible provision in Reg 3 that the creditor should furnish a copy of his submission to the trustee.

²⁴³ Section 45(3) of the Insolvency Act.

²⁴⁴ Meskin par 8-1.

²⁴⁵ Section 60 of Ordinance 6 of 1843.

²⁴⁶ Section 55(1) of the 1916 Insolvency Act.

Act permits questions relating to the business and affairs of the insolvent before and after the sequestration of the estate, the object is to obtain a complete and detailed picture of the insolvent's estate and financial affairs. The focus of such proceedings is on gathering information which could assist the trustee in his administration duties, rather than on investigating any probable causes of insolvency.²⁴⁷ The matter of investigating the cause of insolvency was omitted from our current law.

By way of comparison, the present English system has a robust investigation procedure, linked to the idea of maintaining public confidence.²⁴⁸ The investigatory functions primarily rest with the official receiver, who routinely conducts an exhaustive investigation of the individual debtor's financial condition and the causes of bankruptcy.²⁴⁹ With regard to a company under any form of administration or liquidation, the office-holder²⁵⁰ is immediately vested with powers of investigation under the Insolvency Act 1986.²⁵¹ Although the primary responsibility of an office-holder is the collection and realisation of a company's assets and the settlement of its liabilities, there is also an obligation on all office-holders to report to the Secretary of State if it appears that there has been any misfeasance on the part of the directors such as, for instance, a breach of the Company Directors Disqualification Act.²⁵² The Companies Investigation Branch, located within the Insolvency Service, also carries out investigations on receipt of complaints, investigates the companies against which they have been made, and assesses whether or not there appears sufficient reason to investigate and whether or not an investigation is in the wider public interest.²⁵³

Within South African insolvency law there are different types of interrogations which can as a rule be divided into public and private enquiries. The Insolvency Act provides for three different types of interrogations: the provision primarily aimed at investigating the validity of claims lodged for proof at a meeting of creditors,²⁵⁴ a creditor's enquiry in order to

²⁴⁷ See Hockly 147; Mars 415.

²⁴⁸ Milman 90.

²⁴⁹ Insolvency Act 1986 ss 290 and 366.

²⁵⁰ The term "Office-holder" is used in the Insolvency Act 1986 and thus in the United Kingdom (hereafter referred to as the "UK") and may refer to an administrator, administrative receiver, provisional liquidator or liquidator.

²⁵¹ Insolvency Act 1986 ss 235 and 236.

²⁵² Company Directors Disqualification Act, 1986.

²⁵³ Section 447 of the Companies Act 1985.

²⁵⁴ Section 42 of the Insolvency Act.

investigate the affairs of the insolvent²⁵⁵ and a private Master's enquiry in terms of the provisions of Section 152. Corresponding provisions contained in the Companies Act also provide for public enquiries by creditors,²⁵⁶ and provisions relating to private enquiries before the Master or a Commissioner appointed by the Master or the Court.²⁵⁷

An examination of the subject matters as set out in the Insolvency Act shows that the scope of interrogations is defined in the widest terms, and the presiding officer has no discretion to disallow a relevant question unless it would prolong the interrogation unnecessarily.²⁵⁸ As stated by section 65, which deals with the subject matter of interrogations, the insolvent or witness may be interrogated concerning all matters relating to the business affairs of the insolvent, matters concerning the property of the insolvent and the business affairs or property of the solvent spouse.²⁵⁹ Although it has in the past been confirmed that an interrogation is held both in the public interest and that of the creditor,²⁶⁰ the main purposes of interrogations could *inter alia* be listed as follows:

- 1 to seek out and recover assets;
- 2 to determine whether the insolvent or company was a party to any impeachable transactions which can be set aside;
- 3 to determine whether any civil claims can be instituted against directors and officials of companies in liquidations and other persons in terms of sections 423 and 424 of the Companies Act;²⁶¹

²⁵⁵ Sections 64, 65 and 66 of the Insolvency Act.

²⁵⁶ Sections 415 and 416 of the Companies Act.

²⁵⁷ Sections 417 and 418 of the Companies Act. See Mars 418.

²⁵⁸ *Pretorius v Marais* 1981 1 SA 1051 (A).

²⁵⁹ Section 65 of the Insolvency Act. See also *Harksen v Lane NO* 1998 1 SA 300 (CC) in which the constitutionality of this section was tested. Section 415 of the Companies Act has the same provisions as s 65. This section provides the examination of directors, officers and other persons who is deemed to be in a position to provide material information. See Mwelase "Insolvency Interrogations: An Investigation into sections 64, 65, 66 and 152 of the Insolvency Act 24 of 1936" (2005) 37 LLM dissertation Potchefstroom University for Christian Higher Education (hereafter referred to as Mwelase).

²⁶⁰ See *Simon v The Assistant Master* 1964 3 SA 715 (T); *Ex parte Dickson & Orr* 1931 TPD 207. See also Mars 424.

²⁶¹ See *Cooper v SA Mutual Life Assurance Society* 2001 1 SA 967 (SCA) for the requirements to fix liability under s 424(1). See also the cases referred to in *Kalinko v Nisbet* 2002 5 SA 766 (W). This case decided that a subordinated debt did not die a natural death upon the insolvency of the debtor for purposes of pursuing the statutory remedy under s 424(1). See also *Heneways Freight Services (Pty) Ltd v Grogor* 2007 2 SA 561 (SCA).

4 to determine whether the estate or company in liquidation has other civil claims against any other parties; and to determine the validity and enforceability of any claims which any other parties make against the estate.²⁶²

It is submitted that the role of presiding officer at such interrogation proceedings could be compared to that of a judge in a jury trial.²⁶³ In most common law jurisdictions the jury is responsible for establishing the facts of the case, while the judge determines and applies the law.²⁶⁴ The judge oversees the process to ensure that the procedures have been followed correctly and he rules on all questions of law relating to the particular case.²⁶⁵ The presiding officer in an insolvency interrogation acts more or less like a neutral umpire in relation to the process and, as a judge does at a jury trial, also makes decisions relating to the law. During the interrogation proceedings the presiding officer must call and administer the oath to the insolvent or other witnesses and has to ensure that the proceedings are conducted in accordance with the fundamental principles of justice and that he performs his functions fairly and impartially.²⁶⁶ The court may intervene to stop a proceeding if it amounts to an abuse of the provisions in the Act or if it is vexatious or oppressive.²⁶⁷

The only limitations on the scope of an enquiry are that the matter in relation to which the question is being asked must concern a topic described in the relevant provisions and the question may not according to the presiding officer prolong the interrogation.²⁶⁸ The purpose of the relevant sections is not to place the trustee in a superior position to that of the debtor and creditors of the estate but “to place [him], because of the disabilities resulting from the sequestration, on such a footing that [he] can litigate on equal terms with [the] debtors and creditors”.²⁶⁹

In a public interrogation the officer who is to preside or who presides at any meeting of creditors may summons any person who is known or upon reasonable grounds is believed to be or to have

²⁶² *Study Notes: Diploma in Insolvency Law and Practice* 209.

²⁶³ Section 2 of Article 3 of the US Constitution specifies the subject-matter jurisdiction of the federal courts and requires trial by jury in all criminal cases, except impeachment cases. The alternative to a jury trial is a bench trial in which a judge or panel of judges make all decisions.

²⁶⁴ Von Mehren *Law in the United States* (2007) 224 (hereafter referred to as Von Mehren).

²⁶⁵ Von Mehren 224.

²⁶⁶ *Cf Advance Mining Hydraulics (Pty) Ltd v Botes NO & Others* 2000 1 SA 815 (T) at 824-825.

²⁶⁷ *Lane and Another NNO v Magistrate Wynberg* 1997 2 SA 869 (C) at 874.

²⁶⁸ Section 416 of the Companies Act provides, subject to certain conditions and clarifications that ss 66 to 68 of the Insolvency Act apply to a company unable to pay its debts.

²⁶⁹ *Pitsiladi v van Rensburg and Others* 2002 (2) SA 160 (SE). See Meskin par 8-2.

been in possession of any property which belonged to the insolvent before the sequestration of his estate or which belongs or belonged to the insolvent estate or to the spouse of the insolvent or to be indebted to the estate, or any person who in the opinion of said officer may be able to give any material information concerning the insolvent or his affairs (whether before or after the sequestration of his estate) or concerning any property belonging to the estate or concerning the business, affairs or property of the insolvent's spouse, to appear at such meeting or adjourned meeting for the purpose of being interrogated.²⁷⁰ In *Bestbier v Chief Magistrate, Stellenbosch and Another*²⁷¹ the court assumed, without making a formal finding, that the issuing of a subpoena by a presiding officer constituted an administrative action and was governed by the provisions of the PAJA.²⁷²

3.2.7.1 Public Interrogations

The insolvent is obliged to attend the first and second meetings of creditors, and must also attend further meetings if required to do so in writing by the trustee.²⁷³ There is a similar obligation on directors or officers to attend meetings of a company unable to pay its debts.²⁷⁴ Both the Insolvency and Companies Acts make provisions for a general or public inquiry. As mentioned, section 65(1) provides that the presiding officer, the trustee and any creditor who has proved a claim against the estate or the agent of any of them may interrogate a person called and sworn

²⁷⁰ Sections 64(2) and 64(3) of the Insolvency Act; s 414(2) of the Companies Act. If at any time the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers desirable to obtain, concerning the insolvent, or concerning his estate or the administration of the estate or concerning any claim or demand made against the estate, he may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice to deliver all the information within his knowledge concerning the insolvent or concerning the insolvent's estate or the administration of the estate. Section 152(1) of the Insolvency Act; s 381 of the Companies Act. Section 381(2) of the Companies Act provides that the Master may at any time in relation to any winding-up examine the liquidator or any other person on oath concerning the winding-up.

²⁷¹ 2006 2 ALL SA 598 (C).

²⁷² *Smith v Porritt and others* [2007] SCA 19 (RSA); Hoexter 184. It is not an abuse of the process if the subpoena does not specify in precise terms the documentation required by the witness provided that the subpoena is not unlimited in scope and does not go beyond what is permissible for investigation under s 64(2) of the Insolvency Act. The subpoena could therefore not be issued *duces tecum* and the judgment in *Laskarides v German Tyre Centre (Pty) Ltd* also confirmed that the presiding officer should be able to justify the production of the documents requested in the subpoena to be sustained exclusively by reference to material available at the time. It was also found that a party causing the subpoena to be issued should tender the reasonable out-of-pocket costs and expenses of a witness subpoenaed for the purposes of producing, compiling, copying, printing and collating documents, material and information. See also *Foot v The Master* unreported case no 14797/1992 (CPD); *Pitsiladi v van Rensburg and Others* (n 269).

²⁷³ Section 64(1) of the Insolvency Act. The Constitutional Court has ruled that ss 64(2), 65(1) and 65(2) of the Insolvency Act are constitutional in principle *Harksen v Lane* 1998 1 SA 300 (CC).

²⁷⁴ Section 414(1) of the Companies Act.

“concerning all matters relating to the insolvent or his business or affairs, whether before or after the sequestration of his estate, and concerning any property belonging to his estate, and concerning the business, affairs or property of his spouse”.²⁷⁵ In the case of a company or corporation, one may interrogate “concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding up, and concerning any property belonging to the company”.²⁷⁶

Section 39(6) of the Insolvency Act provides that the place where a meeting of creditors is to be held must be accessible to the public. Section 65(2A) provides that, notwithstanding the provisions of section 39(6), the presiding officer must order that the part of the proceedings where a witness may incriminate himself or give evidence that may prejudice him at a criminal trial must be held *in camera* and that no information regarding such questions and answers may be published in any manner whatsoever. In terms of section 65(6) any witness may be assisted at the interrogation by counsel, an attorney or agent. Proceedings may be set aside as not in accordance with the fundamental principles of justice if unrepresented witnesses are not informed of their right to legal representation.²⁷⁷

Section 66(3) of the Insolvency Act authorises the officer presiding at a meeting to commit a summonsed person to prison if he fails to produce a book or document or fails to answer a question lawfully put to him, or to answer it fully and satisfactorily. In *De Lange v Smuts*²⁷⁸ a majority of the Constitutional Court held that the committal provision infringes section 12(1)(b) of the 1996 Constitution only to the extent that a person who is not a magistrate is authorised to issue a warrant committing to prison an examinee at a creditors’ meeting held under section 65 of the Insolvency Act.²⁷⁹ Therefore the outcome of the judgment was that the Master when acting as presiding officer will not be able to issue a warrant in terms of section 66(3). The main intent of the ruling had been that while the Master acts as presiding officer he lacks the independence of the judiciary, given that he acts in an administrative and not a judicial capacity.²⁸⁰

²⁷⁵ Section 65(1) of the Insolvency Act.

²⁷⁶ Section 415(1) of the Companies Act. But interrogation may only occur where the company is unable to pay its debts on the date the section in the Companies Act is invoked. See *Taylor and Steyn v Koekemoer* 1982 1 SA 374 (T). See also Meskin 8-1.

²⁷⁷ *Advance Mining Hydraulics (Pty) Ltd v Botes NO* 2000 1 SA 815 (T); 2000 2 BCLR 119 (T).

²⁷⁸ 1998 3 SA 785 (CC).

²⁷⁹ Section 66(3) read with s 39(2) *De Lange v Smuts* (n 34) at 819C.

²⁸⁰ Sections 414 and 415 of the Companies Act contain provisions similar to ss 64 and 65 of the Insolvency Act for a company unable to pay its debts. See Meskin par 8-6.

3.2.7.2 *Private Interrogations*

The constitutionality of the interrogation process has been thoroughly tested in our courts, and some of the most significant constitutional judgments, such as *Ferreira v Levin*; *Vryenhoek v Powell*²⁸¹ and *Bernstein v Bester*,²⁸² dealt with the constitutionality of sections 417 or 418 of the Companies Act in terms of the Interim Constitution.²⁸³ The court rejected an attack on the provisions of sections 417 and 418 of the Companies Act and found that the mechanisms embodied in these provisions furthered very important public policy objects, such as the honest conduct of the affairs of a company.²⁸⁴

Following *Ferreira v Levin*; *Vryenhoek v Powell*²⁸⁵ and *Pharboo v Getz*,²⁸⁶ the Companies Act was amended to provide that *inter alia* any person being interrogated may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him and shall, if he does refuse on that ground, be obliged to so answer at the instance of the Master.²⁸⁷ The provision further provides that the Master may compel the person to answer only once the Master has consulted with the Director of Public Prosecutions, who has jurisdiction. Any incriminating answer or information directly obtained, or incriminating evidence directly derived from an examination, shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to certain prescribed matters.²⁸⁸

Section 152 of the Insolvency Act provides that the Master may summon the insolvent, the trustee or any other person who is able to give any information concerning the insolvent, his estate or the administration of the estate or any claim or demand made against the estate to

²⁸¹ 1996 (1) SA 984 (CC).

²⁸² 1996 (2) SA 751 (CC).

²⁸³ See part IV above. The UK has a similar provision to our s 417 in s 236 of Insolvency Act 1986 which states that:

The court may, on the application of the office-holder, summon to appear before it – (a) any officer of the company, (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealing, affairs or property of the company.

²⁸⁴ *Bernstein v Bester* NNO 1996 (2) SA 751 (CC) at par [50] 782A.

²⁸⁵ *Ferreira v Levin*; *Vryenhoek v Powell* 1996 (1) SA 984 (CC)

²⁸⁶ 1997 (4) SA 1095 (CC).

²⁸⁷ Sections 415(3) and (5) and 417(2)(b) and (2)(c) of Companies Act.

²⁸⁸ See Meskin par 8-6; *Study Notes: Diploma in Insolvency Law and Practice* 209.

appear before the Master, a magistrate, or an officer in the public service mentioned in the Master's notice.²⁸⁹ The section 152 procedure can even be employed if it is feasible for an enquiry to be held at a meeting, and a creditor still had ample time to prove his claim and subsequently convene an enquiry.²⁹⁰ The Companies Act in turn also provides that the Master may at any time in relation to any winding-up examine the liquidator or any other person under oath concerning the winding-up.²⁹¹

Section 417 of the Companies Act provides for the examination by the Master or the Court in any winding-up of a company unable to pay its debts and section 418 for the examination by commissioners appointed by the Master or the court.²⁹² Examinations by commissioners and any applications are therefore private and confidential unless the court or the Master directs otherwise.²⁹³ In *Merchant Shippers SA v Millman*²⁹⁴ the court stated that there was good reason for the preservation of secrecy,²⁹⁵ not only with regard to the examination, but also the application for the enquiry. In *Bernstein and Others v Bester and Others*²⁹⁶ privacy had been described as "an amorphous and elusive" concept. Ackermann J held that privacy should be demarcated with respect to the rights of others and the interests of the community.²⁹⁷ The court pointed out that it was difficult to see how information regarding the affairs of an insolvent company which an individual possesses can be private. Even if confidential facts were included in the summonsed documents, the compulsion to disclose may amount to justifiable limitation to privacy.²⁹⁸

²⁸⁹ Mars 419.

²⁹⁰ *Cools v The Master* 1998 4 SA 212 (C). Section 152 applies to Close Corporations – *Nedcor Bank Ltd v The Master* 2002 5 SA 132 (SCA).

²⁹¹ Section 381(2) of Companies Act. In terms of s 381(3) to (5) the Master may appoint a person to investigate the books and vouchers of a liquidator.

²⁹² *South African Philips (Pty) Ltd v The Master* 2000 2 SA 841 (N) held that an enquiry in terms of s 417 cannot be held in the case of a creditors' voluntary winding-up, unless in terms of s 346(1)(e) the Master or a creditor or member applies to have the company wound up by the court. An enquiry in terms of s 417 cannot be held in the case of a voluntary winding-up, because the section requires a winding-up order by the court – *Janse van Rensburg v The Master* 2001 3 SA 519 (W), confirmed in *Michelin Tyre Co (South Africa) (Pty) Ltd v Janse van Rensburg* 2002 5 SA 239 (SCA).

²⁹³ Section 417(7) of the Companies Act.

²⁹⁴ 1986 1 SA 413 (C).

²⁹⁵ See also *Lategan v Lategan* NO 2003 6 SA 611 (D & CLD) at 625J-626D.

²⁹⁶ *Bernstein and Others v Bester and Others* (n 284).

²⁹⁷ De Waal *et al* *The Bill of Rights Handbook* (2001).

²⁹⁸ *Bernstein and Others v Bester and Others* (n 284) at 796B. Unless the court or, as the case may be, the Master, were to direct otherwise, s 417(7) operates to deny all persons access to the application and any documents accompanying it and to the examination or enquiry itself, the record of it, and to any books or papers produced at it. Cf *Meskin Henochsberg on the Companies Act*, (loose-leafed) at 894 and see *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 4 SA 389 (D&CLD).

Section 418 of the Act empowers the Master to delegate his powers under section 417 thereof to a Commissioner, who would typically be a senior magistrate, advocate or attorney with experience in this field of law. This would typically be the case where urgency prevails. Because of the probability that assets may be removed or evidence destroyed, it might at times be essential for the liquidator to convene an enquiry without delay. If the Master is not readily available to preside at such enquiry it is advisable to apply for an enquiry in terms of section 417 read with section 418 to be held before a Commissioner who could be available at short notice.²⁹⁹ The Commissioner is generally a retired judge, a senior advocate or a senior attorney experienced in the field of insolvency.³⁰⁰

The question arises in this context whether a decision by the Master to approve an enquiry under section 152 of the Insolvency Act, or sections 417 and 418 of the Companies Act, amounts to an administrative action as envisaged by PAJA and as such is subject to the relevant judicial review proceedings.³⁰¹ In *Podlas v Cohen and Bryden*,³⁰² which had been decided prior to the promulgation of PAJA, the court, in examining the nature of an enquiry under section 152, found that such an enquiry is purely investigative and that the presiding officer makes no findings that detrimentally affects a person's rights.³⁰³ In *Strauss and Others v The Master of the High Court and Others*³⁰⁴ the Court referred with approval to the *Podlas* decision, adding³⁰⁵ that it cannot be held that a decision to convene an enquiry under section 152 of the Insolvency Act, or sections 417 and 418 of the Companies Act, amounts to an administrative action and would consequently not be reviewable under the provisions of PAJA.

²⁹⁹ Calitz "Sections 417 and 418 of the Companies Act – Relevance Prevailing over the Right to Privacy: *Gumede v Subel* 2006 3 SA 498 (SCA)" (2006) *Obiter* 403 (hereafter referred to as Calitz "Sections 417 and 418 of the Companies Act"). See *Study Notes: Diploma in Insolvency Law and Practice* 209.

³⁰⁰ Commissioners should conduct enquiries in such a way that they not only demonstrate their impartiality and lack of bias, but also avoid a "perception of bias, objectively assessed on reasonable grounds." See *ABSA Bank v Hoberman* 1998 2 SA 781 (C) at 796G and 799B.

³⁰¹ See discussion in Part IV ch 3 above.

³⁰² 1994 4 SA 662 (T).

³⁰³ Although this case was decided prior to the promulgation of PAJA and dealt with the nature of an enquiry under s 152, the decision is relevant in the context that the definition of "administrative action" in such Act refers to one that "adversely affects the rights of any person and which has a direct, external legal effect". *Study Notes: Diploma in Insolvency Law and Practice* 209.

³⁰⁴ 2001 1 SA 649 (T).

³⁰⁵ *Podlas v Cohen and Bryden* (n 302) at 665F-666E.

In *Strauss v The Master*³⁰⁶ Mynhardt J concurred with the decision in *Podlas v Cohen and Bryden NNO*³⁰⁷ and also recognised that an enquiry in terms of section 152 is purely investigative since the presiding officer makes no findings that can detrimentally affect a person's rights.³⁰⁸ The position as set out in these decisions is affected by the coming into operation of PAIA and PAJA.

In *Gumede v Subel SC, Arnold NO*,³⁰⁹ which involved the review of the decision of a commissioner in an enquiry held in terms of sections 417 and 418 of the Companies Act, it was originally contended that the decision was reviewable as an administrative action in terms of sections 1(b) and 6 of PAJA; the argument was not pursued, however.³¹⁰ In *Nedbank Ltd v Master of the High Court*,³¹¹ the Court expressed the view, *inter alia*, that when the Master gives effect to section 417 of the Companies Act, he does not act administratively, and accordingly PAJA does not apply to a decision by the Master to convene such enquiry.³¹² However, in *Nafcoc Investment Holding Co Ltd and Others v Miller*³¹³ Snyders J stated that “[t]he decision [by the Master] to authorise the . . . enquiry is one that is subject to the Promotion of Administrative Justice Act 53 of 2002 [*sic*] (PAJA)” and that “[i]n terms of section 6(2)(e)(iii) of PAJA a court has the power to judicially review an administrative action if the action was taken because relevant considerations were not considered.”³¹⁴

It should however be noted that in *Bernstein v Bester*³¹⁵ Ackermann J decided that an enquiry in terms of sections 417 and 418 of the Companies Act did not constitute administrative action in the context of an alleged violation of the Interim Constitution of 1993, and in *Podlas v Cohen and Bryden*³¹⁶ in which Spoelstra J went on to state, expressly, that “an enquiry in terms of section 152 of the Insolvency Act (which is equivalent to section 417 of

³⁰⁶ 2001 1 SA 649 (T).

³⁰⁷ 1994 4 SA 662 (T).

³⁰⁸ For a discussion on the role of the presiding officer see *ABSA Bank v Hoberman* 1998 2 SA 781 (C).

³⁰⁹ [2006] 3 All SA 411 (SCA).

³¹⁰ Meskin at par 1.8.

³¹¹ 2009 3 SA 403 (W).

³¹² See *Nedbank Ltd v Master of the High Court*, (n 311) at par 36, in which the Court referred to the fact that ss 417 and 418 of the Companies Act are purely investigative measures and that a decision to take evidence from a witness in winding-up does not have the potential to adversely affect the rights of any person.

³¹³ Decision under unreported case no 27442/2008 (WLD).

³¹⁴ *Nafcoc Investment Holding Co Ltd and Others v Miller and Others* unreported case no 27442/2008 (WLD) at par 23.

³¹⁵ *Bernstein v Bester* (n 284). This reasoning was also followed in *Roux v Die Meester* 1997 SA 815 (T) and in *Strauss v The Master* 2001 1 SA 649 (T).

³¹⁶ *Podlas v Cohen and Bryden* (n 305) at 675.

the Companies Act) is purely investigative” and that “the presiding officer neither made findings that could detrimentally affect any person’s rights, nor determined any rights, but simply recorded the evidence and regulated the proceedings.”³¹⁷ It is thus submitted that in view of the abovementioned Constitutional Court judgments, the more plausible approach was followed in *Nedbank Ltd v Master of the High Court*.³¹⁸

3.2.8 Taxing of the Remuneration of the Insolvency Practitioner

It should be noted that South Africa at present follows a commission-based system regarding the remuneration of insolvency practitioners.³¹⁹ In terms of section 63 of the Insolvency Act the trustee is entitled to a reasonable remuneration for his services to be taxed by the Master according to the tariff as set out in the Act, in effect providing for a percentile-based commission on the nature of each type of asset.³²⁰ However, it is clear that the tariff is merely a guide to be used by the trustee, as the Master still has to tax the trustee’s remuneration in terms of section 63 of the Insolvency Act.³²¹

The remuneration claimable in terms of the tariff is comprehensive, and the trustee is not entitled to claim additional remuneration for any additional services rendered. It should also be noted that co-trustees share the remuneration equally, or on another basis as agreed between them.³²² However, the tariff is merely a guide to the taxation of the trustee’s remuneration and if a particular service cannot appropriately be accommodated under any of the items, then the Master must on an *ad hoc* basis fix a reasonable fee.³²³ In terms of 63(1) of the Insolvency Act, the Master may increase or reduce the remuneration as determined in

³¹⁷ *Podlas v Cohen and Bryden* (n 305) at par 97.

³¹⁸ See (n 311).

³¹⁹ Burdette “Liquidators’ Fees: The Time Factor and the Notion of Swings and Roundabouts *Nel and Another NNO v The Master and Others* 2005 1 SA 276 (SCA)” (2005) *THRHR* 686 (hereafter referred to as Burdette “Liquidators’ fees”).

³²⁰ For example, where movables are sold a commissioned-based fee of 10% is prescribed, while in the case of the sale of immovable property the rate is only 3%. Where a company is being wound up by the court or as a voluntary winding-up by creditors, Tariff B of Schedule 2 to the Insolvency Act (made applicable to companies by Annex CM 104 read with Reg 24 of the Winding-up Regs) sets out the tariff that applies. See also Chief Master Directive *Remuneration of Trustees, Liquidators, Judicial Managers and similar functionaries* (2009-06).

³²¹ See also Burdette “Liquidators’ Fees” 686. See also *Gore v The Master* 2002 2 SA 283 (E).

³²² *Cooper v The Master of the Supreme Court and Others* 1998 1 All SA 158 (N). Burdette “Liquidators’ fees” 687.

³²³ *Rennie NO v The Master; Glaum NO v The Master* 1980 2 SA 600 (C). In terms of a company there are similar provisions contained in s 384(1) of the Companies Act.



terms of section 63(1) if, in the Master's opinion, there is good cause for doing so,³²⁴ and he may disallow such remuneration in whole or in part on account of any failure or delay by the liquidator in the discharge of his duties.³²⁵ The Master as seen below has a very wide discretion in taxing the trustee's remuneration.³²⁶

In the case of *Nel v The Master and Others*³²⁷ the court held that the Master, in considering a reasonable remuneration, may take into account any factor which may be relevant in determining a reasonable fee. Van Heerden AJA observed:

[T]he Master has a duty to satisfy himself as to the reasonableness of the remuneration arrived at by the application of the tariff ... The concept of "good cause" is very wide [and includes] ... any factor which may be relevant in determining what constitutes reasonable remuneration for a liquidator's services in the circumstances of each case. Obviously, what factors are relevant will vary from case to case, but may certainly include aspects such as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration thereof, the amount of work done by the liquidator and the time spent by him in the discharge of the duties involved.³²⁸

The relevant factors to be considered will thus vary from case to case, but would include aspects such as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration of the estate, the amount of work done by the liquidator and the time spent in the discharge of the duties involved.³²⁹ In the *Elliot Brothers*³³⁰ case, it was also confirmed that the Master may take into account the overall degree of difficulty or extent of the trustee's performance of his duties. The discretion to reduce or increase the fee is consequently a very wide one, and the Master may adjust the fee "as a whole".³³¹ In *Klopper v The Master*³³² the court held that in determining whether good cause existed to increase of the appellant's remuneration, the Master had to consider all facts which had relevance on the administration of the estate. This included time and effort together with the degree of complexity of the duties.³³³

³²⁴ Cf *Elliot Brothers (East London) (Pty) Ltd v The Master* 1988 4 SA 183 (E) at 190-191 regarding the application of similar provisions contained in s 63 of the Insolvency Act.

³²⁵ *Thorne v The Master* 1964 3 SA 38 (N).

³²⁶ See eg *Collie v The Master* 1972 2 SA 7 (T); *Hillhouse v Stott* 1990 4 SA 580 (W) at 583.

³²⁷ 2005 1 SA 276 (SCA).

³²⁸ *Nel and Another NNO v The Master and Others* (n 327) at 285. See Hockly 117.

³²⁹ Burdette "Liquidators' fees" 688. See *Johannes Klopper v The Master of the High Court* unreported case no 2475/2008 (CPD) delivered on 2008-06-13.

³³⁰ *Elliot Brothers (East London) (Pty) Ltd v The Master* 1988 4 SA 183 (E).

³³¹ *Elliot Brothers (East London) (Pty) Ltd v The Master* (n 330); *Thorne v The Master* 1964 3 SA 38 (N).

³³² [2008] SCA 155 (RSA).

³³³ *Klopper v The Master* (n 332) at par 16.

3.2.9 The Liquidation and Distribution Account

The trustee appointed in an insolvent estate must within six months from the date of his (final) appointment submit an estate account, also referred to as the liquidation and distribution account, to the Master.³³⁴ The account of the trustee serves as a record of the administration of the estate for which the trustee is appointed and provides details of the administration of the estate to the Master.³³⁵ The process of administering an insolvent estate consists of a number of phases. However, the entire process of liquidation aspires towards the realising of the assets which eventually leads to the distribution of the proceeds to the proved creditors. This action may take place only according to a duly confirmed liquidation and distribution account.³³⁶

The Master is empowered by the Act to remove the trustee from office if he fails to perform satisfactorily any duty imposed upon him by the Act, or to comply with a lawful demand from the Master.³³⁷ If a trustee fails to submit a liquidation and distribution account within the six months period afforded to him, the Master will in practice issue a written demand (also known as a final demand) to the trustee requesting that he submit an account within a certain timeframe and include a written warning that if he fails to comply he will be removed from office.³³⁸ If a trustee of an insolvent estate is unable to submit an account within the prescribed period he must before the period has expired submit an affidavit to the Master in which he states the reasons why an account cannot be lodged, and must include any information regarding the affairs of the insolvent required by the Master and state the amount of money available for payment to creditors.³³⁹

³³⁴ Section 91 of the Insolvency Act and s 403(1) of the Companies Act. Neither in the Insolvency Act nor in its regulations there under is there any form prescribed for the compiling of the account. Accordingly each account may be submitted in any form provided such form complies with the related requirements of the Act. The Companies Act, however, provides for the account to be substantially lodged in the form prescribed and set out in Annex CM101 to the winding-up regulations to the Act. The Annex contains a general description as to the contents of each account. See Meskin paras 11.3.1-11.3.2. Previously according to the Insolvent Ordinance 6 of 1843 and the Transvaal Insolvency Law of 1895 the trustee had to lodge with the Master an account reflecting the liquidation of assets and debts and apart from the account also draw up a plan of distribution specifying the proved creditors in order of preference and also the balance which will remain for division amongst them. 1916 Insolvency Act also provided that the trustee had to frame his accounts consisting of a liquidation account, if he had carried on business a trading account and a plan of distribution of the assets and lay them before the Master. Section 108 of the Insolvent Ordinance of 1843. See Buchanan *Decisions in Insolvency* (1896) 144 (hereafter referred to as Buchanan) and ss 92-93 of the 1916 Insolvency Act. See Nathan 311.

³³⁵ Section 107 of the Insolvency Act. See *Ex parte Thomas*; *Ex parte Thomas* 2002 4 All SA 227 (T); See Mars 513.

³³⁶ Sections 112 and 113 of the Insolvency Act. See Mars 513.

³³⁷ Section 60(b) of the Insolvency Act.

³³⁸ Mars 513.

³³⁹ Section 109 of the Insolvency Act. The affidavit must be sent to each proved creditor by registered post. (The trustee should provide proof that the affidavit has been posted to creditors by registered post). The requirement

The account is ordinarily submitted to the Master in duplicate. If the insolvent resided or carried on business in a district in which there is no Master's office, a copy of the account must also be transmitted to the local magistrate with an indication when it will lie open for inspection.³⁴⁰ As soon as possible after lodging an account with the Master the trustee must give notice of such fact and that the account "will lie open for inspection by the creditors of the estate at the place or places and during the period stated in such notice".³⁴¹ The period for inspection is fourteen days from date of publication of the notice in the *Government Gazette* and the location where inspection of the account by interested parties may take place is the Master's office and where relevant also the office of the magistrate.³⁴² If the account was open for inspection at the office of a magistrate, the magistrate will send the copy of the account to the Master with an endorsement to indicate the period during which it was open for inspection.

In *Wilkins v Potgieter*³⁴³ Roux J indicated that the Master should not allow an account to be advertised unless the Master had studied the relevant documents and correlated them with the account.³⁴⁴ In practice the Master will give permission that the account may be advertised or raise queries that must be dealt with prior to the account being advertised. Although the Act does not contain a specific requirement that the Master be required to give his permission before the account is advertised, the Master has the right, whether or not any objections against an account have been received, to direct the trustee to amend the account if the Master is of the opinion that the account is in any respect incorrect or contains an improper charge or that the trustee acted *mala fide*, negligently or unreasonably in incurring any costs included in the account.³⁴⁵

The insolvent as well as any interested person may at any time before the confirmation of the account submit a written objection together with the grounds for the objection to the Master.³⁴⁶ The objecting party also has to send a copy of the objection and supporting

that a trustee had to advertise his application for extension in the *GG* fell away when this section was amended in 1983. The Companies Act contains similar provisions in s 404 in respect of the liquidator of a company.

³⁴⁰ Section 108(1) of the Insolvency Act. Cf s 406(1) and (2) of the Companies Act.

³⁴¹ Section 108(4) of the Insolvency Act and s 406(1)(a) of the Companies Act.

³⁴² Meskin par 11.4.1. Meskin Appendix II. Section 108(2) of the Insolvency Act. The liquidator of a company need not advertise in newspapers but must submit a copy of the notice in the *GG* to each proved creditor. Section 406(3) of the Companies Act and Winding-up Reg 20.

³⁴³ 1996 4 SA 936 (T).

³⁴⁴ *Study Notes: Diploma in Insolvency Law and Practice* 340.

³⁴⁵ Section 111(2) of the Insolvency Act. Cf s 407(3) of the Companies Act.

³⁴⁶ Section 111(1) of the Insolvency Act and s 407(1) of the Companies Act. See Mars 526. Previously according to the Ordinance of 1843 objections against the account had to be sent to the Master in writing within a certain time period but the objector had to apply to the Supreme Court (now the High Court) by way

documents to the trustee, who within 14 days of receipt must furnish a written response to the Master, who then may refer the remarks to the objector for the latter's information.³⁴⁷

Alternatively, and, it is submitted, also in any event, the Master may require the trustee or the objector or, it is submitted, both, to appear before him either personally or by an agent.³⁴⁸

According to section 111 of the Act:

- (2) If the Master is of the opinion that any such objection is well founded or if, apart from any objection, he is of the opinion that the account is in any respect incorrect or contains any improper charge or that the trustee acted *mala fide*, negligently or unreasonably in incurring any costs included in the account and that the account should be amended, he may direct the trustee to amend the account or may give such other direction in connection therewith as he may think fit:

The Master is required to rule on the objection received.³⁴⁹ As mentioned, section 111 of the Insolvency Act requires the Master to make a ruling if he is of opinion that the objection is well founded and may direct the trustee to amend the account or may give such other direction in connection therewith as he may think fit.³⁵⁰ If any person feels aggrieved by the direction of the Master or the refusal to sustain an objection he may apply to court for an order to set aside the Master's decision.³⁵¹ The word "review" is frequently used in this context; however, the concept of "review" obtains a different meaning in the sphere of insolvency law.³⁵² Mars refers to the review proceedings afforded in the Insolvency Act as a statutory remedy which includes an application for relief or a re-consideration procedure.³⁵³

It is clear from the wording of the Act that the objecting party is limited to the grounds stated in his objection lodged in terms of section 111(1) of the Act. The objector cannot proceed beyond the grounds stated therein.³⁵⁴ This principle should however be distinguished from the fact that

of motion proceedings to rule on the objection. See Buchanan 150. Under the former Transvaal Law of 1895, objections to the account were made directly to the Court. However, under the previous 1916 Insolvency Act this approach was amended and objections were lodged with the Master, who had to decide upon them. See Nathan 310.

³⁴⁷ Mars 525; s 111 of Insolvency Act read with Reg 6(1) of the Act.

³⁴⁸ Regulation 6(2) of the Insolvency Act; Meskin Winding-up Reg 19(2).

³⁴⁹ Mars 527. It is respectfully submitted that the ruling upon an objection by the Master amounts to administrative action by him, and such a ruling will consequently be subject to the provisions of the PAJA. See Meskin par 11.5.1.

³⁵⁰ Section 407 of the Companies Act reads similar to s 111 of the Insolvency Act.

³⁵¹ Section 111(2)(a) of the Insolvency Act. See Mars 527 in (n 122).

³⁵² *CP Smaller (Pty) Ltd v The Master and Others* 1977 3 SA 159 (T); *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* 1991 4 SA 514 (N).

³⁵³ Mars 527 in (n 122).

³⁵⁴ See *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* (n 352) at 518; *Hudson v The Master* 2002 1 SA 862 (T) at 867.



the objector is not limited to the “material” placed before the Master. In the case of *South African Bank of Athens Ltd v Sfier*³⁵⁵ De Klerk J confirmed that the procedure when applying to court in terms of section 407 of the Companies Act or section 111 of the Insolvency Act, although referred to as a review, does not refer to review proceedings in the strict sense, as the applicant is not limited to the material placed before the Master. It is not a review and not even an appeal in the wide sense, limited to the facts which were before the Master. It is indeed a fresh application where new facts and in appropriate cases also oral evidence will be allowed.³⁵⁶

It was also soundly argued by the court that the purpose of both section 407 of the Companies Act and the similarly worded section 111 of the Insolvency Act was to enable the objector to take the matter further when he does not obtain the relief he seeks from the Master. This would occur, for instance, where the Master refuses to sustain the objection and also where the Master refuses to sustain the objection based on the grounds that he is unable to resolve the dispute on the facts.³⁵⁷ This will also be applicable where the Master errs on the facts before him or where his conduct is such that it is open to criticism or tainted with irregularity.³⁵⁸

In *Van Zyl NO v The Master*³⁵⁹ it was said that where no new facts are placed before the court, the court should hesitate to substitute the opinion of the Master with that of its own in exercising its wide powers under section 407(4) (a) of the Companies Act unless it is clear that any particular ruling of the Master is tainted by irregularity or error.³⁶⁰ However, in *Gore v The Master*³⁶¹ the court’s opinion was (and, it is submitted, correctly so) that the rulings of the Master “ordinarily deserve some deference” but there does not seem to be any warrant for holding that the court’s wide powers of review should be restricted in those cases where no new facts are placed before it.³⁶²

A thorny issue emerges when the objection is based on a complex factual dispute. The question is often raised whether the Master has jurisdiction to rule on such an objection and

³⁵⁵ 1991 3 SA 534 (T).

³⁵⁶ *South African Bank of Athens Ltd v Sfier* (n 355) at 536. See Mars 528.

³⁵⁷ *South African Bank of Athens Ltd v Sfier* (n 355) at 536F-537E; *Fourie’s Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* (n 352) at 524-525. See Mars 528.

³⁵⁸ Mars 529.

³⁵⁹ 2000 3 SA 602 (C) at 607.

³⁶⁰ Mars 529.

³⁶¹ 2002 2 SA 283 (E) at 289.

³⁶² Mars 529.

may hear oral evidence in order to arbitrate such a dispute. As confirmed in the *Fourie's Poultry Farm*³⁶³ case, the attitude of the Master when ruling on an objection is that, being a creature of statute his powers are limited to those conferred to him by the Act, either expressly or by implication.³⁶⁴ Notwithstanding a provision in the regulations³⁶⁵ which allows the Master to hear evidence by the trustee or objector, the Master does not have the resources or experience to resolve complex factual disputes and usually refuses to sustain an objection if it involves factual disputes. In such cases the correct procedure is for the objector to apply to the court for a decision, even if it was beyond the powers of the Master to rule on the objection, and the court may refer the matter for the hearing of oral evidence.³⁶⁶ In the decision of *CP Smaller v The Master*³⁶⁷ the following was stated with reference to the provisions of the Insolvency Act:³⁶⁸

There is no provision in the Insolvency Act for the Master to hear evidence as a result of an objection to an account in terms of section 111 of the Insolvency Act. A Master cannot use his power in such a way as to relieve persons from the expense of protecting their own interests. The Master cannot decide questions upon which the rights of creditors *inter se* may depend.³⁶⁹

In the same case it was also submitted that the Master does not have the infrastructure or experience to resolve complex factual disputes and in practice usually refuses to sustain an objection if it involves factual disputes.³⁷⁰ In practice the general attitude of the Master in matters which include a factual dispute is to notify the objector that the objection falls beyond his jurisdiction and would then inform the objector that he is to approach the court in order to protect his rights. There are different opinions as to the correct procedure in cases of complex factual disputes. Mars is of the opinion that in such cases the correct procedure would be for

³⁶³ *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* (n 352)

³⁶⁴ See *The Master v Talmud* 1960 1 SA 236 (C) 238; *Götz v The Master and Others NNO* 1986 1 SA 499 (N); *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* (n 352); *CP Smaller (Pty) Ltd v The Master and Others* (n 352) at 163 and cases there cited. The Master's refusal to sustain the objection on this ground is properly the subject of an application under s 111(2) of the Insolvency Act and in such application the Court may act in terms of Rule 6(5)(g) of the Rules of the Supreme Court in relation to any relevant dispute of fact: *South African Bank of Athens Ltd v Sfier* (n 355); *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* (n 352) at 522-525 (these cases were decided under s 407 of the Companies Act but it is respectfully submitted that the conclusion holds also for s 111 of the Insolvency Act). See Meskin par 11.5.1.

³⁶⁵ Regulation 6 (see Mars at 630; Meskin Appendix II at 115) and Winding-up Reg 6. *Study Notes: Diploma in Insolvency Law and Practice* 340.

³⁶⁶ *Fourie's Poultry Farm v Kwanatal Food Distributors* (n 352) at 522E-528D.

³⁶⁷ *CP Smaller (Pty) Ltd v The Master and Others* (n 352)

³⁶⁸ *CP Smaller (Pty) Ltd v The Master and Others* (n 352) at 163. According to Appendix IV Reg 19 in the case of a company the Master may require the attendance of the liquidator or the objecting party. Meskin par 11.5.1; Mars 527.

³⁶⁹ *CP Smaller (Pty) Ltd v The Master* (n 352).

³⁷⁰ *Study Notes: Diploma in Insolvency Law and Practice* 340.



the objecting party to apply to court for a decision. The court may then refer the matter for the hearing of oral evidence. *Meskin* holds the opinion that the Master in such a case should rule against the party on whom the onus would lie in relation to such issue.³⁷¹ *Meskin* further submits that the Master's inability to decide an issue of fact does not mean that an objection involving the resolution of such issue is on that ground beyond the jurisdiction of the Master as there is no jurisdictional limitation as to grounds upon which an objection may be based to be derived from the relevant statutory provisions.³⁷²

In the *Fourie's Poultry Farm* case the procedure to follow in a case of this nature was also examined and in his judgment Page J considered the Full Bench decision in *South African Bank of Athens Ltd v Sfier*.³⁷³ Both these judgments confirmed that even if it was beyond the powers of the Master to rule on the objection, in such cases the correct procedure would be for the objecting party to approach the court for a decision, and the court may refer the matter for the hearing of oral evidence.³⁷⁴ Also that section 407(4)(a) of the Companies Act did not intend, by the use of the words "apply" and "application", to prohibit any party aggrieved by a decision of the Master on an objection against the liquidation and distribution account from proceeding by way of action and especially when having regard to the unique nature of the proceedings as contemplated by the section as explained in the case of *South African Bank of Athens Ltd v Sfier*.³⁷⁵ Although referred to as a review, it is not a review in the strict sense and the applicant is not limited to the material placed before the Master.³⁷⁶

The "taking of the Master's decision on review" to the court "ipso facto constitutes a bar to the confirmation of the account until such time as the review and the objection to which it relates have been finally determined",³⁷⁷ unless, it is respectfully submitted, the court orders otherwise. If the Master authorised advertisement and no objections are received or the objections have been finalised, the confirmation of the account is a mere formality once proof has been received by the Master that the account has been advertised according to law. The Master confirms the account by way of an endorsement on the account and informs the

³⁷¹ *Meskin* par 11.5.1.

³⁷² *Meskin* par 11.5.1.

³⁷³ 1991 3 SA 534 (T).

³⁷⁴ *Fourie's Poultry Farm v Kwanatal Food Distributors* (n 352) at 522E-528D.

³⁷⁵ *South African Bank of Athens Ltd v Sfier* (n 355); *Fourie's Poultry Farm v Kwanatal Food Distributors* (n 352) at 515.

³⁷⁶ *South African Bank of Athens Ltd v Sfier* (n 355).

³⁷⁷ *Fourie's Poultry Farm v Kwanatal Food Distributors* (n 352) at 528.

trustee of the confirmation.³⁷⁸ The trustee must give notice in the *Government Gazette* of the confirmation of the account.³⁷⁹

3.2.9.1 Confirmation of the Liquidation and Distribution Account

If an account has duly lain open for inspection the court when refusing an application for an order to set aside the Master's decision overruling an objection may itself confirm an account. In all other cases, *viz* where no objections have been lodged or where an objection has been lodged and appropriately dealt with, the Master may confirm the account.³⁸⁰ Previously under the Ordinance of 1843 it was the duty of the trustee to apply to court on motion for the distribution plan to be confirmed by the Supreme Court.³⁸¹ It was also stated clearly in the provision that the confirmation had the effect of a final sentence.³⁸²

In 1895 the Transvaal Insolvency Act³⁸³ was enacted and although largely an adaptation of the Cape Ordinance of 1843 some of the provisions were rearranged, abridged and in some instances amended.³⁸⁴ One of these amendments was the provision which dealt with the confirmation of the account and plan of distribution framed by the trustee. According to the 1895 Insolvency Act the Master had the power to confirm an account in matters where no objection had been received.³⁸⁵ If however an objection against the account had been received, the High Court had to decide on the objection and upon the confirmation of the account. Such confirmation either by the Master or the court again had the effect of a final sentence.³⁸⁶

Section 112 of the present Act reads as follows:

³⁷⁸ In *Gilbey Distillers & Vintners (Pty) Ltd v Morris* 1991 1 SA 648 (A) at 656C-656E the appeal court gave the following exposition of the meaning of "duly confirmed":

The account must have been open for inspection by creditors under s 108; objections (if any) must have been dealt with in terms of section 111; and confirmation must have taken place by the Master (consequent upon him honestly applying his mind to the matter) and not, say, by an imposter. But the fact that the confirmation is flawed by reason of it having been procured by the fraud of a creditor or the trustee or because the Master was ignorant of facts material to his decision cannot detract from the account having been duly confirmed in the sense envisaged by section 151. To uphold the argument that it does would result in the provision for finality in section 112 being rendered largely inoperative.

³⁷⁹ Section 113(1) of the Insolvency Act and s 409(2) of the Companies Act.

³⁸⁰ Mars 532.

³⁸¹ Now known as the High Court. The Renaming of High Courts Act 30 of 2008 came into effect on 2009-03-01.

³⁸² Section 112 of Ordinance 6 of 1843.

³⁸³ Act 13 of 1895. Hereafter referred to as 1895 Insolvency Act.

³⁸⁴ Mars 11.

³⁸⁵ Section 119 of the 1895 Insolvency Act.

³⁸⁶ Section 119 of the 1895 Insolvency Act. See Buchanan 68.

When a trustee's account has been open to inspection by creditors as hereinbefore prescribed and –

- (a) no objection has been lodged; or
- (b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again been open for inspection if necessary as in paragraph (b) of subsection (2) of section *one hundred and eleven* prescribed and no application has been made to the court in terms of paragraph (a) of the said subsection (2) to set aside the Master's decision; or
- (c) an objection has been lodged but withdrawn or has not been sustained and the objector has not applied to the court in terms of the said paragraph (a), the Master shall confirm the account and his confirmation shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it.³⁸⁷

The Master is not bound to confirm an account against which no objection has been received, for if he is of the opinion that the account is in any respect incorrect, or that the trustee had acted *mala fide*, negligently or unreasonably in incurring any costs included in the account, he may direct the trustee to amend the account.³⁸⁸ Section 112 provides that confirmation of an account by the Master “shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it”.³⁸⁹ The words “confirmation shall be final” do not give to the each item in the account the quality of a judgment and means merely that effect must be given to the account as confirmed unless the Court permits it to be reopened.³⁹⁰

In *Wilkens v Potgieter*³⁹¹ Roux J set aside an account although dividends had already been paid out on the grounds that the account had not been “duly confirmed” because the proper procedure had not been followed. The judge agreed that as the proper procedure as set out in section 45(3) had not been followed this resulted in the confirmation being invalid.³⁹² However, the appellate division in *Gilbey Distillers & Vintners (Pty) Ltd v Morris*³⁹³ explicitly decided that where a confirmation was flawed, *inter alia* because the Master had been ignorant of certain facts, this could not detract from the account being duly confirmed.

³⁸⁷ Section 112 of the Insolvency Act and s 408 of the Companies Act.

³⁸⁸ Subsection 2 of s 111 has been amended by s 35 of Act 99 of 1965.

³⁸⁹ Section 408 of the Companies Act provides that confirmation of the account “shall have the effect of a final judgment” subject to a similar provision in respect of reopening of the account. This provision of the Companies Act does not mean that confirmation of the account has the effect of a final judgment in respect of amounts collectable in terms of the account. *Cf Kilroe-Daley v Barclays National Bank Ltd* 1984 4 SA 609 (A) at 627D-E; *Standard Bank of South Africa Ltd v Master of the Supreme Court* 1997 2 All SA (C); *Wipesco v Herrigel* 1983 2 SA 20 (C); *PG Bison Ltd v Johannesburg Glassworks (Pty) Ltd (In Liquidation)* 2006 4 SA 535 (W).

³⁹⁰ *Cf Kilroe-Daley v Barclays National Bank Ltd* 1984 4 SA 609 (A) at 627D-E;

³⁹¹ 1996 4 SA 936 (T).

³⁹² *Wilkens v Potgieter* (n 391) at 940. See Mars 538.

³⁹³ 1991 1 SA 648 (A).

Mars submits that if a confirmed account can be set aside merely because it does not agree with documentation in possession of the Master, this will render section 112 ineffective.³⁹⁴

In cases where a dividend has been paid, the Appeal Court has expressed doubt whether the court may review the confirmation of the account on the grounds of *just error* or even on the ground of fraud. However, the court noted that fraud was a special case and that it had been said that “fraud unravels everything”.³⁹⁵ In the unreported decision of *Sequera v Hodgson*³⁹⁶ Eloff JP held that once the account had been confirmed and distribution had ensued even fraud would not entitle a creditor to ask for the account to be set aside and the best he could do was to sue the liquidator for damages. By contrast in *Wilkens v Potgieter*³⁹⁷ Roux J set aside a confirmed account although dividends had been paid out. However, in *Rutherford v Ferguson*³⁹⁸ Pretorius AJ concluded that the meaning of “final” is that the court’s power to review the confirmation of an account where a dividend has been paid has been ousted, even where there had been fraud on the part of the trustee.³⁹⁹

The trustee must without delay lodge with the Master receipts or paid cheques as proof that the dividends to creditors have been paid.⁴⁰⁰ If any dividend remains unpaid at the expiration of a period of two months from the confirmation of the account, the trustee must deposit this in the Guardian’s Fund for the account of the creditor.⁴⁰¹ Special provision is made for cases where contribution cannot be collected in terms of the account.⁴⁰²

3.2.10 Rehabilitation of Insolvent Individual

The effect of rehabilitation is to put an end to the sequestration, discharging all debts of the insolvent which were due or the cause of which had arisen before the sequestration and

³⁹⁴ Mars 538.

³⁹⁵ *Gilbey Distillers & Vintners v Morris* 1991 1 SA 648 (A) at 659. *Cf Morris and Strydom v The Master* 1994 2 SA 731 (N) at 735.

³⁹⁶ Unreported case no 17355/1994 (WLD).

³⁹⁷ *Wilkens v Potgieter* (n 391).

³⁹⁸ 2000 2 SA 275 (O) at 279-280.

³⁹⁹ Mars 537.

⁴⁰⁰ Section 114(1) of the Insolvency Act and s 410 of the Companies Act. Premature payment is sometimes made to a secured creditor where the trustee has realised the security and wishes to limit the estate’s liability for interest. However, such payments ought to be made conditional upon immediate repayment in the event that for any reason the Master refuses to confirm the account. See Mars 541.

⁴⁰¹ Section 114(2) of the Insolvency Act 24. See also ss 91-92 of the Administration of Estates Act.

⁴⁰² Section 118 of the Insolvency Act. *Cf* s 342(2) of the Companies Act.



relieving the insolvent of every disability resulting from the sequestration.⁴⁰³ The insolvency of a party comes to an end when he is rehabilitated and although a person's estate is sequestrated his person is rehabilitated.⁴⁰⁴ Any insolvent not rehabilitated by the court within 10 years from the date of (provisional) sequestration,⁴⁰⁵ is deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person orders otherwise before the expiration of the 10 years.⁴⁰⁶

The period during which an insolvent person applies for rehabilitation depends on certain factors such as whether the prescribed period after confirmation of the first account has lapsed,⁴⁰⁷ whether the insolvent's estate has previously been sequestrated,⁴⁰⁸ or whether the applicant has previously been convicted of certain offences.⁴⁰⁹ An additional factor to be reckoned with is whether the Master would be recommending the rehabilitation.⁴¹⁰ When an applicant applies for rehabilitation prior to the expiry of the four-year period, as mentioned in the Insolvency Act, section 124(2) contains a *proviso* stating that no application for rehabilitation shall be granted before the expiration of four years from the date of sequestration of the estate of the applicant, except upon the recommendation of the Master.⁴¹¹

⁴⁰³ Section 129(1) of the Insolvency Act.

⁴⁰⁴ Hockly 192.

⁴⁰⁵ *Grevler v Landsdown* 1991 3 SA 175 (T) at 178D.

⁴⁰⁶ "Automatic" rehabilitation is provided for in s 127A of the Insolvency Act. Ss 124-126 of the Insolvency Act sets out the circumstances under which rehabilitation may be sought prior to the expiration of the 10-year period, and the procedure which must be followed to obtain an order of court. The period after sequestration when an insolvent may apply to court for rehabilitation depends on the circumstances. Provisions in the Insolvency Act are laid down for the furnishing of security, facts to be averred in the application and notice in the *GG*, to the Master and to the trustee. See Hockly 192; In *Ex parte Elliot* 1997 4 SA 292 (W); *Ex parte Minnie et Uxor* 1996 3 SA 97 (SEC).

⁴⁰⁷ Section 124(2)(a) of the Insolvency Act.

⁴⁰⁸ Section 124(2)(b) of the Insolvency Act.

⁴⁰⁹ Section 124(2)(c) of the Insolvency Act.

⁴¹⁰ Section 124(2) of the Insolvency Act.

⁴¹¹ See the *proviso* to s 124(2), *Kruger v The Master* 1982 1 SA 754 (W); *Ex parte Porritt* 1991 3 SA 866 (N); *Ex parte Anderson* 1995 1 SA 40 (SE); *Greub v The Master* 1999 1 SA 746 (C). In certain cases the insolvent may also apply for rehabilitation at an earlier stage. After giving six weeks notice he may apply if no claims were proved against his estate within six months from the sequestration, he has not been convicted of certain offences and his estate has not been previously sequestrated. He may also apply after giving the appropriate notice if the Master has issued a certificate that creditors have accepted an offer of composition in which payment has been made, or security has been given for payment of no less than 50c in the rand to every concurrent creditor in the estate. He may also seek an early rehabilitation after the confirmation of an account providing for the payment in full of all the claims of creditors with interest thereon. See ss 124(1); 124(5); 124(3) of the Insolvency Act.

The Master's recommendation may thus be viewed as a *sine qua non* for the applicant's rehabilitation.⁴¹² In this context "to recommend" means that the Master has to assess all to be said for, and against, the application for rehabilitation and that he must decide whether removal of the diminished status of the insolvent is desirable. In formulating his opinion as to whether the applicant is worthy of rehabilitation, the Master must bear in mind:

[T]he purpose of rehabilitation, namely whether the applicant is a person who ought to be allowed to trade with the public on the same basis as any other honest man and whether, if he traded in a negligent manner or so as to deceive others prior to his becoming insolvent, he has been subject to his insolvency long enough to ensure that he has received a sufficiently severe lesson as to the necessity of trading honestly.⁴¹³

Refusal to recommend the rehabilitation constitutes a decision which is subject to review in terms of section 151 and the court may consider the matter *de novo* as if it were a court of appeal.⁴¹⁴ According to Mars there are conflicting views as to whether the Master's refusal to grant a recommendation is reviewable under section 151 of the Act, since in one case the court held that the Master's refusal does not represent a decision, ruling or order as contemplated in section 151 of the Act.⁴¹⁵ In another case, however, the court ruled that the Master's decision not to recommend rehabilitation was a decision in terms of section 151 and was thus subject to review.⁴¹⁶

It is duty of the Master in every application for rehabilitation to have before the court on the day set down for the hearing of the application a report thereon.⁴¹⁷ A trustee who receives a notice of an application must also report to the Master any facts which in his opinion would justify the court in refusing, postponing or qualifying rehabilitation⁴¹⁸ and the Master's report

⁴¹² The Master's recommendation must be based on the information available to him. See *Ex Parte Porritt* 1991 3 SA 866 (N); *Ex Parte Anderson* 1995 1 SA 40 (SE).

⁴¹³ *Ex Parte Anderson* 1995 1 SA 40 (SE) at 45 *per* Leach J citing from Wessels J in *Ex Parte Heydenreich* 1917 TPD 657 at 658. See Mars 571.

⁴¹⁴ *Greub v The Master* 1999 1 SA 746 (C).

⁴¹⁵ *Cf Kruger v The Master* 1982 1 SA 754 (W) at 758.

⁴¹⁶ *Greub v The Master* 1999 1 SA 746 (C) at 751. Squires J in the matter of *Ex Parte Porritt* (n 411) dealing with the word "recommendation", acknowledged the fact that because the word has no special meaning given to it by the legislation, the word would have to bear its normal ordinary interpretation, being to name or speak of a person as worthy of a particular attention or consequence i.e. recommendation is the action of commending someone or something as worthy or desirable for such result. Implicit in this, as also pointed out by Squires J will be to consider and weigh the merits and demerits of the subject of recommendation in relation to what is recommended. See *Chairperson Association v Minister of Art and Culture and Others* (6063/04) [2005] ZAGPHC 89.

⁴¹⁷ Section 127(1) of the Insolvency Act.

⁴¹⁸ Section 124(4) of Insolvency Act.

to the court usually refers to the trustee's report to him.⁴¹⁹ As the Master and not the court is in possession of the estate file, the Master basically acts as the court's eyes and ears concerning the facts of the insolvency and other matters concerning the affairs of the insolvent. The Master would therefore advise the court on any matters which in his opinion may affect the fate of the application.

In *Ex parte Le Roux*⁴²⁰ Irish AJ was somewhat surprised at the passive attitude adopted by the Master and the trustee in their reports. The debtor had managed to amass assets of some R30,000 and gave no details as to the composition of his family, or other income received by members of the family. Some of the monthly expenditure items were startling at face value and no justification was given for the expenditure. Because creditors obtained little benefit from the sequestration and there was nothing in the application to suggest that the applicant had learnt the lessons of insolvency and had any genuine appreciation of the possible hardship which his sequestration may have caused, the court was not satisfied that a proper case for rehabilitation had been made out and postponed the application with leave to enrol it again with papers duly supplemented.⁴²¹

Even if the provisions of the Act have been complied with, the court is not obliged to grant the rehabilitation.⁴²² The insolvent has no right to the rehabilitation and the court has a discretion to either grant, refuse or postpone rehabilitation. The test to be applied by the court is whether the applicant is a fit and proper person to trade with the public on the same basis as any other honest person.⁴²³ The court will attach great weight to any views expressed or recommendations made in the reports submitted by the Master.⁴²⁴ In *Ex parte Theron*⁴²⁵ the court criticised the Master for issuing certificates that part of the insolvent's income should be paid to the trustee in terms of section 23(5) and recommended that the court should in terms of section 127(2) make rehabilitation conditional on compliance with the certificate of

⁴¹⁹ Mars 566.

⁴²⁰ 1996 2 SA 419 (C).

⁴²¹ *Study Notes: Diploma in Insolvency Law and Practice* 294.

⁴²² *Ex Parte Woolf* 1958 4 SA 190 (N).

⁴²³ *Cf Kruger v The Master* 1982 1 SA 754 (W); *Ex parte Le Roux* 1996 2 SA 419 (C) 423I-424A; *Greub v The Master* 1999 1 SA 746 (C); *Ex Parte Heydenrich* 1917 TPD 657 at 658.

⁴²⁴ See Mars 576; s 116 of the Insolvency Act. If after the confirmation of a final plan of distribution there is any surplus in an insolvent estate which is not required for the payment of claims, costs, charges or interest, the trustee shall, immediately after the confirmation of that account, pay that surplus over to the Master, who shall deposit it into the Guardians' Fund. At the date of rehabilitation such moneys will be paid out to the insolvent at his request.

⁴²⁵ 1994 4 SA 136 (O).

the Master. Where creditors are not liable to pay contributions the court will only in exceptional circumstances make rehabilitation subject to further payments to creditors.⁴²⁶

3.2.11 Master's Powers in relation to Books and Records

The Master has custody of all books and records and other documents relating to an insolvent estate.⁴²⁷ Immediately after his appointment the trustee of an insolvent estate must open a book in which he must enter a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the estate.⁴²⁸ The Master may at any time direct the trustee to produce such book for inspection and may also direct the trustee to deliver to him books and documents relating to the estate.⁴²⁹

It is not necessary for the Master him self or any officer under him to produce in evidence any original document under his control, for it is sufficient if such document is produced by any person authorised by the Master to produce it.⁴³⁰ If there is endorsed upon or attached to any document or record a certificate purporting to have been signed by a person describing him self as Master, wherein he describes the nature of the document or record and states that it relates to a specified insolvent or insolvent estate, that document or record shall on its mere production by any person *prima facie* be deemed to be what the certificate describes it to be.⁴³¹

As it is not always possible to produce the original document as kept on record by the Master the Act makes provision for the certification of a document by the Master. Any document or record which is endorsed or to which a statement is attached purporting to have been signed by a person describing himself as Master, wherein he certifies that the document or record is a true copy of or extract from a document or record relating to a specified insolvent or insolvent estate, and wherein he describes the nature of the original document or record, shall on its mere production by any person be as admissible in evidence in any court of law and be

⁴²⁶ The court may require the insolvent to consent to judgment against him for the payment of any debt which was or could have been proved against his estate. Section 127(3) of the Insolvency Act.

⁴²⁷ Section 154(1) of the Insolvency Act.

⁴²⁸ Section 71(1) of the Insolvency Act.

⁴²⁹ Section 71(2) of the Insolvency Act. See Mars 29.

⁴³⁰ Mars 30.

⁴³¹ Section 154(2) of the Insolvency Act.



of the same force and effect as the original document or record would be.⁴³² Any of the books and records relating to the estate which are in the possession of the trustee may be destroyed six months after confirmation of the final account on receipt of written consent by the Master. Documents in the Master's office and the Master's other records relating to an insolvent estate may be destroyed by the Master after five years have elapsed from the date of the insolvent's rehabilitation.⁴³³

3.3 REVIEW PROCEEDINGS

An individual who wishes to challenge any decision or action of the Master is confronted with several different avenues of relief. In a previous part to this study the legal principles regarding judicial control over the administrative powers and functions of the Master, which includes review in terms of PAJA and constitutional review in terms of the principle of legality, have already been dealt with.⁴³⁴ However, there is also the option of the internal remedy conferred by the legislature in the form of a special statutory power of review.⁴³⁵

Section 151 of the Insolvency Act empowers the Court to review any decision (other than one relating to the appointment of a trustee), ruling or order made, or taxation effected, by the Master under the Insolvency Act and any decision, ruling or order made by a presiding officer at a meeting of creditors of such estate.⁴³⁶ In *Strauss v The Master* it was held that a decision, ruling or order as contemplated in section 151 of the Act must have three attributes before it can be reviewed: Firstly, it must be final in effect and not susceptible to alteration by the court of first instance. Secondly, it must be definitive of the rights of the parties. Thirdly, it must have the effect of disposing of at least a substantial portion of the relief sought.

The type of review envisaged by this section is one on which the court has powers of both appeal and review with the additional power, if required, of receiving new evidence and entering into and deciding the whole matter afresh.⁴³⁷ The review proceedings here envisaged

⁴³² Section 154(3) of the Insolvency Act.

⁴³³ Section 155(2) of the Insolvency Act. See Meskin par 15-7.

⁴³⁴ See part IV par 3.2.4.2 above.

⁴³⁵ Hoexter 110-111.

⁴³⁶ Section 151 read with s 57 of the Insolvency Act. See Meskin par 15-12.

⁴³⁷ *Nel and Another NNO v The Master (ABSA Bank Ltd Intervening)* 2005 1 SA 276 (SCA). See Hockly 9.

were confirmed in *Nel and Another NNO v The Master*⁴³⁸ as the “third type of review”, where Parliament confers a statutory power of review. In the judgment in *Johannesburg Consolidated Investment Co v Johannesburg Town Council*⁴³⁹ reference was also made to this kind of review and it was stated that the Court may decide the matter *de novo*. It possesses not only the powers of a court of review in the legal sense, but also has the function of a court of appeal with the privilege of being able, after setting aside the decision arrived at, to deal with the whole matter on fresh evidence.⁴⁴⁰

The nature of the section 151 review was also confirmed in *Nedbank Ltd v The Master of the High Court*,⁴⁴¹ where it was held that the aim and object of an enquiry in terms of section 417 into the affairs of a company in liquidation is purely investigative. Accordingly, no rights or obligations are determined or affected by the Master when he makes the decision to institute the enquiry, and as such does not constitute an administrative action. It accordingly follows that the “special” type of review provided in section 151 of the Insolvency Act, read together with the provisions of section 339 of the Companies Act, is also inapplicable to a section 417 enquiry.⁴⁴²

⁴³⁸ *Nel and Another NNO v The Master (ABSA Bank Ltd Intervening)* (n 437).

⁴³⁹ 1903 TS 111 at 117. See also *Gumede and others v Subel* 2006 3 SA 498 (SCA).

⁴⁴⁰ Meskin par 15-12. The one limitation on the court’s power of review in this context is that it cannot reopen any duly confirmed trustee’s account after a dividend in terms thereof has been paid. A duly confirmed account in this context is one which results from the proper procedure having been followed. But the fact that the confirmation is flawed by reason of it having been procured by the fraud of a creditor or the trustee or because the Master was ignorant of facts material to his decision cannot detract from the account having been duly confirmed in the sense envisaged in s 151 of the Act. Section 108 read with s 111 of the Insolvency Act. See *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Others* 1991 1 SA 648 (A).

⁴⁴¹ *Nedbank Ltd v The Master* (n 311).

⁴⁴² *Nedbank Ltd v The Master* (n 311) at par 45.



CHAPTER 4: INSTITUTIONAL FRAMEWORK IN SOUTH AFRICAN INSOLVENCY LAW

South Africa does not have specialised insolvency courts. The High Courts in general deal with insolvency matters, and play their part both in applying and developing the law through case law.⁴⁴³ The courts therefore play a limited role in the insolvency or winding-up proceedings and they are generally not involved in routine matters or the day-to-day administration process.⁴⁴⁴ It is interesting to note that early legislation specifically made provision for insolvency practitioners to be appointed by the court, and it was only with the enactment of the 1936 Insolvency Act that this responsibility was handed over to the Master.⁴⁴⁵

As discussed earlier in this study, the current US regulatory framework consists of a highly evolved bankruptcy court and the judicial-oriented system of bankruptcy courts, and this distinguishes US bankruptcy law from most other insolvency jurisdictions around the world.⁴⁴⁶ The present governing policy favours direct negotiation between debtors and creditors, paving the way for the prominent role of the private attorney in the US bankruptcy process.⁴⁴⁷ It is safe to conclude that the specialisation of the US bankruptcy judges and the degree of their daily involvement in bankruptcy cases give them a better feel for the complexities of consumer bankruptcy than is enjoyed by a generalist judge in a jurisdiction without specialist bankruptcy courts.⁴⁴⁸ Because the US system places the courts in a far more central role than many other common law systems, lawyers have exclusive access to courts and their jurisdictional monopoly has resulted in lawyers playing a key role in shaping the legal culture in the American bankruptcy system.

The administrative format of the English system also minimises the role of private attorneys in the general bankruptcy process, which distinguishes the English bankruptcy process from

⁴⁴³ The High Court in the main commercial centre, Johannesburg, has a commercial court which deals occasionally with cases involving insolvency. The courts have authority in the case of the winding up of companies to give directions regarding the administration of the winding-up.

⁴⁴⁴ In the case of individuals, the court issues rehabilitation orders (the procedure to discharge the insolvent debtor from insolvency) if the debtor does not wait for “automatic” rehabilitation after ten years.

⁴⁴⁵ Section 57 of the 1916 Insolvency Act.

⁴⁴⁶ Skeel “Debt’s Dominion” 43.

⁴⁴⁷ Milman *Personal Insolvency Law, Regulation and Policy* (2005) 149 (hereafter referred to as Milman).

⁴⁴⁸ Milman 149.

the lawyer-oriented US system.⁴⁴⁹ Judges and lawyers are not influential actors in the English insolvency process and government relies heavily on the expertise and experience of the Insolvency Service in regard to policy and law reform. In scaling down on the interaction with the courts in regard to bankruptcy administration, the English system represents a cost-effective alternative to the judicial-oriented system of the US.

During the late nineties a high-level Commission of Inquiry, the Hoexter Commission, rejected proposals for specialised insolvency courts in South Africa.⁴⁵⁰ The Commission was of the opinion that the principles governing the law of insolvency were neither inaccessible, nor complicated enough to the ordinary practitioner or judge, to merit the creation of a specialist court. The Commission's grounds for adopting its findings generally amounted to resisting the temptation to create a specialised *niche* area of the law if it was not essential.⁴⁵¹

⁴⁴⁹ Martin "Common-Law Bankruptcy Systems: Similarities and Differences" (2003) *American Bankruptcy Institute LR 373* (hereafter referred to as Martin "Common-Law Bankruptcy Systems").

⁴⁵⁰ Third and final report of the *Commission of Inquiry into the Rationalization of the Provincial and Local Divisions of the Supreme Court* vol 1 Book 2 Part 3 (1997) Report number RP 201/97 (hereafter referred to as the *Hoexter Report*).

⁴⁵¹ *Hoexter Report* 99.



CHAPTER 5: PROBLEMS AND PITFALLS IDENTIFIED

To recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interest of society or other groups in society are vitally affected by the insolvency and its outcome, and to ensure that these public interests are recognised and safeguarded.⁴⁵²

The discussion above offers a broad outline of the structure of the regulatory system in South African insolvency law. In recent years there has been a great deal of debate surrounding the Master's reputation as insolvency regulator, which in turn has led to this field of law increasingly being the subject of scholarly articles, reflection and deliberation.⁴⁵³ On a larger scale the main problem at present is that the Master is burdened with the task of preserving the integrity of the law relating to insolvency matters without having the necessary legal and infrastructural resources and institutional capacity to support this undertaking. In addition, the system continues to lag behind international standards, as drawn from the guidelines and rules of best practice generated by bodies such as the World Bank and UNCITRAL, as well as the comparative study of particular leading international jurisdictions. The aim of this chapter is to identify certain challenges and shortcomings within the current system in order to facilitate a later discussion on policy consideration and law reform. The problems and pitfalls mentioned are by no means a *numerus clausus* and are also in certain instances not unique to the institution of the Master.

5.1 Master as Regulatory Body

As has already been established, the Master acts as regulator in South African insolvency law, but is limited in power and scope to the functions and powers granted within the four corners of the Insolvency Act.⁴⁵⁴ In comparison with the role of international institutions such as the UK's Insolvency Service, the Master lacks the discretion and the authority of an authentic regulator. According to its statutory purpose, the priority of the Master lies very much in protecting the interest of creditors through the legislative powers granted to it, in contrast to the more influential role of international regulators, who act to protect the rights of

⁴⁵² Cork Report ch 4.

⁴⁵³ The following are recent publications on comparative consumer insolvency law: Niemi-Kiesiläinen *et al Consumer Bankruptcy in Global Perspective* (2003); Ziegel *Comparative Consumer Insolvency Regimes – A Canadian Perspective* (2003).

⁴⁵⁴ See par 3.1 above.

creditors and furthermore to protect the public interest.⁴⁵⁵ An example of this would be the legislative powers of the Insolvency Service to create legislation in order to develop certain policies and to promote its role as regulator.⁴⁵⁶

The legal framework within South African insolvency law results in the Master being involved and entangled in various technical issues relating to the administration of the insolvent estate. Consequently, the Master does not prioritise matters of a public nature, such as the investigative aspect of the cause of insolvency or being involved in the development of general insolvency policies and law reform, as these represent matters which fall outside the Master's statutory agenda. Due to its multifarious character, the Master finds him self in the midst of certain challenges relating to the regulation of insolvency law.

The lack of specialisation by the Master's office officials in the particular field of insolvency law, and their inadequate training and experience, creates a level of ineffectiveness and inefficiency among staff. As a result of officials having to be able to function in all the different sections situated in the Master's office it is very difficult to train people in specialised skills, as they tend to be operating as "jacks of all trades". This state of affairs is not only unproductive but also in direct contrast to the government's skills development policies.⁴⁵⁷ South Africa's economic engine could also be negatively affected if funds are not administered expeditiously and efficiently, as each year the value of estates under the supervision of the Masters' offices amounts to approximately R18 billion.⁴⁵⁸ In a recent keynote address the acting Chief-Master acknowledged the following:

The workload in those two offices has, not surprisingly, increased at a phenomenal rate. The rightsizing initiative and filling of vacancies have inevitably resulted in the appointment of many new staff members who are still in the process of finding their feet.⁴⁵⁹

The lack of specialisation in the office of the Master combined with the lack of resources not only has an impact on service delivery, but also prevents the Master from effectively acting out the Constitution's commitment to "an efficient, equitable and ethical public

⁴⁵⁵ See Burdette 6-9.

⁴⁵⁶ See part III ch 4 above.

⁴⁵⁷ See Skills Development Act 97 of 1998.

⁴⁵⁸ See <http://www.info.gov.za/aboutgovt/justice/>

⁴⁵⁹ Basset *His Master's Voice: A Message from the Regulator* (2009) unpublished paper presented at the AIPSA Conference, Johannesburg.



administration which respects fundamental rights and is accountable to the broader public”.⁴⁶⁰

A good illustration of this allegation can be found in the case of *Moseneke v The Master*⁴⁶¹ where the Master opposed the application on considerations which included:

- a The lack of human resources, infrastructure, training and finance to administer the intestate estates of Blacks.
- b The current workload of the masters of the high court which already provides substantial pressure and managerial problems.
- c The transferal of intestate Black estates from the magistrate’s to the master’s office would create chaos.⁴⁶²

One of the first disparities that one notices when studying the functions of the Master within the context of international standards is the lack of investigative powers of the Master relating to the cause of the insolvency. In most foreign jurisdictions the investigation into the cause of insolvency, which also includes the behaviour of the insolvent prior to the sequestration of his estate, represents a major objective in the justification of these regulatory institutions.⁴⁶³ Customarily, the investigative process of insolvency law is also established as a public policy measure.

The UK’s Cork Committee⁴⁶⁴ was a strong advocate of having a robust investigation procedure, linking the idea to maintaining public confidence in the ability of the bankruptcy system to weed out abuse.⁴⁶⁵ The investigatory function rests with the official receiver, who investigates an individual debtor as well as officers and directors of companies. Although the South African system hosts a strong interrogation procedure, the investigative powers of the Master are limited to the general enquiries afforded by the Act, which generally aims to obtain information on the financial affairs of the insolvent and the whereabouts of property. To be able to determine the cause of insolvency not only has the advantage of separating the *bona fide* insolvent from the person abusing the system but in the context of law reform will also have substantial scientific and empirical value. The existence of limited liability also

⁴⁶⁰ See *President of RSA v SARFU* 2000 1 SA 1 (CC) at par 133. See also Hoexter *Administrative Law in South Africa* (2006) 14.

⁴⁶¹ 2001 2 SA 18 (CC). The case dealt with the constitutionality of certain provisions of the Black Administration Act 38 of 1927.

⁴⁶² *Moseneke v The Master* (n 461) at par 14.

⁴⁶³ In the UK the Insolvency Service’s Companies Investigation Branch (“CIB”) investigates serious corporate abuse using compulsory powers under the Companies Act 1985. See also ss 235 and 236 of the Insolvency Act 1986.

⁴⁶⁴ The full reference of this committee’s work is *Cork Report of the Review Committee Insolvency Law and Practice* Cmnd 8558 (1982) 16 (hereinafter referred to as the *Cork Report*).

⁴⁶⁵ *Cork Report* par 238.

increases the potential for abuse of the system. Prevention of abuse of this privilege requires investigation into the conduct of those responsible for the insolvent company.

Apart from the restrictive nature of the Master's investigative powers, the court has also reduced the powers of the Master, who no longer has the status of a judicial officer in the official structure of the court (*De Lange v Smuts NO*),⁴⁶⁶ to the extent that a person who is not a magistrate is authorised to issue a warrant committing to prison an examinee at a creditors' meeting held under section 65 of the Insolvency Act. Although according to the Master's officials this judgment has not yet had a negative effect on the number of interrogations taking place before the Master, it could in future result in all the uninteresting and tedious matters being scheduled with the Master and all challenging matters of note being transferred to the magistrate's court, or in the case of a winding-up to a commissioner. This will unquestionably lead to a decline in experience and knowledge regarding the legal and technical aspects of interrogations at the Master.

5.2 Regulation of Insolvency Practitioners

International elements are increasingly encountered by trustees in the estates which they are charged with administering. This trend is likely to continue given the integration of the global economy, the growth in international economic interdependence and the greater mobility of people and property.⁴⁶⁷ The study of the regulation of the insolvency profession in other jurisdictions has long indicated that South Africa lacks an adequate regulatory framework. As a result legitimate concerns may be raised about whether there are sufficient regulatory safeguards in place to ensure that only impartial insolvency practitioners with the necessary experience are appointed to act as office-holders. Practitioners perform a vital role in protecting the integrity of the system. As the situation stands now, the Master and particularly officials responsible for the appointments of provisional trustees are on a daily basis subject to criticism and are not only vulnerable to statutory review proceedings but are also confronted with the constitutional aspects of possessing a discretionary power to appoint a person as trustee without any legal or statutory guidelines. The unfortunate result is that the appointment of insolvency representatives by the Master will always be viewed with cynicism and beset with controversy.

⁴⁶⁶ 1998 3 SA 785 (CC).

⁴⁶⁷ Keay "International Elements in Bankruptcy: Problems and Solutions" (1992) *Adelaide LR* 245 (hereafter referred to as Keay "International Elements in Bankruptcy: Problems and Solutions").

A notable feature of present-day commerce is the recognition that insolvency administration has become a specialised discipline. The idea of regulating the industry should therefore not be viewed as a “watchdog” initiative, but rather as an opportunity to reform the industry in order to give creditors confidence in the persons they appoint and ultimately reducing the amount of supervision provided by the state.⁴⁶⁸ It is the view of various academic scholars in South Africa that the present regulatory regime is inadequate and in desperate need of reform. *Loubser* comments that: “The situation at the moment is that no qualifications, whether academic or practical, no experience and no professional affiliation are required by law. As a result, there is virtually no control over or disciplinary action against negligent, dishonest or incompetent insolvency practitioners”.⁴⁶⁹ In *Beinash & Co v Nathan (Standard Bank of SA Ltd intervening)*, Fleming DJP confirmed this view when he stated that the liquidators and trustees were regarded by many as ineffective and “even sometimes disrespected with regard to integrity”.⁴⁷⁰ The many media reports concerning allegations of corruption and fraud against practitioners as well as the Master’s personnel have certainly done nothing to change this widely held view.⁴⁷¹

Reform of the English insolvency practice and the formation of a new insolvency practitioner’s profession were cornerstones of the Cork Committee’s *Report*.⁴⁷² These recommendations were implemented by the Insolvency Act 1986, and mandatory licensing of all persons wanting to be recognised as insolvency practitioners were instated.⁴⁷³ The reformers and government chose the classic approach of licensing professionals through statutory mandate. But since this was a government wary of professional monopolies, it created a hybrid of a profession that kept the government’s hand in the formulation and enforcement of professional ethics, and maintained its capacity to adjust the rate of admissions into the profession.⁴⁷⁴ The model of regulation is therefore one of practitioner-led self-regulation within a statutory framework overseen by the state. Both the UK’s Insolvency

⁴⁶⁸ Calitz 734.

⁴⁶⁹ Loubser “An International Perspective on the Regulation of Insolvency Practitioner” 124.

⁴⁷⁰ 1998 3 SA 540 (W) 545D. See Loubser “An International Perspective on the Regulation of Insolvency Practitioner” 126.

⁴⁷¹ See eg, *Sunday Times Business Times* (2004-03-24) 1; *Sakebeeld* (2004-03-24) 14; *Business Day* (2004-04-22) 1; “Liquidation industry rife with corruption” *Independent online* (2003-10-12). See also Loubser “An International Perspective on the Regulation of Insolvency Practitioner” 126.

⁴⁷² Carruthers “Professionals in Systemic Reform of Bankruptcy Law: The 1978 US Bankruptcy Code and the English Insolvency Act 1986” 2000 *American Bankruptcy LJ* 68 (hereafter referred to as Carruthers).

⁴⁷³ Fletcher *Law of Insolvency* (2009) 28.

⁴⁷⁴ Ramsay “Professionals in Systemic Reform of Bankruptcy Law: The 1978 US Bankruptcy Code and the English Insolvency Act 1986” (2000) *American Bankruptcy LJ* 35 at 71 (hereafter referred to as Ramsay “Professionals in Bankruptcy Reform”).

Service and the US's Trustee system encompass the regulation of private sector insolvency practitioners and the insolvencies administered by latter. The UK and US experience underlines the critical importance of a strong regulatory framework in the regulation and monitoring of the insolvency profession.

Any attempt at regulating the South African insolvency profession, however, needs to take cognisance of the socio-economic realities that prevail in South Africa. Then again, any regulatory measures need to be of an international standard in order for foreign investors to have the peace of mind that their affairs will be conducted in an impartial and regulated environment. Although South Africa is in dire need of a proper general regulatory framework, it is probably not necessary for an overregulated environment such as found in the UK. Although the English licensing model has at times been criticised as overly complex and fragmentary,⁴⁷⁵ the focus on professionalism, ethics, qualification and experience might still provide a suitable benchmark when an attempt is made to strike a balance between the unique South African socio-economic environment and the safeguarding of public interest and fostering of public confidence.

⁴⁷⁵ See Finch 168; also see Walters "Complaints Handling in the Insolvency Practitioners Profession" A Report Prepared for the Insolvency Practices Council, (2008-01-23) available at <http://ssrn.com/abstract=109475> (last visited 09-11-30).

CHAPTER 6: LAW REFORM

We also hope to finalise a legislative framework relating to some of the services which are rendered by the masters of the high courts, most notably the revision of the law of insolvency. The current legislative framework relating to the winding-up of insolvent estates is outdated and requires urgent revision. Although it has been adapted over the years, our Insolvency Act dates back to 1936.⁴⁷⁶

Although the South African Law Reform Commission set out reviewing the South African law of insolvency in the late eighties, and has published a number of working papers for discussion, reports as well as draft legislation, this has not been taking place at any great speed and the final proposals are still awaiting recommendation.⁴⁷⁷ Perhaps one should be more patient with the law reform process and bear in mind that South Africa's commercial sector is perhaps relatively conservative.⁴⁷⁸ Moreover, one should also consider that in developing and transitional countries political interference, a lack of experience and resources, and the constraints imposed by weak enforcement agencies often make the task of legal drafting and the implementation of reform initiatives even more challenging.⁴⁷⁹ Insolvency law also does not operate within a vacuum, and parallel with the insolvency law reform efforts the Department of Trade and Industry⁴⁸⁰ is currently in the phase of a comprehensive review of corporate law in South Africa.⁴⁸¹ This process seeks to establish a comprehensive legislation and regulatory framework for the purposes of regulating companies and heralds some major changes to the environment in which companies operate.⁴⁸² The expectation is that this development will provide the insolvency law reform effort with some momentum.

⁴⁷⁶ Budget vote speech by the deputy Minister of Justice and Constitutional Development, Mr A Nel, MP, Parliament (2009-06-24) available at <http://www.info.gov.za/speeches> (last visited at 09-11-30).

⁴⁷⁷ Havenga "Simplification and Unification in Corporate and Insolvency Law – Are We Making Any Progress?" (2000) *SA Merc LJ* 408 (hereafter referred to as Havenga).

⁴⁷⁸ Evans 483.

⁴⁷⁹ Mistelis "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations" (2000) *The International Lawyer* 1055 (hereafter referred to as Mistelis). See Evans 430 for a detailed discussion and criticism of the commission's interchangeable use of the terms "reform" and "review".

⁴⁸⁰ Hereafter referred to as "DTI".

⁴⁸¹ See the Companies Bill 61 of 2008 as introduced in the National Assembly with explanatory summary of Bill published in *GG* no. 31104 of 2008-05-30. The Companies Bill 61 of 2008 was signed by the President as Act 71 of 2008 and published in *GG* no.32121 of 2009-04-07.

⁴⁸² Suggestions include ending the distinction between close corporations, private and public companies; a possible statutory code of conduct for directors; more reporting requirements for companies including on remuneration; and black economic empowerment, environmental and labour issues.

In this chapter the insolvency law review proposed by the Law Reform Commission in respect of regulatory aspects as well as the regulation of the insolvency industry will be considered in more detail. This is necessary in order to determine whether substantial policy issues have been considered and in order to ascertain if it is at all necessary to consider suggesting further proposals relating to the law reform regarding the regulatory regime in South African insolvency law.

6.1 THE DRAFT BILL AND EXPLANATORY MEMORANDUM⁴⁸³

Almost two decades ago, policymakers in South Africa engaged in an extensive study of South African insolvency law.⁴⁸⁴ The South African Law Reform Commission published its *Report on the Review of the Law of Insolvency* in 2000.⁴⁸⁵ This report contained a Draft Insolvency Bill and an Explanatory Memorandum⁴⁸⁶ and included recommendations for what were described as mainly technical reforms to insolvency law in South Africa.⁴⁸⁷ The Bill contains only proposals regarding the insolvency of individuals. However, one consolidated Act is envisaged that would incorporate the winding-up provisions of companies and close corporations.⁴⁸⁸ Some of the main substantive changes proposed in the original 2000 South African Law Reform Commission report include abolition of many of the preferent claims currently provided for in the Insolvency Act,⁴⁸⁹ changes in the provisions for setting aside prior transactions, and provisions to regulate the insolvency practitioners industry.⁴⁹⁰ The findings of this study were published in 2000 by the South African Law Reform Commission, but have till now failed to result in the promulgation of efficient and effective insolvency law legislation.⁴⁹¹

⁴⁸³ In 1999 the South African Law Commission published its second draft Insolvency Bill and Explanatory Memorandum (n 8). This Explanatory Memorandum and Draft Bill were however officially published in 2000. The previous draft Bill was published for comment in 1996 as the Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum working Paper 66; Project 63 (1996) (hereafter referred to as 1996 draft Bill). See Evans 9 (n 27).

⁴⁸⁴ Boraine “The Draft Insolvency Bill – An Exploration (Part 1)” (1998) 4 *TSAR* 621 at 622 (hereafter referred to as Boraine “The Draft Insolvency Bill – an Exploration (Part 1)”).

⁴⁸⁵ See (n 8). See also Evans 430; Evans “Aspects of the Draft Insolvency Bill” (1999) *SA Merc LJ* 210.

⁴⁸⁶ See (n 8).

⁴⁸⁷ See McKenzie-Skene 48.

⁴⁸⁸ For a detailed discussion see Burdette ch 11.

⁴⁸⁹ Sections 97-102 in Insolvency Act.

⁴⁹⁰ South African Law Reform Commission *Report*, par 20.1 *et seq.*

⁴⁹¹ Burdette “Reform, Regulation and Transformation” 5.



In the same year the South African Law Reform Commission published its proposals, the Centre for Advanced Corporate and Insolvency Law (CACIL) at the University of Pretoria,⁴⁹² acting on a remit from the Standing Advisory Committee of Company Law,⁴⁹³ produced proposals for a new uniform insolvency law.⁴⁹⁴ These proposals by CACIL were based on the South African Law Reform Commission's original proposals for reform of non-company insolvency law, but incorporated reformed company insolvency law provisions.⁴⁹⁵ The enactment of a unified statute as suggested by the South African Law Reform Commission could possibly reflect a shift in policy in our insolvency law also in respect of the type of debtor that will be assisted since, historically, our insolvency law has been structured around the individual.⁴⁹⁶

The final version of the Draft Unified Insolvency Bill reflecting the sum total of the research conducted by the South African Law Reform Commission and CACIL was eventually presented to the South African Law Reform Commission, *via* the Standing Advisory Committee on Company Law, in 2000.⁴⁹⁷ In 2003 the Cabinet of the South African government approved the Draft Insolvency and Business Recovery Bill⁴⁹⁸ and it was handed over to the Chief State Law Advisers for final certification before being referred to Parliament. However, before the certification process could be completed the absence of a business rescue model was brought to the Department of Justice's attention and the process came to a grinding halt.⁴⁹⁹ The final Draft Unified Bill has not yet been officially published by the Law Reform Commission and as such the original Draft Bill included in the 2000 South African Law Reform Commission Report remains the only official version reflecting the changes proposed by the Law Reform Commission. Consequently this study will henceforth refer solely to the 2000 version of the Bill.

In its report on the review of insolvency in South Africa the Law Reform Commission mentions that the general principles of a number of legal systems and reform proposals were considered in its search for innovative solutions to the problems experienced with the law of

⁴⁹² Hereafter referred to as "CACIL".

⁴⁹³ See Burdette "Reform, Regulation and Transformation" 5.

⁴⁹⁴ Keay "To Unify or not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals" (1999) *De Jure* 62.

⁴⁹⁵ See (n 105).

⁴⁹⁶ Burdette "Reform, Regulation and Transformation" 9.

⁴⁹⁷ See Burdette "Reform, Regulation and Transformation" 6-9.

⁴⁹⁸ The name awarded to the Bill when it was envisaged that the Business Rescue provisions for corporate entities would form part of the Insolvency Act.

⁴⁹⁹ See Burdette "Reform, Regulation and Transformation" 10.

insolvency, and in a few cases where it seemed advisable provisions were adapted for use in South Africa.⁵⁰⁰ It is clear from the general proposals as well as the proposals regarding the regulatory regime in South Africa, however, that no in-depth comparative study on specific issues such as state regulation in insolvency law had been undertaken, and if so the outcome had not been published.

The Explanatory Memorandum refers to the system in the UK, where the Department of Trade and Industry supervises the regulation and activities of insolvency practitioners, and where it is compulsory for such practitioners to be members of one of the eight recognised professional bodies. The Memorandum also refers to the UK system's qualification and training requirements.⁵⁰¹ It is not clear, however, whether the UK was the benchmark which the Commission applied or if it played any part when the regulatory changes were suggested. The Memorandum also does not provide any substantial motivation for referring to the regulatory system in use in the UK only. Consequently there is a lack of clarity about the whole continuum of regulatory issues and the means by which the suggested changes would function.⁵⁰²

6.2 PROPOSALS RELATING TO THE REGULATORY REGIME IN SOUTH AFRICAN INSOLVENCY LAW

The tenor of the South African Law Reform Commission's Draft Insolvency Bill⁵⁰³ suggests that the government at the time of issuing its report was evidently not ready to make the paradigm shift to bring about a change to the underlying policy and overall structure of the regulatory framework of South African insolvency law.⁵⁰⁴ When the Explanatory Memorandum to the Draft Bill is perused for amendments or revisions of the current policy and status quo, the changes detected can at best be described as technical ones. The Memorandum suggests that the Draft Bill places more responsibilities on creditors and reduces the role of the Master.⁵⁰⁵ It is not exactly clear, however, on what research or comparative study the Commission bases this suggestion. The only substantive change linked

⁵⁰⁰ Explanatory Memorandum 10.

⁵⁰¹ Explanatory Memorandum 141.

⁵⁰² Evans 430.

⁵⁰³ See *Commission Paper* 582 vol 1 and vol 2.

⁵⁰⁴ See Burdette 656. See also Boraine "Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law" 2002 *International Insolvency Review* 1.

⁵⁰⁵ Explanatory Memorandum 14.



to the regulatory system is the acceptance by the Commission as a general premise that creditors should accept responsibility for the protection of their own interests.⁵⁰⁶

6.2.1 Role of the Master

There are a few recommendations in the report which have the effect of reducing the role of the Master in insolvency law.⁵⁰⁷ Clause 41 stipulates that the liquidator⁵⁰⁸ instead of the Master or a magistrate may preside at most creditors' meetings. In the Explanatory Memorandum to clause 41 it is suggested that allowing the liquidator to attend at meetings may prevent objections regarding creditors' lack of participation in creditors' meetings. The reasoning behind the proposal is that its practicality outweighs the seeming independence of having the Master as presiding officer. There is also some merit in having the same person allowing claims at the meeting and then subsequently having to decide on a dispute in regard to such claims.⁵⁰⁹

Another proposal concerning the general functions of the Master is the reduction of the investigative powers in regard to the liquidation and distribution account. In *Wilkens v Potgieter*,⁵¹⁰ Roux J said that the Master had a clear duty to study the relevant documents and correlate them with the account received. In the suggested clause 87(2) the Master may as he deems fit insist on strict compliance with the format of the account.⁵¹¹ This suggestion confirms that the Master will not have the duty of critically investigating each and every account. In the absence of the duty to investigate each account, the prerequisite for vouchers and proved claims to accompany every account also falls away. Clause 87(9) requires vouchers and claims only on request of the Master.⁵¹² This proposal by the Commission is a clear example of a so-called practical or technical reform proposal. Although the Master is still to receive the account from the liquidator, the careful and sometimes unnecessary

⁵⁰⁶ Explanatory Memorandum 14.

⁵⁰⁷ Explanatory Memorandum 12.

⁵⁰⁸ Explanatory Memorandum 12.

⁵⁰⁹ Explanatory Memorandum 117.

⁵¹⁰ 1996 4 SA 936 (T).

⁵¹¹ Set out in Schedule 1, Form D (Form and contents of account).

⁵¹² Explanatory Memorandum 221. See also Cronje *The Role of Regulators in Insolvency Regimes – South Africa* (2004) 4 presentation at the International Insolvency Commission (INSOL) Conference, India (hereafter referred to as Cronje).

dissection of the account is no longer expected. This proposal does not represent any shift in policy or an adjustment in the nature of the role of the Master, but it does lighten the burden of the Master, and allow him to in devote his attention to more purely regulatory issues.

The clause in the Draft Bill which elicited the most comments by far was the question on the appointment of liquidators and especially whether the Master should retain its discretion in this regard. Although the Commission acknowledged that a properly exercised discretion is preferable to rigid rules which cannot provide adequately for all circumstances, it in any case went ahead and limited the discretionary powers of the Master. It proposed in clause 32(2) that creditors should be given the right to nominate a liquidator of their choice by a majority in value or number according to rules that apply at the first meeting. The Master's discretion to overrule the wishes of creditor had been suggested to be limited as follows:

- The Master may appoint a liquidator of his choice in terms of clause 32(7) if no liquidator is nominated or elected by creditors.
- If no liquidator is elected at a meeting of creditors the liquidator appointed in terms of clause 32 becomes the liquidator of the estate in terms of clause 52(3).
- If the Master deems it necessary for the proper administration of an insolvent estate he may at time appoint one additional liquidator in terms of clause 32(2A) or 54(4) within 48 hours notice by telefax, electronic mail or personal delivery to each liquidator already appointed of the reasons for an additional appointment.
- In terms of clause 32A the Master must keep a public record which must be updated at least every 14 days of additional appointments which reflect the name and the reference number of the estate, the name and address of the person appointed, and the amount of security called for and the reason for the appointment.
- The Master should have the right to refuse to appoint a qualified person because the Master is of opinion that he is not suitable for appointment in the estate in question (clause 54).
- The Master should have the right the right to decide whether a nominee has interest opposed to the general interests of the creditors if the nominee has declared under oath that he does not have such interests (clause 55).
- The Master should have the right to remove a liquidator from office because in the opinion of the Master he is no longer a suitable person to be liquidator (clause 58).
- When a liquidator must be appointed the Master must direct the remaining liquidator or liquidators to convene a meeting for the election of a new liquidator and the Master should not merely appoint a person that he regards as suitable (clause 60).⁵¹³

Given the acknowledgement of consistent rumours of undue influence with regard to appointment procedures in the Master's office, and admission that the dominance of one group of creditors in the administration and appointment process of the estate holds a threat,

⁵¹³ Explanatory Memorandum 101.

proposals that the liquidator should be appointed by the court were rejected.⁵¹⁴ The Commission submitted that it would be more difficult to review a process where someone other than a public official such as the Master is alleged to be at fault. It therefore viewed it advisable to limit the discretion of the Master rather than remove it completely.⁵¹⁵

6.2.2 Regulation of Insolvency Practitioners

With regards the regulation of the industry, the suggestion by the Commission was that a person who is not a member of a professional body recognised under the proposed legislation should be disqualified from being elected or appointed as an insolvency representative.⁵¹⁶ It was also suggested that the Minister of Justice may from time to time publish by notice in the *Government Gazette* the name of a recognised professional body if it appears to the Minister that such a body regulates the practice of a profession and maintains and enforces rules for ensuring that a member of such body is a fit and proper person to be appointed as an insolvency representative and meets acceptable requirements with respect to education, practical experience and training. Recognition may be revoked if the professional body no longer satisfies these requirements.⁵¹⁷

Another significant new provision included in the Bill is the power bestowed on the Master to suspend a liquidator on the strength of a complaint made to him on affidavit or if the person has been charged with an offence, pending the investigation into the suitability of the liquidator to remain in office.⁵¹⁸ It is clear from the Bill that the investigation should be undertaken by the Master, but the clause fails to give any detail as to the nature and scope of the Master's power to investigate. Given the impact this proposal would have on the Master's resources, it is unfortunate that the Commission did not use the opportunity to include specific guidelines. It is also unclear whether the constitutionality of such an investigation into the rights of the individual had been carefully considered.

Under the heading "General guidelines proposed by commentators" the Commission Report

⁵¹⁴ Explanatory Memorandum 101.

⁵¹⁵ Explanatory Memorandum 101.

⁵¹⁶ Explanatory Memorandum 14.

⁵¹⁷ Clause 53 of Draft Bill. See Cronje 4.

⁵¹⁸ Clause 58(2) of Draft Bill.

states that one of the commentators remarked that the Master fulfills such an important role that as a result creditors are less interested and involved. Another commentator said that the existing Act leans too heavily on “policing” by the state. By contrast, another commentator mentioned that without the Master to monitor the administration of estates fraud by liquidators would become rampant.⁵¹⁹ The Commission states in the Explanatory Memorandum that the general guidelines proposed by commentators did not reveal any startling solutions to existing problems.⁵²⁰

Evans mentions that there is no indication or proposal in the commission report to consider the policy considerations in South African insolvency law upon which this “review” or “investigation” will hinge.⁵²¹ Evans further submits that a failure to consider policy issues will lead to a disjointed and flawed “revision” of insolvency law.⁵²² It is clear from the changes and recommendations suggested by the Commission that no substantial policy-driven investigation in respect of regulation in South African insolvency law had been undertaken and as a result except for a few technical and perfunctory suggestions the *status quo* had been more or less maintained.

Although it falls beyond the scope of this study to provide an exhaustive survey or detail analysis of the reform process of our Company law, it is interesting to note that the Department of Trade and Industry⁵²³ followed a distinctly different path of law reform to that of the South African Law Reform Commission.⁵²⁴ In 2004, DTI published a policy paper which acted as the foundation for the subsequent debate and process of law reform thereafter.⁵²⁵ The intention of the Department was clearly revealed in the following statement:

It is not the aim of the DTI simply to write a new Act by unreasonably jettisoning the body of jurisprudence built up over more than a century. The objective of the review is to ensure that new legislation is appropriate to the legal, economic and social context of the South Africa as

⁵¹⁹ Explanatory Memorandum 11.

⁵²⁰ Explanatory Memorandum 10.

⁵²¹ See Evans 430 for a detailed discussion and criticism of the commission’s interchangeable reference to the words “reform” and “review”.

⁵²² Evans 431.

⁵²³ Hereafter referred to as “DTI”.

⁵²⁴ Companies Bill 61 of 2008 has been signed by the President as Act 71 of 2008 published in *GG* no 32121 (2009-04-07).

⁵²⁵ See “South African Company Law for the 21st Century: Guidelines for Corporate Law Reform” – *GG* 26493 of (2004-06-23).



a constitutional democracy and open economy. Where current law meets these objectives, it should remain as part of the company law.

It is submitted that one should be cautious of a law reform initiative which had been founded on research concluded in a pre-Constitutional era.⁵²⁶ The key objective of any law reform proposal should be not only to be compatible and harmonious with international best practice in the field of law, but also to incorporate the legal, economic and social context of a contemporary South Africa. It is submitted that although the investigation of the South African Law Reform should not be regarded as completely redundant, a fresh approach supported by a policy-based methodology is urgently required. When assessing the present state of the law of insolvency the following statement very aptly articulates this above notion:

This will probably mean that the old pre-Constitution jurisprudence will need to be read with circumspection – practitioners and courts should no longer be entitled to simply rely on this old case law as authority. Each and every pre-Constitutional precedent will need to once again be scrutinized, this time against the values that permeate through the Bill of Rights, so as to make sure that all law (including case law) is constitutionally compliant. That it is our duty to do this is beyond question – the common law must be developed so that it is brought into line with our Constitution.⁵²⁷

⁵²⁶ See part IV above.

⁵²⁷ Hopkins “The Influence of the Bill of Rights on the Enforcement of Contracts” (August 2003) *De Rebus* 22.

CHAPTER 7: CONCLUSION

History shows that the institution of the Master was initially established with the aim of acting as custodian for persons such as widows and orphans, and, in time, minors and incapacitated persons, in order to protect their interests. The supervisory duty of the Master in relation to insolvency law was only relatively recently incorporated into the Master's general duties and functions.⁵²⁸ It is also clear that the courts initially dominated the insolvency process and the Master had only limited functions, which were more administrative in nature. In time the Master gradually accumulated powers over the daily administration of the insolvency process and the role of the Master became more prominent and the nature of its functions more complex, ranging from judicial to administrative in nature.

One can pinpoint certain common denominators when studying regulatory bodies in other jurisdictions such as the UK and the US. Some of these denominators are that regulatory frameworks of some nature do exist; that they possess broad investigative powers focused on the cause of the insolvency and the probability of fraud; and that they are not involved in the administrative duties of the insolvency representative on a daily basis, are able to initiate and implement strong policy direction, and are actively involved in the development of legislation and governmental policies relating to insolvency law.⁵²⁹

In the absence of these characteristics and proper rule-making and policy development powers, it is difficult to view the Master as an independent regulatory body and to unearth a credible measure to determine its success. Since the profit criterion of the private sector is not applicable to public servants and the Master has only limited powers when acting as regulator it is difficult to find tangible measures of success to justify the Master's activity. Examples of this predicament are the constrained provisions under which the Master may remove a trustee from office as well as the limited scope of the investigative powers afforded to the Master by legislation.

Another inconsistency between the Master as regulator and its equivalent in other international jurisdictions is the lack of official control in regard to the South African

⁵²⁸ See par 4.2.3.2 above.

⁵²⁹ See part III above.



insolvency profession. Literature on the regulation of insolvency law suggests that in the absence of a sophisticated regulatory framework, the role of the regulatory body becomes more acute. In the absence of any statutory regulation of the South African insolvency profession the role of the Master is becoming more controversial and also resulting in the underlying tensions and irregularities that can be found in this industry. The absence of a proper regulatory framework and a specialised regulator could result in the general ineffectiveness of the South African insolvency system as a whole.

The attraction of foreign capital is often crucial to the sustainable development of developing countries and the insolvency regime provides the investor with the predictability and transparency needed to assess the risk of an investment decision. Insolvency laws and systems are increasingly being recognised as a fundamental institution essential for the development of credit markets and entrepreneurship in developing countries and, in turn, these insolvency systems depend on the existence of sound and transparent institutional and regulatory frameworks.⁵³⁰ South African law- and policymakers are at present on the threshold of introducing significant new legislation in both corporate and insolvency law disciplines.⁵³¹ Interested parties will have to achieve a balance between the interests of debtors and creditors and the public interest while at the same time acknowledging the link between these interests and institutional structures and their capacities. The absence of an effective insolvency regime will have an adverse impact on the future availability of credit and foreign capital.⁵³² The design and development of a strong central government agency responsible for regulating South African insolvency law has therefore become vital in assuring public confidence in the system of regulation and supervision, and in the process of insolvency law.⁵³³

⁵³⁰ Joyce *The Role of Insolvency Regulators in the Past and in the Future* 4 (2003) unpublished paper delivered at the International Insolvency Conference, Singapore, (hereafter referred to as Joyce “The Role of Insolvency Regulators in the Past and in the Future”) on file with the author. *Cf* Mistelis 1057.

⁵³¹ See Companies Bill 61 of 2008 as introduced in the National Assembly (proposed s 75) with explanatory summary of Bill published in GG No. 31104 of 2008-05-30.

⁵³² Falke *Insolvency Law Reform in Transition Economies* (2003) 27 LLD dissertation Humboldt University of Berlin (hereafter referred to as Falke).

⁵³³ *Cf* Mistelis 1057.



*A Reformatory Approach to State Regulation of Insolvency Law in
South Africa*

PART VI

**POLICY DEVELOPMENT AND CONSIDERATIONS WITH REGARD
TO THE REGULATION OF SOUTH AFRICAN INSOLVENCY LAW**

SUMMARY

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CHAPTER 1: INTRODUCTION

The policy decision between decisive and gradual change is not simple. On the one hand the benefit of incremental change is that it reduces the likelihood of a radical mistake that would generate a sharp backlash from stakeholders or a loss of face by lawmakers. On the other hand, where a new institution is being constructed, a failure to proceed systematically, with all the components in place at the outset and perceptible progress from the beginning, may also lead to a backlash from stakeholders who lose confidence quickly and de-legitimize the institution.¹

The aim of this thesis, namely ultimately to propose a framework that can serve as a guideline for further law reform in this particular field of South African insolvency law, inherently suggests a change in approach towards the traditional regulation paradigm. In order to remain on the path of sound law reform, this part of the study considers and explores certain key elements to be considered in determining the parameters of a comprehensive regulatory policy in the South African insolvency law. Any discussion on policy matters has the potential to develop into a collection of abstract themed ideas, resulting in a confusing and contradicting message being sent to the parties involved. The challenge will be to pin down the relevant policy outcomes in order to provide a clear and predictable regulatory framework. Over the years there has been considerable debate on the reform of the insolvency laws in South Africa in general.² By contrast, progress on policy formulation aimed at improving the regulation of our insolvency law has been far more gradual, reflecting the inherent complexity of this part of our law.³

Several key themes have thus far emerged from this study. The first theme is the relationship between our local insolvency regime and internationally recognised norms and standards. It has

¹ Halliday “Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances” 29 (hereafter referred to as Halliday “Lawmaking and Institution Building”) in the Organisation for Economic Co-operation and Development *Asian Insolvency Systems Closing the Implementation Gap* (2007).

² See Loubser “An International Perspective on the Regulation of Insolvency Practitioners” (2007) *SA Merc LJ* 123 (hereafter referred to as Loubser “An International Perspective on the Regulation of Insolvency Practitioners”). See also Calitz “The Role of the Master of the High Court as Regulator in a Changing Liquidation Environment: a South African Perspective” (2005) *TSAR* 728 at 734; See Burdette *Reform, Regulation and Transformation: The Problems and Challenges Facing South African Insolvency Industry* (2005) unpublished paper presented at the Commonwealth Law Conference, London (hereafter referred to as Burdette “Reform, Regulation and Transformation”); See also Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK* (2006) unpublished paper presented at INSOL Europe Annual Conference, Romania, on file with the author. See Norris *Insolvency Practitioner Regulation in the United Kingdom* (2004) unpublished paper delivered at INSOL Congress, Cape Town, (hereafter referred to as Norris “Insolvency Practitioner Regulation in the United Kingdom”) on file with the author. Calitz “The Appointment of Insolvency Practitioners in South Africa: Time for change?” (2006) *TSAR* 721 (hereafter referred to as Calitz “The Appointment of Insolvency Practitioners in South Africa”).

³ At the National Insolvency Conference of the Association of Insolvency Practitioners of Southern Africa (hereafter referred to as “AIPSA”), August 2009, more than 200 delegates participated in the debate on the regulation of the insolvency industry and no general consensus could be reached.

been argued that globalisation is a development that is having a profound impact on the subject of economics as a whole – to such an extent that it has become the defining process of the present age.⁴ This development raises questions concerning the value to be obtained from conformity to such global standards, balanced against a distinctive and unique national path that reflects the peculiarities of national historical, cultural and legal developments.⁵ The challenge will thus lie in translating internationally identified standards and norms into our national context.

A second theme had been the dawn of a new democratic constitutional dispensation in South Africa. The Constitution⁶ provides a framework within which policy can be formulated and original legislation giving effect to that policy can be enacted and interpreted.⁷ The foundation of constitutionalism is that the power of the state is defined and circumscribed by law to protect the interests of society.⁸ Any law reform process should thus aspire to comply with the underlying values of the Constitution.⁹

This sentiment is also echoed by Evans:

In formulating new legislation the question is not whether constitutional requirements, underpinned by human rights interests, must form an integral part thereof, but rather to what extent policy changes should occur in order to align such legislation with the required constitutional principles and expectations, and how to achieve this while maintaining or balancing the interests of creditors, debtors, society and the state.¹⁰

This part of the study attempts to set out the broad areas for policy considerations. It cannot be exhaustive, as any policy process devolves and many policy matters will arise during the process of deliberation. The study will commence with a brief discussion of the existing policies underlying the South African insolvency law.¹¹ The advantages of engaging in a policy formulation process with the aim of setting the tone for future reform proposals will

⁴ Loots *Globalisation, Emerging Markets and the South African Economy* (2001) unpublished paper presented at the International Jubilee Conference of the Economic Society of South Africa, Johannesburg, (hereafter referred to as Loots) on file with the author.

⁵ Halliday “Lawmaking and Institution Building” 17.

⁶ Act of 1996. Hereafter referred to as the Constitution.

⁷ Hoexter *Administrative Law in South Africa* (2006) 22 (hereafter referred to as Hoexter).

⁸ Burns *Administrative Law under the 1996 Constitution* (2003) 28 (hereafter referred to as Burns).

⁹ See part IV above.

¹⁰ Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) 428 LLD dissertation University of Pretoria (hereafter referred to as Evans).

¹¹ For a detailed discussion of the philosophy of South African insolvency law refer to Bertelsmann *et al Mars: The Law of Insolvency in South Africa* (2008) 1 (hereafter referred to as Mars). See also Roestoff *'n Kritiese Evaluasie van Skuldverligtingsmaatreëls vir die Individu in die Suid-Afrikaanse Insolvensiereg* (2002) LLD dissertation University of Pretoria; Evans ch 7.



also be argued. Although the role of the state in insolvency law represents an interesting and controversial area of law, the legal pitfalls are myriad. To this end this study endeavours to address the underlying philosophies of the role of the state and underlines the need for institutional efficiency within an effective insolvency system. Drawing on leading international standards and guidelines, as well as snippets of legal policy in our domestic arrangement, the remaining chapters of this part of the study consider several policy goals and objectives to be considered in determining the parameters of a cohesive and comprehensive policy framework within this area of our insolvency law.

CHAPTER 2: EXISTING POLICIES AND POLICY CONSIDERATIONS IN SOUTH AFRICAN INSOLVENCY LAW

The *concursum creditorum*¹² is regarded as one of the key concepts of South African insolvency law.¹³ The concept entails that the rights of the creditor as a group are preferred to the rights of individual creditors. Evans mentions that: “[t]he predominant policy in South African insolvency is the collection of the maximum assets of the debtor for the advantage of creditors in insolvent estates ... If advantage to creditors cannot be shown in an application for the sequestration of a debtor’s estate, a court will refuse to grant that order.”¹⁴ These two principles fundamentally form the basis of South African insolvency law.¹⁵

In the previous part of this study¹⁶ the reflection on the South African Law Reform Commission’s review¹⁷ of South African insolvency law concluded that throughout the Commission’s review of the present insolvency law, the development of a formal regulatory policy did not at the time appear to have formed an integrated part of the reform agenda. If we take the recent communication by government on evident policy directions out of the equation,¹⁸ the only substantive provision which appears to deal with the aspect of regulation in our law is the recent amendments to the Insolvency Act relating to the appointment of insolvency practitioners.¹⁹

In 2003 the Minister of Justice and Constitutional Development,²⁰ reacting to persistent allegations of corruption in the appointment of insolvency practitioners, introduced the

¹² See *Walker v Syfret* 1911 AD 141 at 166; cf Swart *Die Rol van 'n Concursum Creditorum in Suid-Afrikaanse Insolvensiereg* (1990) LLD dissertation University of Pretoria (hereafter referred to as Swart); Mars 2.

¹³ See Mars 2.

¹⁴ Evans 3.

¹⁵ Having collective debt-collecting as its basic premise, South African insolvency law is also being classified as a creditor-friendly system as the primary object of the Insolvency Act 24 of 1936 (hereafter referred to as Insolvency Act of 1936 or the Insolvency Act) is not to provide debt relief to debtors. See Wood *Principles of International Insolvency* (2007) 4-5 (hereafter referred to as Wood); Mars 3. See part V above.

¹⁶ See part V ch 6 above.

¹⁷ See South African Law Commission *Review of the Law of Insolvency* Project 63 (2000) Report, vol I Explanatory Memorandum, and vol 2 Draft Bill (hereafter referred to as 2000 draft Insolvency Bill or draft Insolvency Bill). See also discussion by Evans at 9 and 430.

¹⁸ Keynote address by Deputy Minister of Justice and Constitutional Development (hereafter referred to as the Department of Justice), Mr A Nel, MP (hereafter referred to as the Deputy-Minister), at the International Association of Insolvency Regulators (“IAIR”) annual general meeting and conference, Sandton, 2009-10-12 (hereafter referred to as the Minister’s address) available at http://www.justice.gov.za/m_speeches/sp2009.html (last visited at 09-11-30).

¹⁹ See part IV above.

²⁰ Hereafter referred to as the Minister or the Minister of Justice.



Judicial Matters Amendment Act of 2003.²¹ According to this Act, section 158 of the Insolvency Act had been amended to read as follows:

Regulation and Policy

- (1) The Minister may from time to time make regulations not inconsistent with the provisions of this Act, prescribing –
 - (a) the procedure to be observed in any Master's office²² in connection with insolvent estates;
 - (b) the form of, and manner of conducting proceedings under this Act;
 - (c) the manner in which fees payable under this Act shall be paid and brought to account.
- (2) The Minister may determine policy for the appointment of a *curator bonis*, trustee, provisional trustee or co-trustee by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.
- (3) Any policy determined in accordance with the provisions of subsection (2) must be tabled in Parliament before publication in the *Gazette*.²³

The stated aim of the legislation was first to create uniform procedures for the appointment of practitioners in all Master's offices and secondly to promote the general transformation policy of government in promoting consistency, fairness and transparency and the achievement of equality in these appointments by the various Masters.²⁴ From a formal perspective the basis of the English law on bankruptcy is to be found in the Insolvency Act 1986²⁵ as primary legislation, supported by the Insolvency Rules 1986,²⁶ a major piece of delegated legislation authorised by such primary Act.²⁷ The recent amendment to the present Insolvency Act thus follows a similar approach to enable the implementation and administration of the Amendment Act of 2003. As yet no formal policy document has been published or tabled in parliament, and therefore it is difficult to speculate on its final content.²⁸

²¹ Act 16 of 2003. Hereafter referred to as Judicial Matters Amendment Act of 2003 or the Amendment Act of 2003. See Loubser "An International Perspective on the Regulation of Insolvency Practitioners" 125.

²² Master of the High Court. Hereafter referred to as the Master or the Master's office.

²³ Section 158 of the Insolvency Act.

²⁴ *Memorandum on the Objects of the Judicial Matters Amendments Bill*, 2003 at par 2.2. However, the legislative amendment applies only to the appointment of practitioners by the Master and not those nominated by creditors and merely accepted and confirmed by the Master. See Loubser "An International Perspective on the Regulation of Insolvency Practitioners" 125.

²⁵ Hereafter referred to as the Insolvency Act 1986. The Act received Royal Assent on 1986-07-25 and came into force on 1986-12-29. See Milman 22.

²⁶ Insolvency Rules (SI 1986/1925) means the rules for the time being in force and made under s 411 and s 412 of Insolvency Act 1986 in relation to insolvency proceedings.

²⁷ See part III ch 3.

²⁸ Loubser "An International Perspective on the Regulation of Insolvency Practitioners" 125.

In a recent keynote address the Deputy-Minister of Justice acknowledged – “the urgent need to address the regulatory and institutional set-up.”²⁹ He subsequently refers to the following proposals submitted:

- The establishment of an ombud to deal independently with complaints and decisions regarding the administration of insolvent estates;
- The creation of an independent statutory body to exercise oversight and control over insolvency practitioners and to regulate the entry into and exit from the industry;
- The statutory recognition of the existing voluntary associations to enable the industry to self-regulate;
- The adoption of a dual administration process in terms of which the insolvency regulator (in this case the master) attends to the administration of small estates while the administration of big and complex estates is attended to by the insolvency practitioners.

Subsequently he also concluded that:

Although all the above mentioned proposals have advantages, funding, training and capacity building would still remain a challenge. The World Bank has correctly found that the capacity to enforce and apply legislation, is often more important than the statutory provisions which are in place.³⁰

The importance of a sound policy design process as a key component of any sound reform program can not be overstated. Not only do policies provide guidance on government’s objectives, and the norms and principles underlying these goals, but it also provide policy – and lawmakers with the opportunity to effectively manage the reform process which in turn depends on plans consisting of measurable outputs and agreed financial inputs.³¹

Although it should be noted that the Deputy-Minister’s lecture did not include any official commitment to policy direction or design and did not introduce any formal deadlines, the core of the message nevertheless implies that firstly it seems that the level of importance of the regulation of insolvency law had been raised, and secondly it presented us with a general indication of the policy direction Government is prepared to follow. Even though it is not apparent how much significance could be read into to the detail of the proposals set out in the

²⁹ See Minister’s address (n 18).

³⁰ See part III ch 6 above with regard to the international principle dealing with capacity and institutional building. Johnson “Towards International Standards on Insolvency: The Catalytic Role of the World Bank” (2000) *Law in Transition* 69 (hereafter referred to as Johnson).

³¹ Ball *Security Sector Governance in Africa: A Handbook* (2004) ch 4 (hereafter referred to as Ball *Security Sector Governance in Africa*) as available at <http://www.ssronline.org> (last visited at 09-11-12).



Deputy-Minister's address, it will nevertheless be feasible to refer to certain comments and proposals during the following discussion on policy considerations.

CHAPTER 3: POLICY CONSIDERATIONS FOR A REVISED REGULATORY REGIME

3.1 INTRODUCTION

This chapter identifies and discusses the key issues that arise in the design of a sound regulatory system. The strategic decisions within each of the three cornerstones of an insolvency system – namely the regulatory, institutional and legal frameworks – will be underlined and considered.³²

Before venturing down the path of policy considerations, one might first question the relevance and purpose of such a policy-developing process. It is submitted that the following statement on generic policy processes in Africa made in a recent study on “Security Sector Governance in Africa” could also be seen as relevant to any South African law reform process:

Policy is important because:

- (a) it provides clear guidelines for developing and implementing strategies;
- (b) it helps to discipline government behaviour, and to promote the optimal utilization of resources in the pursuit of specific objectives;
- (c) it promotes accountability by providing normative and practical guidelines; and
- (d) it encourages the predictability of government actions.³³

Within the context of South African insolvency law reform, it is vital to realise the critical importance of balancing difficult policy considerations when considering any law reform proposal. In the law of insolvency policy, objectives should not only add up on a commercial level, but should also reflect the values of our society.³⁴ While there are clearly certain aspects regarding the subject of regulation of insolvency law that transcend jurisdictional boundaries, these should be balanced against distinctive national circumstances.³⁵

Although dominant themes and general policies such as affirmative action³⁶ and Black Economic Empowerment³⁷ introduced by government as measures to redress the wrongs of the past are of huge importance when embarking on any insolvency law reform initiative, they should be balanced against the aim of restoring public confidence in the system and linking

³² See part I above.

³³ Ball *Security Sector Governance in Africa* par 4.1

³⁴ Johnson “Toward International Standards on Insolvency: The Catalytic Role of The World Bank” 2000 *Law in Transition* 69 (hereafter referred to as Johnson).

³⁵ Halliday “Lawmaking and Institution Building” 17.

³⁶ See Employment Equity Act 55 of 1998 ch 3. See Coetsee *The Fairness of Affirmative Action: An Organisational Justice Perspective* (2005) PhD dissertation University of Pretoria.

³⁷ Hereafter referred to as “BEE”. See *Broad-Based Black Economic Empowerment Act* 53 of 2003. See also *BEE Codes of Good Practice* as published in GG 29617 February 2007. The Act has its roots within the Freedom Charter of 1955.



reform to sustainable development through international investment. In South African insolvency law reform, the formulation of policy has to take place within the context of issues such as transformation of the insolvency industry on the grounds of race and gender, which are probably unique to South Africa.³⁸ In a modern pluralistic society it can be difficult to identify those principles which are truly representative of a nationwide consensus, or to articulate them except in very general or abstract terms. Nevertheless, for the purpose at hand, it is necessary to accept this challenge of reviewing the existing ethos with regard to regulation in our insolvency law, in order to strike a balance between a sustainable commercially motivated model and the meanings ascribed to a successful regulatory system within the international and local society.³⁹

As the reform of the insolvency process would undoubtedly include a wide-ranging transformation process, the final step in the policy development and strategic review processes would have to include the dissemination of the policy and other relevant materials to all stakeholders. Policy communication, dialogue and debate are at the centre of any policy process.⁴⁰ With the introduction or modification of any policy, it is critical to take into account the sentiments of the political and civil society, as well as the state. As far as possible, one should identify the major role-players required for the success of the policy (both inside and outside the organisation concerned), determine their attitudes toward the proposed changes, and analyse their influence over the formulation and implementation of the policy.⁴¹

The international best practice and standards drawn from international reference points on insolvency law issues such as the World Bank's *Principles for Effective Insolvency and Creditor Rights System*⁴² and the United Nations Commission on International Trade Law's⁴³ *Legislative Guide on Insolvency Law*,⁴⁴ as well as the substantive lessons from the comparative consideration of other insolvency regimes, provides us with sufficient material to create the ideal regulatory framework. The policy process thus provides a platform for

³⁸ See Burdette "Reform, Regulation and Transformation" 5.

³⁹ Johnson "Building Effective Insolvency Systems: Towards Principles and Guidelines" (1999) paper presented at Conference on Insolvency Systems in Asia, Sydney (hereafter referred to as Johnson "Building Effective Insolvency Systems: Towards Principles and Guidelines").

⁴⁰ *Security Sector Governance in Africa* par 4.4.1.

⁴¹ *Security Sector Governance in Africa* par 4.4.1.

⁴² See World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*).

⁴³ Hereafter referred to as "UNCITRAL".

⁴⁴ See UNCITRAL *Legislative Guide on Insolvency Law* (2005) 10 (hereafter referred to as "UNCITRAL *Legislative Guide*" or "*Legislative Guide*").

research, debate and scrutiny with the aim of ultimately developing a realistic and achievable policy statement. It is also submitted that the careful examination of the relevant policy matters as well as the subsequent problem-solving process could hopefully lead to more informed legislative reforms in bankruptcy.

Policymakers involved in the South African insolvency law reform process will need to attend to particular strategic policy decisions in order to assess which areas of activity are the most problematic at any particular point in time, and sequentially design a response that will optimise the regulatory outcomes.⁴⁵ Firstly, a policy direction with regard to the dominant theme of the role of the state in our insolvency law will have to be considered. In a highly competitive world, institutions have to develop and innovate continuously and proactively. Reputation alone may not guarantee future continued existence and success.⁴⁶ Secondly, the various regulatory models available to regulate office-holders will have to be analysed in order to assess which model will best suit the local social and economic conditions. And thirdly, the interplay between the regulatory body and the office-holder will constantly have to be evaluated. The interaction between and coexistence of the different cornerstones of our insolvency system will subsequently have to be aligned in order for the system to operate as a whole.

In order to successfully implement policy and subsequent law reform proposals, it is necessary to develop long-term strategic plans and to translate these objectives into programmes that can be implemented and budgets that can support the specific plans and programmes.⁴⁷ Throughout the law reform process a realistic approach with regard to institutional capabilities and available resources will have to be maintained. Joyce appropriately states that how, and how swiftly, a regulatory framework can be developed, consistent and coherent with the overall structure of the legislation, will depend in some part on the existing structures and capacities as well as setting realistic timetables. This solution may encompass introducing some requirements and standards earlier than others, with the recognition that they may need to be raised or improved at a later stage.⁴⁸

⁴⁵ Knott *Regulatory Issues Impacting on Insolvency* (2001) unpublished paper presented at the National Conference of Insolvency Practitioners Association of Australia, Adelaide.

⁴⁶ Zhang “Developing a Regulatory Framework for Outsourcing of Insolvency Work in Hong Kong China” in *OECD Asian Insolvency Systems – Closing the Implementation Gap* (2007) 193.

⁴⁷ Ball *Security Sector Governance in Africa* par 4.6.2.

⁴⁸ Joyce *The Role of Insolvency Regulators in the Past and in the Future* (2003) 4 unpublished paper delivered at the International Insolvency Conference, Singapore, (hereafter referred to as Joyce “The Role of Insolvency Regulators in the Past and in the Future”) on file with the author.



3.2 THE ROLE OF THE STATE IN THE REGULATION OF INSOLVENCY LAW

3.2.1 Introduction

There are various contemporary means against which the relationship between the state and the law of insolvency can be measured. In its 1997 *World Development Report* the World Bank stated that there are “five fundamental tasks at the core of every government’s mission, without which sustainable, shared, poverty-reducing development is impossible.”⁴⁹ The five fundamental tasks are:

- (a) establishing a foundation of law;
- (b) maintaining a non-distortionary policy environment, including macro-economic stability,
- (c) investing in basic social services and infrastructure,
- (d) protecting the vulnerable and
- (e) protecting the environment.⁵⁰

Both the International Monetary Fund⁵¹ and the World Bank have placed great emphasis on the need to provide a regulatory framework which will provide the most efficient, effective and fair outcome for those for whose benefit an insolvency system exists.⁵² During the consulting stages of the World Bank’s process that culminated in its *Principles and Guidelines for Effective Insolvency and Creditor’s Rights System*,⁵³ the bank stated:

While there are clearly costs to be borne in maintaining a regulatory framework, these must be weighed against the benefits in providing a system that is efficient and effective and in which the public can have confidence.⁵⁴

⁴⁹ World Bank, *World Development Report 1997: The State in a Changing World* (hereafter referred to as 1997 World Development Report). See Heath “Consumer Bankruptcies: A New Zealand Perspective” (1999) *Osgoode Hall LJ* 428 at 442 (hereafter referred to as Heath).

⁵⁰ Heath 442.

⁵¹ Hereafter referred to as the “IMF”. IMF *Orderly and Effective Insolvency Procedures* (hereafter referred to as IMF *Orderly and Effective Insolvency Procedures*) (1999) available at <http://www.imf.org> (last visited at 09-11-30).

⁵² Halliday “Architects of the State: International Organizations and the Reconstruction of States in the Global South” (2008) *American Bar Foundation Research Paper no 08-01*; *Centre on Law and Globalization Research Paper no 08-01* (hereafter referred to as Halliday “Architects of the State: International Organizations and the Reconstruction of States in the Global South”) available at SSRN: <http://ssrn.com/abstract=1193162> (last visited at 30-11-09).

⁵³ See World Bank *Principles* (n 42).

⁵⁴ See Johnson “Building Effective Insolvency Systems: Towards Principles and Guidelines” 3; Mason “Cross-Border Insolvency Law: Where Private Law and Insolvency Law Meet” in Omar *International Themes and Perspectives* (2008) 36.

A very appropriate statement was also issued by the United States⁵⁵ Congress when the House of Representatives reported the passage of the 1978 Bankruptcy Code.⁵⁶ The Congressional Statement read:

The practice in bankruptcy is different for several reasons. First there is a public interest in the proper administration of cases. Bankruptcy is an area where there exists a significant potential for fraud, for self dealing, and for diversion of funds. In contrast the general civil litigation, where cases affect only two or a few parties at most, bankruptcy cases may affect hundreds of scattered ill-represented creditors. In general civil litigation, a default by one party is relatively insignificant, and though judges do attempt to protect parties' rights, they need not be active participants in the case for the protection of public interest in seeing disputes fairly resolved. In bankruptcy cases, however, active supervision is essential. Bankruptcy affects too many people to allow it to proceed untended by an impartial supervisor.⁵⁷

The scheme of regulation of insolvency practitioners in England and Wales⁵⁸ is one of government-monitored self-regulation.⁵⁹ As early as the 1880s senior staff members of the Board of Trade in England realised that the conceptual key to bankruptcy legislation is directly related to the state's role in the administration of insolvent estates.⁶⁰ English lawmakers shared a vision that bankruptcy law is not only the concern of creditors but affects the wider society, resulting in the acceptance that bankruptcy law should be viewed as a public policy measure. When formulating recommendations on law reform the Cork Committee⁶¹ observed that "the success of any insolvency system is very largely dependent upon those who administer it"⁶² and that –

... while the method of control over the administration of bankruptcy varies from country to country, in almost all bankruptcy systems creditors were originally given the primary responsibility for administering the process. In country after country however, this had led to scandal and abuse, and exclusive control has been progressively removed from creditors and varying degrees of official control have been introduced as it has increasingly accepted that the public interest is involved in the proper administration of the Bankruptcy system.⁶³

⁵⁵ Hereafter referred to as the "US".

⁵⁶ Also referred to as the Bankruptcy Code, Code, 1978 Act or Bankruptcy Reform Act of 1978. (Pub L No 95-598, 92 Stat. 2549 (1978) 11 USC. § 101, *et seq.* which was signed into law on 1978-11-06 and became effective on 1979-10-01).

⁵⁷ HR Rep NO 95-595, 95th Cong, 1st session 88 (1977) (Congressional Statement on the passage of new US bankruptcy law in 1978). See *New Zealand Law Commission Study Paper 34*.

⁵⁸ Hereafter referred to as the "UK".

⁵⁹ Norris "Insolvency Practitioner Regulation in the United Kingdom" 2. See Fletcher *The Law of Insolvency* (2009) 26.

⁶⁰ Lester *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and the Company Winding-Up in the Nineteenth Century England* (2003) 304.

⁶¹ See report of the *Review Committee on Insolvency Law and Practice* Chairman Sir Kenneth Cork GBE Cmnd 8558 London: Her Majesty's Stationery Office 1982 (*Cork Report*) at par 732 (hereafter referred to as *Cork Report*).

⁶² See Tolmie *Corporate and Personal Insolvency Law* (2003) 208.

⁶³ *Cork Report* at par 702.



Internationally, different models to regulate insolvency law have emerged. Regulation may be undertaken by a government agency or department or public body, one or more private sector professional bodies, or a combination of government and professional bodies.⁶⁴ The different systems are nonetheless all directed to securing and assuring public confidence in the system of regulation and the process of insolvency.⁶⁵ To set the scene for the discussion of the policy considerations with regard to the role of the state, the element of public interest as a wider dimension of insolvency law would have to be more closely examined.

3.2.2 Public Interest

In attempting to formulate a workable definition of the term “public interest” relating to insolvency law, Keay states the following:

... [f]or the purpose of insolvency law, that the public interest involves taking into account interests which society has regard for and which are wider than the interests of those parties directly involved in any given insolvency situation, that is, the debtor and the creditors.⁶⁶

The South African economy can only partially be categorised as a credit-based society.⁶⁷ It boasts a complex economy, ranging from a significant section of sophisticated lenders and corporate entities making use of credit facilities on a regular basis, to the informal sector representing a large portion of the economy,⁶⁸ which has not yet been exposed to the credit environment. During the past decade the demographics of our credit market have experienced a remarkable change and significantly the groups in society to which unsecured credit has become available have also expanded.⁶⁹

⁶⁴ IMF *Orderly and Effective Insolvency Procedures* at par 5.

⁶⁵ Joyce “The Role of Insolvency Regulators in the Past and in the Future” 4.

⁶⁶ Keay “Insolvency Law: A Matter of Public Interest?” (2000) *Northern Ireland Legal Quarterly* 525 (hereafter referred to as Keay “Insolvency Law: A Matter of Public Interest”).

⁶⁷ Seekings *Class, Race and Inequality in South Africa* (2005).

⁶⁸ Saunders *Estimates of the Informal Economy in South Africa: Some Macroeconomic Policy Implications* (2005) LLD dissertation University of Johannesburg.

⁶⁹ South Africa’s credit industry – worth an estimated R500 billion and with more than 20 million customers (*The Sunday Independent* (28-05-2006)) – had also recently been overhauled with the enactment of the National Credit Act 34 of 2005 (hereafter referred to as “NCA”). The NCA, which applies only to certain written credit agreements (s 8 of NCA), became fully operative on 2007-06-01. Although the new NCA will most certainly have an impact on credit usage and expenditure it has only a limited jurisdiction. See Scholtz *et al. Guide to the National Credit Act* (2008). See also Gross “Legislative Messaging and Bankruptcy Law” (2005-2006) *University of Pittsburgh LR* 504 at 514. See also See Niemi-Kiesiläinen “Introduction” (hereafter referred to as Niemi-Kiesiläinen “Introduction”) in Niemi-Kiesiläinen *Consumer Bankruptcy in Global Perspective* (2003) 11 (hereafter referred to as Niemi-Kiesiläinen, *Consumer Bankruptcy in Global Perspective*).

There are many causes for this growth and expansion of the availability of credit. On the supply side the availability of credit cards, especially during the past decade due to the deregulation of the consumer credit market, has extended credit in the form of credit cards to consumers which include a legacy of previously disadvantaged consumers with modest exposure to a free market economy.⁷⁰ On the demand side, in the midst of a global economic slowdown resulting mainly from rising food and fuel prices, South Africa has evidently also been experiencing tightening economic conditions.⁷¹ With the rise in ordinary expenses such as medical care, food prices and education and the lack of a well developed social welfare system, incurring debt often becomes the only practical solution for consumers who would otherwise prefer a lesser debt burden.

The reality is that financially less sophisticated and previously disadvantaged debtors are increasingly being induced to make use of increased credit opportunities and are forced to function in a market-based economy without the necessary financial literacy skills.⁷² As this component, of what could be described as a vulnerable group of society, are becoming part of the credit culture, the role of the state becomes even more pertinent in protecting the public interest at large, as well as that of the individual. In broader terms it is thus submitted that the state has to be involved in the regulatory framework of insolvency law, in protecting the rights of the more vulnerable consumer.

It is also possible to narrow the underlying principle of the role of the state down to more tangible issues. In two particularly relevant articles⁷³ Keay highlights the basic issues relating to interaction between the public interest and insolvency law and states the following:

It is possible to divide instances where the public interest is a factor in insolvency law into three very broad categories. First, it is in the public interest that insolvencies are resolved in an

⁷⁰ See Martin “The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation” (2005) *Boston College International & Comparative LR* 8 (hereafter referred to as Martin “The Role of History and Culture”); Ramsay “Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in the Informational Economy” 18 (hereafter referred to as Ramsay “Consumer Credit Society”) in Niemi-Kiesiläinen, *Consumer Bankruptcy in Global Perspective*.

⁷¹ The *repo rate* rose from 7% in May 2006 to 12% in June 2008. The *prime rate* increased from 10.5% to 15.5%. In August 2009 the *repo rate* returned to 7% and the *prime interest rate* to 10.5%. See <http://www.statssa.gov.za> (last visited at 30-11-09).

⁷² Nga “An Investigative Analysis into the Saving Behaviour of Poor Households in Developing Countries: with Specific Reference to South Africa” (2007) LLM dissertation University of Western Cape.

⁷³ Keay “Insolvency Law: A Matter of Public Interest” 509; Keay “Balancing Interests in Bankruptcy Law” 2001 *Commercial Law World Review* 209 (hereafter referred to as Keay “Balancing Interests”).



orderly and expeditious way. Second, it is in the public interest to ensure that commercial morality is enforced, so as, *inter alia*, to prevent fraud and improper practices.⁷⁴

It has previously been submitted that one of the challenges that the Master faces, is the lack of specialisation within the organisation and the subsequent lack of service delivery. In addition, a large number of the functions that the Master presently performs could be characterised as “private” in nature, as the primary purpose thereof is to obtain repayment for creditors – as oppose to a “public” power which is evidently associated with a duty to act in the public interest rather than for private purposes.⁷⁵ When the decision to review the policy with regard to the nature and purpose of the regulatory authority in South African insolvency law is taken, it should be borne in mind that an organ of state⁷⁶ is capable of performing an administrative action when they exercise powers in terms of the Constitution, a provincial constitution or legislation – provided that the exercise of that power or performance of functions in terms of legislation are restricted to “public” powers or “public” functions.⁷⁷ In restricting the realm of the powers of such a regulatory body to merely powers characterised as being public in nature, not only would the broad philosophical values of the Constitution be absorbed, but moreover values such as lawfulness, reasonableness and procedural fairness would also be captured.⁷⁸

3.2.3 Orderly and Prompt Resolution of Insolvency Cases

The universal principle of insolvency law, which can be traced back to 1570,⁷⁹ is that the secured creditors are to be paid on a *pari passu* basis equally and rateably. Insolvency law represents procedures of an inherently collective nature in that each creditor forfeits the individual right to take action to enforce debt recovery, and in return must depend on the results of the collective proceedings.⁸⁰ The procedure is compulsory in order to ensure that there is a co-operative system which is orderly in nature.⁸¹ In order to optimise the outcomes and minimise the adverse effects of financial failure, it is this vital that the insolvency system operates at an optimal level. Insolvency laws and systems are increasingly being recognised

⁷⁴ Key “Insolvency Law: A Matter of Public Interest” 510.

⁷⁵ See “Insolvency Law Reform: Promoting Trust and Confidence” *New Zealand Law Commission Study Paper* 11 Wellington (2001) 33-35 (hereafter referred to as *New Zealand Law Commission Study Paper*); Hoexter 3.

⁷⁶ S 239 of the Constitution. See also Hoexter 192 as well as part IV ch 2 above.

⁷⁷ See Hoexter 9; see also part IV ch 3 above.

⁷⁸ See part IV par 3.2.3 above. See also the Promotion of Administrative Justice Act 3 of 2000 (hereafter referred to as PAJA).

⁷⁹ 13 Eliz ch 7 (1570). Key “Balancing Interests” 211.

⁸⁰ See Key “Balancing Interests” 211; Mars 29.

⁸¹ Key “Insolvency Law: A Matter of Public Interest” 511.

as a fundamental institution essential for the development of credit markets and entrepreneurship in developing countries, and in turn, those insolvency systems depend on the existence of sound and transparent institutional and regulatory frameworks.⁸²

In order to satisfy the economic imperative relating to effectiveness, an insolvency system depends not only on administrative and legislative standards, but also on the speed with which the system releases the proceeds of the assets back into the capital market.⁸³ It is thus important that any law reform is initiated with the ultimate target of creating a framework which provides not only for an effective insolvency system, but also for a support structure in order to create orderly and speedy resolutions to insolvency matters. It is interesting to note that the South African Law Reform Commission in its Explanatory Memorandum to the Draft Bill states in its report that “[e]ffective, speedy and fair procedures are important needs of stakeholders and formed the basis for this review”.⁸⁴ In his recent address the Minister states the following on the subject:

We are also alert to the fact that an efficient and effective insolvency legislative framework, with particular reference to the regulation of the insolvency industry, will contribute to releasing “frozen” money and assets back into the economy, which, in turn, can be put to good use in working for a better life for all.⁸⁵

3.2.4 Need for Commercial Morality

According to the *Cork Report*, “it is a basic objective of the law to support the maintenance of commercial morality.”⁸⁶ It is in the public interest that the community is satisfied that there has been no commercial impropriety or perpetration of fraud by the insolvent entering the bankruptcy process, or by the officers involved in a company being wound up.⁸⁷ The failure of a company manifests itself in economic terms, but it has also been recognised that insolvency law has significant implications for other social matters.⁸⁸

⁸² Joyce “The Role of Insolvency Regulators in the Past and in the Future” 2; Mistelis “Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations” (2000) *The International Lawyer* 1057 (hereafter referred to as Mistelis).

⁸³ Report on Evaluation and Synthesis (2000) presented at UNICITRAL/INSOL/ IBA Global Insolvency Colloquium session, Vienna (hereafter referred to as Report on Evaluation and Synthesis Session) on file with the author.

⁸⁴ Explanatory Memorandum 10.

⁸⁵ See Minister’s address (n 18).

⁸⁶ *Cork Report* at par 191. See also Keay “Insolvency Law: A Matter of Public Interest” 510. *Bishopsgate Investment Management Ltd v Maxwell* [1992] 1 ALL ER 856 at 876. See also *Re Thellusson* [1919] 2 KB 735 at 764.

⁸⁷ Keay “Insolvency Law: A Matter of Public Interest” 513.

⁸⁸ Gross 23.



By means of the interrogation procedures South African insolvency law provides for the investigation of the affairs of an insolvent, the officers of a company, the directors or any concerned person.⁸⁹ The Act also stipulates that if it appears from the statements made during the interrogation that there are reasonable grounds to suspect that a person has committed an offence, the Master is obliged to transmit such records to the Director of Public Prosecutions.⁹⁰ However, it is very clear that the main objective of interrogations in South African insolvency law is recognised as the acquisition of information and the recovering of assets to the benefit of creditors, and is not conducted merely to foster commercial morality.⁹¹

The World Bank consultative draft notes that:

With the increasing awareness of the important role of insolvency in wider economic policies and the increasing emphasis on promoting business rescue and reorganization, there is an increasing demand on the knowledge and skills of the office holders. That is to say, the inevitability of financial failures is no longer followed by automatic assumptions of bankruptcy/liquidation, business close down, asset break up and dissolution. That knowledge and those skills need to be evident to provide the basis of appointment as office-holder, through a framework which tests competence and provides assurance that the office-holder will act professionally and impartially to secure the optimum outcome. While there are clearly costs to be borne in maintaining a regulatory framework, these must be weighed against the benefits in providing a system that is efficient and effective and in which the public can have confidence.⁹²

Unless misconduct is identified and punished and the reasons behind financial failures promptly and effectively investigated, the integrity of the credit system and as such the financial system on which our commercial life is based would be cast in doubt. The enforcement of commercial morality is consistent with public interest, and even more so in a developing economy, based on policies such as job creation and the attraction of international investment. It is thus safe to assert that an effective insolvency regime will involve the proper enforcement of duties affecting commercial morality by an efficient administrative and regulatory regime which can diligently carry out regulatory obligations and ensure that impartial office-holders with integrity and skill are appointed to carry out the statutory duties entrusted to them.⁹³ All these functions bear directly upon the degree of trust and confidence

⁸⁹ Sections 65; 66 and 152 of the Insolvency Act and ss 415-419 of the Companies Act.

⁹⁰ Section 67 of the Insolvency Act.

⁹¹ *Gumede v Subel* NO 2006 3 SA 498 (SCA) at par 506F. See also Calitz “Sections 417 and 418 of the Companies Act 61 of 1973 – relevance prevailing over the right to privacy *Gumede v Subel* NO 2006 3 SA 498 (SCA)” (2006) *Obiter* 403.

⁹² *Principles* 55–62.

⁹³ *New Zealand Law Commission Study Paper* 36.

that the commercial community (and the community at large) will have in the proper functioning of an insolvency system.⁹⁴

Given the above, it has hopefully been established that the state has a legitimate interest in ensuring that the institution of credit, the lifeblood of any economy, is not abused. It should be clear that the role of the state is a core element of any policy decision with regard to a regulatory system and demands a serious and in-depth investigation. In short, dealing with personal insolvency is a major concern that cannot simply be outsourced to the private sector, which would quite properly be driven by the profit line in delivering its service. Having added this caveat, it is necessary to state that if the role of the state in regulating insolvency law should continue, the impetus should fall on protecting the interests of the different role-players as well as the public as a whole.

3.3 THE REGULATORY FRAMEWORK

3.3.1 Introduction

This chapter offers some observations on the context in which policies relating to the regulatory framework should be developed and implemented. Insolvency regulation consists of two principal components. First, the design and development of an insolvency regulatory body within the South African insolvency law environment, as well as the techniques and methods it employs will be discussed, and, secondly, the independent qualifications and standards of those who are appointed to administer particular insolvency cases will receive attention.⁹⁵ The deliberation on the future role of the Master as well as the regulatory measures pertaining to the insolvency industry should be viewed as an opportunity to align the supervisory and regulatory aspects of South African insolvency law with international norms and standards as well as to maintain the integrity of and public confidence in the system.

⁹⁴ *New Zealand Law Commission Study Paper 37*. The office of the Master of the High Court is created in s 2(1) of the Administration of Estates Act 66 of 1965. See part V above.

⁹⁵ World Bank Regulatory Working Group “Insolvency Law and the Regulatory Framework” (2000) paper delivered at the Symposium, Washington DC (hereafter referred to as Regulatory Working Group “Insolvency Law and the Regulatory Framework” or the document prepared by the Working Group) available at <http://web.worldbank.org> (last visited on 09-11-30).



The following caution by Westbrook is extremely relevant in this context:

The choices made in reforming an insolvency law must be closely linked to the capacities (and institutional prejudices) of existing institutions or institutional reform must accompany legal reform.⁹⁶

3.3.2 The Regulatory Body

“It is now a truism to affirm that in all lawmaking a gap opens between on the books and law in action”.⁹⁷ It is precisely this gap that should represent a central focus theme in the development of policy with regard to the regulatory framework in the South African insolvency law. It is increasingly recognised by scholars that the effectiveness of any insolvency law relies heavily on the institutions of implementation.⁹⁸ The principal decision to be taken in the design and implementation of a regulatory regime concerns whether the Master as supervisory body should continue to exist (albeit in a revised shape), or whether a complete and independent regulatory agency should be introduced into our insolvency law.⁹⁹

The positive aspect of persisting with the Master as regulatory authority is that the centuries-old institution will remain “as is”, and no institutional or legislative changes will have to be considered.¹⁰⁰ Henning makes a very relevant statement when he mentions that law reform should take place for the right reason. He relates the story that business entity reform in South Africa was a response to the economic and political situation in the nation.¹⁰¹ It is submitted that the ultimate criterion should be whether it is possible for the Master to emerge as an efficient and effective institution capable of instilling commercial trust.

The remaining option entails establishing and implementing a new independent and complete regulatory agency responsible for overseeing and implementing the regulatory procedures in our insolvency law. The international profile of a regulatory body ranges from a government

⁹⁶ Westbrook “The Globalisation of Insolvency Reform” (1999) *New Zealand LR* 401 (hereafter referred to as Westbrook).

⁹⁷ Halliday “Lawmaking and Institution Building” 17.

⁹⁸ Ngok “Law-making and China’s Market Transition Legislative Activism at the Eighth National People’s Congress” in Pistor *et al Problems of Post-communism* (2002).

⁹⁹ Halliday “Lawmaking and Institution Building” 17.

¹⁰⁰ See part V above.

¹⁰¹ See Vestal “Business Law Reform in South Africa: The Right Path, The Right Reason” (2002) *Kentucky LJ* 829 (hereafter referred to as Vestal). See also Henning “Reforming Business Entity Law to Stimulate Economic Growth among the Marginalized: The Modern South African Experience” 2003 *Kentucky LJ* 91 (hereafter referred to as Henning).

department or agency to a professional body or a combination of the two. Against this background, the following statement by Halliday is significant:

... the implementation and institution building are as important as – indeed arguably more consequential than – formal lawmaking. It is a dangerous illusion that the legal framework and institutions of an effective insolvency system can be done cheaply. Effective bankruptcy systems require the careful design, infrastructural expenditure, and political will comparable to major infrastructural projects in transportation or energy or defence. This is especially so in circumstances where there is rapid economic development and social dislocation in a society that had previously invested little in legal institutions. Failure of government to act boldly and decisively can lead not only to incapacity but instability in society and ultimately the market.¹⁰²

During various discussions on different forms of regulation the option of self-regulation has been mentioned.¹⁰³ The term “public regulation” describes the more traditionally oriented regulatory system whereby a public authority being the all – embracing regulator, is responsible for setting the relevant legislation and subsequent rules and regulations, and also monitors the compliance by enforcing certain imposed sanctions. The advantages of such a public regulatory system is that one of the basic attributes of democratic sovereignty is that regulation is established and facilitated by democratically appointed authorities, and for this reason public regulation will as a rule not be challenged in terms of its authority to express the general public interests.¹⁰⁴ The public regulatory system also appears to be the more appropriate way to ensure the effective implementation of public policy.¹⁰⁵

The system of “self-regulation” is situated at the other end of the regulatory scale.¹⁰⁶ According to this system the stakeholders within the industry will draw up their own regulations in order to achieve certain goals and objectives and alternatively may also be laid down by a self-regulatory organisation created by the parties concerned. The advantages of a self-regulatory system is not only that the industry itself is perceived as more experienced and better placed to evaluate the risks and challenges within a certain industry, but it is perceived that interested parties within the industry may react more positively to their “own” rules than those imposed by a public authority.

¹⁰² Halliday “Lawmaking and Institution Building” 34.

¹⁰³ See various options explained in Minister’s address (n 18).

¹⁰⁴ Palzer *Self-Regulation, Co-Regulation, Public-Regulation* (2003) unpublished paper presented at workshop on “Co-Regulation of the Media in Europe” (hereafter referred to as Palzer) available at http://www.obs.coe.int/oea_publ/iris_special/2003.html (last visited at 09-11-30).

¹⁰⁵ Palzer 2.

¹⁰⁶ Palzer 3.



Another option is to develop a system of co-regulation which combines elements of self-regulation as well as the traditional public authority regulation to form a new and self-contained regulatory system.¹⁰⁷ This scheme combines elements of self-regulation and the traditional public regulation and the detail of the regulatory aspects and framework would depend on the various objectives as well as tasks to be performed. Within the South African context it would be apparent that in such a scheme the state or competent regulatory authority would indeed play a significant role. A key element would thus be that the state would be responsible for setting a legal framework and monitoring the functions of the system. Hence, the achievement of public policy goals would not be relinquished to societal control entirely and the responsibility for the implementation thereof remains with the state.¹⁰⁸ The degree of autonomy of the self-regulatory bodies as well as the influence over policy and rule making could be incorporated represents some of the key elements open for discussion and debate.

Any institutional reform initiative will however have to take cognisance of several challenges which could be encountered along the way. Apart from the costs implication and other resource constraints, issues such as institutional capacity, social, cultural and historical factors and political economy aspects may also feature.¹⁰⁹ Thus, as a result of the sheer gravity of introducing such institutional change it becomes even more important to introduce an initial policy process in order to conduct a realistic appraisal of the project, identify those factors that could influence policy outcomes and develop a policy containing clear and consistent objectives.¹¹⁰ In rethinking the structure of the regulatory system in our insolvency law, policy- and lawmakers will have the opportunity to reform the process and to develop a streamlined and effective system in line with international standards and guidelines.

3.3.3 Regulation of the Insolvency Profession

The term used in South Africa as well as a number of international jurisdictions to refer to the person in charge of the administration on an insolvent estate is “trustee”¹¹¹ or “trustee in bankruptcy”.¹¹² Terminologically this is an interesting choice of words which immediately

¹⁰⁷ Palzer 6.

¹⁰⁸ Palzer 7.

¹⁰⁹ Richter *Insolvency Law and Economic Development in Central and Eastern European Transition Countries* (2008) unpublished paper presented The Law and Society Association, Canada, on file with the author.

¹¹⁰ Ball *Security Sector Governance in Africa* par 4.6.1.

¹¹¹ The Draft Insolvency Bill (n 17) suggests that the generic term “liquidator” be used.

¹¹² Milman 67.

conjugates up fiduciary connotations. Although the subject of agency would fall outside the scope of this study, those who administer insolvencies – whether by appointment by creditors, by the court or by a government department or public or statutory authority – are given functions and powers in relation to the debtor and the debtor’s assets under the authority of legislation.¹¹³ The assets and funds are not the property of the office-holder and he has a special duty to protect them. The nature of the appointment of an office-holder responsible for the administration of an insolvent estate therefore closely resembles that of the institution of stewardship and the legal principles associated with such responsibility.¹¹⁴

From time to time the suggestion that insolvency practitioners should be regarded as “officers of the court” has been made.¹¹⁵ With regard to the practitioners’ legal position as to subsequent ethical standards, Mars asserts that an insolvency practitioner is not an officer of the court but does however occupy a position of trust not only towards the creditors but also towards the insolvent himself.¹¹⁶ Meskin also concurs that it is doubtful whether an “officer of the court” is an appropriate designation in relation to the legal position of an insolvency practitioner, and in turn maintains that the trustee does however stand in a fiduciary relationship towards the insolvent and creditors.¹¹⁷ Hence this essentially entails that he should act honestly and with good faith on all his dealings.¹¹⁸

Following the English tradition most common law jurisdictions consecutively considers an office-holder to be an officer of the court.¹¹⁹ In addition it is also a determined common law principle that equity and impartiality imposes much more onerous duties on a fiduciary than would be the case if the relationship was solely governed by the common law principles.¹²⁰ The basic premise is that there can be no conflict between a person’s duty as a fiduciary and

¹¹³ Milman 65.

¹¹⁴ Milman 81.

¹¹⁵ See Minister’s address (n 18). See also Burdette “Reform, Regulation and Transformation” 8.

¹¹⁶ Mars 293.

¹¹⁷ Meskin par 4.20. See also *Thorne v Receiver of Revenue* 1976 2 SA 50 (C); *Hobson v Abib* 1981 1 SA 556 (N); *S v Reyneke* 1972 4 SA 366 (T).

¹¹⁸ See Meskin par 4.20.

¹¹⁹ See Finch *Corporate Insolvency Law: Perspectives and Principles* (2002) 378. See also Insolvency Act 1986 ss 117(5); 400(2) and Schedule B1.

¹²⁰ The common law heritage is also to be found reflected in the curious rule of professional ethics laid down in *Ex Parte James* (1874) LR 9 Ch App 609 and confirmed in: *Re Carnac, Ex Parte Simmonds* (1885) 16 QBD 308.



his private interests. The purpose of this rule is to ensure that fiduciary duties are not influenced by private considerations.¹²¹

The Cork Committee also recognised that trustees in bankruptcy occupy a fiduciary position *vis-à-vis* the estate.¹²² This obligation of stewardship is a common facet of English law where one person has been selected to oversee the assets of another. Clearly one outcome of this status is that a trustee should not profit from handling the estate assets over and above their agreed remuneration. As the court is responsible for the appointment of trustees in bankruptcy this additionally renders them officers of the court.¹²³ As such they become subject to the duty to act honourably as laid down by the court in *Ex Parte James*.¹²⁴ The principle was laid down as follows:

I am of the opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given to him by the court and the Court regards him as its officer and he is to hold money in his hands upon trust for its equitable distribution among creditors. The court then finding that he has in his hands money which belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.¹²⁵

A further common law principle associated with the ethical standards of a trustee comprises of the court's dim view on a trustee who allows his position to be compromised by aligning himself too closely with a particular creditor.¹²⁶ In the English case of *Re Ng*¹²⁷ this point was emphasised when it was stated that: “[a] trustee in bankruptcy is not vested with powers and privileges of his office so as to enable himself to accept engagement as a hired gun”.¹²⁸

¹²¹ See Meike “Fiduciary Duties and Office Holders Remuneration” *Insolvency Law Forum* available at <http://www.insolvencylawforum.co.uk/> (last visited at 09-11-30).

¹²² Cork Report par 781.

¹²³ Milman 68.

¹²⁴ See (n 104).

¹²⁵ *Ex Parte James* (n 104) at 614. See Milman 69. The Supreme Court of the United States stated in *Ex Parte Garland* 71 US 333 (1866) that “Attorneys and counsellors are not officers of the United States; they are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character.” However, it was held in *Cammer v United States*, 350 US 399 (1956) that, for the purposes of 18 USC par 401(2), lawyers are not court “officers” in the same class as marshals, bailiffs, court clerks or judges.

¹²⁶ Milman 70.

¹²⁷ [1997] BCC 507.

¹²⁸ *Re Ng* (n 72) at 509.

Within a South African context Stander¹²⁹ holds the view that the trustee is not merely an agent of the creditors and subsequently refers to the case of *Gilbert v Bekker*¹³⁰ where the trustee had been regarded as merely the holder of an office and was regarded as a statutory officer *per se*.¹³¹ Stander is thus of the opinion that the trustee is a statutory officer acting in a fiduciary position, and continues to mention that in the South African insolvency law the trustee is in fact regarded as owner of the assets of the estate, although this situation finds no support in the Roman and Roman Dutch law.¹³²

Hence, it is submitted that although it has from time to time incorrectly been stated that an insolvency practitioner occupies the position of an officer of the court,¹³³ it is evident that the concerns relating to the ethical standards of practitioners could partly be resolved by means of a mechanism whereby practitioners are considered to be officers of the court.¹³⁴ The policy assessment in this regard would however have to be combined with the consideration on whether the courts ought to be responsible for the appointment of insolvency practitioners – consequentially rendering the practitioner an officer of the court.¹³⁵

There appears to be a definite need within the insolvency profession to protect its reputation and raise standards to an international level.¹³⁶ The question posed for policymakers is simply what is seen to be required of those who administer cases under a formal insolvency procedure. In 2000 the “Regulatory Working Group” of the World Bank produced a paper which focused on the importance of having independent qualifications standards for insolvency office-holders, which also emphasised the need for effective and periodic training programmes and considered the design and development of a regulatory body, techniques,

¹²⁹ See Stander *Die Invloed van Sekwestrasie op Onuitgevoerde Kontrakte* (1994) LLD dissertation Potchefstroom University for Christian Higher Education at 31 and further (hereafter referred to as Stander). See also Evans *A Critical Analysis of Problem Areas in respect of Assets of Insolvent Estates of Individuals* (2009) LLD dissertation University of Pretoria at 324 (n 43) (hereafter referred to as Evans).

¹³⁰ 1984 3 SA 774 (W).

¹³¹ *Gilbert v Bekker* (n 130) at 781E. See Mars 293.

¹³² Stander at 42.

¹³³ See *Shokkos v Lampert* 1963 3 SA 421 (W); Smith *Law of Insolvency* (1988) at 185-186 also describes the position of the trustee as an officer of the court. In the article of Cilliers “The development and significance of the title ‘officer of the court’” (1995) *THRHR* 603 (hereafter referred to as Cilliers) it had been suggested that the term “officer of the court” has over time been watered down to such an extent that it no longer has any legal significance. See also *Receiver of Revenue Port Elizabeth v Jeeva and Others, De Klerck and Others v Jeeva and Others* 1996 (2) SA 573 (SCA) at 584; Mars 239 at (n 2).

¹³⁴ *Gluckman v Wylde* 1933 EDL 322; *Rulten NO v Herald Industries (Pty) Ltd* 1982 3 SA 600 (D) at 609A-C. See Mars 293 at (n 4).

¹³⁵ See Cilliers 612.

¹³⁶ AIPSA Newsletter (March 2008). See Halliday “Lawmaking and Institution Building” 18.



methods, and benefits to be obtained from regulated procedures.¹³⁷ The document prepared by the Working Group had been expressed very largely in terms of “requirements” for an effective regulatory framework based on the experiences of a number of developed countries’ systems, and included certain key principles and recommendations.¹³⁸ The Minister in his mentioned address states the following on the subject:

There is an urgent need to lay down qualifications for insolvency practitioners. A balance must be struck between qualifications which will ensure that only capable and suitable persons qualify to be insolvency practitioners, on the one hand, and setting the bar too high, on the other. Based on international common practice there are various proposals with regard to the qualification of insolvency practitioners.¹³⁹

The context in which any policy is developed and implemented is critical. Key aspects of the South African context would include not only laying down standard entry qualification for insolvency practitioners, but also to introduce measures to ensure ongoing skills transfer and development. It is submitted that by introducing a scheme similar to the “Continuing Professional Development”.¹⁴⁰ Not only could such a CPD programme, assists with the updating of professional knowledge and the improvement of professional competence, but could also be developed as a skills transfer mechanism.

The core principle identified was that a regulatory framework should provide assurance as to the level of competence of those responsible for administering insolvencies. This was necessary to ensure the efficiency, effectiveness and integrity of and confidence in the insolvency system. To achieve this –

Office Holders will need to be:

- Competent, demonstrating by qualification and/or experience their knowledge and practical understanding of insolvency and related legislation and practice and related issues.
- Independent
- Insured/bonded against loss
- Knowledgeable about what is required in relation to individual cases
- Diligent, meticulous and scrupulous in carrying out their work.¹⁴¹

¹³⁷ World Bank Regulatory Working Group “Insolvency Law and the Regulatory Framework” Introduction.

¹³⁸ See introduction to Regulatory Working Group “Insolvency Law and the Regulatory Framework”.

¹³⁹ See Minister’s address (n 18).

¹⁴⁰ Hereafter referred to as “CPD”. According to the *SAICA Continuing Professional Development (CPD) Policy* (updated November 2008) available at <https://www.saica.co.za/> (last visited at 09-11-30) “CPD” is defined as:

CPD can be defined as the holistic commitment to structured skills enhancement and personal or professional competence and is the means by which members of professional associations maintain, improve and broaden their knowledge and skills and develop the personal qualities required in their professional lives.

¹⁴¹ Regulatory Working Group “Insolvency Law and the Regulatory Framework” Annex A.

Internationally, the various regulatory models available are briefly the following:¹⁴²

- 1 Voluntary accreditation – Under a voluntary accreditation scheme an agency would be empowered by statute to certify that accredited individuals have satisfied particular requirements for demonstrating competence in the field of insolvency law. Other persons may practise as office-holders, but may not use specified titles or imply in any way that they are certified practitioners. Voluntary accreditation would have the benefit of providing information about a person’s skills and qualifications, but since accreditation is done on a voluntary basis, this option would not exclude a person with insufficient skills and experience from the profession.
- 2 Mandatory licensing – Mandatory licensing scheme regimes typically prohibit all but a licensed person from undertaking certain functions. The granting of a licence is usually dependent on a person meeting and maintaining certain prescribed standards. This type of regulation is not a novel idea in South Africa, as the Law Society of South Africa¹⁴³ and the South African Institute of Chartered Accountants¹⁴⁴ have a similar approach. The Law Society of South Africa is entirely self-regulatory, with oversight being provided by the High Court. It should however be noted that both the Law Society of South Africa and the South African Institute of Chartered Accountants consist of thousands of members, which makes the system considerably more cost-effective to operate.¹⁴⁵

The stumbling block associated with such a licence-based system is its lack of flexibility. Such a “one size fits all” scheme would find it very difficult to incorporate the unique South African socio-economic conditions. The substance of the regulatory criteria would have to be very clear on issues regarding minimum qualifications, admission requirements, practical experience and disqualification procedures.

- 3 Competitive licensing – This is a variant on the government-run licensing model described above. In essence, this approach would require all persons carrying out

¹⁴² The models are discussed in “Regulation of Insolvency Practitioners” Cabinet Paper, New Zealand, (2008) (hereafter referred to as Report “Regulation of Insolvency Practitioners”) on file with the author. See also *New Zealand Law Commission Study Paper* 150.

¹⁴³ Hereafter referred to as “LSSA”.

¹⁴⁴ Hereafter referred to as “SAICA”.

¹⁴⁵ Burdette “Reform, Regulation and Transformation” 8.



insolvency processes to be members of an approved professional organisation. An overseeing body would have to be satisfied that a professional body seeking approval has the necessary infrastructure to ensure that regulatory standards and requirements are maintained. The advantage of such a scheme is that it would be less rigid and more cost-effective than the mandatory scheme.

The shortcoming of this scheme is the lack in choice of existing professional associations. The only recognised member organisations are the Association of Insolvency Practitioners of Southern Africa¹⁴⁶ and the Association for the Advancement of Black Insolvency Practitioners.¹⁴⁷ Other professional organisations include the LSSA or the SAICA. However, neither of these bodies has the required insolvency-specific systems in place to deal with such industry-specific challenges.

An inherent risk in both systems, namely the mandatory and competitive licensing schemes, is that such systems would be restricted to persons who comply with certain pre-existing requirements, which could lead to the forced exit of experienced practitioners who do not meet the criteria.

- 4 Negative licensing – Negative licensing involves the exclusions or suspension of some incompetent or delinquent practitioners from operating as insolvency practitioners. To an extent the Master already employs a negative licensing system in that incompetent or delinquent practitioners can be prevented from taking appointments. The Insolvency Act and the Companies Act already contains sophisticated provisions that allow for the removal of insolvency practitioners by the Master and / or the court in defined circumstances.¹⁴⁸

After the design and development of the regulatory body as well as the entry level requirements of those administering insolvencies have been considered, the interaction between these two components would have to be contemplated. There is a very delicate balance between creating a complex, inefficient and unsustainable bureaucracy, and developing an infrastructure in which the public and business communities on a national and

¹⁴⁶ Hereafter referred to as “AIPSA”.

¹⁴⁷ Hereafter referred to as “AABIP”.

¹⁴⁸ Burdette “Reform, Regulation and Transformation” 9.

international and level can have trust and confidence.¹⁴⁹ The call for oversight is likely to escalate where the office-holder is not appropriately qualified and does not have the skills and expertise to undertake the relevant insolvency work. This risk is however very significantly reduced through the existence of an effective system of oversight and regulation.

To summarise, regulatory frameworks in insolvency law have been developed in different ways in different jurisdictions, reflecting the divergence in history, tradition and culture.¹⁵⁰ Internationally, different regulatory and institutional models have emerged in order to provide the necessary checks and balances against the abuse of an insolvency system.¹⁵¹ At first glance some of the policy considerations mentioned seems obvious to the point of triteness, which begs the question why they have not yet been implemented. A closer examination, however, reveals a process constantly hampered by complex institutional relationships.¹⁵² In following a policy-driven approach, it would be possible to identify possible factors that could influence policy outcomes and prepare an appropriate response. In brief, there is no single regulatory model or guideline applicable, but policymakers should nevertheless endeavour to create a policy framework, based on the unique South African socio-economic environment which at the same time will safeguard public interest and foster international and local confidence.¹⁵³

3.4 INSTITUTIONAL FRAMEWORK

South Africa does not have specialised insolvency courts as part of the general court structure. The High Court in general deals with insolvency matters.¹⁵⁴ The role of the courts is mainly limited to the granting of orders which commence insolvency or winding-up proceedings and they are not generally involved in routine matters or the day-to-day administration process.¹⁵⁵ There are also existing provisions providing for certain administrative actions and decisions to be taken on review and appeal and thus further expanding the courts' role of dispute

¹⁴⁹ Keay "Balancing Interests".

¹⁵⁰ Martin "The Role of History and Culture" 1.

¹⁵¹ Cf Wessels *Cross-Border Insolvency Law – International Instruments and Commentary* (2007).

¹⁵² Ball *Security Sector Governance in Africa* ch 4.

¹⁵³ Joyce "The Role of Insolvency Regulators in the Past and in the Future" 4.

¹⁵⁴ The High Court in the main commercial centre, Johannesburg, has a commercial court which deals occasionally with cases involving insolvency. The courts have authority in the case of the winding-up of companies to give directions regarding the administration of the winding-up.

¹⁵⁵ In the case of individuals, the court issues rehabilitation orders (the procedure to discharge the insolvent debtor from insolvency) if the debtor does not wait for "automatic" rehabilitation after ten years.



resolution and the determination of legal issues.¹⁵⁶ Thus apart from its adjudicatory role the courts do not play any active role in the process of administering an insolvent estate.

There has been a clear move in common law countries to transfer functions from the courts to the agency or authority with insolvency responsibility to eliminate the costs and the almost inevitable delay of court proceedings.¹⁵⁷ In England and Wales a good example is the applications for the proposed debt relief orders which have to be submitted to the Insolvency Service's official receivers.¹⁵⁸ Further factors affecting a shift in this area have been the increasing worldwide introduction of some form of registration or licensing of insolvency office-holders, which has removed the perceived need for the court to exercise a detailed control over case management.¹⁵⁹

During the late nineties a high-level Commission of Inquiry, the Hoexter Commission,¹⁶⁰ rejected proposals for specialised insolvency courts in South Africa. The Commission's findings were as follows:

In the opinion of the Commission the principles governing the law of insolvency are neither so inaccessible to the ordinary practitioner or Judge nor so difficult to grasp as to be intelligible only to the initiated. It is not in the view of the Commission the type of work which requires highly specialized training and in litigation insolvency matters do not require an individual treatment insulated from the general body of litigation. Apart from the fact that it regards such treatment as unnecessary the Commission is opposed in principle to the notion that the adjudication of insolvency matters should be the exclusive preserve of a specialist court. The temptation to create specialized niche areas of the law is an unhealthy one and should be resisted.¹⁶¹

In contrast, the World Bank in its *Principles and Guidelines for Effective Insolvency and Creditor Rights System*¹⁶² states the following:

Given the specialized nature of enterprise insolvency and the issues that arise in bankruptcy proceedings there is a significant value in having independent, specialized commercial and bankruptcy courts or specialized insolvency judges within general jurisdiction courts. The insolvency process is highly complex and demands a specific understanding of and familiarity

¹⁵⁶ See part IV above.

¹⁵⁷ Johnson 73.

¹⁵⁸ Debt Relief Orders (hereafter referred to as DROs) were also introduced by the Tribunals, Courts and Enforcement Act 2007 and appear at s 108 of this Act read with schedule 17 onwards.

¹⁵⁹ Johnson 73.

¹⁶⁰ Third and final report of the *Commission of Inquiry into the Rationalization of the Provincial and Local Divisions of the Supreme Court* Report number RP 201/97 Pretoria: Government Printing Works 1997 vol 1 Book 2 Part 3 (hereafter referred to as the *Hoexter Report*).

¹⁶¹ *Hoexter Report* 98.

¹⁶² See (n 48).

with financial and business arrangements and with commerce and finance standards and practices.¹⁶³

From the above statements it is clear that the Hoexter Commission was of the opinion that neither should a specialist insolvency court be established, nor should any specialisation of the judiciary be introduced into the current court system. During the past decade not only has the South African legal as well as commercial landscape changed dramatically, but the conception of a modern insolvency legal regime has changed as well. The Commission's findings are based on a review which occurred in 1997, and the current global emphasis on the strategic importance of institutional design and infrastructure could perhaps in future result in a different outcome. In light of the need to ensure efficiency and the proper exercise of discretion, a number of countries have established specialised courts, in the form of either bankruptcy courts or commercial courts.¹⁶⁴ A well-functioning and effective insolvency system requires that the insolvency law be supported by an effective infrastructure.¹⁶⁵ The policy consideration with regard to the role of the courts in South African insolvency law would entail whether to introduce specialisation in our courts, either by means of specialised insolvency courts, or alternatively *via* a system of judicial specialisation in our law.

When considering the introduction of specialised insolvency courts into our legal system it should be noted that the integration of the insolvency system into the general law is important to ensure that the two complement and reinforce one another.¹⁶⁶ One of the main advantages of having a specialised court of insolvency is the transparency and consistency that this development would bring about, which in turn is a vital element in fostering trust and confidence in the system.¹⁶⁷ The negative aspect to this option would be the costs involved in developing and maintaining such a court and the lack of resources available. It should be mentioned that even in well-established systems such as the English bankruptcy system, there have often been calls for the establishment of a specialist court comprising of both the High Court and county court jurisdictions.¹⁶⁸

The alternative to establishing a specialised insolvency court would be for the court to be structured in such a way that it provides for experience in the area of insolvency law, which would suggest specialisation within the judiciary. The advantage of this option would be that it would encourage efficient and timely adjudication of cases as well as reinforcing the predictability in the system through consistent and uniform interpretation and application of

¹⁶³ *Principles* at par 200.

¹⁶⁴ IMF *Orderly and Effective Insolvency Procedures* par 5.

¹⁶⁵ UNCITRAL *Legislative Guide*.

¹⁶⁶ Johnson 69.

¹⁶⁷ IMF *Orderly and Effective Insolvency Procedures* par 5.

¹⁶⁸ The *Cork Report* paras 1772-1773 recommended this innovation. See also Milman 156.



the law.¹⁶⁹ This option would also be in line with the World Bank's recommendation as indicated in its *Principles*:

The caseload in many countries may not justify the additional expense of creating an independent insolvency court system. Where this is not possible the optimal approach is to have a pool of judges trained in insolvency who are equipped to deal with the real time litigation demands of insolvency proceedings which likewise should be governed by independent rules and procedures designed accommodate the unique needs of insolvency.¹⁷⁰

An important limitation on the success of legal and judicial reform within any developing economy is the simple fact that material and human resources are limited. From a practical point of view the question should be to what extent should judicial reform be prioritised while resources are scarce? It is therefore important to consider the role of judicial reform as well as the necessary institutional reform priorities as part of a larger reform strategy. This argument had been reiterated by the Deputy Minister of Justice in his recent address:

However, bearing in mind that we are also in the midst of rationalising our court structures and the judiciary and bearing in mind our capacity constraints, the possibility of creating bankruptcy courts might be a longer term vision.¹⁷¹

3.5 LEGAL FRAMEWORK

At this point, it is appropriate to repeat the statement that the aim and purpose of this study is to focus on the general principles regarding the development of a regulatory framework within South African insolvency law, and that the practical implementation and drafting of a complete legal framework falls outside the scope of this work. Having said that, it is important to emphasise the need to integrate and harmonise the proposals on law reform with regard to the regulatory aspects of our law, within the broader legal framework of our insolvency law, as well as our general commercial law. The integration of the regulatory principles into general insolvency law is important to assure that they complement and reinforce one other.

Policymakers must make policy choices with respect to a number of *substantive* issues. The policy considerations with regard to the legal framework firstly entail the option to incorporate the suggested regulatory proposals by the strengthening of existing statutory

¹⁶⁹ Johnson 74.

¹⁷⁰ *Principles* at par 201.

¹⁷¹ See Minister's address (n 18).

measures. New provisions and even the introduction of secondary or subordinate legislation could be introduced into the present system. The implementation of this policy design option will be cost-effective and less time-consuming to implement. The challenge would however lie in the integration of any new policy objectives into the existing philosophy entrenched in our insolvency law.

It is submitted that if a complete review of our regulatory regime is to be undertaken, substantive reform of key areas of our insolvency law, which actively address the underlying policy problems, would have to be undertaken. This policy consideration would entail a complete overhaul of our insolvency legislation. This option would provide law- and policymakers with the opportunity to introduce a philosophical change into our system, consistent with and complementary to the legal and social values of the society in which it is rooted, and whose value system it must ultimately sustain.¹⁷² A commitment to introduce a new legal framework would support the need for long-term policy determinations rather than short-term remedies.¹⁷³

Notwithstanding the variety of substantive issues that must be resolved, insolvency laws are highly procedural in nature. The design of the procedural rules plays a critical role, and perhaps the most critical procedural issue relates to the identification of the decision-maker.¹⁷⁴ To the extent that the law confers considerable responsibility upon the institutional infrastructure to make key decisions, it is critical that this infrastructure be sufficiently developed.¹⁷⁵ It is submitted that any resistance to and scepticism about a fresh approach to insolvency law reform highlight the persistent myths and stereotypes which impede the development of effective and responsive legal strategies in the law reform arena.¹⁷⁶ As correctly stated in the literature, “legislation on insolvency is a crossroads where all the elements of the legal system in question meet”.¹⁷⁷

¹⁷² See Evans 1-14.

¹⁷³ Johnson 74.

¹⁷⁴ IMF *Orderly and Effective Insolvency Procedures* par 2.

¹⁷⁵ IMF *Orderly and Effective Insolvency Procedures* par 5.

¹⁷⁶ Hunter *Changing Law: Rights, Regulation and Reconciliation* (2005).

¹⁷⁷ Braun “German Insolvency Act: The Special Provisions of Consumer Insolvency Proceedings and Discharge of Residual Debts” (2006) *German LJ* 59 at 60.



CHAPTER 4: CONCLUSIONS

Any insolvency law reform initiative will have to take cognisance of the fact that insolvency law is a dynamic branch of the law that impacts on a vast variety of interests that need to be regularly re-evaluated in light of changing conditions. In time, within any commercial landscape certain policies and basic principles become absolute and eventually cosmetic measures are no longer sufficient.¹⁷⁸ In order to implement changes to our existing regulatory framework which would best serve the South African society, as well as generate international trust and confidence, certain important policy considerations would have to be critically assessed and analysed.

With regard to the development of a regulatory framework, policymakers will initially have to grapple with the nature of the role of the state in our insolvency law and in particular the progression of the role of the state as protector of the public interest. There is a dual policy consideration involved – namely, whether the state should be involved in any way in the regulation of insolvency law, and, if so, then to what extent it should be involved. The key consideration would be to acknowledge that South Africa as an emerging market has had less exposure to international financial practices, and has a legacy of previously disadvantaged consumers with modest exposure to a free-market economy.¹⁷⁹ This makes it imperative to better understand the role and function of insolvency systems in today's global markets and to develop solutions adapted to the needs of emerging markets.¹⁸⁰ Another consideration would be the following: there is a wider government and public (society) interest in insolvency because it involves financial loss. There is thus an interest in seeing that economic, as well as potential social damage is limited and resources are efficiently re-allocated to more productive use.

A further question that arises in relation to the state as role-player in our insolvency law is the extent of this involvement and the character and nature of such regulatory institution. The current role of the Master has to be evaluated and policy decisions about the future of the Master as supervisory institution in our insolvency law, or the development of a complete

¹⁷⁸ IMF *Orderly and Effective Insolvency Procedures* par 2-5.

¹⁷⁹ Martin "The Role of History and Culture" 8.

¹⁸⁰ Johnson – Comment and Discussion – Brookings-Wharton Papers on Financial Services 2001 Brookings-Wharton Papers on Financial Services 2001 (2001) 330-342.

new regulatory agency or institution, will have to be considered. There is of course no single set of “best practices” applicable to every institutional programme, and each programme should be designed in light of each country’s social, cultural and political characteristics.¹⁸¹

A second aspect to consider as part of the regulatory structure is the regulation of the office-holder responsible for the administration of the insolvent estate. The policy consideration with regard to the regulation of the insolvency industry involves implementing an acceptable regulatory model incorporating both local government policies as well as internationally recognised principles. By embracing accepted international standards and principles the regulation of the industry could considerably reduce the level of government involvement and ensure the credibility of the system both locally and internationally.

With regard to the assessment of economic and commercial issues, it is necessary to ensure that insolvency law is applied with predictability. With regard to our institutional framework, policymakers would have to consider whether to introduce a specialist insolvency court or, alternatively, introduce judicial specialisation in our law. A similar set of hard choices arises when we consider the interdependence of legal rules and institutions. In building an effective and efficient regulatory framework it is crucial that any institutional design should be accompanied by a sound legal framework.¹⁸² Policy-makers and legislatures will have to decide whether the proposed regulatory model agreed on could be implemented either by maintaining the existing legislation accompanied by certain minor adjustments, or by introducing a complete overhaul of the legislation which underpins our insolvency law.¹⁸³ Even if partial reform does have some counterproductive and adverse effects on the practical implementation of a regulatory reform proposal, these problems could be viewed as short-term if the initial reform efforts are followed by more extensive efforts at a later stage.

As discussed above, there are a number of factors which policy- and lawmakers need to consider in order to build an effective and efficient regulatory framework for South African insolvency law. Designing the appropriate model will involve compromises between and among certain competing policy objectives. The challenge facing the architects of a new regulatory framework would be to design a simple and predictable system, which would be an

¹⁸¹ Regulatory Working Group “Insolvency Law and the Regulatory Framework” 4.

¹⁸² Johnson 72.

¹⁸³ Evans 430.



accurate reflection of the present South African economic and social environment while at the same time safeguard public interest and foster international and local confidence. Finally, it is submitted that the reworking of any area of our insolvency law, and more specifically the regulation of insolvency law, should be done against the background of a well-managed policy based process and generally accepted social and economic goals, and not a combination of academic ideology and private advantage.¹⁸⁴

¹⁸⁴ Vestal 829.

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PART VII

RECOMMENDATIONS AND CONCLUDING SUMMARY

SUMMARY

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CHAPTER 1: INTRODUCTION

Bankruptcy law and regimes are always nested in other institutions. While it is convenient for scholars and norm makers to isolate bankruptcy law as if it were purely technical, policy makers know that its effects can ramify to the most fundamental social and political issues in a country.¹

Based on the most important conclusions resulting from the research conducted in this study, the present chapter puts forward proposals for a new regulatory paradigm and its constituent elements.² Derived from the studies undertaken in the preceding sections, this part of the study would thus be devoted to those practical and material conditions and requirements that are considered to be instrumental to the establishment of the kind of institutional mechanisms which would result in a more effective and better functioning insolvency practice. Using certain policy considerations, this chapter presents a series of intermediate and long-term recommendations that could improve and reform the regulatory structure of South African insolvency law. The recommendations are not intended to be exhaustive, nor do they attempt to set out the entire groundwork for this field of insolvency law. The main objective is to propose and highlight certain vital design features which would complement and hopefully contribute to any future policy design and law reform in this field of law.

Before embarking on a discussion of proposals for the development of a regulatory framework within the South African insolvency regime, it is necessary to make a few remarks regarding the subject of law reform. When standing before a blank canvas with the opportunity to create a new discipline in a specific field of law, anyone will be inspired by the freedom and opportunity, and will probably attempt to create an original masterpiece. Now that the global norms and standards have been clearly articulated by the United Nations Commission on International Trade Law³ and the World Bank, it should become a priority to examine ways of adapting them to a South African context.⁴ In order to achieve these objectives, policy- and lawmakers will have to take account of global norms and standards,

¹ Halliday “Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances” in the Organisation for Economic Co-operation and Development *Asian Insolvency Systems Closing the Implementation Gap* (2007) 39 (hereafter referred to as Halliday “Lawmaking and Institution Building”).

² This part of the study is based on the conclusions reached throughout the study. However due to the practical nature of the recommendations which follow hereafter, certain original ideas and sources which had not been previously incorporated in the study would occasionally be referred to.

³ Hereafter referred to as “UNCITRAL”.

⁴ See part III ch 5 above.

which would be acceptable on an international level, while also anticipating the difficulties that could arise out of the political and economic realities of a developing country with unique commercial and legal issues. The challenge will lie in striking a balance between, on the one hand, designing a model which will optimise the regulatory outcome, while on the other hand bearing in mind that this should take place within an achievable and sustainable approach.

As mentioned earlier, the South African Law Reform Commission is at present in the final stages of introducing a Unified Insolvency Act aimed at modernising and uniting our insolvency laws.⁵ Although this study has expressed concerns about the relevance of an investigation done in a pre-Constitutional era, it should be anticipated that government could persist in going down this path of law reform. The following chapter goes on to propose the launching of a completely new regulatory regime, but a certain degree of effectiveness may be achieved without simultaneously setting up all the detailed elements.

In a recent keynote address the Deputy Minister of Justice and Constitutional Development acknowledged the importance of regulating the insolvency industry and especially the importance of building institutional capacity. He stated that: “[t]he current economic climate dictates that we have an industry that is regulated properly and regulated soon.”⁶ Although the regulatory aspects of South African insolvency law have not been a dominating theme in the academic literature and textbooks on insolvency law, certain foundations and underpinnings for a regulatory model has over time been identified.⁷ The following proposals on law reform will describe a regime in which some of these identified factors are co-ordinated with new ideas and policy adjustments in order to create a modernised and improved regulatory framework in our insolvency law.

⁵ See part IV above.

⁶ Keynote address by Deputy Minister of Justice and Constitutional Development (hereafter referred to as the Department of Justice), Mr A Nel, MP (hereafter referred to as the Deputy-Minister), at the International Association of Insolvency Regulators (“IAIR”) annual general meeting and conference, Sandton, 2009-10-12 (hereafter referred to as the Minister’s address) available at http://www.justice.gov.za/m_speeches/sp2009.html (last visited at 09-11-30).

⁷ See part VI ch 1 at (n 2).



CHAPTER 2: PROPOSALS FOR LAW REFORM

2.1 INTRODUCTION

It is submitted that in order to create an effective and efficient regulatory model a complete and comprehensive overhaul of the South African insolvency law regime in general should occur.⁸ Although this is ambitious, such a rigorous approach will afford national policy- and lawmakers the opportunity of embarking on a comprehensive policy-based investigation of South African insolvency law in general. A holistic approach to insolvency law reform would not only have the advantage of questioning the degree of harmonisation or convergence with insolvency regimes in other jurisdictions, but also ensure that the implementation of various policy considerations and law reform initiatives will have a firm constitutional footing. If, however, a piecemeal approach is to be adopted, it is submitted that any regulatory law reform objective should be complementary to, and compatible with, the insolvency system as a whole.

2.2 PROPOSED REGULATORY FRAMEWORK FOR THE SOUTH AFRICAN INSOLVENCY REGIME

The World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights System* states the following:

Strong institutions and regulations are crucial to an effective insolvency system. The insolvency framework has three main elements: the institutions responsible for insolvency proceedings, the operational system through which cases and decisions are processed and the requirements needed to preserve the integrity of those institutions – recognising that the integrity of the insolvency system is the linchpin for its success. A number of fundamental principles influence the design and maintenance of the institutions and participants with authority over insolvency proceedings.⁹

Insolvency regulation thus consists of two principal components. First, there is the need for independent entry-level qualification standards, education and training for those who are appointed to administer particular insolvency cases. Secondly, there is the design and development of the insolvency regulatory bodies themselves, the techniques and methods they employ and the establishment of criteria to measure the benefits to be obtained from regulated

⁸ See part V; part VII ch 3 above.

⁹ See part III ch 5 above. See *World Bank Revised Principles for Effective Insolvency and Creditor Rights Systems* (2005) 6 (also referred to as *Revised Principles*).

procedures and promote a higher level of specialisation and professionalism.¹⁰ Given the multiplicity of questions raised by substantive proceedings in insolvency law, and the diversity of responses in national laws, this study is necessarily selective.

It had been stated with regard to the development of a regulatory framework that policymakers will initially have to contemplate various policy considerations.¹¹ Notwithstanding the variety of substantive issues that must be resolved, insolvency laws are highly procedural in nature. The design of the procedural rules plays a critical role in determining how risk is to be allocated among the various participants in the proceedings. Perhaps the most critical procedural issue relates to the identification of the decision-maker.¹² Set forth below are several issues that are of relevance when the regulatory authority as well as the regulation of the practitioners responsible for the administration of the insolvent estate in South African insolvency law are considered.

2.2.1 An Independent Regulatory Body

It is submitted that, given the unique South African political, social and economic dispensation, it is inevitable that the state should be involved in the regulatory process. Despite the problems and pitfalls identified in our present regulatory system, it is proposed that the state nevertheless play a significant role in the regulatory framework to the South African insolvency system, albeit in a completely revised form. The public interest has been a vital component of insolvency regulation since the earliest days and continues to occupy a position of prominence.¹³ Apart from protecting certain vulnerable groups within society, the state also has a legitimate interest in ensuring that the institution of credit, the lifeblood of the economy, is not abused.¹⁴ A combination of factors relating to *inter alia* our emerging market economy, as well as the unique socio-political dynamics, contribute to the recognition that the

¹⁰ See part VII par 3.3.1 above. See World Bank – Regulatory Working Group “Insolvency Law and the Regulatory Framework” (1999) (hereafter referred to as World Bank “Insolvency Law and the Regulatory Framework”).

¹¹ See part VII above.

¹² Legal Department – International Monetary Fund (hereafter referred to as “IMF”) *Orderly and Effective Insolvency Procedures* (1999) (hereafter referred to as IMF *Orderly and Effective Insolvency Procedures*).

¹³ The *Cork Report* (see part III ch 3 above) par 1734 concluded that:

Insolvency proceedings have never been treated in English law as an exclusive private law matter between the debtor and his creditors; the community itself has always been recognised as having an important interest in them.

¹⁴ See part IV above.



regulatory aspects of insolvency law represents a considerable social concern that simply cannot be outsourced to the private sector.

If it is accepted that the state has to be engaged in the regulatory regime, the next key issue to be addressed is in which form the state should become involved, and in the South African context this involves the future role of the Master of the High Court¹⁵ in a regulatory landscape. As a result of the challenges identified earlier in this study and especially the lack in public confidence in the current conduct of the Master,¹⁶ it is submitted that the Master should discontinue acting in a supervisory capacity with regard to insolvency law and should disassociate itself from it.¹⁷ It is submitted that the Master should continue to exist as a government institution charged with some of the duties it presently performs, for example the administration of deceased estates, including the acceptance and custodianship of wills; protection of the interests of minors and legally incapacitated persons; controlling the registration and administration of both testamentary and *inter vivos* trusts as well as management of the Guardians Fund. This approach would mark a return for the Master to its roots as the “Master of the Orphan Chamber”.¹⁸ This recommendation would ensure that the Master would be able to focus on the protection of the interests of minors and other vulnerable groups and would thus align its functions more closely with the values entrenched in the Constitution within the current socio-economic circumstances in South Africa.¹⁹

As a substitute for the Master’s current supervisory role it is submitted that a new regulatory agency in insolvency law should be established that would fulfil the role of a complete “insolvency regulator” in insolvency law. The new independent regulatory authority would aim not only to ensure some degree of harmonisation and convergence with insolvency regimes in other jurisdictions, including important trading partners and sources of investment, but also to foster more local and international confidence in our insolvency law system by more closely reflecting the values of the Constitution.²⁰

¹⁵ Hereafter referred to as the Master.

¹⁶ See Loubser “An International Perspective on the Regulation of Insolvency Practitioners” (2007) *SA Merc LJ* 123 (hereafter referred to as Loubser).

¹⁷ See part V ch 5 above.

¹⁸ Also referred to as the “Weesheer”. See part II above.

¹⁹ See part IV ch 2 above.

²⁰ See part IV above.

The new independent office of what we for present purposes could refer to as the “Superintendent in Insolvency” would preferably operate as an independent Business Unit within the Department of Justice and Constitutional Development.²¹ It is recommended that the Superintendent should be a person of high standing with established credentials in insolvency administration and preferably hold the trust and confidence of the national commercial community. The organisational structure and design of the institution could be loosely based on the English system’s Insolvency Service, which at present is constituted as an Executive Agency of the Department of Business, Innovation and Skills.²² South African insolvency legislation is deeply rooted in English law, and this has resulted in South African and English laws reflecting similar legal philosophies and principles.²³ Although the English regulatory framework as encapsulated within the present Insolvency Act 1986²⁴ may not suit the South African economic conditions in a strict sense, there are adequate similarities between the jurisdictions’ historical, legal and cultural elements to constitute a distinct and identifiable practice. It is submitted that the state’s role in the regulatory aspects of the law should be confined to issues which are truly public in nature and which could not be adequately performed by the creation of adequate incentives for private practitioners in the insolvency process. This approach would strike the correct balance between state and private sector interest in a country with a unique legal and socio-economic environment.²⁵

It is proposed that the most prominent feature of the new regulatory agency should be that it would act as a truly independent role-player in insolvency law. The rationale for this is that the enforcement of government policies such as the transformation of the insolvency industry should remain the responsibility of a public administrator rather than the private sector.²⁶ The *World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* also states the following:

It is essential where a professional body is involved that its independence from its members is clearly demonstrated through its constitution, mechanisms and processes, and through its staff. That may require a legislative framework or statutory oversight – but not necessarily

²¹ Hereafter referred to as the Department of Justice.

²² The key provisions are to be found in the Insolvency Act 1986 ss 399-401 and Part 10 of the *Insolvency Rules* (1986). See also previous discussion of the Insolvency Service in part III above.

²³ See part III par 3.1 above.

²⁴ Insolvency Act of 1986. Hereafter referred to as the Insolvency Act 1986 or the Insolvency Act of 1986. The Act received Royal Assent on 1986-07-25 and was brought into force on 1986-12-29. See part III ch 3 above.

²⁵ “Insolvency Law Reform: Promoting Trust and Confidence” *New Zealand Law Commission Study Paper* 11, Wellington, (2001) 33-35 (hereafter referred to as *New Zealand Law Commission Study Paper*).

²⁶ See part VI above.



involvement in individual matters – by a Government department or agency or separately constituted body.²⁷

International norms and standards suggest that the hallmarks of a regulatory system should be clarity, transparency and fairness, and predictability and accountability.²⁸ This study's research into the role of the regulatory type bodies in other benchmark jurisdictions identified certain key functions performed by such authorities.²⁹ The key bankruptcy functions of the office of the Superintendent are thus recommended to be the following: enquiry and enforcement to deal with the breach of law and abuse of the system as a matter of public interest; the regulation and supervision of all insolvency practitioners; and in future the office could also become involved in the administration of cases where the assets are insufficient to meet the costs of doing so.³⁰ While the precise functions and duties of regulatory agencies vary between jurisdictions, in broad terms their functions consistently fall within the three abovementioned categories. Therefore, the new regulatory authority would more closely simulate other international regulators, specifically those in the benchmark jurisdiction of England and Wales, and provide services more consistent with those typically associated with that of an insolvency regulator.³¹ It is proposed that the office of the Superintendent be divided into three different sections or branches which would operate independently and be responsible for investigations and enforcement, the regulation of practitioners, and the administration of estates where the assets would seemingly be insufficient to cover the administration costs of the estate.

The first branch, which for now we could refer to as the “Insolvency Investigations Branch”, would act as an independent enforcement unit and have responsibility for all public enforcement functions.³² Prosecutions and preventions are routinely seen as the responsibility of the state in

²⁷ See World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*) par 222.

²⁸ *Revised Principles D7*.

²⁹ See part III ch 6 above.

³⁰ The so called “last resort” functions.

³¹ See part III ch 3 above.

³² See Insolvency Act 1986 s 289 – Investigatory duties of official receiver:

- (1) Subject to subsection (5) below, it is the duty of the official receiver to investigate the conduct and affairs of every bankrupt and to make such a report (if any) to the court as he thinks fit.
- (2) Where an application is made by the bankrupt under section 280 for his discharge from bankruptcy, it is the duty of the official receiver to make a report to the court with respect to the prescribed matters; and the court shall consider that report before determining what order (if any) to make under that section.
- (3) A report by the official receiver under this section shall, in any proceedings, be prima facie evidence of the facts stated in it.
- (4) In subsection (1) the reference to the conduct and affairs of a bankrupt includes his conduct and affairs before the making of the order by which he was adjudged bankrupt.

most jurisdictions: however, both activities are dependent on an adequate enquiry taking place to detect offences and abuse.³³ The Cork Committee was a strong advocate of having robust investigation procedures. Once again this initiative was linked to the idea of maintaining public confidence.³⁴ It is recommended that the Superintendent should at the initial stages of the insolvency process possess the powers to perform a basic level of enquiry and investigation into the events that lead to insolvency, whether these relate to an individual debtor or to the investigation of the conduct of a director or other company official. A further stage would include a reporting mechanism in matters requiring further substantive investigation or prosecution.³⁵ The facets of investigation and enforcement are once again directed at securing and assuring public confidence in the system of regulation and the process of insolvency.

The second recommended branch, which we could for now refer to as the “Insolvency Regulation Branch”, would be responsible for regulating and supervising all insolvency practitioners, and would also at a later stage be responsible for the regulation and appointment of official receivers under certain conditions.³⁶ The need for such state oversight tends to increase exponentially where the insolvency practitioner is not appropriately qualified and does not have the necessary skills and expertise to undertake certain complex matters. But the risk, if not entirely removed, is very significantly reduced through the existence of an effective system of regulatory oversight.³⁷ It is submitted that the more the industry accepts responsibility for its own professionalism and ethical behaviour, the less the state would have to intervene in enforcing these principles. It is also envisaged that certain strategic decisions initially taken about the shape of the regulatory framework, along with the location of the authority and responsibility for it, could in time be reviewed. The duties of the Superintendent could become less onerous, as the system devolves into a self-regulatory system, with the role of the state being devoted solely to public interest matters in general.

(5) Where a certificate for the summary administration of the bankrupt's estate is for the time being in force, the official receiver shall carry out an investigation under subsection (1) only if he thinks fit.

³³ Zhang “Developing a Regulatory Framework for Outsourcing of Insolvency Work in Hong Kong China” 193 in *OECD Asian Insolvency Systems – Closing the Implementation Gap* (2007).

³⁴ See *Cork Report* par 238.

³⁵ As a division of the English Insolvency Service, the Companies Investigation Branch (“CIB”) investigates serious corporate abuse using compulsory powers under the Companies Act 1985. See part III ch 3 above.

³⁶ See discussion hereafter.

³⁷ See part VI above.



One of the key elements within a regulatory system is the symbiotic relationship between the regulatory body and the insolvency practitioner. Those who administer insolvencies – whether appointed by the creditors, by the court or by a government agency – are given functions and powers in relation to the debtor’s assets under the authority of legislation: the assets and funds are not those of the practitioner, and he or she has a special duty to protect them. It is submitted that the nature of the appointment is seen as that of, or closely resembling, a trustee undertaking functions and exercising public interest powers for the benefit of the creditors. But these functions and powers should be accompanied by responsibilities and accountabilities, and mechanisms for ensuring the proper discharging of such duties.³⁸

In order to implement the above objectives and ensure that an individual is fit and proper to act as an insolvency practitioner, a two-pillar system is recommended. The system will depend on compulsory membership to a “Recognised Professional Body”³⁹ in addition to a mandatory licensing scheme being implemented. Firstly, in order to practise formally as an insolvency practitioner, an individual will have to gain membership of a Recognised Professional Body, and, secondly, as an additional prerequisite, will also be compelled to apply successfully to the Superintendent for a formal licence to practice. The regulatory branch of the Superintendent will thus firstly be responsible for conferring on certain member organisations official “Recognised Professional Body” status, and by way of a mandatory licensing system will also have the power to directly authorise practitioners to practise as such.⁴⁰ The proposed system would thus represent a hybrid system of government regulation with incorporated elements of self-regulation, as opposed to the English system of self-regulation with government oversight.⁴¹

The third suggested branch of the Superintendent is the “official receiver’s Branch”, which could *inter alia* be responsible for the administration of cases as a last resort where the assets

³⁸ World Bank “Insolvency Law and the Regulatory Framework” 6.

³⁹ Also referred to as a “RPB: or Recognised Professional Body.

⁴⁰ See part VI above.

⁴¹ The Insolvency Act 1986 in the United Kingdom (hereafter referred to as the “UK”) created an insolvency practitioner profession through the medium of delegated regulation. Two methods are provided: membership of and authorisation by a professional body recognised by the Secretary of State (s 391), or direct authorisation by a “competent authority” (for the time being the Secretary of State).

in the estate are insufficient to meet the cost of administration.⁴² This function could also be extended to include cases where no private-sector practitioner has been appointed or cases where an urgent appointment, due to for example the nature of the assets, is required. After the sequestration or winding-up order has been made the conduct of the case will immediately be transferred to the official receiver attached to the court of jurisdiction.⁴³ If the assets are minimal the official receiver will act as the person responsible for the administration, and in cases where the assets are more substantial the Receiver will summons a meeting of creditors. The Superintendent will also be responsible for supervising the official receivers and the status of officer of court will be conferred upon each person appointed as official receiver.⁴⁴ Apart from this status in relation to which an official receiver would exercise his functions, the Superintendent would also be responsible for setting down certain criteria in regard to qualifications and experience in order for a person to be appointed as an official receiver.

The branch of official receivers could also be utilised as a training facility not only for government officials but also to provide technical insolvency training for insolvency practitioners. A scheme where it would be possible for practitioners to register as trainees at the branch of the official receivers could not only assist practitioners in obtaining practical experience but could also make a positive contribution to the resources of such office. It is submitted that the involvement of the branch of the official receiver in the administration of estates could gradually be phased in as part of the overall regulatory structure. This outcome would not only allow for sufficient training of individuals in this specific field of law, but also ensure that the structure and functions of this office are adequately thought through in order to be integrated successfully into the general regulatory scheme.

⁴² Role of the official receiver in England and Wales was brought into existence in the Bankruptcy Act 1883. Today they are civil servants who have their own legal personality and act as officers of the courts to which they are appointed. See part III ch 3 above.

⁴³ See part III ch 3 above.

⁴⁴ See discussion of concept of “officer of the court” in part VI. See also Insolvency Act 1986 s 400 – Functions and status of official receivers:

- (1) In addition to any functions conferred on him by this Act, a person holding the office of official receiver shall carry out such other functions as may from time to time be conferred on him by the Secretary of State.
- (2) In the exercise of the functions of his office a person holding the office of official receiver shall act under the general directions of the Secretary of State and shall also be an officer of the court in relation to which he exercises those functions.
- (3) Any property vested in his official capacity in a person holding the office of official receiver shall, on his dying, ceasing to hold office or being otherwise succeeded in relation to the bankruptcy or winding up in question by another official receiver, vest in his successor without any conveyance, assignment or transfer.



One of the focal points of this study was to examine the current state of affairs of our regulatory regime, and in doing so various problems and challenges were identified. The challenges experienced by the Master can mainly be divided into two categories – namely the lack in specialisation experienced as a result of the fact that the Master has to perform various roles and functions in various fields of our law, as well as the lack of a proper and formal regulatory structure with regard to our insolvency industry.⁴⁵ In recommending a regulatory framework consisting of the establishment of a complete and independent government institution to undertake regulatory and supervisory functions within a statutory framework, in addition to a mandatory licensing system which would prohibit all but licensed individuals from undertaking certain functions, it is suggested that the current problems and challenges could be adequately solved. It is also foreseen that the suggested regulatory mechanisms will significantly reduce fraud and other related dishonest behaviour, as the establishment of a new regulatory authority would also create a further hurdle for unscrupulous and unprofessional behaviour.⁴⁶

2.2.2 Regulation of Insolvency Practitioners

The second component of the regulatory framework deals with the regulatory scheme relating to those responsible for administering insolvencies. Global norms point to three sets of attributes critical to the effective professionalisation of the insolvency practice.⁴⁷ Firstly, professionals must display a level of competency that requires technical sophistication in the relevant field of law, and could include accounting skills, in addition to familiarity with general business practice. Secondly, since insolvency practitioners control moneys and are exposed to opportunities for self-enrichment, they must be socialised in values of integrity and honesty, and be rooted in regulatory structures that reinforce honest behaviour and sanction deviance. Thirdly, both the first and second attributes would depend on the effective functioning of the regulatory mechanisms.⁴⁸

⁴⁵ See part V ch 5 above.

⁴⁶ See part VI above.

⁴⁷ Johnson “Toward International Standards on Insolvency: The Catalytic Role of The World Bank” 2000 *Law in Transition* 69 (hereafter referred to as Johnson).

⁴⁸ Halliday 29. See also UNCITRAL *Legislative Guide on Insolvency Law* (2005) paras 36-41 (hereafter referred to as “UNCITRAL *Legislative Guide*” or “*Legislative Guide*”) and World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) D8 (also referred to as *Principles*).

Thus, a common theme that has been explored and identified throughout the study regarding the regulation of those responsible for insolvency administration is that such a person should be competent and suitable for the particular work by reference to qualifications and experience.⁴⁹ The English licensing model has at times been criticised as overly complex and fragmentary, and although South Africa is in dire need of a proper regulatory framework, it is probably not necessary for an overregulated environment such as to be found in the England and Wales. Having said that, the focus on professionalism, ethics, qualifications and experience might still provide a suitable benchmark when a balance between the unique South African socio-economic environment and the safeguarding of public interest and fostering of public confidence is attempted.

The aim of the recommendations hereafter is not only to encourage a high standard of competence and professionalism amongst insolvency practitioners, but also to arrive at an equitable balance between certain provisions imitating a self-regulatory scheme of regulation and the overall supervision provided by the state. This study recommends the adoption of a two-pillar approach regarding the regulation of practitioners, consisting of a mandatory licensing scheme based on the compulsory membership of a Recognised Professional Body.⁵⁰

In the proposed regulatory scheme it is suggested that there be two levels of authorisation, namely, compulsory membership of a Registered Professional Bodies and secondly successful application to the office of the Superintendent for a licence to practice.⁵¹ A Registered Professional Body would be approved by the Superintendent in accordance with established criteria, indicating that such body has set standards of competence and professional and ethical conduct, and has developed a proper infrastructure to deal with investigation and discipline.⁵² The Professional Body should also play a role in the supervision and discipline of practitioners through codes of conduct and ethics, investigative and disciplinary committees

⁴⁹ See part III; part VI above.

⁵⁰ As mentioned in the previous chapter the endorsement of “Recognised Professional Bodies” would fall under the Superintendent.

⁵¹ See Insolvency Act 1986 s 391 – Recognised professional bodies:

- (1) The Secretary of State may by order declare a body which appears to him to fall within subsection (2) below to be a recognised professional body for the purposes of this section.
- (2) A body may be recognised if it regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules to act as insolvency practitioners –
 - (a) are fit and proper persons so to act, and
 - (b) meet acceptable requirements as to education and practical training and experience.

⁵² See Insolvency Act 1986 s 391.



and professional development activities.⁵³ In practice the Professional Bodies would thus be responsible for enforcement of standards and norms of fitness, suitability and professional competence. The Superintendent would have the power to withdraw the recognition of any accredited professional body if it has reason to believe that the body no longer complies with the set requirements.

It is submitted that primary legislation would make it an offence for someone to act as an insolvency practitioner without being qualified to do so.⁵⁴ The primary legislation would define the meaning of being “qualified to do so” as being a member of a Registered Professional Body, and being authorised to do so by the Superintendent of Insolvency. The licensing regime will thus prohibit all but licensed individuals from undertaking certain functions, and the granting of licences would depend on a person meeting and maintaining certain prescribed standards relating to education, experience and ongoing competence requirements.⁵⁵ The licensing function would be allocated to the new independent regulator, the Superintendent of Insolvency, who would be issuing licences based on set criteria as determined by the introduction of subordinate legislation. The decisive factor in issuing a practitioner’s licence would be a confirmation, in the form of a certificate, by the Registered Professional Body that:

- a such individual holds valid membership of the organisation;
- b that he or she has fulfilled the necessary requirements regarding experience and education;
- c and to the knowledge of such an organisation would be a fit and proper person to act as a professional insolvency practitioner.

One of the most controversial areas of our present-day insolvency law is the discretionary power of the Master to appoint a provisional insolvency practitioner in certain circumstances.⁵⁶ It is suggested that on the date of the court order of sequestration or winding-up, the estate devolve onto the office of the relevant official receiver, who would be responsible for the calling of a creditors’ meeting in cases where the volume of the assets of the estate would dictate for him to do so. The official receiver would subsequently act as receiver of the property

⁵³ See discussion below.

⁵⁴ See Insolvency Act 1986 s 389 – Acting without qualification an offence:

(1) A person who acts as an insolvency practitioner in relation to a company or an individual at a time when he is not qualified to do so is liable to imprisonment or a fine, or to both.

(2) This section does not apply to the official receiver.

⁵⁵ See part VI above.

⁵⁶ See discussion on appointment of insolvency practitioners in part V above.

and have appropriate powers to protect and safeguard any property and would have limited powers to realise assets if necessary.⁵⁷ It is suggested that the recommended regime would be based on principles which would provide for the general body of creditors to be responsible for the nomination of a final practitioner, and in cases where urgency or the nature of the estate calls for an urgent appointment, a clear set of specified criteria for the making of such an appointment should exist. It is submitted that due to the official receiver acting as receiver from the time of the insolvency order to the time of appointment of final practitioner, the need for an urgent appointment would be greatly reduced.

2.2.2.1 Education and Training

With regard to the educational standard of an insolvency practitioner, it is recommended that a standard examination in insolvency law and practice should be implemented as prerequisite to the successful application for a licence to practise.⁵⁸ The function of developing an examination curriculum, conducting the training and examinations as well the suggested continuing development may be discharged by a recognised independent body. It is submitted that, irrespective of the form of educational requirements and standards laid down, what is essential is that through a legal, accountancy or other qualification or degree or through experience, the practitioner is able to demonstrate that he or she has knowledge and practical understanding of insolvency and other legislation and commercial matters likely to be involved in an insolvency case, in order for him to be able to properly exercise the powers given to him and is able to discharge his or her functions, duties, responsibilities and accountabilities.

⁵⁷ See Insolvency Act 1986 s 287 – Receivership pending appointment of trustee:

- (1) Between the making of a bankruptcy order and the time of which the bankrupt's estate vests in a trustee under Chapter IV of this part, the official receiver is the receiver and (subject to section 370 (special manager)) the manager of the bankrupt's estate and is under a duty to act as such.
- (2) The function of the official receiver while acting as receiver or manager of the bankrupt's estate under this section is to protect the estate; and for this purpose –
 - (a) he has the same powers as if he were a receiver or manager appointed by the High Court, and
 - (b) he is entitled to sell or otherwise dispose of any perishable goods comprised in the estate and any other goods so comprised the value of which is likely to diminish if they are not disposed of.
- (3) The official receiver while acting as receiver or manager of the estate under this section –
 - (a) shall take all such steps as he thinks fit for protecting any property which may be claimed for the estate by the trustee of that estate,
 - (b) is not, except in pursuance of directions given by the Secretary of State, required to do anything that involves his incurring expenditure,
 - (c) may, if he thinks fit (and shall, if so directed by the court) at any time summon a general meeting of the bankrupt's creditors.

⁵⁸ Applicants in the UK now have to pass the Joint Insolvency Examination, set by the Joint Insolvency Examination Board, in addition to a minimum level of experience. See Reg 7 of Insolvency Practitioners Regs 2005.



The training offered to obtain this qualification ought to be sufficient to enable a successful candidate to act in smaller and presumably less complicated cases where the assets are valued at less than a maximum stipulated amount. This requirement regarding an entry-level examination for qualification in a profession is not new to South Africa, as the Law Society of South Africa is managed along similar lines.⁵⁹ The Law Society of South Africa is entirely self-regulatory, with oversight being provided by the High Court. The South African Institute of Chartered Accountants is another example of this kind of system.⁶⁰

A further level with regard to the qualifications and skills requirements is that it is also important to provide for compulsory continuing education for all practitioners in order to ensure sustained high and increased levels of competence. A programme similar to the Continuing Professional Development⁶¹ is recommended. The Continuing Professional Development is the means by which members of professional associations maintain, improve and broaden their knowledge and skills and develop the personal qualities required in their professional lives. In South Africa the current trend with major professional institutes and bodies such as the South African Institute of Chartered Accountants is to require a pre-determined number of hours or points per year spent on a balance of Continuing Professional Development activities, which include activities such as courses, technical meetings or relevant seminars. Monitoring is mostly done by way of members providing record of these activities according to a preset timescale for submission.⁶² It is recommended that a similar programme should be implemented as part of the educational and skills transfer process.

In order to ensure that skills transfer takes place, practical training in the form of assuming professional responsibility for work while under the supervision of a more senior practitioner could also be considered. It is suggested that this form of practical training be included as an activity which would represent a certain number of points within the Continuing Professional Development programme. Thus, in order to ensure that more senior practitioners get involved in practical training and skills transfer a “stick-and-carrot” method could be employed

⁵⁹ See part VI above.

⁶⁰ See *Burdette Reform, Regulation and Transformation: The Problems and Challenges facing South African Insolvency Industry* (2005) unpublished paper presented at the Commonwealth Law Conference, London, (hereafter referred to as Burdette “Reform, Regulation and Transformation”).

⁶¹ Also sometimes referred to as Continuous Education or Training. See discussion on part VI above.

⁶² See also South African Institute of Chartered Accountants “Updated CPD Policy: December 2008” available at <http://www.saica.co.za> (last visited at 09-11-30).

whereby the training of a junior colleague could also qualify as a Continuing Professional Development activity.

Apart from the abovementioned licensing and membership requirements it is recommended that in order to introduce a skills development programme as well as create an infrastructure for inexperienced practitioners to obtain the necessary experience, a two-tier system be introduced into the framework. A constant theme throughout the study has been the need to customise any proposed insolvency law reform project to suit the local legal and political culture.⁶³ An important factor to be considered in a South African context is that historically disadvantaged persons need to have entry into the insolvency profession.⁶⁴ It should, however, also be noted that insolvency law is a highly specialised field of law and an individual who passes a basic entry-level examination will not necessarily possess the extent and depth of technical knowledge and practical experience that is required. As a result he could obtain a licence to practice, but not necessarily have the practical experience required to administer a complicated insolvent estate.

It is proposed that the entry-level examination and training should provide for a minimum level of knowledge to enable any individual to manage the administration of a smaller, less complicated estate, but the administering of a larger and more complex estate would require a higher degree of qualification and experience. For larger or more complicated cases, provision should be made for a higher level of professional competence and a subsequent level as senior or advanced insolvency practitioner would denote a higher level of experience and competence. If a high level of experience is suddenly imposed on all practitioners it will exclude members of the previously disadvantaged groups as well as other members of the Registered Professional Body who have not yet had the opportunity to obtain a certain level of experience. With the two-tier system it would be possible for inexperienced individuals to obtain the necessary experience and at a later stage advance to the senior level.⁶⁵ It could also be considered that a person should advance to a certain level on the proposed Continuing Professional Development programme in order to proceed to a senior practitioner's level as well as maintain a certain level of certification. This approach would act as encouragement to enter the programme and as such increase sustainable levels of competence.

⁶³ See part III; part IV and part VI above.

⁶⁴ Loubser 138.

⁶⁵ Loubser 137.



2.2.3 Joint Insolvency Forum

Within the context of the proposed framework it is proposed that a research and advisory body be created that would be responsible for ongoing research and would act as a forum for discussion and co-ordination not only between the different role-players in the proposed regulatory model but also between the various government departments. It is recommended that the proposed forum – for now we could refer to it as the Joint Insolvency Forum – operate in a similar fashion as the Standing Advisory Committee under the Companies Act.⁶⁶ The idea would be for various stakeholders and interest groups, ranging from the Superintendent, the various Registered Professional Bodies, and the Banking Council, to organised labour, government departments, academics and international consultants, to be represented at this Forum.

It is also critical that the research be co-coordinated, and a mechanism for this purpose should be considered. The promulgation of new laws as is envisaged with the proposed Unified Insolvency Bill⁶⁷ is certainly not the end of the road. New provisions need to be tested and unforeseen eventualities are likely to occur. With this in mind, such a specialised body could be responsible for research and law reform issues on an ongoing basis.⁶⁸ The main objective of this Forum would be to act in an advisory capacity to the Minister as well as the Superintendent. The objectives of this Forum would be to ensure ongoing research on matters of insolvency law, have regard to international developments in the field of insolvency law, and also from time to time the making of recommendations for the review of subordinate-legislation.

2.2.4 Complaints Mechanism

From the outset of this study it has been made clear that one of the key considerations when recommendations on law reform are made would have to be that of public interest within the spirit of the Constitution. In order to develop a system based on accountability which would

⁶⁶ Act 61 of 1973. Hereafter referred to as the Companies Act. According to s 18 of the Companies Act 2008 (Companies Bill 61 of 2008 was signed by the President as Act 71 of 2008 published in *GG no 32121* (2009-04-07)) the Minister may appoint one or more specialist committees to advise the –

(a) Minister on any matter relating to company law or policy; or
(b) Commissioner on the management of the Commission's resources.

⁶⁷ See part III ch 6 above.

⁶⁸ Havenga "Simplification and Unification in Corporate and Insolvency Law – Are we Making any Progress?" (2001) *SA Merc LJ* 408 (hereafter to as Havenga).

satisfy the public interest and create trust and confidence in the system it would be vital that key measures such as the independence of the Superintendent, the mechanisms of accountability for the insolvency practitioners and public servants as well as the procedures to receive and investigate complaints are put in place.

Another important factor is that the process for determining the appointment of a practitioner to an insolvency case takes account of the need for those who have a real interest in who might be appointed having the opportunity to oppose or complain about such appointment. Accordingly the law should enable the review of a decision to appoint an office-holder by providing the grounds upon which an appointment may be reviewed; providing for a process for such a review and if such appointment is set aside, providing for the appointment of another qualified person.

It is submitted that the Superintendent should have a complaints mechanism in place, which would act as a conduit through which complaints could be channelled to the respective Registered Professional Bodies and in some cases the complaints could also be subject to an investigation by the Superintendent itself. The Registered Professional Bodies would be required to have a formal complaints procedure to ensure that these procedures are harmonised across the spectrum. The policy aim would be to have a disciplinary procedure in place that is just and fair to all concerned parties, including the practitioner and the complainant, that is transparent and that will thus create trust and confidence in the insolvency system.⁶⁹

Apart from the internal structures, it is submitted that an “Insolvency Tribunal” should be established. It is submitted that the Tribunal be an independent juristic person, subject only to the Constitution and the law, so as to ensure that it functions impartially and without fear of

⁶⁹ See Insolvency Act 1986 s 287 – Action of Tribunal on reference:

- (1) On a reference under section 396 the Tribunal shall –
 - (a) investigate the case, and
 - (b) make a report to the competent authority stating what would in their opinion be the appropriate decision in the matter and the reasons for that opinion, and is the duty of the competent authority to decide the matter accordingly.
- (2) The Tribunal shall send a copy of the report to the applicant or, as the case may be, the holder of the authorisation; and the competent authority shall serve him with a written notice of the decision made by it in accordance with the report.
- (3) The competent authority may, if he thinks fit, publish the report of the Tribunal.



favour or prejudice. The Tribunal could function in a similar way to the newly introduced Companies Tribunal,⁷⁰ and as an organ of state have a dual mandate –

- a to serve as a forum for the adjudication of disputes as well as voluntary alternative dispute resolution in any matter arising from the Insolvency Act
- b to carry out reviews of administrative decisions made by the Superintendent on an optional basis.⁷¹

The High Court would however remain the primary forum for the resolution of disputes, and the interpretation and enforcement of the proposed Insolvency Act.

2.2.5 Record-keeping and Statistics

In respect of each case in which a practitioner acts it is recommended that a statutory obligation should exist to keep record of prescribed information on matters such as the bonding arrangement, matters relating to the remuneration of the practitioner, and the liquidation and distribution account reflecting aspects of the administration and distribution. These records should be made available for inspection by the Superintendent, the relevant Registered Professional Bodies and in certain instances also the public. Records should also be retained for a prescribed period after the conclusion of the estate.

There is an increasing expectation that policy and practice be evidence-based and subject to post-implementation evaluation and review. Accordingly, an increasing use of statistical information and research into the development of proposals and assessment of the impact of

⁷⁰ See s 195 of Companies Act, 2008. The Companies Tribunal or a member of the Tribunal acting alone in accordance with this Act, may –

- (a) adjudicate in relation to any application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application;
- (b) assist in the resolution of disputes as contemplated in part C of chapter 7; and
- (c) perform any other function assigned to it by or in terms of this Act, or any law mentioned in Schedule 4.

⁷¹ See s 6 of the Promotion of Administrative Action Act 3 of 2000. Hereafter referred to as “PAJA”. Before someone can ask a court to review an administrative action, there is an important rule in the PAJA that must be complied with – the rule of exhaustion of internal remedies. This means that, where the law sets out procedures allowing someone to review or appeal a decision of the administration, these must be used up before an affected person can approach a court. A person can therefore only ask for judicial review as a last resort. This is dealt with in s 7(2) of the PAJA. Internal remedies are ways of correcting, reviewing or appealing administrative decisions using the administration itself. The difference between internal remedies and the remedy of judicial review is that the judicial review is review by a court, which is independent from the administration. See part VI above.

changes is envisaged.⁷² A further regulatory responsibility that the Superintendent could undertake is the collection of statistical information on which to base future policy decisions for insolvency law reform. The Office of the Superintendent could not only continue to act as office of record for documents such as court orders, appointment and bonding documents as well as liquidation and distribution accounts, but would also co-ordinate the collection of raw data.

2.2.6 Transitional Measures

Given that a new regulatory framework for insolvency practitioners will probably entail a plethora of new requirements and entry-level criteria governing the qualification of individuals as insolvency practitioners, the question arises as to what will be required of present practitioners when the new regime comes into operation. Provision will have to be made for an interim period during which existing practitioners would be given the opportunity to obtain the required qualifications without being deprived of their right to earn a livelihood. It is submitted, however, that they should not be exempted from complying with the requirements. This would ensure that all insolvency practitioners possess at least the basic competence to fulfil their duties. The detail of how this can be done should be a topic of debate within the industry.

2.2 INSTITUTIONAL FRAMEWORK

The second building block for developing an effective insolvency system deals with the supporting infrastructure for implementation. This encompasses the governing institutions vested with authority to process cases and administer insolvency proceedings.⁷³ There has been a clear move in common law jurisdictions to transfer functions from the courts to the agency or authority with the insolvency responsibility in order to reduce costs and the inevitable delay in court proceedings. There are however invariably provisions that allow for administrative actions and decisions to be appealed in court, with the court's role increasingly being seen in these jurisdictions to be the resolution of disputes and the determination of legal issues.

⁷² See part III above.

⁷³ Johnson 72.



It has been stated that the successful implementation of an insolvency system depends on the construction of an effective judiciary. According to the global norms a system should guarantee the independence of the judiciary, judicial decisions should be impartial and the judiciary should act in a competent and effective manner.⁷⁴ In this regard South Africa is fortunate in that it has a strong tradition of the rule of law: courts and the court structure are by definition strong and a modern and independent Constitution protects our court's autonomy. Historically, in South African insolvency law, the High Court has in general dealt with insolvency matters.⁷⁵ The role of the courts has mainly been limited to the granting of orders which commence insolvency or winding-up proceedings and the role of dealing with dispute resolution and the development of common law and precedent through the determination of legal issues.

Over the years there have also been a number of scholars in England and Wales who have supported the idea of a specialist insolvency tribunal and notably the Cork Committee in its final commentary also recommended the establishment of a new insolvency court that would have exclusive jurisdiction in all insolvency matters.⁷⁶ The proposal was rejected at the time, however, as a number of judges were opposed to such a development and viewed it as the creation of a court with a specific jurisdiction.⁷⁷ South Africa also does not have specialised insolvency courts and during the late nineties a high-level Commission of Inquiry, the so-called Hoexter Commission, rejected proposals for specialised insolvency courts in South Africa.⁷⁸ It would therefore not be sensible to walk down this path again, given that the most rigorous objections came from the judiciary itself.⁷⁹

Another policy design available to law- and policymakers would be to appoint specialised judges within the courts of general jurisdiction. Given the unique nature of insolvency law proceedings and the regular need for real-time judgements, this option could improve timely and efficient adjudication and judicial decision-making. The introduction of specialised judges would also reinforce predictability and consistent and uniform interpretation and

⁷⁴ *Revised Principles* D1-5.

⁷⁵ See part III above.

⁷⁶ *Cork Report* par 1003.

⁷⁷ Milman *Personal Insolvency Law, Regulation and Policy* (2005) 156 (hereafter referred to as Milman).

⁷⁸ Third and final report of the *Commission of Inquiry into the Rationalization of the Provincial and Local Divisions of the Supreme Court* Report number RP 201/97 Pretoria: Government Printing Works 1997 vol 1 Book 2 Part 3.

⁷⁹ See part VI above.

application of the law.⁸⁰ To this end, court organisation should however take stock of the resources available to the court, including sufficiency and composition of judicial officers and staff as well as adequacy of court facilities.⁸¹

Having reviewed the issues in a critical manner it is submitted that the reform of our judiciary to include a specialist insolvency court would be neither a feasible nor a practical option. The most credible option would be to support calls for the promotion of specialised judicial skills within the field of insolvency law. However, in order to make a truly informed decision on whether it is viable to implement a system of insolvency specialisation within the judiciary, improved empirical data and statistics should be made available and extended research and consultation on this topic should be undertaken.⁸²

2.3 LEGAL FRAMEWORK

The third of the three core building blocks is the legal framework also identified as essential to an effective and efficient insolvency system. This component focuses on the need to integrate and harmonise the insolvency law within a country's broader legal and commercial framework.⁸³ The second aspect of the legal framework is the review of the fundamental design features that should be present in an insolvency law and particularly relevant for this study would be the integration into the present legislative framework of the recommendations made in regard to a regulatory framework.

It has previously been mentioned that the chapter on South African insolvency law reform commenced in the late 1980s and has at the time of writing this thesis not yet culminated in the promulgation of efficient and effective insolvency law legislation.⁸⁴ Lawmaking frequently proceeds in episodes – long cycles of reform that continue until practice is normalised around policy goals set by government. The stabilisation of reforms occurs when the gap between formal law and law in practice is reduced sufficiently for the policy to be implemented in the form intended and acceptable to lawmakers, interest groups and other

⁸⁰ *Revised Principles* D1.1.

⁸¹ Johnson 72.

⁸² See part VI above.

⁸³ Johnson 72.

⁸⁴ See Burdette "Reform, Regulation and Transformation" 8.



stakeholders.⁸⁵ Halliday correctly states that: “[t]his disconnection between the quality of the ‘law on the books’ and the quality of its implementation is often referred to as the ‘implementation gap’ and is one of the most significant issues facing legal reformers and policy-makers today.”⁸⁶

The recommendations included in the previous sections of this chapter will however involve a paradigmatic shift in the perceptions of the public as well as other role-players and would require a reorientation towards all aspects of regulation in insolvency law. As previously submitted, it would be possible to attempt to weave the proposed recommendations into the present suggestions made by the South African Law Reform Commission. This option would however not only represent a superficial approach to the reform of our regulatory regime, but would also prove to be problematic with regard to the implementation of some of the most critical aspects of the proposed regime, namely the introduction of an independent and complete regulator with functions consistent with global norms and international standards.

In this regard the following statement by Halliday, quoted earlier, is worth repeating:

... the implementation and institution building are as important as – indeed arguably more consequential than – formal lawmaking. It is a dangerous illusion that the legal framework and institutions of an effective insolvency system can be done cheaply. Effective bankruptcy systems require the careful design, infrastructural expenditure, and political will comparable to major infrastructural projects in transportation or energy or defence. This is especially so in circumstances where there is rapid economic development and social dislocation in a society that had previously invested little in legal institutions. Failure of government to act boldly and decisively can lead not only to incapacity but instability in society and ultimately the market.⁸⁷

The integration of the insolvency system within the context of the general law is essential to ensure that the two complement and reinforce one another. Any insolvency system should be compatible with the legal system of the society in which it is rooted, and whose value system it should ultimately sustain.⁸⁸ An effective insolvency system requires not only an effective, efficient and modern regulatory and institutional framework, but also a determinate system of lawmaking that produces legitimate institutions. It is thus generally concluded that the South African law- and policymakers should return to the drawing board and engage in further

⁸⁵ Halliday 23.

⁸⁶ Halliday 23.

⁸⁷ Halliday 34.

⁸⁸ Johnson 72.

research and consultation in order to incorporate a modern and sophisticated regulatory framework into our insolvency law. There is a pressing need to introduce a regulatory model which would not only be consistent with global norms but would also be adapted to the singularity of our national situation. This fresh approach will require not only the political will and support of national policymakers, but also technical assistance from international financial institutions and aid agencies of advanced economies.⁸⁹ Although this option will be costly, commercial and consumer insolvencies have become phenomena that are too important legally as well as socially and economically to be shortchanged with nominal budgets.⁹⁰

⁸⁹ Halliday 34.

⁹⁰ Ziegel “Bill-55 and Canada’s Insolvency law Reform Process” (2006) *Canadian Business LJ*.



2.4 CONCLUSION

The objective of this final part of the study was to integrate all the ideas and outcomes presented in this thesis into a single regulatory framework and to present a coherent description of the underlying intricate concepts of this topic. The work embodied in this thesis includes ideas, concepts and methods from international institutions such as the World Bank, and also highlights international best practice where appropriate. By reflecting the convergence of thought across these disciplines, an attempt was made towards an “integrative philosophy” of regulation in insolvency law. The conclusion is that, generally, every insolvency regime has to address several core issues in regard to the regulation of insolvency law, but the further enhancement and modification have to be in accordance with the locally prevailing environment and the unique economic, social and political needs of a particular country or region.

The general investigation into the global norms recognised by international institutions and developed jurisdictions yields the conclusion firstly that regulatory frameworks have been developed in different ways in different countries but at the same time the two key elements of such regulatory models have been the existence of a strong and transparent regulating institution directed at securing public confidence through independence and impartiality. Secondly, the essential proposition of the insolvency practitioners in all systems is the same: that every effective insolvency system requires competent and ethical insolvency practitioners who should have the experience and expertise necessary to deal with the range of business and legal issues which arise in insolvency matters.

The recommendations for an efficient and effective regulatory framework for South African insolvency law are as follows:

- 1 In order to address the core issues evident in global regulatory norms and standards with the aim of implementing a modernised, effective and efficient regulatory system, a complete overhaul of our regulatory regime is proposed.⁹¹
- 2 The implementation and institution-building that are essential for the development of a regulatory framework are as important as lawmaking and thus require careful design and

⁹¹ See part III above.

infrastructural expenditure. As a result it might become evident that the robust approach is neither feasible nor practical and the end result might be better accomplished by initially introducing certain key reforms, followed by a series of corrective adjustments to deal with the gaps and the unanticipated consequences.⁹²

- 3 It is thus submitted that the newly proposed regulatory framework will first and foremost consist of a new regulatory agency in insolvency law that would fulfil the role of a complete insolvency regulator in insolvency law.⁹³
- 4 The new independent office that we for present purposes could call the Superintendent in Insolvency would be responsible for all investigations and enforcement functions, for the regulation and oversight of insolvency practitioners and at a later stage could also become involved in the administration of cases where the assets are insufficient to meet the costs of doing so.⁹⁴
- 5 As part of the framework this study recommends the adoption of a two-pillar system which would consist of a system of mandatory licensing to regulate insolvency practitioners to be based on compulsory membership of a Recognised Professional Body.⁹⁵
- 6 The Registered Professional Body would be approved by the Superintendent in accordance with established criteria, which would indicate that such body has set standards of competence and professional and ethical conduct, and has developed a proper infrastructure to deal with investigation and discipline. As a prerequisite for issuing a licence the Registered Professional Body would have to confirm in writing that a candidate:
 - i holds a valid membership of the organisation;
 - ii has fulfilled the necessary requirements regarding experience and education;

⁹² See part VI above.

⁹³ See part I above.

⁹⁴ See part III ch 6 above.

⁹⁵ See (n 39).



- iii and to the knowledge of such an organisation would be a fit and proper person to act as a professional insolvency practitioner.
- 7 The licensing function would be allocated to the Superintendent and would depend on a person meeting certain prescribed criteria in relation to education, standard of character and ongoing competence requirements, as well as prior membership of a Recognised Professional Body.
- 8 Licensed practitioners would be divided into two levels: an entry level, which would indicate that the person has the necessary qualifications and experience to administer a basic insolvency estate, and a senior level, which would encompass a certain level of professional competence, academic qualifications, and a certain specified level of experience as well as advancement to a certain level of the Continued Professional Development programme.
- 9 In order to ensure sustained high and increased levels of competence, a Continued Professional Development programme is recommended. Apart from improving levels of experience this method could ensure that skills transfer occurs. The proposed method is one in which the training of a junior colleague could also qualify as a Continuing Professional Development activity.
- 10 As to the answer to the question of how extensively involved a court should be in the aspects of insolvency law, it was suggested that the status quo be maintained and the courts govern only the process of entry of the debtor to the insolvency system and act in the role of dispute resolution body and the determination of legal issues. As opposed to a radical reform of our judiciary the prospect of specialised judicial skills within the field of insolvency law has been suggested. It is submitted, however, that much more research based on empirical studies is necessary for an informed decision to be taken.
- 11 A “Joint Insolvency Forum” responsible for co-ordinating insolvency research as well as advising the Minister and the Superintendent on matters relating to policy and insolvency law matters is recommended.

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- 12 It is submitted that an “Insolvency Tribunal” should be established. The Tribunal would be an independent juristic person, subject only to the Constitution and the law, so as to ensure that it functions impartially and without fear of favour or prejudice. The Tribunal would be an organ of state with a dual mandate: to adjudicate disputes as well as serve as forum for voluntary alternative dispute resolution in any matter arising from the Insolvency Act, and to carry out reviews of administrative decisions made by the Superintendent on an optional basis.
- 13 It is recommended that a statutory obligation on the Superintendent should exist to keep record of prescribed information of matters such as the bonding arrangement, matters relating to the remuneration of the practitioner, and the liquidation and distribution account reflecting aspects of the administration and distribution.

Finally, it is concluded that in order to surmount the hurdle of the implementation and inclusion of an effective regulatory system into our insolvency system in general, policy- and lawmakers should return to the drawing board in order to create a modern and sophisticated insolvency law which not only recognises contemporary and constitutionally sound insolvency principles in general, but also includes a strong and effective regulatory framework.



CHAPTER 3: CONCLUDING SUMMARY

Despite the fundamental changes in society and commercial life which have occurred since then, the system for dealing with the problems created by insolvency has been tinkered with, patched and extended by false analogies, so that today it is replete with anomalies, inconsistencies and deficiencies. We are convinced that the systems (for they are numerous) no longer work satisfactorily. They do not accomplish what is required of them; moreover, they no longer accord with what the general public conceive to be the demands of fairness and justice to all in a modern society.⁹⁶

This thesis investigated certain aspects of state regulation in South African insolvency law with the view ultimately to proposing a framework within which the legislator could consider legal reform based on comprehensive policy objectives in this field of law. The study's final recommendations are woven around a series of key findings:

- 1 the current regulatory regime in South African insolvency law has become obsolete and out of sync with general international and local demands;⁹⁷
- 2 in order to foster international and local confidence in our insolvency system, an improved regulatory mechanism should be developed against the background of a comprehensive and well-managed policy based process and generally accepted social and economic objectives.⁹⁸
- 3 it had been established that the challenges relating to the South African regulatory system could be overcome by means of not only reassessing the philosophies and principles underlying our present regulatory regime, but also introducing a holistic and rigorous law reform agenda based on sound constitutional principles.⁹⁹

The aim of this chapter is not to repeat the topic-relevant issues discussed throughout the thesis but to summarise the findings of this study in broad terms. Nonetheless, it might be appropriate to refer to some points, which may also correspond with expectations outlined at the outset of the thesis.¹⁰⁰

⁹⁶ Cork *Report* par 9.

⁹⁷ See part III; part IV and part VI above.

⁹⁸ See part III and VI above.

⁹⁹ See part VI above.

¹⁰⁰ See part I above.

The search for answers began with a study of the historical roots of our insolvency law. An insolvency system profoundly reflects the historical, legal, and cultural context of the country within which it operates. South African insolvency law is neither pure Roman-Dutch law, nor pure English law, but a fusion of influences deriving from periods of Dutch and British colonial domination in the Cape of Good Hope.¹⁰¹ In exploring the historical evolution of regulation in South African insolvency law, this study endeavoured to establish a pattern of state regulation in our law and in the process attempt to explain the unique regulatory system presently in place.¹⁰² Although the development of the concept of state regulation in our insolvency law has not received much attention in our insolvency law literature, nevertheless, drawing from the study of our common law, an outline of state regulation did emerge.

The origins of our present regulatory system can be traced to the period of Roman-Dutch law. The establishment of the *Desolate Boedelkamers* and the 1777 Ordinance, which introduced the practice of the *Desolate Boedelkamers* to Amsterdam, stands out as a significant milestone. This important innovation represented the first acquaintance with the concept of state regulation in the form of a regulatory authority overseeing the insolvency procedure. It is submitted that this development in favour of greater state regulation indicated a significant shift from a creditor-controlled system to a system that had more of an administrative nature.¹⁰³

The historical development of the English law provides a much clearer exposition of state regulation of bankruptcy law. The great expansion of commerce that was a hallmark of the Victorian age led to calls for major reform of English insolvency laws. The Bankruptcy Act 1883 sought to modernise the law and codify it into one regime. It came about as a response to public concerns and in particular dissatisfaction with the administration of bankrupt estates, which were privately run and were haphazard affairs, open to considerable abuse. Significantly, this Act introduced the concept of “officialism” by placing “the administration of the insolvent’s estate under the control of the Board of Trade, which it arms with the powers necessary to protect the interests of the creditors and to vindicate public morality”.¹⁰⁴ The process of administrative oversight established in 1883 was carried over to the present 1986 Act and established what are still the basic parameters of English bankruptcy law today. Of significance is the recognition of

¹⁰¹ See part II par 1.4 above.

¹⁰² See part II ch 3 above.

¹⁰³ See part I par 1.4 above.

¹⁰⁴ Martino “Approaching Disaster: Personal Bankruptcy Legislation in Italy and England 1880-1939” (2005) *Business History* 23-43.



the recurring theme of protecting the public interest through the role of the state in the administration of bankruptcy estates, as illustrated by the strong administrative features of the English regulatory framework and the institutional support of bankruptcy law in general.¹⁰⁵

The foundation of the Master of the High Court, the present regulatory authority in our insolvency law, can be traced back to the founding of the *Desolate Boedelkamers* during the eighteenth century. In 1803 the *Desolate Boedelkamers* was established in the Cape for the administration of abandoned estates and the execution of civil sentences, including the estates of all persons obtaining *cessio bonorum*. The introduction of the *Desolate Boedelkamers* played a significant role in shaping the future character of the regulatory process in South African insolvency law.¹⁰⁶

In the year 1828 a few significant events occurred. The first was when, under the second British occupation, a Charter of Justice was issued in order to revise the judicial system, which made provision for the establishment of an independent “Supreme Court” and also *inter alia* confirmed that the court had to make provision for the post of a “Master of the Supreme Court”.¹⁰⁷ The second noteworthy event occurred with the passing of Ordinance of 1828, which mentioned for the first time that in future all insolvent estates had to be administered by an official referred to as the “Master of the Supreme Court”. Another significant event took place in 1833 when the duties of the Orphan Chamber, which had primarily been responsible for supervising the administration of minors as well as certain deceased estates, were transferred to the newly appointed office of Master of the Supreme Court. In this way the outline of the Master’s office as we know it today was established.¹⁰⁸

The study searched for answers in jurisdictions abroad. In an era of globalisation of law, which will inevitably accompany the globalisation of the economy, it is vital to any law reform effort to keep up with international trends as we enter a phase in history where legal certainty and predictability are definite virtues.¹⁰⁹ Without falling into the trap of a complete legal transplant, the provision of an effective and internationally comparable insolvency system is an essential

¹⁰⁵ See part II par 1.5 above.

¹⁰⁶ See part II par 1.6.1 above.

¹⁰⁷ See part II par 1.6.1 above.

¹⁰⁸ See part I above.

¹⁰⁹ Mistelis “Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform – Some Fundamental Observations” (2000) *The International Lawyer* 1069 (hereafter referred to as Mistelis).

component in assuring that South Africa maintains its role as a competitive emerging market. It will thus be necessary to keep in mind what the essential ingredients of an international regulatory framework are, in order to ensure that in the context of international investment and international standing our system does not fall behind. By studying the regulatory methodology within the English, American and Dutch bankruptcy systems as well as the principles and guidelines issued by international organisations, this study attempted to establish whether the global norms identified as such could provide domestic policy- and lawmakers with persuasive and digestible solutions and policy considerations.¹¹⁰

The United States¹¹¹ represented one end of the continuum, with a framework consisting of a specialised system of bankruptcy courts not only to reach judgments and make decisions in the event of conflict, but to set the important precedents that provide the detailed interpretations of statutory rules – rules that establish the local legal culture, which are also made by the bankruptcy judge. The US has developed great expertise through its bankruptcy courts which can be attributed to the US federal court system and the increasingly common judicial specialisation in the US.¹¹²

For a variety of reasons, the US Trustee Program was introduced to alleviate the bankruptcy judges of the administrative burden of administering bankrupt estates. In this sense a clear demarcation between the judicial and administrative functions in the administration of a bankrupt estate was brought about. When one compares the present US system to those of emerging nations one notices that the relative health and stability of the US economy seem to give the country the luxury of a bankruptcy system in which the government typically plays a passive role. These characteristics – the generally debtor-friendly approach to bankruptcy, the prominence of lawyers rather than an administrator or government agency, and the judicial-oriented system of bankruptcy courts – distinguishes US bankruptcy law from most other insolvency jurisdictions around the world.

In contrast, the UK adopted an administrative system whereby the Insolvency Service is responsible for virtually all important decisions and the establishment of detailed interpretations of statutory rules. This is a consequence of the English lawmakers having a

¹¹⁰ See part III above.

¹¹¹ Hereafter referred to as the “US”.

¹¹² See part III above.



shared vision that bankruptcy law is not just the concern of creditors but affects the wider society. This led to the acceptance that government has a supervisory role to play and bankruptcy law is also viewed as a public policy measure. The link between the role of the state in protecting the public interest and the administration of bankruptcy estates is illustrated by the strong administrative features of the English regulatory framework and the institutional backing of bankruptcy law in general. The administrative format of the English system also minimises the role of private attorneys in the general bankruptcy process, which distinguishes the English bankruptcy process from the lawyer-oriented US system.¹¹³

The position with regard to state regulation under the Dutch bankruptcy laws is fundamentally different to those of the common law jurisdictions mentioned earlier, and the underlying principles of their Code are only of limited use in a South African context. There are no specific licensing or regulatory systems.¹¹⁴ Insolvencies are administered by private-sector office-holders who are invariably lawyers and are members of the Netherlands Bar and as such subject to the requirements of the Bar, which has public powers to set standards in relation to education, qualification and general experience. Although there is no system of specialised bankruptcy courts in the Netherlands, the Dutch courts play a leading role in the regulation and interpretation of the bankruptcy laws. The Dutch civil law system is so fundamentally different in its basic conception and operation of bankruptcy law, however, that it would be misleading to compare any aspects of this system to other common law jurisdictions. The undesirability of the Dutch system's regulatory experience as a "legal transplant" could serve to further the argument that even when countries share similar legal backgrounds, they may evolve and develop along completely independent paths, resulting in different legal cultures and conceptions of the role of bankruptcy law.¹¹⁵

Drawing from the knowledge obtained from reviewing the different jurisdictions, signs of some convergence between the common law and Continental approaches and even more so between the common law jurisdictions themselves have become clear. It has been established that although the underlying philosophies and principles differ from one jurisdiction to another, the regulation of insolvency law is a major policy objective in all developed jurisdictions. Although the dynamics of the relationship of state agencies to the various actors in the bankruptcy system may vary,

¹¹³ See part III ch 3 above.

¹¹⁴ See part III ch 4 above.

¹¹⁵ See part III ch 4 above.

certain similar influences and key elements can be recognised. The study examined the role performed by regulatory-type bodies in other jurisdictions, and while the precise functions and means of delivery varied between jurisdictions, in broad terms their functions consistently fell within the following three categories:

- a Administration of insolvency cases (so-called cases of “last resort”), where the assets in the estates are insufficient to meet the costs of doing so;
- b Taking on the responsibility of enquiring into the possible reason for insolvency and subsequent enforcement, as a matter of public interest;
- c The regulation and supervision of the practitioners who are appointed to administer particular insolvency cases.¹¹⁶

The recognition and significance of a modern insolvency system as the cornerstone of sustainable economic development is also reflected in the extensive research carried out by international institutions in this area. The World Bank with the assistance of international financial institutions such as UNCITRAL, leading insolvency organisations and international insolvency experts, has developed comprehensive principles and guidelines that underpin sound insolvency and creditors’ rights around the world. These principles distil international best practice in the design of insolvency and creditor rights mechanisms and could be used to benchmark the strengths and weaknesses of our existing system. After analysing the various recommended principles it became apparent that in order to foster local and international commercial confidence and inspire investor confidence, the establishment of a modern and effective institutional and regulatory framework is fundamental to the development of an efficient and effective South African insolvency law system.¹¹⁷

When assessing the value of comparative research, scholars should analyse and emphasise what is actually there. This could be similarities or differences, or apparent convergence or divergence. The comparative enterprise entails both recognition and appreciation of diversity

¹¹⁶ See part III ch 6 above.

¹¹⁷ See part III ch 5 above.



and search for commonality.¹¹⁸ One of the aspects complicating issues is that the law on the books and the law in action often bear little resemblance to each other. Scholars are increasingly recognising the central importance of “local legal culture” in the actual operation and effective implementation of any legal system. Therefore, when the current policies and law reform proposals are reviewed, the choices made in reforming the South African regulatory system must be closely linked to the capacities of existing legal institutions and should be compatible with the insolvency law system in general.¹¹⁹

In South Africa, 181 years after the Master of the Supreme Court was established, the new Constitutional dispensation changed the South African legal landscape dramatically. Legislation may now be tested by the courts in order to establish its constitutionality, and public interest has taken centre stage.¹²⁰ This study argued the Insolvency Act was in place long before the new constitutional dispensation, and that as a result the constitutional values and principles could only artificially be incorporated into the application of the law. While the effect of the Constitution on state regulation in South African insolvency law was examined, it became apparent that not a great deal of research, case law or other sources existed on this topic. In the context of this study the enactment of the Promotion of Administrative Justice Act¹²¹ had certainly the most relevant and significant constitutional development. As a public body and organ of state the Master is henceforth bound by the provisions of PAJA, with the result that every administrative action performed by the Master is made subject to the requirements for valid administrative conduct and the grounds for review specified therein.¹²²

It had thus become important that the aim of any law reform proposal in insolvency law should be to create an environment of accountability and justification and to align the regulatory principles of our law with the values expressed in modern administrative and constitutional law. Concern had also been raised about the impact of the additional procedural constraints brought along by the new constitutional dispensation and other relevant legislation applicable to the Master, in that these could have the effect of impeding the efficient, effective

¹¹⁸ Örtücü “Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition” (2000) *Nederlandse Vereniging voor Rechtsvergelijking*.

¹¹⁹ See part III ch 5 and 6.

¹²⁰ Dlamini “The Right to Administrative Justice in South Africa” (2000) *TSAR* 697 at 701 (hereafter referred to as Dlamini).

¹²¹ Act 3 of 2000. Hereafter referred to as “PAJA”. This Act came into force on 2000-11-30, except ss 4 and 10, which came into force on 2001-07-31.

¹²² See part IV above.

and swift finalisation of an insolvent estate. It has been noted that in redefining the role of the law as well as of any public institution, tension will always exist between the procedural fairness and rationality advocated by the Constitution and PAJA on the one hand, and the need for effective, efficient and expeditious public administration on the other hand.¹²³ With regard to the purpose of this study, namely to make proposals for a professional and effective regulatory framework in South African insolvency law, the principle of constitutional supremacy is critical to the outcome. The positive challenge therefore lies in absorbing the right to administrative justice and the access to information entrenched in the Constitution into the development of a regulatory framework with the aim of securing and assuring public confidence in the insolvency process within the current socio-economic circumstances in South Africa.¹²⁴

In order to determine whether it is attainable, or even desirable, to bring about law reform in the regulatory discipline within our insolvency law, it is necessary to examine the present provisions in our insolvency law as they relate to the regulation of insolvency and identify problem areas within the system.¹²⁵ International principles and guidelines portray the regulatory framework within an insolvency law system as dealing with the qualification and regulation of insolvency practitioners¹²⁶ as well as the establishment and implementation of the regulatory body that has oversight and responsibility for implementing the regulatory procedures.¹²⁷ The problems and pitfalls within the regulatory system in our insolvency law cannot be fully understood without an appreciation of the legal regimes that govern the regulatory structures. In order to justify a change in law, it is as a starting point necessary to have a clear understanding of the present legal environment and subsequent reform recommendations by the South African Law Reform Commission, in an effort to identify possible limitations within the system and to consider potential legal and strategic outcomes and solutions.

From an international perspective it has been established that even in the midst of the diversity of national laws and standards, a global trend of convergence in the key regulatory principles and standards can be observed. The study found that if we align the institution of the Master with international norms and standards, it is particularly difficult to clearly define

¹²³ See part IV above.

¹²⁴ See part IV ch 2 above.

¹²⁵ See part III above.

¹²⁶ See discussion in part I par 1.6 above.

¹²⁷ Johnson 73.



the role of the Master within the context of an international insolvency regulator. As a “creature of statute” the Master has only the powers the statute accord, whether expressly or by necessary implication.¹²⁸ History reflects that the institution of the Master was initially established with the aim of protecting the interests of persons such as widows and orphans, and, in time, minors and incapacitated persons.¹²⁹ The supervisory duty of the Master in relation to insolvency law was only relatively recently incorporated into its general duties and functions. It had also become clear that the courts initially dominated the insolvency process and the Master had only limited functions which were more administrative in nature. In time the Master gradually accumulated powers relating to the daily administration of the insolvency process, and the role of the Master became more prominent and its functions more complex, ranging from judicial to administrative in nature.

The central theme of this thesis is the investigation of the concept of state regulation in insolvency law, and in South African insolvency law this concept entails the Master acting in a supervisory capacity with regard to matters concerning insolvency law. The legal framework of South African insolvency law results in the Master being entangled in various technical issues relating to the administration of insolvent estates. According to its statutory purpose, the priority of the Master lies very much in protecting the interests of creditors through the legislative powers granted to it, in contrast to the more influential role of international regulators, who try to strike a balance between protecting the rights of creditors and protecting the public interest.¹³⁰

After studying the present South African regulatory regime and the powers and duties of the Master, the following specific challenges were identified:

- 1 Within an international context it was discovered that when compared to the role of international institutions such as the UK’s Insolvency Service, the Master lacks the discretion and the authority of an authentic regulator.¹³¹

¹²⁸ *Die Meester v Protea Assuransiematskappy Bpk* 1981 2 SA 685 (T) at 690; *De Lange v Smuts* 1998 3 SA 785 (CC) at 853; *The Master v Talmud* 1960 1 SA 236 (C) at 238.

¹²⁹ See part II par 1.6.1.

¹³⁰ See part VI above.

¹³¹ See part III above.

- 2 The lack of specialisation by the Master's office officials, particularly in the field of insolvency law, creates a level of ineffectiveness and inefficiency due to the inadequate training and experience of staff members.¹³²
- 3 Internationally, the role of the state can be characterised as truly public in nature: therefore its primary purpose would be to act in the public interest. A private practitioner, on the other hand, would tend to use his or her powers to obtain the maximum benefit for creditors.¹³³ It was established that the Master lacks investigative powers relating to the cause of the insolvency and the possible abuse of the law as well as matters of commercial immorality. In most foreign jurisdictions investigation of the cause of insolvency, which also includes the behaviour of the insolvent prior to the sequestration of his or her estate, represents a major objective in the justification of these regulatory institutions.¹³⁴
- 4 Another inconsistency between the Master as regulator and its equivalent in other international jurisdictions is the lack of official control with regard to the South African insolvency profession. Literature on the regulation of insolvency law suggests that in the absence of a sophisticated regulatory framework, the role of the regulatory body becomes more important. Consequently, it was submitted that South Africa lacks an adequate regulatory framework with regard to the regulating and monitoring of insolvency practitioners, and as a result legitimate concerns could be raised about whether there are sufficient regulatory safeguards in place to ensure that only impartial insolvency practitioners with the necessary experience are appointed to act as office-holders. The absence of a proper regulatory framework and a specialised regulator could result in the general ineffectiveness of the South African insolvency system as a whole.¹³⁵
- 5 Finally, although the Master is seen to be the protector of public interest, it plays no active or formal role in the drafting process of insolvency legislation or the development of policy. As the South African commercial environment embodies a rich tapestry of cultures and legal traditions, the design and development of a strong central government

¹³² See part V ch 5 above.

¹³³ See part VI above.

¹³⁴ See part V ch 5 above.

¹³⁵ See part V ch 7 above.



agency responsible for regulating South African insolvency law has therefore become vital in assuring public confidence in the system of regulation and supervision and the process of insolvency law.¹³⁶

Almost two decades ago, policymakers in South Africa engaged in an extensive study of South African insolvency law. The South African Law Reform Commission published its *Report on the Review of the Law of Insolvency* in 2000.¹³⁷ This report contained a Draft Insolvency Bill and an Explanatory Memorandum and included recommendations for what were described as mainly technical reforms to insolvency law in South Africa. Judging by the tenor of the South African Law Reform Commission's Draft Insolvency Bill,¹³⁸ the government at time of issuing its report had evidently not yet been ready to make the paradigm shift to bring about a change to the underlying policy and overall structure of the regulatory framework of South African insolvency law. Although the Draft Insolvency Bill did contain certain changes linked to the regulatory system, it is not clear whether it had been based on any critical comparative studies or policy development process. It is submitted that in order to implement changes to our existing regulatory framework which would best serve the South African society, as well as generate international trust and confidence, certain important policy considerations would have to be critically assessed and analysed. A dual policy consideration has been identified – namely, whether the state should be involved in the regulation of insolvency law in any way, and, if so, then to what extent it should be involved.¹³⁹

A second aspect to consider as part of the regulatory structure is the regulation of the insolvency practitioner responsible for the administration of the insolvent estate. The policy consideration with regard to regulation of the insolvency industry involves implementing an acceptable regulatory model incorporating both local government policies as well as internationally recognised principles.¹⁴⁰ By embracing accepted international standards and principles the regulation of the industry could considerably reduce the level of government involvement and

¹³⁶ See part VI above.

¹³⁷ See South African Law Commission *Review of the Law of Insolvency* Project 63 (2000) Report, vol I Explanatory Memorandum, and vol 2 Draft Bill (hereafter referred to as 2000 Draft Insolvency Bill or Draft Insolvency Bill).

¹³⁸ See *Commission Paper* 582 vol 1 and vol 2.

¹³⁹ See part VI above.

¹⁴⁰ See part III above.

ensure the credibility of the system both locally and internationally. Again it should be reiterated that a regulatory model should be suited to the particular historical development and current institutional matrix of a country and it is submitted that the adaptation of a statutory mandatory licensing system would establish efficient professional standards and the members of such a regulated profession would hopefully act rigorously to rid the profession of its tainted image.

It is submitted that the key concern should be to acknowledge that South Africa as an emerging market has had less exposure to international financial practices, and has a legacy of previously disadvantaged consumers who have had limited exposure to a free-market economy.¹⁴¹ This theme underlines the need to better understand the role and function of insolvency systems in today's global markets and to develop solutions suited to the needs of emerging markets. Another consideration would also be to note that there is a wider government and public (society) interest in insolvency because of the financial loss, and thus an obligation in seeing that economic as well as potential social damage is limited, and resources are effectively re-allocated to more productive use.¹⁴²

The objective of the final part of the study was to integrate all the ideas and work presented in this thesis in a single regulatory framework and to present practical and material conditions and requirements that are considered to be instrumental to the establishment of the kind of institutional mechanisms which would result in a more effective and better-functioning insolvency practice.¹⁴³ The recommendations for an efficient and effective regulatory framework for South African insolvency law are as follows:

- 1 In order to address the core issues evident in global regulatory norms and standards with the aim of implementing a modern, effective and efficient regulatory system, a complete overhaul of our regulatory regime is proposed, consisting of the establishment of a new institution, the Superintendent in Insolvency, who would act a complete regulator in insolvency law.
- 2 The new independent office would be responsible for all investigations and enforcement functions, for the regulation and oversight of insolvency practitioners and at a later stage

¹⁴¹ See part IV above.

¹⁴² See part IV above.

¹⁴³ See ch 1 above.



- could also become involved in the administration of cases where the assets are insufficient to meet the costs of doing so.
- 3 As part of the framework this study recommends the adoption of a two-pillar system which would consist of a system of mandatory licensing to regulate insolvency practitioners based on compulsory membership of a Recognised Professional Body.
 - 4 Licensed practitioners would be divided into two levels: an entry level, which would indicate that the person has the necessary qualifications and experience to administer a basic insolvency estate, and a senior level, which would encompass a certain level of professional competence, academic qualifications, and a certain specified level of experience as well as advancement to a certain level of the Continued Professional Development programme.
 - 5 In order to ensure sustained high and increased levels of competence, a Continued Professional Development programme is recommended.
 - 6 As opposed to a radical reform of our judiciary, the notion of specialised judicial skills within the field of insolvency law has been suggested.
 - 7 A “Joint Insolvency Forum” responsible for co-ordinating insolvency research as well as acting in an advisory capacity to the Minister and the Superintendent on matters relating to policy and insolvency law matters is recommended.
 - 8 An independent “Insolvency Tribunal” responsible for adjudicating disputes to carry out reviews of administrative decisions made by the Superintendent on an optional basis is also recommended.
 - 9 The Superintendent should continue to act as office of record for matters such as the bonding arrangement, matters relating to the remuneration of the practitioner, and the liquidation and distribution account reflecting aspects of the administration and distribution.¹⁴⁴

¹⁴⁴ See ch 2 above.

In conclusion, it is submitted a number of factors exist which policy- and lawmakers should consider when the building of an effective and efficient regulatory framework for South African insolvency law is attempted. In designing the appropriate model it should be noted that institutional and legal reform involves compromises between and among certain competing policy objectives. The challenge facing the architects of a new regulatory framework would be to design a simple and predictable system, which would be an accurate reflection of the present South African economic and social environment while at the same time safeguarding public interest and fostering international and local confidence. It is also submitted that the reworking of any area of our insolvency law, and more specifically the regulation of insolvency law, should be done against the background of a well-managed policy process, generally accepted social and economic goals, rather than a combination of academic ideology and private advantage.

The law of insolvency consists of conflicting interests. Key states:

These rationales clearly suggest that the existence of bankruptcy is tied up with an attempt to arrive at a balance, that is the law is seeking to ensure that there is a balance between the interests of those who, for the want of a better word, are stakeholders in a person's insolvency ... These stakeholders together with the debtor's family which also can be seen as a stakeholder, have conflicting interests which produce tension, and the task of the law is to reconcile these interests.¹⁴⁵

Where a recommended practice may benefit the wider community but at the cost of the individual, the sacrifice can only be rationalised where the feeling of a "greater good" prevails. However, when an individual cannot see the wider benefit, then the individual preference becomes important.¹⁴⁶ It is hoped that the reform of South African insolvency law will continue down the path of transparency and fairness, and will ultimately yield a sound economic outcome.

Everything takes place between sacrifice and non-sacrifice, if this is not all suspended between the sacrifice that cuts and the sacrifice that binds, writes Derrida. "We sacrifice in order not to sacrifice". At issues in the smooth functioning of our economies and the non-ritual bio-politics that inform these economies is therefore not the absence of sacrifice, but the countless instances of invisible, inaudible and therefore unseen, unheard and thus unacknowledged sacrifices.¹⁴⁷

¹⁴⁵ Key "Balancing Interests in Bankruptcy Law" (2001) *Commercial Law World Review* 206 at 208. See also Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (2009) LLD dissertation University of Pretoria 9.

¹⁴⁶ Ministry of Economic Development, New Zealand *Behavioural analysis for Policy – new lessons from Economics, Philosophy, Psychology, Cognitive Science, and Sociology* (2006) on file with the author.

¹⁴⁷ Van der Walt *Law and Sacrifice* (2005) 135.

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