

THE FUTURE OF THE CROSS-BORDER INSOLVENCY ACT 42 OF 2000 IN VIEW OF DEVELOPMENTS ELSEWHERE

By

Clinton Ras

29070717

Submitted in fulfilment of the requirements for the degree

LLM

In the Faculty of Law,

University of Pretoria

November 2014

Supervisor: **Professor Andre Boraine**

Clinton Ras

29070717

1 July 2014

Mini-dissertation title: The future of the Cross-Border Insolvency Act 42 of 2000 in view of developments elsewhere

Supervisor: Professor Andre Boraine

LLM (Coursework): Procedural Law

SUBMISSION OF RESEARCH PROPOSAL AND SUMMARY

My research project explores the future of the Cross-Border Insolvency Act 42 of 2000 in view of developments relating to cross-border insolvency regimes elsewhere. The continuing development of International trade and investment gave rise to the escalation in the amount of multinational enterprises that have debt, own assets and conduct business in numerous jurisdictions around the globe. The increase of cross-border insolvency as a global economic problem, gave rise for the need of a general equitable system to administer cross-border insolvency universally. The *Model law on Cross-Border Insolvency* was promulgated by the *United Nations Commission on International Trade Law* (UNCITRAL) in 1997. The purpose of the UNCITRAL *Model Law on Cross-Border Insolvency* is to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address instances of cross-border insolvency more effectively. South Africa adopted the UNCITRAL *Model Law on Cross-Border Insolvency* by way of the Cross-Border Insolvency Act 42 of 2000. However the Cross-Border Insolvency act is not effectively operative. One of the main reasons why the act hasn't become fully operative yet is because of the fact that the Act introduced a reciprocity clause. In my Research project I will address the issues caused by cross-border insolvency. I will discuss the common law position relating to cross-border insolvency in South Africa. I will furthermore indicate why the Cross-border Insolvency Act 42 of 2000 is not effectively operative in South Africa. Lastly I will compare the Cross-border Insolvency dispensation in South Africa to that of the United States of America, the United Kingdom and Australia.

TABLE OF CONTENT

1. Chapter 1: Introduction	1
2. Chapter 2: The common law dispensation in South Africa on the regulation of cross-border insolvency	6
2 1 Introduction	6
2 2 Universalism and territorialism	6
2 3 Common law	8
2 3 1 Movable property	9
2 3 2 Immovable property	11
2 3 3 The distinction between an inward-bound and outward-bound request	11
2 3 4 The distinction between individuals and corporate entities	12
2 3 5 Comity, Convenience and Equity	14
2 3 6 Protection of local creditors	16
2 4 Conclusion	17
3. Chapter 3: The operation of the Cross-Border Insolvency Act 42 of 2000	19
3 1 Introduction	19
3 2 The UNCITRAL <i>Model Law</i>	20
3 3 Objectives and application of the Act	20
3 4 Designation Provision	23
3 5 International obligations, treaties and interpretation of the Act	25
3 6 Access of foreign representatives and creditors to courts in the Republic	26
3 7 Recognition of foreign proceedings	26
3 8 Relief upon application for recognition	28
3 9 Protection of creditors and other interested persons	30
3 10 Cooperation with foreign courts and foreign representatives	30
3 11 Concurrent proceedings in terms of the Act	31
3 12 Conclusion	32
4. Chapter 4: Comparative study on the implementation of the UNCITRAL <i>Model Law</i> in the United States, United Kingdom and Australia	36
4 1 Introduction	37

4 2	United States of America	37
4 2 1	Introduction	37
4 2 2	Objectives and application of Chapter 15	38
4 2 3	Recognition of foreign proceedings	38
4 2 4	Relief that may be granted upon recognition	39
4 2 5	Protection of local creditors	40
4 2 6	Rights of foreign representatives and creditors	42
4 2 7	Results of the implementation of Chapter 15	43
4 3	United Kingdom	44
4 3 1	Introduction	44
4 3 2	Cross-Border Insolvency Regulation 2006	46
4 3 2 1	Application of the Regulation	46
4 3 2 2	Recognition of foreign proceedings	47
4 3 2 3	Relief that may be granted during the application for, and upon recognition	47
4 3 2 4	Cooperation with foreign courts and representatives	49
4 3 2 5	Protection of creditors	49
4 3	Australia	50
4 4	Differences between the Model Laws of the various jurisdictions	53
4 5	Conclusion	53
5.	Chapter 5: Conclusion	58
6.	Bibliography	64
7.	Declaration of originality	69

Chapter 1: Introduction and background

Cross-border insolvency issues are becoming progressively frequent in the restructuring and insolvency world. Cross-border insolvency forms the overlap between the law of insolvency and winding-up on the one hand, and private international law on the other. The sequestration or the winding-up of a debtor contains a foreign element, such as assets located or debts owed in a jurisdiction, other than the jurisdiction in which the sequestration or winding-up has been ordered. We are experiencing increased indications that the world is becoming smaller and more global. As a result of this, certain things become simpler whilst others become more complex in nature. One indicator of a rapidly shrinking world is the undoubted trend for insolvencies and financial restructurings to be cross-border in nature.¹

Generally speaking, cross-border insolvency issues are approached either by following a model based on universality, or a model based on territoriality.² The universality approach calls for the treatment of insolvency proceedings as a single case in order to treat creditors from different jurisdictions equally, whilst the law of the jurisdiction which issues the bankruptcy order will find application outside the boundaries of the last-mentioned jurisdiction. Territoriality, however, seeks to protect the interests of the local creditors before allowing assets to be utilised in favour of foreign creditors.³ Universal approach simply means that all insolvency matters are dealt with in a single case. Creditors are regarded as equal, globally. The territorial approach is the exact opposite. The territorial approach tends to protect the interests of local creditors rather than creditors as a whole.

The research project explores the future of the Cross-Border Insolvency Act 42 of 2000⁴, in view of developments relating to cross-border insolvency regimes elsewhere. This will be achieved by conducting a critical analysis of the current position in South Africa with regards to Cross-Border Insolvency matters. The research will further focus on the Cross-Border Insolvency Act, analysing some of the important sections and discussing the importance for the Act to become fully operative.

Numerous major advanced economies are subject to some form of cross-border insolvency regime, such as the common law principles that are applicable in South Africa, Chapter 15 of the United

¹ Rutstein "U.K Perspective Recognition of Overseas Insolvency Procedures: Spoiled for Choice?" 2009 <http://www.jonesday.com/uk-perspective-recognition-of-overseas-insolvency-procedure-spoiled-for-choice-09-30-2009/1>.

² Olivier and Boraine "Some aspects of International Law in South African cross-border Insolvency Law" 2005 *CILSA* 374.

³ *Idem* 375.

⁴ Cross-Border Insolvency Act 42 of 2000 (hereafter Cross-Border Insolvency Act).

States Bankruptcy Code and the Cross-Border Insolvency Regulation that is effective in the United Kingdom. A large part of the research will be focused on countries that have implemented similar Cross-Border Insolvency Acts, to study the difficulties that they have encountered and the successes they have achieved. A comparative literature will be conducted to critically analyse to the implementation and operation of the UNCITRAL *Model Law on Cross-Border Insolvency*⁵ in the United States of America, the United Kingdom and Australia. The comparison will be done between South Africa and these important role players in the field of cross-border insolvency.

To enable a better description of the problems caused by cross-border insolvencies, which the research project will attempt to address, it is necessary to provide a brief synopsis of the situations that gave rise for the need of a regulatory framework, to address the problems caused by cross-border insolvencies. Cross-border insolvency is a global economic problem. The continuing development of international trade and investment gives rise to the escalation in the amount of multinational enterprises that have debt, own assets and conduct business in numerous jurisdictions around the globe.⁶ This requires different jurisdictions to cooperate with one another, to effectively govern practical matters flowing from cross-border insolvencies.⁷ Cross-border insolvency law deals with the situation in which the debtor has property, debts or both in a particular jurisdiction or numerous jurisdictions, other than the jurisdiction in which insolvency proceedings concerning the debtor have been instituted.⁸

The estate representative or otherwise known as a trustee or a liquidator of the debtor, in a local jurisdiction will have to contemplate the possibility of pursuing property or interests in the foreign jurisdiction belonging to the debtor, in an attempt to attach the property or interests for the benefit of the local creditors.⁹ The representative will have to abide by the legal principles of the particular foreign jurisdiction where the property or interests are situated. The law of the foreign jurisdiction will regulate the property or interests located within its jurisdiction.¹⁰ This will entail that the foreign representative will normally have to bring an application to the relevant court of the foreign jurisdiction, to be recognised as such. The application made by the representative will usually be compulsory in the absence of a treaty or convention between the relevant jurisdictions, before the representative will be allowed to deal with any property or interests located within the foreign

⁵ UNCITRAL *Model Law on Cross-Border Insolvency* (hereafter the UNCITRAL *Model Law*).

⁶ Weideman and Stander "European and American perspectives on the choice of law regarding cross-border insolvencies of Multinational Corporations- suggestions for South Africa" 2012 *PELJ* 133.

⁷ Olivier and Boraine 2005 *CILSA* 373.

⁸ Bertelsmann ea *Mars the Law of Insolvency* (2008) 660. (hereafter Mars).

⁹ Olivier and Boraine 2005 *CILSA* 373.

¹⁰ Weideman and Stander 2012 *PELJ* 134.

jurisdiction's borders. In the alternative, the representative might attempt to open another (concurrent) bankruptcy proceeding in the relevant foreign jurisdiction.¹¹

The significant problem that arises in this context is that some jurisdictions adopt a universalist approach to cross-border insolvencies, whilst other jurisdictions adopt a territorial approach to cross-border insolvency matters. With these issues regarding cross-border insolvency, it would be ideal to have a global law on cross-border insolvency that can apply effectively throughout all jurisdictions globally. Unfortunately, we don't have such law; we don't have a universal or global court which creates a problem with enforcement of judgments. The notion of universality does not produce remarkable effects with regards to the adoption of a system based thereon, and therefore many jurisdictions are still stuck with the system of territoriality. According to writers and case law in the field of cross-border insolvency, the South African system can be described as a combination between pure territorialism and modern territorialism.¹²

The increase of cross-border insolvency as a global economic problem, gave rise for the need of a general equitable system to administer cross-border insolvency universally. The *Model law on Cross-Border Insolvency* was promulgated by the *United Nations Commission on International Trade Law* (UNCITRAL) in 1997.¹³ The purpose of the UNCITRAL *Model Law* is to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address instances of cross-border insolvency more effectively.¹⁴ South Africa was one of the very first countries to adopt the UNCITRAL *Model Law on Cross-Border Insolvency* by way of the Cross-Border Insolvency Act 42 of 2000. The Act came into force on 28 November 2003. Cross-border insolvency is currently regulated by the South African common law, despite the fact that the Cross-Border Insolvency Act came into force on 28 November 2003. The UNCITRAL *Model Law* is intended to serve as a basis for national legislation in a particular state, reflecting modern and efficient processes of cross-border insolvency. It is not a convention and it permits flexibility. It respects the unification of the law and the emphasis of the Act is on procedure, not substantive law. The Act is currently ineffective because of the designation clause inserted into the South African version of the UNCITRAL *Model Law*. A consequence of the requirement of the designation of a State and the definition of "foreign State" in section 1 is that the definition of "foreign proceedings" applies only in respect of proceedings in a designated State. In view of direct and indirect cross-references to "foreign

¹¹ Olivier and Boraine 2005 *CILSA* 373.

¹² Fourie 'n *Vergelyking van die oorgrens-insolvensiewetgewing van Suid-Afrika met die Verenigde State van Amerika* (LLM Dissertation 2012 NWU) Abstract.

¹³ *Idem* 2.

¹⁴ Stander "Cross-border insolvencies as a global economic problem" 2002 *Journal for Juridical Science* 27(2) at 73.

proceedings” the definitions of “foreign main proceedings”, “foreign non-main proceedings”, “foreign representative” and “foreign court” applies only to proceedings in a designated State. The result is that the whole of the Act applies only in respect of designated States and the Act will have no effect until States have been designated by the Minister. Although it may perhaps be argued that section 13 and 14 apply even if no States have been designated, section 2(1)(d) limits the scope of application to creditors or other interested persons in a “foreign State” who have an interest in requesting the commencement of, or participating in local proceedings.

The designation clause will have the effect that South Africa will in future follow a dual system, because the Cross-Border Insolvency Act will only be applicable to the designated states, whilst the states which are not designated will still have to follow the common law route. Smith and Boraine argue that the system proposed by the *Model Law*, may take a while to operate adequately in South Africa because of the designation clause.¹⁵ The system of designation can also cause a delay between the introduction of another states’ version of the *Model Law*, and the South African designation of that foreign state for the purpose of reciprocity.¹⁶ The South African common law will prevail even in the event of proceedings, which will substantiate the application of both the *Model Law’s* between South Africa and another state until the foreign state has been designated.¹⁷

An abbreviated study will also be conducted on the Working Document of the South African department of Justice and Constitutional development, with regards to the proposed unified Insolvency Bill.¹⁸ The purpose of the discussion will illustrate, that even if South Africa has one unified insolvency system, the common law will still be applicable in certain instances relating to cross-border insolvency. This research study will highlight some of the issues that may be encountered when dealing with the insolvency of a debtor, which operates beyond the boundaries of any particular jurisdiction or legal system. In a complex insolvency situation it is the norm rather than the exception, that the debtor in question will have assets and operations in several states.¹⁹

It is imperative for this research study to distinguish between the current position under the South African common law regarding cross-border insolvency and the statutory position that will apply once the Cross-Border Insolvency Act comes into full effect. The fact that South Africa has no

¹⁵ Smith and Boraine “Crossing borders into South African Insolvency Law: from the Roman-Dutch Jurists to the UNCITRAL Model Law” 2002 10 *American Bankruptcy Institute Law Review* 215.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ South African Proposed Insolvency bill as approved by Cabinet in 2003 and amended in June 2013.

¹⁹ Rutstein 2009 <http://www.jonesday.com/uk-perspective-recognition-of-overseas-insolvency-procedure-spoiled-for-choice-09-30-2009/1>.

bilateral or multilateral treaty with any other jurisdiction with regards to cross-border insolvency²⁰, as well as the fact that the Cross-Border Insolvency Act is currently not effective, has the effect that the common law still regulates cross-border insolvency matters in South Africa. The Cross-Border Insolvency Act will be affected by the rules of international law, the international *Lex Mercatoria*, and international comity with regards to the application and developments of the Act.²¹ In the next chapter a study will be conducted on the South African common law, which regulates Cross-Border insolvency matters currently in South Africa.

²⁰ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 377.

²¹ *Ibid.*

Chapter 2: The common law dispensation in South Africa on the regulation cross-border insolvency

2 1	Introduction	6
2 2	Universalism and territorialism	6
2 3	Common law	8
2 3 1	Movable property	9
2 3 2	Immovable property	11
2 3 3	The distinction between an inward-bound and outward-bound request	11
2 3 4	The distinction between individuals and corporate entities	12
2 3 5	Comity, Convenience and Equity	14
2 3 6	Protection of local creditors	16
2 4	Conclusion	17

2 1 Introduction

The South African common law which deals with international private law and precedent will be applicable in cross-border insolvency instances.²² Having regard to comity, convenience and equity, a South African High Court may exercise its discretion to recognise the appointment of a foreign representative.²³ The significant problem that arises in the cross-border context is that some jurisdictions adopt a universalist approach to cross-border insolvencies, whilst other jurisdictions adopt a territorial approach to cross-border insolvency matters.

2 2 Universalism and territorialism

Territorialism has at aim to protect the rights of local creditors, and to promote certainty amongst them with regards to the distribution of assets. The territorial approach is commonly referred to as

²² Kunst, Boraïne, Burdette *Meskin: Insolvency Law and its Operation in Winding-up* (loose-leaf) Lexis Nexis Butterworths Durban (2011) 17-2 (hereafter Meskin).

²³ *Ibid.*

the *grab rule*.²⁴ The premise of the territorial approach is that separate procedures need to be applied in different jurisdictions involved in cross-border insolvency matters. Only the local laws are applicable in cross-border insolvency matters.²⁵ The territorial approach imposes a number of disadvantages. Although the intention of this approach is to promote the maximum advantage to local creditors, it does not encourage the best possible return for the pool of creditors as a whole.²⁶ In response to the deficiencies caused by the territorial approach, a modern territorial or cooperative territorial model has been proposed.²⁷ In terms of the cooperative model, the assets of the insolvent will be administered and divided by the local laws of the jurisdiction where the assets are situated.²⁸ Every court involved will appoint an estate representative who will cooperate with one another. The representatives may enter into an agreement to regulate certain aspects of the proceedings.²⁹ The representatives are however, not obliged to enter into such an agreement, and therefore the cooperative model does not solve the problems caused by territoriality, conceding that the representatives of the different jurisdictions fail to reach an agreement.

The primary focus of the universality approach is to promote the cooperation between different jurisdictions involved in cross-border insolvency matters. The motive behind this model is that all the different insolvency procedures of the multiple jurisdictions involved will be treated as a single insolvency procedure.³⁰ There will be a central proceeding for the administration and the collection of the assets of the debtor, regardless of where the assets are situated. The applicable forum will be determined by several considerations, such as the “home-country”, place of incorporation or as described by the UNCITRAL *Model Law* the centre of main interests (COMI). The home-country will be the place where a natural person is domiciled and the centre of main interests of a company.³¹ The main challenge with this model is the uncertainty with determining the COMI in each particular case.

²⁴ Botha and Stander “Die bepaling van die ‘sentrum van hoofbelange’ by oorgrens insolvensies: Is die Parmalat-benadering voldoende om die behoeftes van modern handel te bevredig?” 2011 36(1) *Journal for Juridical Science* 23.

²⁵ *Ibid* 24.

²⁶ *Ibid*.

²⁷ Stroebel *Protocols as a possible solution to jurisdiction problems in cross-border insolvencies* (LLM Dissertation NWU 2006) 6.

²⁸ Botha and Stander 2011 36(1) *Journal for Juridical Science* 25.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ *Ibid* 27.

Most jurisdictions follow the territorial model in cross-border insolvency matters, but because of the increase in international trade and investment, more jurisdictions tend to be heading towards the utilization of the universal model.

With the adoption of the Cross-Border Insolvency Act, the legislature agreed to move away from the territorial model.³² The Cross-Border Insolvency Act is not operative yet, and therefore cross-border insolvency matters are regulated by the South African common law, and the territorial approach is still followed. South African courts place much emphasis on the protection of local creditors, and therefore it can be argued that the South African system of cross-border insolvency, is currently based on the modern-territorialism model.

2.3 Common law

Legal rules are frequently steeped in a certain legal culture and there is minimal uniformity in the various insolvency regimes.³³ This causes major legal problems to occur in cross-border insolvency matters.³⁴ These difficulties can be dealt with in various ways, such as treaties or conventions between different jurisdictions, or specific legal rules based either on common law or statute.³⁵ South Africa is not a party to any treaty or convention dealing with the subject of cross-border insolvency. Therefore when dealing with cross-border insolvency in South Africa, one has to rely on the South African common law. The South African legal system is derived from the Roman-Dutch Law, which is commonly referred to as the South African common law.³⁶ The South African legal system was also influenced by the English Law most particularly in the area of mercantile law, such as the law of insolvency and the English system of precedent.³⁷

The South African law of cross-border insolvency is based on the principle of comity.³⁸ In order to determine which principles would apply to a cross-border insolvency matter, a distinction needs to be drawn between movable and immovable property as well as the categorization of the parties involved. The definition of property contained in section 2 of the Insolvency Act³⁹, includes movable as well as immovable property wherever situated in the Republic of South Africa.⁴⁰ The general rule is that all property of the insolvent located in South Africa, vests in his trustee. Whether a foreign

³² Botha and Stander 2011 36(1) *Journal for Juridical Science* 26.

³³ Meskin 17-2.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Stroebel (LLM Dissertation NWU 2006) 16.

³⁷ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 140.

³⁸ *Idem* 135.

³⁹ Insolvency Act 24 of 1936 (hereafter Insolvency Act).

⁴⁰ Zulman "Cross-Border Insolvency in South African Law" 2009 21 *SA Merc LJ* 809.

representative such as the trustee or liquidator may deal with South African assets, is a question determined by a division of types of property, and classification of persons.⁴¹

2 3 1 Movable property

The common law draws a distinction between immovable and movable property. The distinction between movable and immovable property also affects the question of whether the foreign trustee is required to seek recognition from the High Court in South Africa. A sequestration order has no effect on immovable property situated in a foreign jurisdiction, the property remains vested in the insolvent, under the common law. A sequestration order granted by the court of the debtor's domicile *ipso facto*, divests the insolvent of all his movable property, wherever situated, but a sequestration order granted by any other court has *per se* no operation on the debtor's assets, whether movable or immovable, situated outside such court's jurisdiction.⁴² The latter creates one *concursum creditorum*, the rule is universal in its effects and so advances universality.⁴³

The rule has been evidently illustrated in the case of *Trustee of Howse, Sons & Co v Trustees of Howse, Sons & Co*.⁴⁴ In this case the estate of an English firm which was situated in the Cape Colony, petitioned in London for liquidation proceedings by arrangement or composition. The firm had only movable assets in the Cape Colony.⁴⁵ The creditors of the English firm which were based in the Cape, later instituted proceedings for sequestration in a Cape court. De Villiers CJ said: "the general rule relating to movable or personal estate is that it is subject to the same law as that which governs the person of the owner, in other words the law of his domicile".⁴⁶ The property was assigned by virtue of the English law, the law of the debtor's domicile, and the effect of this step was universal.⁴⁷ The insolvent's movables were transferred everywhere else as well, including the movables in the Cape Colony.⁴⁸ The Cape court set aside the sequestration proceedings in the Cape as well as the local trustee's appointment, though with the necessary safeguard for local creditors to ensure that local creditors would not lose their local preferences.⁴⁹ The notion that the movable property is assigned to their owners domicile is based on the principle of comity. Comity is the recognition

⁴¹ Sharrock *et al Hockley's Insolvency Law* 9th edition Juta Law Books (2012) (hereafter Hockley) 298.

⁴² Mars 663.

⁴³ Smith "Some aspects of Comity and the Protection of Local Creditors in Cross-Border Insolvency Law: South Africa and the United States Compared" 2002 14 *SA Merc LJ* 24.

⁴⁴ *Trustee of Howse, Sons & Co v Trustees of Howse, Sons & Co; Jocelyne v Shearer & Hine* 1884 3 (SC) 14.

⁴⁵ Smith 2002 14 *SA Merc LJ* 25.

⁴⁶ 1884 3 (SC) 19.

⁴⁷ Stroebel (LLM Dissertation NWU 2006) 17.

⁴⁸ *Ibid.*

⁴⁹ Smith 2002 14 *SA Merc LJ* 25.

which one nation allows within its territory to the judicial acts of another state.⁵⁰ The use of this fiction serves as a mechanism of simplifying rights of transfer, which prevents confusion otherwise caused by *leges rei sitae*.⁵¹

Smith is of the opinion that practical effect should be given to the fiction according to the local law.⁵² The foreign trustee may need to approach the local courts for assistance in exercising administrative powers, although the trustee already owns the movables, his ownership is not unlimited. Innes CJ held in *Re Estate Morris*:⁵³

‘It is clear, more especially by our law, that sequestration at the domicile vests in the trustee of the insolvent all the latter’s movables, wherever situated. By a fiction of the insolvent’s movable property is all considered to be present at his domicile, and sequestration there operates at once to transfer that movable property, wherever it is actually situated, to the trustee when appointed.’

The trustee will usually have to comply with certain conditions imposed by the court to protect the interest of local creditors.⁵⁴ Before the trustee may deal with the local assets or transfer the proceeds of the local assets, the trustee must comply with the conditions imposed on him or her by the court.

Although it is not compulsory for the representative to obtain recognition when dealing with movable property of the insolvent situated outside the Republic, the frequency of doing so has raised the requirement into principle.⁵⁵ In the case of *Moolman v Builders & Developers (Pty) Ltd*⁵⁶, the court stated that recognition orders had been sought in previous cases. The Appeal Court explained that where a foreign representative, such as an executor, liquidator, or receiver, wishes to deal with assets in South Africa, in his representative capacity and by virtue of his foreign authorisation, he must first be recognised in appointment by a court of law or person of competent jurisdiction in South Africa, before he is entitled to act.⁵⁷

⁵⁰ Stroebel (LLM Dissertation NWU 2006) 17.

⁵¹ Smith 2002 14 SA Merc LJ 26.

⁵² *Ibid.*

⁵³ *In Re Estate Morris* 1907 TS 657.

⁵⁴ Smith 2002 14 SA Merc LJ 27.

⁵⁵ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 174.

⁵⁶ *Moolman v Builders & Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 (1) SA 954 (A).

⁵⁷ *Moolman v Builders & Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 (1) SA 954 (A) 959 H.

In *Ex Parte Palmer: in re Hahn*⁵⁸, the court held that with regards to movable property, a formal application for the recognition of a foreign trustee is not strictly necessary.⁵⁹ The court also referred to the judgment of *Moolman v Builders & Developers (Pty) Ltd* and stated that as a matter of practice, such an application is invariably made and the need for formal recognition has been elevated into principle.⁶⁰ *Formal recognition is often the only route to follow with regards to movables.*⁶¹

2 3 2 Immovable property

The position regarding immovable property is different. In relation to immovable property the principle of *lex loci rei sitae* applies. When dealing with immovable property, the representative of the insolvent estate will have to obtain recognition from the foreign jurisdiction before the representative may deal with any of the immovable property situated in the foreign jurisdiction.⁶² According to Mars, the court's discretion in relation to the recognition of immovable property at common law has been described as absolute, and no court is bound to recognise the appointment of a trustee made in other jurisdictions.⁶³ The South African court exercises its discretion in hearing the recognition application based on comity, convenience and equity.⁶⁴ No person will be allowed to act in a representative capacity in South Africa before obtaining the said recognition.⁶⁵

2 3 3 The distinction between an inward-bound and outward-bound request

It is also necessary to distinguish between an 'inward-bound' request and an 'outward-bound' request. Inward-bound request is the situation where the foreign representative makes the request to the High Court in South Africa, and an outward-bound request is where the request for assistance is sought by a South African trustee or liquidator, to courts outside the Republic.⁶⁶ If a trustee is obliged to seek recognition, he has no power to deal with South African assets until he has obtained recognition.⁶⁷

In practical terms it indicates that, if a liquidator or trustee has been appointed in England or in Namibia or any other country in relation to a debtor who also owns property in South Africa, the

⁵⁸ *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C).

⁵⁹ *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) 362 E.

⁶⁰ *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) 362 E.

⁶¹ Stroebel (LLM Dissertation NWU 2006) 20.

⁶² Mars 663.

⁶³ *Idem* 665.

⁶⁴ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 176.

⁶⁵ Zulman 2009 21 *SA Merc LJ* 810.

⁶⁶ Mars 664.

⁶⁷ *Idem* 665.

foreign representative must approach a South African court to recognise him as a trustee or a liquidator in order to deal with the assets situated in South Africa. The foreign representative approaches the South African court with his letter of appointment, as evidence that he has been duly appointed as a liquidator in the particular foreign jurisdiction. The recognition will allow him to conduct certain activities in relation to the assets of the particular debtor, whose assets are situated in South Africa. This request is an 'inward-bound' request.

On the other hand, if a South African trustee or liquidator establishes that the debtor's estate has been sequestrated or liquidated in South Africa, and the debtor also owns property in foreign jurisdictions, then the South African estate representative, who wants to attach these assets in order to sell them for the benefit of the South African creditors, will have to search the legal system of the foreign jurisdiction where the assets are situated. The South African estate representative will have to apply for a recognition order, in terms of the law in the foreign jurisdiction, which will allow him/her to deal with those assets. This process will be described as an 'outward-bound' request.

2 3 4 The distinction between individuals and corporate entities

In terms section 20 of the Insolvency Act, property of the insolvent vests in the trustee of an insolvent estate.⁶⁸ However, property of a company in winding-up remains vested in the company and the liquidator obtains control of such property.⁶⁹ Under the South African common law, the distinction between a juristic person and a natural person is therefore imperative when dealing with a cross-border insolvency matter.

A foreign representative is obliged to seek recognition from the local courts with the liquidation of a company or close corporation that is domiciled in a foreign country.⁷⁰ Most international insolvencies focus on companies and not individuals, and therefore the foreign representative is not assisted by the convenient fiction of comity.⁷¹ In *Ward v Smith: in re Gurr v Zambia Airways Corporation Ltd*⁷², the court illustrated the importance of foreign liquidators seeking recognition from the local courts. In this case, an employee of Zambian Airways applied for the compulsory liquidation of the company⁷³ under section 344(g) of the South African Companies Act.⁷⁴ Zambian Airways was an external company.

⁶⁸ Meskin 17-5.

⁶⁹ Section 361 of the Companies Act 61 of 1973.

⁷⁰ *Donaldson v British SA Asphalt and Mfg. Co Ltd* 1905 TS 735.

⁷¹ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 175.

⁷² 1998 (3) SA 175 (SCA).

⁷³ *Ward v Smith: in re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) 176 B.

⁷⁴ 61 of 1973.

The Zambian liquidators relied on section 354 of the Companies Act for a court order, recognising their appointment as liquidators of the company and declaring them to be empowered to administer the South African estate of the company.⁷⁵ The Zambian liquidator further applied for a court order setting aside the provisional and final winding-up order granted to the South African employee and to compel the provisional liquidator to hand them the company's assets.⁷⁶ The Supreme Court of Appeal dismissed their application and held accordingly, that a South African court had jurisdiction in terms of section 344(g) to grant a winding-up order in respect of an external company notwithstanding that the company was the subject of a winding-up in the country of its incorporation, and that it followed that the Local Division which granted the winding-up order, had jurisdiction to do so.⁷⁷ The court held that the appointment of the foreign liquidators by the Zambian court had no effect outside its jurisdiction.⁷⁸

If a liquidator is obliged to seek recognition, he has no power to deal with movable or immovable assets of a company in South Africa until he has obtained recognition. The Zambian liquidators attempted to deal with the company's South African assets without obtaining recognition from the South African court. The court stated that the foreign liquidators' excuses for their failure of obtaining recognition will not be tolerated. The fact that the liquidators had failed to understand the South African law or that they were overworked, served as no excuse in this particular case.⁷⁹

From the above it is evident that it is compulsory for a foreign liquidator to obtain recognition from the Local court in South Africa before dealing with any of a company's assets situated in South Africa, whether the assets are movable or immovable. Although the rule on immovable property is simpler because it doesn't distinguish between individuals or juristic persons, an inference can be drawn that any foreign representative should apply for recognition before dealing with any assets in South Africa, whether movable or immovable or pertaining to a company or individual. The reason for the latter is that although a foreign representative need not apply for recognition pertaining to movable assets of an individual, if the sequestration order is granted by a court of the debtors domicile the frequency of doing so has raised the requirement into principle. In all the other instances it is a statutory requirement for the foreign representative to apply to the local court for recognition before dealing with any of the assets.

⁷⁵ *Ward v Smith: in re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) 176 C.

⁷⁶ *Ibid.*

⁷⁷ *Ward v Smith: in re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) 177 D.

⁷⁸ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 175.

⁷⁹ *Ibid.*

2 3 5 Comity, Convenience and Equity

When a court contemplates the possibility whether to grant an application for recognition, the court exercises its discretion on the basis of comity, convenience and equity.⁸⁰ The discretion of the court is absolute in relation to immovable property.⁸¹ Comity and convenience is a factor which plays a part in influencing the local court to exercise its discretion in favour of recognising a foreign trustee; it is not a separate ground for granting the recognition to the trustee.⁸² When the courts exercise their discretion, they will also try to ensure that the interests of local creditors are adequately protected.⁸³ The court in *Ex parte Stegman*⁸⁴ said:

“But on the other hand, in the same court, acting from motives of comity or convenience, is equally justified in allowing the order of the judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of such order. **The matter is entirely one for its own discretion.**”

In *Ex Parte Palmer NO: In re Hahn*⁸⁵, the court held that in order for the foreign representative to deal with the insolvent's immovable property in South Africa, formal recognition is required. The court further held that the granting of recognition is no formality, and that the South African courts may grant or refuse to accord recognition of a foreign trustee in their discretion. The court will only exercise such discretion in favour of the foreign trustee under special circumstances. Smith argues that the South African Law of cross-border insolvency, both in the convenient fiction for movable property and the inflexible rule for immovable property rest on comity.⁸⁶

The court defined comity in the case of *Hilton v Guyot*⁸⁷ as follows:

“Comity is neither a matter of absolute obligation on the one hand, nor of mere courtesy or goodwill upon the other. But it is the recognition which one nation allow within its territory to the legislative, executive or judicial act of another nation, having due regard both to international duty and convenience, and to rights of its own citizens or of other persons who are under the protection of its law.”

⁸⁰ Mars 666.

⁸¹ *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) 362 J.

⁸² *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) 363 H.

⁸³ Fourie (LLM Dissertation 2012 NWU) 30.

⁸⁴ 1902 TS 40.

⁸⁵ 1993 (3) SA 359 (C) 362 F-G.

⁸⁶ Smith 2002 14 SA Merc LJ 31.

⁸⁷ 1895 159 US 113 at 163-164.

Boraine and Smith argue that comity itself is not analyzed but merely invoked as a basis for the rules under the common law on cross-border insolvency as developed by the South African courts.⁸⁸

*Deutsche Bank AG v Moser and Another*⁸⁹ clearly illustrates the principle of convenience and equity. The court asserted that considering the question of convenience in an application for the sequestration of an estate, is not the convenience of the Courts but what happens after the order is granted.⁹⁰

The applicant was a duly incorporated and registered company in Germany. The respondent was a German citizen and resided in Germany. The respondent owned immovable property within the courts' jurisdiction which was Plettenberg Bay, Cape. The respondent owned virtually no assets in Germany. It was common cause that the respondent signed three agreements of suretyship in favour of the applicant between 1987 and 1992. The suretyship was for the debt of three German companies of which he was a shareholder and managing director. One of these companies had been wound up in Germany. The other two companies had not been wound up but were *de facto* insolvent. The respondent opposed the application by contending that all the suretyships were invalid and unenforceable in terms of German Law. His second contention was that it was neither convenient nor equitable that his estate be sequestrated in South Africa, and that the applicant should have sought relief in a court in Germany.⁹¹

The court held that it was more convenient that the matter be adjudicated upon the South African court than the one in Germany, especially as an application to a German court may have resulted into no advantage to creditors. This results because a foreign order of sequestration would not by itself have divested the respondent of the immovable property within the jurisdiction of the South African court.⁹²

StroebeI argues that there should be a balance between the consideration of comity in the recognition of foreign proceedings and the protection of local creditors.⁹³ StroebeI defines comity as follows: "*comity could be defined as the recognition by Country A of the legislative, executive and judicial act of Country B, after a careful consideration of a possible disadvantage to local creditors*".⁹⁴ Fourie is of the opinion that the local creditor's secured right will be treated according to the South

⁸⁸ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 173.

⁸⁹ 1999 (4) SA 216 (C).

⁹⁰ 1999 (4) SA 216 (C) 219 H-H/I.

⁹¹ *Idem* 217 F-H.

⁹² *Deutsche Bank AG v Moser and Another* 1999 (4) SA 216 (C) 219 I-220 A.

⁹³ StroebeI (LLM Dissertation NWU 2006) 22.

⁹⁴ *Ibid.*

African insolvency law, and that the debtor will be treated as if he/she is an insolvent according to the South African law.⁹⁵ Therefore the effect of the recognition will be that the debtor will be treated as if he/she is an insolvent in terms of the South African law although he or she will not be an insolvent in terms of our jurisdiction.⁹⁶

2 3 6 Protection of Local Creditors

A court considering an application for recognition of foreign proceedings should have regard to the interests of local creditors. If the court grants the application for recognition the court should impose conditions for the protection of local creditors.⁹⁷ Comity, as a basis on which the South African court exercises its discretion when hearing a recognition application can be seen as the universalist impulse of South African cross-border insolvency law.⁹⁸ On the other hand the protection of local creditors and their interest can be described as the territorialist impulse of the South African cross-border insolvency law.⁹⁹

The conditions imposed by the court serve as a mechanism to protect the local creditors, as a safeguard that the estate will be equally divided and that the dividends due to local creditors are paid out of local assets if there are sufficient local assets.¹⁰⁰

The foreign representative is usually compelled to provide security to the satisfaction of the Master to ensure that the representative will properly perform his/her duties.¹⁰¹

In *Clegg v Prieststley*¹⁰², the court held that it is a critical principle in South African law that the court should not make an order that may prejudice the rights of parties not before the court.¹⁰³ The court said that usually a rule *nisi* should be ordered to inform local creditors of the foreign representative's intention to attach the local assets. Smith is of the opinion that the rule *nisi* must be issued, and argues that protection logically requires effective notification.¹⁰⁴

*Ex parte Steyn*¹⁰⁵ is a practical illustration of how the court goes about to protect the local creditors. In this case the Lesotho High Court sequestered the estate of Moreira and appointed Steyn as the

⁹⁵ Fourie (LLM Dissertation NWU 2012) 30.

⁹⁶ Olivier and Boraïne 2005 *CILSA* 380.

⁹⁷ Mars 670.

⁹⁸ Smith 2002 14 *SA Merc LJ* 32.

⁹⁹ *Ibid.*

¹⁰⁰ Mars 670.

¹⁰¹ *Ibid.*

¹⁰² 1985 3 SA 950 (W).

¹⁰³ *Idem* 953 J.

¹⁰⁴ Smith 2002 14 *SA Merc LJ* 32.

¹⁰⁵ 1979 2 SA 309 (O).

trustee of the insolvent estate. Steyn applied to the South African court for an order, recognising his appointment as trustee of the insolvent estate, to enable him to administer the assets of the insolvent situated in South Africa. The court recognised Steyn's appointment until it should order the withdrawal thereof. The court set certain conditions to his power of dealing with the South African assets. These conditions included that Steyn would furnish security to the satisfaction of the master, to ensure the proper performance of his duties and he must also pay the masters costs and charges. The court order made provision that the rights defined in terms of the Insolvency Act 24 of 1936 in favour of the Master, a creditor and an insolvent *mutatis mutandis* exist in relation to the sequestration order of the Lesotho High Court as if it was a sequestration order made by a South African court.¹⁰⁶ The court's order provided that only a creditor whose whole cause of action arose within South Africa or who is an *Incola* of the Republic, shall acquire any right to prove a secured or preferent claim.¹⁰⁷

As illustrated in *Ex parte Steyn*, the South African courts will go to great lengths in order to protect local creditors. Smith is of the opinion that because so much emphasis is being placed on the protection of the interests of local creditors, the South African approach to cross-border insolvency can be described as 'modified territoriality'.¹⁰⁸

2 4 Conclusion

The current position in South Africa with regards to cross-border insolvencies, involves a burdensome procedure, which in my opinion will have a great impact on international trade and investment. The increase of cross-border insolvency as a global economic problem, gave rise for the need of a general equitable system to administer cross-border insolvency universally. The *Model law on Cross-Border Insolvency* was promulgated by the *United Nations Commission on International Trade Law* (UNCITRAL) in 1997.¹⁰⁹ The purpose of the UNCITRAL *Model Law on Cross-Border Insolvency* is to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address instances of cross-border insolvency more effectively.¹¹⁰ South Africa was one of the very first countries to adopt the UNCITRAL *Model Law on Cross-Border Insolvency* by way of the Cross-Border Insolvency Act 42 of 2000. Cross-border insolvency is currently regulated by the South Africa common law, despite the fact that the Cross-Border Insolvency Act came into force on

¹⁰⁶ *Ex parte Steyn* 1979 2 SA 309 (O) 311 H- 312 A.

¹⁰⁷ *Idem* 312 C.

¹⁰⁸ Smith 2002 14 SA Merc LJ 34.

¹⁰⁹ *Ibid.*

¹¹⁰ Stander 2002 *Journal for juridical Science* 27(2) 73; Smith and Boraine "Cross-Border Insolvency Law and the Local Creditor's Risk of Receiving Payment from a Foreign Company Registered as an External Company in South Africa" 2004 16 SA Merc LJ 468.

28 November 2003. The Act is currently ineffective because of the designation clause inserted into the South African version of the UNCITRAL *Model Law*.

In the next chapter I will address the problems caused by the designation requirement. I will analyse the Act indicating certain important provisions. Thereafter, a critical discussion will follow on the benefits, shortfalls of the Act and practical procedures that will need to be put in place in order for the Act to become fully operative. In this chapter I will also indicate the great impact that the Cross-Border Insolvency Act will have on the improvement of international trade and investment, and specifically by increasing foreign investors' trust in the South African legal system regarding cross-border insolvencies. I will furthermore discuss the fact that South Africa is heading towards a dual system, since the Cross-Border Insolvency Act contains a designation clause. Once the Act becomes fully operative, only those countries designated in the Act will be able to rely on the Act, the other countries however will have to follow the general route that is based on common law and precedent.

Chapter 3: The operation of the Cross-Border Insolvency Act 42 of 2000

3 1	Introduction	19
3 2	The UNCITRAL <i>Model Law</i>	20
3 3	Objectives and application of the Act	20
3 4	Designation Provision	23
3 5	International obligations, treaties and interpretation of the Act	25
3 6	Access of foreign representatives and creditors to courts in the Republic	26
3 7	Recognition of foreign proceedings	26
3 8	Relief upon application for recognition	28
3 9	Protection of creditors and other interested persons	30
3 10	Cooperation with foreign courts and foreign representatives	30
3 11	Concurrent proceedings in terms of the Act	31
3 12	Conclusion	32

3 1 Introduction

This chapter will address the problems caused by the designation requirement. I will analyse the Act by indicating certain important provisions. Thereafter, a critical discussion will follow on the benefits, shortfalls of the Act and practical procedures that will need to be put in place in order for the Act to become fully operative. In this chapter I will also indicate the great impact that the Cross-Border Insolvency Act will have on the improvement of international trade and investment, and specifically by increasing foreign investors' trust in the South African legal system regarding cross-border insolvencies. I will furthermore discuss the fact that South Africa is heading towards a dual system, since the Cross-Border Insolvency Act contains a designation clause. Once the Act becomes fully operative, only those countries designated in the Act will be able to rely on the Act, the other

countries however will have to follow the general route that is based on common law and precedent.

The primary objective of this chapter is to illustrate the incorporation of the UNCITRAL *Model Law* in the South African framework of cross-border insolvency. In this chapter the Cross-Border Insolvency Act will be analysed within the South African ambit of multinational insolvencies. The embodiment of this chapter will be focused on the important provisions of the Act and the practical implications thereof.

3 2 The UNCITRAL *Model Law*

The *Model Law on Cross-Border Insolvency* was promulgated by the *United Nations Commission on International Trade Law* (UNCITRAL) in 1997.¹¹¹ The purpose of the UNCITRAL *Model Law on Cross-Border Insolvency* is to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address instances of cross-border insolvency more effectively.¹¹² The UNCITRAL *Model Law on Cross-Border Insolvency* is the most significant attempt to assist various jurisdictions with the problems caused by cross-border insolvencies. Under the chairmanship of Retired Judge Zulman, the Project Committee of the South African Law Commission adapted the UNCITRAL *Model Law* for local use in South Africa.¹¹³ An adaption of the *Model Law* was therefore enacted into South African Law. South Africa was one of the very first countries to adopt the UNCITRAL *Model Law on Cross-Border Insolvency* by way of the Cross-Border Insolvency Act 42 of 2000. Although the Act came into force on 28 November 2003 it will only become operational and effective on the date of formal designation by the Minister of Justice.¹¹⁴ The designation procedure will be discussed in more detail later in this Chapter.

3 3 Objectives and application of the Act

The Act aims to strengthen cooperation between South African courts and those of foreign states involved in cases of cross-border insolvency matters. The Act strives to provide greater legal certainty for trade and investment and to provide a framework for fair and efficient administration of cross-border insolvencies. The goal is to protect creditors and other interested persons, including the debtor. Furthermore, the Act focuses on the protection and maximisation of the value of the debtor's assets. Lastly the Act provides an effective mechanism for the facilitation of the rescue of

¹¹¹Fourie (LLM Dissertation 2012 NWU) Abstract.

¹¹² Stander 2002 *Journal for juridical Science* 27(2) 73.

¹¹³ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 169.

¹¹⁴ *Ibid.*

financially troubled businesses, to ensure the protection of investment and thereby preserving employment.¹¹⁵

In terms of section 2 of the Cross-Border Insolvency Act, the Act applies in the following circumstances:

- (a) Where assistance is sought in the Republic by a foreign court or a foreign representative in connection with foreign proceedings; (this is also known as an inbound request).
- (b) Where assistance is sought in a foreign state in connection with proceedings under the laws of the Republic relating to insolvency; (this is also known as an outbound request).
- (c) Where foreign proceedings and proceedings under the laws of the Republic relating to insolvency in respect of the same debtor are taking place concurrently; (this is more commonly known as concurrent proceedings).
- (d) Where creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participating in, proceedings under the laws of the Republic relating to insolvency.

The purpose of the UNCITRAL *Model Law on Cross-Border Insolvency* is to assist countries to even out the process to ensure that the process is predictable. However, in many instances the use of local insolvency law might still be necessary. Although the purpose of the UNCITRAL *Model Law* is to make the process of cross-border insolvency more predictable, it was not taken into consideration by the drafters of the South African version of the *Model Law*. The South African version of the *Model Law* contains a designation provision which was not intended by the drafters of the *Model Law*. The objective and effect of a designation provision will be discussed below.

A designation provision was not recommended in the South African Law Commission's interim Report on Review of the Law of Insolvency: The Enactment in South Africa of UNCITRAL's Model Law on Cross-Border Insolvency.¹¹⁶ The Commission did not accept proposals by The Society of Advocates of South Africa (Witwatersrand Division), in comments by A P Rubens SC and David

¹¹⁵ Preamble to the Cross-Border Insolvency Act 42 of 2000.

¹¹⁶ ISBN: 0-0621-29300-8 June 1999 available at http://www.justice.gov.za/salrc/reports/r_prij63_crossborder_1999jun.pdf.

Leibowitz and a committee of the Society of Advocates of Natal, consisting of CJ Pammenter SC and G D Harpur that reciprocity should be required.¹¹⁷ The Commission concluded as follows¹¹⁸:

The Guide to Enactment stresses that the outcome of an application should be predictable.¹¹⁹ It is very important that the automatic effects of clause 20 create a breathing space without delay.¹²⁰ Requirements such as comity or reciprocity would probably impair the predictability of an application seriously and hamper the ability to obtain the minimum relief urgently. According to paragraphs 143,149 and 150 of the Guide to Enactment: if recognition should in a given case produce results that would be contrary to the legitimate interests of an interested party, the law of the enacting State should provide possibilities for protecting those interests; sometimes it may be desirable for the court to modify or terminate the effects of article 20; it may be necessary to set out the grounds on which the court could modify or terminate the mandatory effects under article 20; it would be consistent with the objectives of the Model Law if an enacting State spells out provisions that govern this question and the procedure.

The designation requirement was inserted by the Justice Portfolio Committee of Parliament. Strong motivation why reciprocity should not be required is made by Keith D Yamauchi¹²¹ where he states the following:

Because South Africa was one of the first countries to adopt the Model Law, one writer described this reciprocity requirement as a “sting in the tail”. Although the SA Act was passed in 2000, its date of commencement was postponed to 28 November 2003. To date, the Minister has yet to designate a State, as permitted by Section 2(2)(b). Thus, ironically although South Africa was one of the first countries to adopt the Model Law, for all practical purposes the SA Act remains dormant because of the reciprocity requirement.¹²²

Because of the protective provisions contained in the Model Law, reciprocity of any sort is not necessary. If domestic courts bear in mind the purposes of the Model Law, the Model Law could be beneficial to stakeholders and their countries’ economies given certainty and result in the event of a

¹¹⁷ See paragraphs 4.15 and 4.18 on page 9 *et seq.*

¹¹⁸ See paragraphs 4.15 and 4.18 on page 9 *et seq.*

¹¹⁹ See paragraphs 13 and 16.

¹²⁰ See paragraph 32 of the Guide to Enactment.

¹²¹ Yamauchi “Should Reciprocity be a part of the UNCITRAL Model Cross-Border Insolvency Law?” 2007 *Insolvency International Review* 145-179.

¹²² *Idem* 168.

business failure. As well, global restructuring could be a better solution for all stakeholders, even though territoriality might allow domestic creditors to gain a benefit in the short term.¹²³

Countries could adopt the Model Law, with no reference to reciprocity of any sort. Those countries that have included reciprocity provisions should consider repealing those provisions immediately.¹²⁴

3 4 Designation provision

The designation clause entails that the Act will only be applicable to countries designated by the Minister of Justice by notice in the *Government Gazette*.¹²⁵ The Minister must be satisfied that the foreign state recognizes proceedings under the laws of the Republic of South Africa relating to insolvency, to the extent that justifies the application of the Act to foreign proceedings in the foreign state, before making the designation.¹²⁶ The Minister may at any time, by way of notice in the *Government Gazette* withdraw such notice. This will have the effect that the designated state will no longer be a foreign state for purposes of the Act.¹²⁷ Prior to the publication of any of these notices it must be approved by Parliament.¹²⁸ Unfortunately no countries have yet been designated; therefore the Cross-Border Insolvency Act is currently of no assistance in cross-border insolvency matters.

The Cross-Border Insolvency Act is not sufficiently operative despite the fact that the Act was passed over 11 years ago. One of the main reasons why the Act has not become fully operative is because the Act introduced a reciprocity clause. The reciprocity clause is not contained in the UNCITRAL *Model Law*, and therefore the South African Cross-Border Insolvency Act deviates from the *Model Law* on the aspect of reciprocity. Due to the designation requirement in the Act, the Act is more limited in its application than the UNCITRAL *Model Law* on cross-border insolvency.¹²⁹ The UNCITRAL *Model Law* excludes certain specialised institutions such as banks, whereas the designation requirement in the Cross-Border Insolvency Act restricts the entire legal system and not merely specific types of debtors.¹³⁰

¹²³ Yamauchi "Should Reciprocity be a part of the UNCITRAL Model Cross-Border Insolvency Law?" 2007 *Insolvency International Review* 179.

¹²⁴ *Ibid.*

¹²⁵ Section 2(2)(a) Cross-Border Insolvency Act 42 of 2000.

¹²⁶ Section 2(2)(b) Cross-Border Insolvency Act 42 of 2000.

¹²⁷ Section 2(3) Cross-Border Insolvency Act 42 of 2000.

¹²⁸ Section 2(4) Cross-Border Insolvency Act 42 of 2000.

¹²⁹ Meskin 17-15.

¹³⁰ *Ibid.*

According to Smith and Boraine the principle of reciprocity will have a contradictory approach to Cross-Border Insolvency.¹³¹ The designation clause will have the effect that South Africa will in future follow a dual system, because the Cross-Border Insolvency Act will only be applicable to the designated states, whilst the states which are not designated will still have to follow the common law route. Smith and Boraine argue that the system proposed by the *Model Law* may take a while to operate adequately in South Africa because of the designation clause.¹³² The system of designation can also cause a delay between the introduction of another state's version of the *Model Law* and the South African designation of that foreign state for the purpose of reciprocity.¹³³

The South African common law will prevail even in the event of proceedings that will substantiate the application of both the *Model Law*'s between South Africa and another state until the foreign state have been designated.¹³⁴ Therefore in the latter event it would not be possible to apply the South African version of the *Model Law* until the other state has been designated. Smith and Boraine asserted that it is evident that the process of designation is the pivot on which the Cross-Border Insolvency Act turns.¹³⁵ Another viewpoint is that the designation requirement might encourage other states to adopt the *Model Law*, which will result in more harmonization in the field of cross-border insolvency.¹³⁶

The designation clause in the Cross-Border Insolvency Act is detrimental to the effective operation of the Cross-Border Insolvency Act. It was not the intention of the UNCITRAL *Model Law on Cross-Border Insolvency* to have a designation clause in the Act, and according to some researchers the designation clause defeats the purpose of the *Model Law*, which is to harmonise the field of Cross-Border Insolvency. Fourie is of the opinion that it can justifiably be argued that the designation clause should be removed from the Cross-Border Insolvency Act by way of an amendment to the Act.¹³⁷ In agreement with Fourie, that if the designation clause would be amended it will be beneficial for international trade and investment. By amending the designation clause it will bring the cross-border insolvency dispensation in line with the most important role players in international trade and investment such as the United States of America and the United Kingdom. Retired Judge Zulman states that the designation clause in the Cross-Border Insolvency Act constitutes a serious flaw.¹³⁸ Zulman further mentioned that the concept of reciprocity and comity is outdated and not in

¹³¹ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 215.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Olivier and Boraine 2005 *CILSA* 388.

¹³⁷ Fourie (LLM Dissertation 2012 NWU) 27.

¹³⁸ Zulman 2009 21 *SA Merc LJ* 816.

conformity with modern thinking on the subject of cross-border insolvency, and that these concepts are usually political in nature.¹³⁹ According to Zulman, a particular country can be acceptable at one point in time and unacceptable at another, which will lead to uncertainty which was one of the main reasons for the enactment of the *Model Law*.

It is clear that the designation clause contained in section 2 of the Cross-Border Insolvency Act causes major problems with regards to the effective operation of the Act. Although the Act was passed in 2003, the Minister of Justice has not designated any countries in the Act, which leaves the Act completely ineffective and of no assistance in the field of cross-border insolvency. This leads to further frustration in practice.

It is of utmost importance to encourage the designation of foreign states in order for South Africa to attract foreign investment. The designation of foreign states will provide foreign investors the affirmation of the local situation, in case of cross-border insolvency matters. The handling of cross-border insolvency matters will remain unpredictable to foreign investors until designation takes place. Although the Cross-Border Insolvency Act is currently ineffective, it is important to address the rules and principles as set out in the Act that will apply to designated states once designation takes place. The Cross-Border Insolvency Act provides a more suitable and appropriate structure for cross-border insolvencies than the rules and principles applicable under the common law.

3 5 International obligations, treaties and interpretation of the Act

Section 3 of the Cross-Border Insolvency Act states that the extent to which the Act conflicts with an obligation of the Republic, arising out of any treaty or other form of agreement to which South Africa is a party with one or more foreign states, and which treaty or agreement has been enacted into law in terms of section 231(4) of the Constitution of RSA 1996, the requirements of the treaty or agreement will prevail. If South Africa for instance has a cross-border treaty with Namibia, then the treaty will trump the Cross-Border Insolvency Act in as far as the Act is out of line with the treaty. Currently South Africa has no treaty with any other state regarding cross-border insolvency.¹⁴⁰ What section 3 entails is that in the event that South Africa enter into an agreement or treaty with another state and the Act conflicts with an obligation arising out of such treaty, then the treaty will prevail. Section 5 of the Cross-Border Insolvency Act makes provision for a South African insolvency representative such as a trustee or liquidator, to Act in a foreign country in respect of South African insolvency proceedings insofar as the laws of the foreign country may permit. The Act also provides

¹³⁹Zulman 2009 21 *SA Merc LJ* 817.

¹⁴⁰ Section 3 Cross-Border Insolvency Act 42 of 2000.

access for foreign representatives to courts in the Republic of South Africa which will be discussed below.

3 6 Access of foreign Representatives and Creditors to Courts in the Republic

The provisions of chapter 2 of the Cross-Border Insolvency Act provide direct access for foreign representatives to Courts in the Republic.¹⁴¹ The Act provides direct access to foreign representatives without the obligation of diplomatic or other intervention or interference.¹⁴² The recognition of foreign proceedings referred to in the Act, must be done by the High Court of South Africa.¹⁴³ The debtor's or the foreign representative's foreign assets or affairs are not subject to the jurisdiction of the Courts in the Republic for any other purpose than the application being made.¹⁴⁴ The recognition of foreign proceedings by the South African High Court has the effect that the foreign representative will be allowed to participate in the South African insolvency proceeding, which will still be governed by the South African law relating to Insolvency.¹⁴⁵

Foreign creditors have the same rights as South African creditors with regards to the institution of, and participation in South African proceedings.¹⁴⁶ The latter does not affect the ranking of local creditor's claims provided that the foreign creditor's claims may not be ranked lower than local non-preferent claims.¹⁴⁷ For instance, if the foreign creditor wants to be ranked as a secured creditor in the South African proceedings, then the foreign creditor will have to proof a secured claim in terms of South African law. Section 13(3) provides that without generally derogating from the application of the law and practice of the Republic, the ranking of claims in respect of assets situated in the Republic is regulated by the law and practice of South Africa in respect of the ranking of claims. Stander is of the opinion that this is an indication of the legislature's intention that for a single proceeding, the local creditors should be paid the dividend that they are entitled to in gross before any amount of money is paid over to the foreign representative.¹⁴⁸

3 7 Recognition of Foreign Proceedings

Chapter 3 of the Cross-Border Insolvency Act deals with the recognition of foreign proceedings and relief.¹⁴⁹ The foreign proceedings must either be recognised as foreign main or foreign non-main

¹⁴¹Section 9 Cross-Border Insolvency Act 42 of 2000.

¹⁴²*Ibid.*

¹⁴³ Stander 2002 *Journal for juridical Science* 27(2) 76.

¹⁴⁴Meskin 17-16.

¹⁴⁵*Ibid.*

¹⁴⁶Meskin 17-16.

¹⁴⁷*Ibid.*

¹⁴⁸ Stander 2002 *Journal for juridical Science* 27(2) 78.

¹⁴⁹Zulman 2009 21 *SA Merc LJ* 816.

proceedings. Proceedings taking place in the State where the debtor has the centre of his or her or its main interests, will be described as foreign main proceedings in terms of section (1)(e) of the Cross-Border Insolvency Act. Foreign non-main proceedings are proceedings other than foreign main proceedings taking place in a state where the debtor has an establishment within the meaning of section (1)(c) of the Act. An establishment in terms of the Act means any place of operation where the debtor carries out a non-transitory economic activity with human means and goods or services.

In terms of section 17(3) the court is obliged to recognise foreign proceedings if certain requirements are met. The requirements include that the application for recognition must be submitted to the relevant court. The foreign proceedings must be proceedings within the meaning of section 1(g) of the Act.¹⁵⁰ The foreign representative applying must be a person or body within the meaning of section 1(h) of the Act.¹⁵¹ The application for recognition must meet the requirements as set out in section 15(2) of the Act. The application for recognition must be accompanied by a certified copy of the decision, commencing the foreign proceedings and appointing the foreign representative.¹⁵² If the latter is not possible, the Act also provides an alternative which is a certificate from the foreign court, affirming the existence of the foreign proceedings and of the appointment of the foreign representative.¹⁵³ If the decision or certificate as mentioned above indicates that the foreign proceedings are proceedings as construed and the foreign representative is a person or body as construed, the court may so presume.¹⁵⁴

Section 15(2)(c) provides that in the absence of such evidence that needs to accompany the application for recognition, any other evidence acceptable to the court of the existence of the foreign proceedings and of the appointment of the foreign representative will suffice. Section 16(2) of the Act provides that the court may presume that the documents submitted in support of the application for recognition are authentic, whether they are legalised or not. The court is obliged, in terms of section 17 of the Act to recognise an application for foreign proceedings if the requirements as set out above are met. At common law, the court exercises its discretion to recognise the foreign proceedings; however the Act places an obligation on the court to recognise

¹⁵⁰ Foreign proceedings means collective judicial or administrative proceedings in a foreign state, including interim proceedings, pursuant to a law relating to insolvency in which proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

¹⁵¹ Foreign representative means a person or body, including one appointed on an interim basis, authorised in foreign proceedings to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

¹⁵² Section 15(2)(a) of the Cross-Border Insolvency Act 42 of 2000.

¹⁵³ Section 15(2)(b) of the Cross-Border Insolvency Act 42 of 2000.

¹⁵⁴ Section 16(1) of the Cross-Border Insolvency Act 42 of 2000.

the foreign proceedings if certain requirements are met.¹⁵⁵ Upon the recognition of a foreign proceeding, certain relief is afforded to the foreign representative. The relief that may be granted upon the recognition of foreign proceedings or during the time of applications to be recognised differs depending on the situation. The relief that may be granted in each particular instance will be addressed below.

3 8 Relief upon application for recognition

In terms of section 19 of the Act, the court may from the time of filing an application for recognition until the application is decided upon, at the request of the foreign representative grant relief of a provisional nature, where the relief is urgently needed to protect the interest of creditors.¹⁵⁶ Unless the relief is extended as discretionary relief, the relief terminates when the application for recognition is decided upon.¹⁵⁷ The court may refuse to grant provisional relief if such relief would interfere with the administration of foreign main proceedings.¹⁵⁸ When the relief sought is urgent, interim relief, and then a notice of temporary relief must be given.¹⁵⁹

The provisional relief that the court may grant, includes *inter alia* staying execution against the debtor's assets and entrusting the administration or realisation of the debtor's assets which is located in South Africa to the foreign representative.¹⁶⁰ The court will only entrust the foreign representative with the administration and realisation of the debtor's assets, if the court is certain that the local creditor's rights are adequately protected. The court may suspend the right to transfer, encumber or otherwise dispose of any of the debtor's assets. The court may allow the foreign representative to examine witnesses, to take evidence or information regarding the debtor's assets, affairs, rights, obligations or liabilities.¹⁶¹

The court may grant any additional relief that may be available to a trustee, liquidator, judicial manager and curator of an institution or receiver under the laws of the Republic.¹⁶² Once the foreign proceedings have been recognised as either foreign main or foreign non-main proceedings, certain relief may be granted to the foreign representative. The relief that may be granted will

¹⁵⁵ Section 17 of the Cross-Border Insolvency Act 42 of 2000.

¹⁵⁶ See section 19(1)(a)-(c) of the Cross-Border Insolvency Act 42 of 2000.

¹⁵⁷ The provisional relief may be extended under section 21(1)(f) of the Cross-Border Insolvency Act 42 of 2000.

¹⁵⁸ Section 19(4) of the Cross-Border Insolvency Act 42 of 2000.

¹⁵⁹ Stander 2002 *Journal for juridical Science* 27(2) 80.

¹⁶⁰ Section 19 (1)(a) and (b) of the Cross-Border Insolvency Act 42 of 2000.

¹⁶¹ Section 19 (1)(c) of the Cross-border Insolvency Act 42 of 2000.

¹⁶² Section 21 (1)(g) of the Cross-border Insolvency Act 42 of 2000.

depend on whether the foreign proceedings are recognised as foreign main proceedings or foreign non-main proceedings.

When proceedings are recognised as foreign main proceedings, then the relief emanates automatically upon the grant of the application for recognition. Recognition of a foreign main proceeding has a distinct advantage for practitioners in the sense that upon such recognition, commencement or continuation of individual legal actions or individual legal proceedings, concerning the debtor's assets, rights, obligations or liabilities is stayed.¹⁶³ Section 21 of the Insolvency Act applies in terms of a recognition order with regards to assets situated in the Republic to the same extent as it would have, if the debtor had been sequestrated by a court.¹⁶⁴ This is another aspect where the Cross-Border Insolvency Act deviates from the UNCITRAL *Model Law*. The court may at the request of a foreign representative, or an affected person, terminate the scope of the stay and suspension.¹⁶⁵

It is therefore clear that the South African courts do not have a general discretion to modify or terminate the automatic stay and suspension. However, the courts do have such a general discretion in the case of section 19 and 21.¹⁶⁶ Section 20 of the Cross-Border Insolvency Act provides that the automatic stay does not affect the right to commence individual actions or proceedings to the extent necessary, to preserve a claim against the debtor.¹⁶⁷ The right to request the commencement of proceedings under the laws of the Republic relating to insolvency, or the right to file claims in such proceedings are not affected by the automatic stay.¹⁶⁸

Section 21 of the Act makes numerous forms of discretionary relief available to a foreign representative. The discretionary relief as provided for under section 21 may be granted whether the foreign proceedings are recognised as foreign main proceedings or foreign non-main proceedings. The court will grant the discretionary relief sought by the foreign representative under section 21 where the relief is necessary to protect the assets of the debtor or the interests of the creditors. The relief that may be granted under section 21 includes inter alia that upon recognition of foreign proceedings as foreign main or foreign non-main proceedings, the court may entrust the distribution of the debtors assets in the Republic to the foreign representative or another person designated by the court, only when the court is satisfied that the interests of local creditors are

¹⁶³Section 21 (1)(g) of the Cross-border Insolvency Act 42 of 2000.

¹⁶⁴ Section 20(1)(d) of the Cross-Border Insolvency Act 42 of 2000.

¹⁶⁵ Section 20(2) of the Cross-Border Insolvency Act 42 of 2000.

¹⁶⁶Stander 2002 *Journal for juridical Science* 27(2) 81.

¹⁶⁷ Section 20(3) of the Cross-Border Insolvency Act 42 of 2000.

¹⁶⁸ Section 20(4) of the Cross-Border Insolvency Act 42 of 2000.

adequately protected.¹⁶⁹ Section 21(4) provides that without derogating from the application of the laws of the Republic generally, the court must indicate that the laws of the Republic relating to the administration, realisation or distribution of the debtor's estate in the Republic, will apply. With the relief that may be granted in mind, it is important to have regards to the safeguards that the Act has, with regards to creditors and other interested person.

3 9 Protection of creditors and other interested persons

When granting relief under section 19 or 21 of the Act, the court must be certain that the interests of the creditors and other interested persons including the debtor are adequately protected.¹⁷⁰ The court may impose conditions upon the relief granted in terms of sections 19 and 21, as the court considers appropriate. Section 22(3) provides that the court may at the request of the foreign representative or a person affected by the relief, granted under section 19 or 21, modify or terminate such relief. The court may at its own motion modify or terminate the relief that it has granted under section 19 or 21. Section 23 makes provision for actions that needs to be avoided to actions that may be detrimental to creditors. Upon recognition of foreign proceedings, the foreign representative has standing to initiate any legal action to set aside a disposition that is available to a trustee or liquidator under the laws of the republic relating to insolvency.¹⁷¹ When the foreign proceedings are foreign non-main proceedings, the court must be satisfied that the legal actions relates to assets that, under the laws of the Republic should be administered in the foreign non-main proceedings.

Section 24 of the Cross-Border Insolvency Act creates a statutory right of a foreign representative or trustee to intervene. The Act provides that upon recognition of foreign proceedings, the foreign representative has standing to initiate any legal action to set aside a disposition that is available to a trustee or liquidator under the laws of the Republic relating to insolvency. The Act places an obligation upon South African courts to cooperate with foreign courts and foreign representatives which will be addressed in more detail below.

3 10 Cooperation with foreign courts and foreign representatives

Chapter 4 of the Cross-Border Insolvency Act compels South African courts to cooperate with foreign courts or foreign representatives to the maximum extent possible, either directly or through a trustee, liquidator, judicial manager, curator of an institution or receiver.¹⁷² The South African court

¹⁶⁹ Section 21(2) of the Cross-border Insolvency Act 42 of 2000.

¹⁷⁰ Section 22 of the Cross-border Insolvency Act 42 of 2000.

¹⁷¹ Section 23(1) of the Cross-border Insolvency Act 42 of 2000.

¹⁷² Section 25(1) of the Cross-Border Insolvency Act 42 of 2000.

may communicate directly with, or request information or assistance directly from foreign courts or foreign representatives.¹⁷³ The South African trustee, liquidator, judicial manager, curator of an institution, or receiver must, in the performance of his or her or its functions, and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.¹⁷⁴

3 11 Concurrent proceedings in terms of the Act

Chapter 5 of the Cross-Border Insolvency Act makes provision for concurrent proceedings. Reference to the coordination of concurrent proceedings regarding the same debtor is being made in the form of cooperation. In this regard the Act makes provision for concurrent proceedings after foreign main proceedings have been recognised for the institution of South African proceedings. This can only occur if the debtor has assets situated in the Republic. Section 28(2) of the Act provides that the effects of such proceedings are restricted to the assets of the debtor that are located in the Republic, and to the extent necessary for implementing cooperation and coordination under sections 25 to 27 to other assets of the debtor, that under the law of the Republic, should be administered in those proceedings. At all material times where foreign proceedings and local proceedings are running concurrently regarding the same debtor, the court is obliged to explore cooperation and coordination under chapter 4 of the Cross-Border Insolvency Act.¹⁷⁵

Section 31 of the Act creates a presumption of insolvency based on the recognition of foreign main proceedings. The Act provides that in the absence of proof to the contrary, recognition of foreign main proceedings is, for the purpose of commencing proceedings under the laws of the Republic relating to insolvency, proof that the debtor is insolvent.¹⁷⁶ To illustrate the latter, an example is that if the South African court grants a recognition order, it is then taken that that debtor is insolvent in South Africa, even though the debtor might not be insolvent in South Africa, but is in fact solvent. The latter creates an implication, which in the case of a natural person will enable an estate representative to apply for compulsory sequestration.

Section 32 of the Act contains the rule of payment in concurrent proceedings. The Act provides that without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of his or her, or its claim in proceedings pursuant to a law relating to insolvency in a foreign state, may not receive a payment for the same claim in proceedings under the laws of the Republic

¹⁷³ Stander 2002 *Journal for juridical Science* 27(2) 84.

¹⁷⁴ Section 26(1) of the Cross-Border Insolvency Act 42 of 2000.

¹⁷⁵ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 194.

¹⁷⁶ Section 31 of the Cross-Border Insolvency Act 42 of 2000.

relating to insolvency regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.¹⁷⁷

3 12 Conclusion

Foreign representatives will have to accustom themselves with the South African insolvency law and the connection thereof to the Cross-Border Insolvency Act, and with the other South African statutes and common law rules and principles relevant to the particular set of facts.¹⁷⁸ The foreign representatives will gain access to the South African proceedings by way of the Cross-Border Insolvency Act, however from there onwards they will have to abide by the local rules relating to insolvency in South Africa.¹⁷⁹ Smith and Boraine argues that in this regard, the appointment of a co-representative in South Africa might hinder pure universality by leading to further costs, but it might advance speed and efficiency if the foreign representative could rely on local knowledge and contacts.¹⁸⁰

The Cross-Border Insolvency Act will afford a portal for foreign representatives to acquire access to South African proceedings; furthermore it will provide the same for South African representatives to gain access to foreign proceedings. The latter will only be reached when the Act comes into full force in the international system for cooperation intended by the UNCITRAL *Model Law*.¹⁸¹ Although the Cross-Border Insolvency Act is restricted in its designation conditions or requirements in section 2(2)-(5), the Act does however empower South African courts and practitioners to play a positive role in cooperating with their foreign correspondents, and more specifically in the solicitation of business rescue.¹⁸² *It was submitted above that none of the provisions of the Act, including Chapter 4 dealing with cooperation, have any application in the absence of designation by the Minister.*

Stander notes in her article *Cross-border insolvencies as a global economic problem*, that the South African legislation offers the following solutions, namely; “ access for the person administering the foreign insolvency proceedings to the courts of South Africa; determining when a foreign insolvency proceeding should be accorded recognition and what the consequences of recognition should be; providing a regime for the right of creditors to commence or participate in insolvency proceedings in South Africa; permitting courts in South Africa to cooperate more effectively with foreign courts and foreign representative involved in a insolvency matter; authorising courts in South Africa and

¹⁷⁷ Section 32 of the Cross-Border Insolvency Act 42 of 2000.

¹⁷⁸ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 204.

¹⁷⁹ *Ibid.*

¹⁸⁰ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 204.

¹⁸¹ Mars 692.

¹⁸² *Ibid.*

persons administering insolvency proceedings in South Africa to seek assistance abroad; providing for court jurisdiction and establishing rules for coordination where insolvency proceedings in South Africa are taking place concurrently with insolvency proceedings in a foreign state; and establishing rules for coordination of relief granted in South Africa in favour of two or more insolvency proceedings that may take place in foreign states regarding the same debtor.” The conclusion made by Stander of the solutions that is provided for by the Cross-Border Insolvency Act creates an understandable summary.

Foreign creditors may not be ranked lower than concurrent creditors in the order of preference when seeking recognition under the Cross-Border Insolvency Act, whereas in terms of the common law rules, it is only what remains after the payment of local creditors that may be remitted to foreign proceedings.¹⁸³

The orders granted under the common law create the impression that local concurrent creditors are preferred above non-local creditors, because it usually states that funds may only be transferred out of the country after the payment of “all amounts due in respect of...(local) proved claims”. The matter has not been decided authoritatively and the position may still be as it was set out in early Colonial legislation of the turn of the century before the repeal thereof. *Ex Parte Steyn*¹⁸⁴ stated the following: “Firstly, the order should not be seen as a considered precedent for making special provision for ‘local’ creditors. This aspect was not argued at the hearing of the application nor raised in written submissions filed on behalf of applicant in regard to the aspects hereinbefore considered. Similar special provision was on previous occasions made in orders of this Court but this might well ultimately be based upon the mere consideration that the Court should provide for a similar result to that created by the Colonial legislation”. For example, section 9 of the Foreign Trustees and Liquidators Recognition Act 7 of 1907 (Transvaal) provided that the balance after payment of local preferent creditors was available for distribution among the general body of creditors, including the local concurrent creditors, provided that the balance had to remain in the Colony until the dividend of local concurrent creditors had been paid in so far as the balance allowed such payment. In other words local concurrent creditors must not be paid in full before money is released for foreign creditors, but local concurrent creditors must be paid their dividend based on the amount available globally for concurrent creditors inside and outside South Africa.

Foreign creditors should be wary of the latter when choosing whether to seek recognition in terms of the Cross-Border Insolvency Act, or in terms of the common law rules on cross-border insolvency.

¹⁸³ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 204.

¹⁸⁴ 1979 (2) SA 309 (O) 311B.

Smith and Boraine argue that foreign creditors are almost subordinated to the local concurrent creditors by the common law, but under the Cross-Border Insolvency Act, this odious distinction can no longer be drawn.¹⁸⁵ The dualistic system created by the requirement of reciprocity will cause the distinction that is drawn between creditors under the common law rules and the Act to remain immensely.¹⁸⁶ Creditors from designated states as per the Cross-Border Insolvency Act will rank no lower than South African concurrent creditors however creditors from non-designated states will rank lower than the South African concurrent creditors and the creditors from designated countries in terms of the common law rules.¹⁸⁷

The South African requirement of reciprocity, however, will introduce a dualistic system and pose considerable problems. A repugnant analogy will be drawn, for example, between creditors from designated foreign states and creditors from non-designated states. Furthermore, it is unclear how cooperation between the different foreign main and non-main proceedings of designated states within the sphere of the Act would engage with cooperation between proceedings of non-designated states beyond the scope of the Act. Smith and Boraine mentioned that we are witnessing a movement from territoriality towards universality, the Cross-Border Insolvency Act being a way station; and it is therefore unfortunate that the designation system reins in the smooth progress that the UNCITRAL *Model Law* no doubt envisaged.¹⁸⁸ They further are of the opinion that the dualistic South African will create undesired problems.¹⁸⁹

It is my respectful opinion that the requirement of designation causes a major obstacle to the application of the Cross-Border Insolvency Act. The question can in honesty be asked whether this prerequisite should be removed from the Act by way of an amendment to the Act.¹⁹⁰ The benefit would be that South Africa's handling of cross-border insolvencies would then line up with the majority of other jurisdictions and major role players in cross-border insolvency, such as the United States of America and the United Kingdom. It will also establish legal certainty and thereby promoting investment in South Africa and preserving employment. It is only fair to argue that South Africa will provide assistance to foreign representatives, if it is certain that those states will be of assistance to the same extent for South Africa's creditors and representatives.¹⁹¹

¹⁸⁵Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 204.

¹⁸⁶*Ibid.*

¹⁸⁷*Ibid.*

¹⁸⁸*Ibid.*

¹⁸⁹ *Idem* 205.

¹⁹⁰ Fourie (LLM Dissertation 2012 NWU) 27.

¹⁹¹ *Ibid.*

In addition to the controversy of the designation requirement, the efficiency of the Cross-Border Insolvency Act has to rely upon the strength of local statutes, principles, and procedures in the particular enacting state.¹⁹² Smith and Boraine argues that these factors might significantly influence the progressive application of the *Model Law*, because even if the same *Model Law* template is adopted in various states, there might still remain considerable variations in its specific application in various jurisdictions.¹⁹³

The development of the Cross-Border Insolvency Act will to a large extent rely upon the ability and adaptability of the insolvency practitioners and Judges of the High Courts in South Africa.¹⁹⁴ Although the Cross-Border Insolvency Act has many shortcomings and can be very unpredictable in certain circumstances, one can only commend the introduction of the Cross-Border Insolvency Act in South Africa. The Cross-Border Insolvency Act enhances recognition considerably, by adequately understandable rules that limit confusion, deception and postponement. The Cross-Border Insolvency Act contemplates to bring about an impartial or equitable structure of distribution that is specifically concerned with the interests of foreign creditors in ways that is not accomplished by common law, and sheds light on a reasonably hidden or secret subject for foreign creditors not used to the common law rules based on comity. The appropriate execution and advancement of the *Model Law* will provide assistance to developing countries to captivate inbound investment.

Designation is the crucial element to determine which countries will gain assistance under the Cross-Border Insolvency Act. The Cross-Border Insolvency Act may prevail to retain a rather segregated club of nations, rather than the incentive for diversity, openness, adaptability and speed that the *Model Law* proposed to accomplish. The Cross-Border Insolvency Act in this sense is prematurely trembling.

The effective operation of the Cross-Border Insolvency Act is of paramount importance. The designation clause contained in section 2 of the Cross-Border Insolvency Act is detrimental to the effective operation of the Act and therefore this section should be addressed in order for the Act to become fully operative. The proper implementation of the Act will be beneficial for the current economy of South Africa, and will also provide legal certainty to foreign investors. This will in turn improve international trade and investment in South Africa greatly.

¹⁹²Smith and Boraine 2002 10 *American Bankruptcy Institute Law review* 205.

¹⁹³*Ibid.*

¹⁹⁴*Ibid.*

Chapter 4: A comparative study on the implementation of the UNCITRAL *Model Law* in the United States, United Kingdom and Australia

4 1	Introduction	37
4 2	United States of America	37
4 2 1	Introduction	37
4 2 2	Objectives and application of Chapter 15	38
4 2 3	Recognition of foreign proceedings	38
4 2 4	Relief that may be granted upon recognition	39
4 2 5	Protection of local creditors	40
4 2 6	Rights of foreign representatives and creditors	42
4 2 7	Results of the implementation of Chapter 15	43
4 3	United Kingdom	44
4 3 1	Introduction	44
4 3 2	Cross-Border Insolvency Regulation 2006	46
4 3 2 1	Application of the Regulation	46
4 3 2 2	Recognition of foreign proceedings	47
4 3 2 3	Relief that may be granted during the application for and upon recognition	47
4 3 2 4	Cooperation with foreign courts and representatives	49
4 3 2 5	Protection of creditors	49

4 3	Australia	50
4 4	Differences between the Model Laws of the various jurisdictions	53
4 5	Conclusion	53

4 1 Introduction

The purpose of this chapter is to draw a comparison between the South African Cross-Border Insolvency Act and other legal systems that have successfully implemented the UNCITRAL *Model Law* on Cross-Border Insolvency. Foreign investors seek certainty regarding the consequences of conducting business in South Africa. This certainty can be provided to the foreign investors if South Africa implements more or less the same law regarding cross-border insolvency as the major role players in international trade like the United States of America and the United Kingdom. Therefore, the primary focus of this chapter will be to compare the situation in South Africa to that of the United States and the United Kingdom. The major difference between the South African position and that of other states is the incorporation of a designation requirement in the South African version of the UNCITRAL *Model Law*. This chapter will be concluded with an overview of the current and the future Cross-Border Insolvency dispensation in South Africa.

4 2 United States of America

4 2 1 Introduction

The UNCITRAL *Model Law* was adopted in the United States and codified almost word for word as Chapter 15 of the United States Bankruptcy Code.¹⁹⁵ Considering the drafting of section 1507 it seems that Chapter 15 is the one and only portal in the United States for giving assistance to a foreign representative.¹⁹⁶ Based on the UNCITRAL *Model Law*, the United States has enacted Chapter 15 in the United States Bankruptcy Code which came into operation on 17 October 2005. Preceding the UNCITRAL *Model Law* it was troublesome to acquire recognition of foreign proceedings in most countries and generally hopeless to do so promptly.¹⁹⁷ According to Westbrook, the central goal of the UNCITRAL project was the need for speed and certainty in obtaining recognition and protecting assets.¹⁹⁸ Unlike the position of the Cross-Border Insolvency Act, Chapter 15 of the US Bankruptcy code is effectively operative and is furthermore used almost

¹⁹⁵ Westbrook "An Empirical Study of the Implementation in the United States of the Model Law on Cross-border Insolvency" 2013 87 *Am. Bankr. L.J* 249.

¹⁹⁶ Mc.Cormack "COMI and COMITY in UK and US Insolvency Law" 2012 *Law Quarterly Review* 157.

¹⁹⁷ Westbrook 2013 87 *Am. Bankr. L.J* 250.

¹⁹⁸ *Ibid.*

on a daily basis in practise in the United States. Westbrook is of the opinion that because the United States is one of the most important role players in international trade, the adoption of the UNCITRAL *Model Law* in Chapter 15 will encourage other states to do same.¹⁹⁹

4 2 2 Objectives and application of Chapter 15

The main objective of Chapter 15 of the US Bankruptcy Code with the incorporation of the UNCITRAL *Model Law* is to provide a structure to administer cross-border insolvency more effectively. Another objective of Chapter 15 is to improve cooperation between the United States and foreign jurisdiction, in order to provide legal certainty with regards to international trade. Chapter 15 strives to provide an effective system to administer cross-border insolvency to ensure the protection of the interests of creditors, debtors and all other persons of interest. Furthermore Chapter 15 aims to provide support to financially troubled businesses in order to protect employers and investments.

The pre-dominant difference between Chapter 15 of the US Bankruptcy Code and the Cross-Border Insolvency Act is that Chapter 15 does not contain a designation provision. A foreign representative can therefore make use of Chapter 15 irrespective whether or not the State that the foreign representative represents, has adopted the *Model Law*.²⁰⁰

4 2 3 Recognition of foreign proceedings

Generally, Chapter 15 provides a mechanism for a debtor that has a pending case in a foreign jurisdiction to commence ancillary proceedings in the United States.²⁰¹ The foreign case must satisfy Chapter 15's definition of a foreign proceeding. A foreign proceeding consists of, a collective judicial or administrative proceeding in a foreign country, including an interim proceeding under a law relating to insolvency or adjustment of debt, in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.²⁰² The foreign representative is entitled to institute proceedings in the United States upon recognition of the foreign proceedings by a court in the United States. Put differently, a foreign representative may sue or be sued in the United States when a United States court accords recognition to those foreign proceedings.²⁰³

¹⁹⁹ Westbrook "Chapter 15 at Last" 2005 *American Bankruptcy Law Journal* 728.

²⁰⁰ Fourie (LLM Dissertation 2012 NWU) 17.

²⁰¹ Bernstein "The International Insolvency Review" 2013 *The International Insolvency Review* 5.

²⁰² *Ibid.*

²⁰³ Fourie (LLM Dissertation 2012 NWU) 19.

Chapter 15 also ensures that a foreign representative may approach a court in the United States directly upon recognition of the foreign proceedings. The latter is similar to section 9 of the Cross-Border Insolvency Act. Direct access to the courts in the United States entails that the foreign representative has *locus standi* in the United States. The foreign representative therefore does not have to consult a United States insolvency practitioner in order to commence cross-border insolvency proceedings in the United States.²⁰⁴ Section 1509(b)(1) – 1509(b)(3) provides that the United States court is obliged to accord recognition to the foreign proceedings if all the requirements that are set out in Chapter 15 are met. Section 17 of the Cross-Border Insolvency Act encumbers the same obligation upon South African courts.

4 2 4 Relief that may be granted upon recognition

As provided for in section 19 of the Cross-Border Insolvency Act, section 1519 of the United States Bankruptcy code also provides that from the time of filing an application for recognition until the application is decided upon, and at the request of the foreign representative, the court may grant relief of a provisional nature. The court will only grant such relief where the relief is urgently needed to protect the assets of the debtor or to protect the interests of the creditors. Despite provisional relief accorded in urgent circumstances, a distinction needs to be drawn between relief which is granted automatically and relief which will be granted based on the court's discretion.²⁰⁵ This distinction will depend on whether the foreign proceedings are recognised as foreign main or foreign non-main proceedings.

In accordance with section 1517(b)(1) of the United States Bankruptcy Code, a foreign proceeding will only be recognised as a foreign main proceeding if the proceeding is pending in a country where the debtor has the centre of its main interests.²⁰⁶ The burden of proof to establish a debtors' centre of main interests is vested on the debtor.²⁰⁷ If the debtor fails to prove its centre of main interest, then section 1516(c) of the United States Bankruptcy Code presumes that the debtors' centre of main interest is the location of its registered office.²⁰⁸ According to Westbrook, the key objective of Chapter 15 is to conduct recognition of foreign proceedings, especially foreign main proceedings as

²⁰⁴ Fourie (LLM Dissertation 2012 NWU) 19.

²⁰⁵ Hamer and McClintock "Understanding Chapter 15 of the United States Bankruptcy Code: Everything you need to know about Cross-Border Insolvency Legislation in the United States" 2008 *Law and Business Review of the Americas* 268.

²⁰⁶ Bernstein 2013 *The International Insolvency Review* 6.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

timely and certain as possible, thus ensuring a stay that would secure the debtor's property globally against creditors and insiders.²⁰⁹

Recognition of a proceeding as a foreign main proceeding gives automatic relief, but most of the permanent relief available is discretionary.²¹⁰ When the proceedings are recognised as foreign main proceedings then the provisional relief is automatically accorded to the proceedings in terms of section 1520. The legislative History of the United States suggests that section 1520 of the US Bankruptcy Code includes provisions that are more extensive and exhaustive than those proposed by the *Model Law*, but encompass all the restrictions that the *Model Law* provisions would impose or dictate.²¹¹ The relief is granted automatically upon recognition as a foreign main proceeding without any order of court. Recognition of a foreign proceeding as a main proceeding has a distinct advantage for practitioners in the sense that upon such recognition commencement or continuation of individual legal actions or legal proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed.²¹² The relief that is automatically accorded in terms of section 1520 of Chapter 15 includes *inter alia* that execution of the debtor assets are stayed, the foreign representative is entitled to manage the debtor's affairs and is furthermore entitled to exercise the functions of a curator.

When proceedings are recognised as foreign non-main proceeding, then according automatic relief does not apply. The foreign representative has to lodge an application to the appropriate court for the specific relief that he requires.²¹³ The court exercises its discretion as to whether or not to grant the relief sought by the foreign representative.

4 2 5 Protection of local creditors

Section 1521 (b) of Chapter 15 states that the recognition sought will only be granted if the court is convinced that the interests on the creditors in the United States are sufficiently protected. The statute does not specify exactly what accords to sufficient protection, but there is also no suggestion that the protection of local creditors has to be indistinguishable to that of United States Law.²¹⁴

Section 1521 accords discretion to the United States Courts to entrust the distribution of the debtor's assets to the foreign representative. This section affords foreign representatives a broad

²⁰⁹ Westbrook 2013 87 *Am. Bankr. L.J.* 251.

²¹⁰ Westbrook 2013 87 *Am. Bankr. L.J.* 251.

²¹¹ Mc.Cormack 2012 *Law Quarterly Review* 141.

²¹² Stander 2002 *Journal for Judicial Science* 27(2) 80.

²¹³ Fourie (LLM Dissertation 2012 NWU) 20.

²¹⁴ Bernstein 2013 *The International Insolvency Review* 10.

sense of power to step into the shoes of a United States debtor.²¹⁵ Section 1522 provides that the court will only allow the debtor's assets to be distributed by the foreign representative if the court is absolutely certain that the interests of local creditors are sufficiently protected.²¹⁶ It is evident that Chapter 15 of the US Bankruptcy code has at aim to protect the interests of local creditors.²¹⁷

Section 1522 explicitly states that the relief in terms of section 1519 and 1522 will only be granted to the foreign representative if the court is certain that the interests of local creditors are sufficiently protected. The United States version of the *Model Law* deviates from Article 21(2) of the UNCITRAL *Model Law*. Section 21(2) of the UNCITRAL *Model Law* provides that the court will only grant recognition if the court is certain that the interests of the creditors are "adequately" protected. The word adequately was replaced with sufficiently in section 1521(b) and 1522(a) of the US Bankruptcy Code. It appears that American representatives or delegates to the Insolvency Working Group, desired to remove the term of adequate protection on account of the concepts rich history and conceptual baggage.²¹⁸ This has been explained as evading confusion with a specialized legal term in United States bankruptcy.²¹⁹ It may be that the concept of sufficient protection under Chapter 15 allows greater leeway for the transfer of US based assets to a foreign liquidator to be distributed in accordance with the relevant foreign law.²²⁰

Section 1522 furthermore provides that the court may grant the relief subject to certain conditions as the court may deem to be just.²²¹ Bernstein argues that the relationship between sections 1521 and 1522 embodies the objective of Chapter 15, which is in furtherance of the principle of comity. The United States courts should therefore defer to the foreign representative as long as the local creditors are sufficiently protected.²²² Section 1521 is not the only way through which a foreign representative may gain discretionary relief.²²³ Section 1507 encompasses a more common grant of power. The United States Courts are permitted in terms of section 1507 to provide unspecified additional assistance to a foreign representative.²²⁴ Focusing on the notion of sufficient protection, the United States court would have regard to section 1507 which embody or include the comity

²¹⁵ Bernstein 2013 *The International Insolvency Review* 10.

²¹⁶ Fourie (LLM Dissertation 2012 NWU) 35.

²¹⁷ *Idem* 36.

²¹⁸ Yamauchi "The UNCITRAL Model Cross-Border Insolvency Law: The Stay of Proceedings and Adequate Protection" 2004 13 *International Insolvency Review* 87 89.

²¹⁹ *Ibid.*

²²⁰ Mc.Cormack 2012 *Law Quarterly Review* 153.

²²¹ Bernstein 2013 *The International Insolvency Review* 10.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

criteria as set out in the preceding section 304 and they might also have regard to the case law under the former section 304.²²⁵

Section 1507 refers to additional assistance consistent with the principles of comity, that will reasonably assure the just treatment of all holders of claims against or interests in the debtors' property; protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceedings; prevention of preferential or fraudulent dispositions of property of the debtor; distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title. Comity is expressly cited in the preliminary passage of section 1507 and causes the presumption that comity is the concept which dictates whether a United States court will grant additional assistance, rather than a mere factor to consider.²²⁶ The Cross-Border Insolvency Act is likewise explicit on the protection of local creditors. When a South African court grants relief to a foreign representative, whether it may be upon the application for recognition or once the proceedings have been recognised, the court must be satisfied that the interests of the creditors and other persons of interests, including the debtor, are adequately protected.²²⁷ Section 22(2) of the Cross-Border Insolvency Act furthermore provides that the court may subject the relief that the court granted to condition that the court considers appropriate.

4 2 6 Rights of foreign representatives and creditors

Section 1513(a) of the United States Bankruptcy Code provides that foreign creditors has the same rights regarding the commencement of, and participation in proceedings related to insolvency as the local creditors.²²⁸ Section 1513(b) provides that the ranking of claims in insolvency proceedings will not be affected by section 1513(a), except that a foreign creditor's claim may not be ranked lower than a general unsecured claim without priority, solely because the holder of such claim is a foreign creditor.²²⁹ This provision affords cold comfort to a foreign secured creditor because of the fact that the secured foreign creditor is only certain of a concurrent status and will in all probability lose his secured status.²³⁰ Fourie is of the opinion that the United States are reluctant to subject the local creditors to the rules of foreign states in as far as their ranking of claims is concerned. The Cross-Border Insolvency Act 42 of 2000 allows similar protection to South African creditors.

²²⁵Mc.Cormack 2012 *Law Quarterly Review* 153.

²²⁶ Bernstein 2013 *The International Insolvency Review* 10.

²²⁷ Section 22(1) of the Cross-Border Insolvency Act 42 of 2000.

²²⁸ Fourie (LLM Dissertation 2012 NWU) 40.

²²⁹ *Idem* 41.

²³⁰ *Ibid.*

Section 13 of the Cross-Border Insolvency Act grants foreign creditors with the same rights regarding the commencement of, and participation in, proceedings under the laws of the Republic relating to insolvency as creditors in the Republic. The latter does not affect the ranking of claims in proceedings under the law of the Republic relating to insolvency, except that the claims of foreign creditors may not be ranked lower than non-preferent claims.²³¹ This has the inherent affect that if a foreign creditor wants to have a secured status in South Africa, then the foreign creditor will be obliged to prove a secured claim in terms of the South African laws on Insolvency. Section 13(3) of the Cross-Border Insolvency Act further administer, that without derogating from the application of the law and practise of the Republic generally, the ranking of claims in respect of assets in the Republic is regulated by the law and practice of the Republic on the ranking of claims.

It is evident that both countries, South Africa and the United States, will go the extra mile to protect its local creditors. States are generally very reluctant to subject their local creditors to the rules and or structures of a foreign jurisdiction if it appears that the local creditors will be negatively affected. Fourie argues that when one analyses some of the reported cases in the United States it is evident that the United States accounts more weight to the interests of local creditors than to *comity* interstate.²³²

4 2 7 Results of the implementation of Chapter 15

Westbrook has conducted an empirical Study of the Implementation in the United States of the *Model Law*. Westbrook clearly illustrates the enormous effect that the UNCITRAL *Model Law* has had in the United State's cross-border insolvency structure. Westbrook notes that the utmost important pillar in the emerging structure of cross-border insolvencies is the UNCITRAL *Model Law* on Cross-Border Insolvency.²³³ The data collected by Westbrook illustrates that the preponderance of foreign cases seeking recognition in the United States has been successful.²³⁴

After the United States courts have rejected recognition applications from haven jurisdictions where the there is no economic connection to the debtor company, various writers and/or critics reported that the United States has deteriorated by adopting Chapter 15. They assert that this deterioration is due to the fact that the United States were now hesitant to recognise foreign insolvency proceedings.²³⁵ Westbrook is of the opinion that nothing could be more remote from the truth than

²³¹ Section 13(2) of the Cross-Border Insolvency Act 42 of 2000.

²³² Fourie (LLM Dissertation 2012 NWU) 42.

²³³ Westbrook 2013 87 *Am. Bankr. L.J* 247.

²³⁴ *Idem* 248.

²³⁵ *Idem* 254.

this statement. Westbrook found that the United States Courts has granted some form of recognition in about 96% of all the cases filed.²³⁶

Westbrook concludes his empirical study by making the following remarks. Westbrook states that the *Model Law* in its United States manifestation has achieved a high level of success, in significant part because of the court's understanding of its enactment as an acceptance by the United States of modified universalism, which is a pragmatic form of the universalist ideal of having each case managed by a single court or other authority.²³⁷ Westbrook sums up his study by highlighting three conclusions from the data collected as far as recognition in the United States is concerned. He notes that recognition has been granted in the overwhelming majority of cases in the United States. He furthermore argues that the much discussed difficulty in locating the debtor's centre of main interests is a significant question, but he concludes that is of limited practical importance. In the United States there is less willingness to recognise proceedings as main proceedings when they lie in jurisdictions in which the debtor engaged in little economic activity prior to the filing of the proceedings.²³⁸

Recent United States cases suggest that if there is one aspect of Chapter 15 that has remained the most dedicated in its commitment to the cross-border cooperation in the insolvency field, it is the Chapter's generous accessibility.²³⁹ These cases confirm the notion that, in furtherance of Chapter 15's primary role as a mechanism to coordinate foreign proceedings with United States courts, practitioners can expect courts to not be overly territorial or restrictive into its domain.²⁴⁰

4 3 United Kingdom

4 3 1 Introduction

In England, there are four main sources of law regarding cross-border insolvency, pursuant to which the English court may recognise and give assistance to a foreign insolvency proceeding.²⁴¹ The First source of law is The European Convention Regulation on Insolvency Proceedings.²⁴² The EC Regulation came into operation on 31 May 2002.²⁴³ The EC Regulation is an attempt to unify

²³⁶ Westbrook 2013 87 *Am. Bankr. L.J.* 247.

²³⁷ *Idem* 268.

²³⁸ *Ibid.*

²³⁹ Bernstein 2013 *The International Insolvency Review* 6.

²⁴⁰ *Ibid.*

²⁴¹ Brown "Overview of the English legal framework for cross-border insolvency" 2012 http://www.mayerbrown.com/public_docs/Overview_English_Legal_Framework.pdf 1.

²⁴² No. 1346/2000 (the 'EC Regulation').

²⁴³ Omar "Cross-Border Insolvency Law in the United Kingdom: An Embarrassment of Riches" 2006 *Insolvency Law and Practice* 134.

insolvency proceedings among member states and propose a consolidated avenue within the European Union.²⁴⁴ The main provision of the EC Regulation is that there should be a single main insolvency proceeding which will be located in the jurisdiction where the debtor has its Centre of main interests. Other insolvency proceedings will be secondary proceedings and it will be restricted to a peculiar class of assets or creditors within another member state.²⁴⁵ This discussion will not be focused on the EC Regulation but instead, the focus will be on insolvency proceedings that involve states outside of the European Union.

The common law rules relating to cross-border insolvency is based on the principle of *comity* in the United Kingdom. The principle of comity requires recognition to be acknowledged by the courts where a foreign officeholder has been appointed given that the court was jurisdictionally competent to make the appointment.²⁴⁶ Recognition under the common law is expected to be of limited assistance going forward in the sphere of cross-border insolvency matters. Recognition under the common law will be circumscribed to cases that do not fall within the other three methods of recognition that are available in the United Kingdom.²⁴⁷

Under Section 426 of the English Insolvency Act 1986, courts in the Channel Islands, Isle of Man or certain designated countries can apply to the courts in the United Kingdom for assistance in insolvency proceedings.²⁴⁸ Section 426 of the English Insolvency Act 1986, gives The United Kingdom's courts the discretion to give assistance to foreign representatives in foreign proceedings.²⁴⁹ To put it differently, the court may exercise their discretion to recognise a foreign representative in order to deal with the assets situated inside the court's jurisdiction with regards to cross-border insolvency proceedings. Fortunately South Africa is one of the countries designated by the Secretary of State.²⁵⁰ Section 426(5) of the Insolvency Act 1986 provides for international cooperation between courts in specified jurisdictions when dealing with insolvency matters.²⁵¹

²⁴⁴ Bolger "No Frontiers: An Analysis of the EC Insolvency Regulation and the UNCITRAL Model Law on Cross-border Insolvency and how each will apply to a cross-border insolvency" 2012 http://www.consulegis.com/wp-content/uploads/2013/06/Laura.Bolger_Paper.pdf 4.

²⁴⁵ *Ibid.*

²⁴⁶ Day "Cross-border recognition of insolvency procedures: options for foreign officeholders" 2011 <http://www.inhouselawyer.co.uk/index.php/insolvency-and-corporate-restructuring/1402-cross-border-recognition-of-insolvency-provides-options-for-foreign-officeholders> 3.

²⁴⁷ Rutstein "U.K. Perspective Recognition of Overseas Insolvency Procedures: Spoiled for Choice?" 2009 <http://www.jonesday.com/uk-perspective-recognition-of-overseas-insolvency-procedure-spoiled-for-choice-09-30-2009/> 2.

²⁴⁸ Omar 2006 *Insolvency Law and Practice* 132.

²⁴⁹ Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 184.

²⁵⁰ *Ibid.*

²⁵¹ Day 2011 <http://www.inhouselawyer.co.uk/index.php/insolvency-and-corporate-restructuring/1402-cross-border-recognition-of-insolvency-provides-options-for-foreign-officeholders> 1.

Section 426 is only concerned with requests for assistance from foreign courts and the officeholder must therefore apply to his local court for a request to be made to the English court for assistance.²⁵² Having briefly discussed the above mentioned sources of recognition, it is important to mention the main focus of this comparison will be on the Cross-Border Insolvency Regulation 2006.

4 3 2 Cross-Border Insolvency Regulation 2006

In accordance with section 14 of the Insolvency Act 2000, the *Model Law* may be enacted by the Secretary of State by secondary legislation with or without adjustments.²⁵³ Consistent with this power of the Secretary of State, the Cross-Border Insolvency Regulations 2006 have been enacted by the Secretary of State and has been effective from 4 April 2006.²⁵⁴ The discrepancies between the UNCITRAL *Model Law* and the British Legislation are on account of the entrenched local requirements and were not meant to abandon the fundamental principles underlying the *Model Law*.²⁵⁵ These differences include references to Council Regulation (EC) 1346/2000 on Insolvency Proceedings (the “EU Regulation”), section 426 of the Insolvency Act 1986, the British court systems, and different forms of relief available under British insolvency laws.²⁵⁶ The British Insolvency Service explained during the drafting of the Cross-Border Insolvency Regulation that it had tried to stay as close as possible to the drafting in the UNCITRAL *Model Law* to provide consistency, confidence and harmonization, with other jurisdictions enacting the *Model Law* which may lead to terminology that is not commonly known or standard in British Insolvency Laws.²⁵⁷ However, discrepancies do appear from the *Model Law* in certain places, including changes in terminology. The scope of the automatic stay, following the recognition of a foreign main proceeding has also been clarified.²⁵⁸

4 3 2 1 Application of the Regulation

The *Model Law*, as adapted by the United Kingdom will apply where assistance is sought in Great Britain by a foreign court or a foreign representative in connection with a foreign insolvency proceeding.²⁵⁹ The *Model Law* will be applicable where assistance is sought in a foreign state in

²⁵² Day 2011 <http://www.inhouselawyer.co.uk/index.php/insolvency-and-corporate-restructuring/1402-cross-border-recognition-of-insolvency-provides-options-for-foreign-officeholders1>.

²⁵³ Fletcher “Better late than never: The UNCITRAL Model Law enters into force in Great Britain” 2006 *Insolvency Intelligence* 86.

²⁵⁴ Shandro “The Implementation of the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain” 2006 *American Bankruptcy Institute Journal* 31.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ Shandro “Implementation of the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain” 2005 *UK Insolvency Service* 7.

²⁵⁸ *Ibid.*

²⁵⁹ Article 1 (1)(a) of the Cross-Border Insolvency Regulation 2006.

connection with a British insolvency proceeding, and where a foreign insolvency proceeding and a British insolvency proceeding in respect of the same debtor are taking place concurrently.²⁶⁰

Furthermore it will apply where creditors or other persons of interests in a foreign State have an interest in requesting the commencement of, or participating in, a British insolvency proceeding.²⁶¹

The scope of application of the British version of the *Model Law* is the same as is provided for in section 2 of the Cross-Border Insolvency Act. The Regulation provides that to the extent that the *Model Law* conflicts with an obligation of the United Kingdom under the EU Regulation, the obligation under the EU Regulation will prevail.²⁶² Unlike the Cross-Border Insolvency Act, the Cross-Border Insolvency Regulation applies without the need for reciprocity.

4 3 2 2 Recognition of a foreign proceeding

Section 426 of the Insolvency Act 1986 will continue to dispose assistance in cross-border insolvency cases. The *Model Law*, the EU Regulation, section 426 of the Insolvency Act 1986 and the common law will run parallel in cross-border insolvency matters in the United Kingdom.²⁶³ Advice should be sought in every case as to which is the most appropriate and effective in any particular situation.²⁶⁴

The *Model Law* allows direct access for a foreign representative to a British Court without the obligation to meet any formal requirements.²⁶⁵ Article 9 of the Cross-Border Insolvency Regulation provides that a foreign representative is entitled to apply directly to a court in Great Britain. It is compulsory for a British Court to recognise foreign proceedings if certain requirements are met. The requirements include the production of a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative.²⁶⁶ In order for a proceeding to be recognised under the Cross-Border Insolvency Regulation, the debtor must have a place of business, residence or assets situated in the United Kingdom, or the court must otherwise consider recognition appropriate; and certain formalities must be complied with.²⁶⁷

4 3 2 3 Relief that may be granted during the application for and upon recognition

It is prescribed that a British Court adjudicates on an application for recognition of a foreign insolvency proceeding at the earliest conceivable point in time.²⁶⁸ Article 17(3) provides that an

²⁶⁰ Article 1 (1)(b) and (c) of the Cross-Border Insolvency Regulation 2006.

²⁶¹ Article 1 (1)(d) of the Cross-Border Insolvency Regulation 2006.

²⁶² Article 3 of the Cross-Border Insolvency Regulation 2006.

²⁶³ Shandro 2006 *American Bankruptcy Institute Journal* 31.

²⁶⁴ *Idem* 32.

²⁶⁵ Article 9 of the Cross-Border Insolvency Regulation 2006.

²⁶⁶ Shandro 2006 *American Bankruptcy Institute Journal* 33.

²⁶⁷ Brown 2012 http://www.mayerbrown.com/public_docs/Overview_English_Legal_Framework.pdf 3.

²⁶⁸ Article 17(3) of the Cross-Border Insolvency Regulation.

application for recognition of a foreign proceeding shall be decided upon, at the earliest possible time. Imminent to the court's ruling and at the request of the foreign representative, the court may grant relief of a provisional nature, where the relief is urgently needed.²⁶⁹ The provisional relief includes *inter alia* staying execution against the debtor's assets. Furthermore, the court may entrust the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court. This is in order to protect and preserve the value of assets that, by their nature or because of other circumstances are perishable, susceptible to devaluation or otherwise in jeopardy.²⁷⁰

Similar to Chapter 15 of the US Bankruptcy Code, and the Cross-Border Insolvency Act, the relief that may be granted after recognition of a foreign proceeding in terms of the British Regulation will depend on whether the proceeding is recognised as a foreign main or foreign non-main proceeding. Proceedings taking place in the State where the debtor has the centre of its main interest will be described as a foreign main-proceeding. Foreign non-main proceedings are proceedings other than main proceedings taking place in a state where the debtor has an establishment. The concepts of centre of main interest and establishment are similar to those in the EU Regulation. While centre of main interests has no defined meaning, "establishment" is defined by means of a place of operation where the debtor carries out a non-transitory economic activity with human means and assets or services.²⁷¹ In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of main interest.²⁷²

When a foreign proceeding is recognised as a foreign main proceeding under the British Regulation, the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities are automatically stayed or suspended. Furthermore, the execution against the debtor's assets and the right to transfer, encumber or otherwise dispose of any assets of the debtor, are automatically stayed or suspended upon recognition as a foreign main proceeding.²⁷³ The United Kingdom's version of the *Model Law* explicitly states that the above mentioned stay does not affect the rights to enforce security, rights to repossess goods under hire-purchase and retention of title agreements, rights of set-off and rights pertaining to financial market transactions to the extent that all these rights would be exercisable in a domestic UK context.²⁷⁴ The foreign representative is entitled to apply during the time of his application for

²⁶⁹ Article 19 (1) of the Cross-Border Insolvency Regulation 2006.

²⁷⁰ Article 19(1)(b) of the Cross-Border Insolvency Regulation 2006.

²⁷¹ Shandro 2006 *American Bankruptcy Institute Journal* 32.

²⁷² *Ibid.*

²⁷³ *Idem* 4.

²⁷⁴ Cross-Border Insolvency Regulation 2006 Schedule 1 Article 20(3).

recognition, for the effects of the stay to be modified and for more appropriate relief to be granted. The latter will only be possible where the foreign proceedings are of a rescue or reorganisation rather than a liquidation nature.²⁷⁵

Upon recognition of a foreign proceeding as a foreign non-main proceeding, the court may at the request of the foreign representative, grant any appropriate relief in instances where it is necessary to protect the assets of the debtor or the interests of the creditors.²⁷⁶ The Regulation also provides that the court may entrust the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court.²⁷⁷ Apart from seeking judicial recognition of a foreign insolvency proceeding, a foreign insolvency representative is entitled to participate in a proceeding regarding the debtor under British Insolvency law, to intervene in any proceedings in which the debtor is a party, and to make an application to the court to avoid acts detrimental to creditors.²⁷⁸

4 3 2 4 Cooperation with foreign courts and representatives

The courts of the United Kingdom are not obliged to cooperate with foreign courts; they are simply empowered to cooperate with foreign courts to the maximum extent possible.²⁷⁹ Cooperation is thus exercised on a discretionary basis by the courts of the United Kingdom. The UK officeholder is obliged to cooperate with the foreign court, but only in so far as the cooperation is consistent with his other duties under the law of Great Britain.²⁸⁰ The courts of the United Kingdom are entitled to communicate directly with foreign courts or foreign representatives. Likewise, the United Kingdom courts are entitled to request information or assistance directly from foreign courts or foreign representatives.²⁸¹

4 3 2 5 Protection of creditors

The court will only grant the relief, as discussed in par 4.3.2.3 above, if the court is certain that interests of the creditors, and other interested persons including the debtor are adequately protected.²⁸² Whilst the US Bankruptcy Code deviates from Article 21(2) of the UNCITRAL *Model Law*, the Cross-Border Insolvency Regulation incorporated the usage of adequate protection as is

²⁷⁵ Shandro 2005 *UK Insolvency Service* 57.

²⁷⁶ Shandro 2006 *American Bankruptcy Institute Journal* 33.

²⁷⁷ *Idem* 34.

²⁷⁸ *Ibid.*

²⁷⁹ Article 25 of the Cross-Border Insolvency Regulation 2006.

²⁸⁰ Article 26(1) of the Cross-Border Insolvency Regulation 2006.

²⁸¹ Article 25 (2) of the Cross-Border Insolvency Regulation 2006.

²⁸² Article 22(1) of the Cross-Border Insolvency Regulation 2006.

provided for in the *Model Law*. The UNCITRAL *Model Law* contains various provisions aimed at protecting creditors.

Article 22 of the Cross-Border Insolvency Regulation affords protection to creditors and other interested persons. The court must be satisfied that the interests of creditors and other interested persons, including, and if appropriate, the debtor are adequately protected when granting or denying relief under the Regulation.²⁸³ Furthermore, the court may subject relief granted under the relevant section in the Regulation to conditions the court considers appropriate, including the provision by the foreign representative of security or caution for the proper performance of his functions.²⁸⁴ The United Kingdom Regulation includes the so called “hotchpot” rule which is also provided for in the Cross-Border Insolvency Act. The rule provides that without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law, relating to insolvency in a foreign state may not receive a payment for the same claim in a proceeding under the British insolvency law regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.²⁸⁵

The United Kingdom’s version of the *Model Law* does not contain a designation clause as it is contained in South Africa’s version of the *Model Law*. Similar to Chapter 15 of the United States Bankruptcy Code and the Cross-Border Insolvency Act, the British Court is also required to recognise foreign proceedings when certain requirements are met.²⁸⁶ Bolger argues that in order to attract foreign investment from emerging markets outside the EU during a time when there is little economic certainty, with the possibility of future insolvency hanging over a vast majority of companies, it is necessary to offer a streamline law in relation to insolvency proceedings.²⁸⁷ It can be concluded that the Cross-Border Insolvency Regulation provides a perfect streamline law in relation to cross-border insolvency matters.

4 3 Australia

The Cross-Border Insolvency Act 2008 (*Cth*) introduced the UNCITRAL *Model Law* in Australia and substantially came into effect on 1 July 2008. The Cross-Border Insolvency Act 2008 (*Cth*) provides in section 6 that, subject to the Act, the UNCITRAL *Model Law*, with the modifications set out in Part 2

²⁸³ Article 22(1) of the Cross-Border Insolvency Regulation 2006.

²⁸⁴ Article 22(2) of the Cross-Border Insolvency Regulation 2006.

²⁸⁵ Shandro 2006 *American Bankruptcy Institute Journal* 35.

²⁸⁶ *Ibid.*

²⁸⁷ Bolger 2012 http://www.consulegis.com/wp-content/uploads/2013/06/Laura.Bolger_Paper.pdf 18.

of the Act, has force of law in Australia.²⁸⁸ The Cross-Border Insolvency Act 2008 (*Cth*) has confirmed to be an adequate tool for foreign insolvency representatives to protect and access Australian assets and interests of international debtors.²⁸⁹ The Act incorporates the *Model Law* as an independent instrument instead of being broken up and appropriated across current Australian insolvency statutes.²⁹⁰ The system makes it much easier for the respective courts and representatives to cooperate and communicate directly with one another. This again has the inherent effect of reducing time and resources involved in determining the debtor's assets and making arrangements in the interests of the creditors. Interim relief may be granted to protect the debtor's assets and the creditor's interests.

Under the Cross-Border Insolvency Act 2008, foreign representatives are entitled to begin local insolvency proceedings.²⁹¹ Foreign representatives are also entitled to participate in current actions against debtors, which also allow the foreign representatives to make submissions about the debtor's assets and facilitate cooperation with foreign proceedings. The Act accords foreign representatives the same rights as local creditors and they are therefore not ranked lower due to their status as foreign creditors. The Act provides relief that may be granted automatically upon recognition of a foreign proceeding as a foreign main proceeding. A proceeding will be recognised as a foreign main proceeding if the proceeding is taking place in the state where the debtor has the centre of its main interests. Unless there is proof to the contrary, the debtor's registered office, or in the case of an individual debtor, the debtor's habitual residence is presumed to be the centre of the debtor's main interest. A proceeding that is not a foreign main proceeding, will be recognised as a foreign non-main proceeding if the debtor has any place of operations or where the debtor carries out a non-transitory economic activity with human means and goods or services.

The court may grant any appropriate relief necessary to protect the assets of the debtor or the interests of the creditors, upon the recognition of foreign proceedings as either main or non-main foreign proceedings. The *Model Law* does not limit the types of relief that may be granted but does list some of the orders that the court may grant. The relief includes inter alia that the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets rights, obligations or liabilities is stayed. Furthermore, the execution against the debtor's assets is stayed and the right to transfer, encumber or otherwise dispose of any assets of

²⁸⁸ Federal Court of Australia *Practice Note CORP 2* Cross-Border Insolvency Cooperation with Foreign Courts or Foreign Representatives.

²⁸⁹ Atkins "Test driving the Model Law on Cross-Border Insolvency in Australia: A Map of the Journey So Far" 2011 1 *INSOL W* 33.

²⁹⁰ *Ibid.*

²⁹¹ Article 12 of the Cross-Border Insolvency Act 2008.

the debtor is suspended.²⁹² Article 21(2) of the Cross-Border Insolvency Act 2008 provides that upon recognition of foreign proceedings, whether main or non-main proceedings the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtors assets located in Australia to the foreign representative or other persons designated by the court, provided that the court is satisfied that the interests of the local creditors are adequately protected.

It is notable that unlike the US, Australia has kept to the wording of the model law with regards to the adequate protection of local creditors. Article 21 of the Cross-Border Insolvency Act allows the court to grant additional relief where it is necessary in order to protect the assets of the debtor, or it remains in the interests of the creditors to do so. The Federal Court of Australia has highlighted that the Australian courts will be reluctant to grant additional relief to a foreign representative under the Cross-Border Insolvency Act 2008 (*Cth*), where the additional relief sought would adversely affect the rights of creditors. The Federal Court held that it was not in the interest of creditors to grant additional relief sought.²⁹³ The *Model Law* is a useful tool for the efficient management of cross-border insolvency matters. It is critical to realise that it has limitations and that the Courts will be reluctant to grant additional relief if the relief sought will have an adverse impact on the rights that creditors may otherwise have had.²⁹⁴

Article 22 of the Cross-Border Insolvency Act 2008 provides protection to creditors and other interested persons. The court must be satisfied that the interests of the creditors and other interested persons, including the debtors are adequately protected. The court may subject the relief that it granted to conditions that the court considers appropriate. The Act deviates slightly from the UNCITRAL *Model Law*. Articles 25 and 27 of the *Model Law* provide for cooperation with foreign courts and foreign representatives in cross-border insolvency matters. Australian Chief Justice JLB ALLSOP stated in the Practice Note that the form or forms of cooperation appropriate to each particular case will depend on the circumstances related to each case. He further stated that as experience and jurisprudence in this area develops, it might be possible to lay down certain parameters and guidelines for the forms of cooperation in the Practice Note.²⁹⁵

According to Atkins, the Act promotes accessibility of the *Model Law* by international interest when seeking relief in Australia and it also facilitates consistency in its interpretation and application

²⁹² Section 20(1) of the Cross-Border Insolvency Act 2008.

²⁹³ *Yu v STZ Pan Ocean Co Ltd (South Korea)*, in the matter of *STX Pan Ocean Co Ltd* (2013) FCA 680.

²⁹⁴ *Ibid.*

²⁹⁵ Federal Court of Australia *Practice Note CORP 2 Cross-Border Insolvency Cooperation with Foreign Courts or Foreign Representatives*.

within Australia and elsewhere with regards to cross-border insolvency matters.²⁹⁶ The Cross-Border Insolvency Act 2008 (*Cth*) has been utilised by foreign representatives in Australia and it has also been embraced by the Australian courts.²⁹⁷ Atkins argues that the modest early signs suggest a commitment to consistent application of the *Model Law* which promotes efficiency and fairness in transnational insolvency cases touching upon Australian interests.²⁹⁸ Similar to Chapter 15 of The United States Bankruptcy Code and the United Kingdoms' Cross-Border Insolvency Regulation, the Australian version of the *Model Law* does not contain a designation clause. Unfortunately time and space does not permit a lengthy analysis of the Australian system of the UNCITRAL *Model Law*.

4 4 Differences between the Model Laws of the various jurisdictions

In the implementation of the Cross-Border Insolvency Regulation in the United Kingdom, no changes were made to section 426 of the Insolvency Act 1986. Section 426 of the English Insolvency Act 1986 gives The United Kingdom's courts the discretion to give assistance to foreign representatives in foreign proceedings. Countries designated in terms of section 426 are relatively limited and these countries appear to have been chosen due to their similar common law background. Therefore, In England there are four main sources of law regarding cross-border insolvency, pursuant to which the English court may recognise and give assistance to a foreign insolvency proceeding. However, in the United States it has been held that Chapter 15 is the sole gateway for a US court to provide assistance to foreign courts and it is stated that there is no residual common law discretion. The United States, the United Kingdom and Australia have abided, as close as possible to the contours of the *Model Law* but there have been some changes of language to contain national drafting styles as well as local legislative landscape. In the US these terminological alterations may also have substantive effects. Yet it is unclear what the reference to sufficient protection of creditors in Chapter 15, as distinct from adequate protection in the *Model Law* portends.²⁹⁹

4 5 Conclusion

Possibly the most important aspect of the *Model Law* is the principle and ability of direct court access of foreign representatives to enact in insolvency proceedings. The right of access gives procedural standing to a foreign representative for interim relief, even when the courts have not yet decided upon the recognition of the foreign proceedings. Having discussed the incorporation of the

²⁹⁶ Atkins 2011 1 *INSOL W* 33.

²⁹⁷ *Idem* 35.

²⁹⁸ *Ibid.*

²⁹⁹ Mc.Cormack 2012 *Law Quarterly Review* 154.

UNCITRAL *Model Law* in the above mentioned jurisdictions respectively, it is important to finally address the South African Cross-Border Insolvency Structure.

South Africa has no bilateral or multilateral cross-border insolvency treaty with any other jurisdiction. The fact that South Africa has no established bilateral or multilateral cross-border insolvency treaty with any other jurisdiction together with the fact that the Cross-Border Insolvency Act is currently ineffective means that the common law still regulates cross-border insolvency matters in South Africa. The designation requirement causes the Act to be ineffective because the Minister of Justice has not designated any foreign states as is required in terms of the Act.

The branch of cross-border insolvency law is presently regulated by principles of the South African common law, even though the UNCITRAL *Model Law* was adopted into our legal system as the Cross-Border Insolvency Act. The application of the Act will be affected to a certain extent by rules of international law and international comity. At present, the common law that deals with international private law and precedent in this regard must still be applied in this area of South African Law. Based on comity, convenience and equity, a South African High Court is thus entitled to recognise the appointment of a foreign representative. The principles of private international law will also be applied, especially with regards to property situated in South Africa. However, the common law will regulate the recognition of foreign estate representatives by South African courts.

Comity and convenience are factors which play an evident part in influencing the local court to exercise its discretion in favour of recognising a foreign trustee; it is not a separate ground for granting the recognition to the trustee. When the court exercises its discretion, it will try to ensure that the interests of local creditors are adequately protected. The process to obtain recognition under the common law involves a burdensome procedure and it furthermore leads to great uncertainties in this field of the law. It is clear that those countries that have the benefit of the Cross-Border Insolvency Act will be in a much better position than those countries which will be assisted by the common law approach. The creditors as well as the foreign representatives will benefit significantly from the Cross-Border Insolvency Act, because the *locus standi* is set out. If they can prove to the South African court that they have been duly appointed, then the court must recognise the foreign representative.

The Cross-Border Insolvency Act will remain ineffective until designation takes place. The requirement for the designation of a state to which the Act will apply, introduces the principle of reciprocity into the Act.³⁰⁰ The latter has the inherent effect that, if a foreign State wishes to utilise

³⁰⁰ Meskin 17-14(3).

the advantage or benefit accorded to the foreign representative by the Act, they will, in turn have to provide to the South African representatives and creditors mutual benefits under their systems. Designation will have the effect that a dual system will operate in South Africa. In terms of the so called dual system, the law and rules applicable at the date of commencement of the Act, which is more commonly known as the common law, will govern cross-border insolvency matters between South Africa and non-designated States, whilst the Cross-Border Insolvency Act will apply in relation to cases involving designated states.³⁰¹

The working document of the South African department of Justice and Constitutional development³⁰² has proposed a uniform insolvency bill to consolidate, unify and amend the law relating to the insolvency of natural persons, companies, close corporations, trusts, partnerships and other legal entities, with or without legal personality. This uniform Insolvency Bill is to balance the needs of the different stakeholders.³⁰³ Chapter 26 of the proposed bill deals with the subject of Cross-Border Insolvency. In terms of section 137(1)(i) a foreign state means a state **not** designated under section 139(2), for purposes of cross-border insolvency. Section 139 (2)(a) provides that Chapter 26 will only apply to States **not** designated by the Minister. Section 139 (2)(b) provides that the Minister may designate a State if he or she is satisfied that the recognition accorded by the law of such a state to proceedings under the laws of the Republic relating to insolvency does **not** justify the application of Chapter 26 to foreign proceedings in that State. Sub section (3) provides that the Minister may at any time by subsequent notice in the *Gazette* withdraw any notice under subsection (2)(a), and thereupon any State referred to in such last-mentioned notice is a foreign State for the purposes of Chapter 26.

The purpose of the above discussion is to illustrate that even if South Africa has one unified insolvency system, the common law will still be applicable in certain instances relating to cross-border insolvency. Very few, if any, countries will be designated under the revised provisions so that the Act will apply to most if not all the countries. The countries which are in fact designated by the Minister will not be able to utilize the cross-border insolvency legislation, and these countries will continue to make use of the ordinary common law route. This approach is exactly the opposite of what is currently provided for in terms of section 2(2) of the Cross-Border Insolvency Act. The latter has the inherent effect that South Africa will either way be heading towards a dual system on the subject of cross-border insolvency law. Once again the dual system approach was not intended by the drafter of the UNCITRAL *Model Law*. The Cross-Border Insolvency Act will in both instances run

³⁰¹ Meskin 17-14(3).

³⁰² South African Proposed Insolvency bill as approved by Cabinet in 2003 and amended in June 2013.

³⁰³ Working Document of the department of Justice and Constitutional development.

parallel with the common law rules, depending on which principles is applicable to the specific foreign country. The Cross-Border Insolvency Act is deficient in this regard because it will always be limited to certain jurisdictions such as those jurisdictions designated by the Minister in terms of the current Cross-Border Insolvency Act, or those jurisdictions which are not designated in terms of the proposed Working Document of the Department of Justice and Constitutional Development.

Chapter 15 of the United States Bankruptcy Code can be seen as a role model for other jurisdictions that has already enacted the UNCITRAL *Model Law* or jurisdictions that has yet to enact the *Model Law*. It is my respectful submission that South Africa can learn a great deal from the United States as far as the enactment, as well as the operation of the Cross-Border Insolvency Act is concerned. Upon effective operation of the Cross-Border Insolvency Act, South Africa will have a significant advantage as there will be a hierarchy of precedents in these jurisdictions as discussed above. This advantage will rest on various aspects relating to cross-border insolvency such as the much debated or pertinent issue of the debtors centre of main interest. This will enable South African courts to have regards to the judgments of the foreign jurisdiction when dealing with cross-border insolvency issues in South Africa.

It is notable that Chapter 15 of the US Bankruptcy Code protects its local creditors to a great extent although it is not hesitant to recognise foreign proceedings in order to even out the process and allow for the furtherance of the principle of comity. Some commentators might argue that the United States have deteriorated by adopting Chapter 15 because they are hesitant to recognise foreign insolvency proceedings, yet they are one of the few of states worldwide that has successfully enacted the UNCITRAL *Model Law* on Cross-Border Insolvency. One has to remember that every state will protect the interest of their citizens to the maximum extent possible, whether it may be the interests of local creditors or local debtors. It is therefore my respectful submission that the United States has enacted the UNCITRAL *Model Law* in an admirable fashion in Chapter 15 of the United States Bankruptcy Code. It is my suggestion that the South African Law Reform Commission should have regard to Chapter 15 and amend the Cross-Border Insolvency Act to accord with Chapter 15, bearing in mind the traditional aspects of South Africa.

With the comparison between the United Kingdom and South Africa the similarities between the two jurisdictions with regards to their respective versions of the UNCITRAL *Model Law* are glaringly striking. Although the Cross-Border Insolvency Regulation does not contain a designation requirement, the concept of reciprocity is derived from section 426 of the English Insolvency Act 1968. Although the comparison of the Australian system was very limited, it is clear that the Cross-Border Insolvency Act 2008 (*Cth*) has been utilised by foreign representatives and it has also been

embraced by the courts. As mentioned by Atkins that the modest early signs suggests a commitment to consistent application of the *Model Law* which promotes efficiency and fairness in transnational insolvency cases touching upon Australian interests.

Foreign investors seek certainty regarding the consequences of conducting business in South Africa. This certainty can be provided to the foreign investors if South Africa attempts to implement more or less the same law regarding cross-border insolvency as the major role players in international trade like The United States of America, The United Kingdom and Australia.

When considering the fact that none of the above jurisdictions have incorporated a designation requirement in their versions of the UNCITRAL *Model Law*, it is unavoidable to ask the question why South Africa would have inserted a designation procedure in the Cross-Border Insolvency Act. It is my respectful conclusion that if the designation clause is retained in the Cross-Border Insolvency Act then the Minister of Justice should attend to the designation of the countries as required in the Act without any further delay. Certainly it cannot take longer than thirteen years to designate countries in terms of the Act. This constitutes a glaringly slow process which is most definitely unfavourable to attract foreign trade and investment in South Africa, which in turn will have a great impact on the protection of employment which is one of the objectives of the UNCITRAL *Model Law*.

Chapter 5: Conclusion

Cross-Border Insolvency laws are based on either a universal or a territorial approach in each particular jurisdiction. Territorialism has at aim to protect the rights of local creditors and to promote certainty amongst local creditors with regards to the distribution of assets. The universality approach primarily focuses on promoting the cooperation between different jurisdictions involved in cross-border insolvency matters. The idea behind the universality model is that all the different insolvency procedures of the multiple jurisdictions involved, will be treated as a single insolvency procedure or proceeding. Most jurisdictions follow the territorial model in cross-border insolvency matters, but because of the increase in international trade and investment, more jurisdictions tend to be heading towards the universal model.³⁰⁴

The objective behind the adoption of the Cross-Border Insolvency Act was that the legislature had agreed to move away from the territorial model. The Cross-Border Insolvency Act is not effectively operative yet, and therefore cross-border insolvency matters are currently still regulated by the South African common law, which has the inherent effect that the South African system is based on the territorial model. The South African courts place much emphasis on the protection of local creditors and therefore it can be argued that South Africa is currently based on the modern-territorialism model. There are examples of a universal approach by South African law. Several cases expressed a preference for a single forum of administration. The general rule is that the court of the domicile should direct the main sequestration and that all other decrees should be ancillary or subsidiary.³⁰⁵ A winding-up order has been refused where a single liquidation order would be more convenient and the interest of local creditors would be as well protected in the foreign proceedings as if local winding-up order had been granted.³⁰⁶ *In Ward v Smith: In re Gurr v Zambia Airways Corp Ltd*³⁰⁷ the court expressed a preference for a single *concurus creditorum*, but refused recognition because application was not made timeously. Section 149 of the Insolvency Act provides for a discretion to refuse sequestration if it is equitable and convenient that the debtor be sequestrated elsewhere.

The UNCITRAL *Model Law* is an international or universal initiative of the United Nations, which provides a model for the improvement and implementation of a local legislative framework on cross-

³⁰⁴ See *supra* notes 20-29 and accompanying text.

³⁰⁵ See *In Re Estate Morris* 1907 TS 657 at 668.

³⁰⁶ See *Donaldson v British South African Asphalt and Manufacturing Co Ltd* 1905 TS 753; See also *In Re Keydsdorp & Pietersburg Estate Ltd (in liquidation)* 1903 TS 254.

³⁰⁷ 1998 (3) SA 175 (SCA) 179G.

border insolvency rules to the member states of the United Nation.³⁰⁸ Currently relatively few jurisdictions have embraced or enacted the *Model Law* in their various local laws relating to cross-border insolvency. Despite the fact that the *Model Law* is a colossal upspring in countless ways, the major obstacle it imposes currently is the fact that it has only been adopted or embraced by the minority of jurisdictions world-wide.³⁰⁹

The comparative study conducted in Chapter 4 sheds light on the field of Cross-Border Insolvency Law in South Africa. The comparative study shows that it is possible to implement the UNCITRAL *Model Law* within a jurisdiction to the advantage of all participating role players, whilst the interests of local creditors, debtors and other interested persons are still being adequately protected. The predominant differences between the three jurisdictions as discussed in Chapter 4 and the Cross-Border Insolvency Act is that these jurisdictions did not implement a designation clause in their respective versions of the UNCITRAL *Model Law*. A foreign representative can therefore make use of the cross-border insolvency legislation in these jurisdictions, irrespective whether or not the state who the foreign representative represents has adopted the *Model Law*.³¹⁰

It was illustrated that Chapter 15 of the United States Bankruptcy code is being utilised on a daily basis in the United States and studies have also shown that the US Courts have granted recognition in the majority of cases. These cases confirm the notion that, in furtherance of Chapter 15's primary role as a mechanism to coordinate foreign proceedings with United States courts, practitioners can expect courts not to be overly territorial or restrictive into its domain.³¹¹

The United Kingdom has also successfully enacted the UNCITRAL *Model Law* within the ambit of cross-border insolvency in Great Britain. The Cross-Border Insolvency Regulation is being utilised in the United Kingdom, together with the EU Regulation, section 426 of the Insolvency Act and the common law.³¹² The discrepancies between the UNCITRAL *Model Law* and the British Legislation are on account of the entrenched local requirements, and were not meant to abandon the fundamental principles underlying the *Model Law*.³¹³ These differences include references to Council Regulation (EC) 1346/2000 on Insolvency Proceedings (the "EU Regulation"), section 426 of the Insolvency Act

³⁰⁸ See *supra* note 109 and accompanying text.

³⁰⁹ See Smith and Boraine 2004 16 *SA Merc LJ* 468; See also http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

³¹⁰ See *supra* notes 177-281 and accompanying text.

³¹¹ See *supra* notes 216-223 and accompanying text.

³¹² See *supra* notes 224-226 and accompanying text.

³¹³ See *supra* note 237 and accompanying text.

1986, the British court systems, and different forms of relief available under British insolvency laws.³¹⁴

The Australian Cross-Border Insolvency Act promotes accessibility of the *Model Law* by international interest when seeking relief in Australia, and it also facilitates consistency in its interpretation and application within Australia and elsewhere with regards to cross-border insolvency matters.³¹⁵ The Cross-Border Insolvency Act 2008 (*Cth*) has been utilised by foreign representatives in Australia and it has also been embraced by the Australian courts. According to Atkins, the modest early signs suggest a commitment to consistent application of the *Model Law* which promotes efficiency and fairness in transnational insolvency cases touching upon Australian interests.³¹⁶

The current position in South Africa with regards to cross-border insolvencies involves a burdensome procedure, which will have a great impact on international trade and investment.³¹⁷ Although the purpose of the UNCITRAL *Model Law* is to make the process of cross-border insolvency more predictable, it was not taken into consideration by the drafters of the South African version of the *Model Law*. The South African version of the *Model Law* contains a designation provision which was not intended by the drafters of the *Model Law*. The designation clause is not contained in the UNCITRAL *Model Law on Cross-Border Insolvency*, and therefore the South African Cross-Border Insolvency Act deviates from the *Model Law* on the aspect of reciprocity. Due to the designation requirement in the Act, the Act is more limited in its application than the UNCITRAL *Model Law* on cross-border insolvency. The UNCITRAL *Model Law* excludes certain specialised institutions such as banks, whereas the designation requirement in the Cross-Border Insolvency Act restricts the entire legal system and not merely specific types of debtors.³¹⁸

The model law was designed to provide a template of uniform legislative provisions to assist acceding states to equip their insolvency laws with a modern, harmonised and fair framework for dealing with cross-border insolvency matters. The designation requirement does most definitely not promote greater legal certainty for trade and investment. The only logic behind the designation requirement is that the South African legislature wants to protect the South African creditors as well as the debtors. However, the interests of local creditors can still be adequately protected without the need of a stringent designation requirement. Under the UNCITRAL *Model Law* creditors are

³¹⁴ See *supra* note 238 and accompanying text.

³¹⁵ See *supra* note 278 and accompanying text.

³¹⁶ See *supra* notes 280 and accompanying text.

³¹⁷ See *supra* notes 32-79 and accompanying text.

³¹⁸ See *supra* notes 107-121 and accompanying text.

adequately³¹⁹ or sufficiently³²⁰ protected whilst recognition is afforded to foreign proceedings based on a unified structure.

The principle of reciprocity will have a contradictory approach to Cross-Border Insolvency. The designation clause will have the effect that South Africa will in future, follow a dual system, because the Cross-Border Insolvency Act will only be applicable to the designated states, whilst the states which are not designated will still have to follow the common law route. Smith and Boraine argue that the system proposed by the *Model Law* may take a while to operate adequately in South Africa because of the designation clause. The system of designation can also cause a delay between the introduction of another states' version of the *Model Law* and the South African designation of that foreign state for the purpose of reciprocity.³²¹

The Cross-Border Insolvency Act is fragmented because of the fact the common law will still be applicable to cross-border insolvency matters even if the system of designation is functioning effortlessly. The introduction of a foreign country's local version of the UNCITRAL *Model Law* and the South African designation of that foreign jurisdiction for purposes of reciprocity might cause the postponement of the Cross-Border Insolvency Act being of any assistance to that particular foreign state. The latter entails that if there were proceedings between South Africa and that foreign jurisdiction that would justify the applications of both countries versions of the *Model Law*, it would not be possible to apply the South African version until the foreign state has been designated. Until designation take place, the South African common law would have to be applied in South Africa to the proceedings in question.³²² It is evident that the common law will always be applicable to certain cross-border insolvency proceedings as long as our cross-border insolvency legislation retains the principle of reciprocity.³²³

The question can in all honesty be asked whether this prerequisite should be removed from the act by way of an amendment to the Act. The benefit would be that South Africa's handling of cross-border insolvencies would then line up with the majority of other jurisdictions and major role players in cross-border insolvency such as the United States of America and the United Kingdom. It will also establish legal certainty and thereby promoting investment in South Africa and preserving employment. An alternative is not to include a designation clause in the South African Proposed Insolvency bill as approved by the Cabinet in 2003 and amended in June 2013. Foreign investors

³¹⁹ See *supra* note 272 and accompanying text.

³²⁰ See *supra* notes 205-209 and accompanying text.

³²¹ See *supra* notes 167-170 and accompanying text.

³²² See Smith and Boraine 2002 10 *American Bankruptcy Institute Law Review* 184.

³²³ See *supra* notes 282-285 and accompanying text.

want certainty regarding the consequences of conducting business in South Africa. This certainty can be provided to the foreign investors if South Africa implements more or less the same law regarding cross-border insolvency as the major role players in international trade like the United States of America, the United Kingdom and Australia.

It is only fair to argue that South Africa will provide assistance to foreign representatives, if it is certain that those states will be of assistance to the same extent for South Africa's creditors and representatives. If the designation requirement remains in the Cross-Border Insolvency Act, then the Minister of Justice should attend to the designation of countries without any further delay. It is of critical importance that the designation of foreign states is encouraged in order for South Africa to attract foreign investment. The designation of foreign states will provide foreign investors the affirmation of the local situation in case of cross-border insolvency matters. The handling of cross-border insolvency matters will remain unpredictable to foreign investors until designation takes place. Fortunately the Cross-Border Insolvency Act is still relatively new within the ambit of cross-border Insolvency and it can be changed by way of amendment.

Irrespective of this much debated academic subject, one has to shift the focus to the current position in South Africa with regards to the handling of cross-border insolvency matters. Foreign representatives will have to accustom themselves with the South African insolvency law and the connection thereof to the Cross-Border Insolvency Act, and with the other South African statutes and common-law rules and principles relevant to the particular set of facts. The foreign representatives will gain access to the South African proceedings by way of the Cross-Border Insolvency Act, however from there onwards they will have to abide by the local rules relating to insolvency in South Africa. The Cross-Border Insolvency Act will afford a portal for foreign representatives to acquire access to South African proceedings, and furthermore it will provide same for South African representatives to gain access to foreign proceedings.³²⁴ The latter will only be reached when the Act comes into force in the international system for cooperation intended by the UNCITRAL *Model Law*. The development of the Cross-Border Insolvency Act 42 of 2000 will mostly rely upon the ability and adaptability of insolvency practitioners and Judges of the High Courts in South Africa. In addition to the controversy of the designation requirement, the efficiency of the Cross-Border Insolvency Act 42 of 2000 has to rely upon the strength of local statutes, principles, and procedures in the particular enacting state.

³²⁴ See *supra* notes 160-162 and accompanying text.

Despite the fact that the Cross-Border Insolvency Act is restricted in its designation conditions or requirements in section 2(2)-(5), the Act does however, empower South African courts and practitioners to play a positive role in cooperating with their foreign correspondents, and more specifically in the solicitation of business rescue.³²⁵ Although the Cross-Border Insolvency Act has many shortcomings and can be very unpredictable in certain circumstances, one can only commend the introduction of the Cross-Border Insolvency Act in South Africa. The introduction of the *Model Law* in South Africa is most certainly a step in the right direction. Although the Act is not currently operative and efficient, it still suggests that South Africa is willing to enter the sphere of a universality approach. A pure universality approach will obviously be ideal, whilst it is almost a common fact that no jurisdiction will adopt a pure universality approach when it comes to cross-border insolvency.

The Cross-Border Insolvency Act enhances recognition considerably, by providing adequately understandable rules that limit confusion, deception and postponement. The Cross-Border Insolvency Act contemplates to bring about an impartial or equitable structure of distribution that is specifically concerned with the interests of foreign creditors in ways that is not accomplished by the common law, and sheds light on a reasonably hidden or secret subject for foreign creditors not familiar with the common law rules based on comity. The appropriate execution and advancement of the *Model Law* will provide assistance to developing countries to captivate inbound investment.

I am concluding my research project on the development of the Cross-Border Insolvency Act 42 of 2000 in view of developments elsewhere with the suggestion made by Westbrook, that as we move forward towards the solution of the next set of problems in multi-national bankruptcies, we should occasionally look back to remember how far we have come since UNCITRAL first convened an insolvency group eighteen years ago. The backward glance over the dramatic achievements of recent years will make the way forward look less daunting. Hopefully in the years to come designation will take place and the Cross-Border Insolvency Act will be effective and of great assistance in the management of cross-border Insolvency matters, as it was intended by the drafters of the *Model Law*. By then a number of case laws will exist and it would be utilised by insolvency practitioners to illustrate how conflicts will be resolved and how the hierarchy of rules will be established in practice. This much debated field of the law will remain a topic for discussion and various contradictory opinions for many years to come.

³²⁵ See *supra* note 163 and accompanying text.

BIBLIOGRAPHY

Books and Articles

1. Atkins S “Test driving the Model Law on Cross-Border Insolvency in Australia: A Map of the Journey So Far” (2011) 1 *INSOL World* 33-35.
2. Bernstein DS “The International Insolvency Review” (2013) *The International Insolvency Review* 1-14.
3. Bertelsmann ea *Mars: The Law of Insolvency in South Africa* (9th ed, 2008, Juta Law Publishers) chapter 30.
4. Bolger L “No Frontiers: An Analysis of the EC Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency and how each will apply to a cross-border insolvency” (2012) http://www.consulegis.com/wp-content/uploads/2013/06/Laura.Bolger_Paper.pdf 1-22.
5. Boraine A “Comparative Notes on the Operation of some Avoidance Provisions in a Cross-Border Context” (2009) 21 *SA Merc LJ* 435-469.
6. Botha SJ and Stander AL “Die bepaling van die ‘sentrum van hoofbelange’ by oorgrens insolvensies: Is die Parmalat-benadering voldoende om die behoeftes van modern handel te bevredig?” (2011) 36(1) *Journal for Judicial Science* 19-48.
7. Brown M “Overview of the English legal framework for cross-border insolvency” (2012) http://www.mayerbrown.com/public_docs/Overview_English_Legal_Framework.pdf 1-4.
8. Day J “Cross-border recognition of insolvency procedures: options for foreign officeholders” (2011) <http://www.inhouselawyer.co.uk/index.php/insolvency-and-corporate-restructuring/1402-cross-border-recognition-of-insolvency-provides-options-for-foreign-officeholders> 1-6.
9. Fletcher IF “Better late than never: The UNCITRAL Model Law enters into force in Great Britain” (2006) *Insolvency Intelligence* 86-93.
10. Gropper AL “The Arbitration of Cross-Border Insolvencies” (2012) 86 *Am. Bankr. LJ* 201-242.
11. Hamer AL and McClintock ME “Understanding Chapter 15 of the United States Bankruptcy Code: Everything you need to know about Cross-Border Insolvency

- Legislation in the United States” (2008) *Law and Business Review of the Americans* 257-280.
12. Kunst, Boraine, Burdette *Meskin: Insolvency Law and its Operation in Winding-up* (loose-leaf) Lexis Nexis Butterworths Durban (2011).
 13. Loubser A “An International perspective on the regulation of insolvency practitioners” (2007) 19 *SA Merc LJ* 123-139.
 14. Mc.Cormack G “COMI and COMITY in UK and US Insolvency Law” (2012) *Law Quarterly Review* 140-159.
 15. Olivier M and Boraine A “Some Aspects of International Law in South African Cross-Border Insolvency Law” (2005) *CILSA* 373-395.
 16. Omar PJ “Cross-Border Insolvency Law in the United Kingdom: An Embarrassment of Riches” (2006) *Insolvency Law and Practice* 132-136.
 17. Roodt C “Recognition and enforcement of foreign judgments: still a Hobson’s choice among competing theories?” (2005) *TSAR*.
 18. Rutstein “U.K Perspective Recognition of Overseas Insolvency Procedures: Spoiled for Choice?” (2009) <http://www.jonesday.com/uk-perspective-recognition-of-overseas-insolvency-procedure-spoiled-for-choice-09-30-2009/>1-5.
 19. Shandro S “Implementation of the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain” (2005) *UK Insolvency Service* 1-7.
 20. Shandro S “The Implementation of the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain” (2006) *American Bankruptcy Institute Journal* 30-36.
 21. Sharrock *et al Hockley’s Insolvency Law* 9th edition Juta Law Books (2012).
 22. Smith “Some aspects of Comity and the Protection of Local Creditors in Cross-Border Insolvency Law: South Africa and the United States Compared” (2002) 14 *SA Merc LJ* 17-30.
 23. Smith A and Boraine A “Cross-Border Insolvency Law and the Local Creditor’s Risks of Receiving Payment from a Foreign Company Registered as an External Company in South Africa” (2004) 16 *SA Merc LJ* 495-524.
 24. Smith A and Boraine A “Crossing Borders Into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law” (2002) 10 *American Bankruptcy Institute Law Review* 136-216.

25. Stander L “Cross-Border insolvencies as a global economic problem” (2002) 27(2) *Journal for Judicial Science* 72-87.
26. Weideman J and Stander AL “European and American Perspectives on the Choice of Law Regarding Cross-Border Insolvencies of Multinational Corporations- Suggestions for South Africa” (2012) 15(5) *PELJ* 133-227.
27. Westbrook JL “Chapter 15 at Last” (2005) *American Bankruptcy Law Journal* 713-728.
28. Westbrook JL “An Empirical Study of the Implementation in the United States of the Model Law on Cross-Border Insolvency” (2013) 87 *Am. Bankr. LJ* 247-270.
29. Yamauchi K “The UNCITRAL Model Cross-Border Insolvency Law: The Stay of Proceedings and Adequate Protection” (2004) 13 *International Insolvency Review* 87-114.
30. Zulman RH “Cross-border Insolvency in South African Law” (2009) 21 *SA Merc LJ* 804-817.
31. Yamauchi KD “Should Reciprocity be a part of the UNCITRAL Model Cross-Border Insolvency Law?” (2007) 16 *Insolvency International Review* 145-179.

Thesis and Dissertations

1. Stroebel *Protocols as a possible solution to jurisdiction problems in cross-border insolvencies* (LLM Dissertation 2006 NWU).
2. Fourie EG *’n Vergelyking van die oorgrens-insolvensiewetgewing van Suid-Afrika met die Verenigde State van Amerika* (LLM Dissertation 2012 NWU).

Case law

1. *Clegg v Prietsley* 1985 (3) SA 950 (W).
2. *Deutsche Bank AG v Moser and Another* 1999 (4) SA 216 (C).
3. *Donaldson v British SA Asphalte and Mfg. Co Ltd* 1905 TS 735.
4. *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C).
5. *Ex parte Stegman* 1902 TS 40.
6. *Ex parte Steyn* 1979 2 SA 309 (O).
7. *In Re Estate Morris* 1907 TS 657

8. *Moolman v Builders & Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 (1) SA 954 (A).
9. *Prietsley v Clegg* 1985 (3) SA 955 (T).
10. *Trustee of Howse, Sons & Co v Trustees of Howse, Sons & Co; Jocelyne v Shearer & Hine* 1884 3 (SC) 14.
11. *Ward v Smith: in re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) 176 B.
12. *Yu v STZ Pan Ocean Co Ltd (South Korea)*, in the matter of *STX Pan Ocean Co Ltd* (2013) FCA 680.

Legislation South Africa

1. Cross-Border Insolvency Act 42 of 2000.
2. Insolvency Act 34 of 1936.
3. South African Proposed Insolvency bill as approved by Cabinet in 2003 and amended in June 2013.
4. Companies Act 61 of 1973.

Legislation Unites States of America

1. House of Representatives Report 109-31 of 8 April 2005.
2. United States Bankruptcy Abuse Prevention and Consumer Prevention Act of 2005.
3. United States Bankruptcy Reform Act of 1978.

Legislation United Kingdom

1. English Insolvency Act 1968.
2. Cross-Border Insolvency Regulations (S.I 2006/1030).
3. Council Regulation No. 1346/2000 (the 'EC Regulation').

Legislation Australia

1. The Cross-Border Insolvency Act 2008 (*Cth*) No 24 of 2008.
2. Federal court of Australia *Practice Note CORP 2* Cross-Border Insolvency Cooperation with Foreign Courts or Foreign Representatives.

International Instruments

1. UNCITRAL Model Law on Cross-Border Insolvency of 1997.
2. The UNCITRAL Model Law on cross-border insolvency and Guide to Enactment.

Internet Sources

1. http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html
2. <http://www.insol-europe.org/download/file/484>
3. http://www.justice.gov.za/salrc/reports/r_prj63_crossborder_1999jun.pdf.

UNIVERSITY OF PRETORIA

DECLARATION OF ORIGINALITY

**This document must be signed and submitted with every
essay, report, project, assignment, mini-dissertation, dissertation and/or thesis**

Full names of student:

CLINTON RAS

Student number: 29070717.....

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this mini-dissertation (eg essay, report, project, assignment, mini-dissertation, dissertation, thesis, etc) is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work

SIGNATURE OF STUDENT: C RAS

SIGNATURE OF SUPERVISOR: A BORAINÉ.....

DATE: 15 December 2015