

CHAPTER 1: INTRODUCTION

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

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

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

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

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

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

⁵ Falke 27.



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

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

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

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

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

⁹ See Joyce 2; Mistelis 1057.

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

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

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

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

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

¹³ Joyce 4.



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

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

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

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

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

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

¹⁷ Hereafter referred to as the "IMF".

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



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



CHAPTER 2: THE UNITED STATES

2.1 INTRODUCTION

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

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

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

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

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

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

²¹ Ramsay “Comparative Consumer Bankruptcy” 250.

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

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

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



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

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

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

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

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

²⁷ Ramsay “Comparative Consumer Bankruptcy” 256.

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

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

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

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

³² Ziegel “Facts on the Ground” 321.

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



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

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

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

³⁴ Ramsay “Comparative Consumer Bankruptcy” 256.

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

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

³⁷ Ziegel “Facts on the Ground” 302.

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

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

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

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

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

⁴⁰ Martin "Common-Law Bankruptcy Systems" 367.

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

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

⁴³ Carruthers 54.



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

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

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

⁴⁵ Ramsay “Comparative Consumer Bankruptcy” 271.

⁴⁶ Hereafter referred to as the US Trustee.

⁴⁷ Ramsay “Comparative Consumer Bankruptcy” 271.

⁴⁸ Evans 13.

⁴⁹ Burdette 124.

⁵⁰ See (n 35). See Evans 135.



2.2 HISTORICAL OVERVIEW OF THE AMERICAN BANKRUPTCY LAW

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

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

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

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

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

⁵⁵ Rajak "The Culture of Bankruptcy" 19.

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

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



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

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

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

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

⁵⁹ White 53.

⁶⁰ (34 and 35 Hen VIII, c 4).

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

⁶² Chapter 19, 2 Stat 19.

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

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

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



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

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

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

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

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

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

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

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

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

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

⁷³ The English Act of 1831.

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



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

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

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

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

⁷⁶ Tabb "The History of Bankruptcy Laws" 18.

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

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

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

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

⁸¹ Skeel *Debt's Dominion* 27.

⁸² White 55.

⁸³ (32 and 33 Vict, c 71).



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

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

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

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

⁸⁵ Tabb “The History of Bankruptcy Laws” 19.

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

⁸⁷ Tabb “The History of Bankruptcy Laws” 19.

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

⁸⁹ White 55.

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

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

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

⁹³ (46 and 47 Vict, c 71).



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

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

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

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

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

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

⁹⁷ Chapter 541 par 34, 30 Stat at 555.

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁵ Skeel *Debt’s Dominion* 43.

¹⁰⁶ Skeel *Debt’s Dominion* 43.

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

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

¹⁰⁹ Lester 298. According to Congressman Doliver:

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

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

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

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



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

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

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

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

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

¹¹³ Hereafter referred to as the Commission.

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

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

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

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

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

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

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

¹¹⁹ Tabb "The History of Bankruptcy Laws" 35.

¹²⁰ Aminoff 127.

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

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

¹²³ Tabb "The History of Bankruptcy Laws" 34.

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

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

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



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

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

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

¹²⁷ Skeel “Bankruptcy Lawyers” 514.

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

¹²⁹ Ziegel *Comparative Consumer Insolvency* 57.

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

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

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

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



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

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

¹³⁴ Schlecter “Before and after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005” 787.

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

¹³⁶ 11 USC par 704(b)(1).

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

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

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

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



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

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

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

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

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

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

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

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

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

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

2.3 REGULATORY FRAMEWORK: THE UNITED STATES TRUSTEE

2.3.1 Introduction

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

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

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

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

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

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

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



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

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

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

The report then went on to make the following recommendation:

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

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

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

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

¹⁵³ 1973 *Commission Report* 18.

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

¹⁵⁵ 1973 *Commission Report* 18.

¹⁵⁶ 1973 *Commission Report* 18.

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

¹⁶⁸ 28 USC pars 581-589a.

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

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

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

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

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

2.3.2 Duties of the US Trustee

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

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

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

¹⁷⁴ White "Bankruptcy Law Provides New Tools" 4.

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

¹⁷⁶ Treister 95.

¹⁷⁷ NBRC *Report* 844.



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

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

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

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

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

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

¹⁸⁰ Strategic Plan FY 2005-2010 2.

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

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

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

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

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

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

¹⁸⁵ 11 USC pars 523 and 727.

¹⁸⁶ 28 USC par 586 (d).

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

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

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

¹⁹⁰ Albergotti 20.

¹⁹¹ Albergotti 11.

¹⁹² 11 USC par 1107 (1994).



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

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

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

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

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

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

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

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

¹⁹⁸ 11 USC par 1328. See Treister 97.

¹⁹⁹ 28 USC par 586(a)(3)(C).

²⁰⁰ Treister 97.



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

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

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

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

²⁰² Ziegel “Comparative Consumer Insolvency” 61.

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

²⁰⁴ 11 USC par 701(a)(2).

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

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

²⁰⁷ 28 USC par 586(d)(1).

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

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



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

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

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

²¹⁰ 28 USC par 1930(a)(6).

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

²¹² Treister 99.

²¹³ Ziegel “Comparative Consumer Insolvency” 61.

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

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

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

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



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

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

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

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

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

²¹⁹ See (n 136).

²²⁰ See (n 138).

²²¹ See (n 135).

²²² 11 USC par 707(b) (2005).

²²³ White “Bankruptcy Law Provides New Tools” 4.

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

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

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



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

2.4 REGULATORY FRAMEWORK: THE BANKRUPTCY ADMINISTRATOR

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

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

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

²²⁸ White "Bankruptcy Law Provides New Tools" 2.

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

²³⁰ 28 USC par 586(f).

²³¹ Alexander "Non-Uniform Bankruptcy Laws" 550.

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

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

²³⁴ Alexander 550.



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

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

²³⁵ NBRC Report 1039.

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

²³⁷ NBRC Report 1039.

²³⁸ NBRC Report 1039.

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

²⁴⁰ 38 F 3d 1525 (9th Cir 1994).

²⁴¹ Alexander 550.

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



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

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

2.5 INSTITUTIONAL FRAMEWORK: ROLE OF THE COURTS

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

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

²⁴³ 28 USC par 1930(a)(7) (2000).

²⁴⁴ NBRC *Report* 1039.

²⁴⁵ White 61.

²⁴⁶ Tabb “The History of Bankruptcy Laws” 34.

²⁴⁷ Treister 7.

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

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

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

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

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

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

²⁵¹ Tabb “The History of Bankruptcy Laws” 34.

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

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

²⁵⁴ 458 US 50, 102 S Ct 2858 (1982).

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



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

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

²⁵⁶ White 61.

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

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

²⁵⁹ Hereafter referred to as “BAFJA”.

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

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

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

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

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

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

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

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

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

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

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

²⁶⁸ 11 USC par 105. See Ahart 2.

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

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

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

²⁷² Ziegel *Comparative Consumer Insolvency* 61.



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

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

²⁷⁴ Milman 149.

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

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

CHAPTER 3: UNITED KINGDOM

3.1 INTRODUCTION

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

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

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

²⁷⁸ See Burdette 78; Evans 83.

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

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



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

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

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

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

²⁸³ Hereafter referred to as the Cork Committee.

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

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

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

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

²⁸⁸ Ramsay “Bankruptcy in Transition” 223.

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

²⁹⁰ See Ramsay “Bankruptcy in Transition” 225.

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

3.2 HISTORICAL OVERVIEW OF ENGLISH INSOLVENCY LAW

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

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

²⁹¹ Came into force in October 2001.

²⁹² Fletcher 27.

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

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

²⁹⁵ Milman 24.

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

²⁹⁷ (34 and 35 Hen VIII, c 4).

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

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



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

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

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

³⁰⁰ (13 Eliz I, c 7)

³⁰¹ Lester 18.

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

³⁰³ (5 Geo II, c 30).

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

³⁰⁵ See Milman 7; Lester 19.

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

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

³⁰⁸ Lester 12.



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

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

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

³⁰⁹ Milman 7.

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

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

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

³¹³ Milman 9.

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



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

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

³¹⁵ Lester 2.

³¹⁶ Hicks 124 (n 3).

³¹⁷ (1 and 2 Will IV, c 56).

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

³¹⁹ Lester 3.

³²⁰ Skeel “The Genius of the 1898” 326.

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

³²² (24 and 25 Vict, c 134).

³²³ Skeel “The Genius of the 1898” 326.

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

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

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

³²⁴ (32 and 33 Vict, c 71).

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

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

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

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

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

³³⁰ Tolmie 39.

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

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

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



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

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

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

³³⁴ Lester 290.

³³⁵ Lester 292.

³³⁶ Lester 292.

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

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

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

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

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

³⁴⁰ Frieze 2.

³⁴¹ Frieze 2.

³⁴² See Frieze 2; Milman 10.

³⁴³ Milman 10.

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

³⁴⁵ Fletcher 13.

³⁴⁶ Cork *Report* (n 282).



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

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

3.2.1 Insolvency Regulation as Envisaged by the *Cork Report*

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

³⁴⁷ Fletcher 17.

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

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

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

³⁵¹ See (n 286).

³⁵² Ramsay "Bankruptcy in Transition" 225.

³⁵³ Insolvency Act 1986 s 279(2).

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

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

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



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

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

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

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

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

³⁵⁹ Hereafter referred to as the Cork Committee.

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

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

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

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

³⁶⁴ Fletcher 17.

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

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



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

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

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

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

³⁶⁷ Finch 12-13.

³⁶⁸ Cork *Report* ch 20.

³⁶⁹ Cork *Report* ch 14.

³⁷⁰ Cork *Report* chs 15-16.

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

³⁷² Cork *Report*, ch 14 par 702.



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

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

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

³⁷³ Key 34.

³⁷⁴ Carruthers 59.

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

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

³⁷⁷ *Cork Report* par 1003.

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

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

³⁸⁰ Carruthers 64.



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

3.3 REGULATORY FRAMEWORK: THE INSOLVENCY SERVICE

3.3.1 General

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

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

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

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

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

³⁸⁴ Sealy 1.

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

³⁸⁶ Fletcher 31.

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

³⁸⁸ Fletcher 32.



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

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

³⁸⁹ Fletcher 32.

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

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

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

³⁹³ Fletcher 32.

³⁹⁴ Milman 20.



3.3.2 Office of the Official Receiver

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

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

³⁹⁵ Insolvency Act 1986 s 399(2).

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

³⁹⁷ See Flynn 5; Fletcher 32.

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

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

⁴⁰⁰ Fletcher 32.



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

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

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

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

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

⁴⁰⁴ See Flynn 1; Milman 22; Fletcher 32.

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

⁴⁰⁶ Insolvency Act 1986 section 287(1).



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

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

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

⁴⁰⁷ Fletcher 47.

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

⁴⁰⁹ Insolvency Act 1986 s 287(3).

⁴¹⁰ Insolvency Act 1986 s 291(4).

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

⁴¹² Insolvency Act 1986 s 288(1).

⁴¹³ Insolvency Act 1986 s 292(5).

⁴¹⁴ Insolvency Act 1986 s 293(3).

⁴¹⁵ Pt XIII of the Insolvency Act 1986.

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

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

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

⁴¹⁷ Insolvency Act 1986 s 139.

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

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

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

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

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

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

3.3.3 Functions of the Insolvency Service

3.3.3.1 *General*

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

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

⁴²² See Milman 20; Fletcher ch 4.

⁴²³ Ramsay “Bankruptcy in Transition” 219.

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

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

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

⁴²⁷ Milman 125.

⁴²⁸ Milman 124.

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

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

The Insolvency Service:

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

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

⁴³⁰ Tolmie 205.

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

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

⁴³³ See (n 339).

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



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

3.3.3.2 *Investigations and Enforcement*

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

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

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

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

⁴³⁷ *Guide to the Insolvency Service* 12.

⁴³⁸ Tolmie 32.

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

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

⁴⁴¹ Tolmie 207.

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



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

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

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

⁴⁴³ Insolvency Act 1986 s 289. Milman 88.

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

⁴⁴⁵ Tolmie 225. See s 291 of Insolvency Act.

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

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

⁴⁴⁸ Fletcher 189.



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

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

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

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

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

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

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

⁴⁵⁴ Tolmie 227.

⁴⁵⁵ Keay 367.



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

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

⁴⁵⁶ The Insolvency Act 1986 s 236.

⁴⁵⁷ The Insolvency Act 1986 s 236(2).

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

⁴⁵⁹ Fletcher 710.

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



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

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

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

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

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

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

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



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

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

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

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

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

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

⁴⁶⁹ Fletcher 375.

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

⁴⁷¹ Section 6 of Company Directors Disqualification Act.

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



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

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

3.3.3.3 *The Regulation and Supervision of Insolvency Practitioners*

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

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

⁴⁷⁴ *Guide to Insolvency Service* 12.

⁴⁷⁵ Flynn 1.

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

⁴⁷⁷ Milman 67.

⁴⁷⁸ Fletcher 23.

⁴⁷⁹ Carruthers 68.

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

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

⁴⁸⁰ Fletcher 28.

⁴⁸¹ Ramsay "Professionals in Systemic Reform of Bankruptcy Law: The 1978 US Bankruptcy Code and the English Insolvency Act 1986" (2000) *American Bankruptcy LJ* 35 at 71 (hereafter referred to as Ramsay "Professionals in Bankruptcy Reform").

⁴⁸² Insolvency Act 1986 ss 292 and 293. Where a bankruptcy order has been made and no certificate for the summary administration of the bankrupt's estate has been issued, it is the duty of the official receiver, as soon as practicable in the period of 12 weeks beginning with the day on which the order was made, to decide whether to summon a general meeting of the bankrupt's creditors for the purpose of appointing a trustee of the bankrupt's estate.

⁴⁸³ Insolvency Act 1986 s 286. The court may, if it is shown to be necessary for the protection of the debtor's property, at any time after the presentation of a bankrupt's petition and before making a bankruptcy order, appoint the official receiver to be the interim receiver of the debtor's property.

⁴⁸⁴ The Insolvency Act 2000 inserted a new s 389A into the Insolvency Act 1986, which authorises the Secretary of State to recognise bodies that are not licensed insolvency practitioners to act as nominees or supervisors of voluntary arrangements.

⁴⁸⁵ Insolvency Act 1986 ss 252 and 253. Application to the court for an interim order may be made where the debtor intends to make a proposal to his creditors for a composition in satisfaction of his debts, or a scheme of arrangement of his affairs. The proposal must provide for some person ("the nominee") to act in relation to the voluntary arrangement either as trustee or otherwise for the purpose of supervising its implementation. This procedure makes provision for a moratorium for the insolvent debtor pending the implementation of a proposal to creditors.

⁴⁸⁶ The licensing framework for Insolvency Practitioners is set out in Insolvency Act 1986, Pt XIII. See Milman 21; Ramsay "Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy" (2000) *American Bankruptcy LJ* 399 (hereafter referred to as Ramsay "Market Imperatives").

⁴⁸⁷ Milman 21.



As mentioned, the Insolvency Service is within the present statutory framework responsible for authorising and regulating the insolvency profession and thus the Insolvency Service exercises the licensing function of the Secretary of State.⁴⁸⁸ The scheme of regulation is therefore that of government-monitored self-regulation and the regulatory structure consists of the following:

- a The Secretary of State for Department for Business, Innovation and Skills has powers to authorise practitioners directly or to delegate that power to professional bodies;⁴⁸⁹
- b The Insolvency Service as an agent of the Secretary of State directly monitors authorised insolvency practitioners;⁴⁹⁰
- c The Insolvency Service has jurisdiction to authorise insolvency practitioners who wish to provide services in Great Britain – that is, England, Wales and Scotland – according to the European Union Directive;⁴⁹¹

⁴⁸⁸ Norris *Insolvency Practitioner Regulation in the United Kingdom* (2004) unpublished paper presented at the Academics' Meeting of the INSOL Congress, Cape Town (hereafter referred to as Norris "Insolvency Practitioner Regulation") on file with the author.

⁴⁸⁹ To date, seven such professional bodies have been recognised by the Secretary of State. See Norris "Insolvency Practitioner Regulation" 4; see Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK* (2006) unpublished paper presented at the INSOL Europe Annual Conference, Romania (hereafter referred to as Walters "The Licensing, Regulation and Supervision of Insolvency Practitioners in the United Kingdom") on file with the author.

⁴⁹⁰ Insolvency Act 1986 s 393(1) contains the power to grant or refuse the authorisation to act as an insolvency practitioner. Where the Secretary of State refuses an application, or withdraws a holder's authority to act, the applicant or holder will be notified in writing, setting out the reasons for the refusal or withdrawal, and informing the interested party of the date the action will take effect. Insolvency Act 1986 s 396 introduces a more substantial procedure, which involves referring the case to the Insolvency Practitioners Tribunal (IPT). The Insolvency Practitioners Tribunal was established as an independent statutory body by the Insolvency Act, and its function is to deal with cases referred by the Secretary of State regarding whether or not an individual should be an authorised insolvency practitioner. See Insolvency Act 1986 ss 396-397. See also Fletcher 33.

⁴⁹¹ In the context of insolvency practitioners, the EU Directive The European Communities (Recognition of Professional Qualifications) Regulations 2007 SI 2781 /2007 implemented in part EU Directive 2005/36 provides that practitioners who have acquired professional qualifications in one relevant state (members of EEA and Switzerland) shall have access to that profession in the other relevant states. In practical terms an applicant from a relevant state who wishes to become established in another state (the host state) will be able to apply for authorisation to a competent authority and that authority will be required to recognise equivalent professional qualifications obtained in the applicant's home state or other relevant state where he or she is authorised to act in that state. The Insolvency Service has jurisdiction



- d The Insolvency Service as an agent of the Secretary of State accredits those professional bodies which license their members;⁴⁹² and
- e The professional bodies are responsible on terms agreed in memoranda of understanding (MoU) with the Secretary of State to oversee the professional and ethical standards, monitoring and discipline of those members who practise as insolvency practitioners.⁴⁹³

The present regulation of insolvency practitioners is derived from an inbuilt requirement within the Insolvency Act 1986 whereby eligibility to act as an office-holder in an insolvency proceeding is restricted to persons who are “qualified” within the meaning of the Act.⁴⁹⁴ The Act provides that a person is qualified to act as an insolvency practitioner only where he or she is authorised so to act by virtue of membership of a recognised professional body being permitted so to act by, or under the rules of, that recognised body or if he or she holds an authorisation granted by a competent authority.⁴⁹⁵ At present, the Secretary of State for the Department of Business, Innovation and Skills is the only recognised competent authority.⁴⁹⁶

To achieve the status of a recognised professional body, a professional body must satisfy the criteria in the Insolvency Act 1986, which provide that a body may be recognised if:

... it regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules act as insolvency

to authorise insolvency practitioners who wish to provide services in Great Britain (GB) – that is, England, Wales and Scotland.

⁴⁹² Insolvency Act 1986 s 391(2) if the Insolvency Act provides that the Secretary of State may declare a body to be a recognised Professional Body if it:

regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules to act as insolvency practitioners

a are fit and proper persons to act, and

b meet acceptable requirements as to education and practical training and experience.

⁴⁹³ Norris “Insolvency Practitioner Regulation” 4.

⁴⁹⁴ Fletcher 33. Insolvency Act 1986 s 389 makes it an offence to act as insolvency practitioner when he is not qualified to do so. The word “qualified” refers not only to a professional qualification but to a complex set of requirements.

⁴⁹⁵ Insolvency Act 1986 s 390(2). See Walters “The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK” 1-2.

⁴⁹⁶ Norris “Insolvency Practitioner Regulation” 4.



practitioners – (a) are fit and proper persons so to act, and (b) meet acceptable requirements as to education and practical training and experience.⁴⁹⁷

Any applicant wanting to act as an insolvency practitioner may thus obtain a licence to be authorised to act as such in one of two alternative manners, *viz* by virtue of membership of a recognised professional body, or by direct application to the Secretary of State.⁴⁹⁸ In both instances a licence will only be granted if a person has proved that he or she is a “fit and proper”⁴⁹⁹ person, and has satisfied the prescribed requirements for education⁵⁰⁰ and practical training and experience⁵⁰¹ within the meaning of the Insolvency Act of 1986.⁵⁰² The direct licensing of insolvency practitioners by the Secretary of State is governed by eligibility criteria similar to those which the recognised professional bodies are required to impose in relation to fitness and propriety and education and training requirements.⁵⁰³

The UK recently introduced new Insolvency Regulations with regard to the regulation of insolvency practitioners.⁵⁰⁴ The Insolvency Regulations represent a set of secondary legislation which makes detailed provision for the authorisation of insolvency practitioners

⁴⁹⁷ Insolvency Act 1986 s 391(2). The relevant order is the Insolvency Practitioners (Recognised Professional Bodies) Order 1986 (SI 1986/1764) under which the following bodies are recognised: the Chartered Association of Certified Accountants; the Institute of Chartered Accountants of England and Wales; the Institute of Chartered Accountants of Scotland; the Institute of Chartered Accountants of Ireland; the Insolvency Practitioners Association; the Law Society of Scotland; and the Law Society.

⁴⁹⁸ The concept of acting as an insolvency practitioner is dealt with in Insolvency Act 1986 s 388. Section 389(1) of the Act also makes it criminal offence punishable by imprisonment and/or a fine to act as an insolvency practitioner in relation to a company or individual when not qualified to do so. See Walters “The Licensing, Regulation and Supervision of Insolvency Practitioners in the United Kingdom” 1.

⁴⁹⁹ According to Reg 6 of Insolvency Practitioners Regs 2005.

⁵⁰⁰ Have passed the Joint Insolvency Examination set by the Joint Insolvency Examination Board.

⁵⁰¹ A common standard among the accountancy bodies is at least 600 hours of insolvency experience over a period of three years.

⁵⁰² Insolvency Act 1986 s 393(2).

⁵⁰³ Insolvency Act 1986 s 396-398.

⁵⁰⁴ Statutory Instrument 2005 no 524, the Insolvency Practitioners Regs 2005, which came into force on 2005-04-01. The UK recently introduced new Insolvency Regulations (Statutory Instrument 2005 no 524, the Insolvency Practitioners Regs 2005) in regard to the regulation of insolvency practitioners, and these came into force on 1 April 2005. Regulation 6 sets out the matters to be taken into account by a competent authority in deciding whether an individual is a fit and proper person to act as an insolvency practitioner. Regulations 7 and 8 set out prescribed requirements regarding education and training in relation to insolvency practitioners seeking an authorisation from a competent authority. A person will therefore not be able to accept an appointment as an insolvency practitioner if he or she is not authorised to do so by virtue of membership of a professional body recognised under the Insolvency Act 1986.



by the Secretary of State under the direct licensing alternative.⁵⁰⁵ In practice, the Insolvency Service and the recognised professional bodies have sought to achieve consistency through institutional mechanisms such as a memorandum of understanding⁵⁰⁶ entered into and the formation of a Joint Insolvency Committee,⁵⁰⁷ which acts as a forum for discussion and coordination.⁵⁰⁸

This obligation of “stewardship” is a common facet of English law in which one person is selected to oversee the assets of another. Clearly one consequence of this status is that trustees should not profit from handling the estate assets over and above their agreed remuneration. It should be noted further that any person in office in an insolvency proceeding appointed by the court is acting as an officer of court, and as such becomes subject to the duty to act honourably as laid down by the court in *Ex parte James*.⁵⁰⁹ The principle was stated as:

I am of the opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given to him by the Court and the Court regards him as its officer and he is to hold money in his hands upon trust for its equitable distribution among creditors. The Court, then finding that he has in his hands money which in equity belongs to someone else, ought to set example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people.⁵¹⁰

⁵⁰⁵ Regulation 6 sets out the matters to be taken into account by a competent authority in deciding whether an individual is a fit and proper person to act as an insolvency practitioner. Regulations 7 and 8 set out prescribed requirements regarding education and training in relation to insolvency practitioners seeking an authorisation from a competent authority. See Calitz “The Role of the Master of the High Court” 735.

⁵⁰⁶ Available at www.insolvency.gov.uk/freedomofinformation/memorandum%20of%20Understanding.doc (last visited at 09-11-30).

⁵⁰⁷ Formation in 1999.

⁵⁰⁸ Walters “The Licensing, Regulation and Supervision of Insolvency Practitioners in the United Kingdom” 6.

⁵⁰⁹ (1874) LR 9 Ch App 609. It is often been said that the principle requires trustees to behave fairly and honourably, although, in practice, it seems to operate in favour of parties at whose expense the insolvent estate has been unjustly enriched in circumstances where assets have been handed over to the trustee on the mistaken assumption that the estate was entitled to them. See Walters “The Licensing, Regulation and Supervision of Insolvency Practitioners in the United Kingdom” 12. See also *Re Collins & Aikman Europe SA* [2006] EWHC 1343 (Ch).

⁵¹⁰ *Ex parte James* (1874) LR 9 Ch App at 614.



The Insolvency Practitioner Unit is responsible for all policy matters relating to the authorisation and regulation of insolvency practitioners, including the regulation of the Recognised Professional Bodies. The unit issues guidance to insolvency practitioners and provides advice to Ministers, officials and the public on the regulation of insolvency practitioners.

While the system of regulation in the UK is fairly well developed, it has not been without criticism. It has been suggested that the Insolvency Service's dual role of "regulator of regulator" and that of authorising body for the Secretary of State could result in a potential conflict of interest. This allegation has been denied by the Inspector-General of the Service and explained on the basis that the Service does not actively promote its power to license insolvency practitioners and in practice only does so in relation to a small number of individuals, currently totalling 92.⁵¹¹ The English licensing model has at times also been criticised as overly complex and fragmentary, and it has been objected that the number of recognised professional bodies causes confusion and leads to a duplication of resources and costs.⁵¹² In his response, the Inspector-General explained that this was due to the way in which the regulation of the insolvency profession has evolved. He argued that the real issue was whether the regulation was consistent, which he believed it to be.⁵¹³

3.3.3.4 Policy

The Ministerial responsibility for policy matters relating to insolvency law falls under the Department for Business, Innovation and Skills. In turn, the responsibility for the development and implementation of policy and of securing compliance with the

⁵¹¹ See Business and Enterprise Committee *The Insolvency Service: Sixth Report of Session (2008-09)* – House of Commons, April 2009 22 (hereafter referred to as *Business and Enterprise Committee Report*) on file with the author.

⁵¹² See Walters *First Report: Complaints Handling in the Insolvency Practitioner Profession* (Jan 2008) available at <http://ssrn.com/abstract=1094757> (last visited at 09-11-30) and *Second Report: Complaints Handling by the Regulators of Insolvency Practitioners: A Comparative Study* (Jan 2009) available at <http://ssrn.com/abstract=1310791> (last visited at 09-11-30) on file with the author.

⁵¹³ *Business and Enterprise Committee Report 22*.

insolvency legislation has been delegated to the Insolvency Service.⁵¹⁴ The Service is able to amend and modernise secondary insolvency legislation and issue new Insolvency Rules⁵¹⁵ to replace the current rules, which had been in force since 1986.

A distinctive feature of the Insolvency Service is the role it plays in the evaluation and development of insolvency law policy, procedures, and legislation as well as acting in an advisory capacity to Ministers and other government department and agencies on insolvency and related matters.⁵¹⁶ The extensive liaison with officials from HM Treasury in relation to the new modified insolvency regimes for banks, enacted through the Banking Act of 2009, serves as an example of the strategic and technical assistance provided by the Service to other departments. The project assisted in ensuring that the new legislation delivers appropriate variations from normal insolvency law required for financially distressed banks.⁵¹⁷

To meet its goal of ensuring that the legislative framework for insolvency is up to date, fit for its purpose and serves the needs of its users, the Service is involved in several evaluation and consultation projects and also undertakes and commissions research projects to further assist with policy-making and evaluation.⁵¹⁸ Several instances can be mentioned where the Insolvency Service has either been directly involved or has influenced the development of insolvency legislation or policy.⁵¹⁹

⁵¹⁴ Goode *Principles of Corporate Insolvency Laws* (2005) 17 (hereafter referred to as Goode).

⁵¹⁵ *Annual Report and Accounts* (2008-2009) 28.

⁵¹⁶ *Guide to Insolvency Service* 18.

⁵¹⁷ *Annual Report and Accounts* (2008-2009) 9.

⁵¹⁸ *Annual Report and Accounts* (2008-2009) 8. The Insolvency Service recently commissioned Michael Green, a Research Fellow of the University of Wales, to carry out research into IVAs, over-indebtedness and the insolvency regime. Report on file with the author.

⁵¹⁹ Following consultation and published information, the proposals for DRO were incorporated into the recent Tribunals, Courts and Enforcement Act 2007. The main effects of the Act are to introduce a package of measures to help those who are willing and able to pay off their debts over time and a new personal insolvency procedure for some people who have fallen into debt and have no foreseeable way out of it. The Act has its basis in a number of White Papers and consultation papers commissioned by the Service including “Relief for The Indebted – An Alternative to Bankruptcy”, on file with the author. The Service has also been directly involved in the development of new rules relating to pre-pack administrations. The new rules (Statement of Insolvency Practice number 16) will require administrators to explain to the creditors the background to their appointment and the reasons why they consider that a “pre-pack” sale would be the best outcome. Following consultation and published information, the proposals for debt relief orders were incorporated into the recent Tribunals, Courts and Enforcement Act 2007. The Insolvency Service established a stakeholder working group in 2004 to consider how the IVA regime could be improved. See



3.4 INSTITUTIONAL FRAMEWORK: ROLE OF THE COURTS

In many ways the courts are at the apex of the system, as they are, either on their own volition or upon applications made by interested parties, able to direct how an insolvency administration is to be conducted. They can also decide on contentious issues which may arise during the course of an insolvency administration. It is important to note that courts do not, as a matter of necessity, have to be involved in the daily process of administration except where they ought to be involved in the initiation of the process.⁵²⁰ With the view to providing a more efficient and expeditious judicial service, a bankruptcy court was established in London in 1831.⁵²¹ Although originally scheduled to merge with the Supreme Court of Judicature, the bankruptcy court in London functioned separately until finally merging with the High Court under the Bankruptcy Act of 1883. Under this Act the High Court acquired jurisdiction in bankruptcy, which it retains to the present day.⁵²²

The administration of personal and corporate insolvency matters has remained largely distinct, with bankruptcy matters being allocated in the first instance to the High Court Registrars sitting in court rooms designated as “bankruptcy courts”, while company winding-up proceedings are heard by judges or Registrars of the Chancery Division either in chambers or in the company court.⁵²³ It is thus only on appeals – either to a single judge of the Chancery Division or to the Court of Appeal – that cases from the two branches of insolvency law are likely to be heard or considered by judges from the same group.⁵²⁴

Initially, jurisdiction in bankruptcy outside London was vested in a system of District Bankruptcy Courts, but with the creation of county courts under the County Courts Act of

Roestoff “Debt Relief for Consumers – The Interaction between Insolvency and Consumer Protection Legislation (Part II)” 2005 *Obiter* 99 for a discussion of the alternative debt relief measures and proposals in the UK. The Service is also undertaking to modernise the insolvency legislation (Insolvency Rules Modernisation Project) and the first phase came into force in April 2009.

⁵²⁰ Keay 30.

⁵²¹ (1&2 Will 4, c 56): “An Act to establish a Court in Bankruptcy”. See Fletcher 31.

⁵²² Insolvency Act 1986 s 373(3)(a). See Fletcher 31.

⁵²³ Fletcher 31.

⁵²⁴ Fletcher 31.



1846 it became feasible to rationalise the administrative arrangements.⁵²⁵ Thus it came about that under the Bankruptcy Act 1847 certain county courts acquired exclusive control over bankruptcy matters outside London. This jurisdiction has been retained ever since in the bankruptcy proceedings taking place outside the area formerly known as the London Bankruptcy District, and renamed the London Insolvency District in 1986.⁵²⁶

At present no specialist insolvency court exists as part of English laws, and this state of affairs has attracted a mixed reaction by role-players.⁵²⁷ The Cork Committee in its final commentary was in favour of such an innovation, and called for the establishment of a new insolvency court with exclusive jurisdiction in all insolvency matters.⁵²⁸ It also recommended the introduction of a new institution with the objectives of giving consistency to decisions in insolvency matters and allowing judges to acquire a detailed knowledge of the subject for the benefit of the users of the system.⁵²⁹ Some of the judges were, however, opposed to such a development and viewed it as being pigeon-holed into a court with a specific jurisdiction. The Lord Chancellor simply informed his cabinet colleagues and the then Department of Trade and Industry that he rejected the *Cork Report's* proposal for a new insolvency court and the matter went no further.⁵³⁰ Over the years there have been certain writers who have also advocated the promotion of specialist judicial skills in the insolvency field.⁵³¹

⁵²⁵ Fletcher 31.

⁵²⁶ Insolvency Act 1986 s 374(4)(a) and Schedule 3 to the Civil Courts Order 1983 as amended. See Fletcher 26.

⁵²⁷ Milman 19.

⁵²⁸ *Cork Report* par 1003. Milman 19.

⁵²⁹ *Cork Report* par 1003. See also Aminoff 131.

⁵³⁰ Carruthers 63.

⁵³¹ Green *Individual Voluntary Arrangements: Over-indebtedness and the Insolvency Regime* (2002) on file with the author. See Milman 20.



CHAPTER 4: THE NETHERLANDS

4.1 INTRODUCTION

The basic origin of modern South African law remains the Roman-Dutch law as it was introduced in the southern part of Africa approximately four centuries ago.⁵³² In 1803 the establishment of the institution of the *Desolate Boedelkamers* in the Cape of Good Hope was a significant development in the historical evolution of state regulation in South African insolvency law, and also laid the foundation for the institution of the Master of the High Court.⁵³³ Although Dutch bankruptcy laws of today differ substantially from the days of the *Desolate Boedelkamers*⁵³⁴ it nevertheless seems appropriate to conclude this part with a brief discussion of the Dutch bankruptcy law as it functions today.

“It took from the English law of bankruptcy the provisions regarding the proof of debts, accounts and their confirmation and the rehabilitation and discharge of the debtor, and from Roman-Dutch law the rules relating to the vesting of ownership and preferences.”⁵³⁵

The legislation which established the principles of South African insolvency law, the 1843 Cape Ordinance,⁵³⁶ was a mixture of English and Roman-Dutch law.⁵³⁷ Thus in response to an argument by counsel about the relevance of an English case, in *Mills and*

⁵³² It should be noted that Roman-Dutch law is not the only system applied in South Africa. In certain fields indigenous African law is to be applied under certain circumstances to certain persons. See Van Warmelo “The Function of Roman Law in South African Law” (1958-1959) *Tulane LR* 565 (hereafter referred to as Van Warmelo). See, eg, *Fairlee v Raubenheimer* 1935 AD at 136; *Swadif (Pty) Ltd v Dyke* 1978 1 SA 928 (A) at 938; *Millman v Twiggs* 1995 3 SA 674 (A) 679 at 680.

⁵³³ The title of Master of the High Court (then Master of the Supreme Court) was bestowed in legislation of the Cape of Good Hope enacted during English rule in 1828. Stander “Gesiedenis van die Insolvensiereg” (1996) *TSAR* 371 (hereafter referred to as Stander “Gesiedenis van die Insolvensiereg”); De Villiers *Die Ou- Hollandse Insolvensiereg en die Eerste Vaste Insolvensiereg van de Kaap De Goede Hoop* (1923) 77 LLD dissertation University of Leiden (hereafter referred to as De Villiers).

⁵³⁴ See discussion in part II of this study.

⁵³⁵ Hahlo *The Union of South Africa: The Developments of its Laws and Constitution* (1960) 22 (hereafter Hahlo and Kahn).

⁵³⁶ See Bertelsmann *et al. Mars: The Law of Insolvency in South Africa* (2008) 11 (hereafter referred to as Mars); Stander “Gesiedenis van die Insolvensiereg” (1996) *TSAR* 377 (hereafter referred to as Stander “Gesiedenis van die Insolvensiereg”).

⁵³⁷ Also adopted in Transvaal, Natal and the Orange Free State in the nineteenth century. See Palmer *Mixed Jurisdictions Worldwide* (2001) 112 (hereafter referred to as Palmer).

Sons v Trustees of Benjamin Bros,⁵³⁸ De Villiers CJ noted that the terms of the 1843 Ordinance which define the rights vested in the trustee in insolvency “differ materially from those of the English law with regard to the assignee in bankruptcy”.⁵³⁹ The current insolvency statute, the Insolvency Act of 1936, is strongly influenced by the 1777 Ordinance of Amsterdam, as also noted in *Fairlie v Raubenheimer*.⁵⁴⁰ While Roman-Dutch law in its proper form ceased to be applied in the Netherlands as early as the beginning of the nineteenth century, it is still to be consulted by South African courts in questions on which the insolvency statute is silent.⁵⁴¹

The present Dutch civil code can be found in the *Nieuwe Burgerlijk Wetboek*⁵⁴² of 1992, the successor to the previous *Burgerlijk Wetboek* of 1938. While the present Code was substantially influenced by the French *Code Civil* supplemented with former Dutch law, it did adopt many Dutch innovations. A considerable part of the Code is based on joint roots of both French and Dutch law, as a result of their shared origin in Roman law.⁵⁴³ The main source of Dutch bankruptcy law is the Netherlands Bankruptcy Act 1896,⁵⁴⁴ and although the Act has been amended from time to time it has remained nearly unchanged.⁵⁴⁵ The Act consists of three different procedures of which the most important are the procedures relating to the suspension of payment (*surséance van betaling*)⁵⁴⁶ and bankruptcy proceedings (*faillissementsprocedure*).⁵⁴⁷ In 1998 as subtitle to the Dutch Bankruptcy Act, the Consumer Bankruptcy Act⁵⁴⁸ was enacted.⁵⁴⁹ At present the

⁵³⁸ (1876) 6 Buch 115 at 121.

⁵³⁹ As cited in Palmer 112.

⁵⁴⁰ 1935 AD 136 at 146.

⁵⁴¹ Palmer 112.

⁵⁴² Meijer “Influence of the Civil Code in the Netherlands” (2002) *European Journal of Law and Economics* 1 (hereafter referred to as Meijer).

⁵⁴³ Meijer 2.

⁵⁴⁴ Also referred to as *Faillissementswet* or *Fw*.

⁵⁴⁵ Declercq “Restructuring European Distresses Debt: Netherlands Suspension of Payment Proceeding ... The Netherlands Chapter 11?” (2003) *American Bankruptcy LJ* 377 at 384 (hereafter referred to as Declercq “Restructuring European Distresses Debt”).

⁵⁴⁶ Titel II art 213-283 *Fw*

⁵⁴⁷ Titel I art 1-213 *Fw*.

⁵⁴⁸ Also referred to as *Wet schuldsanering natuurlijke personen* or “Wsnp” (Act Debt Restructuring Private Individuals). Entered into force on 1 December 1998. See Title III art 213-283 *Fw*.

⁵⁴⁹ Declercq “Restructuring European Distresses Debt” 384. See also Huls “Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law” (hereafter



Netherlands is in the process of reviewing the 1896 *Faillissementswet*, with a preliminary draft for a new Dutch Insolvency Act⁵⁵⁰ recently presented to the Minister of Justice.⁵⁵¹ Due to the civil law nature of the Dutch bankruptcy law any reference to the underlying principles of their Code is of limited use to this study. However, when two jurisdictions that belong to markedly different legal cultures are compared, this recent statement in the House of Lords is particularly relevant: “The discipline of comparative law does not aim at a poll of solutions in different countries. It has the different and inestimable value of sharpening our focus on the weight of competing considerations”.⁵⁵² This means that the influence of comparative law in this type of study is that of finding inspiration in the process of weighing the arguments in favour or against a particular solution.⁵⁵³ At the same time, comparing countries with a similar legal history that nonetheless adopted different approaches to the development of insolvency law, and more specifically the regulatory aspects of the law, may be illuminating.

This chapter includes a brief overview of the historical development of Dutch bankruptcy law and a discussion of the Dutch regulatory framework in general. The three different bankruptcy proceedings available under the *Faillissementswet* will be discussed independently in order to illustrate the application of the Dutch regulatory provisions in practice.

4.2 HISTORICAL OVERVIEW OF THE DUTCH BANKRUPTCY LAW

Prior to 1799 no uniform bankruptcy legislation existed in the Netherlands. In 1799 a uniform Code of Civil Procedures was introduced which contained a chapter on

referred to as Huls) in Niemi-Kiesiläinen *Consumer Bankruptcy in Global Perspective*. For a detailed discussion of the Dutch bankruptcy law see Roestoff at 243-313.

⁵⁵⁰ Also referred to as *Voorontwerp Insolventiewet*.

⁵⁵¹ *Voorontwerp Insolventiewet* as compiled by the *Commissie insolventierecht* under the chairmanship of Professor Kortmann delivered to the Minister of Justice on 2007-11-01. See Kortmann *Geschiedenis van de Faillissementswet: Voorontwerp Insolventiewet* (2007) (hereafter referred to as Kortmann “Geschiedenis van de Faillissementswet”) on file with the author.

⁵⁵² Lord Steyn in *McFarlane v Tayside Health Board* 2000 SC (HL) 15.

⁵⁵³ Smits “Comparative Law and its Influence on National Legal Systems” 477 (hereafter referred to as Smits). in Reimann *The Oxford Handbook of Comparative Law* (2006).



bankruptcy law based on the 1777 Amsterdam Ordinance.⁵⁵⁴ In 1809 the Netherlands was occupied by the French and an amended version of the French Commercial Code was subsequently adopted.⁵⁵⁵ With French rule came a French way of running the state, which included a new system of positive law – the *Code Civil*.⁵⁵⁶ This practice remained in place for almost three decades and even though the Dutch legislators opted for a different approach, the *Burgerlijk Wetboek* of 1838 as well as the present-day Dutch civil code retains its strong French influence.⁵⁵⁷

Soon after the defeat of Napoleon and the regaining of independence in 1813, a new Dutch state was created comprising the Netherlands and Belgium. The French Codes were revised and adapted to suit the circumstances prevailing in the Netherlands and Belgium at the time.⁵⁵⁸ With regard to bankruptcy law certain draft proposals were presented in 1815 and onwards with the aim of returning to a system based on the Amsterdam Ordinance 1777.⁵⁵⁹ However, due to the dominant French influence as well as the fading desire to return to old Dutch traditions, none of the drafts were ever enacted.⁵⁶⁰ As a result the new draft Codes prepared in 1825 had a distinctly French flavour and were intended to apply only to merchants, while non-merchants were extensively dealt with in Book 11 of the Code of Civil Procedure, referred to as the *Staat van Kennelijk Onvermogen*.⁵⁶¹

Finally, with the introduction of the *Burgerlijk Wetboek* in 1838 provision was made for insolvency procedures which included both merchants and non-merchants, even though a different test for insolvency for each had been incorporated. The difference between the two procedures was finally abolished with the preparation and enactment of a new Act in 1893

⁵⁵⁴ Nederlandse Jaarboeken (1777) 291. See Dalhuisen par 3.03 [1] 1-68; Roestoff 246.

⁵⁵⁵ Dalhuisen par 3.03 [1] 1-68.

⁵⁵⁶ Roestoff 246.

⁵⁵⁷ Roestoff 246.

⁵⁵⁸ Dalhuisen par 3.03 [1] 1-68.

⁵⁵⁹ Dalhuisen par 3.03 [1] 1-68.

⁵⁶⁰ See Roestoff 247; Dalhuisen par 3.03 [1] 1-68.

⁵⁶¹ Dalhuisen par 3.03 [1] 1-69.



and in 1896 the *Faillissementswet*⁵⁶² was promulgated and remains in force today.⁵⁶³ Like other jurisdictions, the volume of consumer credit in the Netherlands grew exponentially from the late sixties to the late eighties, along with a growing incidence of excessive debt for some. The rising indicator of consumer economic distress became a cause for concern to policymakers who sought a legislative solution to the crisis. A report⁵⁶⁴ to the State Secretary of Justice caught the government's attention and subsequently the Mijnsen commission was appointed to investigate certain aspects of the Dutch bankruptcy laws.⁵⁶⁵ In October 1989 the commission issued a report containing a recommendation to introduce the concept of debt relief through voluntary debt settlement, which represented an important shift in the Dutch bankruptcy policy. The report was positively received and in 1992 a Government Reform Bill was introduced which subsequently became effective on 1 December 1998.⁵⁶⁶ The *Wet schuldsanering natuurlijke personen*⁵⁶⁷ added a new third and final title to the Dutch Bankruptcy Act of 1896.⁵⁶⁸

4.3 REGULATORY FRAMEWORK

4.3.1 General

The Dutch court plays a leading role in the regulation and interpretation of the bankruptcy laws, and although there is no system of specialised bankruptcy courts, each district court has a separate bankruptcy division. The judges acting in these divisions deal *inter alia* with petitions for suspension of payments and as *Rechter-commissaris* also acts

⁵⁶² Staatsblad 9.

⁵⁶³ Dalhuisen par 3.03 [1] 1-70. Roestoff 250.

⁵⁶⁴ Prepared by Prof NJH Huls. See Huls *Van Liquidatie tot rehabilitatie, Een beleidsgerichte verkenning naar de toepassingsmogelijkheden van het Amerikaanse faillissementsrecht voor particulieren* (November 1988). See also Verschoof *Schuldsaneringsregeling Voor Natuurlike Personen* (1998-12-17) (hereafter referred to as Verschoof).

⁵⁶⁵ Verschoof 12.

⁵⁶⁶ TK 1992-1993 22969, *Wijziging van de Faillissementswet in verband met de sanering van schulden van natuurlijke personen*. See Verschoof 13.

⁵⁶⁷ Also referred to as "WSNP".

⁵⁶⁸ Roestoff 250-255.

in a supervisory and advisory role to the trustee in bankruptcy.⁵⁶⁹ The Dutch regulatory framework consists of a system of court control whereby the districts court appoints a *Rechter-commissaris* entrusted with the supervision of the trustee's administrative actions. In the same judgment an administrator (*bewindvoerder*) or trustee (*curator*) is appointed and is charged with the administration and liquidation process. In the Netherlands usually an attorney at law is appointed.⁵⁷⁰

Relevant to this study is that the Netherlands law, and more specifically the current *Faillissementswet*, does not contain any formal requirements that have to be met for eligibility to act as a trustee. In practice, however, a certain selection process could be argued, as the courts almost always appoint a lawyer and in turn the *Advocatenwet*⁵⁷¹ sets forth certain statutory requirements in order to qualify for admission as a member of the bar.⁵⁷² In essence a person will approach the court with the request to be enrolled for appointment as trustee and each court will compile its own list of potential trustees. In recent years a tendency has arisen for courts to require successful attendance and completion of a specialised course developed by the *Grotius Academie*⁵⁷³ and the *Vereniging Insolventierecht Advocaten* (Insolad) or similar training as measurable entrance qualification.⁵⁷⁴ It remains clear, however, that no statutory guidelines, criteria or secondary legislation for the appointment or regulation of the Dutch trustee exist, and during the process of appointing a trustee the bankruptcy judge is not compelled to act according to any statutory limitations. A distinct feature of the Netherlands insolvency

⁵⁶⁹ Bekkers "Van Faillissementsrecht en Insolventie Recht naar het Recht Inzake Continuïteit- en Discontinuïteit-vraagstukken" (2005) *Kroniek van het Insolventierecht* (hereafter referred to as Bekkers) on file with the author.

⁵⁷⁰ Vriesendorp "The Righteous Trustee: The Influence of Creditors on the Appointment of a Bankruptcy Trustee from a Netherlands Perspective" (2008) *Potchefstroom Electronic LJ* (hereafter refer to as Vriesendorp "The Righteous Trustee"). Art 14 *Fw* en art 223a *FW*.

⁵⁷¹ A law was adopted on 1952-06-23 establishing the Bar of the Netherlands and laying down the internal regulations and the disciplinary rules applicable to *advocaten* and *procureurs* (the *Advocatenwet*, the Law on the Bar).

⁵⁷² Vriesendorp "The Righteous Trustee" 5

⁵⁷³ An institution for postgraduate legal education in the Netherlands.

⁵⁷⁴ Aimed at promoting uniformity among courts, the joint *Rechters-commissarissen* (*Recofa: Rechters-commissarissen in faillissementen*) recently published a set of bankruptcy guidelines regarding the provisions of *faillissementen* and *surseances van betaling*. See *Rechters-commissarissen in Faillissementen – Richtlijnen voor faillissementen en surseances van betaling* (2004), *bijlage bij TvI*, jaargang 11, januari 2005.



law is the lack of creditor participation in the appointment procedure and regulation process of the insolvency practitioner.

4.3.2 Bankruptcy (*Faillissement*)

The purpose of the Dutch bankruptcy proceedings is ultimately to liquidate all the debtor's assets for the benefit of his or her creditors.⁵⁷⁵ The debtor can voluntarily petition his or her own bankruptcy or creditors can file for a compulsory bankruptcy.⁵⁷⁶ For reasons of public order the public prosecutor can also file for bankruptcy of a debtor.⁵⁷⁷ The court will only proceed to declare a bankruptcy if the debtor "is in the situation of having stopped his payments".⁵⁷⁸ This will be considered the case if at least two creditors exist, and the debtor cannot, refuses to or simply does not pay one of the claims which has become due.⁵⁷⁹

Once the bankruptcy proceedings are confirmed the debtor loses the right to manage and dispose of his or her assets. In the judgment by which the debtor is declared bankrupt the court appoints a *Rechter-commissaris* (one of the members of the bench) and in the same judgment will appoint one or more independent persons to act as trustee(s) (*curator*) in the insolvent estate.⁵⁸⁰ As mentioned above, it is usually an attorney at law who is appointed.⁵⁸¹ The trustee is charged with the administration and liquidation of the bankruptcy estate and has the exclusive right to manage and dispose of the assets of the estate.⁵⁸² Simultaneously the district court will also appoint a *Rechter-commissaris*, who supervises the administration

⁵⁷⁵ Van Wijmen *Bankruptcy and a Fresh Start: Stigma on Failure and Legal Consequences of Bankruptcy, The Dutch Report 4* (2002-02-04) (hereafter referred to as the *Dutch Report*). See also Declercq "Restructuring European Distresses Debt" 384.

⁵⁷⁶ Artikel 1 *Fw*. Declercq "Restructuring European Distresses Debt" 384.

⁵⁷⁷ Artikel 1 *Fw*. Wessels *Insolventierecht I, Faillietverklaring* (2009) 107. See also Declercq "Restructuring European Distresses Debt" 384.

⁵⁷⁸ *Verkeert in de toestand dat hij heft opgehouden te betalen*. See Cork *European Insolvency Practitioners' Handbook: the AEPPC Compendium of Insolvency Law and Practice* (1984) 197 (hereafter referred to as *Cork European Insolvency Practitioners' Handbook*).

⁵⁷⁹ Declercq "Restructuring European Distresses Debt" 384.

⁵⁸⁰ Cork *European Insolvency Practitioners' Handbook* 199. See Declercq "Restructuring European Distresses Debt" 386.

⁵⁸¹ *Dutch Report 4*. Declercq "Restructuring European Distresses Debt" 384.

⁵⁸² Declercq "Restructuring European Distresses Debt" 386.



and liquidation of the estate and approves most of the legal steps the trustee undertakes.⁵⁸³ He or she is also responsible for convening creditors meetings for the proof of creditors' claims and will preside at these meetings.⁵⁸⁴ The *Rechter-commissaris* is also responsible for supervising the debtor. If the debtor refuses to co-operate with the trustee the *Rechter-commissaris* will request him to do so and could also sentence the debtor to detention. Creditors may also address the *Rechter-commissaris* with a request to hand certain orders down to the trustee.⁵⁸⁵

4.3.3 Suspension of Payments (*Surséance van Betaling*)⁵⁸⁶

The purpose of the suspension of payment proceedings is to give the debtor an opportunity to reorganise and to search for alternatives means of financing his or her debts and in order to continue his or her business. The proceedings are intended where the enterprise of the debtor is still viable, but are in temporary financial difficulties. The suspension of payment proceedings, however, is quite often only a gateway to ultimate bankruptcy.⁵⁸⁷

The petition for a suspension of payments will only be instituted at the request of the debtor him or herself. The criterion is that he or she foresees that he or she will no longer be able to pay his or her debts as they become due and payable.⁵⁸⁸ If at the same time both a petition for bankruptcy and a suspension of payment are pending before the court, the court will first deal with the latter. This is one of the reasons why debtors will make

⁵⁸³ Dutch Report 4-5.

⁵⁸⁴ Artikel 69 *Fw* Cork *European Insolvency Practitioners' Handbook* 198.

⁵⁸⁵ Cork *European Insolvency Practitioners' Handbook* 205.

⁵⁸⁶ The MDW Project, consisting of representatives of various Ministries under the chairmanship of Professor Raaijmakers, may have an effect on suspension of payment (*Surséance van Betaling*) procedures. The MDW project consists of two stages and the aim is investigate whether or not it is possible to enhance the "reorganisation ability" of the *Fw*. The first stage was completed in July 2000, with the submission of Bill 27 244 to the Second Chamber of Parliament. The Bill has not yet been adopted. The second stage is still ongoing and consists of in-depth consultations with all interested parties involved in the field of insolvency law. See Declercq "Netherlands Insolvency Law" 50-55.

⁵⁸⁷ See Dutch Report 4-5; Declercq "Restructuring European Distresses Debt" 385.

⁵⁸⁸ Cork *European Insolvency Practitioners' Handbook* 221.



use of these proceeding as a defence mechanism against a compulsory bankruptcy petition filed against their estate.⁵⁸⁹

In a suspension of payment process an independent third person, who will usually be an attorney at law, is appointed by the court to act as administrator(s) (*bewindvoerder*).⁵⁹⁰ The role of the *Rechter-commissaris* is however different from that of the *Rechter-commissaris* during bankruptcy proceedings as he or she acts in an advisory role only, and only at the specific request of the administrator.⁵⁹¹ The *Rechter-commissaris* does have the power to recommend the dismissal of an administrator.⁵⁹² After the suspension of payment is adjudicated, which occurs when the suspension of payment is granted in a court order, the administrator and the debtor are only allowed to continue with the business of the debtor with each other's consent.⁵⁹³ The administrator and debtor will therefore have to co-operate with each other. As Declercq remarks: "the debtor and administrator operate as Siamese twins in this regard".⁵⁹⁴

4.3.4 Debt Restructuring Private Individuals (*Schuldsaneringregeling Natuurlijke Personen*)

The debt-restructuring proceedings are regulated by the *Wet schuldsanering natuurlijke personen* and the aims of the Act are to offer a fresh start to over-indebted debtors who acted in good faith and to encourage more voluntary debt settlements by making judicial debt-adjusting financially less attractive to creditors.⁵⁹⁵ The Act applies to private individuals with or without a business. The core of the act is to provide private indebted individuals with the possibility of a fresh start (*schone lei*) and to prevent a lifelong debt responsibility.⁵⁹⁶

⁵⁸⁹ Dutch Report 5.

⁵⁹⁰ Artikel 215 par 2 *Fw*. See Dutch Report 6; Declercq "Netherlands Insolvency Law" 45.

⁵⁹¹ Artikel 223a *Fw*. See Declercq "Restructuring European Distresses Debt" 289. See also Dutch Report 6.

⁵⁹² Artikel 224 par 2 *Fw*.

⁵⁹³ Declercq "Restructuring European Distresses Debt" 386.

⁵⁹⁴ See Dutch Report 5- 6; Declercq "Netherlands Insolvency Law" 42.

⁵⁹⁵ Huls 303.

⁵⁹⁶ Roestoff 244.



To obtain the fresh start the debtor may approach the court with a debt-restructuring plan and if such plan is accepted an automatic stay will take effect and creditors will no longer have the right to claim outstanding debt.⁵⁹⁷ One of the requirements the court imposes before ordering the debt adjustment is that a debtor should previously have approached a debt management agency to negotiate a voluntary settlement and this negotiation should have failed.⁵⁹⁸ As part of the adjustment order the court will decide on the length of the payment period, the amount to be discharged and goods accruing to the estate. The debtor's entire capital and income above a certain legal minimum subsistence level is deposited into an estate account. At the end of more or less three years the proceeds are divided between creditors and as much of the debt as possible will be repaid to creditors.⁵⁹⁹

The court appoints a *Rechter-commissaris* and an administrator to supervise the debtor and to monitor the adjustment process.⁶⁰⁰ Any person may be appointed as an administrator and in some cases the court may even appoint a debt-relief social worker.⁶⁰¹ Only in the more complicated cases will an attorney be appointed. In order to be appointed as administrator, a debt-relief social worker will have to complete a training programme in the legal aspects of debt adjustment and will after successful completion be included in a register reserved for such purpose at court.⁶⁰²

The administrator is responsible for managing the debtor's assets and ensuring that he or she meets his or her obligations. He or she is also responsible for the success of the adjustment plan.⁶⁰³ It should be mentioned that the administrator may at some level be involved in drawing up the adjustment plan but it is important that he or she is not

⁵⁹⁷ Roestoff 244.

⁵⁹⁸ Huls 305.

⁵⁹⁹ Huls 305. On 2008-01-01 an amendment came into force which includes two new instruments – the so-called moratorium and the compulsory composition.

⁶⁰⁰ Huls 307. See also Verschoof 109.

⁶⁰¹ Verschoof 109. See also Dutch *Report 7*.

⁶⁰² Verschoof 109.

⁶⁰³ Artikel 316 *Fw*. See also Verschoof 107-108.



perceived to be a representative of the debtor, as he or she will have to at some stage express an independent opinion in regard to the merit of the plan.⁶⁰⁴

In contrast to the suspension of payment proceedings a *Rechter-commissaris* is appointed in each debt-restructuring case.⁶⁰⁵ The role of the *Rechter-commissaris* relates to the liquidation aspects of the estate as well as control over the decision-making process of the administrator.⁶⁰⁶ The *Rechter-commissaris* also has an additional duty to that of his colleague appointed in a bankruptcy case – that of supervising the successful execution of the court-approved adjustment plan.⁶⁰⁷ As a result the *Rechter-commissaris* in a debt-restructuring case will have periodic contact with the administrator in order to exercise his or her control over the estate.⁶⁰⁸ The new procedure therefore combines legal, economic and social aspects.⁶⁰⁹

4.4 VOORONTWERP INSOLVENTIEWET

The main source of the Netherlands bankruptcy law dates back to 1893 and during the past decade there have been various appeals for substantial changes to the *Faillissementswet*.⁶¹⁰ In April 2003 the *Commissie insolventierecht* was appointed, under chairmanship of Professor Kortmann, to advise government on legislation in the field of insolvency law and the appropriateness of law reform. Between 2003 and 2006 the *Commissie* issued various recommendations and concluded its mandate with the publication of the *Voorontwerp Insolventiewet* in November 2007.⁶¹¹

The foreword to the *Voorontwerp Insolventiewet* mentions that the launching of a new Insolvency Act does not suggest the introduction of an entirely new insolvency system.

⁶⁰⁴ Verschoof 110.

⁶⁰⁵ Verschoof 103.

⁶⁰⁶ Artikel 314 *Fw*. Verschoof 103.

⁶⁰⁷ Verschoof 104.

⁶⁰⁸ Verschoof 104.

⁶⁰⁹ Huls 312.

⁶¹⁰ See Vriesendorp *Wetgever: De Hoogste Tijd voor een Insolventiewet* (2000) TvI; Declercq *Netherlands Insolvency Law: The Netherlands Bankruptcy Act and the Most Important Legal Concepts* (2002) (hereafter referred to as Declercq “Netherlands Insolvency Law”).

⁶¹¹ Kortmann “*Geschiedenis van de Faillissementswet*” IX.

Important principles of the present legislation have been retained, and the updated legislation does not represent a new approach or philosophy towards insolvency law.⁶¹² One of the most important amendments to the present state of affairs is the introduction of a single insolvency procedure valid to both corporate and private individuals. As a result of this single-gateway approach the present regulatory framework and relationship between the administrator, creditors and the *Rechter-commissaris* would have to be adjusted to adapt to the recommended procedure.⁶¹³

From the available information it can with reasonable certainty be assumed that the fundamental principles of the Dutch regulatory model will not be fundamentally altered and the positions of both the *Rechter-commissaris* and *bewindvoerder* have essentially been retained. Nevertheless, the instances in which the *bewindvoerder* needs to obtain permission from the *Rechter-commissaris* have been significantly scaled down and as such there is a distinct shift in emphasis. The role of *bewindvoerder* has been extended so that this person becomes a central figure in the process of administering the estate in all different types of procedures and in this capacity acting first and foremost to the advantage of the collective group of creditors.⁶¹⁴ Apart from taking charge of the liquidation and the distribution of proceeds of the estate, the *bewindvoerder* has also been given strict and extensive information and consultation responsibilities towards the creditors. Additionally, the administration of the estate will now also include certain social responsibilities – *inter alia*, exploring the possibility of maintaining the debtor’s employment status.⁶¹⁵

⁶¹² Kortmann “*Geschiedenis van de Faillissementswet*” X.

⁶¹³ Vriesendorp “*Het Voorontwerp Insolventiewet afgezet tegen de Faillissementwet*” in Faber *De Bewindvoerder, Een Octopus* (2008) 15 (hereafter referred to as Vriesendorp “*Het Voorontwerp Insolventiewet afgezet tegen de Faillissementwet*”).

⁶¹⁴ Vriesendorp “*Het Voorontwerp Insolventiewet afgezet tegen de Faillissementwet*” 15.

⁶¹⁵ The management and supervision of the estate are dealt with in title 4 of the *Voorontwerp Insolventiewet*. See Kortmann “*Geschiedenis van de Faillissementswet*” 142; 272-309.



CHAPTER 5: INTERNATIONAL ORGANISATIONS

5.1 INTRODUCTION

In a world driven by credit, developing the means to effectively respond to default conditions is essential to foster commercial confidence and predictability. If properly designed, insolvency and creditor rights laws can contribute to the economic health of countries by providing a safety valve in the event of financial distress, reducing asset deterioration, and restoring balance to commercial relationships.⁶¹⁶

When considering global lawmaking, legal debate and literature is generally dominated by “public” or “hard law” matters based on state rights and obligations.⁶¹⁷ Hard law models and principles commonly take the shape of conventions, treaties, or any form of national legislation.⁶¹⁸ However, parallel to the continued development of traditional international law, a system of “private” or “soft law standards”⁶¹⁹ and obligations have been emerging. Generally, soft law is understood to mean a method of regulating certain issues in a non-enforceable way. It is created by participants directly involved in a certain sector or field by means of mutual discussion and agreement.⁶²⁰ In legal theory such uniform rules or codes are also presented as “new international law”.⁶²¹

Soft law can materialise in *inter alia* precedents, standards, principles, guides or guidelines, codes and records of certain customs. Since it is commonly accompanied by practical and efficient recommendations, which are based on broad support in the respective sector or group of interested parties, soft law in general advances and

⁶¹⁶ See introduction to the World Bank *Principles for Effective Insolvency and Creditor Rights System* (2001) (also referred to as *Principles*) available at http://www.worldbank.org/ifa/ipg_eng.pdf (last visited at 09-11-30).

⁶¹⁷ Mistelis 1061.

⁶¹⁸ Mistelis 1061.

⁶¹⁹ Wessels *International Insolvency Law* (2006) 51 (hereafter referred to as Wessels *International Insolvency Law*).

⁶²⁰ Wessels “Insolvency Law” 294 (hereafter referred to as Wessels “Insolvency Law”) in Smits *Elgar Encyclopedia of Comparative Law* (2006).

⁶²¹ A convention takes the form of a multilateral treaty. Countries accede to a single standard. See Block-Lieb “Harmonization and Modernization in UNCITRAL’s Legislative Guide on Insolvency Law” (2007) *Texas International LJ* (hereafter referred to as Block-Lieb “Harmonization and Modernization”). See Mistelis 1061.



simplifies mutual communication and predictability of actions.⁶²² The development of soft standards also attempts to establish a form of harmonisation or international regulation of commercial law.⁶²³ This drive towards harmonisation also provides for a flexible and effective convergence of different legal systems and may also serve as a preliminary step towards the development of hard law.⁶²⁴

In the past few decades a number of national agencies along with international (inter-governmental or non-governmental) organisations have emerged.⁶²⁵ These organisations all employ different processes in promulgating rules and standards and operate independently from individual states and enjoy either acquired expertise in legislative drafting or have international experience by virtue of their membership.⁶²⁶ Although there is always the possibility that the formulating organisation's particular visions of insolvency law could be in conflict with national policies, interests and traditions of individual countries, the work produced by organisations such as UNCITRAL and the World Bank serves as a foundation for jurisdictions to apply as a benchmark in order to ensure that any law reform initiative complies with international best practice in this regard.⁶²⁷

Two dimensions to global financial systems exist. On the one hand national financial systems operate autonomously responding to domestic needs and on the other hand they are also tied to a day-to-day interaction with the systems of their international trading partners.⁶²⁸ In order for emerging market economies to participate and benefit from the global economy, they

⁶²² Wessels *International Insolvency Law* 50-51.

⁶²³ Wessels *International Insolvency Law* 3.

⁶²⁴ See Mistelis 1055; Wessels *International Insolvency Law* 51.

⁶²⁵ International organisations able to develop both "hard law" and "soft law" are "UNCITRAL"; the International Institute for the Unification of Private Law (also referred to as "UNIDROIT"); The Hague Conference on Private International Law and the World Trade Organisation (also referred to as "WTO"). The non-government organisations are the International Chamber of Commerce (also referred to as "ICC"); International Law Association (also referred to as "ILA") and the International Bar Association (also referred to as "IBA"). Other organisations developing standards and guidelines of a private law nature include the World Bank, the European Bank for Reconstruction and Development (also referred to as "EBRD"); the Asian Development Bank (also referred to as "ADB") and the International Monetary Fund (also referred to as "IMF"). See Wessels *International Insolvency Law* 52.

⁶²⁶ Mistelis 1061.

⁶²⁷ See Ramsay "Functionalism and Political Economy" 625; Johnson 70.

⁶²⁸ Wessels *International Insolvency Law* 3.



need to strengthen and stabilise their institutions and take note of international economic trends and best practices.⁶²⁹ The drafting of UNCITRAL's *Legislative Guide on Insolvency Law*,⁶³⁰ approved in 2004, can be mentioned as an example of the administering and aligning or streamlining of the consequences of financial insolvency by making available a comprehensive set of recommendations to national legislators.⁶³¹ Other examples of soft law and the codification of "best practices" is to be found in the *Revised Principles for Effective Insolvency and Creditor Rights System*⁶³² developed by the World Bank, UNCITRAL's *Model Law on Cross Border Insolvency*⁶³³ and the IMF's *Orderly and Effective Insolvency Procedures*.⁶³⁴ These models all strive towards setting certain standards and benchmarks which might assist *inter alia* practitioners, judges or legislators with their law and policymaking activities.⁶³⁵

This chapter considers the contribution to the global insolvency lawmaking process by the World Bank and UNCITRAL. It is not intended that a detailed exposition of the various works be given here. The purpose, rather, is to refer to the suggested legal principles and guidelines in respect of institutional and regulatory frameworks.

5.2 UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW

5.2.1 General

⁶²⁹ Wessels *International Insolvency Law* 3.

⁶³⁰ *Legislative Guide* (n 11). See also Wessels *International Insolvency Law* 3.

⁶³¹ Wessels *International Insolvency Law* 3.

⁶³² Revised Draft Creditor Rights and Insolvency Standard, Based on the World Principles and for Effective Creditor Rights and Insolvency Systems and UNCITRAL Legislative Guide on Insolvency Law, Revised Draft, (2005) (also referred to as *Revised Principles*) available at <http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRPrinciples-March2009.pdf> (last visited at 30-11-09). Also Wessels *International Insolvency Law* 3.

⁶³³ Adopted by UNCITRAL on 1997-05-30, the Model Law is designed to assist states to their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency. See Wessels *Cross-Border Insolvency Law* for a detailed discussion of the UNCITRAL Model Law.

⁶³⁴ Available at <http://www.imf.org/external/pubs/ft/orderly/index.htm> (last visited at 09-11-30). Developed by the IMF's Legal Department in 1999, this book outlines the key issues involved in designing and implementing orderly and effective insolvency procedures.

⁶³⁵ Wessels *International Insolvency Law* 3.

UNCITRAL was established in 1966⁶³⁶ by the United Nations⁶³⁷ General Assembly with the aim of providing the UN with a more active role in managing differences of national legal systems in the domain of international trade.⁶³⁸ The General Assembly acknowledged that disparities in the national laws governing international trade created obstacles to the flow of international trade. UNCITRAL was established as a support mechanism to enable the UN to play a more active role in reducing or removing these obstacles. The General Assembly gave UNCITRAL a general mandate to further the progressive harmonisation and unification of the international law of trade and it has since become the core legal body of the UN system in the field of the international law of trade.⁶³⁹

In 2000 UNCITRAL gave a mandate to one of its Working Groups (Working Group on Insolvency Law)⁶⁴⁰ to prepare a comprehensive statement of key objectives and core features for a strong insolvency regime and to embrace a more pragmatic approach to the implementation of such objectives and features.⁶⁴¹ The Working Group concluded this five-year project in late 2004, with the release of the UNCITRAL *Legislative Guide on Insolvency Law*.⁶⁴² The work produced a stand-alone, principles-oriented product to address the diversity of insolvency laws among states. The *Guide* sets out global standards on insolvency law for national legislators within the wider focus of aligning, harmonising or unifying international commercial law.⁶⁴³ The aim of the project is to

⁶³⁶ Resolution 2205 (XXI) of 1966-12-17.

⁶³⁷ Hereafter referred to as the “UN”.

⁶³⁸ Wessels *International Insolvency Law* 61.

⁶³⁹ UNCITRAL describes itself as a “legal body with universal membership specialising in commercial law reform worldwide for over 40 years. UNCITRAL’s business is the modernisation and harmonisation of rules on international business”. See the official website of UNCITRAL available at <http://www.uncitral.org/> (last visited at 09-11-30). See also <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited at 09-11-30) for a more detailed discussion of the origin of UNCITRAL. See also Block-Lieb “Legitimation and Global Lawmaking” (2006) *Fordham Law Legal Studies Research Paper no 952492* available at <http://ssrn.com/abstract=952492> (last visited at 09-11-30) (hereafter referred to as Block-Lieb “Legitimation and Global Lawmaking”). See also Loubser “Aiding the Development of a New Insolvency Law in South Africa: The UNCITRAL *Draft Legislative Guide on Insolvency Law*” (2003) *SA Merc LJ* 396.

⁶⁴⁰ Also referred to as Working Group V.

⁶⁴¹ Wessels “Insolvency Law” 305.

⁶⁴² See (n 11).

⁶⁴³ Block-Lieb “Harmonization and Modernization” 5.



present a comprehensive exposition of the core objectives and the structures of an effective and efficient insolvency system.⁶⁴⁴

The *Guide* is intended to be used by national authorities and legislative bodies as a reference when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. It is intended merely to provide recommendations regarding substantive insolvency law.⁶⁴⁵ The content and structure of the *Guide* exemplifies the formal ability of a broad diversity of actors and interests to achieve agreement in a contentious policy domain.⁶⁴⁶ While UNCITRAL had in the past adopted conventions and model laws it changed course with the promulgation of the Legislative Guide, which contains a variety of topics – objects, purposes, a glossary, commentary and recommendations.⁶⁴⁷

The *Guide* is divided into two parts. Part one examines the broad policies and purposes common to all insolvency laws and includes the nine “key objectives” which serve as a point of reference for the remainder of the *Guide*. Part two specifies the core provisions for an effective and efficient insolvency law and sums up each section with a set of *Recommendations*. The *Recommendations* are derived from the lengthier commentary that precedes them and are intended to be used as a reference by legislative bodies when preparing new laws and reviewing existing laws and structures.⁶⁴⁸ Finally, every key provision which is recommended to be included in a national law is discussed and the possible treatment evaluated.⁶⁴⁹

The *Guide* does not provide a single set of model solutions to address the central issues to an effective and efficient insolvency law, but assists the reader in evaluating different methodologies in order to decide on the most suitable scenario in the national or local context.⁶⁵⁰ For the purpose of this study only a brief summary of Part One: Section III of

⁶⁴⁴ See Wessels “Insolvency Law” 305; Block-Lieb “Legitimation and Global Lawmaking” 49.

⁶⁴⁵ Wessels *Cross-Border Insolvency Law* 11.

⁶⁴⁶ Block-Lieb “Legitimation and Global Lawmaking” 49.

⁶⁴⁷ Block-Lieb “Harmonization and Modernization” 6.

⁶⁴⁸ *Legislative Guide* 1.

⁶⁴⁹ Wessels “Insolvency Law” 305.

⁶⁵⁰ *Legislative Guide* 1-2. See Wessels *Cross -Border Annex* 3.

the *Guide*, which sets out the objectives and recommendations in respect of Institutional Frameworks, will be included.⁶⁵¹

5.2.2 UNCITRAL *Legislative Guide on Insolvency Law: Regulatory and Institutional Aspects*

The introduction to *Section III: Institutional Frameworks* submits that insolvency law is part of an overall commercial legal system and is heavily reliant for its proper application not only on a well-developed commercial legal system, but also on a well-developed institutional framework for the administration of the law.⁶⁵² It is stated that when law reform takes place the choices made will be closely linked to the capacities of existing institutions.⁶⁵³ It is recommended that if the institutional capacity does not already exist, it is highly desirable that reform of the insolvency law be accompanied by institutional reform. The costs of establishing and maintaining the necessary institutional framework should be weighed against the benefits of providing a system that is efficient and effective and in which the public has confidence.⁶⁵⁴

The *Guide* then continues to formulate general observations which mainly place emphasis on the role of the court and the judiciary. It mentions that in most jurisdictions insolvency proceedings are administered by a judicial authority, often through commercial courts or courts of general jurisdiction or, in a few cases, through specialised bankruptcy courts. It is also recognised that in a few jurisdictions, non-judicial or quasi-judicial institutions fulfil the role that, in other jurisdictions, is fulfilled by the courts.

The *Guide* demonstrates that in order to reduce the functions to be performed by the court under an insolvency law, but at the same time provide the necessary checks and balances, specific functions in insolvency law could be assigned to other participants, such as the insolvency representative and creditors, or to some other authority, such as an insolvency

⁶⁵¹ *Legislative Guide* 33-35 par 1-7.

⁶⁵² *Legislative Guide* 33.

⁶⁵³ *Legislative Guide* 33 par 1.

⁶⁵⁴ *Legislative Guide* 33 par 1.



regulator.⁶⁵⁵ An insolvency law may also provide that an insolvency representative is authorised to make decisions on a number of issues, such as the verification and admission of claims, the need for post-commencement funding, surrender of encumbered assets of no value to the estate, sale of major assets, commencement of avoidance actions and treatment of contracts, without the court being required to intervene, except in the case of dispute resolution. The *Guide* states further that the use of this approach depends upon the availability of a body of suitably qualified professionals to serve as insolvency representatives.⁶⁵⁶

It is recognised that the court's capacity to deal with sometimes complex commercial issues in insolvency law cases is often not only a question of knowledge and experience of a specific law but also includes an updated and current knowledge. It is recommended that in order to address the issue of judicial capacity a special focus should be placed on the education and ongoing training of court personnel (including the judiciary). This, it is argued, will assist in supporting an insolvency regime that has the ability to respond efficiently and effectively to its insolvency caseload.⁶⁵⁷ A further consideration related to the court's capacity to supervise insolvency cases is the balance between the mandatory and discretionary components of the insolvency law. It is suggested that where the law requires the discretion of the decision-maker such as the court, adequate guidance as to the proper exercise of that discretion is included in order to assure the transparency and predictability of the insolvency proceedings.⁶⁵⁸

Finally, the section concludes that it is clear that the implementation of an insolvency system depends not only on the court, but also on the professionals involved in insolvency proceedings and the adoption of certain professional standards and training may assist in developing capacity. The important assumption is made that it may be appropriate to assess which insolvency functions are truly public of nature and should therefore be performed in the public sector in order to ensure public trust and confidence

⁶⁵⁵ *Legislative Guide* 34 paras 2-3.

⁶⁵⁶ *Legislative Guide* 34 par 4.

⁶⁵⁷ *Legislative Guide* 34 par 5.

⁶⁵⁸ *Legislative Guide* 34 par 6.



in the system. A different set of functions would then be performed by private-sector representatives such as insolvency practitioners.⁶⁵⁹

5.3 WORLD BANK “*PRINCIPLES AND GUIDELINES FOR EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEM*”

5.3.1 General

In the aftermath of the Asian financial crisis in the late part of the previous century, the World Bank launched an initiative to improve the future stability of international financial systems.⁶⁶⁰ Although effective and efficient insolvency and creditor rights systems were already widely recognised as important elements in the drive for a stable international financial system, no internationally recognised benchmarks or standards to evaluate the effectiveness of domestic insolvency systems existed.⁶⁶¹ As a result, in 1999 the IMF published a survey of the most important policies to consider when a system of insolvency law is designed.⁶⁶² In the same period the World Bank also embarked on a project to identify certain principles and guidelines for sound insolvency systems and for the strengthening of related debtor-creditor rights in emerging markets.⁶⁶³ Subsequently a “Status Report”⁶⁶⁴ was compiled and deliberation took place with representatives from various countries at four regional workshops.⁶⁶⁵ In consensus with international partner organisations and experts from some 75 countries the *Principles and Guidelines for Effective Insolvency and Creditor Rights System* transpired and was approved in 2001.⁶⁶⁶

⁶⁵⁹ *Legislative Guide* 34 par 7.

⁶⁶⁰ Wessels “Insolvency Law” 305.

⁶⁶¹ Wessels “Insolvency Law” 305. The *Global Insolvency Law Database* (“GILD”) represents the World Bank’s legal portal for insolvency and creditor rights matters and is maintained by the World Bank’s Legal Vice-Presidency.

⁶⁶² *Orderly and Effective Insolvency Procedures* composed by the Legal Department, IMF 1999. See Wessels *Cross-Border Insolvency Law* 2.

⁶⁶³ Wessels *Cross-Border Insolvency Law* 2.

⁶⁶⁴ Based on the initial papers assembled in the report “*Building Effective Insolvency Systems:*” (Washington 1999). See Wessels *International Insolvency Law* 63.

⁶⁶⁵ Wessels *International Insolvency Law* 63.

⁶⁶⁶ See (n 616).



In the introductory discussion in the 2001 *Principles* which leads up to the proposed key principles several fundamentally important submissions are made. First, effective systems respond to national needs and problems and as such must be rooted in the country's broader cultural, economic, legal and social context. Second, transparency, accountability and predictability are fundamental to sound credit relationships on both a national and international level. And thirdly, legal and institutional mechanisms must align incentives and disincentives across a broad spectrum of market-based systems – commercial, corporate, financial and social. This calls for an integrated approach to reform, taking into account a wide range of laws and policies in the design of insolvency and creditor rights systems.⁶⁶⁷ In the executive summary of the 2001 document the compilers also make the following important statement:

Strong institutions and regulations are crucial to an effective insolvency system. The institutional framework has three main elements: the institutions responsible for insolvency proceedings, the operational system through which cases and decisions are processed and the requirements needed to preserve the integrity of those institutions. A number of fundamental principles influence the design and maintenance of the institutions and participants with authority over insolvency proceedings.⁶⁶⁸

As previously mentioned, the *Principles* approved by the World Bank in 2001 cover a wide range of commercial themes, including the institutional and regulatory aspects of these commercial law systems. They lay down fundamental principles with the intention that these are applied flexibly in the diverse systems that obtain in various countries.⁶⁶⁹ The UNCITRAL *Legislative Guide* consequently focuses more deeply on the key elements of an effective insolvency system to assist the establishment of an efficient and effective legal framework. Given the complementary nature and the international consensus on best practices reflected in both the *Principles* and the *Recommendations* included in the *Legislative Guide*, the members of staff of both the World Bank and IMF proposed to their respective Executive Boards that these *Principles* and *Recommendations* be recognised as the unified standard for insolvency and creditor rights systems for the purpose of assessments under the IMF-World Bank programme and initiative on Standards and Codes. The result of

⁶⁶⁷ *Principles* 2.

⁶⁶⁸ *Principles* 5.

⁶⁶⁹ Wessels *Cross-Border Insolvency Law* 14.

the initiative is that Insolvency and Creditor Rights ROSC assessments are currently conducted on the basis of a unified standard on insolvency and creditor rights systems, in which both documents have been consolidated.⁶⁷⁰

While the Bank's *Principles* and UNCITRAL's *Legislative Guide* had been devised according to their own governance process and structures, staff and experts from both institutions have joined forces to ensure consistency in these complementary products. The *Principles* cover a wider range of commercial law systems, including regulatory and institutional aspects of these systems and elaborate fundamental principles that are intended to be applied flexibly in the diverse systems of the various countries. In contrast to the *Legislative Guide*, which discusses issues central to the design of an efficient and effective system, the *Principles* are designed to serve as a broad-spectrum assessment tool to assist countries in efforts to evaluate and improve core aspects of their insolvency systems.⁶⁷¹ In December 2005 the integration of the *Principles* and the *Guide* into a combined document resulted in the *Revised Draft Creditors Rights and Insolvency Standards*.⁶⁷² The World Bank's *Principles* and the UNCITRAL's *Legislative Guide* function in a complementary way and together serve as important reference points for countries to evaluate and strengthen their insolvency systems in line with generally recognised standards of good practice.⁶⁷³

The document specifying the *Revised Principles* is arranged into an "Introduction" and "Executive Summary", followed by the key principles each divided into different parts alphabetically numbered.⁶⁷⁴ Only the principles and guidelines dealing with the regulatory and institutional aspects will be considered briefly.

⁶⁷⁰ *Revised Principles* (n 632). See Wessels *Cross-Border Insolvency Law* 15.

⁶⁷¹ See introduction to the *Principles* (n 616).

⁶⁷² Wessels *Cross-Border Insolvency Law* Annex 4.

⁶⁷³ Wessels *Cross-Border Insolvency Law* 3.

⁶⁷⁴ Wessels *Cross-Border Insolvency Law* 3.



5.3.2 *Creditors' Rights and Insolvency Standards, based on the World Bank Principles for Effective Creditor Rights and Insolvency Systems and UNCITRAL's Legislative Guide on Insolvency Law, Revised Draft December 2005*

In the context of this research it is important to take note of principles D1 and D7 as they converge on the implementation of basic insolvency principles by way of institutional and regulatory frameworks as well as the role of the supervisory body.⁶⁷⁵ As mentioned above, the important aspects for this study are addressed in part D of the document with the heading *Implementation: Institutional & Regulatory Frameworks*. The suggested principles are specified as follows:

D1 Role of the Courts

D1.1 Independence, Impartiality and Effectiveness. The system should guarantee the independence of the judiciary. Judicial decisions should be impartial. Courts should act in a competent manner and effectively.

D1.2 Role of Courts in Insolvency Proceedings. Insolvency proceedings should be overseen and impartially disposed of by an independent court and assigned, where practical, to judges with specialized insolvency expertise. Non-judicial institutions playing judicial roles in insolvency proceedings should be subject to the same principles and standards applied to the judiciary.

D1.3 Jurisdiction of the Insolvency Court. The Court's jurisdiction should be defined and clear with respect to insolvency proceedings and matters arising in the conduct of these proceedings.

D1.4 Exercise of Judgment by the Court in Insolvency Proceedings. The court should have sufficient supervisory powers to efficiently render decisions in proceedings in line with the legislation without inappropriately assuming a governance or business administration role for the debtor, which would typically be assigned to the management or the insolvency representative.

⁶⁷⁵ *Revised Principles* 20-22.

D1.5 Role of Courts in Commercial Enforcement Proceedings. The general court system must include components that effectively enforce the rights of both secured and unsecured creditors outside of insolvency proceedings. If possible, these components should be staffed by specialists in commercial matters. Alternatively, specialized administrative agencies with that expertise may be established.

D7 Role of Regulatory Supervisory Bodies

The bodies responsible for regulating or supervising insolvency representatives should:

- Be independent of individual representatives;
- Set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability; and,
- Have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively.

D8 Competence and integrity of insolvency Representatives

- Criteria as to who may be an insolvency representative should be objective, clearly established and publicly available;
- Insolvency representatives be competent to undertake the work to which they are appointed and to exercise the powers given to them;
- Insolvency representatives act with integrity, impartiality and independence; and
- Insolvency representatives where acting as managers be held to director and office standards of accountability, and be subject to removal for incompetence, negligence, fraud or other wrongful conduct.⁶⁷⁶

To summarise, it is evident when drawing from international instruments such as the *Legislative Guide* and the World Bank's *Principles* that while the primary focus of any law reform project should be on how to serve the needs and interests of society, it would be unrealistic to ignore wider global trends and the international environment in which

⁶⁷⁶ *Revised Principles* 20-22.



trade and commerce takes place. However, the UNCITRAL's *Legislative Guide* states that irrespective of which insolvency law design is chosen it should:

be complementary to, and compatible with, the legal and social values of the society in which it is based and which it must ultimately sustain. Although insolvency law generally forms a distinctive regime, it ought not to produce results that are fundamentally in conflict with the premises upon which laws other than the insolvency laws are based.⁶⁷⁷

In the World Bank's *Principles* the call for an integrated approach to law reform, taking into account a wide range of laws and commercial, corporate, financial and social aspects in the design of an insolvency and creditor rights systems, is prominent.⁶⁷⁸ Consequently, in the important regulative guidelines in UNCITRAL's *Legislative Guide* the need for a well-developed institutional framework as a part of insolvency law is emphasised. It is also submitted by the compilers that when law reform takes place the decision-making will be greatly influenced by the capacities of existing institutions.⁶⁷⁹ The recommendation is made that the reform of insolvency law should also be accompanied by institutional reform. The *Guide* further points out that in most jurisdictions, insolvency proceedings are administered by a judicial authority, but this role could also be fulfilled by non-judicial or quasi-judicial institutions.⁶⁸⁰

In order to reduce the functions to be performed by the court, and at the same time provide the necessary checks and balances, the *Guide* suggests that specific functions in insolvency law may be assigned to insolvency representatives and creditors, or to some other authority, such as an insolvency regulator. In order to build capacity, the prominent role of education, the adoption of certain professional standards and the training of role-players (for instance, the insolvency representative and the judiciary) are mentioned.⁶⁸¹ Lastly, the important point is made that it may be appropriate to assess which insolvency functions are truly public of nature and should therefore be performed in the public sector

⁶⁷⁷ *Legislative Guide* 10. See Mason "Where Private International and Insolvency Law Meet" 35 (hereafter referred to as Mason "Where Private International and Insolvency Law Meet") in Omar *International Insolvency Law: Themes and Perspectives* (2008).

⁶⁷⁸ *Principles* 2.

⁶⁷⁹ *Principles* 20-22.

⁶⁸⁰ *Legislative Guide* 33-35.

⁶⁸¹ *Legislative Guide* 34-35.



in order to ensure public trust and confidence in the system, and which functions could be performed by private-sector representatives such as insolvency practitioners.⁶⁸²

⁶⁸² *Legislative Guide* 34 par 7.



CHAPTER 6: CONCLUSION

Globalization is causing, and being reinforced by, a world-wide convergence of economic and political values that portend a possible, though distant, future world in which human beings will look upon themselves as part of a single humane civilization comprised of a single human race.⁶⁸³

In an era of the globalisation of law that will inevitably accompany the globalisation of the world economy, we enter a phase in history where legal certainty and predictability are definite virtues. It is submitted that the provision of an effective and internationally comparable insolvency system is an essential component in ensuring that South Africa maintains its role as a competitive emerging market. The establishment of a modern legal framework for the regulation of commercial and economic activity is not only fundamental to the development of a competitive market economy, but is also a precondition to the sustainable flow of foreign capital to the South African economy. In determining whether it is attainable to bring about a new regulatory regime in South African insolvency law it is thus vital to stay abreast of international trends and standards and to determine what the internationally recognised principles and characteristics of a regulatory model in insolvency law are, so as to ensure that our system does not lag behind the international norm.⁶⁸⁴

The recognition that a modern insolvency system should be the cornerstone of sustainable economic development is also reflected in the extensive research carried out by international institutions in this area. The World Bank, with the assistance of international financial institutions such as UNCITRAL, leading insolvency organisations and international insolvency experts, has developed comprehensive principles and guidelines that underpin sound insolvency and creditors' rights around the world. An analysis of the various "soft law" principles reveals that the establishment of a modern and effective institutional and regulatory framework is fundamental to the development of an efficient and effective insolvency law system, and that the latter is crucial to the fostering of local

⁶⁸³ Seita "Globalization and the Convergence of Values" (1997) *Cornell International LJ* 429 at 429 as cited in Mistelis 1055.

⁶⁸⁴ For a more comprehensive discussion of these issues, see Mistelis at 1055-1069.

and international commercial confidence in South Africa.⁶⁸⁵ It has been established that although the underlying philosophies and principles differ from one jurisdiction to another, the regulation of insolvency law is a major policy objective in all developed jurisdictions. The dynamics of the relationship of state agencies to the various actors in the bankruptcy system may vary, but certain similar influences and key elements can be recognised.

The English regulatory system can be classified as an administrative system, typified by the pervasive character of the government agency, as represented by the Insolvency Service.⁶⁸⁶ At present, the public administrator is responsible for virtually all the key administrative decisions as well as for establishing detailed interpretations of statutory rules in bankruptcy law.⁶⁸⁷ This is a consequence of the English lawmakers having a shared vision that bankruptcy law is not just the concern of creditors but affects the wider society. This has resulted in the acceptance that government has a supervisory role to play, and that bankruptcy law is a public policy measure.⁶⁸⁸ The core functions of the English public administrator have been identified as the administration of the insolvent estate by government-employed officials in the absence of a private-sector practitioner; focusing of resources on discharging the public interest functions of investigating and prosecuting the conduct of individual debtors and directors of failed companies; and, finally, authorising and regulating the insolvency profession. These features of a regulator are universal in almost all common law systems, to a greater or lesser degree.

In view of the objectives of this thesis and drawing from the comparative study done here, it is appropriate to state that South African law and policymakers will probably draw the greatest benefit from the development and philosophy underlying the English regulatory model. Although the English regulatory framework may not suit the South African economic conditions in a strict sense, there are adequate similarities between the jurisdictions' historical, legal and cultural aspects.

⁶⁸⁵ See Mistelis 1057; Loubser 396.

⁶⁸⁶ Insolvency Act 1986 ss 399-401 and Pt 10 of Insolvency Rules 1986.

⁶⁸⁷ See Martin "Common-Law Bankruptcy Systems" 376; Niemi-Kiesiläinen "Introduction" 11.

⁶⁸⁸ Martin "Common-Law Bankruptcy Systems" 397.



In contrast to the English regulatory system, the US represents the other end of the continuum. It has a framework consisting of a specialised system of bankruptcy courts to reach judgments and to make decisions in the event of conflict. But the important precedents that provide the detailed interpretations of statutory rules – that set the local legal culture – are also made by the bankruptcy judge. While early bankruptcy law followed in the footsteps of the English law, the tenor of the 1898 Bankruptcy Act was rather to downsize the administrative machinery and set up an adversarial judicial process as the US model for bankruptcy. As a result the US never adopted the highly administrative bankruptcy process evident in the English insolvency law.

The US system has no equivalent for the public official receiver's office and instead the present governing philosophy favours direct negotiation between debtors and creditors. This in turn paves the way for the prominent role of the private attorney in the US bankruptcy process. The US Trustee as public administrator had been established in order to lessen the administrative burden on the bankruptcy judges thereby enabling them to serve more exclusively in a judicial role. The US Trustee acts in a general supervisory role regarding bankruptcy proceedings and private trustees, and furthermore also views the investigation and detection of fraud and bankruptcy abuse as a main policy objective.⁶⁸⁹

Although it is safe to conclude that the specialisation of the US bankruptcy judges and the degree of their daily involvement in bankruptcy cases gives them a better feel for the complexities of consumer bankruptcy than is enjoyed by a generalist judge in a jurisdiction without specialist bankruptcy courts, it is submitted that the precise mechanics of the US system cannot easily be imported into a country that does not make use of a federal system of government and a federal court system.⁶⁹⁰ Americans have designed their bankruptcy laws around the uniqueness of their socio-economic and political system, and while the effectiveness of their system is to be lauded, it cannot be

⁶⁸⁹ See generally, Skeel *Debt's Dominion*; Milman 149-151; Niemi-Kiesiläinen 11.

⁶⁹⁰ Milman 149.



implemented in its precise form by a country which has only a developing economy.⁶⁹¹ It is for this reason that the content and proceedings of the American system is of limited use to South African policy- and lawmakers in designing a regulatory framework in insolvency law.

The position in regard to state regulation under the Netherlands laws is fundamentally different to that of the mentioned common law jurisdictions, and the underlying principles of their Code are therefore only of limited use in a South African context. Although there is no system of specialised bankruptcy courts in the Netherlands, the Dutch courts play a leading role in the regulation and interpretation of the bankruptcy laws. The Dutch regulatory framework consists of a system of court control whereby the district court appoints a *Rechter-commissaris* entrusted with the supervision of the trustee's administrative actions. In the same judgment a *bewindvoerder* or *curator* is appointed and is charged with the administration and liquidation process. In the Dutch insolvency practice, no formal statutory requirements have to be met before a person can be appointed as a trustee. However, the courts almost always appoint lawyers who are members of the bar as trustees, and hence a certain selection can be reached along this detour, because not everyone is admitted to the bar. The Dutch civil law system is so fundamentally different in the basic conception and operation of its bankruptcy law, however, that it would be misleading to compare any aspects of this system to other common law jurisdictions.⁶⁹²

Without entering into the widespread academic debate on the merits of legal transplantation, it could be argued that the undesirability of the Dutch system's regulatory experience as a "legal transplant" could serve to further the argument that even when countries share similar legal backgrounds, they may evolve and develop along completely independent paths, resulting in different legal cultures and conceptions of the role of

⁶⁹¹ In this regard see Braucher "Harmonizing the Business Bankruptcy Systems of Developed and Developing Nations: Some Issues" (1997) 17 *New York Law School Journal of International and Comparative Law* 473-480. Braucher states that a country's bankruptcy reorganisation system should be viewed as part of its law and policy of economic development, but that this does not necessarily mean that a country's stage of development is or should be the predominant concern a business bankruptcy system is designed. See Burdette 186.

⁶⁹² See generally: Declercq "Netherlands Insolvency Law" 45; Vriesendorp "The Righteous Trustee".



bankruptcy law. Historical development and background do however play some part in shaping legal culture. This would explain the different attitudes to regulatory proceedings in common law systems (which all have an English legal basis) and in the Dutch civil bankruptcy system, which is influenced by the French *Code Civil* complemented with Roman and earlier Roman-Dutch law.⁶⁹³

Despite the historical and philosophical differences between jurisdictions – and especially the differences between the common law-based and civil European systems – it is important not to present these jurisdictions as if they were cast in stone. There are signs of some convergence between the common law and European approaches and even more so between the common law jurisdictions themselves.⁶⁹⁴ When the international experience is considered, certain assumptions can be made:

- 1 One of the main policy issues to emerge from the study of the various regulatory models is the choice between an administrative system and a judicial system responsible for the implementation of the law. Although different systems for the regulation of bankruptcy law have emerged in different countries, a general regulatory framework has been implemented, ranging in various degrees in nature from an administrative to a judicial system.
- 2 The profession of insolvency practitioners is consistently regulated throughout the continuum, ranging from the UK's intense and complicated licensing system to the judicial supervision of the trustee in the Dutch bankruptcy law system.
- 3 Legal history should not be the only factor influencing the choice of the bankruptcy system and philosophy a country develops. If it were, the US and England would have adopted similar laws, as they both drew on the same English legal history. Yet each reflects certain unique bankruptcy characteristics – in particular the role of the state in the

⁶⁹³ Meijer 1.

⁶⁹⁴ Ziegel *Comparative Consumer Insolvency* 148.



regulation of bankruptcy law. This is presumably the result of cultural and economic influences.

- 4 Historical development and background do however play some part in shaping legal culture. This would explain the different attitudes to regulatory proceedings in the common law systems, on the one hand, and the Dutch civil bankruptcy culture, on the other.⁶⁹⁵

Academic literature is increasingly recognising the central importance of “local legal culture” in the actual operation and effective implementation of any legal system.⁶⁹⁶ Therefore, while the input and comparison with the other international jurisdictions and institutions is beneficial, the content of the laws of these jurisdictions is of secondary importance. The process of law reform and the compatibility of the new framework with the local pre-existing legal, economic and social environment are paramount.⁶⁹⁷ Consequently, while certain questions relating to the current policies and law reform proposals will be asked, it is submitted that the choices made in reforming the South African regulatory system must be informed by the capacities of existing legal institutions. Reforms must also be compatible with the insolvency law system in general. As correctly stated in the literature, “legislation on insolvency is a crossroads where all the elements of the legal system in question meet”.⁶⁹⁸

⁶⁹⁵ Meijer 1.

⁶⁹⁶ See generally: Tabb “Lessons from the Globalization of Consumer Bankruptcy” 2005; Ziegel “The Challenges of Comparative Consumer Insolvencies” (2005) *Pennsylvania State International LR* 639.

⁶⁹⁷ Pistor “The Standardization of Law and its Effect on Developing Economies” (2000) *American Journal of Comparative Law* 97 (hereafter referred to as Pistor).

⁶⁹⁸ Braun “German Insolvency Act: The Special Provisions of Consumer Insolvency Proceedings and Discharge of Residual Debts” 2006 *German LJ* 59.