LOCAL LIQUIDATION OF EXTERNAL COMPANIES

LL.M.-thesis written in partial compliance of the requirements for the degree

MAGISTER LEGUM

at the

POTCHEFSTROOMSE UNIVERSITEIT

vir CHRISTELIKE HOëR ONDERWYS

in the subject International Private Law and Comparative Law

PVI 835

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1 November 1999

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1. Introduction

The peculiar problems caused by the insolvency of international companies have long been a source of much debate. Interest herein has recently become intensified as companies increasingly own assets and incur liabilities in countries other than the country or countries of their incorporation. The liquidation of such companies give rise to unique problems. The right of administration conferred upon a liquidator by a foreign law may be recognized and enforced by a South African court. The local court has a wide discretion in this regard. Prior to such recognition, the foreign liquidator is legally incompetent to administer the local assets and liabilities of the foreign company. One of the issues that arise is whether it is competent for a South African court to locally wind up an external company despite the prior and still pending liquidation thereof in the country of its incorporation. The resultant multiple *concursus creditorum* consequent upon the existence of such jurisdiction create problems of its own. Which creditors would be entitled to prove claims in which liquidations? On what basis is a dividend in every liquidation to be calculated? These and related problems regarding the control and administration of estates in cross-border insolvencies[1] can only properly be addressed by distilling from our jurisprudence the essential principles governing this branch of our law.[2] This paper attempts to establish some of these principles.

2. Section 344(g) of the Companies Act 61 of 1973

2.1 Introduction

The first issue to be addressed is whether it is it competent for a South African court to locally wind up an external company **despite the prior and still pending liquidation thereof in the country of its incorporation**. Central to the resolution of this issue is the interpretation and ambit of section 344(g) of the *Companies Act*[3]. The subsection provides as follows:

> A company may be wound up by the Court if -
>
> (g) in the case of an external company, that company is dissolved in

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1. The terms "cross-border insolvency", "trans-national insolvency" and "international insolvency" are use interchangeably in literature on the subject.

2. Although these problems also arise in sequestrations, the focus in this paper falls on liquidations.

3. 61 of 1973.

> the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

As an aid to the interpretation of this section, it is rewarding to consider its historical roots.

2.2 England

The English *Joint Stock Companies Winding-up Act* of 1848[4] provided as follows:

> V. That it shall be lawful for any person who shall be or claim to be a contributory of a company to present a petition to the Lord Chancellor or to the Master of the Rolls in a summary way for the dissolution and winding-up or for the winding-up of the affairs of such company, in any of the following cases; (that is to say,)
>
> 7. If any company shall have been dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding-up its affairs, and the same shall not be completely wound up:

This Act was repealed by the English *Companies Act* of 1862.[5]

The *fons et origo* of section 344(g) is section 199(3) of the English *Companies Act* of 1862. The relevant portion thereof provides as follows :

> (3) The circumstances under which an unregistered company may be wound up are as follows: (that is to say,)
>
> (a) Whenever the company is dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;

In the preamble of section 199 an unregistered company is described to include any partnership, association or company, consisting of more than 7 members, and not registered under the said Act.[6]

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4. 45 of 1848.

5. 89 of 1862 (hereinafter "English Companies Act of 1862").

6. An unregistered company would therefore include a foreign company.

Section 199(3) of the English *Companies Act* [7] fell to be considered by the master of the rolls lord Romilly in *In re Commercial Bank of India*.[8] The court found that section 199 gave jurisdiction to an English court to wind up a company incorporated in India, which carried on business in England and which had previously been wound up voluntarily in India. In granting the winding-up order the master of the rolls held as follows :

> I think that I have jurisdiction to make the order; if the company is not wound up here, these persons will not be able to get their money.

In *In re Matheson Brothers Ltd*[9] the company was incorporated in New Zealand. It also had a branch office, managing director, agent and assets and liabilities in England. There was a pending winding-up thereof in New Zealand in which a liquidator had been appointed. The court followed the judgment in the *Commercial Bank of India*-case[10] and found that the English court had jurisdiction to wind up the company in England in terms of section 199(3).[11] The pending winding-up in New Zealand did not affect such jurisdiction:

> Had it not been then for the fact of a winding-up order existing in New Zealand this Court would in my opinion have had jurisdiction to wind up this New Zealand company having an office and carrying on part of its business here as an unregistered company within the terms of the 199th section.
>
> This being the case, what is the effect of the winding-up order which it is said has been made in New Zealand? This Court upon principles of international comity, would no doubt have great regard to that winding-up order and would be influenced thereby, but the question of jurisdiction is a different question, and the mere existence of a winding-up order made by a foreign Court does not take away the right of the Courts of this country to make a winding-up order here, though it would no doubt exercise an influence upon this Court in making the order.[12]

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7. English Companies Act of 1862.

8. (1868) LR 6 Eq 517.

9. (1884) 27 Ch 225.

10. (1868) LR 6 Eq 517.

11. *Companies Act* 89 of 1862.

12. *In re Matheson Brothers Ltd*(1884) 27 Ch 225 230.

The judgments in *In re Commercial Bank of India*[13] and *In re Matheson Brothers*[14] have ever since been the law in England.

2.3 New Zealand

Section 310(1)(a) of the New Zealand *Companies Act* of 1908 provides as follows:

> (1) Any foreign company may be wound up under this Act -
>
> (a) Where the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs:

In *In re The Westland Gold-Mining Syndicate Ltd*[15] a creditor petitioned for an order that the Westland Gold-Mining Syndicate Ltd be wound up by the court under the provisions of the *Companies Act* of 1908. The company was a foreign company incorporated in London. Its assets, a mining claim and rights thereunder, were in the Dominion. Its debts amounted to approximately £9 000. Of these £8 000 were due to English creditors and £1 000 to creditors in New Zealand. The English creditors were largely directors of the company and their relatives, who had advanced money to the company on debentures and otherwise. All the shareholders resided in England. The company was being wound up in England under a voluntary liquidation. The liquidator was endeavouring to sell the assets of the company, all of which were in New Zealand. The petitioner was a creditor of the company for a sum of £65 6s. His petition was supported by four creditors whose debts amounted to £606 11s 8d. The petitioner established on affidavit that the conditions contained in section 311 of the *Companies Act* of 1908 (as to proof that the company was unable to pay its debts and was therefore, under the provisions in section 310, liable to be wound up by the order of the New Zealand court) had been satisfied. The petition was opposed by the liquidator appointed in England.

The court referred to the *In re Matheson Brothers*-case[16] and held that "there can be no doubt"[17] that the New Zealand court has the power to make such an order, notwithstanding the fact that the company was being voluntarily wound up in the

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13. (1868) LR 6 Eq 517.

14. (1884) 27 Ch 225.

15. [1916] NZLR 169.

16. *In re Matheson Brothers Ltd* (1884) 27 Ch 225.

17. [1916] NZLR 169 171.

country in which it was domiciled.

2.4 Australia

The Australian *Companies Act* of 1981[18] applies in New South Wales, Victoria, Queensland and Western Australia. Section 315(1)(c) thereof provides as follows:

> 1(c) The circumstances in which the company may be wound up are -
>
> (i) if the company is dissolved or has ceased to have a place of business in the State or has a place of business in the State only for the purpose of winding-up its affairs or has ceased to carry on business in the State;

Paterson and Ednie render the following commentary on section 315(1)(c):[19]

> The pendency of a foreign liquidation does not affect the jurisdiction to make a winding-up order :
>
> Re Commercial Bank of South Australia, (1886), 33 Ch. D. 174;
> Re Naamlooze Vennootschap Handelmaatschappij Wokar, (1946) Ch. 98.

2.5 Canada

According to the law of Canada, the business of a foreign company having assets in Canada may be wound up in Canada although the company is in the process of being wound up elsewhere.[20] In *Re Briton Medical and General Life Association Ltd (No 2)*[21] Canadian policy holders petitioned for distribution of the deposit made by a foreign company which had since become insolvent. It was held that the policy holders were entitled to the relief notwithstanding that proceedings to wind up the company were pending before the English courts.

The prior existence of a *concursus creditorum* in a foreign jurisdiction clearly does not exclude the jurisdiction of a Canadian court to wind up a foreign company doing

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18. 89 of 1981.

19. Paterson WE and Ednie HH *Australian Company Law* Vol III 2nded (Sydney 1982) 3101.

20. *Re The Stewart River Gold Dredging Company Ltd* (1912) 7 DLR 736; Stewart JL and Palmer ML *Company Law of Canada* 5thed (Toronto 1962) 16.

21. (1886) 12 OR 441.

business in Canada.

2.6 India

Section 583(4)(a) of India's *Companies Act* of 1956 provides as follows:

> (4) The circumstances in which an unregistered company may be wound up are as follows :-
>
> (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;

Srinivasa Iyengar, Thayil and Bagga deal with the rights of the liquidators where a foreign company has also been wound up locally:[22]

> Where a foreign company is already in the course of being wound up in the country where it was domiciled the winding-up in this country will be ancillary to the foreign liquidation and the power of the liquidator is restricted to dealing with the assets in this country.

2.7 South Africa

The provisions of section 199(3) of the *English Companies Act* of 1862 soon found its way into local statutory jurisprudence. The Natal *Winding-Up Law* of 1866[23] included the following provisions in section 5:

> 5. Any person who shall be a creditor of any Joint-stock or other Company, and whose debt shall amount to fifty pounds and upwards, or who shall claim to be a contributory of a Company may present a petition to the Supreme Court in a summary way for the winding-up of the affairs of such Company in any of the following cases, that is to say :
>
> 1st - 6th ...
>
> 7th. If any Company shall have dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding-up its affairs, and the same shall not have been

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22. Srinivasa Iyengar, TR Thayil PK and Bagga SN *Encyclopaedia of Company Law* Vol II (Allahabad 1962) 229. An "unregistered company" includes a foreign company.

23. 19 of 1866.

completely wound up.

The Cape of Good Hope *Companies Act* of 1892[24] included section 216(3):

> (3) The circumstances under which an unregistered company may be wound up are as follows (that is to say),
>
> (a) When the company has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;

The Transvaal *Companies Act*[25] followed the English *Companies Act.*[26] Section 203(iii)(a) of the Transvaal *Companies Act*[27] provided as follows:

> Subject to the provisions of this Chapter any company, association, syndicate or partnership having its place of business in this Colony, which consists of more than seven members and is not a company to which Chapters I, II, and III apply, may be wound up under this Act, and all the provisions of this Act with respect to winding-up shall apply to such a company, association, syndicate or partnership (hereinafter referred to as an `unregistered company'), with the following exceptions and additions :-
>
> (iii) The circumstances in which an unregistered company may be wound up are as follows (that is to say) :-
>
> (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;[28]

In *Donaldson v British South African Asphalte and Manufacturing Co Ltd*[29] (decided prior to promulgation of the Transvaal *Companies Act* of 1909[30]) chief justice Innes

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24. 25 of 1892.

25. 31 of 1909.

26. 89 of 1862.

27. 31 of 1909.

28. An "unregistered company" included a foreign company.

29. 1905 TS 753 755-756.

30. 31 of 1909.

held that there was nothing in Law 1 of 1894[31] which would prevent the Transvaal supreme court from placing in liquidation a company registered outside the Transvaal, but domiciled for purposes of business therein. The court assumed (without deciding) that it is competent for the Transvaal supreme court to place in local liquidation such a company despite it already having been liquidated elsewhere. In the event the court refused to grant a local winding-up order as a single liquidation would be more convenient on the facts of the matter and as the interest of local creditors would be as well protected as if a local winding-up order had been granted.

The Republic of the Orange Free State did not adopt the English law on this point.[32]

The Company laws of the various provinces were consolidated in the South African *Companies Act* of 1926.[33] This act provided, *inter alia*, as follows :

Section 208 :

> An unregistered company shall mean a foreign company having a place of business in the Union and any company, syndicate, association or partnership having a place of business in the Union, which consists of more than seven members and is not a company to which Chapters I, II and III apply.

Section 209 :

> An unregistered company may, subject to the provisions of this Chapter be wound up under this Act, and the provisions of section ninety and all the provisions of Chapter IV. of this Act and of the winding-up rules framed under section two hundred and twenty shall apply to such an unregistered company, and to the directors, officers or members thereof, with the following exceptions and additions :-
>
> (c) The circumstances in which an unregistered company may be wound up are as follows (that is to say) :-
> (i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs;

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31. The then prevailing statute on the liquidation of companies.

32. See s 2 of the Orange Free State *Winding-Up of Joint Stock Companies Law* 2 of 1892.

33. 46 of 1926.

Regarding the issues referred to herein, the *Companies Act* of 1973[34] did not contain an equivalent to section 208 of the *Companies Act* of 1926.[35] Section 344 of the *Companies Act* included, however, in sub-section (g), a reference to "an external company". Section 344(g) provides that a company may be wound up by the Court if, in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding-up its affairs.

Section 1 of the *Companies Act* of 1973[36] states that in the Act, unless the context otherwise indicates, "external company" means a company or other association of persons, incorporated outside the Republic, the memorandum of which was lodged with the Registrar under the repealed Act, or which, since the commencement of the Act, has established a place of business in the Republic.

Chapter XIV of the *Companies Act*[37] deals with the winding-up of companies. Section 337 thereof provides that in chapter XIV, unless the context otherwise indicates, "company" includes a company, external company and any other body corporate.

It is quite proper and legitimate to have regard to the provisions of section 199 of the English *Companies Act*[38] and the English case law thereon for the purpose of interpreting section 344(g) in establishing the full ambit of the section's applicability. In *Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours* it was held that:[39]

> If this country adopts an English enactment the presumption is that the adoption is with full recognition of the sense which judicial interpretation has given it.

Accordingly, when the legislature adopted the wording of section 344(g),[40] it is

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34. 61 of 1973.

35. 46 of 1926. The 1973 *Companies Act* repealed the 1926 *Companies Act*.

36. 61 of 1973.

37. 61 of 1973.

38. 89 of 1862.

39. *Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours* 1938 AD 146 174.

40. *Companies Act* 61 of 1973.

presumed to have been aware of all its predecessors, namely the applicable provisions of the *Companies Act* of 1926,[41] the Companies Acts of the various provinces and especially of section 199 of the English *Companies Act,*[42] as well as of the English case law pertaining thereto.[43]

Having regard to the legal ancestry of section 344(g),[44] there exists

> ... the presumption against any further alteration of current law than that clearly conveyed by the statute under consideration.[45]

Section 344(g) contains three conditions or jurisdictional facts. They are independent and not cumulative.[46] Purely as a matter of language section 344(g) contemplates the right of the court to wind up an external company that is already being wound up in the country in which it has been incorporated. If this were not so, the words "if .... that company is dissolved in the country in which it has been incorporated" would have no discernable meaning whatsoever.

The history of section 344(g) and all the case law on its English predecessor and colonial brothers make it quite plain that the words "is dissolved" as used in section 199 of the English *Companies Act*[47] and incorporated in section 344(g) of the *Companies Act,*[48] refer to a company that is being wound up in another jurisdiction.

"Is dissolved" strikes one as possibly an unexpected choice of phrase. In the context of a company the words "is being wound up" might rather have been used. In ***Banque***

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41. 46 of 1926.

42. 89 of 1862.

43. *Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours* 1938 AD 146.

44. *Companies Act* 61 of 1973.

45. *Protective Mining and Industrial Equipment Systems (Pty) Ltd v Audiolens (Cape) (Pty) Ltd* 1987 2 SA 961 (A) 991I-992A.

46. *Companies Act* 61 of 1973. See *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) 82E-F.

47. 89 of 1862.

48. 61 of 1973.

des Marchands de Moscou v Kindersley[49] the following is said in regard to the background against which the words "is dissolved" should be interpreted:[50]

> As regards the `doubts' which Lord Atkin thought were intended to be removed by what became sub-s. (2) of s. 338 of the Act of 1929, it is to be remembered that the word `dissolved', which, as I have already observed, has consistently appeared in all our legislation for the winding-up of companies since 1848, took its rise from the old partnership conception, and might, therefore, reasonably be taken to refer to the step or process of dissolution as understood in partnership affairs as distinct from the final extinction of the corporate entity.

The Russian revolution caused another problem to arise. The post-revolution government caused certain Russian banks to cease to exist as legal *persona*. Despite this, some banks carried on doing business outside Russia. One such bank was the Banque des Marchands de Moscou (Koupetschesky), which traded in London. Upon an application for its liquidation brought in England, the question arose whether an application could be brought for the liquidation of a company which had ceased to exist and consequently had no legal *persona*. In these circumstances it was held that "is dissolved" can also be taken to mean "has been dissolved". In the *Banque des Marchands de Moscou*-matter[51] the master of the rolls lord Evershed held as follows:

> Section 338(1) of the Act of 1929 provided :
> `(d) The circumstances in which an unregistered company may be wound up are as follows : - (i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding-up its affairs ...'
>
> This form of words is substantially identical with that which has consistently appeared in all the relevant legislation since the Act of 1848 (11 and 12 Vict., c. 45). As a matter of language it is plain that the three conditions named are independent and not cumulative. Assuming, therefore, in the case of a foreign corporation, which has by its local law been extinguished, that it is covered by the words `is dissolved' - which words must, as it is conceded, be taken to mean `has been dissolved' - it would appear; from the language used that no other condition has to be fulfilled in order to confer on the English court jurisdiction to wind it up.

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49. [1950] 2 All ER 549 (CA).

50. 560C-D.

51. [1950] 2 All ER 549 (CA) 556.

The supreme court of appeal recently considered the ambit of section 344(g) of the *Companies Act*[52] in the matter of *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd.*[53] The facts were briefly these: Zambia Airways was an external company incorporated in Zambia according to the laws of that country. It registered its memorandum locally some eleven years later in terms of section 322 of the *Companies Act* .[54] A few years thereafter its members passed an extra-ordinary resolution in Zambia to wind it up voluntarily in that country in terms of section 180(c) of the Zambian *Companies Act.*[55] Pursuant thereto the applicants were appointed its joint liquidators. Sometime thereafter Zambia Airways was wound up locally in terms of section 344(g) of the *Companies Act*[56] by the high court of South Africa. The provisional and final orders were granted. Pursuant thereto the first respondent was appointed as the liquidator in the local winding-up.

The foreign liquidators contended in their founding papers that the local winding-up order was invalid and should be set aside.[57] The thrust of their case was that once the external company had been wound up in the country of its incorporation, the high court of South Africa no longer has jurisdiction to locally wind up such external company. It was contended that the voluntary winding-up of Zambia Airways in Zambia created a worldwide *concursus creditorum* which included the local creditors and which rendered the existence of another *concursus creditorum* impossible in law. Consequently, so the contentions proceeded, the supreme court of appeal should set aside the winding-up order in terms of section 354 of the *Companies Act*.

This argument proved to be fallacious for ignoring the fundamental principle that foreign insolvency legislation has no force locally. The principle was articulated as follows in *Rex v Etberg*:[58]

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52. 61 of 1973.

53. *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA).

54. 61 of 1973.

55. *Companies Act* Chapter 686 of the Laws of Zambia.

56. 61 of 1973.

57. Not all of what is stated herein appear from the reported judgment. Some facts were gleaned from the papers filed in the matter and some of the arguments raised were taken from counsels' heads of argument.

58. 1932 AD 142 145.

> There are no insolvency statutes of universal application. The English system of law, for instance, has always rejected the unity of bankruptcy (Westlake, 4th ed., p. 159, sec. 127 in fine). An insolvency or bankruptcy statute is only of force in the State where it is enacted, though by the comity of nations assignments in bankruptcy in one State are sometimes recognised as effective in another.

The jurisdiction of the courts in this country is not affected by the sequestration of the estate of a person in the (foreign) country of his domicile, or by the liquidation of a company in its foreign country of incorporation. In *Hymore Agencies Durban (Pty) Ltd v Gin Nih Weaving Factory*[59] the following is said:

> The mere fact that there has been since the attachment both a bankruptcy and a receiving order against defendant in the Court of its domicile - a foreign Court - is no bar to plaintiff proceeding with his action against defendant; proceedings in our Courts are not thereby stayed. Ex parte Solomon, 1928 W.L.D. 1; Herman, N.O. v Tebb, 1929 C.P.D. 65 at p. 76. It has been held that a Bankruptcy Statute is only of force in a State where it is enacted, nevertheless by comity of nations assignments in bankruptcy in one State are sometimes recognised as effective in another. It is for this reason that the sequestration of a debtor by a foreign court does not preclude a creditor in this country instituting or proceeding with an action against the debtor in the ordinary way.

At a time when the present constituent parts of this country consisted of colonies and independent states, it was not uncommon that the same person was sequestrated at the same time in more than one of them. The multiple *concursus creditorum* created thereby did not interfere with the jurisdiction of the court who granted the second sequestration order. In *Liddle and Leask v Pooley and Leinberger*[60] a certain Ziegler was sequestrated in Kimberley in the Cape Colony. The high court of justice in the former Zuid-Afrikaansche Republiek thereafter sequestrated him again. In the event the effect was that two *concursus creditorum* competed for the insolvent's assets in the Zuid-Afrikaansche Republiek. The court decided that the creditors of the *concursus* in the Cape Colony would be entitled to prove their claims in the Zuid-Afrikaansche Republiek. The court held as follows:

> The creditor or his agent must appear and give full details of his claim so that the Master or Landdrost can judge whether the claim should be accepted. The trustee cannot as agent appear on behalf of a creditor, therefore the creditor must himself appear and the creditor cannot rely on the account filed in the insolvent estate in

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59. 1959 1 SA 180 (D) 182H - 183A.

60. (1899) 6 Off Rep 109.

the Cape Colony.[61]

In *In re Testate Estate of Edwin Allan Skeen*[62] the deceased's estate in the Transvaal was sequestrated during May 1905. The deceased estate in Natal was administered as an insolvent estate and consisted of movable and immovable property. On 8 August 1905 the Natal court empowered Singer, the trustee in the Transvaal insolvent estate, to administer and realise for the benefit of the Transvaal insolvency all the movable assets of the insolvent in Natal. That was done and the proceeds applied in reduction of the claims of the Transvaal creditors only. The court found as follows:[63]

> I am satisfied that the law of this Colony, as regards the proceeds of the immovable property, gives all creditors equal rights, whether they are resident or whether they are foreign. That being so, the Transvaal creditors have a right to prove in this estate, but the trustee of the insolvency in the Transvaal has no authority to put in a proof on behalf of the Transvaal creditors en bloc. If the Transvaal creditors have any claim against this property in Natal they must come here and prove as individual creditors in the same way as local creditors must prove.

In *Herman v Tebb*[64] the court held:

> The fact that Tebb's estate was sequestrated in the Transvaal did not debar his creditors from proceeding against him, either by suing him or for the sequestration of his estate here, but they have failed to do so until now.

The judgment in the *Ward*-matter[65] settled our law in these terms:

> It follows from the aforegoing that, in my view, a South African Court has jurisdiction in terms of s 344 (g) of the Act to grant a winding-up order in respect of an external company notwithstanding that it is the subject of a voluntary or compulsory winding-up in the country of its incorporation. It follows, too, that the Court which granted the winding-up order in the present case on 28 February

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61. *Liddle and Leask v Pooley and Leinberger* (1899) 6 Off Rep 109 112.

62. (1906) 27 NLR 127.

63. See 130 - 131 of the report.

64. 1929 CPD 65 76.

65. *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA)1831-84B.

> 1995 had jurisdiction to do so. In the circumstances, there is no basis upon which this Court can interfere with the exercise by the Court a quo of its discretion to refuse to set aside the winding-up order in terms of s 354(1) of the Act. The appeal must therefore fail.
>
> It is perhaps regrettable that there will be more than one concursus creditorum. But the appellants themselves are largely to blame for this state of affairs. However, the limited extent of the recognition afforded to them by the Court a quo will at least serve to confirm their standing to monitor the first respondent's winding-up of the company's South African estate and if needs be to take such action as lodging an objection to the latter's account.

3. Recognising foreign liquidators locally

It is unusual to liquidate an external company in South Africa notwithstanding that it is the subject of a voluntary or compulsory winding-up in the country of its incorporation, as happened in the *Ward* -matter.[66] The usual way of dealing with local assets and liabilities of a liquidated external company, is for the foreign liquidator to apply to a South African court for recognition.[67] The court is vested with a wide discretion in this regard:[68]

> Indeed, quite apart from principles on international comity, the advantages of having one concursus creditorum are obvious. The object of a creditors' winding-up is to ensure a fair division of the company's property among the creditors according to their legal rights. Where there is both a local concursus and a foreign concursus it may well be that one group of creditors will be either favoured or disadvantaged depending on the location of the company's assets. Nonetheless, a Court faced with an application for the recognition of a foreign liquidator with plenary powers has a wide discretion and will be particularly concerned to protect as far as possible the interests of local creditors. In appropriate cases, therefore, it will refuse to grant such recognition if there are circumstances which render it undesirable to do so.

The factors which our courts have taken into account in exercising their discretion

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66. *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) 1998 3 SA 175 (SCA).

67. In *Donaldson v British South African Asphalte and Manufacturing Co Ltd* 1905 TS 753 756-757 chief justice Innes considered this to be the "proper course".

68. *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) 179G-H.

when deciding whether to recognize a foreign order, include the following:[69]

(a) The interests of creditors generally,[70] especially if the rights of local creditors are in no way prejudiced by the recognition order.[71]

(b) That the law in South Africa and in the foreign country are practically identical[72] or at least that the same system of law applies in the foreign country and South Africa.[73]

(c) The number and value of creditors in the foreign country compared to those in South Africa.[74]

(d) The value and assets of the insolvent in the foreign country compared to those in South Africa.[75] If there are only moveables in South Africa and immovable property in the foreign country, a court may be more inclined to recognize the foreign order.[76]

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69. These factors have conveniently been listed by O'Brien P "Transnational Aspects in South African Insolvency Law"18-21, a paper delivered at a conference on Reform of South African Insolvency Law held on 28 August 1995 at the Rand Afrikaans University in Johannesburg under the chairmanship of mr justice R H Zulman. O'Brien dealt with sequestrations and insolvencies and some of the factors listed by him are peculiar to insolvencies; others apply equally to sequestrations and liquidations. Only the most important factors relevant to the liquidation of external companies have been considered herein.

70. *Re Estate Morris* 1907 TS 657 660 expressed by the court *a quo*.

71. *Ex parte B Z Stegmann* 1902 TS 40 52. In *Ex parte Singer: In re Insolvent Estate Skeen* 1905 NLR 536 548 the court refused to consider in this regard the rights of creditors *inter se*, such as the rights, competition and preference of creditors and the allocation of the proceeds of the local property.

72. *Moolman v Builders and Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 1 SA 954 (A) 961D.

73. *Ex parte B Z Stegmann* 1902 TS 40 54.

74. *Re Estate Morris* 1907 TS 657 660-661 expressed by the court *a quo*. One of the considerations inducing the Transvaal court to recognize the foreign (Rhodesian) trustee was that the Rhodesian creditors amounted to over £11 000, whereas the local creditors represented an amount of only £870.

75. *Re Estate Morris* 1907 TS 657 661 expressed by the court *a quo*. In recognizing the foreign bankuptcy and the foreign trustee, it weighed with the court that the respondent's main asset was situate in the foreign jurisdiction.

76. *Trustee of Howse, Sons and Co v Trustees of Howse, Sons and Co; Jocelyne v Shearer and Hine* (1884) SC 14 19.

(e) The provisions made for South African creditors under the foreign liquidation order; for example the convenience for them to prove their claims; the guarantees as to the proper administration of the estate by the foreign liquidator[77] and the safeguards contained in the recognition order.[78]

(f) The ease and cost with which foreign creditors can prove their claims in South Africa, bearing in mind that they may use powers of attorney.[79]

(g) Where litigation is expected to occur in South Africa it is more convenient that the administrator of the estate who may be a party to such litigation should be one who is directly subject to the local court's jurisdiction and control.[80]

(h) The historic bond and large measure of interdependence and co-operation between South Africa and the foreign country involved which comity requires to be recognized.[81]

(i) That the nature of the matter to be investigated is of such a nature that it clearly requires to be examined.[82]

(j) The interest of all parties involved, including considerations of costs.[83]

In asking for recognition locally, a foreign liquidator seeks an indulgence. Consequently the foreign liquidator bears the onus to place all the facts before the court in order to enable it to exercise its discretion.

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77. *Re Estate Morris* 1907 TS 657 661 expressed by the court *a quo*. The question whether special provision should be made for local creditors was left open in *Ex parte Steyn* 1979 2 SA 309 (O) 311B-C.

78. *Ex parte Steyn* 1979 2 SA 309 (O) 311E.

79. *Re Estate Morris* 1907 TS 657 670.

80. *Ex parte Singer: In re Insolvent Estate Skeen* 1905 NLR 536 547.

81. *Moolman v Builders and Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 1 SA 954 (A) 961E.

82. *Moolman v Builders and Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 1 SA 954 (A) 961E.

83. *Moolman v Builders and Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 1 SA 954 (A) 961F.

Where the debtor has been liquidated locally and the foreign liquidator seeks to replace the local liquidator, such consideration will weigh against recognition of the foreign liquidator. This weight is compounded if the local winding-up has been virtually completed.

In *In re Estate Morris*[84] the foreign trustee sought an order setting aside the Transvaal sequestration and authorising him to administer the Transvaal assets. The court per chief justice Innes considered this to be a "very startling request".[85] In the event the order was refused mainly because continuing the local sequestration process would be more convenient to local creditors.

In *Feltham v Meintjes*,[86] the Cape of Good Hope Bank was liquidated in the Cape Colony. Whilst the winding-up there was still pending, the bank was also liquidated in the Zuid-Afrikaansche Republiek. Provisional liquidators were appointed in the Zuid-Afrikaansche Republiek. They instituted an application for an order confirming their provisional appointment in the Zuid-Afrikaansche Republiek "tergelyk gezamenlyk met de liwidateeren van de Cape of Good Hope Bank in de Kaap Kolonie alwaar de gemelde Bank in likwidatie geplaats is". The Cape liquidators opposed the application. The court *a quo* granted the order sought. On appeal by the Cape liquidators the court of appeal appointed them the sole liquidators of the bank in the Zuid-Afrikaansche Republiek. It was in addition ordered that the liquidators in the Zuid-Afrikaansche Republiek should receive a reasonable remuneration from the estate for the services they had rendered.

The *Feltham*-case[87] is distinguishable from the *Ward*-case,[88] as certain facts were peculiar to the *Ward*-matter:

(aa) The appellants received notice of the provisional liquidation of Zambia Airways on 6 February 1995. They nonetheless failed to oppose the final liquidation order which was granted on 28 February 1995. No explanation for such failure to oppose was given.

(bb) The immovable assets had already been sold and transferred in the local

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84. 1907 TS 657.

85. See 667 of the report.

86. 10 November 1890 TS (unreported).

87. *Feltham v Meintjes* 10 November 1890 TS (unreported).

88. *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA).

winding-up. The local creditors had proved their claims. Payment of their dividends was suspended pending only the outcome of the appeal.

(cc) The foreign creditors did not avail themselves of the opportunity to prove claims in the local winding-up. This they could have done without difficulty.

(dd) The court *a quo* recognised the appellants for the purpose of providing them with the necessary *locus standi* to object to the local liquidation and distribution accounts, if so advised.

In the matter of *In re The Leydsdorp and Pietersburg (Transvaal) Estates Ltd (In Liquidation)*[89] a foreign liquidator successfully applied to set aside a local winding-up order which was granted *ex parte* where the local applicant failed to disclose that the company was incorporated in a foreign country where it had already been placed in voluntary liquidation.

The court has a wide discretion in matters of this kind.[90] According to Smith and Ailola comity and convenience are the "watchwords" in this exercise.[91]

4. Considerations of comity

Foreign insolvency legislation does not have force outside the country of its origin, hence the necessity for foreign liquidators to apply to a South African court for recognition.[92] Such recognition is granted on the grounds of comity.[93]

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89. 1903 TS 254.

90. Forsyth CE *Private International Law* 3rd ed (1990) contends at 330 n 281 that the notion of a discretionary recognition was perhaps based on a misunderstanding of comity. The court's discretion is, however, now well established. See also O'Brien "Transnational Aspects In South African Insolvency Law" 11-13.

91. Smith and Ailola 1999 *SA Merc LJ* 193.

92. *Liquidator Rhodesian Plastics (Pvt) Ltd v Elvinco Plastic Products (Pty) Ltd* 1959 1 SA 868 (C) 869C-D approved in *Moolman v Builders and Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 1 SA 954 (A) 959H-I.

93. The philosophical or theoretical basis for the court of one country to apply the law of another country has for centuries been a source of disagreement. For a discussion of the various theories, see *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D) 513H-516C.

The consideration of comity has acquired a defined content in our jurisprudence on cross-border insolvencies. A pre-requisite for applying comity is an assurance of reciprocal acknowledgement in the foreign jurisdiction. In *Re African Farms Ltd*[94] the full court said the following:

> The recognition which our courts, in common with those of most civilised countries, accord to a foreign trustee in bankruptcy does not depend merely on the doctrine that sequestration duly made at an insolvent's domicile vests in his trustee his movable property wherever situated. In Ex parte Stegmann ([1902] T.S. 40) such recognition was extended in respect of immovable property, the dominium in which could in no sense be said to have vested in the trustee, on the wider principle that the right of administration conferred upon a trustee by a foreign law might, with propriety, be recognised and enforced by this Court on grounds of comity. And it is on this principle, it seems to me, that our recognition of a foreign liquidator is founded. Winding-up Acts do not, so far as I know, generally vest the dominium of the company's assets in the liquidator; but they deprive the company of any beneficial ownership in those assets, and confer upon the liquidator the sole right of administering them. And it is this right of administration - a right quite inconsistent with an attachment of the assets by individual creditors - which our courts in such cases recognise.

In *Ex parte B Z Stegmann*[95] the full court said the following:

> But, even though we may extend our assistance upon grounds of comity to the order of the Cape Courts in a matter like the present, trusting to receive reciprocal recognition in the future from those Courts, we cannot shut our eyes to the fact that the whole question of the mutual enforcement of extra territorial decrees in insolvency, as between the various British Colonies of South Africa, can only be completely and effectually dealt with by treaty or convention followed by reciprocal legislation. The decisions of South African Courts may do much towards securing uniformity and simplicity of insolvency administration; but nothing short of an agreement between the various South African Colonies enforced by general legislation will succeed in completely attaining what is so much to be desired.

The court deals with *Voet*'s suggestion that the mutual enforcement of extra territorial decrees of insolvency be dealt with by treaty and a discussion on the Convention of 1687 between the States of Holland and Utrecht. The court then proceeds:

> There would be nothing, for instance, to prevent a vigilant creditor from attaching

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94. 1906 TS 373 378.

95. 1902 TS 40 54-55.

> the property or sequestrating the estate of a debtor having landed assets in this Colony, in spite of a previous Cape sequestration, if the Cape trustee had not obtained recognition from this Court. Moreover, complicated questions relating to domicile and other matters may be differently decided by different Courts. For the present, however, all we can do is to extend our assistance to the Courts of a sister Colony and thus enable their decrees to operate within our jurisdiction in cases where no objections exist to such a course.

In *Cape Government v Liquidators of the Balmoral Diamond Co Ltd*[96] chief justice Innes held as follows:

> This Court has always endeavoured to give effect to the decrees of other South African courts in insolvency and liquidation proceedings, and we shall consistently pursue that course so long as our decrees enjoy in the neighbouring colonies reciprocal acknowledgement.

In applying the consideration of convenience in cross-border insolvency our courts have emphasised the convenience of the local creditors as opposed to the convenience of the foreign creditors of the debtor. In applying the consideration of convenience in deciding whether or not foreign trustees should administer the local administration of an insolvent's estate, the court held in *Re Estate Morris:*[97]

> The insolvent is here; an investigation of his affairs, which we are told is necessary, can best be carried out and conducted here. It is true the majority of the creditors reside in Rhodesia, but there is nothing to prevent their proving here. That could be done with little expense, if the main concursus were established here. We find that the English creditors have already sent powers to prove their debts in this colony. Why, then, should the assets in the Transvaal be sent to Rhodesia simply to enable the Rhodesian creditors to prove there, when they can prove here?

5 An international solution : Treaties or a model law

The problems created by cross-border insolvencies have for centuries been calling for a need to harmonize the insolvency laws of different jurisdictions.[98] Voet and our

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96. 1908 TS 681 686.

97. 1907 TS 657 670.

98. O'Brien "Transnational Aspects in South African Insolvency Law" 1 suggests that there are four general approaches to harmonize cross-border insolvency laws: The negotiation of multilateral treaties; the preparation of standard or framework multi-national legislation for domestic adoption; the adoption of facilitative provisions in domestic legislation; and a protocol or concordat amongst professionals in the insolvency community which would include procedures to be followed by agreement in multi-national cases. These suggestions are borrowed from a memorandum dated 11 May 1994 addressed by D M Glosband to the International Bar Association Committee J (Insolvency) re UNCITRAL / INSOL Colloguium held in Vienna from 17 to 19 April 1994.

courts have favoured that the matter should be dealt with by treaty.[99] In *Ex parte B Z Stegmann*[100] the court considered this issue:

> Voet (Ad Pandectas 20.4.12) in discussing the question of whether according to strict law it was possible to establish only one place as that of the concursus creditorum, even though the estate to be distributed might include landed property in provinces, strongly advocates the whole matter being dealt with by treaty. He refers to the fact that in 1687 a convention was come to between the States of Holland and Utrecht which dealt very fully with the administration of insolvent and other estates having property in both territories. A summary of the contents of the convention is given by Voet, and the text itself will be found in the Groot Placaat Boek vol. 4 pp 460-61, and it will well repay perusal. It provided, amongst other things, that a curator appointed by the Court of the domicile of the deceased or of the insolvent should administer all the property of the estate both movable and immovable situated in either or both territories. The concursus creditorum was to take place only at the place where the order appointing the curator had been made, and any dispute as to domicile was to be settled by the Judge within whose jurisdiction the insolvent or the deceased had last resided. It may not be considered out of place to express a hope that the Colonies of South Africa may before long follow the same course which was adopted by those two provinces of the Netherlands more than 200 years ago. Until that is done, the efforts of the Courts to obviate confusion and save expense can never be completely successful.

The prospective solution of treaty suggested by Voet and the court in *Stegmann's* case has so far not eventuated. Considerable progress has, however, been made in other directions. The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law in Vienna on 30 May 1997.[101] The scope of the Model Law is limited to some procedural aspects of cross-border insolvency cases[102]

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99. The conclusion of treaties and conventions in insolvency matters can be traced back to the Middle Ages. The Verona-Trent treaty (1204) dealt with the administration of the debtor's assets and the Verona-Venice agreement (1306) dealt with the extradition of fugitive debtors. For a detailed discussion of cross-border treaties and conventions, see Smith and Ailola 1999 *SA Merc LJ* 199-202.

100. 1902 TS 40 54 - 55. See also *Re Bank of Credit and Commerce International SA* (1992) BCLC 570 (Ch D) 577C.

101. UNCITRAL (United Nations) *Model Law on Cross-Border Insolvency, with Guide to Enactment* New York (hereinafter "the Model Law"). The Model Law has been the subject of recent commentary in our law. See in this regard Berends 1998 *Tulane Journal of International and Comparative Law* 309; Smith and Ailola 1999 *SA Merc LJ* 202.

102. Article 20 of the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter "the Guide").

and is designed to assist states to equip their insolvency laws with a modern, harmonized and fair framework to address more efficiently instances of cross-border insolvency.[103]

The Guide to Enactment of the Model Law makes it clear that the Model Law is a legislative text that is recommended to states for incorporation into their national law.[104] In incorporating the text of the Model Law into its system, the state may modify or leave out some of its provisions, though it is recommended that as few changes as possible be made in order for the Model Law to achieve a satisfactory degree of harmonization and certainty.[105] Uniformity of statutes will make it easier for the enacting states to obtain cooperation from other states in insolvency matters.[106]

The Model Law mirrors many of the fundamental principles of our law on cross-border insolvencies. Recognition of foreign proceedings does not prevent local creditors from initiating or maintaining collective insolvency proceedings.[107] Relief available to the foreign representative is subject to the protection of local creditors and other interested persons, including the debtor, against any undue prejudice.[108] Foreign creditors are allowed to prove claims in the insolvency proceedings of the enacting state.[109] The Model Law[110] also provides that without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of a claim in a proceeding pursuant to a law relating to insolvency in a foreign state, may not receive a payment for the same claim in the local insolvency proceedings, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

The UNCITRAL Model Law has found a receptive ear in South African judicial circles[111] and has been considered by the Project Committee of the Law Commission. Their

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103. Article 1 of the Guide.

104. Article 11 of the Guide.

105. Article 12 of the Guide.

106. Article 21 of the Guide.

107. Article 28 read with article 29 of the Model Law.

108. Articles 22 and 19(2) of the Model Law.

109. Article 32 of the Model Law.

110. Article 32 of the Model Law.

111. SOUTH AFRICA (Republic) *Final Report on Trans-National Insolvency* (Pretoria 1998).

endeavours have lead to the draft Cross-Border Insolvency Act.[112]

6. Key principles

The problems peculiar to cross-border insolvencies relate in the main to two matters: Firstly, the control of estates in the various countries. Secondly, the distribution of the assets in the various countries, having regard to creditors being dispersed worldwide. Certain key principles can be distilled from the South African law of cross-border insolvency:

(a) South African law recognises the principle that foreign insolvency legislation does not have force outside the country of its origin. It follows that such legislation does not have force locally.[113]

(b) The right of administration conferred upon a trustee or liquidator by a foreign law might be recognized and enforced by a South African court on grounds of comity.[114]

(c) A court faced with an application for the recognition of a foreign liquidator with plenary powers has a wide discretion and will be particularly concerned to protect as far as possible the interests of local creditors. Several factors must, however, be weighed against each other to establish the proper balance of convenience.[115]

(d) Pending foreign insolvency proceedings do not affect the jurisdiction of our courts over the debtor. This jurisdiction includes the right to subject the debtor to fresh local insolvency proceedings aimed at a liquidation and distribution of the debtor's local assets amongst creditors locally.[116]

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112. For a commentary of the draft Cross-Border Insolvency Act, see Smith and Ailola 1999 *SA Merc LJ* 192 206-207.

113. *R v Etberg* 1932 AD 142 145; *Moolman v Builders and Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 1 SA 954 (A).

114. *In re African Farms Ltd* 1906 TS 373 378.

115. *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) 179I; O'Brien "Transnational Aspects in South African Insolvency Law" 15-22.

116. *Hymore Agencies Durban (Pty) Ltd v Gin Nih Weaving Factory* 1959 1 SA 180 (D); *Herman v Tebb* 1929 CPD 65 76; *Liddle and Leask v Pooley and Leinberger* (1899) 6 Off Rep 109 112; *Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA) 183H-J.

(e) Liquidators appointed in a local liquidation may be substituted by the liquidators previously appointed in the foreign liquidation. In such event the substituted liquidators should receive a reasonable remuneration from the estate for the services they had rendered.[117]

(f) Foreign creditors are allowed to prove their claims in the local insolvency proceedings, provided that they account for any dividend they had received in any foreign insolvency proceeding.[118]

The principles established in South African cross-border insolvency law deal effectively with the problems thrown up by international commerce. These principles also broadly accord with the ideals set by the ***Model Law*** proposed by UNCITRAL.

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117. *Feltham v Meintjes* 10 November 1890 TS (unreported).

118. *Liddle and Leask v Pooley and Leinberger* (1899) 6 Off Rep 109; *In re Testate Estate of Edwin Allan Skeen* 1906 NLR 127.

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