

University of Pretoria etd - Burdette, DA

PART 4B

**PROPOSALS FOR UNIFORM PROVISIONS RELATING TO
INDIVIDUAL AND CORPORATE INSOLVENCY**

**CHAPTER 8: LIQUIDATION APPLICATIONS UNDER A UNIFIED
INSOLVENCY ACT 223**

**CHAPTER 9: THE COMMENCEMENT OF LIQUIDATION AND THE
VESTING OF THE INSOLVENT ESTATE UNDER A UNIFIED
INSOLVENCY ACT 277**

In this part various provisions of the Insolvency Act and the Companies and Close Corporation Acts that are dissimilar to each other will be discussed with a view to introducing uniform provisions, where possible, in a unified Insolvency Act. These dissimilar provisions relate to liquidation applications, the vesting of the insolvent estate upon insolvency, and the commencement of liquidation. The reasons for the distinction between the provisions that apply dissimilarly to natural and juristic persons will be discussed, and proposals made for their uniform inclusion in a unified Insolvency Act.

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CHAPTER 8

LIQUIDATION APPLICATIONS UNDER A UNIFIED INSOLVENCY ACT

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1 INTRODUCTION

Due to the very real differences between natural and juristic persons, the acts of insolvency and grounds upon which a company or close corporation may be wound up obviously differ quite drastically.¹ This chapter deals with this aspect of insolvency law as well as with another closely related issue, namely the form of the application itself.² Historically the acts of insolvency have

¹ One could debate whether South Africa wants or needs to retain a “multiple gateway” approach to insolvency. Currently there are two manners in terms of which, eg. a company can be placed in liquidation. By having a “single gateway” approach, many of the problems enumerated in this chapter would not exist. The point of departure in this chapter is that South Africa will retain a “multiple gateway” approach to insolvency, being liquidation by the court and liquidation by the adoption of a liquidation resolution. Only liquidation by the court will be discussed here, as the aim of this chapter is to bring about uniform procedures for liquidation applications in respect of individuals and corporate entities. Voluntary liquidation by resolution is discussed separately in ch 11 below.

² Although this chapter will mainly address the acts of insolvency and the grounds for liquidation, a unified insolvency statute should also address the uniformity of insolvency applications which, due to the differing nature of these types of applications, currently differ from each other.

always related to the insolvency of individuals.³ On the other hand, and due to the inherent differences between individuals and companies, the grounds for liquidation upon which a company may be liquidated, do not generally apply to the sequestration of individuals.⁴ However, in this chapter it will be shown that the acts of insolvency and grounds for liquidation are not that mutually exclusive. Many of the acts of insolvency could apply to companies and, it is submitted, some of the grounds for liquidation could even apply to individuals. Unfortunately the South African Law Commission has elected to retain the somewhat archaic acts of insolvency,⁵ contrary to other countries such as England,⁶ which have scrapped them as being outdated. Another factor that will influence the application of the grounds for insolvency also to individuals, is the fact that the South African Law Commission has elected to retain⁷ the “advantage to creditors” test in the case of voluntary liquidations⁸ by individuals.⁹

In attempting to draft a unified insolvency statute, one of the main issues that has to be addressed is the question of uniformity in respect of the application to bring about insolvency. Bringing such

³ However, see par 3.1.2 below where reference is made to a Natal statute where it was possible for a company to be wound up if it had committed an “act of insolvency”.

⁴ Many of these grounds are unique to a company or a close corporation, eg where a company has not commenced trading within one year from its incorporation - see s 344(c) of the Companies Act 61 of 1973 (hereinafter referred to as the Companies Act).

⁵ See SA Law Commission Project 63 Commission Paper 582 (11 Feb 2000) Vol 1 (hereinafter referred to as Commission Paper 582 Vol 1) paras 2.1-2.6 40-42. The SA Law Commission states in par 2.1 that “[i]n light of the support for the retention of the acts of insolvency and the lack of compelling reasons for departing from the existing position, the acts of insolvency have been retained in essence”.

⁶ See Fletcher *The Law of Insolvency* 2nd ed (1996) 69 (hereinafter referred to as Fletcher). See also the original recommendations made by the Cork Report paras 529-530 (*Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 (hereinafter referred to as the Cork Report)). See also Boraine and Van der Linde “The Draft Insolvency Bill - An Exploration (Part 1)” 1998 *TSAR* 621 at 633 and the authority cited in fn 76 (hereinafter referred to as Boraine and Van der Linde (Part 1)).

⁷ See Commission Paper 582 Vol 1 par 3.6 43-44.

⁸ This is known as “voluntary surrender” under the current Insolvency Act.

⁹ For this reason an individual would not be able to “pass a resolution” in order to bring about his own liquidation without further ado. He would still have to prove to the court that there would be a substantial advantage to creditors should it grant the liquidation order.

an application would, of course, have to rest on some or other legal basis. In addition there are different forms of insolvency applications. For example, should a *debtor* bring an application for his, her or its voluntary liquidation, there would have to be a legal basis upon which such an application could be brought.¹⁰ On the other hand, if a *creditor* wanted to bring an application for the liquidation of the debtor, there would have to be other, differing grounds upon which such an application could be brought. In this chapter both these aspects will be addressed in determining whether or not common grounds can be found for the liquidation of individuals and juristic persons alike. This chapter will also investigate to what extent the procedures for obtaining a liquidation order can be made uniform in regard to individuals and corporate entities.

2 ACTS OF INSOLVENCY AND THE APPLICATION FOR SEQUESTRATION¹¹

2.1 Current position regarding acts of insolvency in South Africa¹²

It must be borne in mind that under current South African insolvency law a debtor¹³ may be sequestrated in two possible ways, namely by means of a voluntary surrender¹⁴ and compulsorily.¹⁵ In the case of a voluntary surrender the debtor him- or herself brings the application and a unique

¹⁰ Eg that the individual is insolvent and that it would be to the creditors benefit if such an estate were to be liquidated.

¹¹ In order to avoid any confusion, the current term “sequestration” will be used in this chapter. However, it is to be noted that the SA Law Commission has proposed that the term “liquidation” should be used in a new Insolvency Act to alleviate the problems that are currently experienced by the difference in terminology regarding the sequestration of individuals and partnerships, and the liquidation of companies and close corporations - see Commission Paper 582 Vol 2. See also Boraine and Van der Linde (Part 1) 623 fn 12.

¹² See generally Kunst (gen ed) *Meskin, Insolvency Law* (1990, updated to 30 April 1999) ch 2 and ch 3 (hereinafter referred to as Meskin); De la Rey *Mars, The Law of Insolvency in South Africa* 8th ed (1988) (hereinafter referred to as Mars) ch 5.

¹³ The word “debtor” when used in this context means a natural person or a partnership - see s 2 of the Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act).

¹⁴ For a detailed exposition of these types of applications, see Meskin ch 3 and Mars ch 3.

¹⁵ For a detailed exposition of these types of applications, see Meskin ch 2 and Mars ch 5.

set of rules apply when the court considers it. Where a debtor is sequestrated compulsorily by a creditor, a different set of rules apply. The main difference between these two forms of sequestration lies in the burden of proof. In the case of a voluntary surrender the debtor has to prove that the granting of a sequestration order will in fact be to the benefit of the creditors,¹⁶ while in the case of a compulsory sequestration the applicant creditor need merely prove that there is reason to believe that the sequestration will be to the benefit of the creditors.¹⁷ Since it is only compulsory sequestration that is similar to proceedings in order to have a company wound up by the court, only compulsory sequestration proceedings will be discussed under this chapter.¹⁸

In order to assist creditors that apply for the sequestration of a debtor's estate certain presumptions, that are indicative of insolvency, have been provided in the form of "acts of insolvency".¹⁹ In terms of current South African insolvency law, a debtor commits an act of insolvency if:

- (a) He leaves the Republic or otherwise absents himself with the intention of evading or delaying the payment of his debts;²⁰

¹⁶ S 6(1) of the Insolvency Act. As to when an application will be to the advantage of creditors in the case of a voluntary surrender, see Meskin par 3.2 3-3 – 3-4 and Mars par 3.31 53-54. It must be noted that a debtor, when bringing an application for voluntary surrender, cannot rely on any of the acts of insolvency in order to obtain a sequestration order, as this privilege is only accorded creditors that apply for compulsory sequestration.

¹⁷ S 10(c) of the Insolvency Act. As to when an application will be to the advantage of creditors in the case of a compulsory sequestration, see Meskin par 2.1.4 2-18–2-20 and Mars par 5.35 108-111.

¹⁸ The voluntary surrender of an individual debtor's estate will not be discussed here, although it is worth pointing out that the SA Law Commission has retained this form of liquidation, albeit in simplified form, in its Draft Insolvency Bill. Voluntary liquidation by resolution in the case of corporate entities is discussed separately in ch 11 below.

¹⁹ See Commission Paper 582 Vol 1 41 par 2.4.

²⁰ S 8(a) of the Insolvency Act.

-
- (b) He fails to satisfy a judgment by the court, or fails to point out sufficient disposable property to satisfy it, or where a *nulla bona* return has been made by the officer responsible for the execution of the judgment;²¹
 - (c) The debtor makes or attempts to make a disposition of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;²²
 - (d) He removes or attempts to remove any of his property with the intent of prejudicing his creditors or of preferring one creditor above another;²³
 - (e) He makes or offers to make an arrangement with any of his creditors for releasing him wholly or in part from his debts;²⁴
 - (f) After having published a notice of his intent to bring an application for voluntary surrender, he fails to comply with the formal requirements or to bring such application, or where he lodges an incorrect statement of affairs;²⁵
 - (g) He gives notice in writing to any one of his creditors that he is unable to pay any of his debts;²⁶

²¹ S 8(b) of the Insolvency Act. This is similar to a company's inability to pay its debts, which is provided for in s 344(f) of the Companies Act, and which basically provides for sequestration where a debtor is commercially insolvent.

²² S 8(c) of the Insolvency Act.

²³ S 8(d) of the Insolvency Act.

²⁴ S 8(e) of the Insolvency Act.

²⁵ S 8(f) of the Insolvency Act.

²⁶ S 8(g) of the Insolvency Act.

- (h) Being a trader, he places a notice in the *Government Gazette* in terms of section 34 of the Insolvency Act (alienation of business) and is thereafter unable to pay his debts.²⁷

2.2 The application for sequestration²⁸

It is not intended to deal with the application for the compulsory sequestration of a debtor's estate in any detail. Only the general procedures regarding these applications will be dealt with here in order to illustrate the similarities and dissimilarities between applications for the sequestration of an individual's estate as opposed to those for the winding-up of a company,²⁹ and in order to determine whether a single process is feasible.

A creditor may bring sequestration proceedings against a debtor if such creditor has a liquidated claim, sounding in money, for not less than R100.³⁰ The creditor's application for the sequestration of the debtor's estate can only be brought on two grounds, namely that the debtor has committed an act of insolvency as set out in section 8 of the Insolvency Act or that such debtor is insolvent.³¹ The acts of insolvency have been referred to in the previous paragraph, but actual insolvency means that the debtor's liabilities actually exceed his assets on a balance sheet test.³² Sequestration proceedings are motion proceedings in the High Court. These proceedings are subject to the provisions of the Insolvency Act and the practice in these matters as developed

²⁷ S 8(h) of the Insolvency Act. Due to the omission of s 34 of the Insolvency Act from the Law Commission's Draft Insolvency Bill, s 8(h) as an act of insolvency has also been omitted from the Draft Insolvency Act contained in Commission Paper 582 Vol 2 - see Commission Paper 582 Vol 1 41 par 2.6.

²⁸ See generally Meskin paras 2.1.6-2.1.13 and Mars paras 5.13-5.36. As regards new provisions for the liquidation of an individual debtor's estate, see par 4 below and Commission Paper 582, Vol 1 paras 3.1-3.14 and paras 4.1-4.12.

²⁹ As regards applications for the winding-up of a company by the court, see par 3.3 below.

³⁰ S 9(1) of the Insolvency Act. See *Freidberg v Van Niekerk* 1962 2 SA 413 (C) regarding claims sounding in money.

³¹ S 9(1) of the Insolvency Act. See also Meskin par 2.1.1 2-4.

³² *Ohlsson's Cape Breweries Ltd v Totten* 1911 TPD 48 at 50; *De Villiers v Bateman* 1946 TPD 126 at 130. See also Meskin par 2.1.3 2-17-2-18.

through the decisions of our courts.³³ The court's decision to grant a provisional sequestration order will be made on the strength of the applicant creditor's founding affidavit(s), which should contain at least the following allegations:

- (a) The identify of the debtor and his or her marital status.³⁴ Identification of the debtor includes the full names and date of birth of such debtor as well as an identity number if one has been assigned to such person.³⁵ If the applicant creditor is unable to provide all this information the application will not fail, as long as the applicant states the reason for such inability to provide the information.³⁶
- (b) If the debtor is married, identification also of the spouse.³⁷ Meskin³⁸ submits that disclosure must be made as to how the debtor is married, since in the case of a marriage in community of property the application must be brought against both spouses in terms of the Matrimonial Property Act.³⁹
- (c) *Prima facie* proof that the applicant creditor has *locus standi* to bring the application.⁴⁰ This includes proving that the creditor has a liquidated claim of not less than R100 that sounds in money. In regard to the claim itself, the application should disclose the amount,

³³ See eg *Kleynhans v Van der Westhuizen* 1970 1 SA 565 (O) and *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 3 SA 202 (T). See also Meskin par 2.1.6 2-23.

³⁴ S 9(3)(a)(i) and (ii) of the Insolvency Act. These provisions must be read with s 18A of the Insolvency Act.

³⁵ S 9(3)(a)(i) and (ii) and s 9(3)(c) of the Insolvency Act.

³⁶ S 9(3)(c) of the Insolvency Act; Meskin par 2.1.6 2-24.

³⁷ S 9(3)(a)(i) and (ii) of the Insolvency Act.

³⁸ Meskin 2-24.

³⁹ S 17(4)(b) read with s 11 of the Matrimonial Property Act 88 of 1984.

⁴⁰ S 9(1) of the Insolvency Act.

cause and nature of the claim.⁴¹ The applicant must indicate whether the claim is secured and, if so, the nature and value of the security.⁴²

- (d) That the court has jurisdiction to entertain the application and to grant the order of sequestration.⁴³
- (e) The grounds upon which the application is being brought (that is, actual insolvency or that the debtor has committed an act of insolvency).⁴⁴

The application itself must be accompanied by a certificate by the Master stating that sufficient security has been provided for the payment of all fees and charges relating to the application and subsequent administration of the estate up to the time that a trustee has been appointed.⁴⁵ The Master's certificate relating to security must be issued by him not more than ten days before the date of the application.⁴⁶

The Insolvency Act itself does not make provision for notice of the application to be given to the debtor prior to the hearing of the application by the court. In this regard the practice of each particular court must be followed, as such practice differs from jurisdiction to jurisdiction.⁴⁷ In terms of section 10 of the Insolvency Act and the decision in *Moch v Nedtravel (Pty) Ltd t/a*

⁴¹ S 9(3)(a)(iii) of the Insolvency Act.

⁴² S 9(3)(a)(iv) of the Insolvency Act. Meskin 2-24 is of the opinion that the "security" mentioned in this section is "security" as defined in s 2 of the Insolvency Act, meaning real as opposed to personal security.

⁴³ See eg *Hoffman v Hoffman* 1959 2 SA 511 (E) 511-512. As regards which court will have jurisdiction, see the provisions of s 149 of the Insolvency Act.

⁴⁴ Meskin par 2.1.6 2-23, 2-24–2-26.

⁴⁵ S 9(3)(b) of the Insolvency Act.

⁴⁶ S 9(3)(b) of the Insolvency Act. As regards the requirements relating to the Master's certificate see Meskin 2-29.

⁴⁷ See *Gouws v Scholtz* 1989 4 SA 315 (NC) where the leading authorities in this regard are conveniently set out.

*American Express Travel Service*⁴⁸ the court has no authority to grant a final order of sequestration immediately, but is obliged to issue a provisional order of sequestration.⁴⁹ The applicant carries the burden of proof to establish that the requisites for the granting of a sequestration order have been proved.⁵⁰ This is so irrespective of whether or not the granting of the application is opposed.⁵¹ Where the court grants an order of provisional sequestration, it must simultaneously issue a rule *nisi* in terms of which the debtor is called upon to show cause on the return date why his or her estate should not be placed under final sequestration.⁵²

Section 11 of the Insolvency Act requires that the provisional sequestration order must be served upon the debtor. The debtor, on good cause shown, may anticipate the return date of the rule *nisi*, but must give at least twenty-four hours notice of such application to the applicant.⁵³ If upon the return date of the rule *nisi* the court is satisfied that the applicant has proved the three essential elements⁵⁴ of his or her case, the court has a discretion to finally sequestrate the debtor's estate.⁵⁵

⁴⁸ 1996 3 SA 1 (A) 9-10.

⁴⁹ See also *Meskin* par 2.1.8 2-34–2-35.

⁵⁰ *Meskin* 2-34(1). See also *London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D).

⁵¹ *Meskin* 2-34(1).

⁵² S 11(1) of the Insolvency Act.

⁵³ S 11(3) of the Insolvency Act.

⁵⁴ In terms of s 12 of the Insolvency Act these “essential elements” are: i) the applicant creditor has established a claim against the debtor; ii) the debtor has committed an act of insolvency or is insolvent; and iii) there is reason to believe that the sequestration of the debtor's estate will be to the advantage of the creditors.

⁵⁵ See *Visser v Coetzer* 1982 4 SA 805 (W) at 807-811.

3 GROUNDS FOR LIQUIDATION AND THE APPLICATION FOR WINDING-UP

3.1 Historical development of the grounds for liquidation

3.1.1 Cape Colony

In the Winding-up Act 12 of 1868⁵⁶ the first reference to the grounds for liquidation can be found in the Cape Colony. The relevant section read as follows:

“II. Every joint-stock company may be wound up under the following circumstances, that is to say:

1. Whenever the company has passed a special resolution that the same shall be wound up.
2. Whenever the company does not commence its business within one year from its incorporation, or suspends its business for the course of a year.
3. Whenever the number of members is reduced below seven.
4. Whenever three fourths of the subscribed capital have been lost or become unavailable for the business of the company.
5. Whenever the company is unable to pay its debts.
6. Whenever the court is of opinion that it is just and equitable that the company should be wound up.”

It is interesting to note that the grounds did not refer to the circumstances having to be present where the company was to be wound up by the court, although this did in fact happen. Section III of the same Act described, in detail, when a company was deemed unable to pay its debts, the provisions being very similar to the current provisions contained in the Companies Act.

The Companies Act 25 of 1892⁵⁷ replaced the Winding-up Act, the winding-up provisions being contained in Part V of the 1892 Companies Act. Section 135 of the 1892 Companies Act described the circumstances in which a company could be wound up by the court, and lists only five grounds instead of the previous Act's six grounds for liquidation. The relevant section read as follows:

⁵⁶ Hereinafter referred to as the 1868 Winding-up Act.

⁵⁷ Hereinafter referred to as the 1892 Companies Act.

“135. A company may be wound up by the court under this part of the Act under the following circumstances:

- (1) Whenever the company has passed a special resolution requiring the company to be wound up by the court.
- (2) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year.
- (3) Whenever the members are reduced in number to less than seven.
- (4) Whenever the company is unable to pay its debts.
- (5) Whenever the court is of opinion that it is just and equitable that the company should be wound up.”

Section 136 of the 1892 Companies Act set out the circumstances in which a company was deemed unable to pay its debts, and the provisions were far more condensed than was the case in the 1868 Winding-up Act.

3 1 2 *Natal*

The Winding-up Law 19 of 1866,⁵⁸ which was promulgated prior to the Cape Colony 1868 Winding-up Act, contained eleven grounds for liquidation upon which an application for the winding-up of a joint-stock company could take place. Due the importance of these provisions, they are repeated here in their entirety:

“5. Any person who shall be a creditor of any Joint-stock or other Company, and whose debt shall amount to fifty pounds and upwards, or who shall claim to be a contributory of a Company, may present a petition to the Supreme Court in a summary way for the winding-up of the affairs of such Company in any of the following cases, that is to say:

- 1st. If any Company shall have committed any act of insolvency under the Ordinance No. 24, of 1846, entitled “Ordinance for regulating the due collection, administration and distribution of Insolvent Estates within the District of Natal.”
- 2nd. If any Company shall, by virtue of a resolution passed in that behalf at a meeting of the shareholders of such Company or of the directors of such Company, have filed, or have caused to be filed, in the office of the Registrar of the Supreme Court of this Colony, a declaration in writing that such Company is unable to meet its engagements.
- 3rd. If any person shall have recovered judgment for any debt or demand in any Court of this Colony against such Company, or against any person authorised to be sued as the nominal defendant on behalf of such Company, or against any one or more of the members of such Company, acting in that behalf, and such judgment debt shall remain unpaid or unsecured or uncompounded for the space of sixty days from the date of such judgment.
- 4th. If any decree or order shall have been pronounced in any cause pending in any such Court, or any order made therein in any matter of insolvency or lunacy or minority against any such Company or person authorised to be sued, or against any one or more

⁵⁸ Hereinafter referred to as the 1866 Winding-up Law.

- of the members or contributories of such Company on that behalf, or acting on the behalf of other members or contributories thereof, ordering any sum of money to be paid by such Company, and such Company shall not have paid the same at the time when the same ought, according to the exigency of such decree or order, to be paid.
- 5th. If any action shall have been brought against any contributory of a Company for any debt or demand which shall be due or claimed to be due from or by such Company, and such Company shall not, within ten days after notice in writing by such contributory of such action, have paid, secured, or compounded for such debt or demand, or have otherwise procured such action to be stayed, or shall not have indemnified the defendant to his satisfaction against such action, and all costs, damages, and expenses to be incurred by him by reason of the same.
- 6th. If any creditor of a Company, whose debt shall amount to fifty pounds and upwards, shall have filed an affidavit with the Registrar of the Supreme Court that such debt is justly due to him from such Company, and shall have sued out the process of the said Court for the recovery thereof, and such Company shall not within three weeks after the service of notice thereof, have paid, secured, or compounded for such debt to the satisfaction of such creditor, or have made it appear, to the satisfaction of a Judge of the Supreme Court, that it is the intention of such Company to defend such action on the merits, and shall not, within three weeks after service of such notice, have caused appearance to be entered to such action.
- 7th. If any Company shall have dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding-up its affairs, and the same shall not have been completely wound up.
- 8th. Whenever the Company in general meeting has passed a special resolution requiring the Company to be wound up by the Court.
- 9th. Whenever the Company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year.
- 10th. Whenever the shareholders are reduced in number to less than seven.
- 11th. Whenever three-fourths of the paid-up capital of the Company have been lost or become unavailable.”

The first ground of liquidation is noteworthy in that it referred to the acts of insolvency that applied to individuals. This has also been done in the new proposals set out below,⁵⁹ and it would appear that the wheel has turned full circle. Another interesting aspect is that the section does not refer to the ground of just and equitable, as is to be found in the Cape Colony statute of a few years later.⁶⁰

⁵⁹ See par 5 below.

⁶⁰ See par 3.1.1 above.

3 1 3 Transvaal

Section 2 of the *Wet op het Liquideeren van Maatschappijen van 1891*⁶¹ dealt with the grounds upon which a company could be liquidated by the court:

“2. Iedere maatschappij zal kunnen geliquideerd worden door orde van het Hooggerechtshof, Rondgaand Hof of een der rechters in kamers.

- a. Wanneer bewezen wordt, dat onware opgaven hebben plaats gehad, zooals uiteengezet in 1a tot 1f van wet no. 1 van 1891.
- b. Wanneer de maatschappij tot een speciaal besluit gekomen is dezelve te liquideeren.
- c. Wanneer de maatschappij hare werkzaamheden niet heeft begonnen binnen een jaar na hare inlijving of hare werkzaamheden voor een geheel jaar heeft gestaakt.
- d. Wanneer het aantal leden verminderd is tot minder dan vijf-en-twintig.
- e. Wanneer 75 percent van het werkelijk gestorte kapitaal verloren is of nutteloos geworden is voor de bezigheid van de maatschappij.
- f. Wanneer de maatschappij hare schulden niet kan betalen.
- g. Wanneer het Hooggerechtshof van oordeel is, dat het raadzaam, rechtmatig en billijk is, dat de maatschappij geliquideerd zal worden.”

A peculiar aspect of this Act is that it required the number of members to remain above twenty five and not seven as was the case in all the other provinces, and also added a ground of liquidation relating to the submission of incorrect returns. This Act was repealed by the *Wet op het Liquideeren van Maatschappijen van 1894*,⁶² but the grounds for liquidation in this new Act were identical to those contained in the 1891 Act. However, the Companies Act 31 of 1909⁶³ brought the provisions relating to winding-up by the court into line with what the position had been in other provinces. Section 112 of the 1909 Companies Act dealt with the grounds upon which a company could be wound up by the court, and read as follows:

⁶¹ Act 8 of 1891.

⁶² Act No 1 of 1894.

⁶³ Hereinafter referred to as the 1909 Companies Act.

- “112. A company may be wound up by the Court -
- (i) if the company has by special resolution resolved that the company be wound up by the Court;
 - (ii) if default is made in lodging the statutory report or in holding the statutory meeting;
 - (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
 - (iv) if the number of members is reduced, in the case of a private company below two, or, in the case of any other company, below seven;
 - (v) if seventy-five per cent. of the paid up share capital of the company has been lost, or has become useless for the business of the company;
 - (vi) if the company is unable to pay its debts;
 - (vii) if the court is of the opinion that it is just and equitable that the company should be wound up.”

3 1 4 Orange Free State

Section 2 of the Law to Provide for the Winding Up of Joint Stock Companies of 1892⁶⁴ contained the grounds for liquidation of a company (it is not certain from all the subsections whether the court had to grant the order or not):

- “2. The winding up shall take place under the following circumstances, and in the following cases, to wit:-
- (a) If the company has taken a special resolution to enter into liquidation.
 - (b) If the company has not commenced its operations within one year after its incorporation, or has suspended its operations for a whole year, without being able to satisfy such Court that it has valid excuses for such omission or suspension.
 - (c) If the number of shareholders has diminished to less than seven.
 - (d) If the company is unable to pay its debts.
 - (e) If the Court is of the opinion that it would be just and equitable to wind up the company.

As can be seen from all the above provisions, the grounds for liquidation of a company were very similar in all the provinces, bar a few provisions in Natal in the late nineteenth century. These grounds for liquidation were carried over into Union and Republic legislation, as will be illustrated below.

⁶⁴ Law No 2 of 1892.

3.1.5 Legislation in the Union and thereafter

Section 111 of the Companies Act 46 of 1926⁶⁵ is identical to section 112 of the 1909 Companies Act⁶⁶ that applied in the Transvaal Republic. This latter Act was, in fact, used as the basis for the 1926 Companies Act. The provisions of the current Companies Act, which repealed the 1926 Companies Act, are dealt with in detail below.⁶⁷

3.2 Current position in South African law regarding the grounds for liquidation⁶⁸

In terms of the Companies Act and the Close Corporations Act, a company or close corporation may be wound up by the court⁶⁹ on the grounds that:

⁶⁵ Hereinafter referred to as the 1926 Companies Act. For a detailed discussion of the grounds for liquidation under the 1926 Companies Act, see Cilliers and Benade *Maatskappyereg* (1968) 326-329.

⁶⁶ See par 3.1.3 above.

⁶⁷ See par 3.2.

⁶⁸ See generally Cilliers *et al Corporate Law* 3rd ed (2000) 502-509; Shrand *The Law and Practice of Insolvency, Winding-up of Companies and Judicial Management* 3rd ed (1977) ch 7 (hereinafter referred to as Shrand) in regard to companies and Cilliers *et al Close Corporations Law* 3rd ed (1998) 131-132 in regard to close corporations.

⁶⁹ An important remark that needs to be made here is that the grounds for liquidation, unlike the acts of insolvency, are not necessarily indicative of insolvency. In fact, it is important in the context of this study to note that a company may be wound up by the court in circumstances other than insolvency. This aspect relates to the fact that a company is incorporated by statute, and the same entity can therefore also be terminated by the use of the various grounds for liquidation. These grounds for liquidation relate to the unique position that a company finds itself in and can for obvious reasons not be applied in the case of the insolvency of an individual.

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- (a) The company has by special resolution resolved that it be wound up by the court⁷⁰ or, in the case of a close corporation, the members having more than one half of the total number of votes of members, have resolved at a meeting of members called for the purpose of considering the winding-up of the corporation that the corporation be wound up, and sign a written resolution to that effect;⁷¹
- (b) The company has commenced business before a certificate to commence business has been issued by the Registrar;⁷²
- (c) The company or close corporation has not commenced business within a year of incorporation (or registration in the case of a close corporation), or has suspended its business for a whole year;⁷³
- (d) In the case of a public company, the number of members has been reduced below seven;⁷⁴

⁷⁰ S 344(a) of the Companies Act. See also *Ex parte East London Café (Pty) Ltd* 1931 EDL 111 and *Ex parte Maison P Beelen (Pty) Ltd* 1940 WLD 159.

⁷¹ S 68(a) of the Close Corporations Act.

⁷² S 344(b) of the Companies Act. This ground of liquidation only applies to Companies with a share capital - see s 172(1) of the Companies Act.

⁷³ S 344(c) of the Companies Act and s 68(b) of the Close Corporations Act. However, when exercising its discretion to wind up the company the court will have regard to the prospects of the company commencing (or resuming) its business in the foreseeable future - see Cilliers *ea Corporate Law* par 27.33 503; *Hull v Turf Mines Ltd* 1906 TS 68 at 74; *Taylor v Machavie Claims Syndicate* 1912 WLD 187; *Cluver v Robertson Portland Cement & Lime Co Ltd* 1925 CPD 45 at 51; *Nakhooda v Northern Industries Ltd* 1950 1 SA 808 (N). In the *Taylor* case, where the company suspended business for more than a year with the approval of the shareholders, the court did not consider itself bound to issue a winding-up order. However, where the directors have suspended business because it was to their and others' benefit but not to the benefit of the shareholders, the court granted a winding-up order - see *East Rand Deep Ltd v Joel* 1903 TS 616.

⁷⁴ S 344(d) of the Companies Act.

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- (e) In the case of a company, seventy-five per cent of the share capital has been lost or become useless for the business of the company;⁷⁵
- (f) The company or corporation is unable to pay its debts;⁷⁶
- (g) An external company that has been dissolved in the country of its incorporation, or has ceased to carry on business or is carrying on business only for the purposes of winding-up its affairs, may be wound up by the court in South Africa;⁷⁷
- (h) It appears to the court that it is just and equitable that the company be wound up.⁷⁸

The grounds for liquidation have, with a few exceptions, remained constant since the advent of company liquidations in 1866. The question that has to be asked is whether all these grounds need to be retained in modern South African insolvency law, especially in light of the single statute approach that is being mooted in this study. This question will be answered in paragraph 5 below.

⁷⁵ S 344(e) of the Companies Act. See also *Alpha Bank Bpk v Registrateur van Banke* 1996 1 SA 330 (A). If, despite the loss of the share capital, the majority of the members of the company wish the company to continue trading, the court will not easily order the winding-up unless fraud in regard to the minority shareholders is proved - see Cilliers *ea Corporate Law* par 27.35 503; *Fox v SA Trade Protection and Trust Co Ltd* 1903 TH 412; *Burkhardt v Black Sands Reduction Co of SA Ltd* 1910 WLD 244.

⁷⁶ Ss 344(f) and 345 of the Companies Act and s 68(c) of the Close Corporations Act. For a full discussion of this ground of liquidation see Cilliers *ea Corporate Law* 503-505 in regard to companies and Cilliers *ea Close Corporations Law* 131 in regard to close corporations. For an interesting discussion of the concept "inability to pay debts" under English Law, see Goode *The Principles of Corporate Insolvency Law* 2nd ed (1997) ch 4 64-100 (hereinafter referred to as Goode).

⁷⁷ S 344(g) of the Companies Act (and s 68(d) of the Close Corporations Act). See also *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA).

⁷⁸ S 344(h) of the Companies Act and s 68(d) of the Close Corporations Act. Since it not the purpose of this chapter to provide an exhaustive discussion of all the grounds for liquidation, the many cases reported regarding the ground of "just and equitable" will not be discussed here. However, for a complete discussion of this aspect, see Cilliers *ea Corporate Law* paras 27.41-27.49. For a discussion of the ground "just and equitable" under the 1926 Companies Act, see Cilliers and Benade *Maatskappyereg* (1968) 328-329 (hereinafter referred to as Cilliers and Benade *Maatskappyereg*).

3 3 The application for winding-up⁷⁹

The application for the winding-up of a company consists of a notice of motion and supporting affidavits.⁸⁰ The application must be accompanied by a certificate by the Master, which has been issued not more than ten days before the date of the application, and which states that sufficient security has been provided for the payment of all fees and charges relating to the winding-up of the company until the appointment of a provisional liquidator or the discharge of the company from liquidation. A copy of the application and all supporting affidavits must be lodged with the Master,⁸¹ and he may report to the court any facts that would justify the court in postponing the hearing of the application, or dismissing it. Any such report by the Master must be furnished to the applicant and the company itself.⁸²

The application itself must mention the main business and nature of the company, as well as the company's registered office.⁸³ The *locus standi*⁸⁴ of the applicant and the ground of liquidation relied upon for the application,⁸⁵ must also be specified. At the hearing the court can either grant the application, dismiss it, or adjourn proceedings conditionally or unconditionally.⁸⁶ If the

⁷⁹ See generally Cilliers *ea Corporate Law* paras 27.52-27.53 509-510; Shrand ch 7. For a discussion of the liquidation application under the 1926 Companies Act, see Cilliers and Benade *Maatskappyereg* 329-334.

⁸⁰ Cilliers *ea Corporate Law* par 27.52 509.

⁸¹ S 346(4)(a) of the Companies Act; *Confrees (Pty) Ltd v Oneanate Investments (Pty) Ltd (Snoek Wholesalers (Pty) Ltd Intervening)* 1996 1 SA 759 (C); *First National Bank Ltd v EU Civils (Pty) Ltd: First National Bank Ltd v EU Plant (Pty) Ltd; Bassets v EU Civils (Pty) Ltd; EU Holdings (Pty) Ltd v EU Plant (Pty) Ltd* 1996 1 SA 924 (C).

⁸² S 346(4)(b) of the Companies Act. Where the liquidator is the applicant reg 17 of the Winding-up Regulations finds application.

⁸³ *Klass v Zwarenstein en Odendaal (Pty) Ltd* 1961 2 SA 552 (W). This information is required in order to determine whether the relevant court has jurisdiction.

⁸⁴ *Fraser v Warmbaths Cotton Estates Ltd* 1926 WLD 110.

⁸⁵ *Bam v Robertson Portland Cement and Lime Co Ltd* 1927 CPD 137; *McLeod v Gesade Holdings (Pty) Ltd* 1958 3 SA 672 (W); *Breetveldt v Van Zyl* 1972 1 SA 304 (T).

⁸⁶ Cilliers *ea Corporate Law* par 27.54 510; *Bagus Allie v Meer-Onia (Pty) Ltd* 1948 4 SA 550 (C); *London Ranch (Pty) Ltd (in liquidation) v Hyreb Estate (Pty) Ltd* 1963 2 SA 570 (E).

applicant has shown a *prima facie*⁸⁷ case the court will normally issue a provisional winding-up order with a rule *nisi*.⁸⁸ On the return date the company can advance reasons why it should not be placed under final liquidation. Although a provisional order is normally issued by the court, there are instances where this requirement can be dispensed with.⁸⁹ The court may not refuse to grant the winding-up merely on the grounds that the company has no assets, or that the assets have been mortgaged to an amount equal to or in excess of the value of such assets.⁹⁰ On the return date of the rule *nisi* the court will normally confirm the provisional winding-up order by making it final.⁹¹ In terms of section 348 of the Companies Act the winding-up of the company is deemed to have commenced at the time of the presentation of the application to court, that is at the time the application is filed with the Registrar of the High Court.⁹²

⁸⁷ As to what constitutes a *prima facie* case, see *Timmers v Spansteel (Pty) Ltd* 1979 3 SA 242 (T) at 249 and *Kalil v Decotex (Pty) Ltd* 1988 1 SA 943 (A) at 976.

⁸⁸ *Cilliers ea Corporate Law* par 27.56 511; *Nowak v Rosano International Restaurant (Pty) Ltd* 1968 1 SA 93 (O); *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 2 SA 856 (W) at 867; *Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd* 1983 3 SA 815 (O); *Reynolds v Mecklenberg (Pty) Ltd* 1996 1 SA 75 (W).

⁸⁹ *Ex parte Beach Hotel Amanzimtoti (Pty) Ltd* 1988 3 SA 435 (W); *Ex parte Clifford Homes Construction (Pty) Ltd* 1989 4 SA 610 (W).

⁹⁰ S 347(1) of the Companies Act; *F & C Building Construction Co (Pty) Ltd v MacSheil Investments (Pty) Ltd* 1959 3 SA 841 (D). This provision in the Companies Act raises a problem when trying to achieve uniform application procedures for both individuals and companies. The reason for this is that the liquidation of an individual's estate requires an advantage to creditors to be proved before the court will grant the order. This means that there must be some pecuniary benefit to the creditors. Since the "advantage to creditors" requirement has been retained in the Draft Insolvency Bill by the SA Law Commission, a distinction will still need to be made between applications for liquidation by individuals and corporate entities, where no advantage to creditors needs to be proved. However, even in the case of an application for the winding-up of a company or close corporation, there must be some or other benefit for the *applicant* - see eg *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 4 SA 781 (C) at 789 where the court refused to grant an application for liquidation because the applicant could not prove that the granting of the order would be in his interest.

⁹¹ As to how and by whom the granting of a final order may be opposed, see *Cilliers ea Corporate Law* par 27.57 511 and the authority cited in fn 146.

⁹² *Venter v Farley* 1991 1 SA 316 (W). See also *Cilliers ea Corporate Law* par 27.58 512 and the authority cited in fn 152.

4 INSOLVENCY AND BANKRUPTCY APPLICATIONS IN OTHER JURISDICTIONS

4 1 Introduction

In order to ascertain whether or not it is possible to unify the procedures for South African insolvency applications under a unified Insolvency Act, it is necessary to briefly look at the position in other jurisdictions. While countries such as the United States of America and Germany have a “single gateway” approach to insolvency, other jurisdictions such as England and Australia have a “multiple gateway” approach similar to the one currently operative in South Africa. A brief analysis of how insolvency applications are dealt with in these jurisdictions will assist in placing our own current system, and the new system that is being proposed in this study, in the proper perspective.

4 2 Bankruptcy applications in the United States of America

The American bankruptcy system is a codified one where use is made of specialised bankruptcy courts.⁹³ Due to the fact that the United States has a truly unified system of insolvency law, using a single gateway approach to bankruptcy, insolvency proceedings in this jurisdiction will briefly be examined below.

⁹³ As to how these courts function, and for an explanation of the status of bankruptcy judges, see Herbert *Understanding Bankruptcy* (1995) 55-56 (hereinafter referred to as Herbert). As regards a discussion of bankruptcy jurisdiction and venues, see Herbert ch 5; Albergotti *Understanding Bankruptcy in the US: A Handbook of Law and Practice* (1992) 3-8, 13 (hereinafter referred to as Albergotti).

Title 11 of the United States Code⁹⁴ deals with bankruptcy issues, and contains all the substantive provisions of bankruptcy law governing cases filed on or after 1 October 1979.⁹⁵ The Bankruptcy Code is divided into eight chapters:⁹⁶

- (a) Chapter 1 contains general provisions such as definitions;⁹⁷
- (b) Chapter 3 is entitled “Case Administrations” and deals with the commencement of a bankruptcy case under the code;⁹⁸
- (c) Chapter 5 is entitled “Creditors, the Debtor and the Estate” and deals with creditors, their claims, duties and benefits of the debtor and what the estate consists of;⁹⁹
- (d) Chapter 7 is entitled “Liquidation” and deals with liquidation cases under the Bankruptcy Code. In the main this chapter deals with the administration of chapter 7 cases, the collection of assets and the liquidation and distribution of the estate;¹⁰⁰
- (e) Chapter 9 is entitled “Adjustment of Debts of a Municipality”;¹⁰¹

⁹⁴ 11 USC. This title is generally known as the United States Bankruptcy Code and was enacted as part of the Bankruptcy Reform Act of 1978. Hereinafter Title 11 of the United States Code will be referred to as the Bankruptcy Code.

⁹⁵ Sulmeyer *et al* 1998 *Collier Handbook for Trustees and Debtors in Possession* (1998) 2-1 (hereinafter referred to as Sulmeyer *ea*).

⁹⁶ See generally Albergetti 8-13.

⁹⁷ 11 USC ss 101-110; Sulmeyer *ea* 2-4.

⁹⁸ 11 USC ss 301-366; Sulmeyer *ea* 2-4.

⁹⁹ 11 USC ss 501-560; Sulmeyer *ea* 2-4.

¹⁰⁰ 11 USC ss 701-766; Sulmeyer *ea* 2-4.

¹⁰¹ 11 USC ss 901-946; Sulmeyer *ea* 2-4.

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- (f) Chapter 11 is entitled “Reorganisation” and deals with business rescue measures;¹⁰²
- (g) Chapter 12 deals with the adjustment of debts of a family farmer with regular income;¹⁰³
- (h) Chapter 13 is entitled “Adjustment of Debts of an Individual With Regular Income.” As the name suggests, this chapter deals with individuals with regular incomes who seek relief from their debts by way of a plan of composition, an extension for the payment of debt, or both these issues.¹⁰⁴

It is important to note that the provisions of chapters 1, 3 and 5 only apply to chapters 7, 11, 12 and 13.¹⁰⁵ The provisions of chapters 11, 12 and 13 only apply to chapter 11, 12 and 13 cases respectively.¹⁰⁶ Sub-chapter 1 of Chapter 3 of the Bankruptcy Code deals with the “Commencement of a Case.”¹⁰⁷ Section 301 of the Bankruptcy Code deals with voluntary cases¹⁰⁸ and section 303 deals with involuntary cases.¹⁰⁹

¹⁰² 11 USC ss 1101-1174; Sulmeyer *ea* 2-5.

¹⁰³ 11 USC ss 1201- 1231; Sulmeyer *ea* 2-5.

¹⁰⁴ 11 USC ss 1301-1330; Sulmeyer *ea* 2-5.

¹⁰⁵ Sulmeyer *ea* 2-9.

¹⁰⁶ Sulmeyer *ea* 2-9.

¹⁰⁷ King 1998 *Collier Pamphlet Edition, Part 1, Bankruptcy Code* (1998) 110 (hereinafter referred to as King).

¹⁰⁸ “Voluntary cases” is used in this context to indicate that the debtor applies for relief under the Bankruptcy Code. Where the debtor and his or her spouse file for relief under the Bankruptcy Code, s 302, dealing with “joint cases”, finds application - see King 113-116.

¹⁰⁹ See King 116-132.

4 2 1 Voluntary bankruptcy proceedings¹¹⁰

A voluntary bankruptcy proceeding is commenced merely by filing a petition with the bankruptcy court¹¹¹ under the relevant chapter of the code that the debtor¹¹² wishes to utilise. For example, if the debtor wishes his or her estate to be liquidated in a manner similar to insolvency proceedings in South Africa, then a petition would be filed with the bankruptcy court under Chapter 7, dealing with liquidations. However, if the debtor wishes to obtain relief in the form of a composition or the rescheduling of debts, such a debtor would lodge a petition for relief under Chapter 13 of the Bankruptcy Code. Section 301 of the Bankruptcy Code also provides that “[t]he commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter”.

That section 301 also applies to companies is evident from the definition of “entity” in section 101(15) of the Bankruptcy Code and the decision in *Central Mortgage & Trust Inc v State of Texas (In re Central Mortgage & Trust Inc)*,¹¹³ where it was held that a director of a company that has been closed under state insolvency laws may not be precluded from commencing a case under the Bankruptcy Code on behalf of the company, provided the company is eligible to become a “debtor”.

From the provisions of section 305 of the Bankruptcy Code it is evident that the bankruptcy court, after notice and a hearing, may dismiss or suspend an insolvency proceeding at any time if the court is of the opinion that the interests of the creditors and the debtor would be better

¹¹⁰ See also Ayers “Commencing a Case Under the Bankruptcy Reform Act of 1978: A Primer” 1981 51 *Mississippi Law Journal* 639; Kennedy “The Commencement of a Case Under the New Bankruptcy Code” 1979 36 *Washington and Lee Law Review* 977; Herbert ch 6; Albergotti 31-32.

¹¹¹ S 301. Bankruptcy Rule 1002 requires the petition commencing the proceeding to be filed with the clerk of the bankruptcy court - see King 111. See also Herbert 78-83 where a discussion of the commencement under each chapter of the Bankruptcy Code is discussed.

¹¹² The Bankruptcy Code uses the term “entity” in s 301 and the term “person” in s 303. In terms of the definition of “entity” in s 101(15), it includes a person, estate, trust, governmental unit and the United States Trustee. The definition of “person” in s 101(41) includes an individual, partnership and corporation, but excludes certain governmental organisations.

¹¹³ 13 CBC2d 617 50 BR 1010 (SD Tex 1985).

served by doing so, or there are circumstances present as specified in section 305(a)(2)(A) and (B).¹¹⁴

4 2 2 *Involuntary bankruptcy proceedings*¹¹⁵

Section 303 of the Bankruptcy Code deals with involuntary¹¹⁶ bankruptcy proceedings. Section 303 clearly states that involuntary bankruptcy proceedings can only be commenced against a “person” under Chapters 7 (liquidation) and 11 (reorganisation) of the Bankruptcy Code.¹¹⁷ A “person” is defined in section 101(41) as being an individual, partnership or corporation. The insolvency proceeding is commenced by the filing of a petition with the clerk of the bankruptcy court under chapters 7 or 11 of the Bankruptcy Code.¹¹⁸ Section 303(b)(1)-(4) states who may file a bankruptcy petition under this section. In terms of section 303(h) the court must grant an order for the relief requested if the petition is not timeously opposed.¹¹⁹ However, after a trial the court may only grant the order when certain circumstances are present, namely:

- (a) If the debtor is generally not paying his, her or its debts as they become due,¹²⁰ or

¹¹⁴ S 305(a)(2)(A) refers to a pending foreign proceeding and s 305(a)(2)(B) refers to the provisions of s 304(c), which deals with factors that the court must bear in mind when dealing with a case ancillary to foreign proceedings.

¹¹⁵ See generally McCoid “The Occasion for Involuntary Bankruptcy” 1987 61 *American Bankruptcy Law Journal* 195; Herbert 83-94; Albergotti 32-40.

¹¹⁶ The South African equivalent would be compulsory sequestration or winding-up by the court.

¹¹⁷ See also Herbert 85-86.

¹¹⁸ S 303(b) of the Bankruptcy Code. See also Herbert 86.

¹¹⁹ This section uses the words “timely controverted.”

¹²⁰ S 303(h)(1) of the Bankruptcy Code. See also Comment “Involuntary Bankruptcy: The Generally Not Paying Standard” 1982 33 *Mercer Law Review* 903. For a discussion of the abolition of the acts of bankruptcy in the United States, see Herbert 83-84.

- (b) Specified persons have taken possession “of less than substantially all of the property of the debtor” within 120 days before the date of the filing of the petition.¹²¹

Section 303(j) of the Code provides that the court may only dismiss a petition filed under this section after notice to all creditors and a hearing. The petition may be dismissed by the court on the motion of the petitioner,¹²² on consent of all the petitioners and the debtor,¹²³ or “for want of prosecution”.¹²⁴

The procedures for bringing about an insolvency proceeding in the United States of America are relatively straight forward, and the fact that America has a pro-debtor system of insolvency allows for speedy and efficient relief for debtors under this system.¹²⁵ The Bankruptcy Code is truly unified in that most of its provisions deal with all forms of debtors, even if some of these provisions do appear under different chapter headings.

4 3 Insolvency applications in the Federal Republic of Germany¹²⁶

The new German Insolvency Code¹²⁷ provides for a single gateway approach to bankruptcy, a system that is facilitated by the existence of insolvency courts. Section 2 of the Insolvency Code provides as follows:

¹²¹ S 303(h)(2) of the Bankruptcy Code.

¹²² S 303(j)(1) of the Bankruptcy Code.

¹²³ S 303(j)(2) of the Bankruptcy Code.

¹²⁴ S 303(j)(3) of the Bankruptcy Code.

¹²⁵ For a discussion of the procedures, see Herbert ch 6.

¹²⁶ A translated text of the German Insolvency Code, or *Insolvenzordnung*, has been used as the basis for this discussion. See Stewart *Insolvency Code, Act Introducing the Insolvency Code* (1997).

¹²⁷ For a full discussion of the events that led to a new Insolvency Code being introduced in Germany, see ch 4 above.

“ 2 Lower Court as Insolvency Court

(1) For the insolvency proceeding, the Lower Court in the district of which a State Court is located shall have exclusive jurisdiction as the insolvency court for the district of such State Court.

(2) The State governments shall be empowered, for the purpose of expedient administration or more rapid completion of the proceeding, to establish, by regulation, other, or additional, Lower Courts as insolvency courts and to establish other districts of the insolvency courts in derogation from the foregoing. The State Governments may transfer such power to the State justice authorities.”

To the extent that the Insolvency Code does not make provision for procedural rules, section 4 of the Insolvency Code makes the Code of Civil Procedure applicable to insolvency proceedings. Section 11 of the Insolvency Code determines the “permissibility of the insolvency proceeding” and provides that an insolvency proceeding may be commenced in regard to the assets of any natural or legal person. Sections 13 , 14 and 15 deal with the actual petition for commencement, these sections dealing generally with petitions, petitions by creditors and the right to make petitions in regard to legal persons. Section 16 merely states that there must be a reason for the commencement of an insolvency proceeding. Sections 17, 18 and 19 state the acceptable reasons for the commencement of an insolvency proceeding, these being “illiquidity”,¹²⁸ “impending illiquidity”¹²⁹ and “overindebtedness”.¹³⁰ From these provisions it is apparent that any debtor or creditor may approach the insolvency courts by way of petition for the declaration of insolvency of that particular debtor. The closest the German Insolvency Code comes to providing for grounds for liquidation or acts of insolvency, are the rules pertaining to illiquidity, pending illiquidity and overindebtedness.¹³¹ The provisions relating to insolvency proceedings in the German Insolvency Code are simple and direct, with no complicated procedures that need to be followed.

¹²⁸ S 17 of the Insolvency Code.

¹²⁹ S 18 of the Insolvency Code.

¹³⁰ S 19 of the Insolvency Code.

¹³¹ Eg, s 17(1) states that “[i]lliquidity is a general reason for commencement”. S 17(2) takes this step further by stating that “[t]he debtor is illiquid, if it is unable to honor payment obligations when due”.

4 4 Bankruptcy and winding-up applications in England¹³²

Although England has one Insolvency Act¹³³ regulating the insolvency of both individuals and legal persons, it still has a dual gateway approach to insolvency law.¹³⁴ The Cork Report went a long way in recommending wide-sweeping changes to especially insolvency proceedings under English insolvency law.¹³⁵ The abolition of the acts of bankruptcy relating to natural persons under English law was recommended by the Cork Report,¹³⁶ together with the recommendation that the sole ground upon which a court may make an insolvency order, ought to be the inability to pay debts.¹³⁷ However, this only applies to natural person debtors and a whole different set of rules finds application in the case of companies.¹³⁸

4 4 1 *Insolvency proceedings in regard to individuals*

The first stage of insolvency proceedings under English law is the presentation of a petition for a bankruptcy order to the court having jurisdiction in that specific matter.¹³⁹ A petition can only

¹³² See generally Fletcher ch 5 and ch 6.

¹³³ Insolvency Act 1986.

¹³⁴ England has a dual gateway in the sense that a company, eg, may be wound up by the court as well as by the passing of a resolution - see eg Milman and Durrant *Corporate Insolvency Law and Practice* 3rd ed (1999) 2 (hereinafter referred to as Milman and Durrant).

¹³⁵ See eg ch 10 of the Cork Report.

¹³⁶ Cork Report paras 529-530.

¹³⁷ Cork Report paras 535-537.

¹³⁸ Eg, s 264(1) of the Insolvency Act 1986 provides for the bankruptcy petition relating to the estate of an individual, while s 122(1) of the same Act provides for the grounds for liquidation in the case of a company.

¹³⁹ In terms of s 373(1) of the Insolvency Act 1986, the High Court and the County Courts have jurisdiction. See Fletcher 81.

be presented by a person who has the requisite *locus standi*, and could be the debtor him- or herself, or a creditor.¹⁴⁰ Section 264(1) of the (English) Insolvency Act 1986 provides that a petition for bankruptcy may be presented to the court by:

- (a) A single creditor, or more than one creditor jointly;
- (b) By the debtor him- or herself; or
- (c) By certain specified persons relating to voluntary arrangements.

A creditor who petitions the court for the bankruptcy order, has to meet the further requirement that the debt must be one which the debtor is unable to pay, or one which the debtor has no reasonable prospect of being able to pay.¹⁴¹ This provision must be read with the definition of “inability to pay” as defined in the Insolvency Act 1986.¹⁴²

Where the debtor him- or herself petitions the court for a bankruptcy order, the Insolvency Rules provide for certain information to be furnished to the court when presenting the petition.¹⁴³ One of the requirements is that it must contain a statement that the petitioner (debtor) is unable to pay his or her debts, and must include a request that the bankruptcy order be made against him or her.¹⁴⁴ From these provisions it is apparent that under English law the procedures for bringing about the bankruptcy of a natural person debtor are relatively simple, in that the court is petitioned for the bankruptcy of the debtor based on such debtor’s inability to pay his or her debts.

¹⁴⁰ S 264(1) of the Insolvency Act 1986; Fletcher 81.

¹⁴¹ S 267(2)(c) of the Insolvency Act 1986; Fletcher 110.

¹⁴² S 268 of the Insolvency Act 1986; Fletcher 110. As regards the hearing of a creditor’s petition, see Fletcher 130-138.

¹⁴³ Insolvency Rules 1986, r 6.38; Form 6.27; Fletcher 129.

¹⁴⁴ Fletcher 129. As regards the hearing of a debtor’s petition, see Fletcher 138-141.

4 4 2 *Insolvency proceedings in regard to companies*¹⁴⁵

Under English law there is a definite distinction between the bankruptcy of an individual and the winding-up of a company, a distinction that is entrenched by the structure of the (English) Insolvency Act 1986.¹⁴⁶ Like the South African Companies Act,¹⁴⁷ the (English) Insolvency Act 1986 provides for certain grounds for liquidation in terms of which a company may be wound up by the court.¹⁴⁸ The grounds for liquidation under English law are very similar to those found in the South African Companies Act and are contained in section 122(1) of the Insolvency Act 1986.¹⁴⁹ Due to the similarities with the South African grounds for liquidation, the English grounds will not be repeated here.¹⁵⁰

As stated earlier, the winding-up of a company does not necessarily take place due to insolvency, although the majority of companies are wound up because of the fact that the company is unable to pay its debts. This also appears to be the case in England.¹⁵¹

¹⁴⁵ See generally Fletcher ch 20-23; Goode ch 5; Bailey *et al Corporate Insolvency – Law and Practice* (1992) 175-183, 195-206. Regarding the specific procedure and hearing of winding-up petitions, see Fletcher ch 21 533-552; Goode ch 5.

¹⁴⁶ Fletcher 519; Milman and Durrant 2. This is so despite the fact that England has a single insolvency statute. See also Keay “To Unify or Not to Unify Insolvency Legislation: International Experience and the Latest South African Proposals” 1999 *DJ* 62 at 65-68 (hereinafter referred to as Keay “To Unify or not to Unify”).

¹⁴⁷ See par 3.2 above.

¹⁴⁸ S 122(1) of the Insolvency Act 1986. It is to be noted that under English law a company may also be wound up voluntarily. This aspect is covered in ch 11 below.

¹⁴⁹ See also Goode 106-114.

¹⁵⁰ For a list of the relevant grounds for liquidation under English law see Fletcher 522; Milman and Durrant 96-101. One interesting aspect of the ground “inability to pay debts” under English law is the use of a statutory demand. In the proposals made under par 5.1 below, it is suggested that a similar form of statutory demand should be introduced into a unified South African Insolvency Act. As regards the English statutory demand, see Fletcher 524-526; Milman and Durrant 97-98.

¹⁵¹ Fletcher 533.

Briefly, the following persons or organisations may present a petition,¹⁵² in terms of section 124 of the Insolvency Act 1986, for the winding-up of a company on one of the recognised grounds set out in section 122(1):

- (a) The company itself;¹⁵³
- (b) The directors of the company;¹⁵⁴
- (c) One or more creditors;¹⁵⁵
- (d) One or more contributories;¹⁵⁶
- (e) The official receiver;¹⁵⁷
- (f) The Secretary of State;¹⁵⁸
- (g) The Bank of England;¹⁵⁹

¹⁵² See also Milman and Durrant 98; Goode 110-111.

¹⁵³ S 124(1) of the Insolvency Act 1986. If a company has already been placed under voluntary winding-up the liquidator is competent to present the petition - see Fletcher 533.

¹⁵⁴ S 124(1) of the Insolvency Act 1986; Milman and Durrant 100.

¹⁵⁵ S 124(1) of the Insolvency Act 1986.

¹⁵⁶ S 124(1) of the Insolvency Act 1986. See also Milman and Durrant 101.

¹⁵⁷ In terms of s 124(5) of the Insolvency Act 1986. See also Milman and Durrant 100-101.

¹⁵⁸ In terms of s 124(4) and 124A of the Insolvency Act 1986, or under s 72 of the Financial Services Act 1986, or under ss 53 and 54 of the Insurance Companies Act 1982.

¹⁵⁹ In terms of s 92 of the Banking Act 1987.

- (h) The Attorney-General,¹⁶⁰
- (i) The Building Societies Commission,¹⁶¹
- (j) The clerk of the Magistrates' Court.¹⁶²

As opposed to the United States and Germany, England makes use of a dual gateway approach to insolvency. As regards consumer bankruptcy England has discarded the archaic acts of bankruptcy and replaced them with a single ground of bankruptcy, namely the inability to pay debts.¹⁶³ As far as the winding-up of companies is concerned, England still acknowledge various grounds for liquidation, some of which have no relevance to insolvency. In addition, England still distinguishes between individual and corporate insolvency, providing for separate procedures to be applied in each case.¹⁶⁴

4 5 Bankruptcy and winding-up applications in Australia¹⁶⁵

As is the case in England and South Africa, Australia also has a dual gateway approach to insolvency law. In addition, and as is the case in South Africa, Australia also has a fragmented

¹⁶⁰ In the case of charitable companies - see s 63 of the Charities Act 1993.

¹⁶¹ S 37 of the Building Societies Act 1986.

¹⁶² S 87A of the Magistrates' Court Act.

¹⁶³ For a discussion of the distinction between commercial and factual insolvency under English law, see Fletcher 110-112.

¹⁶⁴ For a discussion of the procedures to be followed in order to place a company into compulsory winding-up under English Law, see Milman and Durrant ch 6 94-115; Goode ch 5.

¹⁶⁵ See generally Key *Insolvency, Personal and Corporate Law and Practice* 3rd ed (1998) ch 2 (bankruptcy) and ch 9 (liquidation) (hereinafter referred to as Key *Insolvency*); Tomasic and Whitford *Australian Insolvency and Bankruptcy Law* 2nd ed (1997) ch 7-9 (liquidation) and ch 14-15 (bankruptcy) (hereinafter referred to as Tomasic and Whitford). As regards bankruptcy petitions in respect of individuals, see also Rose *Lewis' Australian Bankruptcy Law* 11th ed (1999) ch 4-8 (hereinafter referred to as Rose).

system of insolvency legislation.¹⁶⁶ The bankruptcy of individuals is dealt with in the Bankruptcy Act¹⁶⁷ while the winding-up of companies is regulated by the Corporations Act.¹⁶⁸

4 5 1 *Bankruptcy procedures in regard to individuals*¹⁶⁹

In Australia a person can be declared bankrupt in one of two ways, namely by a debtor's petition or by a creditor who applies to the court for the sequestration of the debtor's estate.¹⁷⁰ In the case where the debtor himself applies for bankruptcy, the petition is presented to the Official Receiver and, if there is no other pending application to bankrupt the debtor, and provided the petition is accepted by the court, the debtor is bankrupt.¹⁷¹ According to Keay¹⁷² the procedure leading to bankruptcy by way of a debtor's petition is "very simple".¹⁷³

In the case of compulsory bankruptcy where a creditor applies to have the estate of the debtor sequestrated, the creditor will have to establish that an act of bankruptcy has been committed.¹⁷⁴

¹⁶⁶ See Keay "To Unify or not to Unify" 68 where he states that this is because bankruptcy law has been regulated by federal statutes and company law by state Acts.

¹⁶⁷ 1966 (Cth).

¹⁶⁸ See Duns and Mason "Consumer Insolvency in Australia: Current Regulation and Proposed Reforms" 7, a paper presented at the Academics' Meeting of the INSOL Sixth World Congress in London on 17 July 2001 (hereinafter referred to as Duns and Mason), where they point out that Australia distinguishes between consumer and corporate insolvency.

¹⁶⁹ See generally Duns and Mason 1-46; Rose ch 4-8.

¹⁷⁰ Keay *Insolvency* 17. It is of interest that Keay states here that bankruptcy only applies to a debtor who is not a corporation, partnership, association or company that has been registered under a law that provides for the winding-up of such partnership or association. This is very similar to the situation in South Africa, although partnerships are sequestrated under the Insolvency Act in South Africa - see the definition of "debtor" in s 2 of the Insolvency Act and ch 5 above. See also Rose 90-91.

¹⁷¹ Keay *Insolvency* 17; Tomasic and Whitford par [14.34] 467-468; Duns and Mason 10; Rose 91-94.

¹⁷² Keay *Insolvency* 17.

¹⁷³ For a full discussion of the procedure that must be followed in order to succeed with a debtor's petition, see Keay *Insolvency* 28-36; Tomasic and Whitford par [14.34] 467-468.

¹⁷⁴ Keay *Insolvency* 17; Tomasic and Whitford par [14.11] 456. For a discussion of the acts of bankruptcy and their use in practice, see Keay *Insolvency* 38-50; Tomasic and Whitford paras [14.13]-[14.29] 458-465; Duns and Mason 10; Rose 41-42, 48-60.

In order to obtain the order the creditor will have to present a creditor's petition to the court within six months of the commission of the act of bankruptcy.¹⁷⁵ A judge or the registrar, acting as officials of the court, will then decide whether the debtor's estate should be made subject to a sequestration order.¹⁷⁶ Personal bankruptcy procedures in Australia are evidently very similar, procedurally, to those in South Africa.¹⁷⁷ Both countries make provision for:

- (a) The voluntary surrender of a debtor's estate;
- (b) The compulsory sequestration of a debtor's estate by a creditor; and
- (c) Acts of insolvency (or bankruptcy).

4 5 2 *Winding-up procedures in regard to companies*¹⁷⁸

In terms of the Australian Corporations Act there are basically two modes of winding-up, namely voluntary winding-up and compulsory winding-up.¹⁷⁹ Voluntary winding-up by resolution is dealt with as a separate chapter in this study and consequently only winding-up by the court will be discussed here.

¹⁷⁵ Keay *Insolvency* 17; Tomasic and Whitford par [14.11] 456.

¹⁷⁶ Keay *Insolvency* 17; Tomasic and Whitford par [14.11] 456. For a discussion of the procedures that have to be followed in order to succeed with a creditor's petition in practice, see Keay *Insolvency* 50-57; Tomasic and Whitford paras [14.11]-[14.33] 455-467.

¹⁷⁷ However, it must be borne in mind that although South Africa also has a system of voluntary surrender (the Australian equivalent is the debtor's petition), our courts require a clear benefit for creditors before the sequestration order can be granted. In addition, in light of the many formalities that have to be complied with before the court will grant a sequestration order based on an application for voluntary surrender, the procedure here can hardly be said to be a simple one.

¹⁷⁸ See generally Keay McPherson, *The Law of Company Liquidation* 4th ed (1999) ch 2-6 (hereinafter referred to as McPherson).

¹⁷⁹ Keay *Insolvency* 365; Tomasic and Whitford paras [7.1], [10.1]; McPherson 25-26. This mode of winding-up is also referred to as "court winding-up". This is similar to South African winding-up law where a dual gateway approach is taken in that a company may be wound up by the court or voluntarily by its members.

In Australia, as in South Africa and England, compulsory liquidation, or liquidation by the court, is a statutory procedure that enables a certain defined person or institution to bring about the winding-up of a company.¹⁸⁰ Although section 462(2) of the Corporations Act allows for a broad range of persons to bring an application for the winding-up of a company, Keay¹⁸¹ states that it is probable that well over 90% of all liquidations by the court are initiated by creditors. The grounds upon which a company may be wound up are contained in sections 459A and 461 of the Corporations Act. Basically five broad grounds for liquidation¹⁸² are identified in the Corporations Act:¹⁸³

- (a) The company is proved to be insolvent¹⁸⁴ after an application made to court in terms of section 459P of the Corporations Act;¹⁸⁵
- (b) The court finds that the company is insolvent after an application made in terms of sections 260, 462 or 464 of the Corporations Act;¹⁸⁶

¹⁸⁰ Keay *Insolvency* 373; McPherson 35.

¹⁸¹ Keay *Insolvency* 373.

¹⁸² The Australian Law Reform Commission, in its report DP32 *General Insolvency Inquiry* of Aug 1987, proposed major changes to the grounds upon which a company can be liquidated by the court. The Australian Law Reform Commission, in its Report No 45 *General Insolvency Inquiry* Vol 1 paras 133-134 (hereinafter referred to as the Harmer Report), refers to the recommendations made in the DP32 report. In fact, the Harmer report really only made one recommendation relating to the grounds for liquidation, namely “that there should be a single provision setting out all the circumstances in which a company may be wound up in insolvency”.

¹⁸³ See Keay *Insolvency* 374; McPherson 53-54.

¹⁸⁴ Australian winding-up law has also struggled in the past with the concept of “insolvency” or the inability of a company to pay its debts. In the Harmer Report substantial attention is given to this aspect in paras 135-155, the Commission recommending that the “deeming” provision relating to insolvency be replaced by presumptions relating to the insolvency of a company. See also Keay *Insolvency* 375-376, where these presumptions are discussed, and 391-392 where the test for insolvency is discussed. See also McPherson 54-58.

¹⁸⁵ S 459A of the Corporations Act.

¹⁸⁶ S 459B of the Corporations Act.

- (c) Where a company is under voluntary administration and the creditors resolve that the company be wound up;¹⁸⁷
- (d) Where a company fails to give effect to the instrument providing for a deed of company arrangement within 21 days of the meeting of creditors after the creditors resolved to accept the deed;¹⁸⁸
- (e) Where the creditors of a company resolve that a deed of company arrangement be terminated.¹⁸⁹

Basically the procedure for obtaining a winding-up order for the liquidation of a company is as follows: the winding-up procedure is initiated by an application to the court with the necessary jurisdiction.¹⁹⁰ In terms of section 459P any one of the following persons or institutions will have *locus standi* to bring an application:¹⁹¹

- (a) The company itself;¹⁹²
- (b) A creditor of the company;¹⁹³

¹⁸⁷ S 446A(1)(a) and 446A(6) of the Corporations Act.

¹⁸⁸ Ss 446A(1)(b), 444B(2)(a) and 446A(6) of the Corporations Act.

¹⁸⁹ Ss 446A(1)(c), 445E and 446A(6) of the Corporations Act.

¹⁹⁰ Key *Insolvency* 394. For a discussion of the jurisdictional rules, see Key *Insolvency* 393; McPherson 38-45.

¹⁹¹ Key *Insolvency* 393; Tomasic and Whitford paras [7.44]-[7.56] 241-252; McPherson 35-37.

¹⁹² S 459P(1)(a) of the Corporations Act. See also Tomasic and Whitford par [7.45] 242-244.

¹⁹³ S 459P(1)(b) of the Corporations Act. See also Tomasic and Whitford par [7.46] 244-245.

- (c) A contributory of the company;¹⁹⁴
- (d) A director of the company;¹⁹⁵
- (e) A liquidator or provisional liquidator of the company;¹⁹⁶
- (f) The Australian Securities Commission (ASC);¹⁹⁷
- (g) A prescribed agency.¹⁹⁸

An application for the winding-up¹⁹⁹ of a company must comply with the prescribed form of such application, state the nature of the relief sought, namely a winding-up order, and the ground or grounds upon which such application relies.²⁰⁰ The application is supported by an affidavit confirming the allegations made in the application.²⁰¹ Once the application has been filed with the court, it must be served on the company and there are certain requirements relating to the publication of the application.²⁰² At the hearing the court may grant the order, dismiss the

¹⁹⁴ S 459P(1)(c) of the Corporations Act. See also Tomasic and Whitford par [7.54] 250-251.

¹⁹⁵ S 459P(1)(d) of the Corporations Act. See also Tomasic and Whitford par [7.45] 242-244.

¹⁹⁶ S 459P(1)(e) of the Corporations Act. See also Tomasic and Whitford par [7.55] 251.

¹⁹⁷ S 459P(1)(f) of the Corporations Act. See also Tomasic and Whitford par [7.56] 251-252.

¹⁹⁸ The Corporations Regulations prescribe these agencies - see Keay *Insolvency* 393.

¹⁹⁹ See generally Tomasic and Whitford paras [7.57]-[7.60] 252-255 and ch 8; McPherson 117-142.

²⁰⁰ Keay *Insolvency* 394. It is interesting to note that the filing of the application with the court registry (Registrar of the High Court in South Africa) is the date upon which antecedent transactions will be determined. This is similar to s 348 of the Companies Act which provides that a winding-up under South African law is deemed to commence at the time the application is filed with the Registrar of the High Court. In this regard see also Tomasic and Whitford par [7.62] 257.

²⁰¹ Keay *Insolvency* 394.

²⁰² For a discussion of the service of the application on the company and publication, see Keay *Insolvency* 394-395.

application, adjourn proceedings or make an interim or other order it deems fit in the circumstances.²⁰³

From the brief review of Australian insolvency procedures set out above, it is clear that:

- (a) Australia too has a dual gateway approach to the winding-up of companies;
- (b) The procedures in order to bring about the insolvency of an individual differs from the procedures in order to bring about a winding-up order;
- (c) Australia has separate legislation governing the bankruptcy of individuals and the winding-up of companies;
- (d) Australia has scrapped many of the traditional grounds for liquidation that still apply in England and South Africa and that were introduced into Australia via English law;
- (e) The inability of a company to pay its debts is also the most common ground for the winding-up of a company in Australia.

Although Australia has succeeded in reducing the number of grounds for liquidation for the winding-up of a company, the procedures and grounds for bringing about the sequestration of an individual, as opposed to the procedures and grounds for the liquidation of a company, appear to be worlds apart. While the procedures for bringing about the sequestration of a debtor appear to be relatively simple, the procedures for placing a company in liquidation appear to be cumbersome, especially in regard to the presumptions relating to the insolvency of a company.²⁰⁴

²⁰³ For a detailed discussion of the various orders that can be made by the court, see Keay *Insolvency* 397-404.

²⁰⁴ It is a pity that the Harmer Report did not recommend a unified insolvency procedure for individuals and companies alike. Considering the difference in procedures and grounds, it would have been interesting to see how they would in fact have gone about structuring the relevant provisions.

5 PROPOSALS FOR THE BASIS OF LIQUIDATION APPLICATIONS UNDER A UNIFIED INSOLVENCY ACT

5.1 The acts of insolvency and grounds for liquidation under a unified Insolvency Act²⁰⁵

Despite the very obvious difference in insolvency procedures relating to individuals and companies in England, Australia and South Africa,²⁰⁶ it is submitted that it is in fact possible to bring about a large measure of uniformity in the application procedures if a unified insolvency statute were to be introduced in South Africa. In the main, the ground of insolvency or liquidation which is most often encountered is an inability to pay debts. Subtle nuances that exist due to the inherent differences between individuals and companies can quite easily be accommodated within the unified provisions themselves, as will be shown below.

Because the definition of “debtor” now also includes debtors other than natural persons and partnerships, it is necessary to substantially amend the clauses that deal with this aspect in a unified Insolvency Act. At the workshops held at the University of Pretoria during December 1998, it was agreed by all present that if the archaic acts of insolvency are to be retained, then they should also be made applicable to other debtors such as companies and close corporations.²⁰⁷

²⁰⁵ For a discussion of the clauses of the Draft Insolvency Bill prepared by the SA Law Commission, see Boraine and Van der Linde (Part 1) 1998 *TSAR* 626-633.

²⁰⁶ Due to the fact that the United States of America and the Federal Republic of Germany have single gateway insolvency proceedings, it is difficult to glean any assistance from the principles applied in these jurisdictions. In any event, both the United States and Germany have codified systems of bankruptcy, a fact which makes it difficult to implement their approach in a hybrid system of insolvency such as the one used in South Africa.

²⁰⁷ *Final Report Containing Proposals on a Unified Insolvency Act Vol 2 Workshop Transcriptions 109 et seq* (hereinafter referred to as Workshop Transcriptions (Final Report Vol 2)). This suggestion was initially made by Cronje (SA Law Commission) in his written submissions received after the symposium held on 23 Oct 1998.

In addition, it is submitted that the grounds for liquidation which are currently contained in the Companies Act and the Close Corporations Act, should be reduced to those that are most commonly experienced in practice and which deal directly or indirectly with insolvency,²⁰⁸ and also be made applicable to other types of debtors which are not companies or close corporations. It was submitted that the remaining grounds for liquidation currently contained in the Companies Act, if they are to be retained at all, should remain in the Companies Act.²⁰⁹ As a result of these proposals, the proposed clause 2 of a unified Insolvency Act provides as follows:

- “2. Acts of insolvency and circumstances in which certain debtors may be liquidated by the court.²¹⁰ -
- (1) A debtor commits an act of insolvency -
 - (a) in the case of a natural person debtor, if such debtor leaves the Republic or, being out of the Republic remains absent therefrom, or absents himself or herself from his or her dwelling, or regular place of business, with intent thereby to evade or delay the payment of his or her debts;²¹¹
 - (b) if it appears from the return of the officer charged with the execution of a judgment of a court against the debtor that the judgment has not been satisfied after a valid execution thereof;²¹²
 - (c) if a debtor disposes or attempts to dispose of his or her or its property or any part thereof in a manner which appears to the court to be likely to prejudice creditors or to prefer one or more creditors above another, unless the debtor satisfies the court that he or she or it was able to pay his or her debts after the disposition;²¹³
 - (d) if a debtor removes or attempts to remove any of his or her property in a manner which appears to the court to be likely to prejudice

²⁰⁸ The grounds for liquidation that have been omitted are the following: i) commencement of business without certification from the Registrar (s 344(b) of the Companies Act); ii) non-commencement of business within a year of incorporation (s 344(c) of the Companies Act and s 68(b) of the Close Corporations Act); iii) in the case of a public company where the number of members has been reduced below seven (s 344(d) of the Companies Act); iv) in the case of a company where seventy-five per cent of the share capital has been lost or become useless for the business of the company (s 344(e) of the Companies Act); v) where an external company has been dissolved in the country of its incorporation, or has ceased to carry on business or is carrying on business only for the purposes of winding-up its affairs (s 344(g) of the Companies Act).

²⁰⁹ Workshop Transcriptions (Final Report Vol 2) 109 *et seq* and 445-508.

²¹⁰ See cl 2 of the SA Law Commission’s Draft Insolvency Bill in Commission Paper 582 Vol 2 Project 63.

²¹¹ Currently s 8(a) of the Insolvency Act.

²¹² Currently s 8(b) of the Insolvency Act.

²¹³ Currently s 8(c) of the Insolvency Act.

- creditors or to prefer one or more creditors above another, unless the debtor satisfies the court that he or she was able to pay his or her debts after the removal or attempted removal;²¹⁴
- (e) if a debtor makes or offers to make any arrangement with any of his or her creditors for releasing him or her wholly or partially from his or her debts;²¹⁵
 - (f) if, having applied in terms of section 3 for the liquidation of the estate, a debtor fails to comply with the requirements of that section or submits a statement of affairs contemplated in that section which is substantially incorrect or incomplete;²¹⁶
 - (g) if a debtor gives notice in writing to any one of his or her creditors that he or she is unable to pay any of his or her debts.²¹⁷
- (2) A debtor may be liquidated by the court if:
- (a) in the case of a trust debtor, company debtor, close corporation debtor or association debtor, the debtor concerned has resolved that it be liquidated by the court in terms of a liquidation resolution as defined in section 1 of this Act; provided that such debtor is not prevented by law, agreement or any other legally enforceable reason, from passing such resolution;
 - (b) the debtor is unable to pay its debts as described in subsection (3) of this section;²¹⁸
 - (c) in the case of a company debtor, close corporation debtor or association debtor in appropriate circumstances, it appears to the court that it is just and equitable that the debtor should be liquidated.²¹⁹
- (3) A debtor shall be unable to pay its debts if:
- (a) a creditor, by cession or otherwise, to whom the debtor is indebted in an amount of not less than R2000 then due-
 - (i) has served on a company debtor or close corporation debtor, by leaving the same at its registered office or main place of business, a statutory demand for payment of such an amount to pay an amount which is due and payable, or to give security to the reasonable satisfaction of the creditor for such amount, or to enter into a compromise therefor. The statutory demand shall correspond substantially with Form F in Schedule 1 and shall be served on the debtor by the sheriff of the magistrate's court within whose jurisdiction the debtor resides or by the creditor's attorney or the attorney's clerk by delivering it to the debtor; or

²¹⁴ Currently s 8(d) of the Insolvency Act.

²¹⁵ Currently s 8(e) of the Insolvency Act.

²¹⁶ Currently s 8(f) of the Insolvency Act.

²¹⁷ Currently s 8(g) of the Insolvency Act.

²¹⁸ Currently s 344(f) of the Companies Act and s 68(c) of the Close Corporations Act.

²¹⁹ Currently s 344(h) of the Companies Act and s 68(d) of the Close Corporations Act.

- (ii) in the case of a debtor other than a company debtor or close corporation debtor, has served such demand by handing it to the debtor or leaving it at its main office or place of residence, or delivering it to the secretary or some director, manager or principal officer of such association of persons or body corporate or in such other manner as the court may direct, and the debtor has for twenty-one days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
 - (b) if it appears from the return of the officer charged with the execution of a judgment of a court against the debtor that the judgment has not been satisfied after a valid execution thereof; or
 - (c) it is proved to the satisfaction of the court that the debtor is unable to pay its debts.
- (4) In determining for the purpose of subsection (3) whether a debtor is unable to pay its debts, the court shall also take into account the contingent and prospective liabilities of the debtor.”²²⁰

5 2 Explanation of the provisions of clause 2

The main changes and / or proposals made in clause 2 of the proposed unified Insolvency Act can be summarised as follows:

- (a) Due to the contents of clause 2(1)(a), this clause has only been made applicable to natural person debtors and partnership debtors.
- (b) Clauses 2(1)(b) to (g) have been amended to make provision for all types of debtors, not only natural person and partnership debtors.
- (c) Clause 2(2) has been inserted into the proposals in order to make provision for the current provisions, contained in the Companies Act and Close Corporations Act, relating to the grounds for liquidation:²²¹

²²⁰ Currently s 345 of the Companies Act and s 69 of the Close Corporations Act.

²²¹ Most of the delegates that were present at the workshops held at the University of Pretoria in Dec 1998 felt that these provisions should be made applicable to all types of debtors - see Workshop Transcriptions (Vol 2 Final Report) 109 *et seq.* Obviously not all the acts of insolvency can be applicable to corporate debtors and, conversely, not all the grounds for liquidation can be made applicable to natural persons.

- (i) Clause 2(2)(a) replaces the current provisions in the Companies Act and Close Corporations Act which provides for a company or close corporation to be wound up by the court after a resolution to this effect has been passed by the members of the company or close corporation concerned.²²² In order to bring about uniform provisions relating to all types of debtors, provision has been made for a special type of resolution, namely a “liquidation resolution”,²²³ whereby a debtor may resolve to be liquidated by the court. This special “liquidation resolution” has been included due to the current provisions of the Companies Act, which makes provision for a *special* resolution, and the Close Corporations Act, which makes provision for a *written* resolution, in cases where a company or close corporation wishes to pass a resolution to be liquidated by the court. In order to avoid cross-references to the Companies Act and Close Corporations Act, it was decided to include a definition of “liquidation resolution”, which has a special meaning in the context of these unified proposals.²²⁴ In addition, this “liquidation resolution” can also be utilised by other types of debtors.²²⁵

Only the applicable acts of insolvency or grounds for liquidation have been included. It is of course debatable whether the other grounds should be omitted from a unified Insolvency Act, but from a practical point of view it is submitted that only the grounds for liquidation relating to insolvency should be included under the unified Insolvency Act. As stated, the other grounds for liquidation can be retained in the Companies Act if they are to be retained.

²²² This also amounts to a voluntary liquidation by resolution, but should not be confused with a voluntary liquidation by creditors as provided for in cl 8 (cl 8 of the unified Insolvency Act is discussed in ch 11 below). In the circumstances enumerated above, the members resolve to approach the court in order to be liquidated. Consequently there will be a court order liquidating the debtor, which would not be the case when cl 8 is applied.

²²³ See also the definition of “liquidation resolution” in the proposed unified Insolvency Act in ann E below.

²²⁴ By including a definition of “liquidation resolution” it has been a far easier task to draft the relevant clauses of the unified statute. Its use obviates the need to refer back to the provisions of the Companies Act or Close Corporations Act each time reference is made to the specific types of resolution. These references (to the Companies Act and the Close Corporations Act) have therefore only been included once, sc in the definition of “liquidation resolution” in cl 1 of the proposed unified Insolvency Act (see ann E below).

²²⁵ After considering submissions made at the workshops referred to above, it was decided to make this paragraph applicable to all types of debtors except natural person debtors and partnership debtors - see Workshop Transcriptions (Vol 2 Final Report) 445-509. The requirement that the liquidation of an

Natural person debtors and partnership debtors have been omitted from this paragraph, as their inclusion would nullify the requirement of advantage to creditors contained in clause 10(1)(b) of the unified Insolvency Act.²²⁶ By extending the provisions of this paragraph also to trusts and other entities, where control over the assets or business of the debtor is exercised by some person or persons in a representative capacity, it now becomes possible for these entities to approach the court for liquidation based on a resolution passed by the persons authorised to pass such resolution. For example, the trustees of a trust may, in terms of this provision, pass a resolution in terms of which the trust may be liquidated by the court should the circumstances warrant such application. The proviso to this clause is intended to prevent a resolution for liquidation being passed in circumstances where the persons involved are prohibited from doing so, for example as a result of a prohibitive provision in the trust deed of a trust.

- (ii) Clauses 2(2)(b) and (c) represent the two grounds for liquidation that have been retained from the current grounds for liquidation set out in the Companies Act and the Close Corporations Act.²²⁷

individual must be to the advantage of creditors must not be lost sight of here. By allowing an individual to liquidate by means of a resolution, one would negate this requirement.

²²⁶ Despite a suggestion to the contrary, it was felt by the majority of delegates present at the workshops that these provisions should find no application in the case of natural person debtors and partnership debtors - see Workshop Transcriptions (Vol 2 Final Report) 445-509. It is submitted that if it was not for the fact that South Africa still has a conservative pro-creditor approach to insolvency law, it would have been possible to allow a natural person debtor or a partnership debtor to utilise these provisions, effectively allowing these types of debtors automatic access to the liquidation process.

²²⁷ It was felt by delegates at the workshops that the other grounds for liquidation are rarely, if ever, utilised in practice - Workshop Transcriptions (Volume 2 Final Report) 109 *et seq.* The suggestion was made that these grounds can be retained in the Companies Act or Close Corporations Act for use by the Registrar of Companies and Close Corporations, should he or she wish to make use of them - see Workshop Transcriptions (Volume 2 Final Report) 109 *et seq.* In addition, the suggestion was made that these two grounds should also be made applicable to natural person debtors and partnership debtors, in other words to all debtors as defined in a unified Insolvency Act - Workshop Transcriptions (Volume 2 Final Report) 109 *et seq.*

- (d) Clause 2(3) is a re-enactment of the current provisions of section 345 of the Companies Act and section 69 of the Close Corporations Act.²²⁸ The clause has, however, been adapted to make provision for entities other than companies and close corporations. Clause 2(3)(a)(i) has been adapted to make provision for a statutory demand in a prescribed form, which prescribed form has been included as a form in one of the schedules to the unified Insolvency Act.²²⁹ The demand is based on the statutory demand²³⁰ used in the (English) Insolvency Act 1986, and takes the following form:

²²⁸ It would appear that this is a duplication of the provisions contained in cl 1(b), relating to an act of insolvency. However, no apparent problem seems to arise from this duplication as cl 2(b) has a more detailed provision regarding when a debtor is deemed unable to pay his debts.

²²⁹ The proposed unified Insolvency Act is contained in ann E below.

²³⁰ Australia also uses a statutory demand in order to assist creditors in bringing about the winding-up of a company. See Key *Insolvency* 376-391; Key "Statutory Demands in Light of the Corporate Law Reform Act 1992" 1994 12 *Companies & Securities Law Journal* 407.

**STATUTORY DEMAND IN TERMS OF SECTION 2(3)(a)(i) OF THE INSOLVENCY AND
BUSINESS RECOVERY ACT**

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To: _____

Address: _____

The creditor claims that you are indebted to him or her for the following amount which is now due and payable and that he holds no security for the amount claimed.

<i>When incurred</i>	<i>Type of debt (cause of action)</i>	<i>Amount due as at the date of the demand</i>

The creditor demands that you pay the amount due within three weeks after the service of this demand or give security to the reasonable satisfaction of the creditor therefor, or enter into a compromise in respect thereof.

Should you fail to comply with this demand, this does not preclude you from opposing an application for the liquidation of your estate. If you deny indebtedness wholly or in part, you should contact the creditor without delay.

SIGNATURE: _____

NAME OF CREDITOR: _____
(PRINT)

DATE: _____

CAPACITY: _____
(IF NOT CREDITOR PERSONALLY)

ADDRESS: _____

TEL NO: _____

PERSON YOU MAY CONTACT IF NOT CREDITOR PERSONALLY:

NAME: _____

ADDRESS: _____

If debt obtained by cession or otherwise:

	<i>Name</i>	<i>Date of cession or other act</i>
Original creditor		

5.3 Liquidation applications by a debtor under a unified Insolvency Act

Due to the inherent differences between natural persons and juristic persons, as well as the difference in procedure for the voluntary liquidation of individuals and corporate entities,²³¹ I have elected to keep separate the voluntary application provisions for these types of entities. Consequently clauses 3 and 4 of the proposed unified Insolvency Act read as follows:

“3. Application by debtor for liquidation of estate.²³² - (1) A natural person debtor or a partnership debtor who is insolvent or a person who lawfully acts on behalf of an insolvent natural person debtor who is incompetent to manage his or her own affairs or the executor or liquidator of the insolvent estate of a deceased person may apply to a court for the liquidation of the estate of the debtor.²³³

(2) The application shall contain the following information, which shall also appear in the heading of the application:

- (a) The full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number; and
- (b) the marital status of the debtor and, if he or she is married in community of property, the full name and date of birth of his or her spouse and, if an identity number has been assigned to the spouse, that identity number.²³⁴

(3) An application referred to in subsection (1) shall be accompanied by -

- (a) a statement of affairs of the debtor corresponding substantially with Form A of Schedule 1 and which shall contain the particulars provided for in the said Form, which particulars shall be sworn to or confirmed as required by the said Form;²³⁵
- (b) a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 83, which are not recoverable from other creditors of the estate.²³⁶

(4) Before noon on the fifth court day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court

²³¹ The voluntary liquidation (by resolution) of corporate debtors is dealt with separately in ch 11 below.

²³² See cl 3 of the SA Law Commission’s Draft Insolvency Bill in Commission Paper 582 Vol 2 Project 63.

²³³ Currently s 3(1) of the Insolvency Act.

²³⁴ Currently s 9(3)(a) of the Insolvency Act.

²³⁵ Currently s 4(3) of the Insolvency Act.

²³⁶ Currently s 9(3)(b) of the Insolvency Act.

for enrolment and send a copy of the application and two copies of the statement of affairs referred to in subsection 3(a) as well as a copy of the affidavit in support of the application, to the Master.²³⁷

(5) If an applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just.

(6) The affidavit in support of the application for liquidation referred to in subsection (1) shall confirm that the requirements of subsection (4) have been complied with.

(7) The Master may require the applicant to cause the property enumerated in the statement of affairs to be valued by an appraiser appointed in terms of section 6 of the Administration of Estates Act 1965 (Act No. 66 of 1965), or a valuer or associated valuer registered in terms of the Valuer's Act, 1982 (Act No. 23 of 1982), or some other person approved by the Master.²³⁸

(8) Having considered the application, the court may make an order as contemplated in section 10 or may dismiss the application or postpone its hearing or make any other order that it deems just.²³⁹

4. Application for liquidation by certain debtors. (1) An application to the Court for the liquidation of a trust debtor, a company debtor, close corporation debtor or association debtor may, subject to the provisions of this section, be made-

- (a) by the debtor itself²⁴⁰ or, notwithstanding any contrary provisions contained in the articles, memorandum, association agreement or constitution of the debtor concerned, by the management²⁴¹ of such a debtor;
- (b) by one or more of its members, or any person referred to in section 103(3) of the Companies Act 61 of 1973, irrespective of whether his name has been entered in the register of members or not;²⁴²
- (c) jointly by any or all of the parties mentioned in paragraphs (a) and (b);²⁴³

²³⁷ Currently s 4(1) of the Insolvency Act.

²³⁸ Currently s 4(4) of the Insolvency Act.

²³⁹ Currently s 9(4) and (5) of the Insolvency Act.

²⁴⁰ Currently s 346(1)(a) of the Companies Act.

²⁴¹ The "management of a debtor" is defined in cl 1 of the proposed unified Insolvency Act (see ann E). This definition was included in order to simplify the drafting of the provisions in the unified Insolvency Act itself. Instead of referring in every relevant clause to every type of person who may be responsible for the management of a company, close corporation, trust or association of persons, it was decided instead to extensively define the management of each type of debtor in cl 1. This has made the drafting of the proposed unified Insolvency Act a lot easier.

²⁴² Currently s 346(1)(c) of the Companies Act.

²⁴³ Currently s 346(1)(d) of the Companies Act.

- (d) in the case of any debtor being liquidated voluntarily by the Court in terms of a liquidation resolution, by the Master or any creditor or member of that debtor;²⁴⁴ or
- (e) in the case of a judicial management order in terms of Chapter 24, by the judicial manager of the debtor.²⁴⁵
- (2) A member of a debtor shall not be entitled to present an application for the liquidation of that debtor unless he or she has been a member for a period of at least six months immediately prior to the date of the application or the shares or interest he or she holds have devolved upon him or her through the death of a former holder, and unless the application is on the ground referred to in section 2(2)(c).²⁴⁶
- (3) Every application to the Court referred to in subsection (1), except an application by the Master in terms of paragraph (d) of that subsection, shall be accompanied by a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 83, which are not recoverable from other creditors of the estate.²⁴⁷
- (4) Before noon on the fifth day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and send a copy of the application and two copies of the statement of affairs as well as a copy of the affidavit in support of the application to the Master.
- (5) If the applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just.
- (6) (a) After having considered any application referred to in subsections (1) to (3), the court may grant any order in terms of the provisions of section 7, 10 or 11 of this Act, but the court shall not refuse to grant a liquidation order on the ground only that the assets of the debtor have been mortgaged to an amount equal to or in excess of those assets or that the debtor has no assets.²⁴⁸
- (b) Where the application is presented by members of the debtor and it appears to the court that the applicants are entitled to relief, the court shall grant a liquidation order, unless it is satisfied that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the debtor liquidated instead of pursuing that other remedy.²⁴⁹

²⁴⁴ Currently s 346(1)(e) of the Companies Act.

²⁴⁵ Currently s 346(1)(f) of the Companies Act.

²⁴⁶ Currently s 346(2) of the Companies Act.

²⁴⁷ Currently s 346(3) of the Companies Act.

²⁴⁸ Currently s 347(1) of the Companies Act.

²⁴⁹ Currently s 347(2) of the Companies Act.

- (c) Where the application is presented to the court by-
 - (i) any applicant under section 2(2)(d), the court may in the liquidation order or by any subsequent order confirm all or any of the proceedings in the voluntary liquidation; or
 - (ii) any member under that section, the court shall satisfy itself that the rights of the member will be prejudiced by the continuation of a voluntary liquidation.²⁵⁰
- (d) The court shall not grant a final liquidation order in the case of a debtor which is already being liquidated by order of court within the Republic.²⁵¹

Due to the fundamental differences between natural persons and other debtors such as companies and close corporations, the applications for voluntary liquidation by the court in respect of natural persons need to be kept separate from the applications for voluntary liquidation by the court in respect of other types of debtors. The application procedures for voluntary liquidation by the court in respect of a natural person debtor have therefore been dealt with in clause 3, and the application procedures for the liquidation by the court in respect of other debtors in clause 4.

Generally clause 4 is a re-enactment of sections 346 and 347 of the Companies Act, making an in-depth discussion of the provisions unnecessary. However, one very important amendment has been made to clause 4(1)(a), which deals with the power of a debtor to bring an application. There has been some controversy under South African law as to whether a director, or the directors of a company by means of a directors' resolution, may bring an application for the winding-up of a company under section 344 of the Companies Act.²⁵² Section 346(1)(a) of the

²⁵⁰ Currently s 347(4) of the Companies Act.

²⁵¹ Currently s 347(5) of the Companies Act.

²⁵² The conflicting decisions in this regard are *Ex parte Voorligter Drukkery Beperkt* 1922 EDL 315; *Ex parte Edenvale Wholesalers and General Suppliers (Pty) Ltd* 1959 2 SA 477 (W); *Ex parte Umtentweni Motels (Pty) Ltd* 1968 1 SA 144 (D); *Ex parte Tangent Sheeting (Pty) Ltd* 1993 3 SA 488 (W) - in each of these aforementioned cases the applicants were successful in obtaining a winding-up order on the basis of a resolution by the directors) - and *Ex parte Russlyn Construction (Pty) Ltd* 1987 1 SA 33 (D); *Ex parte Screen Media Ltd* 1991 3 SA 462 (W), where the application for a winding-up based on a resolution by the directors did not succeed. See also McLennan "Powers of Directors to Wind up Insolvent Companies" 1987 *SALJ* 232, which the court referred to in *Ex parte Tangent Sheeting (Pty) Ltd*, and Larkin "A Question of Management: Does it Include Ceasing to Manage?" 1987 *BML* 165. It would appear that England experienced a similar problem before rectifying the situation under the Insolvency Act 1986 - see *Re Emmadart Ltd* [1979] ch 540 and Fletcher *The Law of Insolvency* (1996) 533 fn 2.

Companies Act merely states that a company may bring such an application. In order to avoid problems of this nature from occurring in future, it was submitted that the directors as an organ of the company should be able to bring an application.²⁵³ However, in terms of the provisions included here, the directors may only bring such an application if there is no prohibition contained, for example, in the articles or memorandum of a company.

5.4 Liquidation applications by creditors for the liquidation of a debtor's estate

Clause 5 deals with applications for liquidation by creditors, as opposed to clauses 3 and 4, which deal with applications for liquidation by the debtor him-, her- or itself. The amendments made to this clause, which is an adaptation of the clause inserted by the South African Law Commission into their proposed Draft Insolvency Bill,²⁵⁴ relate mainly to the inclusion in the clause of other types of debtors and the insertion of new grounds for liquidation. It also brings about uniformity in the liquidation applications, by creditors, for all types of debtors. The relevant clause reads as follows:

“5. Application by creditor for liquidation of debtor's estate. (1) A creditor who has a liquidated claim of not less than the amount of R2000 against a debtor who has committed an act of insolvency, who is insolvent or which is unable to pay its debts as determined in section 2(3), or two or more creditors who in the aggregate have liquidated claims against such debtor for not less than the amount of R2000 may apply to a court for the liquidation of the debtor's estate.

(2) The Minister may amend the amounts in subsection (1) by notice in the Gazette in order to take account of subsequent fluctuations in the value of money.

(3) A claim in respect of a liquidated debt which is payable at some determined time in the future may be taken into account for purposes of subsection (1).

(4) (a) An application contemplated in subsection (1) shall be made with notice to the debtor and, in the case of a natural person debtor, also to the debtor's spouse with whom he or she is married in community of property, unless the court orders that such notice may be dispensed with.

(b) Such an application shall, subject to subparagraph (d), contain the following information, namely -

²⁵³ This was also suggested at the workshops held at the University of Pretoria in Dec 1998 - see Workshop Transcriptions (Vol 2 Final Report) 104 *et seq.*, where Van der Linde and Edeling discussed this issue.

²⁵⁴ See cl 4 of the Law Commission's Draft Insolvency Bill in Commission Paper 582 Vol 2 Project 63.

-
- (i) in the case of a natural person debtor, the full name and date of birth of the debtor and, if an identity number has been assigned to him or her, that identity number and, in the case of any other debtor, the registration number or other reference number which has been assigned to such debtor and, if no such registration number or reference number exists, this fact shall be stated;
 - (ii) in the case of a natural person debtor, the marital status of the debtor and if he or she is married in community of property, the full name and date of birth of his or her spouse and if an identity number has been assigned to the spouse, such identity number;
 - (iii) the amount, cause and nature of such claim;
 - (iv) whether or not security has been given for the claim and if so, the nature and value of the security; and
 - (v) the act of insolvency or ground of liquidation on which the application is founded or otherwise an allegation that the debtor is in fact insolvent.
- (c) The allegations in the application shall be supported by an affidavit and the application shall be accompanied by a certificate of the Master, issued not more than 14 days before the date on which the application is to be heard by the court, that sufficient security has been given for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate referred to in section 83, which are not recoverable from creditors of the estate.
- (d) The particulars in paragraph (b)(i) and (ii) shall appear also in the heading of the application and if the applicant is unable to furnish all such particulars he or she shall mention the reason why he or she is unable to do so.
- (e) Before noon on the fifth court day before the day on which the application is to be heard by the court, the applicant shall lodge the application with the registrar of the court for enrolment and, unless notice to the debtor has been dispensed with, a copy of the application and copies of all annexures thereto shall be served on the debtor or handed to him or her by the applicant or his or her attorney or the attorney's clerk.
- (f) If the debtor wishes to oppose the application he or she shall lodge a notice and replying affidavit with the registrar and serve on or hand a copy thereof to the applicant, before noon on the second court day before the day on which the application is to be heard by the court.
- (g) A copy of the application and of every affidavit in support of the allegations in the application shall be sent to the Master when the application is lodged with the registrar.
- (5) If an applicant is unable to comply with any of the requirements of subsection (4), the court may dispense with such requirement and dispose of the application in the manner that it finds just.
- (6) Having considered the application, the court may make an order as contemplated in section 10 or may dismiss the application or postpone its hearing or make any other order that it deems just.”

The main changes to the Law Commission's Draft Insolvency Bill can be summarised as follows:

- (a) Clause 5(1) has been adapted to include a reference to a debtor who is unable to pay his, her or its debts in accordance with clause 2(3).²⁵⁵
- (b) Clause 5(3) has been amended in two respects, namely:
 - (i) To distinguish between the type of information required by natural persons as opposed to the information required in regard to juristic persons or other types of debtors, and
 - (ii) To include, in addition to the acts of insolvency, also the other grounds for liquidation.

6 CONCLUSION

Although the clauses reflected above do bring about the uniformity of liquidation applications to a certain degree, it is submitted that it is impossible to entirely unify these provisions under a unified insolvency statute in South Africa. This is borne out by the fact that separate provisions still have to be made for the liquidation of individuals and corporate entities. The reasons for this, it is submitted, are the following:

- (a) While a benefit for creditors is required for the granting of a liquidation order in regard to natural person and partnership debtors, the same requirement is not a prerequisite for the liquidation of a company or close corporation.

²⁵⁵ Cl 2(3) is reflected above.

-
- (b) While a natural person debtor can only be placed in liquidation by the court (due to the benefit for creditors requirement and the change of status that it brings about), this is not the case in regard to companies and close corporations which can also be liquidated on a voluntary basis.
- (c) A natural person and partnership debtor can only be liquidated if he, she or it is insolvent, while companies and close corporations can be liquidated on grounds other than insolvency.
- (d) While an individual has the ability to earn income subsequent to his or her liquidation, this is not the case when dealing with a company, close corporation or partnership.²⁵⁶ This factor further contributes towards the “benefit for creditors” requirement in the case of individuals.²⁵⁷

For the reasons enumerated above, it is impossible to bring about the total uniformity of liquidation applications that can be found in jurisdictions such as the United States of America or Germany. In order to bring about a unified system of insolvency as applied in the aforementioned countries, it would require a total shift in the philosophy underlying South African insolvency law. From the tenor of the South African Law Commission’s Draft Insolvency Bill and its explanatory memorandum,²⁵⁸ the government is evidently not yet ready to make the paradigm shift that will bring about a change to the underlying philosophy of the “benefit for creditors” requirement that is applied in the case of individual insolvency. It is submitted that the failure to be able to totally unify South African insolvency and winding-up law is not to be found in the structures of the insolvency legislation, but rather in the philosophy underlying insolvency law as a whole.

²⁵⁶ Although it does happen that the liquidator of a company or a close corporation continues trading after liquidation, this is normally only done in order to sell the business as a going concern, thereby obtaining a better return for the creditors.

²⁵⁷ See eg *Ressel v Levin* 1964 1 SA 128 (C) and *Ex parte Veitch* 1965 1 SA 667 (W).

²⁵⁸ See Commission Paper 582 Vol 1 and Vol 2.

Despite these shortcomings, it is submitted that the clauses as enumerated above will go a long way to streamlining and simplifying liquidation applications under the unified insolvency statute proposed in this study. The unified provisions will rid the current system of insistent interpretational problems and bring about much more clarity in regard to the procedures that have to be followed, no matter what type of debtor is being dealt with.

CHAPTER 9

THE COMMENCEMENT OF LIQUIDATION AND THE VESTING OF THE INSOLVENT ESTATE UNDER A UNIFIED INSOLVENCY ACT

SUMMARY

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1 INTRODUCTION

In this chapter two aspects regarding individual and corporate insolvency that are dissimilar to each other, will be discussed. Unlike the previous chapter, where it was pointed out that bringing about uniformity in liquidation applications is not entirely possible, this chapter concentrates on two aspects where, it is submitted, the introduction of uniform provisions is in fact possible. The two aspects that will be discussed in this chapter are closely related in that one arises from the other. In the first place the commencement of liquidation will be discussed with reference to the fact that, under current South African law, the provisions relating to the commencement of liquidation and sequestration differ. In the second place the vesting rules that apply once a liquidation order has been granted, will be discussed. Currently the rules relating to vesting differ in the case of individual and corporate insolvency.

In approaching these dissimilar aspects of individual and corporate insolvency, a brief summary of the current position will be provided. After a brief comparison with other jurisdictions, proposals will be made for uniform provisions that apply to both individual and corporate insolvency.

2 THE COMMENCEMENT OF LIQUIDATION

2.1 The current position regarding the commencement of sequestration and liquidation¹

Due to the fact that sequestration and / or winding-up has the effect of bringing about a *concursum creditorum*,² the date upon which the sequestration or liquidation commences is of paramount importance. The date of commencement of sequestration and/or liquidation also has an important impact on the execution of judgments³ and the rights of the parties to transactions entered into prior to sequestration or liquidation.⁴

Under current South African insolvency law the date of commencement of *sequestration* and the date of commencement of *liquidation*, are determined in different ways. In the case of the sequestration of an individual's estate, the date of sequestration is as follows:⁵

- (a) Where the application is for voluntary surrender, the date of sequestration is the date upon which the court grants the sequestration order.

¹ See generally Kunst (gen ed) *Meskin, Henochsberg on the Companies Act* Vol 1 (1994) 738-739 (hereinafter referred to as Henochsberg); Cilliers *et al Corporate Law* 3rd ed (2000) 510-512 (hereinafter referred to as Cilliers *ea Corporate Law*).

² See *Walker v Syfret* 1911 AD 141 at 166. See also *Nel v The Master* 2002 1 SA 354 (SCA), where the court had to decide what the effect is on the *concursum creditorum* when a provisional order for the winding-up of a company that was obtained at the instance of a creditor is discharged and immediately replaced by a final order for the winding-up of the company granted at the instance of another creditor. The court found that since there was no interruption in the proceedings bringing about the liquidation, the *concursum creditorum* that was created by the provisional order remained operative.

³ See s 359 of the Companies Act 61 of 1973 (hereinafter referred to as the Companies Act).

⁴ See ss 26-34 of the Insolvency Act 24 of 1936 (hereinafter referred to as the Insolvency Act) and s 340 of the Companies Act.

⁵ See the definition of "sequestration order" in s 2 of the Insolvency Act, where it is provided that a "sequestration order" means any order of court whereby an estate is sequestrated and includes a provisional order which has not been set aside. S 1 of the Companies Act contains a similar definition for "winding-up order", but see the provisions of s 348 of the Companies Act which provides for the commencement of liquidation. The Insolvency Act does not contain a similar provision to s 348 of the Companies Act.

- (b) Where the application is an application for compulsory sequestration, the date of sequestration is the date on which the provisional sequestration order (rule *nisi*) is granted by the court, provided the provisional order has not been set aside or, stated differently, provided the provisional order has been made final.

In the case of a company⁶ the commencement of liquidation is determined as follows:

- (a) In the case of a company being wound up by the court, section 348 of the Companies Act finds application. In terms of section 348 the winding-up of a company is deemed to commence at the time of the presentation to the court⁷ of the application for the winding-up. The commencement of liquidation is therefore not determined by reference to the date on which the order is granted, or even the date on which the application is heard by the court,⁸ although there can be no commencement of liquidation without a winding-up order having been granted.⁹ It must also be noted that the mere presentation of an application to court does not have the effect of creating a moratorium in respect of the payment of a company's debts.¹⁰

⁶ The same rules apply *mutatis mutandis* to a close corporation in liquidation - s 66 of the Close Corporations Act 69 of 1984 (hereinafter referred to as the Close Corporations Act).

⁷ This means that the application must have been duly lodged with the Registrar of the High Court - see *Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd* 1983 3 SA 815 (O) at 816; *Venter v Farley* 1991 1 SA 316 (W) at 320; *The MV Nantai Princess: Nantai Line Co Ltd v Cargo Laden on the MV Nantai Princess* 1997 2 SA 580 (D) at 584-586. See also *Rennie v South African Sea Products Ltd* 1986 2 SA 138 (C) at 141-142 and *Meaker v Campbell's New Quarries (Pvt) Ltd* 1973 3 SA 157 (R) at 159-160 regarding the position under the Companies Act 46 of 1926.

⁸ See *Venter v Farley* 1991 1 SA 316 (W) 319H-320F; *The MV Nantai Princess: Nantai Line Co Ltd v Cargo Laden on the MV Nantai Princess* 1997 2 SA 580 (D); *Kalil v Decotex (Pty) Ltd* 1988 1 SA 943 (A). See also Kunst (gen ed) *Meskin, Insolvency Law and its Operation in Winding-up* (1990, updated to 30 April 1999) par 5.20 fn 16 (hereinafter referred to as Meskin).

⁹ *Vermeulen v CC Bauermeister (Edms) Bpk* 1982 4 SA 159 (T); *Kalil v Decotex (Pty) Ltd* 1988 1 SA 943 (A).

¹⁰ *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 4 SA 75 (W).

- (b) In the case of a company being wound up voluntarily, the date of the commencement of the liquidation is the date upon which the resolution placing the company in liquidation is registered by the Registrar of Companies.¹¹

There is therefore a difference between determining the date of the commencement of sequestration in the case of an individual, and determining the date of the commencement of the winding-up of a company or close corporation. Whether or not this discrepancy is justified, will be discussed below.

Not one of the commentators on insolvency law discusses the date of sequestration in any detail, and one has to deduce from the provisions of the Insolvency Act itself, and the definition of “sequestration order” in section 2, that sequestration commences on the day any sequestration order is granted, and includes a provisional sequestration order.¹² However, in the case of the commencement of winding-up or liquidation of a company, specific provision has been made for the commencement of winding-up, even in early legislation dealing with the winding-up of joint stock companies.¹³

2.1.1 Comments regarding the winding-up of a company by the court

The reason for the deeming provision contained in section 348 of the Companies Act is, according to the decision in *Lief v Western Credit (Africa) (Pty) Ltd*,¹⁴ to negate any attempt by a dishonest company, or directors, or creditors or others, to gain an unfair advantage during the period

¹¹ S 352 of the Companies Act. See also Henochsberg 744; Cilliers *ea Corporate Law* 496. This was not always the case. Under earlier company law legislation the date of the commencement of liquidation was the date under on which the resolution was passed - see par 2.2 below.

¹² This is also the deduction that can be made from the court’s decision in *Walker v Syfret* 1911 AD 141 at 166. Generally this deduction can be made because the property of the estate vests in the Master upon the granting of a provisional order (in the case of a compulsory sequestration). The property can only vest if the sequestration has commenced. See also De la Rey *Mars, The Law of Insolvency in South Africa* 8th ed (1988) 174 (hereinafter referred to as Mars) and the cases cited in fn 3.

¹³ See par 2.2 below.

¹⁴ 1966 3 SA 344 (W).

between then presentation of the application for a winding-up order and the granting of an order by the court.¹⁵ However, a similar provision does not exist in the Insolvency Act in the case of a compulsory sequestration, although it is conceivable that the same prejudice may occur where there exists an unscrupulous debtor or creditors in the insolvent estate of an individual.¹⁶

The South African Law Commission did consider the effects of section 348 in its final report regarding individual insolvency, coming to the conclusion that a provision such as section 348 may operate unfairly in practice.¹⁷ The fact that there is no similar provision in the Insolvency Act regarding compulsory sequestration does not seem to create any problems in the insolvent estates of individuals, and in any event there are other provisions in the Insolvency Act that could possibly be utilised to protect the interests of creditors, for example the provisions dealing with impeachable transactions.

As stated above, the date of commencement of liquidation is important since it brings about a *concursum creditorum* that affects the rights of especially creditors who have perhaps obtained execution judgments prior to the winding-up being applied for.¹⁸ In regard to the execution of judgments and other legal proceedings,¹⁹ section 359(1)(b) of the Companies Act finds application in the winding-up of a company or close corporation, and reads as follows:

¹⁵ Per Snyman J at 347 of the *Lief* case. Although this decision was based on the predecessor to s 348 of the Companies Act, namely s 115 of the Companies Act 46 of 1926, it nevertheless still finds application today.

¹⁶ This is only the case where one is dealing with a compulsory sequestration as different rules apply in the case of a voluntary surrender. Eg, although the date of sequestration is the date of the granting of the order for a voluntary surrender, s 5(1) of the Insolvency Act determines that all sales in execution are stayed by the publication of a notice to surrender.

¹⁷ See the comments made by the SA Law Commission in Project 63 Commission Paper 582 (11 Feb 2000) 31 paras 1.15-1.16 (hereinafter referred to as Commission Paper 582).

¹⁸ See *Walker v Syfret* 1911 AD 141 and *Nel v The Master* 2002 1 SA 354 (SCA).

¹⁹ See also Henochsberg 757-762; Cilliers *ea Corporate Law* 513-514.

“359. Legal proceedings suspended and attachments void.- (1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200-

- (a) ...
- (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.”

This provision was clearly designed to protect the creditors in the estate, preventing other (judgment) creditors from obtaining an unfair advantage where liquidation of the company is eminent. The term “put in force” used in section 359(1)(b) has been judicially considered in a number of cases.²⁰ According to Henochsberg²¹ the correct approach is that an execution is put into force when, in pursuance of a warrant of execution, the sheriff enters into *possession* of the property. The commencement of liquidation precludes the delivery of property sold in execution prior to such commencement, and delivery can only be proceeded with where the liquidator elects to continue with the sale.²² However, in *Shurrie v Sheriff for the Supreme Court, Wynberg*²³ the court found that the purchaser was entitled to such delivery where the hammer had fallen on the sale of property at an auction after the application had been lodged, but before the liquidation order had been granted. The fact that the deeming provision in section 348 came into operation upon the granting of the liquidation order, did not sway the court in holding that the sale had taken place before the company had been placed in liquidation.²⁴

²⁰ *Pols v R Pols-Bouers & Ingenieurs (Edms) Bpk* 1953 3 SA 107 (T) at 110; *Rennie v Registrar of Deeds* 1977 2 SA 513 (C) at 515; *Strydom v MGN Construction (Pty) Ltd* 1983 1 SA 799 (D) at 802-806; *Rennie v South African Sea Products Ltd* 1986 2 SA 138 (C); *Shalala v Bowman* 1989 4 SA 900 (W); *Shurrie v Sheriff for the Supreme Court, Wynberg* 1995 4 SA 709 (C); *Syffrets Bank Ltd v Sheriff of the Supreme Court, Durban Central*; *Schoerie v Syffrets Bank Ltd* 1997 1 SA 764 (D); *King Pie Holdings (Pty) Ltd v King Pie (Pinetown)(Pty) Ltd*; *King Pie Holdings (Pty) Ltd v King Pie (Durban)(Pty) Ltd* 1998 4 SA 1240 (D); *The MV Nantai Princess: Nantai Line Co Ltd v Cargo Laden on the MV Nantai Princess* 1997 2 SA 580 (D). For the contrary view that to sell the property in execution means to put into force the execution, see *Ex parte Flynn: In re United Investment & Development Corporation Ltd* 1953 3 SA 443 (E) at 445; *Meaker v Campbell's New Quarries (Pvt) Ltd* 1973 3 SA 157 (R) at 162.

²¹ Henochsberg 759. See also Cilliers *ea Corporate Law* 514 fn 166.

²² See *Shalala v Bowman* 1989 4 SA 900 (W); *Schoerie v Syffrets Bank Ltd* 1997 1 SA 764 (D).

²³ 1995 4 SA 709 (C).

²⁴ It is respectfully submitted that this case was incorrectly decided - a view shared by Henochsberg Vol 1 760 - as ss 348 and 359 were designed exactly for this purpose. This case also illustrates that the courts do not interpret the provisions of ss 348 and 359 of the Companies Act consistently. The problem is

Another section of the Companies Act that refers to the commencement of liquidation and also seeks to protect the interests of creditors, is section 341(2).²⁵ This section declares the disposition of its property by a company after the commencement of winding-up to be void. This section only applies to companies that are being wound up and that are unable to pay their debts. From the case law²⁶ on the subject it is evident that the section has regularly been invoked in practice and needs to be addressed when determining the date for the commencement of liquidation.

2.1.2 Comments regarding voluntary winding-up²⁷

It has already been stated that section 352 of the Companies Act provides that a voluntary winding-up commences on the day that the resolution placing the company in liquidation is registered by the Registrar of Companies. This provision differs from earlier legislation²⁸ although it is impossible to determine why this provision was changed. Under earlier legislation the date of commencement of a voluntary winding-up was the date on which the resolution was passed. This was changed in the current 1973 Companies Act, although no explanation²⁹ for the changes

created by the deeming provision in s 348, which states that the winding-up of the company is *deemed* to have commenced at the time the application is lodged with the Registrar. The judge in the *Shurrie* case failed to recognise that liquidation was deemed to have commenced prior to the hammer falling at the auction, when the sale of the property at the auction had taken place before the *liquidation order* had been granted. What the judge failed to appreciate, is that once an order for the winding-up of the company had been granted, the company went into liquidation with retrospective effect from the date that the application was lodged. It is for this very reason that the deeming provision contained in s 348 has been included in the Companies Act, another fact that the court in the *Shurrie* decision failed to appreciate.

²⁵ See generally Henochsberg 675-681; Cilliers *ea Corporate Law* 514.

²⁶ See *Administrator, Natal v Magill Grant and Nell (Pty) Ltd* 1969 1 SA 660 (A); *Rousseau v Malan* 1989 2 SA 451(C); *First National Bank Ltd v EU Civils (Pty) Ltd: First National Bank Ltd v EU Plant (Pty) Ltd; Bassett v EU Civils (Pty) Ltd; EU Holdings (Pty) Ltd v EU Plant (Pty) Ltd* 1996 1 SA 924 (C).

²⁷ See generally De la Rey "Creditors' Voluntary Liquidation: Theoretical Analysis and Practical Guide" 1980 *DJ* 47 (hereinafter referred to as De la Rey "Creditors' Voluntary Liquidation"); Cilliers *ea Corporate Law* 496-499.

²⁸ See par 2.2 below.

²⁹ See also De la Rey "Creditors' Voluntary Liquidation" 47 and 52, where she states that the Van Wyk de Vries Commission (*Kommissie van Ondersoek na die Maatskappywet* (there were two reports, the main report (*Hoofverslag* RP 45/1970) and a supplementary report with a draft Bill (*Aanvullende Verslag en Konsepwetsontwerp* RP 31/1972) (hereinafter referred to as the Van Wyk de Vries Commission)) did not always provide explanations for the changes that they proposed.

to the provision could be found in the Van Wyk De Vries Commission of Inquiry into the Companies Act.³⁰ The fact that a Registrar of Companies was created under the 1973 Companies Act may be one of the reasons why this provision changed, although this could not be determined with any certainty.

One difference between a winding-up by the court and a voluntary winding-up by resolution that is worth noting, is the fact that the provisions of section 359 also apply to companies that are being wound up voluntarily. However, there is no deeming provision in the Companies Act that states that the winding-up is deemed to have commenced at an earlier date, for example the date upon which the resolution has been passed.³¹ It is conceivable, in the words of Snyman J in the *Lief* case, that a dishonest company, or directors, or creditors or others, may try to gain an unfair advantage between the time the resolution to liquidate the company has been passed and the actual registration of that resolution by the Registrar of Companies. Does the fact that there is no deeming provision in the case of a voluntary winding-up imply that the legislature did not wish to protect creditors in such an instance? The current provisions relating to the commencement of sequestration and liquidation are unsatisfactory in that there is not only a difference between the commencement of sequestration and the commencement of liquidation, but also between the provisions relating to compulsory and voluntary winding-up. It is submitted that the new proposed date for the commencement of liquidation as set out in paragraph 2.4 below, will do away with the uncertainties and inconsistencies that are currently experienced in this regard.

³⁰ The report of this Commission led to the promulgation of the current 1973 Companies Act. One reason that may be advanced, is that in terms of s 203 of the Companies Act a special resolution only becomes operative once it has been registered. In terms of the same section any other resolution comes into operation on the date which it is passed.

³¹ While there is no deeming provision regarding the commencement of voluntary winding-up, it should be noted that in the case of the voluntary surrender of an individual's estate in terms of the Insolvency Act, s 5(1) determines that all sales in execution are stayed by the publication of a notice to surrender. This date will in practice usually be some time before the actual sequestration order is granted.

2 2 Historical development regarding the commencement of liquidation

No reason for the difference in approach between companies and individuals could be found, although it is interesting to note that even in the earliest company law legislation the current provision, albeit in different form, relating to the commencement of liquidation was present in most of the provinces.

2 2 1 Cape Colony

In the Cape Colony's Winding-up Act 12 of 1868 section V provided as follows:

“The winding-up shall have relation to the date of the presenting of the petition for winding-up on which any order for winding-up shall be made.”

From this it is evident that the position at that time was the same as it currently is, in that the liquidation commenced at the time the petition (application) was presented to the court. At this time voluntary liquidation was not a known concept, and therefore no provision was made for this eventuality.

As regards winding-up by the court, the position was the same under the Cape Colony's Companies Act 25 of 1892³² where section 138 provided as follows:

“138. A winding-up of a company by the court shall be deemed to commence at the time of the presentation of the petition for winding-up on which any order for winding-up shall be made.”

However, for the first time in the Cape Colony the 1892 Companies Act made provision for the voluntary winding-up of companies, and section 179 of this Act provided as follows:

“179. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing such winding-up.”

³² Hereinafter referred to as the 1892 Companies Act.

This was also the position in the Transvaal,³³ but the date of commencement of liquidation in regard to voluntary winding-up was changed in later legislation.³⁴

2.2.2 Natal

The Natal Winding-up Law 19 of 1866³⁵ did not specifically provide for a date upon which the winding-up would commence. It is also not clear from some of the provisions as to whether the winding-up commenced on the date the order was granted, or on the day the petition was filed with the court. For example, section 13 of the 1866 Winding-up Law provided as follows:

“From the date of any order, as aforesaid, or from any date to be therein fixed for that purpose, the Company therein specified shall be absolutely interdicted and prevented from acting as a Company, and every director or manager shall cease to have or to perform any act, matter, or thing in relation to the affairs of such Company.”

On the other hand, section 28 provided as follows:

“The filing of any such petition with the Registrar of the Court shall have the effect of suspending and staying all and every action and actions, or other proceedings at law ... except in so far as is in this section hereinafter provided for; and such suspensive effect shall continue until such petition shall be dismissed, or such suspensive effect be removed by the said Court ...”

It is submitted that section 28 had the same effect as the current section 348 of the Companies Act,³⁶ in that the effective date of liquidation was the date upon which the petition (application) was lodged with the Registrar of the court.

³³ See par 2.2.3 below.

³⁴ See par 2.1.2 above.

³⁵ Hereinafter referred to as the 1866 Winding-up Law.

³⁶ In fact, the provision appears to be a hybrid of the current ss 348 and 359 of the Companies Act.

2 2 3 Transvaal

Section 4 of the *Wet op het Liquideeren van Maatschappijen* of 1891³⁷ provided that liquidation only commenced on the date on which a winding-up order was granted:

“*De luiquidatie zal van kracht zijn van af den dag waarop de order verleend wordt.*”

The position in the Transvaal differed from the position in the other provinces, and this position was continued in the 1894 Act.³⁸ However, this position changed under the provisions of section 116 the Transvaal Companies Act 31 of 1909:³⁹

“116. A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up.”

It was under this Act that the voluntary winding-up of a company was provided for for the first time, but the provisions were different under this Act than they are under current South African winding-up law. Section 157 of the 1909 Companies Act provided as follows:

“157. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing the winding-up.”

This aspect is important when dealing with voluntary liquidation, and will be referred to again under the chapter dealing with voluntary liquidation by resolution.⁴⁰

2 2 4 Orange Free State

Section 5 of the Law for the Winding-up of Joint Stock Companies of 1892 provided as follows:

“If an order for the winding-up of a company be obtained, the company shall be deemed to have been in a state of liquidation as and from the day on which the application was made.”

³⁷ Act 8 of 1891.

³⁸ See s 4 of the *Wet op het Liquideeren van Maatschappijen*, Act 1 of 1894.

³⁹ Hereinafter referred to as the 1909 Companies Act.

⁴⁰ See ch 11 below.

The commencement of liquidation in the Orange Free State was thus the same as in most of the other provinces.

2.2.5 *Union legislation*

Section 115 of the Companies Act 46 of 1926⁴¹ provided for the commencement of winding-up in the case of a company being wound up by the court:

“115. A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up.”

This position is the same as it was in the 1909 Transvaal Companies Act,⁴² and was in all probability taken over from this statute. As regards the commencement of winding-up in the case of a voluntary liquidation, section 161 of the 1926 Companies Act provided that:

“161. A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing the winding-up.”

This was the same as the provision contained in the Transvaal Companies Act of 1909.

To summarise, the date for the commencement for *winding-up by the court* was, in most cases, the date on which the application was lodged with, or presented to, the court. Once the possibility of *voluntary winding-up* had been included in South African company law, all the legislation made provision for the commencement of such winding-up to be the day on which the resolution to place the company in voluntary liquidation, had been passed.

⁴¹ Hereinafter referred to as the 1926 Companies Act.

⁴² See par 2.2.3 above.

2 3 Commencement of liquidation or bankruptcy in other jurisdictions

2 3 1 *Commencement of bankruptcy in the United States of America*

As mentioned in the previous chapter,⁴³ section 301 of the United States Bankruptcy Code⁴⁴ provides for the voluntary commencement of a bankruptcy proceeding, while section 303 provides for the commencement of an involuntary bankruptcy proceeding. It is not entirely clear what the date of commencement of bankruptcy is in the United States as the word “commencement” used in sections 301 and 303 appears to refer to “commencement” as the manner in which bankruptcy proceedings can be instituted, and does not necessarily indicate the actual moment when the bankruptcy itself commences. The relevant sections read as follows:

“§ 301. **Voluntary cases.** A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

§ 303. **Involuntary cases.**

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person ... that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title- ...”

From the second part of section 301 it would appear that although a bankruptcy *proceeding* is commenced by the filing of a bankruptcy petition, the actual commencement of the bankruptcy itself takes place as soon as the court grants the bankruptcy order. However, in section 303 the date of commencement of the bankruptcy is not as clear. This section does not state that an order for relief brings about the commencement of the bankruptcy, although it would appear from a different sub-section that it would only commence once a court has granted an order for involuntary bankruptcy. The relevant sub-section is paragraph (f) of section 303, and reads as follows:

⁴³ Ch 8.

⁴⁴ 11 USC.

“(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, *and until an order for relief in the case*, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced” (my emphasis).

From this sub-section it would appear that the commencement of an involuntary bankruptcy proceeding under United States bankruptcy law only commences once an order for relief has in fact been granted. In terms of the provisions of section 546, which deals with the limitation on avoiding powers where antecedent transactions are being attacked, an action for the setting aside of impeachable transactions cannot be commenced after “2 years after the entry of *the order for relief*” (my emphasis). However, when it comes to the proof of claims⁴⁵ or the application of the rules regarding impeachable transactions,⁴⁶ the determining date is the date on which *the petition was filed*.⁴⁷ Whatever the date of the commencement of bankruptcy in the United States may be, one thing at least is certain, and that is that the date is the same for all types of debtors.

2 3 2 Commencement of insolvency in the Federal Republic of Germany

In terms of section 27 of the German *Insolvenzordnung*⁴⁸ the time of the commencement of the insolvency proceeding must be indicated in the order commencing it. Section 27 reads as follows:

“§ 27 Order of Commencement

(1) If the insolvency proceeding is commenced, the court shall appoint an insolvency administrator. Sections 270 and 313(1) shall be unaffected.

(2) The order of commencement shall include:

1. Company name or family name and first name, business or occupation, commercial domicile or home address of the debtor;

⁴⁵ See eg 11 USC s 502(b)(5).

⁴⁶ See eg 11 USC s 547(b).

⁴⁷ This situation would appear to be similar to the position regarding the winding-up of companies in South Africa. Under South African law the deeming provision contained in s 348, where it is provided that the liquidation commences on the date on which the application was lodged with the Registrar, can only apply once a winding-up order has in fact been granted. However, once the order has been granted, the date of the commencement of the winding-up is determined with reference to s 348 of the Companies Act.

⁴⁸ *Insolvenzordnung vom 5 Oktober 1994 (BGBl. I, S. 2866)* - hereinafter referred to as the *Insolvenzordnung*. This Code came into operation on 1 Jan 1999.

2. name and address of the insolvency administrator;
3. the hour of commencement.
(3) If the hour of commencement is not provided, the time of commencement shall be deemed to be noon on the day of the order.”

From this section it is clear that the commencement of insolvency is the time and day on which the court granted a bankruptcy order. If the court order omitted to state the time at which the order was granted, then the insolvency is deemed to have commenced at noon on the day of the order. Due to the fact that Germany has a unified insolvency statute, the commencement of insolvency is the same for both individual and corporate debtors.⁴⁹

2 3 3 *Commencement of bankruptcy and winding-up in England*

In light of the fact that England does not have a truly unified system of insolvency law,⁵⁰ a distinction must be made between the commencement of bankruptcy in the case of individuals and the commencement of winding-up in the case of companies.

In the case of individuals, section 278(a) of the (English) Insolvency Act 1986 provides that the technical date of the commencement of bankruptcy is the date on which the court granted the bankruptcy order.⁵¹ According to Fletcher⁵² a bankruptcy order takes effect immediately on the day it is made, and “[b]eing a judicial act it is deemed to be operative from the earliest moment of that day”.

As far as the commencement of the winding-up of a company is concerned, a further distinction

⁴⁹ See also s 35 (concept of insolvency assets), s 38 (concept of insolvency creditors) and ss 80-102 (all dealing with the effects of the commencement of an insolvency proceeding) where the date of commencement is stated as being the determining date. However, in the case of impeachable transactions, the determining date is clearly the date on which the petition was lodged - see eg s 130.

⁵⁰ See ch 4 above.

⁵¹ See Fletcher *The Law of Insolvency* (1996) 145, 189 (hereinafter referred to as Fletcher).

⁵² Fletcher 145.

has to be made between a voluntary winding-up and a winding-up by the court.⁵³ In the case of a voluntary winding up the date of commencement of the winding-up is deemed to be the day on which the resolution to wind up the company is passed.⁵⁴ In the case of a winding-up by the court, the winding-up is deemed to commence at the time of the presentation of the petition to court.⁵⁵ From all these provisions it is evident that the situation in England regarding commencement is the same as the position that currently finds application in South Africa.

2 3 4 *Commencement of bankruptcy and winding-up in Australia*⁵⁶

Under the Australian insolvency regime a distinction once again has to be made between individual bankruptcy and corporate liquidation. The rules regarding the commencement of bankruptcy and the commencement of liquidation differ under these provisions, which are also contained in separate Acts.⁵⁷

The Australian Bankruptcy Act contains an interesting provision regarding the commencement of bankruptcy, which is not to be found in any of the jurisdictions looked at so far. In terms of section 115 of the Bankruptcy Act a distinction is made between the commencement of bankruptcy by a debtor's petition (voluntary surrender of a debtor's estate) and the

⁵³ See also *Insolvency Law and Practice, Report of the Review Committee* (Cmnd 8558) 1982 (hereinafter referred to as the Cork Report) paras 666-673 where the commencement of winding-up was discussed in detail.

⁵⁴ S 86 of the Insolvency Act 1986; Fletcher 505. See also s 84 of the Insolvency Act 1986 and Fletcher 487.

⁵⁵ S 129(2) of the Insolvency Act 1986; Fletcher 554. There is, however, an exception to this rule - in the case where a company has passed a resolution to wind up voluntarily prior to a petition being lodged with the court, then s 129(1) of the Act provides that the date of commencement will be backdated to the day on which the resolution to place the company in voluntary winding-up, was passed (see also Fletcher 554).

⁵⁶ In regard to the commencement of insolvency (individuals) see generally Rose *Lewis' Australian Bankruptcy Law* 11th ed (1999) 138-141 (hereinafter referred to as Rose). In regard to the commencement of liquidation, see Keay *McPherson, The Law of Company Liquidation* 4th ed (1999) 216-221 (hereinafter referred to as McPherson).

⁵⁷ The provisions relating to individuals are contained in the Bankruptcy Act of 1966 (Cth) and the provisions relating to companies in the Corporations Act of 2001.

commencement of bankruptcy where a creditor has filed a petition (compulsory bankruptcy).⁵⁸

In the case of a debtor's petition, the date of commencement of bankruptcy is either:

- (a) The date of the presentation of the petition to court;⁵⁹ or
- (b) At the time of the commission of the earliest act of bankruptcy committed within the six months immediately preceding the presentation of the debtor's petition to court.⁶⁰

In the case of a creditor's petition for the bankruptcy of a debtor, the date of commencement of bankruptcy is the commission of the earliest act of bankruptcy within the six month period immediately preceding the presentation of the creditor's petition.⁶¹ The reference in these provisions to a date prior to the date that the actual order is granted, is known as the "doctrine of relation back".⁶² It is interesting to note that the Harmer Report, and the report that preceded it, actually recommended the abolition of this doctrine (along with the acts of bankruptcy), stating that it should be replaced by a simple provision that provides for bankruptcy to commence on the day that the order is actually granted.⁶³ That these proposals were not implemented is evident from the current provisions still contained in the Bankruptcy Act.

⁵⁸ Keay *Insolvency, Personal and Corporate Law and Practice* 3rd ed (1998) 31-32, 68 (hereinafter referred to as Keay *Insolvency*); Rose 139-140. Regarding bankruptcy generally in Australia, see Tomasic and Whitford *Australian Insolvency and Bankruptcy Law* 2nd ed (1997) ch 14 (hereinafter referred to as Tomasic and Whitford).

⁵⁹ S 115 of the Bankruptcy Act; Keay *Insolvency* 31-32, 68.

⁶⁰ S 115 of the Bankruptcy Act; Keay *Insolvency* 31-32, 68.

⁶¹ S 115 of the Bankruptcy Act; Keay *Insolvency* 31-32, 68; Rose 139-140.

⁶² Australian Law Reform Commission Report No 45 *General Insolvency Inquiry* (hereinafter referred as the Harmer Report) Vol 1 par 398.

⁶³ Harmer Report par 398. In the context of this study it is important to point out that the Harmer Report was of the opinion that the abolition of the relation back provision would not be prejudicial to creditors, provided the provisions relating to antecedent transactions were strengthened. It is submitted that the same approach should be taken when drafting provisions under a unified Insolvency Act in South Africa. This aspect is dealt with in par 2.4 below.

In the case of the liquidation of companies under the Australian Corporations Act of 2001, a distinction has to be made, yet again, between a winding-up under the supervision of the court and the voluntary winding-up of a company.⁶⁴ In the case of a compulsory winding-up (by the court), the date of commencement of liquidation is determined by section 513A(e) of the Corporations Act as being the day on which the liquidation order is granted.⁶⁵ In the case of a voluntary winding-up, the date of commencement of the liquidation is the day on which the special resolution to wind up is passed.⁶⁶ The position regarding the commencement of liquidation of companies in Australia is therefore the same as England as far as voluntary liquidation is concerned, but different regarding compulsory liquidation. Australia do not regard the commencement of liquidation in the case of compulsory liquidation to be detrimental to the creditors of the company. All that they have done in order to protect the creditors in regard to any prejudice that may be suffered between the filing of the petition and the actual granting of the order, is to tighten up the provisions relating to antecedent transactions.⁶⁷

2 4 Proposals for the commencement of liquidation under a unified Insolvency Act

2 4 1 *Uniform date of liquidation*

Contrary to the current Insolvency Act which does not clearly define what the date of sequestration is, the Draft Insolvency Bill⁶⁸ of the South African Law Commission has included in it a definition of the “date of liquidation”. This is extremely helpful in that for the first time, regarding the insolvency of individuals and partnerships, the Insolvency Act will clearly define when liquidation commences. Due to the fact that a unified Insolvency Act will include debtors

⁶⁴ Keay *Insolvency* 432, 439; McPherson 216-218.

⁶⁵ Keay *Insolvency* 404; Tomasic and Whitford par [5.19]; McPherson 216-217.

⁶⁶ S 513B(e) of the Corporations Act; Keay *Insolvency* 439; McPherson 217.

⁶⁷ Keay *Insolvency* 432-433.

⁶⁸ Contained in Commission Paper 582 Vol 2.

such as companies and close corporations, it is therefore only necessary to redraft the definition to also include voluntary liquidations by resolution.⁶⁹

While there is generally agreement as regards the date of liquidation in cases where a debtor is wound up by the court, there was some debate at the conference held on 6 October 1999 as to what the date of commencement of liquidation should be in the case of a voluntary liquidation by resolution. The initial draft of the relevant clauses of the unified Insolvency Act provided that the date of liquidation in the case of a voluntary liquidation by resolution, should be the date upon which the resolution to place the company or corporation into liquidation, is passed (and not the subsequent registration of the resolution by the Registrar of Companies and Close Corporations). This was done in the initial draft mainly for the purposes of determining an equitable date upon which impeachable transactions could be attacked.

Due to the possibility of the liquidation resolution not being registered by the Registrar of Companies and Close Corporations subsequent to it being passed,⁷⁰ this can create unnecessary problems and confusion as to the status of the company. In order to solve this potential problem, it is submitted that the resolution can be made to operate retrospectively once the resolution has in fact been registered. In other words, the date of liquidation will be the date on which the resolution is passed, but only once it has been duly registered.⁷¹ However, in order to further protect creditors against unscrupulous directors of companies and members of close corporations

⁶⁹ The definition as drafted by the Law Commission is sufficiently wide to include the liquidation of a company or close corporation by the court, and therefore no amendment is necessary in order to cater for companies or close corporations. This is also one of the advantages of having uniform application procedures for the liquidation of all types of entities. See ch 11 below for a discussion of voluntary liquidation by resolution.

⁷⁰ If the resolution is not registered within a specified period, it lapses and the company or close corporation retains its status as it was prior to the passing of the resolution - see the discussion of this aspect under par 2 above.

⁷¹ It is worth mentioning that by determining the date of commencement of liquidation as the date upon which the resolution had been passed, as was suggested in the initial draft, this would have been in line with the situation as it was prior to 1909. This is also similar to the current provisions of s 348, which provides that a winding-up order is deemed to operate from the date on which it was filed with the Registrar of the High Court.

who may dissipate the estate assets prior to the registration of the resolution, clause 22 of the unified Insolvency Act⁷² has been drafted in such a way as to make the definitive date for the setting aside of impeachable transactions, the date on which the notice was despatched to creditors informing them of the meeting at which a resolution to place the company into voluntary liquidation will be taken.

Prior to the amalgamation of the liquidation provisions as contained in the Unified Act, the South African Law Commission's Draft Insolvency Bill⁷³ included the following definition of "date of liquidation" under clause 1:

"date of liquidation" means the date of the first liquidation order;"

The date of the first liquidation order could of course be the date upon which the court grants a provisional *or* a final liquidation order, depending on the circumstances in each individual case. In order to include under this definition also voluntary liquidations by resolution, it will be necessary to amend the definition of "date of liquidation" to read as follows:

"date of liquidation" means-

- (a) in the case of a liquidation by the court, the date of the first liquidation order;
or
- (b) in the case of a voluntary liquidation by resolution, the date on which a voluntary liquidation commences as provided for in subsection (9) of section 8;"⁷⁴

It is to be noted that the definition does not state by whom the liquidation resolution has to be registered. This is because there are various possibilities as to who will register the resolution.⁷⁵ For example, in the case of a company or close corporation the resolution would be registered by

⁷² See ann E.

⁷³ Commission Paper 582 Vol 2.

⁷⁴ Cl 8(9) of the proposed unified Insolvency Act provides for the commencement of a voluntary liquidation by resolution - see ch 11 par 6.1 below.

⁷⁵ For a detailed discussion of this aspect, see ch 11 below.

the Registrar of Companies and Close Corporations. However, in the case of a trust the liquidation resolution would have to be lodged with, and registered by, the Master.⁷⁶

2 4 2 *Effect of liquidation order*

As pointed out above, section 359 of the Companies Act, dealing with the effect of a winding-up order on legal proceedings and attachments, was designed to protect creditors and refers to the deeming provision relating to the commencement of liquidation contained in section 348 of the Companies Act. By merging the provisions of section 359 of the Companies Act with clause 11 of the Draft Insolvency Bill of the South African Law Commission, some difficulties may be experienced in aligning the dates of commencement of liquidation under a unified Insolvency Act. In the first place it was decided by the South African Law Commission, in their Draft Insolvency Bill, to retain the current vesting rules pertaining to individuals.⁷⁷ In the second place, clause 11 of the Draft Insolvency Bill also provides for a stay of execution proceedings similar to the provisions contained in section 359 of the Companies Act, but uses the date of the first liquidation order in order to do so. This is contrary to the position in section 359 of the Companies Act, where provision is made for the date of lodgment of the application for liquidation with the Registrar to be the deciding date.

In order to bring about uniform provisions relating to the commencement of liquidation, it is submitted that clause 11 of the Draft Insolvency Bill (clause 14 of the unified Insolvency Act) should also apply to juristic persons such as companies and close corporations that are liquidated in terms of a unified Insolvency Act. Although this will have as a result that the law relating to companies and close corporations as it currently stands and as discussed in paragraph 2 1 above, will change, it is submitted that creditors can be suitably protected with the use of provisions relating to impeachable transactions.⁷⁸ Clause 14 of the Unified Act (clause 11 of the Law

⁷⁶ For a detailed discussion of this aspect, see ch 11 below.

⁷⁷ Commission Paper 582 Vol 1 55-56 cl 11.

⁷⁸ See the conclusion in par 2.5 below.

Commission's Draft Insolvency Bill⁷⁹) which deals with the effect of liquidation on a debtor and his, her or its property, reads as follows (only the relevant portion dealing with execution judgments has been included here):

“14. Effect of liquidation on debtor and his or her property. - (1) The issuing of a first liquidation order, or the registration of a liquidation resolution in terms of section 8, in respect of a debtor shall have the effect that all the property of the debtor concerned shall be deemed to be in the custody and under the control of the Master until a liquidator has been appointed, whereupon the insolvent estate shall be deemed to be in the custody and control of the liquidator ...

- (6) (a) The execution of a judgment in respect of property of the debtor shall be stayed as soon as the sheriff becomes aware of the issuing of a first liquidation order against the debtor, unless the court orders otherwise.
- (b) The execution of a judgment in respect of property of the debtor shall be stayed as soon as the sheriff becomes aware of the adoption of a liquidation resolution by the debtor in terms of section 8; Provided that the sheriff shall hold over such execution of a judgment until such time as he is satisfied that the resolution in question has been registered with the necessary authority in terms of section 8(2)(a), failing which he shall continue with the execution of the judgment as if the liquidation resolution in question had not been adopted.
- (c) If costs in connection with the sale in execution of assets of the debtor have already been incurred when the execution of a judgment is stayed as contemplated in paragraph (a), the Master may on the application of the liquidator, on the conditions he or she finds just and subject to confirmation of the sale price by the Master or by resolution of a meeting of creditors of the estate, approve the continuation of the sale for the benefit of the insolvent estate, in which case the costs of the sale before or after liquidation shall be deducted from the proceeds.
- (d) The liquidator of an insolvent estate is entitled to recover from a creditor of the debtor the net amount of any payment in pursuance of the execution of any judgement made to such creditor after the granting of the first liquidation order or after the adoption of a liquidation resolution in pursuance of section 8”.

From the contents of this clause, it is evident that execution judgments will only be stayed once a first liquidation order is granted, and not at the time the application for liquidation is lodged with the Registrar as is currently the case under section 359(1)(b) of the Companies Act. It is also evident that a provision of this nature will not provide the maximum protection for creditors in the period between the lodging of the application for liquidation and the actual granting of the

⁷⁹ For a discussion of the amendments to cl 11, currently s 20 of the Insolvency Act, by the SA Law Commission, see Commission Paper 582 Vol 1 55-58 paras 11.1-11.7.

order, but it must be pointed out that the current provisions do not provide adequate protection either, despite the clear wording of section 359(1). An example of a case where the provisions of section 359 did not provide the creditors with any protection, can be found in *Shurrie v Sheriff for the Supreme Court, Wynberg*.⁸⁰

2 5 Conclusion regarding the commencement of liquidation

2 5 1 Uniform date of liquidation

From what has been stated above, the following problems exist regarding the varying dates of sequestration and winding-up:

- (a) The date of sequestration has up to now differed from the date of winding up of a company by the court, the former being the date of the granting of the order to sequester, the latter being the date upon which the application to wind up the company is lodged with the Registrar of the High Court.
- (b) The commencement of liquidation in the case of a voluntary winding-up differs from the commencement of liquidation in the case of a winding-up by the court, the former being the date upon which the resolution is passed, and subject to it being duly registered by the Registrar of Companies or other relevant authority.

It is submitted that the uniform provision for the commencement of liquidation as contained in a unified Insolvency Act will remove the uncertainty that has been created in the past by the differing provisions currently found in the Insolvency Act and the Companies Act. Uniformity promotes certainty, and for this reason alone the new clause will bring about a welcome change

⁸⁰ 1995 4 SA 709 (C). In this case the hammer fell at an auction after the application to wind up the company had been lodged with the Registrar, but before the court had granted the winding-up order. The court found that there was no winding-up until the court had in fact granted an order, and directed that the property was to be transferred to the purchaser. This was the finding of the court despite the deeming provision regarding the commencement of liquidation in s 348 of the Companies Act. See the earlier discussion of this case under par 2.1.1 above.

in regard to liquidation orders granted by the court. However, due to the unique nature of the voluntary liquidation of corporate entities by means of a resolution, the date of liquidation in such cases must necessarily differ from the date of liquidation in the case of a liquidation order granted by the court. This difference is brought about by procedural necessities, but the effects thereof can easily be provided for in the legislative provisions of a unified Insolvency Act.

2 5 2 Effect of liquidation order

The differing dates of the commencement of sequestration and the commencement of winding-up have as a result that the effect of a sequestration order differs from the effect of a winding-up order. In addition, the fact that the date of commencement of a winding-up by the court and a voluntary winding-up by resolution are not the same, also has an effect on the consequences of a winding-up order. In the main, the problems are as follows:

- (a) Execution judgments in the case of compulsory sequestration are only void if the disposition took place after the granting of a sequestration order, and not after the date when the application was lodged.
- (b) Execution judgments in the case of the voluntary surrender of a debtor's estate are only void if the disposition took place after the publication of a notice of surrender in terms of section 5(1) of the Insolvency Act.
- (c) In the case of the winding-up of a company or close corporation being wound up by the court, execution judgments are void if proceeded with after the commencement of liquidation, being the date upon which the application was lodged with the Registrar of the High Court.
- (d) In the case of the voluntary winding-up of a company or close corporation by resolution, execution judgments are void if proceeded with after the commencement of liquidation, being the date upon which the resolution is passed and has subsequently been duly registered by the Registrar of Companies or other relevant authority.

While creditors' interests are protected in the case of paragraphs (b) and (c) above, the creditors in cases set out in paragraphs (a) and (d) clearly are not. These types of inconsistencies should have no place in modern insolvency legislation, and it is submitted that the effect of liquidation should be the same for all types of debtors. It is further submitted that, in determining a date for the protection of the creditors' interests, this should not necessarily be done with reference to the date upon which the liquidation commenced.

Where there is a need to use a date that differs from the (uniform) date of liquidation proposed in a unified insolvency statute, for example in determining the date for the setting aside of impeachable transactions, or when determining the personal liability of the directors of the company for insolvent trading, those particular provisions should include the determination of a date which differs from the date of liquidation. That this can in fact be achieved is evident from clause 19 of the unified Insolvency Act⁸¹ contained in Annexure E to this thesis, which reads as follows (the clause deals with dispositions without value, but only sub-clause (1) is included here):

“19. Disposition without value.- (1) Every disposition of property not made for value may be set aside by the court if such disposition was made by the debtor *within two years before the presentation of the application for liquidation of his or her estate to the Registrar* or within three years before the presentation of the application for liquidation to the Registrar if the disposition was made in favour of an associate: Provided that if it is proved by someone opposing the setting aside of the disposition that the liabilities of the debtor at any time after the making of the disposition exceeded his or her assets by less than the value of the property disposed of, the disposition may be set aside only to the extent of such excess” (my emphasis).

As can be seen from the italicised portion of the clause, the date of the presentation of the application is the determining date, and not the date of the commencement of liquidation. When the provisions relating to impeachable transactions (clauses 19, 21 and 22) are applied to companies and close corporations being wound up by resolution, clause 23 finds application. Clause 23 has as its purpose to align the dates and events relating to voluntary liquidations by

⁸¹ Cl 18 of the SA Law Commission's Draft Insolvency Bill - see Commission Paper 582 Vol 2.

resolution, with the dates and events provided for in clauses 19, 21 and 22. Clause 23 reads as follows:

- “23. Application of sections 19, 21 and 22 to certain debtors.** (1) The provisions of section 19, 21 and 22 shall apply to a trust debtor, company debtor, close corporation debtor and association debtor if such debtor has been liquidated in terms of the provisions of this Act.
- (2) For the purposes of applying sections 19, 21 and 22 to a trust debtor, company debtor, close corporation debtor or association debtor, the event which shall be deemed to correspond with the presentation of the application for liquidation of a debtor shall be-
- (a) where the liquidation order has superseded a voluntary liquidation by members, the date of registration of the special resolution or resolution, as the case may be, to liquidate the debtor; and
 - (b) where the liquidation order has superseded a voluntary liquidation by creditors in terms of section 8, the date on which notice was given to creditors of the liquidation resolution to liquidate the debtor; and
 - (c) in the case of a voluntary liquidation by resolution in terms of section 8, the date upon which notice was given to creditors to liquidate the debtor by resolution.
- (3) Any cession or assignment by a trust debtor, company debtor, close corporation debtor or association debtor of all of its property to trustees for the benefit of all its creditors shall be void.”

From clause 23 it is evident that the date upon which the Registrar of Companies and Close Corporations registers the resolution for the voluntary liquidation does not play a role, as it is the date upon which notice of the meeting to pass such a resolution was given that will find application. This is merely one example of how the interests of creditors can be protected within the relevant clauses, and without a general reference to the date of the commencement of liquidation.⁸²

⁸² Another example can be found in cl 172(2) of the unified Insolvency Act in ann E to this thesis. In par 2.1.1 above it was pointed out that the current s 341(2), dealing with a disposition by a company of its property after the commencement of sequestration, was designed to protect the interests of creditors. Having proposed that a uniform date of liquidation should apply to all debtors under a unified Insolvency Act, creditors will still need to be protected against the possible prejudice that could take place if a company was to dispose of its assets after the commencement of proceedings for liquidation, but before the actual order for liquidation is granted. For this reason cl 172(2) has been drafted to make the applicable date after which a company may no longer dispose of its assets, the date upon which an application to liquidate is lodged with the Registrar (in the case of a voluntary liquidation by resolution, the date is the day on which notice was given to creditors that the company is intent on passing a resolution to place the company in liquidation).

It is submitted that the potential prejudice that can be experienced by creditors, as pointed out by the court in *Lief v Western Credit (Africa) (Pty) Ltd*,⁸³ will be countered by provisions such as those relating to the setting aside of dispositions that have been discussed above, and that these potential problems should not prevent uniform provisions for the commencement of liquidation from being introduced. This is currently the situation regarding winding-up in Australia,⁸⁴ and it does not seem to lead to unfair results *vis-à-vis* the creditors.

3 VESTING OF THE INSOLVENT ESTATE⁸⁵

3 1 Introduction

One of the interesting aspects of having dual insolvency legislation in South Africa is the fact that the various provisions in the Insolvency Act and other legislation, such as the Companies Act, contain differing provisions for what should essentially be the same thing. One of these aspects, namely the commencement of liquidation, has already been discussed in paragraph 2 above. Another of these aspects is the vesting of the debtor's assets once the estate has entered insolvency (or winding-up) proceedings. In the case of a debtor who is a natural person, the debtor is divested of his or her estate and the assets *vest* in the Master and then in the trustee once appointed.⁸⁶ However, in the case of a company being wound up by the court,⁸⁷ the assets fall under the *custody and control* of the Master and then the liquidator, once appointed.⁸⁸

⁸³ 1966 3 SA 344 (W). See the earlier discussion of this case under par 2.1.1 above.

⁸⁴ See par 2.3.4 above.

⁸⁵ See generally Meskin par 5.2; Mars 174-175 for the position regarding sequestration and Henochsberg Vol 1 764-765; Cilliers *ea Corporate Law* par 27.62 513; and Meskin par 5.9.6 in regard to winding-up.

⁸⁶ See s 20(1)(a) of the Insolvency Act.

⁸⁷ It is not clear what transpires should the company be wound up in a different manner, eg as a voluntary winding-up by creditors.

⁸⁸ See s 361(1) of the Companies Act.

According to our case law,⁸⁹ the assets of a company never vest in the liquidator, subject of course to cases where the court has made an order in terms of section 361(3).⁹⁰ This chapter seeks to determine why this difference exists, where it originated, whether such a difference is justified and whether or not the vesting rule can be uniform in regard to all types of debtors.

3 2 Historical development regarding vesting⁹¹

3 2 1 Cape Colony

Section XI of the Cape Colony's Winding-up Act 12 of 1868 stated the following in regard to the custody of the company's assets:

“XI. If no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed in the custody of the court; and in any indictment for theft thereof, or any part thereof, under such circumstances, or for any similar purpose, the property may be laid in the Master of the Supreme Court.”

Although it was not specifically stated by the Act, from this excerpt it must be assumed that where a liquidator had been appointed, the assets were in the custody of such a liquidator. Nothing further is stated in this Act in respect of the vesting of the assets. Section 146 of the Cape Colony's Companies Act 25 of 1892 contained exactly the same provision as the Winding-up Act of 1868 (reproduced above) and consequently the same assumption regarding the custody of the assets by the liquidator must be made.

⁸⁹ See *Secretary for Customs and Excise v Millman* 1975 3 SA 544 (A) at 552; *Soane v Lyle* 1980 3 SA 183 (D) at 186; *Letsitele Stores (Pty) Ltd v Roets* 1958 2 SA 224 (T) at 226-227.

⁹⁰ S 361(3) provides that the court may grant an order vesting part or all of the property of a company in the liquidator, albeit in his official capacity. See Henochsberg 764-765 and *Milman and Steub v Koetter* 1993 2 SA 749 (C) as to reasons why this may be necessary.

⁹¹ As regards the common law roots of the vesting rule in the case of sequestration, see Stander “Die Eienaar van die Bates van die Insolvente Boedel” 1996 *THRHR* 388 (hereinafter referred to as Stander).

3 2 2 *Natal*

Early legislation in Natal was a lot different in many respects to the legislation that applied at the Cape. This is again evident in section 19 of the Natal Winding-up Law 19 of 1866, which provided that the assets of the company vested in the official manager responsible for the winding-up of the company. Section 19 provided as follows:

“19. On every such appointment of official manager, all the estate, effects, and credits, and rights of action of the Company, shall, except in so far as the Court shall direct to the contrary, become absolutely vested in the official manager so appointed; and such official manager shall be deemed as entitled to possess and possessing the like powers in all respects in regard to the winding-up of any Company’s estate, as any trustee of an insolvent estate possesses under the provisions of the aforesaid Insolvent Ordinance.”

Clearly the legislature wanted to place the liquidator (official manager) in the same position as a trustee administering an insolvent estate, hence the reference to the “Insolvent Ordinance”.

3 2 3 *Transvaal*

In the Transvaal the *Wet op het Liquideeren van Maatschappijen*, Act 8 of 1891, did not make any provision for the custody and control or the vesting of the assets in the liquidator. From this one has to assume that the company’s assets remained vested in the company, and that the liquidator merely dealt with the assets with the court’s permission as provided for in section 5(a) to (h).⁹² The *Wet op het Liquideeren van Maatschappijen*, Act 1 of 1894, which replaced the 1891 Act, did not make provision for the vesting or otherwise of the company’s assets either.

The first reference to the custody and control of a company’s assets in liquidation in the Transvaal, can be found in the Companies Act 31 of 1909. Section 126 of this Act provided as follows:

⁹² Eg, s 5(d) provided that the liquidator could sell the property belonging to the company (with the court’s permission) and pass transfer thereof where necessary.

“126. In a winding-up by the Court the liquidator shall take into his custody, or under his control, all the property, movable and immovable, to which the company is or appears to be entitled.”

This provision is very similar to section 361(1) of the current Companies Act of 1973, and was probably the origin of the current provision, considering that the 1909 Companies Act formed the basis of the 1926 Companies Act.

3 2 4 *Orange Free State*

Section 11 of Law No 2 of 1892, To Provide for the Winding Up of Joint Stock Companies, provided that the assets of a company under liquidation fell under the custody of the court, or the Master, where no liquidator had been appointed or where the position became vacant. These provisions are identical to the provisions contained in early Cape Colony legislation which have already been referred to above.⁹³

3 2 5 *Union legislation*

Section 124(3)(b) of the 1926 Companies Act provided for the custody and control of the company's assets upon liquidation, and read as follows:

“(b) On a winding-up order being made all the property of the company shall be deemed to be in the custody or control of the Master until a liquidator or provisional liquidator is appointed and is capable of acting as such.”

Section 124(5) of the 1926 Companies Act also provided that in the event of no liquidator having been appointed, or in cases where there was a vacancy, the assets fell under the custody and control of the Master.

⁹³ See par 3.2.1 above.

3 2 6 Post-Union legislation (current position)

Under current company legislation dealing with the winding-up of companies, section 361(1) of the Companies Act provides that, in the case of a company being wound up by the court,⁹⁴ the assets fall under the custody and control of the Master and then the liquidator, once appointed. According to case law,⁹⁵ the assets of a company never vest in the liquidator, subject of course to cases where the court has made an order in terms of section 361(3).⁹⁶

3 3 Vesting of the estate in other jurisdictions

3 3 1 Vesting of the estate in the United States of America

The United States Bankruptcy Code does not appear to make specific provision for the vesting of estate assets in a trustee where a debtor has been declared bankrupt. Sulmeyer *et al*⁹⁷ state the following as regards the possession that is exercised by the trustee:

“The possession of the property by the trustee must be an exclusive possession since the trustee alone is accountable for property taken into possession. Therefore, the trustee must exclude all others, except agents and employees of the trustee, from such possession.”⁹⁸

⁹⁴ It is not clear what transpires should the company be wound up in a different manner, eg as a voluntary winding-up by creditors. However, it is submitted that the assets also in these cases remain vested in the company itself until such time as the company has been divested of its assets prior to its dissolution.

⁹⁵ See *Secretary for Customs and Excise v Millman* 1975 3 SA 544 (A) at 552; *Soane v Lyle* 1980 3 SA 183 (D) at 186; *Letsitele Stores (Pty) Ltd v Roets* 1958 2 SA 224 (T) at 226-227. See also *Syffrets Bank Ltd v Sheriff of the Supreme Court, Durban Central*; *Schoerie v Syffrets Bank Ltd* 1997 1 SA 764 (D) where the court discussed the difference between s 20 of the Insolvency Act and s 361 of the Companies Act. In this case it was also held that s 20 of the Insolvency Act does not find application to companies or close corporations by virtue of the provisions of s 66 of the Close Corporations Act read with s 339 of the Companies Act.

⁹⁶ S 361(3) provides that the court may grant an order vesting part or all of the property of a company in the liquidator, albeit in his official capacity. See also Henochsberg 764-765; *Milman and Steub v Koetter* 1993 2 SA 749 (C).

⁹⁷ *1998 Collier Handbook for Trustees and Debtors in Possession* (1998) 10-7 (hereinafter referred to as *Sulmeyer ea*).

⁹⁸ *Sulmeyer ea* 10-7.

Even though the possession that is exercised by the trustee is to the exclusion of all others, it cannot be said that the property of the insolvent actually vests in the trustee, as the term “vest” is not used expressly in the Bankruptcy Code itself. It is submitted that “possession” itself is not sufficient to include actual ownership of the estate assets, and the conclusion that must necessarily be drawn is that ownership of the estate assets does not vest in the trustee under United States bankruptcy law. The reason why actual vesting of the property in the trustee does not take place in the United States may be attributed to the fact that, upon filing a petition for relief under the Bankruptcy Code, a separate “estate” is created. Section 541 of the Bankruptcy Code then specifies what becomes property of the debtor’s “estate”.⁹⁹

3 3 2 *Vesting of the estate in England*

The position in England is regulated by the Insolvency Act 1986. As is the current position in South Africa, a distinction is made between individual and corporate insolvency. In the case of personal (or individual) insolvency, section 306 of the (English) Insolvency Act provides that the property of the insolvent estate vests in the trustee. Section 306 reads as follows:

“306. Vesting of bankrupt's estate in trustee

(1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.

(2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer.”

In the case of corporate liquidations a further distinction is made between voluntary and compulsory winding-up. In the case of *voluntary winding-up* it would appear that the assets remain vested in the company,¹⁰⁰ as no reference is made to vesting or custody and control of the company’s assets in such a case. It would, however, appear that the court may grant an order

⁹⁹ For a discussion of this concept, see Albergotti *Understanding Bankruptcy in the US: A Handbook of Law and Practice* (1992) 45-50. Herbert *Understanding Bankruptcy* (1995) 95 goes further by stating that “A bankruptcy petition creates an ‘estate’; that is, a new legal entity separate and apart from the debtor who filed the petition ...”

¹⁰⁰ See Fletcher 506 where he states: “Property in the company’s assets remains with the company unless a vesting order is made under section 112.”

vesting the assets in the liquidator if the need should arise.¹⁰¹ Section 112 of the Insolvency Act deals with the court's powers to make orders in the case of a voluntary winding-up, so it is conceivable that the court may confer powers on a liquidator that are the same as those conferred on a liquidator in a winding-up by the court.

In the case of a *company being wound up by an order of court*, it is evident from section 144 of the Insolvency Act that the custody or control of the assets pass to the provisional or final liquidator. In cases where it is necessary, the court may order (in terms of section 145) that all or some of the assets actually vest in the liquidator. From the wording of the section South Africa apparently adopted England's approach to the custody and control of estate assets upon insolvency. For the sake of completeness, the relevant sections of the (English) Insolvency Act read as follows:

“144. Custody of company's property

- (1) When a winding-up order has been made, or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator (as the case may be) shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
- (2) In a winding up by the court in Scotland, if and so long as there is no liquidator, all the property of the company is deemed to be in the custody of the court.

145. Vesting of company property in liquidator

- (1) When a company is being wound up by the court, the court may on the application of the liquidator by order direct that all or any property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator by his official name; and thereupon the property to which the order relates vests accordingly.
- (2) The liquidator may, after giving such indemnity (if any) as the court may direct, bring or defend in his official name any action or other legal proceedings which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.”

¹⁰¹ Fletcher 506.

3.3.3 *Vesting of the estate in Australia*¹⁰²

The position in Australia is similar, if not identical, to the situation in England. In terms of section 58 of the Bankruptcy Act of 1966 (Cth), the property of the insolvent estate, in the case of individual insolvency, vests in the trustee. Section 58 reads as follows:

“58 Vesting of property upon bankruptcy

- (1) Subject to this Act, where a debtor becomes a bankrupt:
- (a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and
 - (b) after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.
- (2) Where a law of the Commonwealth or of a State or Territory of the Commonwealth requires the transmission of property to be registered and enables the trustee of the estate of a bankrupt to be registered as the owner of any such property that is part of the property of the bankrupt, that property, notwithstanding that it vests in equity in the trustee by virtue of this section, does not so vest at law until the requirements of that law have been complied with.
- (3) Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:
- (a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or
 - (b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.
- (4) After a debtor has become a bankrupt, distress for rent shall not be levied or proceeded with against the property of the bankrupt, whether or not the bankrupt is a tenant of the landlord by whom the distress is sought to be levied.
- (5) Nothing in this section affects the right of a secured creditor to realize or otherwise deal with his or her security.
- (5A) Nothing in this section shall be taken to prevent a creditor from enforcing any remedy against a bankrupt, or against any property of a bankrupt that is not vested in the trustee of the bankrupt, in respect of any liability of the bankrupt under:
- (a) a maintenance agreement or maintenance order (whether entered into or made, as the case may be, before or after the commencement of this subsection); or
 - (b) a pecuniary penalty order or interstate pecuniary penalty order.

¹⁰²

As regards the vesting of the estate in the case of individual insolvency, see generally Rose 138-139. As regards the position regarding corporate insolvency, see McPherson 219-221.

(6) In this section, *after-acquired property*, in relation to a bankrupt, means property that is acquired by, or devolves on, the bankrupt on or after the date of the bankruptcy, being property that is divisible amongst the creditors of the bankrupt.”

In terms of section 474 of the Corporations Act, the assets of a company in liquidation fall under the custody or control of the provisional or final liquidator.¹⁰³ Section 474 reads as follows:

“474. Custody and vesting of company's property

(1) If a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company has been appointed, the liquidator or provisional liquidator shall take into his or her custody or under his or her control all the property to which the company is or appears to be entitled, and, if there is no liquidator, all the property of the company shall be in the custody of the Court.

(2) The Court may, on the application of the liquidator, by order direct that all or any part of the property of the company shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity (if any) as the Court directs, bring, or may defend, any action or other legal proceeding that relates to that property or that it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

(3) Where an order is made under this section, the liquidator of the company to which the order relates shall, within 14 days after the making of the order, lodge with the Commission an office copy of the order.”

3 3 4 *Vesting of the estate in Germany*

The German *Insolvenzordnung* does not refer to vesting or custody and control, but uses the terms “manage and transfer”. There are basically only two sections where reference is made to the control of the assets upon insolvency, namely sections 22 and 80. These sections read as follows:¹⁰⁴

¹⁰³ See also McPherson 219.

¹⁰⁴ See the translation of the *Insolvenzordnung* by Stewart *Insolvency Code; Act Introducing the Insolvency Code* (1997) 59 and 93.

“§ 22 Legal Position of the Interim Insolvency Administrator

(1) If a interim insolvency administrator is appointed and the debtor generally enjoined from transferring assets, the debtor’s right to manage and transfer its assets shall be transferred to the interim insolvency administrator. In such event, the interim insolvency administrator shall: ...”

§ 80 Transfer of the Rights of Management and Disposition

(1) As a result of the commencement of the insolvency proceeding, the right of the debtor to manage and transfer assets that constitute part of the insolvency estate shall pass to the insolvency administrator.”

From these provisions it would appear that the “insolvency administrator” does not become owner of the property, but merely obtains the right to “manage and transfer” assets that form part of the estate. It is submitted that this does not amount to ownership of the estate assets that is brought about by vesting, but amounts to custody and control of the estate assets for the purposes of administering the estate in question.

3 3 5 Conclusion regarding vesting in other jurisdictions

To summarise, countries that have a unified system of insolvency legislation (the United States and Germany) do not find it necessary to make provision for the vesting of the estate assets in the trustee of the insolvent estate. On the other hand, countries that do not have a (totally) unified system of insolvency law (England, Australia and South Africa) make a distinction between individual and corporate insolvency. In the case of individual insolvency the assets vest in the trustee in ownership, while in the case of corporate insolvency the assets merely fall under the custody and control of the liquidator.

The underlying reason. it is submitted, appears to be that in England, Australia and South Africa the liquidation of a company is a step that necessarily needs to be taken before a company can be dissolved. Because the company has not yet been dissolved during the period of administration, the company retains its juristic personality and therefore also ownership of its assets.¹⁰⁵ For this

¹⁰⁵ See also Commission Paper 582 Vol 1 55 par 11.1.

reason the estate assets merely fall under the custody and control of the liquidator, with a specific provision allowing the court to order that ownership does indeed vest in the liquidator should the circumstances require this.

Because the American and German insolvency systems do not distinguish between corporate and individual insolvency, their legislation has found it unnecessary to make a distinction. What is interesting, however, is that both these unified systems of insolvency have found it unnecessary to have the estate assets vest in the person administering the insolvent estate.

3 4 Proposals for the vesting of the insolvent estate under a unified Insolvency Act

Clause 14(1) of the unified Insolvency Act¹⁰⁶ deals, *inter alia*, with the vesting of the insolvent estate. The Law Commission, in its draft Insolvency Bill,¹⁰⁷ has elected to retain the current rule for individuals, which is that the estate vests first in the Master and then in the trustee (liquidator under the Law Commission's proposals) upon appointment.¹⁰⁸ The Law Commission's final recommendation¹⁰⁹ in this regard is in contrast to its earlier viewpoint¹¹⁰ that the rule regarding vesting in the case of individuals should be the same as it is in the case of companies, namely that the assets should merely be under the custody and control of the liquidator. In paragraph 11.1 of the Law Commission's final recommendations,¹¹¹ the following statement is made:

¹⁰⁶ See ann E to this thesis.

¹⁰⁷ See Commission Paper 582 Vol 2 cl 11(1).

¹⁰⁸ See Commission Paper 582 Vol 1 55 par 11.1.

¹⁰⁹ Commission Paper 582 Vol 1 55 par 11.1.

¹¹⁰ Recommendation 3 in Working Paper 33 Project 63.

¹¹¹ Commission Paper 582 Vol 1 55.

“11.1 On the assumption that uniform provisions should apply to companies and persons, consideration was given to the rule at present applicable to companies or a similar rule - only the custody and control of assets pass and as a rule the assets vest in the company. The difference in the rule in respect of companies and persons is, however, based on the substantial difference between companies and individuals. After liquidation the company continues to exist and the liquidator merely acts on behalf of the company. An individual can accumulate assets that do not form part of his insolvent estate. Notwithstanding views to the contrary ... the existing rule does not give rise to any problems, except perhaps problems related to section 21. *Clause 11(1) has retained the present position that assets vest in the liquidator.*”

As pointed out above, the position relating to juristic persons under the Companies Act differs from individual insolvency. Section 361(1) of the Companies Act provides that the assets of a company that is being wound up by the court remain vested in the company after liquidation.¹¹² The liquidator only obtains control over such assets, and not ownership.¹¹³

The fundamental difference between the vesting rule for individuals and corporations is not easy to explain, although the Law Commission has pointed out that this rule exists due to the fundamental difference between a corporation and an individual.¹¹⁴ So the argument seems to be that in the case of the sequestration of an individual’s estate, the person undergoes a change of status and he or she no longer has the right to participate freely in commercial intercourse. Liquidation, on the other hand, is a process which precedes the dissolution of a company or close corporation, and the company or corporation does not lose its juristic personality as a result of the liquidation. Consequently, in the latter instance the company remains vested with its assets.¹¹⁵

¹¹² This is also the position in the case of close corporations.

¹¹³ However, see s 361 (3) of the Companies Act, which provides that the court may order that such property vests in the liquidator in his official capacity.

¹¹⁴ But that does not explain why the rules regarding custody and control only apply to companies and corporations being wound up by the court, and not to companies that are being wound up voluntarily.

¹¹⁵ It is interesting to note that s 361(1) only applies to companies that are liquidated by the court. It is not clear what transpires in cases where a company is wound up in some other manner, eg as a voluntary winding-up by creditors, in which case the company is also insolvent. This is also the situation in England - see par 3.3.2 above.

In *Letsitele Stores (Pty) Ltd v Roets*¹¹⁶ the court held that the assets fall under the liquidator's control for a specific purpose, namely in order to wind up its affairs, for the distribution of its assets in satisfaction of claims proved against it, and the division of the surplus amongst its members.¹¹⁷

Since the decision in *De Villiers v Delta Cables*,¹¹⁸ it has been largely accepted that ownership of the assets in the insolvent estate of an individual vest in the trustee. There is, however, a body of opinion which believe that such vesting is unnecessary, and that criticise the *Delta Cables* decision.¹¹⁹ According to Stander,¹²⁰ the vesting rule in the case of individuals cannot be supported by Roman or Roman-Dutch law, and she states that the transfer of ownership to the trustee is superfluous and can remain vested in the debtor.

After having analysed the various viewpoints and possible effects of changing the current rule regarding sequestration, it is submitted that the current rule that the assets vest in the trustee is an unnecessary one. It is not necessary for the trustee to have actual ownership of the assets in order to effectively sell or alienate them in practice, although a change in the rule may necessitate

¹¹⁶ 1958 2 SA 224 (T) at 227. This case was followed with approval in *Sarwill Agencies (Pty) Ltd v Jordaan* 1975 1 SA 938 (T) at 942 and *De Villiers v Electronic Media Network (Pty) Ltd* 1991 2 SA 180 (W) at 184C.

¹¹⁷ While delegates at the workshops held at the University of Pretoria in December 1998 indicated no real preference in respect of whether ownership or control and custody should pass to the Master and then the liquidator under a unified Insolvency Act, all delegates were unanimous in stating that the provisions, whatever they may be, should be the same in respect of individuals and juristic persons alike. This view is shared by Boraine and Van der Linde (Part 1) 621 fn 104.

¹¹⁸ 1992 1 SA 9 (A).

¹¹⁹ See eg Joubert "Artikel 21 van die Insolvensiewet: Tyd Vir 'n Nuwe Benadering" 1992 *TSAR* 699; Evans "Who Owns the Insolvent Estate?" 1996 *TSAR* 719 and Stander 388. See also recommendation 3 in Working Paper 33 of the South African Law Commission, Project 63, which proposed that the property should only be under the control and custody of the trustee also in the case of individuals.

¹²⁰ Stander 388.

minor changes to other legislation, for example to the Deeds Registries Act.¹²¹ Since the vesting rule in regard to individuals cannot be justified on common law grounds, and in the quest for uniform provisions to apply to both individual and corporate debtors, it is proposed that a unified Insolvency Act should contain a provision allowing for the estate assets of all debtors to merely fall under the custody and control of the liquidator.

Consequently clause 14 of the unified Insolvency Act¹²² has been drafted to read as follows (only sub-clauses (1) and (2) have been reproduced here):

“14. Effect of liquidation on debtor and his or her property. - (1) The issuing of a first liquidation order, or the registration of a liquidation resolution in terms of section 8,¹²³ in respect of a debtor shall have the effect that all the property of the debtor concerned shall be deemed to be in the custody and under the control of the Master until a liquidator has been appointed, whereupon the insolvent estate shall be deemed to be in the custody and control of the liquidator: Provided that, if for any reason it appears expedient, the court may direct that all or part of any property belonging to the debtor, or to anyone on the debtor’s behalf, shall vest in the liquidator in his official capacity, and thereupon the property or the part thereof specified in the order shall vest accordingly, and the liquidator may, after giving such indemnity, if any, as the court may direct, bring or defend in his official capacity any action or other legal proceeding relating to that property, or necessary to be brought or defended for the purpose of effectually administering the estate of the debtor and recovering its property.¹²⁴

(2) The estate of the debtor remains in the custody and under the control of the liquidator until it reverts to the debtor in terms of a composition or compromise contemplated in Chapters 22 or 23 of this Act, or until the property is re-vested in the debtor or the debtor’s estate in terms of section 104(1)(d) or any other provision in this Act that makes provision for the setting aside of a liquidation order or a liquidation resolution adopted in terms of section 8.”

¹²¹ Act 47 of 1937. Eg, s 58 of the Deeds Registries Act 47 of 1937 regards the trustee as being the owner of property that forms part of an insolvent estate. However, a minor amendment such as this should not prevent uniform rules regarding individual and corporate debtors from being introduced. In addition there is some legislation, eg the Deeds Registries Act, that regards both the trustee and the liquidator as being an “owner” in terms of the provisions of the Act. A change to the vesting rule will not have any effect on these provisions.

¹²² Cl 11 of the Law Commission’s Draft Insolvency Bill - see Commission Paper 582 Vol 2.

¹²³ Cl 8 makes provision for voluntary liquidation by resolution.

¹²⁴ The proviso to this clause is currently contained in s 361(3) of the Companies Act.

From this clause it is apparent that the property of a debtor is deemed to be in the custody and under the control of the Master upon liquidation, and passes to the liquidator upon his or her appointment. Sub-clause (1) also provides for the voluntary liquidation of a debtor by means of a resolution,¹²⁵ while sub-clause (2), which is currently embodied in section 361(3) of the Companies Act, has been inserted to allow the court to order the vesting of estate property in the liquidator should the circumstances require it.

3 5 Conclusion regarding vesting

From what has been stated above it is clearly still customary, in England, Australia and South Africa, to allow the estate assets to vest in the trustee in the case of individual insolvency. In the case of corporate debtors the various countries' provisions merely allow custody and control of the assets to pass to a liquidator upon liquidation. However, in the United States and Germany, the latter's code being the most recent of all the insolvency legislation referred to, the insolvency administrator only obtains the right to deal with the assets to the exclusion of others without actual vesting taking place. America and Germany have obviously decided that vesting ownership of the estate assets in the insolvency administrator is unnecessary for the exercise of a trustee or liquidator's rights, and applies the rule uniformly to all entities.

It is submitted that actual vesting, or ownership, of the estate assets is not necessary upon insolvency and the clause dealing with this aspect in a unified Insolvency Act has been drafted accordingly. Should the need arise, the courts are in a position to order ownership to vest in the liquidator in terms of the proviso to sub-clause (1) of the proposed clause dealing with this aspect.¹²⁶

¹²⁵ This is not currently the rule that applies to companies and close corporations that are being wound up voluntarily, as s 361(3) only applies to companies being wound up by the court. Voluntary liquidation by means of a resolution is dealt with in ch 11 below.

¹²⁶ See par 3.4 above.

