The competence of the foreign representative in cross-border insolvency matters: A comparison between South Africa and Australia

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Abstract

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The world is continuously becoming a smaller and smaller place. It has become a global community of sorts merely divided by imperceptible borders that are easily transversed by ever-evolving technological advances in the fields of business, travel, communication and such, each regulated by its own set of domestic laws and regulations. Hordes of South Africans immigrate to Australia annually due to, among others, economic and political uncertainty. These ex-patriots generally leave behind assets and creditors in South Africa whilst acquiring new ones wherever they choose to establish themselves. This serves as basis for potential future cross-border insolvency issues. Furthermore, entities such as companies trading internationally, and multinational companies with branches and offices in more than one state, have property and creditors in many different jurisdictions. Should such a company be liquidated, it would give rise to questions of jurisdiction, the procedures to be followed, the appointment of a liquidator(s) and the distribution of assets, to name a few.

The absence of a universal cross-border insolvency law leaves room for much uncertainty and confusion. What is of importance for purposes of this research is to clarify all prevailing uncertainties regarding the rights and obligations of the foreign representative and the foreign creditor in cross-border insolvency matters. The foreign representative is the person or entity appointed to administer the reorganisation or liquidation of the insolvent debtor's assets in a foreign proceeding.

The inconsistency in cross-border insolvency regulations between South Africa and Australia has the consequence that there is no guarantee that a foreign creditor in one state will be treated the same as a foreign creditor in terms of the domestic laws of the other, as the *Model Law* aims to do. The situation would have been significantly less complicated had the South African *Cross-Border Insolvency Act*

been in force at present and had Australia been designated as a state to which this Act would apply. In that case, the treatment of foreign representatives and foreign creditors would be of a reciprocal nature.

This dissertation attempts, through an investigation of the South African and Australian domestic insolvency laws, to ascertain the position of the foreign representative and foreign creditors pre and post incorporation of the *Model Law*. Consequently this dissertation compares the legal positions of these parties in terms of South African and Australian national insolvency legislation.

Keywords: Insolvency, cross-border insolvency, UNCITRAL Model Law on Cross-Border Insolvency, South African Cross-Border Insolvency Act, Australian Cross-Border Insolvency Act, foreign representative, foreign creditor

Uittreksel

Die bevoegdheid van die buitelandse verteenwoordiger in oorgrens-insolvensie aangeleenthede: ‘n Vergelyking tussen Suid-Afrika en Australië

Die wêreld word voortdurend ‘n kleiner plek. Dit het in ‘n sogenaamde “globale gemeenskap” verander wat bloot deur onsigbare grense geskei word en wat sonder moeite oorgesteek kan word te danke aan die ewig-veranderende tegnologiese vooruitgang in die besigheids, reis en kommunikasie velde. Hordes Suid-Afrikaners immigreer jaarliks na Australië as gevolg van, onder andere, ekonomiese en politieke onsekerheid. Sodanige immigrante laat gewoonlik bates en krediteure in Suid-Afrika agter terwyl hul nuwe bates en laste bekom waarookal hul kies om hulself te vestig. Dit dien as ‘n basis vir potensiële oorgrens-insolvensie aangeleenthede. Verder het entiteite soos maatskappye wat internasionaal handel dryf en multi-nasionale maatskappye met takke en kantore in meer as een staat, bates en laste in menigde jurisdiksies. Indien so ‘n maatskappy gelikwideer word sal daar onder andere onsekerheid heers aangaande die jurisdiksie, die korrekte prosedure om te volg asook die aanstelling van die likwidateur(s) en die distribusie van bates.

Die afwesigheid van ‘n universele oorgrens-insolvensie wet veroorsaak baie onsekerheid en verwarring. Die doel van hierdie navorsing is om die heersende onsekerheid aangaande die regte en pligte van die buitelandse verteenwoordiger en die buitelandse krediteur op te klaar. Die buitelandse verteenwoordiger is die persoon of entiteit wat aangestel is om die likwidasie van die insolvente debiteur se bates in die buitelandse prosedure te administreer.

Die onenigheid in oorgrens-insolvensie regulasies tussen Suid-Afrika en Australië het tot gevolg dat daar geen waarborg is dat ‘n buitelandse krediteur in een staat dieselfde behandel sal word as ‘n buitelandse krediteur in terme van die nasionale

wetgewing van ‘n ander staat nie. Die situasie sou heelwat minder gekompliseerd gewees het indien die Suid-Afrikaanse *Oorgrens-Insolvensie Wet* alreeds in werking was en indien Australië uitgesonder was as ‘n staat in terme waarvan die Wet van toepassing is. In sodanige geval sou buitelandse verteenwoordigers en buitelandse krediteure wederkerige behandeling ontvang het.

Deur die Suid-Afrikaanse en die Australiese nasionale insolvensie reg na te vors poog hierdie skripsie om die regs posisie van die buitelandse verteenwoordiger en die buitelandse krediteur pre en post die inwerking trede van die *Model Law* vas te stel. Gevolglik vergelyk hierdie skripsie die regs posisie van sodanige partye in terme van die Suid-Afrikaanse en Australiese nasionale insolvensie wetgewing.

Sleutel woorde: Insolvensie, UNCITRAL Model Law on Cross-Border Insolvency, Suid-Afrikaanse Oorgrens-Insolvensie Wet, Australiese Oorgrens-Insolvensie Wet, buitelandse verteenwoordiger, buitelandse krediteur

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List of abbreviations

ABI Law Review	American Bankruptcy Institute Law Review
AJCL	Australian Journal of Corporate Law
Aus CBA	Australian *Cross-Border Insolvency Act* of 2008
CBI	Cross-border insolvency
CILSA	Comparative and International Law Journal of South Africa
Colum J Eur L	Columbian Journal of European Law
COMI	Centre of main interests
C&SLJ	Company & Securities Law Journal
Emory Bankr Dev J	Emory Bankruptcy Developments Journal
EU	European Union
EU Regulation	European Union Regulation
Melbourne ULR	Melbourne University Law Review
Model Law	UNCITRAL Model Law on Cross-Border Insolvency (1997)
Penn St Int'l L R	Penn State International Law Review
PER	Potchefstroom Electronic Law Journal
SA CBA	South African *Cross-Border Insolvency Act* 42 of 2000
SA Merc LJ	South African Mercantile Law Journal
THRHR	Journal of Contemporary Roman-Dutch Law (Tydskrif vir Hedendaagse Romeins-Hollandse Reg)
UNCITRAL	United Nations Commission on International Trade Law
QUTLJ	Queensland University of Technology Law and Justice Journal

1 Introduction

1.1 Cross-Border Insolvency defined

Cross-border insolvency (CBI) is a global economic stumbling block that not only creates confusion and legal uncertainty, but according to Stander[1], this uncertainty also serves as a disincentive to international investment. When a company's[2] liabilities[3] exceed its assets[4] it is deemed to be insolvent. Depending on the circumstances, both solvent and insolvent companies may be wound up. This research project focuses mainly on the so-called 'compulsory winding-up' of an insolvent company by way of application to court.[5] The 'winding-up' of a company entails that the company's assets are sold, its creditors are reimbursed and the remainder of the company's assets are divided among its shareholders.[6] This process is regulated by the domestic insolvency laws of the state where the insolvent has its registered office or mainly conducts its business and where its assets are located. This is a relatively simple process, assuming that the insolvent company's assets and its creditors are all located within the borders of a single state.

The process becomes much more complex once assets and liabilities exceeds the borders of a single state due to the prevailing uncertainties as to how to address the insolvency.[7] The fact that the laws pertaining to insolvency are bound to the confines of a state proves to be problematic.[8] The phenomenon of 'cross-border insolvency' or 'trans-national insolvency' can be defined as the situation where an insolvent person or entity's assets or liabilities are located in a state other than the state where the sequestration or liquidation order was given.[9] The term CBI encompasses a wide

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1 Stander 2002 *Journal for Juridical Science* 73.

2 This research project will focus mainly on the position of insolvent companies as

2 This research project will focus mainly on the position of insolvent companies as opposed to that of insolvent individuals.

3 Fairly estimated, contingent and prospective liabilities are taken into account.

4 As fairly valued.

5 Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 241. The alternative to this method of winding-up is the voluntary winding-up of a solvent company by way of a special resolution of the company's shareholders. See Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 241 in this regard.

6 Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 240.

7 Weideman and Stander 2012 *PER* 133.

8 Weideman and Stander 2012 *PER* 133.

9 Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 297.

spectrum of scenarios including gaining access to documents and information that are located in another state; the issue of foreign creditors and priority conflicts;[10] simultaneous insolvency proceedings regarding the same debtor in different jurisdictions; recovery of foreign assets; and claims by a foreign insolvency administrator against local assets of the debtor.[11]

The reason for the complexity of this matter is the fact that there is no single international insolvency law that governs all CBI cases in all states. According to Meskin[12] each state has its own legal rules that are based on its own legal customs hence causing a lack of uniformity between the insolvency legislation of different states. Until very recently CBI matters could only be dealt with in terms of either each state's domestic insolvency legislation, the common law doctrine, intergovernmental agreements, judicial cooperation, conventions[13] or a combination of one or more of these mechanisms.[14]

This inconsistency in approach and process concerning CBI leads to much confusion among insolvency practitioners and courts alike. There exists no binding or uniform process for the administration of an insolvent estate in CBI cases and the relevant process in each case would be determined by the specific state's domestic insolvency laws. For example: A, a company incorporated in terms of South African laws with its registered office in South Africa, is declared insolvent and it has assets in South Africa, Australia and Belgium. A South African court appoints B as the liquidator of A. In order to liquidate A, B now has to apply to both the Australian and Belgian courts for assistance in the administration process because B does not have an inherent right to deal with A's foreign assets as it pleases. Because there is no uniform international law that governs CBI matters, B now has to determine what process it has to follow to acquire assistance from both the Australian and Belgian courts, separately. A lot of time and money is consequently wasted due to the lack of a universal CBI approach.

10 States' laws regulating the position of different types of creditors differ.
11 Quinlan and Robinson 2007 www.allens.com.au/pubs/pdf/insol/pap18mar07.pdf.
12 Meskin *Insolvency Law and its Operation in Winding Up* 17-2.
13 In terms of a convention only member states are bound and act in aid of each other.
14 Anon 2002 archive.treasury.gov.au/documents/448/PDF/CLERP8.pdf.

Hence, there is clearly an urgent need for a uniform approach to CBI matters. The *United Nations Commission on International Trade Law* (UNCITRAL), like many others before it, identified this need and developed the *Model Law on Cross-Border Insolvency* (the *Model Law*) which is aimed at resolving disparities in domestic laws on CBI. Both South Africa and Australia have adopted the *Model Law*, but as will be shown in Chapter 3 of this study, the South African *Cross-Border Insolvency Act 42 of 2000* (SA CBA) has not yet taken effect due to the failure of the Minister of Justice to designate states to which this act will apply.[15] As a result, South African CBI matters continue to be governed by the South African domestic laws on insolvency and the common law.

The focus of this research is to determine how to handle an insolvency matter in terms of which both South African and Australian courts have jurisdiction. The *Model Law*, its effect on both the South African and Australian domestic insolvency laws, and on the foreign representative specifically will be discussed in chapters 2, 3 and 4 respectively.

1.2 The significance of cross-border insolvency for this research

The world is continuously becoming a smaller and smaller place. It has become a global community of sorts merely divided by imperceptible borders that are easily transversed by ever-evolving technological advances in the fields of business, travel, communication and such, each regulated by its own set of domestic laws and regulations. Hordes of South Africans immigrate to Australia annually due to, among others, economic and political uncertainty.[16] These ex-patriots generally leave behind assets and creditors in South Africa whilst acquiring new ones wherever they choose to establish themselves. This serves as basis for potential future CBI issues.

Furthermore, entities such as companies trading internationally, and multinational companies with branches and offices in more than one state, have property and

15 Meskin *Insolvency Law and its Operation in Winding Up* 17-2.

16 According to the Australian Department of Immigration and Citizenship, the number of South African-born people living in Australia have increased by 39.9 per cent between 2006 and 2011 to 145683 people. See www.dss.gov.au/sites/default/files/documents/02_2014/south_africa.pdf.

creditors in many different jurisdictions. Should such a company be liquidated, it would give rise to questions of jurisdiction, the procedures to be followed, the appointment of a liquidator(s) and the distribution of assets, to name a few.

The absence of a universal CBI law leaves room for much uncertainty and confusion. What is of importance for purposes of this research is to clarify all prevailing uncertainties regarding the rights and obligations of the foreign representative and the foreign creditor in CBI matters. The foreign representative is the person or entity appointed to administer the reorganisation or liquidation of the insolvent debtor's assets in a foreign proceeding.[17] Barrett[18] explains that a foreign representative is a foreign liquidator or trustee appointed in an insolvency proceeding. If, for example, insolvency proceedings are initiated against company A[19] in Australia while A has assets and creditors in both Australia and South Africa, then B, the liquidator appointed by an Australian court to administer the insolvency proceedings, would apply to the South African courts in his capacity as foreign representative for assistance in administrating A's South African assets. In other words, B would follow up the foreign assets in South Africa with the aim to attach them for the benefit of A's local creditors in Australia. In the same scenario, C - a creditor of A who lives in South Africa - would be known as a foreign creditor of A seeing that C would have to register his claim against A with the Australian courts.

The inconsistency in CBI regulations between South Africa and Australia has the consequence that there is no guarantee that a foreign creditor in one state will be treated the same as a foreign creditor in terms of the domestic laws of the other, as the *Model Law* aims to do. The situation would have been significantly less complicated had the SA CBA been in force at present and had Australia been designated as a state to which this Act would apply. In that case, the treatment of foreign representatives and foreign creditors would be of a reciprocal nature. However, because it is not yet the case and since this position may change at any given moment pending the discretion of the Minister of Justice, both the rights and

17 Article 2 of the *Model Law*.

18 Barrett 2005 http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_barrett060805.

19 Assuming that A is an Australia-based company.

obligations of the interested parties pre and post enforcement of the *Model Law* in South Africa are of importance and will be dealt with. The discussion on the position of the interested parties in terms of Australian law will also focus on the legal position pre and post incorporation of the *Model Law* as the statutes that regulated CBI matters prior to the adoption of the *Model Law* continue to regulate certain aspects of CBI. The *Australian Cross-Border Insolvency Act* 2008 (Aus CBA) did not replace any earlier CBI legislation.

1.3 The layout of this research

Chapter 2 will deal with the *Model Law* in general and specifically with the provisions affecting the foreign representative. Chapter 3 will consider the domestic insolvency laws that currently regulate the position of the foreign representative in South Africa as well as the SA CBA and its provisions pertaining to the foreign representative. Chapter 3 will conclude with an investigation into the effect of the enforcement of the SA CBA on the foreign representative. Chapter 4 will set out the position regarding CBI in Australia before 2008 and its effect on the foreign representative, after which the current position in Australia and the consequent rights and duties of the foreign representative will be examined. Concluding remarks and comparative conclusions will be offered in Chapter 5.

2 The UNCITRAL *Model Law on Cross-Border Insolvency*

2.1 Introduction

The 'primitive and chaotic' manner in which troubled multinational companies have been treated in the past has necessitated an international convention to govern CBI incidents.[20] In order to facilitate this process the UNCITRAL promulgated its *Model Law* which is designed to govern all procedural aspects of CBI. The *Model Law* is not a treaty or a convention that is binding on signatory states without the possibility of derogating from its provisions, but a legislative text that is recommended to states for

20 Trichardt 2002 *Flinders Journal of Law Reform* 96.

incorporation into their domestic legislation.[21] The non-binding nature of its provisions enables enacting states to derogate from the *Model Law* by modifying or leaving out some of its provisions. These modifications may be necessary due to the nature and specifics of a state's national legal system.[22] States are, however, encouraged to deviate from the uniform text as little as possible to ensure a degree of certainty and predictability, as it is the one of the *Model Law's* main objectives to create greater legal certainty in CBI matters.[23] This possibility of derogation has the consequence that the degree of legal certainty that the *Model Law* aims to achieve will most likely be lower than in the case of a convention, in terms of which the enacting parties are not allowed to deviate. Once enacted by a member state as part of a state's national legislation the provisions of the *Model Law* are deemed binding upon the courts of the member state as it forms part of its domestic legislation.[24] The decision to adopt the *Model Law* is voluntary. The choice to adopt the provisions of the *Model Law* as is, or to derogate from them is left to the discretion of a state's legislator. However, once enacted in its national legislation, the provisions of the *Model Law* have the power of law within the enacting state as it forms part of its domestic legislation. Whether the *Model Law* is enacted as a standalone instrument or as part of a state's existing insolvency legislation is up to the member state. Consequently, whether or not the provisions of the *Model Law* will enjoy preference over the provisions of the state's existing insolvency legislation will also be determined by the state.

2.2 The purpose of the Model Law

The purpose of the *Model Law* is to provide its member states with effective mechanisms to deal with CBI matters in order to promote cooperation between international courts in CBI matters.[25] Member states are afforded a harmonised and fair framework to address CBI issues effectively without attempting to substantively

21 *UNCITRAL Model Law on Cross-Border Insolvencies with Guide to Enactment* 21.
22 Loubser 2003 SA Merc LJ 398.
23 Preamble of the *Model Law*.
24 Del Castillo *et al* 2011 http://www.terralex.org/publication/p4e0f8da0de/the-law-of cross border-insolvency-proceedings-a-brief-summary-of-its-sources-development-and-present-status.
25 Preamble of the *Model Law*.

harmonise states' national insolvency laws.[26] It is said that the *Model Law* is based on four cornerstones namely: Access, recognition, relief and cooperation.[27] It is my submission that these so-called "cornerstones" are known as such due to the fact that they constitute the four main aims and outcomes of the *Model Law*. These cornerstones constitute the characteristics that make the *Model Law* unique and that causes it to be so effective. The *Model Law* aims to create greater legal certainty for traders and investors in cross-border transactions by providing interested parties with a clear understanding of the procedures that will be followed should an entity be wound-up in the enacting state.[28] It is concerned with the protection of the interests of all parties involved in CBI matters and therefore aims to promote fair and efficient CBI proceedings – for the benefit of both creditors and the debtor.[29]

The provisions of the *Model Law* may assist in reducing disparities that exist in the national legislation of the enacting state, hence enabling the courts to communicate directly with and to request assistance and information directly from foreign courts and foreign representatives. An example of a void in South African insolvency law is the fact that its domestic insolvency legislation does not make provision for the attachment and reorganisation of the insolvent's foreign assets and therefore the cooperation of its foreign counterparts will need to be enlisted. Should a court fail to recognise the foreign proceedings, the foreign representative will not be entitled to cooperation in terms of the *Model Law*.[30]

2.3 The Model Law's approach to CBI: Universality or Territoriality

States follow various approaches to CBI.[31] A comprehensive discussion on the different insolvency theories will follow in Chapter 3. For now it is sufficient to know that states generally adopt either a universalist or a territorialist approach to CBI.[32] The approach followed affects whether the court will grant cooperation to foreign

26 Wessels *International Insolvency Law* 101.
27 Fletcher *Insolvency in Private International Law* 453.
28 Preamble of the *Model Law*.
29 Preamble of the *Model Law*.
30 Silverman *ILSA Journal of International and Comparative Law* 268.
31 Botha and Stander 2011 *Journal of Juridical Science* 23.
32 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 3.

courts and the foreign representative, and how it influences the rights of foreign creditors.[33] Whether the *Model Law* supports the universalist or the territorialist approach is of significance because member states will follow that same approach once they have enacted the *Model Law* into their domestic legislation. Morrison[34] is of the opinion that the *Model Law* follows a universalist approach to CBI. In terms of it, the winding-up of a company is treated as a single matter, which ensures the equal treatment of all creditors, domestic and foreign.[35] In the Australian-based case, in *Re Akers and Others v Saad Investments Co Ltd and Another,*[36] Judge Rares supports Morrison's opinion asserting that the *Model Law* supports an universalist approach to CBI. According to Burman and Westbrook[37] however, the *Model Law* does not prohibit separate domestic insolvency proceedings in different states. On the contrary, it accepts that multiple insolvency proceedings regarding the same debtor will most likely occur and it merely requires that all the courts involved in such CBI matters cooperate with one another. Cronin[38] argues that concurrent insolvency proceedings are permitted and states that the *Model Law* follows a cooperative territorial approach to CBI by merely altering the procedural laws of its member states, encouraging cooperation between states. Purcell[39] agrees with Cronin in this regard and contends that the *Model Law* merely allows foreign representatives access to the substantive insolvency laws of member states.

In my opinion the *Model Law* follows a universalist approach to CBI as opposed to a territorialist approach, based on the fact that the *Model Law* allows multiple insolvency proceedings in different states. Only one of these proceedings is recognised as the foreign main proceeding and all other proceedings are seen as auxiliary thereto. The significance of this discussion lies in the fact that the Australian courts, having adopted the Australian *Cross-Border Insolvency Act* of 2008 (Aus CBA) now follows the same approach to CBI as the *Model Law*. In other words, Australian courts treat the CBI as a single proceeding initiated by the court where the

33 Botha and Stander 2011 *Journal of Juridical Science* 23.
34 Morrison 1999 *Queensland University of Technology Law Journal* 104.
35 Meskin *Insolvency Law and its Operation in Winding Up* 17-1.
36 *Re Akers and Others v Saad Investments Co Ltd and Another* [2010] 118 ALD 498 at 504.
37 Burman and Westbrook 1997 *International Legal Materials* 1387.
38 Cronin 1999 *Iowa Journal of Corporations Law* 711.
39 Purcell 2001 *Australian Journal of Corporate Law* 6.

debtor has its centre of main interests (COMI).[40] On the other hand, due to the fact that the SA CBA is not yet operational, South African courts do not necessarily follow a similar approach to CBI. This has the consequence that the rights of the parties to the insolvency may differ significantly depending on the approach followed by the South African courts.[41]

2.4 Applicability of the Model Law

The term 'insolvency' as used in the *Model Law* refers to all types of collective proceedings such as reorganisation and liquidation proceedings against all types of insolvent debtors (meaning natural and legal persons).[42] Wessels[43] maintains that the *Model Law* gives the term CBI a broad meaning and, according to the *Guide to Enactment*, instances of CBI include

> cases where the insolvent debtor has assets in more than one state or where some of the creditors of the debtor are not from the state where the insolvency proceeding is taking place.

Article 1 of the *Model Law* sets out the circumstances in which the Act will apply[44] to CBI matters. A member state will apply the provisions of this Act, should a foreign court or a foreign representative apply to a court in the member state for assistance in foreign proceedings.[45] The provisions of the *Model Law* also apply when a state seeks assistance from a court in a foreign state regarding an insolvency proceeding that was initiated in the first mentioned state and has its origin within an insolvency related law of that state.[46] In the case where concurrent insolvency proceedings

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40 A further discussion on this point will follows in Chapter 4.
41 A discussion on the approach adopted by South African courts continues in Chapter 3.
42 Wessels *International Insolvency Law* 111.
43 Wessels *International Insolvency Law* 101.
44 The word "apply" does not mean that the *Model Law* is binding upon a specific state. It merely means that the principles of the *Model Law* will be applicable in certain circumstances. It is concerned with the circumstances in terms of which these principles will be applicable once the *Model Law* becomes part of a state's domestic legislation.
45 Article 1(a) of the *Model Law*.
46 Article 1(b) of the *Model Law*. This is only applicable if the foreign state where the court seeks assistance is a member state. If not, the foreign state will apply the provisions of its domestic insolvency laws in deciding whether or not to assist the foreign court or the foreign representative.

regarding the same debtor take place in a member state[47] and in a foreign state, the provisions of the *Model Law* will apply.[48] The *Model Law* will further be applicable should the debtor's creditors who are located in a foreign state wish to commence or participate in insolvency proceedings regarding the debtor under the domestic insolvency laws of the member state.[49] Article 1(2) of the Act allows member states to exclude certain types of entities from its scope of application, should such entities be regulated by special insolvency regimes in the member state.

According to Purcell,[50] the *Model Law* allows a foreign representative quick and easy access to member states' substantive insolvency laws, consequently curing the complications that the jurisdictional limitations of these laws cause. As mentioned, in terms of article 1(a) the *Model Law* applies where a foreign court or a foreign representative seeks assistance from a member state regarding a foreign proceeding. To better understand this provision one has to define and understand the terms 'foreign representative' and 'foreign proceeding'. Article 2(d) defines a 'foreign representative' as

> a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

A 'foreign proceeding' is defined as

> a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.[51]

From the definition of a 'foreign proceeding' it is clear that the *Model Law* will merely apply when the proceedings are of a collective nature, in other words the creditors have to lodge a collective action against the debtor and individual actions for the

47 The insolvency proceedings initiated in the member state must have their origin within the domestic insolvency laws of the member state.
48 Article 1(c) of the *Model Law*.
49 Article 1(c) of the *Model Law*.
50 Purcell 2001 *Australian Journal of Corporate Law* 6.
51 Article 2(a) *Model Law*.

benefit of a single creditor are excluded.[52] The requirement that the proceedings need to be of a judicial or administrative nature has the effect of excluding voluntary winding-up proceedings initiated by a company, which consequently excludes the involvement of a court.[53] The insolvency proceedings must have their origin in a foreign state and they must be initiated in terms of the provisions of the foreign state's domestic insolvency laws.

Should insolvency proceedings be initiated by an Australian court against a company incorporated in Australia (known as the foreign main proceeding[54]), the said court will appoint a local liquidator to assist the court in winding up the company (the debtor). Should the debtor have assets in both Australia and South Africa, and assuming that insolvency proceedings against the debtor have been initiated in South Africa, the liquidator would have to apply to the South African courts to obtain recognition or permission to collect and liquidate the debtor's South African based assets in favour of the debtor's creditors. The South African insolvency proceedings are known as the 'foreign non-main proceedings'[55] initiated by the court where the debtor has assets. The liquidator, when applying to the South African courts for recognition is known as the 'foreign representative'.

Next a short discussion follows on the crux of the *Model Law* regarding the rights and obligations of the foreign representative as far as it is necessary to reach the objective of this research.

2.5 The rights and obligations of the foreign representative

The *Model Law* enables enacting states to set out the requirements for qualifying as a foreign representative.[56] Specific requirements in this regard are not mentioned and consequently said requirements will differ from member state to member state

52 Trichardt 2002 *Flinders Journal of Law Reform* 111.
53 Trichardt 2002 *Flinders Journal of Law Reform* 112.
54 Foreign proceedings initiated in the state where the debtor has its COMI are known as 'foreign main proceedings'. See article 2(b) of the *Model Law*.
55 Known as 'foreign non-main proceedings', other than the foreign main proceeding, taking place in a state where the debtor has an establishment. An 'establishment' is defined in article 2(f) of the *Model Law* as a place where the debtor carries on non-transitory economic activities.
56 Article 5 of the *Model Law.*

depending on each state's domestic insolvency laws. One would have to look at the enacting state's domestic legislation regarding the requirements to be appointed as a liquidator in an insolvency matter in order to determine who is eligible to act as a foreign representative in a foreign proceeding. The requirements in terms of South African and Australian domestic legislation will be discussed in chapters 3 and 4 of this research respectively.

Once the liquidator in a local insolvency proceeding has been appointed as a foreign representative in another state, it is the liquidator's duty to determine the applicable legal system and the procedures to be followed in the administration of the insolvent's estate, having as objective the benefit of the creditors.[57] Before the existence of the *Model Law*, this was a daunting task due to the fact that the foreign representative would have to determine and study the procedures to be followed in terms of the domestic insolvency laws of each state where the debtor has assets or property.[58] The foreign representative would also have to keep in mind that some states have enacted treaties or conventions governing CBI matters or certain aspects thereof. The *Model Law* simplified the foreign representative's task in the sense that it creates a uniform approach to winding up the insolvent estate, provided that the states concerned have enacted the *Model Law* into their domestic legislation.

Article 5 of the *Model Law* enables a liquidator to apply to a foreign court to act as foreign representative in insolvency proceedings taking place in that state.[59] Article 15 of the *Model Law* speeds up the foreign representative's application process by eliminating time-consuming formalities such as legislative requirements involving consular and notarial procedures. It sets out the proof requirements that the foreign representative should adhere to when seeking recognition of and relief for a foreign proceeding.[60] Article 15(1)[61] allows the foreign representative to apply to a court in the enacting state for recognition of a foreign proceeding on the condition that the foreign representative was appointed in the said proceeding by that state. In the

57 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 1.
58 This continues to be the case in terms of South African insolvency proceedings.
59 Wessels *International Insolvency Law* 130.
60 Wessels *International Insolvency Law* 118.
61 Article 15(1) of the *Model Law*.

application for recognition the foreign representative is obligated to provide the court with a certified copy of the court decision that led to the commencement of the foreign proceeding and the appointment of the foreign representative. A certificate from the foreign court that affirms the existence of the foreign proceeding and the appointment of the foreign representative must also be submitted.[62] If neither of these can be obtained, any other acceptable evidence of the existence of the foreign proceeding and the appointment of the foreign representative in the application may be presented to the court.[63] In terms of article 16(1), should the certificate referred to above indicate that the foreign proceeding is a proceeding as defined in article 2(a) and the foreign representative qualify as such in terms of article 2(d), the court is authorised to proceed with the application on a *prima facie* basis. There is, however no obligation on the court to do so.[64] There exists a further presumption that the documents submitted in terms of article 15(2) are authentic (without requiring that they be legalised). The court is nonetheless entitled to require the foreign representative to prove the authenticity of the document or to obtain a formal authentication from a diplomatic or consular representative within the jurisdiction of the domestic court where the document is to be used.[65] In other words, article 16(2) does not prohibit the court from requiring the foreign representative to comply with its traditional practices in this regard.[66] It is held that the presumptions set out in article 16 of the *Model Law* promote the probability of a successful outcome of the foreign representative's application for recognition.[67]

According to article 15(3)[68] the foreign representative has to include, along with the above-mentioned documents, a statement that identifies all foreign proceedings involving the debtor that are known to the foreign representative. The latter is obliged to promptly inform the court of any change in the status of the foreign proceeding or a change in the foreign representative's appointment, and must also divulge any knowledge of other foreign proceedings regarding the debtor that comes to the

62 Article 15(2)(a) and (b) of the *Model Law*.
63 Article 15(2)(c) of the *Model Law*.
64 Fletcher *Insolvency in Private International Law* 460.
65 Fletcher *Insolvency in Private International Law* 461.
66 Fletcher *Insolvency in Private International Law* 461.
67 Fletcher *Insolvency in Private International Law* 460.
68 Article 15(3) of the *Model Law*.

foreign representative's attention.[69] It is clear that the purpose of this obligation is to allow the court to modify or terminate the consequences of recognition.

2.6 Recognition of a foreign proceeding

In order for the *Model Law* to apply to CBI proceedings, the courts of the enacting state need to recognise the foreign proceedings initiated by a court in a foreign state.[70] The key element that determines whether a foreign proceeding will be recognised as a 'foreign main proceeding' or a 'foreign non-main proceeding' is the debtor's COMI.[71] The *Model Law*[72] distinguishes between a 'foreign main proceeding' and a 'foreign non-main proceeding' in its quest to determine the suitable forum in which the CBI proceedings against the debtor are to be held.[73]

In terms of the *Model Law*, a debtor has a single COMI and the state where the debtor's COMI is located is the place where the main insolvency proceedings against the debtor are to be initiated.[74] The forum determines the rights and remedies available to the foreign representative and creditors.[75] A foreign non-main proceeding takes place in the state where the debtor has an establishment. This distinction is of significance due to the relief that is available in each case.[76]

Neither the *Model Law*, nor the Aus CBA or the SA CBA offers a definition of the COMI concept. In the *Explanatory Memorandum* to the Aus CBA it is stated that the reason for such a deliberate omission is to ensure increased harmony between Australian law and that of other jurisdictions.[77] To achieve this objective courts are expected to refer to the considerable body of common law regarding the COMI concept that exists in other jurisdictions.[78] The same is true for the SA CBA, which in determining the location of the debtor's COMI the court is to rely on international

69 Article 18 of the *Model Law*.
70 Fletcher *Insolvency in Private International Law* 456.
71 Ragan 2010-2011 *Emory Bankr Dev J* 120.
72 In article 2(b) and (c).
73 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems* 14.
74 Botha and Stander 2011 *Journal for Juridical Science* 32.
75 Hargovan 2008 www.austlii.edu.au/au/journals/JIALawTA/2008/3.pdf.
76 Hargovan 2008 www.austlii.edu.au/au/journals/JIALawTA/2008/3.pdf.
77 This aids one of the *Model Law's* main aims, which is to promote cooperation between courts and insolvency practitioners in different jurisdictions.
78 Hargovan 2008 www.austlii.edu.au/au/journals/JIALawTA/2008/3.pdf.

court rulings to gain clarity in this regard.[79] According to the *Model Law's Guide to Enactment*[80] the formulation of the COMI in terms of the *Model Law* is consistent with the formulation set out in article 3(1) of the *European Union Council Regulation*.[81]

Two factors are of importance when determining the COMI.[82] First, the debtor's COMI is deemed to be at the place where it regularly or commonly administers its interests, including its commercial, professional, economic and general interests.[83] Botha and Stander[84] point out that the *EU Regulation* does not state that the COMI is located where the debtor administrates **all** its interests. Also, no mention is made what should happen if each of the debtor's interests are administered in a different state or country.[85] There exists a presumption that a company's COMI is located where it has its registered office unless the contrary is proven.[86] The second factor in determining the COMI is the creditor's view of where the COMI is located.[87] This is an objective approach that entails looking at the situation from the perspective of the creditors. This definition of the COMI as set out in the *EU Regulation* does not give complete clarity on the subject and a degree of uncertainty remains in determining the COMI.

To alleviate this prevailing uncertainty, article 16(3) of the *Model Law* creates a presumption that the debtor's registered office is its COMI. This means that a company's offices that are registered as such in terms of the laws of the place where they are located will be presumed to be its COMI, unless the contrary is proven.

79 Botha and Stander 2011 *Journal for Juridical Science* 33.
80 *UNCITRAL Model Law on Cross-Border Insolvencies with Guide to Enactment* 31.
81 *European Union Council Regulation* 1346/2000 hereafter the *EU Regulation*.
82 Article 3(1) of the *EU Regulation*.
83 Bufford 2007 *Northwestern Journal of International Law and Business* 358.
84 Botha and Stander 2011 *Journal for Juridical Science* 33.
85 Botha and Stander 2011 *Journal for Juridical Science* 33.
86 Article 3(1) of the *EU Regulation*.
87 Bufford 2007 *Northwestern Journal of International Law and Business* 358. See *EU Regulation* preamble section (13).

2.7 Effects of the recognition of a foreign main proceeding

Once the court has decided to recognise a foreign proceeding initiated where the debtor has his COMI as a foreign main proceeding, all individual actions against the debtor as well as execution against the debtor's property will be stayed.[88] Furthermore, the debtor will be barred from transferring, encumbering or disposing of his property.[89] In order to preserve a claim against the debtor, interested parties maintain the right to commence individual proceedings against the debtor.[90]

2.8 Relief available upon recognition as a foreign main proceeding

The *Model Law* follows a so-called neutral approach regarding the relief available to concerned parties by providing a standardised list of remedies available upon the recognition of a foreign proceeding.[91] This approach allows for greater legal certainty and predictability as a set list of remedies is now available to the foreign representative in all CBI cases.[92] The alternative would have been that different remedies are applicable to assets situated in different jurisdictions, depending on the domestic legislation of each state. This non-exhaustive list[93] of relief available upon the recognition of a foreign proceeding includes that the foreign representative may request the stay or suspension of all individual actions against the debtor,[94] as well as a delay in execution of the debtor's local property.[95] The foreign representative may request that the debtor be prevented to dispose of, transfer or encumber any of its rights pertaining to its property.[96] The court may provide the foreign representative with the right to examine witnesses, take evidence or deliver information regarding the debtor's rights, responsibilities and affairs.[97] Upon request, the court may allow

88 Article 20(1)(a) and (b) of the *Model Law*.
89 Article 20(1)(c) of the *Model Law*.
90 Article 20(3) of the *Model Law*.
91 Clift 2004 *Tulane Journal of International and Comparative Law* 324.
92 Clift 2004 *Tulane Journal of International and Comparative Law* 324.
93 The list is considered non-exhaustive due to the fact that article 21(g) of the *Model Law* adds to the list of remedies mentioned in this article by granting the foreign representative any additional forms of relief available to him in terms of the domestic laws of the state.
94 Article 21(a) of the *Model Law*.
95 Article 21(b) of the *Model Law*.
96 Article 21(c) of the *Model Law*.
97 Article 21(d) of the *Model Law*.

the foreign representative to administer or realise all or a part of the debtor's property that is located within the state.

As stated above, upon recognition of the foreign proceeding, the foreign representative has the right to request the court to entrust the distribution of all or part of the debtor's assets located in the enacting state to the foreign representative.[98] The court will only consider this if it is satisfied that local creditors' interests are properly protected.[99] It must be stressed that the relief available in terms of article 21 does not take automatic effect and is dependent upon the foreign representative's request to the court to grant such relief.[100] According to Wessels[101] the court's criteria to determine the sufficiency of protection are unclear. He states that unless the meaning if the word 'adequate' is given an elastic meaning, the existence of a domestic creditor with a lower priority status may prompt a court to apply this safeguard clause.[102] The word 'adequate' or 'proper' should be interpreted from a procedural perspective, making the interpretation process less substantive in nature.[103] A foreign representative or any other interested party affected by the relief granted under articles 19 or 21 of the *Model Law* may request the court to modify or terminate such relief.[104] The grounds for modification or termination must be set out in the national legislation of the enacting state.[105]

In order to breach the gap between the time of application for recognition and the granting of such recognition, article 19 sets out the interim relief available to the foreign representative should such relief become necessary due to an urgent need to protect the property of the debtor or the interests of the creditors.[106] The foreign representative has to prove the urgent nature of the need for relief.[107] The interim relief available to the foreign representative is similar to the relief available in terms

98 Article 21(2) of the *Model Law*.
99 Article 21(2) of the *Model Law*.
100 Franco 2003 *SA Merc LJ* 35.
101 Wessels *International Insolvency Law* 168.
102 Wessels *International Insolvency Law* 168.
103 Wessels *International Insolvency Law* 168.
104 Article 22(3) of the *Model Law*.
105 Wessels *International Insolvency Law* 171.
106 Fletcher *Insolvency in Private International Law* 462.
107 Fletcher *Insolvency in Private International Law* 463.

of article 21. Interim relief granted terminates as soon as the court has made a decision regarding the recognition of the foreign proceedings.[108]

Where there are proceedings concerning individual actions in the enacting state that affect the debtor, article 24 of the *Model Law* renders intervention by the foreign representative possible.[109] In effect, this provision means that should there for example be a pending lawsuit against the debtor, the foreign representative is entitled to intervene in order to protect the interests of the creditors.

2.9 Cooperation with foreign courts and foreign representatives

Articles 25 to 27 of the *Model Law* sets out the provisions pertaining to the cooperation between the courts and insolvency administrators of the states involved in the CBI proceedings. Optimal cooperation is to be given to the foreign court and the foreign representative either by the court directly or *via* local trustees or liquidators.[110] In granting such cooperation, the trustee or liquidator will be placed under court supervision[111] to ensure that the cooperation is in line with and not contrary to domestic laws. Cooperation may occur by way of direct communication between the trustee or liquidator and the foreign court or the foreign representative.[112] Cooperation can take on many different forms, all of which are set out in article 27. The court may appoint a representative to act at its direction in cooperating with foreign courts and foreign representatives.[113] The court is entitled to decide the appropriate means of communication with foreign courts and foreign representatives.[114] The administration of the debtor's property and affairs may be syncronised with concurrent proceedings concerning the same debtor.[115] The court may approve or implement agreements that affect the coordination of proceedings

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108 Article 19(3) of the *Model Law*.
109 Wessels *International Insolvency Law* 118.
110 Articles 25(1) and 26(1) of the *Model Law*.
111 Article 26(1) of the *Model Law*.
112 Article 26(2) of the *Model Law*. Communication must take place within the scope of the normal functions of the trustee or liquidator and is made subject to the supervision of the court.
113 Article 27(a) of the *Model Law*.
114 Article 27(b) of the *Model Law*.
115 Article 27(c) and (e) of the *Model Law*.

regarding the debtor.[116] A non-exhaustive list of forms of cooperation is possible. In enacting the provisions of the *Model Law*, a member state may add any other forms of cooperation that it deems fit.[117]

Next follows a short discussion of the *Model Law* regarding the rights and obligations of the foreign creditor as far as they are necessary to reach the objective of this research.

2.10 The rights and obligations of the foreign creditor

The preamble of the *Model Law* states that one of its objectives is to promote the protection of the interests of all creditors to a CBI matter.[118] By doing so the *Model Law* attempts to address the unequal treatment of foreign creditors by placing them on an equal footing with their local counterparts. Domestic insolvency laws are not identical with regard to the treatment of foreign creditors. According to Wessels[119] a creditor bringing a claim in a foreign jurisdiction should determine the laws that will be applicable in terms of the claim itself, the claim resolution, as well as any other disputes relating to the claim. The insolvency laws of different states prescribe different rules regarding the treatment of claims from different types of creditors. For example, different rules apply with regard to the treatment of claims of employees, shareholders, tax authorities and trade creditors.[120] The domestic laws pertaining to the treatment and ranking of creditors in South Africa and Australia will be discussed in chapters 3 and 4.

Article 13 of the *Model Law* regulates the access of foreign creditors to a CBI proceeding in the enacting state. According to this article, foreign creditors in CBI proceedings should not be treated worse than their local counterparts, thereby reducing the possibility of discrimination against foreign creditors merely because they are of foreign origin. Article 13(1)[121] affords foreign creditors the same rights regarding the commencement of and participation in a proceeding as creditors in the

116 Article 27(d) of the *Model Law*.
117 Article 27(f) of the *Model Law*.
118 Paragraph (c) Preamble *Model Law*.
119 Wessels *International Insolvency Law* 101.
120 Wessels *International Insolvency Law* 101.
121 Article 13(1) of the *Model Law*.

enacting state. In other words, a foreign creditor can also apply to the proceeding, prove a claim against the debtor and vote at meetings of the creditors. Subparagraph 13(2) sets out the minimum ranking for claims of foreign creditors. It states that a claim by a foreign creditor shall not be ranked lower than general non-preference claims (concurrent claims) in the enacting state. The only exception is that a claim of a foreign creditor shall be ranked lower than a general non-preference claim, in case an equivalent local claim has a lower rank than the general non-preference claim.[122]

According to article 14, foreign creditors have the right to be notified of the commencement of a proceeding under the laws of the enacting state. Notification has the purpose of informing the creditors of the fact that the proceeding has commenced and of the time limit to file their claims.[123] Furthermore, local creditors must be notified in accordance with the provisions regarding notification set out in the national law of the state so as to meet the obligations set forth by the principle of equal treatment established by articles 13 and 14 of the *Model Law*.

Accordingly, the *Guide to Enactment*[124] emphasises (correctly) that the question of notice to interested parties is generally governed by the procedural laws of the enacting state and not by the provisions of the *Model Law*. However, if the notification of creditors depended on domestic insolvency laws alone, foreign creditors would be greatly disadvantaged. Local creditors are usually notified of the commencement of such proceedings by way of a publication in the official gazette or a local newspaper, individual notices and notices affixed within the court premises,[125] whereas foreign creditors usually do not have direct access to local publications in the enacting state. In aid, article 14(2) of the *Model Law* states that such notifications shall be made to the foreign creditors in their individual capacity unless other means of notification are deemed more suitable by the court in the enacting state. The notification has to indicate a reasonable period of time to file claims, as well as where such claims should be filed. It must state whether secured creditors

122 In terms of the South African insolvency law, for example, foreign creditors' claims do not rank lower than those of a domestic concurrent creditor. See Meskin *Insolvency Law and its Operation in Winding Up* 17-11 and Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 669 in this regard.

123 *Guide to Enactment* 106.

124 *Guide to Enactment* 37.

125 *Guide to Enactment* 107.

have to file secured claims, and also whether any other information is required by the national law of the state and in terms of the orders of the court. When the foreign creditor receives notification of the commencement of the foreign proceeding, it is up to him to file a claim within the time set out for filing such claims.

In order to protect the interests of the creditor, article 22(1) obliges the court to satisfy itself that the interests of all creditors are adequately protected when granting or denying relief to the foreign representative under articles 19 or 21 of the *Model Law*. This is essential to reach a balance between the "relief granted to the foreign representative and the interests of the persons that may be affected by such relief."[126]

With regards to the payment of creditors, article 32 states that

> without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under the laws of the enacting State regarding the same debtor, as long as payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

2.11 Conclusion

In concluding this chapter, it must be noted that foregoing brief discussion on the *Model Law* was merely aimed at giving the reader an overview of the provisions and effects of the *Model Law* on foreign courts, the foreign representative and foreign creditors. Chapters 3 and 4 will argue in depth the rights and obligations of these key role players in CBI proceedings in South Africa and Australia. A discussion on the South African common law on CBI and the position that will prevail once the SA CBA comes into operation follows next.

126 *Guide to Enactment* 161.

3 The legal position in South Africa regarding cross-border insolvency

To better understand the position of the foreign representative in terms of the South African insolvency law one has to distinguish between the current legal position in South Africa that is governed by the common law and the statutory position that will prevail once the SA CBA comes into effect.[127] The SA CBA will come into force when the Minister of Justice designates the states to which this Act will apply. Once designated, the SA CBA will take effect in terms of those states only. This means that in the future South Africa will follow a dualistic approach to CBI matters.[128] The rights and responsibilities in CBI cases of foreign representatives and foreign creditors from designated states will be governed by the procedures set out in the SA CBA, whereas the position of representatives from non-designated states will be governed by the South African common law. This chapter starts by setting out the current position in terms of the common law pertaining to CBI after which the provisions of the SA CBA will be summarised to promote a clear understanding of the position that will prevail once this Act comes into effect. The discussion is necessary to provide a comprehensive answer to the problem statement set out in Chapter 1 of this research.

3.1 The current position in South Africa

So far, South Africa has not ratified any international treaties or conventions dealing with the issue of CBI.[129] In the absence of an international insolvency act that is binding on all states, states have to look to their own domestic insolvency laws for guidance in CBI matters.[130] The sources currently governing insolvency matters in South Africa are the *Insolvency Act*[131] and the common law.[132] Case law provide

127 Zulman 2009 *SA Merc LJ* 808.
128 See also Meskin *Insolvency Law and its Operation in Winding Up* 17-3.
129 Meskin *Insolvency Law and its Operation in Winding Up* 17-2.
130 The European Union (EU) has come as far as adopting the *EU Regulation* in terms of *Council Regulation (EC)* 1346/2000 that regulates CBI matters amongst EU member states. The *EU Regulation* governs the reciprocal recognition and enforcement of judgments in CBI matters between EU member states. See Meskin *Insolvency Law and its Operation in Winding Up* 17-2 and Wessels B *The Changing Landscape in Cross-Border Insolvency Law in Europe* 2007 *Juridica International* 116-124 in this regard.
131 *Insolvency Act* 24 of 1936 hereafter the *Insolvency Act*.
132 The sources of the common law are the Roman law, the Roman-Dutch law and decisions of the South African courts. See Zulman 2009 *SA Merc LJ* 808 in this regard.

important principles. The private international law as well as certain provisions of the *Companies Act*,[133] the *Long-Term Insurance Act*[134] and the *Alienation of Land Act*,[135] to mention a few, also play a vital role in domestic insolvency matters. With regard to insolvent companies in particular, the *Companies Act* 1973 provides for the initiation of the winding-up proceedings. The *Insolvency Act* supplements the *Companies Act* 1973 by outlining certain principles and rules that are to be followed in the winding-up of an insolvent company should the *Companies Act* fail to address these issues.[136] All the statutes referred to deal with insolvency matters and not with CBI matters as such.

Presently there are no domestic statutes in South Africa outlining the procedural aspects of CBI.[137] This creates uncertainty regarding *inter alia* the authority of domestic courts to act in response to claims against local assets arising from liquidation orders made by foreign courts. Furthermore, questions arise as to whether courts are bound to recognise a foreign order appointing a foreign representative, and whether the court should allow the debtor's foreign assets to be recognised and distributed among its foreign creditors.[138] These are but a few of the pressing concerns caused by the lack of comprehensive CBI legislation. When a company that is incorporated in Australia, for example, is wound up by an Australian court and this company has assets and/or creditors in South Africa, a number of questions arise, for instance: Should or may the company's creditor(s) located in South Africa institute insolvency proceedings in South Africa? With regard to the

133 *Companies Act* 71 of 2008 hereafter the *Companies Act* 2008. The *Companies Act* 61 of 1973, hereafter the *Companies Act* 1973, was repealed by aforementioned. With regard to the liquidation of insolvent companies Chapter XIV of the *Companies Act* 1973 continues to apply. See Schedule 5, item 9 of the *Companies Act* 2008 in this regard. In terms of section 339 of the *Companies Act* 1973, the provisions of the *Insolvency Act* will apply *mutatis mutandis* to any matter not specifically provided for in terms of the *Companies Act* 1973. Consequently the provisions of the *Insolvency Act* will also apply to all insolvency matters not covered in terms of the provisions of the *Companies Act* 2008.

134 *Long Term Insurance Act* 52 of 1998 hereafter the *Long Term Insurance Act*. Part VI of the *Long Term Insurance Act* deals with the winding up of long term insurers. This Act makes the winding up of long term insurers subject to the provisions of Chapter XIV of the *Companies Act.*

135 *Alienation of Land Act* 68 of 1981, hereafter the *Alienation of Land Act*. Sections 21 and 22 of the *Alienation of Land Act* set out the position of the purchaser (and other interested parties) of immovable property should the seller (the owner of the land) be declared insolvent.

136 Smith and Boraine 2002 *ABI Law Review* 151.

137 Ailola *11 Stellenbosch Law Review* 215.

138 Ailola *11 Stellenbosch Law Review* 215.

company's local assets, which legal system will govern the insolvency proceedings and consequently the rights and obligations of the foreign representative and local creditor(s)? Would South African courts recognise insolvency proceedings initiated in Australia? Would the Australian creditors have any claims with regard to the company's local assets and would local creditors enjoy preferential treatment over their foreign counterparts?

States follow various approaches to CBI.[139] Whether a court will merely have jurisdiction over the debtor's local assets or whether it will have jurisdiction over all the debtor's assets, domestic and foreign, will depend on the insolvency approach that the state follows.[140] States' approach to insolvency matters usually falls somewhere amid the universal and the territorial approaches.[141] Academics mainly support four predominant approaches to CBI known as universalism, modified universalism, traditional territorialism and cooperative territorialism.[142] The difference in approaches leads to confusion in determining the appropriate forum to institute CBI proceedings, because the approach to be followed determines whether the domestic court will deal with the matter as a whole or whether it will treat the insolvent's assets and liabilities that are located within the state as a separate proceeding, purely acting in the best interest of domestic creditors.[143] Knowledge of the different approaches to CBI and the approach followed by domestic courts will aid the foreign representative in preparing his case to take control of the debtor's local assets. Therefore, before examining the domestic insolvency principles that govern CBI matters in South Africa, one must determine the approach followed by South African courts.

139 Botha and Stander 2011 *Journal for Juridical Science* 23.
140 Goode et al *Transnational Commercial Law* 544.
141 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 3.
142 Weideman and Stander 2012 *PER* 135.
143 Weideman and Stander 2012 *PER* 134.

3.1.1 Cross-border insolvency theories

The protection of the interests of creditors and minimising their losses is one of the main objectives of insolvency proceedings.[144] When analysing CBI theories, a distinction is to be made between the terms 'unity' and 'plurality' on the one hand, and 'territoriality' and 'universality' on the other. Although connected, the first deals with the jurisdictional issues in CBI matters, while the last deals with the so-called multi-state effects of the CBI proceedings.[145] The principle of the 'unity' of proceedings entails that a single set of insolvency proceedings is conducted in terms of a single debtor, whereas the principle of 'plurality' entails multiple concurrent insolvency proceedings in multiple jurisdictions in terms of the same debtor.[146] The connection between the principles of 'universality' and 'territoriality' will become clear after a brief discussion of these approaches.

3.1.1.1 Universalism

The aim of the universalist approach is to facilitate the cooperation between courts of different states. This approach entails that a CBI matter is treated as a single procedure by a single court where the debtor is domiciled or where a company has its COMI[147] (the so-called court of the 'home country').[148] The court will apply its own domestic insolvency laws in the administration of the debtor's estate[149] and the debtor's local and foreign assets will fall under the administration of this court.[150] Consequently, the liquidator appointed in the insolvency proceedings is able to collect and maximise all of the debtor's assets, whether domestic or foreign.[151] All creditors are entitled to file claims at the court of the 'home country' against the debtor's insolvent estate.[152] However, whether local and foreign creditors will be

144 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 3.
145 Mason 2006 *Melbourne University Law Review* 145.
146 Mason 2006 *30 Melbourne University Law Review* 145.
147 Botha and Stander 2011 *Journal for Juridical Science* 27.
148 Westbrook 2005 *Penn St Int'l L R* 625-637.
149 LoPucki 1999 *Cornell Law Review* 699.
150 Meskin *Insolvency Law and its Operation in Winding Up* 17-1.
151 Smith 2002 *SA Merc LJ* 20. The is made subject to the recognition by the foreign court where the debtor's assets are located of the insolvency proceedings initiated by the court of the 'home country'.
152 Botha and Stander 2011 *Journal for Juridical Science* 26.

placed on an equal footing will be determined by the *lex concursus* (the law of the court).[153] All foreign insolvency proceedings regarding the estate of the debtor are deemed to be auxiliary to the proceedings in the 'home country'. Foreign courts assist the court not only in collecting and realising the debtor's assets that are located in the foreign jurisdiction, but also in giving effect to the orders made by the court.[154] In his criticism against the universalist approach, LoPucki[155] argues that the said approach to CBI will only be viable in a world where states' domestic insolvency laws and procedures as well as the laws regarding the ranking of creditors are essentially identical. To my mind LoPucki's is correct. States are free to choose which approach they will follow, and consequently there is no guarantee that states involved in a CBI matter will follow an identical theoretical approach. Country A may follow a universalist approach to CBI, treating the CBI matter as a single matter. If the debtor's COMI is located in country A, then insolvency proceedings initiated by the court in country A are known as the main proceedings. The liquidator appointed by the court in country A (the court of the 'home country') will attempt to collect all of the debtor's local and foreign assets. While the collection of the debtor's local assets should not pose a problem, exercising control over its foreign assets may prove more difficult. Should country B - where the debtor's foreign assets are located - also follow an universalist approach to CBI, the liquidator's task will be simple as insolvency proceedings initiated in country B will serve as auxiliary proceedings to the main proceedings in country A. However, should country B follow a territorialism approach to CBI, the courts in country B will not allow the liquidator appointed in country A to attach and collect the debtor's assets located in country B unless they are assured that all local creditors will receive exactly the same degree of protection and rights as they would receive in their own jurisdiction. In other words, the universalist approach to CBI will only be feasible if all the states involved in a CBI matter follow an identical approach. The reason for this is most likely the fear that local creditors will be prejudiced if all states involved do not follow a like approach.

153 Smith 2002 *SA Merc LJ* 20.
154 Botha and Stander 2011 *Journal for Juridical Science* 26.
155 LoPucki 2000 *Michigan Law Review* 2216.

3.1.1.2 Modified universalism

Due to the lack of harmonisation between states' domestic insolvency laws and procedures as described above, Weideman[156] is of the opinion that a purely universalist approach to CBI is not feasible at this point in time. Essentially, the 'modified universalism' approach (like the 'universalist' approach) allows auxiliary foreign insolvency proceedings to be initiated by foreign courts where the debtor has assets, in addition to the insolvency proceedings initiated by the court of the 'home country'.[157] Unlike in the case of a purely universalist approach, the foreign court where the auxiliary insolvency proceedings are initiated will not merely administer the debtor's foreign assets for the benefit of the insolvency proceedings in the court of the home country without acknowledging the rights of its local creditors. Foreign courts will apply their own domestic insolvency laws in administering the debtor's local assets.[158] The foreign court is awarded some degree of discretion in deciding whether to comply with the requests of the governing court.[159] This discretion will be exercised after evaluating the fairness of the procedures followed by the court of the home country.[160] The foreign court's main objective in terms of this approach is to protect the rights of its creditor, which is a characteristic of the 'territorialism' approach to CBI. Whether the rights of foreign creditors are affected by the orders of the court of the 'home country', along with the requirement that compliance should not be contrary to the foreign state's public policy, will determine whether the foreign court complies with the orders of the court of the 'home country'.[161]

3.1.1.3 Territorialism

This approach is based on the principle of state sovereignty.[162] 'Territorialism' entails that each state where the debtor has assets applies its own domestic insolvency laws to the assets and liabilities of the debtor that are located within the jurisdiction

156 Weideman *European and American Perspectives on the Choice of Law* 11.
157 Weideman *European and American Perspectives on the Choice of Law* 11.
158 Fourie *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika* 9.
159 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 8.
160 Fourie *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika* 9. See also Bufford 2005 *American Bankruptcy Journal* 112 in this regard.
161 Adams and Fincke 2008-2009 Colum J Eur L 48-51.
162 Botha and Stander 2011 *Journal for Juridical Science* 23.

of the court. Thus, the extraterritorial dimensions of the insolvency are not acknowledged.[163] The state where the insolvency proceedings are initiated protects the interest of local creditors.[164] Foreign insolvency proceedings affecting the debtor are generally disregarded and domestic creditors' claims enjoy preference over those of their foreign counterparts.[165]

One of the disadvantages of this approach is that the location of the debtor's assets determines the extent to which its creditors will benefit in terms of the insolvency.[166] For example, if most of the debtor's assets are located in South Africa, creditors located in other states will not enjoy the extent of benefit that domestic creditors will enjoy. Should a foreign creditor wish to benefit from insolvency proceedings, he would have to prove his claim in the court where the insolvency proceedings were initiated. On the other hand, this approach is advantageous to domestic creditors since it protects their interests in the insolvency and provides them with a sense of security, because they are protected against the orders of prejudiced foreign courts and unknown foreign legislation.[167]

3.1.1.4 Cooperative territorialism

The 'modified territorialism' or 'cooperative territorialism' approach is identical to the territorial approach in the sense that each state where the debtor has assets initiates its own insolvency proceedings and administers and distributes those assets in terms of its domestic legislation.[168] This approach differs from the territorialism approach in that each court appoints a representative that cooperates with the representatives appointed in other jurisdictions.[169] The representatives from different jurisdictions meet to discuss whether cooperation would lead to greater benefits for the debtor's creditors, whilst each representative preserves the right to determine the course of action that would be most beneficial for the creditors of the jurisdiction he

163 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 4.
164 Botha and Stander 2011 *Journal for Juridical Science* 23.
165 Botha and Stander 2011 *Journal for Juridical Science* 23.
166 Weideman *European and American Perspectives on the Choice of Law* 7.
167 Weideman *European and American Perspectives on the Choice of Law* 6.
168 Adams and Fincke 2008-2009 Colum J Eur L 48-51.
169 Adams and Fincke 2008-2009 Colum J Eur L 48-51.

presents.[170] The representative then has the right to either cooperate in the common sale of the debtor's assets or to sell the debtor's assets that are located within his jurisdiction separately for the benefit of local creditors.[171] The cooperative element brought about by this approach allows states to cooperate with each other should such cooperation have mutually beneficial results.[172]

South African courts follow an approach that incorporates aspects of both the universal and territorial approaches to CBI.[173] As will be seen in this chapter, in line with the universalist approach, South African courts are willing to cooperate with and assist foreign insolvency representatives in CBI matters. Despite the fact that the court is willing to cooperate with the foreign representative, it does not do so without protecting local creditors. The latter is a characteristic of the territorialist approach. According to Fourie[174] the strong emphasis placed on the protection of local creditors indicates that the South African common law's approach leans predominantly towards the territorialist approach to CBI.

Once the foreign representative has established the approach followed in terms of the South African insolvency laws, he has to determine which court within the jurisdiction he has to apply to - in other words, which court has jurisdiction in terms of the matter.

3.1.2 Jurisdiction

In order for the foreign representative,[175] for example from Australia, to initiate insolvency proceedings or to request cooperation or recognition from local courts in South Africa, he needs to know which court he is to apply to. In terms of section 2 of the *Insolvency Act* the provincial or local division of the High Court generally has the necessary jurisdiction to hear insolvency matters. The same position applies in terms of the SA CBA. However, unlike the position with regards to the latter, the common

170 Weideman *European and American Perspectives on the Choice of Law* 8.
171 Weideman *European and American Perspectives on the Choice of Law* 8.
172 LoPucki 1999 *Cornell Law Review* 742.
173 Katz Date Unknown http://www.ens.co.za/newsletter/briefs/GRIR07Digital_extracts.pdf.
174 Fourie *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika* 31.
175 For the purpose of convenience this research will refer to the foreign representative in his male form.

law prescribes in certain circumstances that the magistrate's court will have jurisdiction. A CBI matter will thus fall within the jurisdiction of the magistrate's court under circumstances such as the prosecution of offences committed under the *Insolvency Act* and civil proceedings in the magistrate's court such as the setting aside transactions concluded prior to the debtor's insolvency and debt collecting.[176] The only requirement for the magistrate's court to have jurisdiction in one of the mentioned circumstances is that the matter must fall within the scope of the normal jurisdictional competency of said court.[177] In terms of section 149(1) of the *Insolvency Act*, the High Court will have jurisdiction to initiate insolvency proceedings against a debtor if this debtor is domiciled in, owns or is entitled to property within the jurisdiction of the court at the time of the initiation of the insolvency proceedings against it [or within twelve months immediately preceding such time].[178] A debtor that was normally a resident or conducted business within the jurisdiction of the court within twelve months leading up to the initiation of insolvency proceedings against him will also fall under the jurisdiction of the court.[179] The provisions of section 149(1) are made subject to the conditions that the court that has jurisdiction over the estate of the debtor in terms of this section may postpone or reject the surrender of the liquidation on the conditions that the estate of the debtor be excluded from the applicability of the SA CBA and that the court finds it just and convenient that the estate be sequestrated by a court outside the Republic or any other court in the Republic.[180] The jurisdictional provisions of the *Insolvency Act* are not applicable in terms of the winding-up of a company. The *Companies Act* 1973 determines which court has jurisdiction over the winding-up of an insolvent company. In terms of section 12(1) of the *Companies Act* 1973, the High Court of South Africa (previously the Supreme Court) where a company has its registered office or main place of business will have jurisdiction over the winding-up proceedings of the company. In terms of section 339 of the *Companies Act* 1973 the provisions of the *Insolvency Act* apply to the winding-up of companies, however, its applicability only commences once the company is in the process of being wound up (once the winding-up order

176 Melunsky *Insolvency* 3.
177 With regard to the person, the offence and the capital amount due.
178 Section 149(1)(a) of the *Insolvency Act*.
179 Section 149(1)(b) of the *Insolvency Act*.
180 Section 149(1) of the *Insolvency Act*.

has been granted).[181] Thus, the *Companies Act* 1973, rather than the *Insolvency Act* governs the aspect of the jurisdiction of the court in terms of insolvent companies. If A (an individual debtor who lives in Australia) has property in South Africa, the High Court will have the necessary jurisdiction to sequestrate A's estate in South Africa in terms of section 149(1)(a). On the other hand, if A were a foreign company with its registered offices in Australia, the High Court may not act in terms of section 149(1) of the *Insolvency Act* by winding-up B (an external company of A that is located in South Africa) if the *Companies Act* 1973 does not permit the court to do so. In terms of the *Administration of Estates Act*,[182] the Master of the High Court acts as supervisor over the insolvency proceedings.[183] That does not mean that the Master has unrestricted discretion when it comes to making decisions regarding insolvency matters. In *Die Meester v Protea Assuransiemaatskappy Bpk*[184] the court held that the Master may merely act if he is authorised to do so in terms of domestic legislation. In other words he is not entitled to exercise any powers that are not conferred on him by domestic legislation.

The important aspect, whether or not a domestic court has jurisdiction, is dependent on the type of property that is involved in the insolvency proceedings and whether any such property is located within the borders of the Republic of South Africa.

3.1.3 Domestic and foreign property

Property can be classified as either movable or immovable and different rules apply to each type. The distinction between movable and immovable property is of great significance in terms of the common law, although this distinction bears very little or no importance in terms of the SA CBA as no such distinction is provided for in this Act.[185] The type of property and the classification of the parties (whether individuals or a company) will determine which legal principles will govern the CBI proceedings under the common law.[186] The term 'property' is not defined in either the *Companies*

181 Meskin *Insolvency Law and its Operation in Winding Up* 17-4(1).
182 *Administration of Estates Act* 66 of 1965.
183 Barker 2012 http://www.burmeisters.co.za/legal-articles/33-insolvency-articles/52-cross-border-insolvency.html.
184 *Die Meester v Protea Assuransiemaatskappy Bpk* 1981 (4) SA 685 (T) 690.
185 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 663.
186 Smith and Boraine 2002 *ABI Law Review* 137.

Act 2008 or the *Companies Act* 1973. The *Insolvency Act* defines 'property' as all property (movable or immovable) that is situated within the Republic.[187] At first glance it seems that only assets that are situated within the Republic vest in the trustee of the insolvent estate. However, according to Bertelsmann *et al*[188] it was not the legislator's intention to limit the operation of the sequestration order made by the High Court to the borders of the Republic.[189]

Regarding the immovable property of the debtor, one has to differentiate between two scenarios: (i) where the debtor's immovable property is located within the Republic but a foreign court has initiated insolvency proceedings against the debtor; and (ii) where the South African court has initiated insolvency proceedings against a debtor who has immovable property in a foreign state. The rules of the private international law apply in both these situations.[190] The discussion that follows is based on the legal position of an individual debtor's property. Unless the contrary is indicated, the position regarding the property of a company can be assumed to be the same. The legal status of the debtor's movable property will be followed by a discussion of the position regarding his immovable property.

According to Olivier and Boraine[191] movable property of the insolvent that is located in a foreign state will, along with local property, automatically vest in the trustee if the court where he is domiciled sequestrates the insolvent estate of an individual.[192] This is confirmed by Bertelsmann *et al*[193] stating that in terms of the common law, a sequestration order made by a court where the insolvent is domiciled *ipso facto* deprives the insolvent of all his movable property, whether located within the jurisdiction of the court or in a foreign jurisdiction. The same goes for the sequestration of a debtor domiciled in South Africa. A sequestration order issued by a court in the Republic where the debtor is domiciled will have the effect that both the debtor's local and foreign movable property vests in the trustee of the debtor's

187 Section 2 of the *Insolvency Act*.
188 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 662.
189 The same goes for a liquidation order made by the High Court.
190 Olivier and Boraine 2005 *CILSA* 378.
191 Olivier and Boraine 2005 *CILSA* 378. Also see Stander 1999 *THRHR* 510 for South African case law in this regard.
192 Section 20 of the *Insolvency Act.*
193 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 663.

insolvent estate.[194] In *Trustee of Howse, Sons & Co v Trustees of Howse, Sons and Co, Jocelyne v Shearer & Hine*[195] the court held that the general rule is that the "movables follow the person" (*mobilia sequuntur personam*). This means that the insolvent's movable property, no matter where it is located, follows the insolvent to the place where he is domiciled. An order granted by a South African court where the insolvent is domiciled consequently has the effect that the insolvent is automatically deprived of his movable property located in a foreign state(s). At the same time, should the debtor be domiciled in for example Australia, a sequestration order made by the Australian court would divest the debtor of his movable property located in South Africa. With regards to the movable property, the *mobilia sequuntur personam* principle supports the universalist approach to CBI, creating a *concursus creditorum*.[196] A sequestration order made by a court that is not the court where the insolvent is domiciled, on the other hand, does not have any bearing on the movable assets of the insolvent that are located outside the jurisdiction of that court.[197]

The fact that a foreign sequestration order was made which divests the debtor of his movable assets does not automatically give the order effect in South Africa.[198] For the order to have effect, the Australian trustee, for example, must apply to the High Court for recognition of the foreign proceedings in order for the foreign order to have effect, in other words to enable the debtor's movables to vest in the Australian trustee.[199] Meskin[200] is of the opinion that recognition in these circumstances is a mere formality. In *Ex parte Palmer NO: In re Hahn*[201] the court held that it would be to the foreign trustee's advantage to obtain permission from the South African court

194 Meskin *Insolvency Law and its Operation in Winding Up* 17-4. A company in liquidation, on the other hand, remains the owner of its property while the liquidator of this company merely gains control over the property. See Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 662 in this regard.

195 (3) SC 14 at 19.

196 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 17.

197 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 663.

198 Smith and Boraine 2002 *ABI Law Review* 179.

199 Meskin *Insolvency Law and its Operation in Winding Up* 17-7. The position in terms of a foreign order regarding a company's movable assets are the same. In order to deal with a company's movable property located within the Republic the foreign representative has to apply to a domestic High Court for recognition.

200 Meskin *Insolvency Law and its Operation in Winding Up* 17-4.

201 1993 (3) SA 359 (C) at 362 I-J. Also see Stander 1999 *THRHR* 511.

to deal with the insolvent's movable property located in the Republic.[202] Though this is not strictly required, I believe that it would be in the best interest of the foreign trustee or the foreign representative to apply to the High Court for recognition as it ensures the Court's cooperation in the administration of the debtor's estate. The High Court is thus entitled to require from the Australian trustee to comply with certain conditions[203] before he is permitted to attach the debtor's movable property located within the Republic.[204] These conditions are more often than not aimed at protecting the interests of domestic creditors, which is a typical characteristic of the territorial approach to CBI.[205] In my opinion, this common law approach to the cross-border administration of the debtor's movable property is an effective compromise between the territorial and the universal approach to CBI, as it maximises the benefits of each approach and consequently benefits all interested parties.

3.1.3.1 Immovable property located in the Republic

The law of the place where the debtor's **immovable property** is located (the *lex rei sitae*) governs the rights of all parties to the property.[206] The sequestration order of an Australian court, for example, has no bearing on the immovable property of the debtor that is located in the Republic.[207] Hence, should the Australian trustee wish to attach the immovable property of a natural person located within the Republic, he would be obligated to apply to the High Court for recognition of his appointment as insolvency representative by an Australian court.[208] In terms of the common law, the

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202 With regard to the property of a company in *Ward & Another v Smith & Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) the Court held that if the debtor is a juristic person, the foreign representative is obliged to apply for recognition from the High Court when dealing with movable or immovable property located within the Republic.

203 The different conditions that the court is entitled to impose are set out in Ailola 1999 *Juta Business Law* 23-25.

204 Smith 2002 *SA Merc LJ* 26. The same goes for companies. See Meskin *Insolvency Law and its Operation in Winding Up* 17-5.

205 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 18.

206 *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C). Also see Stander 1999 *THRHR* 512.

207 Franco 2003 SA *Merc LJ* 28.

208 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 20. In *Ward v Smith: In re Gurr v Zambia Airways Corp Ltd* 1998 (3) SA 175 (SCA) the Supreme Court of Appeal ruled that it is of vital importance that a foreign representative of a company that has to deal with immovable property of said company

court has an absolute discretion when dealing with the application for recognition of an order made in relation to immovable property.[209] There is no obligation on a court to accept an order made by a foreign court and therefore the immovable property of the insolvent will not necessarily vest in the trustee or fall under the control of the liquidator appointed by a foreign court.[210] In *Viljoen v Venter*[211] the court held that insolvency proceedings in one state are occasionally recognised and enforced in another state, based on the principles of **comity, convenience** and **fairness**.[212] In *Ex parte Palmer: In re Hahn*[213] the High Court held that a local court has the **duty** of considering an application for recognition, making a decision based on these principles. Apart from the principles of comity, convenience and fairness, the insolvent's domicile should also be considered when deciding whether to recognise a foreign insolvency proceeding.[214] 'Comity' was defined in *Hilton v* Guyot[215] as

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

The principle of comity extends to allowing a foreign trustee to attach and recover assets that are located within the Republic.[216] The foreign trustee is merely authorised to deal with the insolvent's domestic assets and remains bound by domestic procedures and laws. Stroebel[217] defines 'comity' as "the recognition by country A of the legislative, executive and judicial acts of country B, after careful consideration of a possible disadvantage to local creditors". The court will assess whether local creditors will be disadvantaged and the degree or severity of such disadvantage. Thereafter the court may, for the sake of comity and goodwill and if the disadvantage to local creditors are minimal or not too severe, decide to assist the

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located within the Republic should apply for recognition. See Meskin *Insolvency Law and its Operation in Winding Up* 17-5 in this regard.

209 *Ex parte Palmer: In re Hahn* at 362 I-J as well as the discussion on this matter in Stander 1999 *THRHR* 511-513.

210 *Ex parte Palmer: In re Hahn* at 362 I-J.

211 1981 (2) SA 152 (W).

212 *Viljoen v Venter NO* 1981 (2) SA 152 (W) at 154H-155A.

213 *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) at 362-363.

214 *Ex parte Palmer: In re Hahn* at 365.

215 1895 159 US 113 at 163-164.

216 *Rennie NO v Holzman* 1989 (3) SA 706 (A).

217 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 22.

foreign court or the foreign representative. Recognising an order made by a foreign court on the grounds of comity signifies a universalist approach to a CBI matter.[218] Regarding the principle of 'convenience', the consideration of whether the court will be able to enforce and execute the order it has made will weigh heavily on its decision when considering which forum is the appropriate forum to hear the dispute.[219] The court's decision on its choice of forum should also take into account the principle of 'fairness' by determining whether creditors will be treated equally. In *Deutsche Bank AG v Moser*[220] the principles of convenience and fairness are clearly illustrated.[221] The applicant in this matter was a company that was duly incorporated and registered in Germany. The first respondent, as shareholder and managing director of the applicant, signed suretyship in favour of the applicant who was *de facto* insolvent at the time of this court case. The first respondent essentially did not have any assets in Germany but he owned immovable property in Plettenberg Bay, South Africa. The applicant sought relief from the South African High Court whereupon the first respondent contended that based on convenience and equitability his estate should have been sequestrated by a German court. The first respondent argued that section 149(1)(a) of the *Insolvency Act*[222] is made subject to the requirements of equitability and convenience.[223] The first respondent argued that it would neither be equitable nor convenient for himself or his creditors to travel to South Africa for the sequestration proceedings. The South African High Court held that when determining what is convenient, what happens after an insolvency order was granted outweighs the matter of the convenience of the courts. In other words, the possibility and probability of the enforcement and execution of the order made by the court is of paramount importance. Due to the fact that the first respondent's only immovable property was located in Plettenberg Bay, the court held that it would be more convenient for the matter to be settled in this court, considering the enforceability and execution of the order.

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218 Fourie *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika* 31.
219 Stroebel *Protocols as a possible solution to jurisdiction problems* 24.
220 1999 (4) SA 216 (C).
221 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 22.
222 In terms of section 149(1)(a) the court has jurisdiction over every debtor that is the owner of property or who is entitled to property that is situated within the jurisdiction of the court.
223 See paragraph 3.1.2 above.

3.1.3.2 Immovable property located outside the Republic

Whether the trustee or liquidator appointed by the South African court will be entitled to attach the debtor's foreign property will depend on the laws of the state where the property is located.[224] Should the foreign court require the trustee or liquidator to apply to it for recognition by way of a letter of request from the South African court, the latter court has the discretion to supply the trustee or liquidator with such letter of request.[225]

3.1.4 Inward-bound request for recognition

As discussed above, when dealing with sequestration order made by the court where the debtor is domiciled, the foreign trustee is not allowed to simply deal with the property before applying to the High Court for recognition.[226] This applies even though the debtor's **movable property** has vested in the foreign trustee in terms of the *mobilia sequuntur personam* principle. Although academics differ in their opinions of whether a request for recognition is necessary, I support the approach followed by Bertelsmann *et al*[227] that the requirement of recognition has been elevated into a principle of the common law, is correct.[228]

In terms of the late *Foreign Trustees and Foreign Liquidators Recognition Act of 1907*,[229] the then Supreme Court of South Africa was entitled to recognise the appointment of a foreign trustee or foreign representative.[230] Even though this Act is no longer in force, certain of its principles have been passed on through precedent

224 Meskin *Insolvency Law and its Operation in Winding Up* 17-6(1).
225 Meskin *Insolvency Law and its Operation in Winding Up* 17-7.
226 Meskin *Insolvency Law and its Operation in Winding Up* 17-7. As seen above, the *mobilia sequuntur personam* principle does not apply to immovable property and therefore said property does not vest in the foreign trustee without the latter applying to the High Court for recognition of the foreign proceedings.
227 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 664. Also see Stander 1999 *THRHR* 512.
228 A foreign representative who wants to deal with a company's movable or immovable property that is located in the Republic is obligated to apply to the High Court for recognition before it may deal with said assets. See Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 668.
229 No longer forms part of the South African law.
230 Olivier and Boraine 2005 *CILSA* 376.

and still form part of the South African law.[231] One such principle pertains to the South African High Court[232] being entitled to recognise the appointment of a foreign trustee or liquidator.[233]

In terms of an inward-bound request to obtain recognition by courts in the Republic, the Australian trustee has to approach the court that made the order in his own jurisdiction to issue letters of request to the South African High Court to recognise the appointment of and act in aid of the foreign trustee.[234] The Australian trustee has to bring a separate application for recognition before the High Court, along with the letter of request.[235] In its decision to recognise the Australian trustee, the court has the obligation of protecting the interests of local creditors.[236] If the rights of a local party that has an interest in the proceedings will be affected by such an application the Australian trustee should duly notify the third party of the application.[237] The said third party will generally be a local creditor, in other words a South African creditor whose rights regarding the foreign debtor's South African assets will be affected if and when the foreign trustee attaches the assets for the benefit of the foreign creditors in the country where the debtor is domiciled. The High Court will determine the manner in which the interested party should be notified.[238] According to Bertelsmann *et al*[239] South African courts are generally inclined to exercise their discretion in favour of granting a foreign trustee recognition to deal with the debtor's movable assets that are located within the Republic, assuming that the sequestration order was made by the court where the debtor is domiciled. On the other hand, recognition would only be granted in exceptional circumstances, should the order be granted by a court other than the court where the debtor is domiciled.[240]

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231 *Ex parte Steyn* 1979 (2) SA 309 (O).
232 Previously the Supreme Court.
233 Olivier and Boraine 2005 *CILSA* 373.
234 Barker 2012 http://www.burmeisters.co.za/legal-articles/33-insolvency-articles/52-cross-border-insolvency.html.
235 Barker 2012 http://www.burmeisters.co.za/legal-articles/33-insolvency-articles/52-cross-border-insolvency.html.
236 Meskin *Insolvency Law and its Operation in Winding Up* 17-7.
237 *Ex parte Steyn* 1979 (2) SA 309 (O) at 312 F. Also see Olivier and Boraine 2005 *CILSA* 380.
238 Olivier and Boraine 2005 *CILSA* 380.
239 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 664-665.
240 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 655 fn 31.

As discussed above, the court has absolute discretion in deciding whether to recognise an application regarding the debtor's **immovable property** that is located within the Republic. In *Herman NO v Tebb*[241] the court held that a request for recognition should not be granted should it result in the debtor's immovable assets being treated in a manner that is inconsistent or in conflict with laws of the place where the debtor is domiciled or the laws of the place where the property is located. In other words, for example, should the foreign creditors receive payment from the proceeds of the immovable property with the exclusion of local creditors or should the laws of the foreign state afford foreign creditors preferential treatment regarding the immovable property over their South African counterparts, the court will not recognise the application for recognition.

Recognition of, for example, an Australian representative entitles him to manage the debtor's South African-based assets as if they were assets within Australia (the foreign jurisdiction) where he (the foreign trustee) was appointed.[242] The court will treat the foreign debtor's assets as if he is an insolvent in terms of domestic law.[243] However, the debtor does not become an insolvent in terms of the South African insolvency laws.[244] In other words, local courts do not gain control over the debtor's estate and the court merely assists the foreign representative in retrieving the debtor's local assets. The foreign representative is awarded the right to initiate any legal action that is available to domestic trustees or liquidators in terms of the insolvency laws of the Republic.[245] This right includes the foreign representative's ability to initiate procedures to trace the debtor's local assets.[246] The foreign trustee also has the right to interfere with any local proceeding regarding the insolvent's estate.[247]

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241 *Herman NO v Tebb* 1926 CPD 65 at 76.

242 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 664. Once a foreign representative is recognised by the High Court he is entitled to the same rights in terms of the company's movable and immovable assets located within the Republic. See Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 666 in this regard.

243 Meskin *Insolvency Law and its Operation in Winding Up* 17-10.

244 1926 CPD 65 at 76.

245 Barker 2012 http://www.burmeisters.co.za/legal-articles/33-insolvency-articles/52-cross-border-insolvency.html.

246 Meskin *Insolvency Law and its Operation in Winding Up* 17-10.

247 Barker 2012 http://www.burmeisters.co.za/legal-articles/33-insolvency-articles/52-cross-border-insolvency.html.

3.1.5 The rights of local and foreign creditors

When the debtor's movable property is located in the place where the debtor has its COMI, the domestic laws of that (local) court or the *lex fori* will govern issues concerning the rights, priorities and preferences of the debtor's creditors.[248] According to Smith[249] the foreign representative is bound by the procedures of the South African courts when dealing with the debtor's assets that are located within the Republic.

The South African common law aims to protect the rights and interests of local creditors over those of their foreign counterparts.[250] This is indicative of a territorial approach to CBI. This objective is met by imposing certain conditions that need to be met before the debtor's local assets may be realised or the proceeds from these assets may be removed from the Republic.[251] To protect local creditors from being disadvantaged by the acts of the foreign representative, the court will issue a rule *nisi* and impose a duty on the foreign representative to inform local creditors of its intention to lay claim on local assets.[252]

Should concurrent insolvency proceedings regarding the debtor be initiated in more than one state, the liquidator appointed in one state cannot prove a collective claim in the other state on behalf of the creditors located in the state where the liquidator was appointed.[253] The creditors have to take it upon themselves to prove their claims separately.[254] If the foreign creditor has already received compensation in terms of his claim in the foreign state, the general rule is that said creditor may only apply to benefit from the insolvency proceedings regarding the same debtor in another state should he be willing to contribute the distribution he has already received in the foreign proceedings to the common fund.[255] This rule ensures that creditors cannot

248 Franco 2003 *SA Merc LJ* 31. Also see Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 669.
249 Smith 2002 *SA Merc LJ* 32.
250 Fourie *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika* 31.
251 Fourie *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika* 31.
252 Smith 2002 *SA Merc LJ* 32.
253 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 670.
254 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 670.
255 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 670.

lay more than one claim against the estate of the debtor and consequently prevents one creditor from gaining an unfair disadvantage over fellow creditors.

According to Fourie[256] the legal position regarding the foreign creditors' right to payment at the same time as their local counterparts is uncertain. In *Ex parte Steyn*[257] some light is shed on this matter. The laws of the Republic do not afford local creditors preference over their foreign counterparts merely because of their status as local creditors,[258] but they allow the court to set out certain conditions for the protection of the rights of local creditors. It is held that these conditions entail that the court may require that local creditors receive compensation from the sale of the debtor's local assets before the debtor's foreign creditors are compensated.[259] There are, however, no special procedures set out in South African insolvency legislation to govern the rights and obligations of foreign creditors. The common law merely sets out provisions to secure the protection of local creditors.

With regard to the debtor's movable property that is located in a foreign state, as well as his immovable property (no matter where it is located), the laws of the place where the property is located or the *lex rei sitae* will govern the position pertaining to the rights and priorities of the creditors.[260]

3.1.6 The outward-bound request for recognition

A domestic trustee (or liquidator) who wishes to recover the debtor's assets that are located in a foreign state has to comply with the insolvency laws and procedures of the foreign jurisdiction in doing so.[261] Whether or not the trustee has to apply to the foreign court for recognition of the insolvency proceedings initiated in the Republic and consequently whether a letter of request issued by the High Court is necessary depends on the domestic laws of the foreign state. As a preparatory step, the trustee

256 Fourie *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika* 31.
257 1979 (2) SA 309 (O). Also see Stander 1999 *THRHR* 510.
258 *Ex parte Steyn* 1979 (2) SA 309 (O).
259 *Ex parte Steyn* 1979 (2) SA 309 (O).
260 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 669.
261 Bertelsmann et al *Mars: The Law of Insolvency in South Africa* 671. The steps to be followed by a foreign representative to be recognised in terms of the Australian insolvency legislation will be considered in Chapter 4 of this research.

or liquidator may obtain a letter of request recognising his appointment in the domestic proceedings from the High Court.[262] When applying for a letter of request from the court, the trustee or liquidator merely needs to convince the court of his genuine belief that initiating foreign proceedings is a necessity.[263]

A brief discussion on the provisions of the SA CBA regarding the rights and obligations of the foreign representative and the foreign creditor follows next. The relevance of this discussion lies in the fact that some time in the future the SA CBA, along with the common law, will govern CBI matters in South Africa. Furthermore, for the purposes of this research it is necessary to compare the legal position of the foreign representative in terms of the common law and the SA CBA.

3.2 The South African Cross-Border Insolvency Act (SA CBA)

The applicability of the SA CBA already commenced on 28 November 2003 but its provisions will only come into practical effect once the Minister of Justice announces, by publication in the *Government Gazette*, that the SA CBA is enforceable against a specific state. Designation depends on whether a foreign state affords South African courts and representatives the same or equal levels of recognition and rights as the SA CBA awards the foreign representatives and courts.[264] In other words, the SA CBA requires reciprocity. Consequently, should a state be designated by the Minister of Justice, local liquidators seeking assistance in another state as well as foreign representatives seeking assistance in the Republic are assured of the necessary reciprocal assistance from the relevant courts and their foreign counterparts. In contrast, the *Model Law* does not make reciprocity a requirement for its applicability to a foreign state.[265] Unlike the SA CBA, the *Model Law* merely excludes certain specialised institutions from its applicability.[266] The SA CBA excludes certain states as a whole.[267] As explained above, only states that are designated will benefit under

262 Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 300.
263 Sharrock, Van der Linde and Smith *Hockly's Insolvency Law* 300.
264 Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* 25.
265 UNCITRAL Date Unknown http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf 15.
266 Article 1(2) of the *Model Law*.
267 Meskin *Insolvency Law and its Operation in Winding Up* 17-15.

the provisions of the SA CBA, while all other cases will be dealt with under the common law.

Since the SA CBA is not yet operational, domestic cases, precedents and practical examples of the application of the SA CBA have yet to come into existence. Hence, the overview below will be limited to a discussion of the position, rights and responsibilities of the foreign representative and the foreign creditor in terms of the SA CBA so as to facilitate a better understanding of these parties' position once the SA CBA comes into operation. For convenience sake, a distinction will be made there will be differentiated between the provisions of the SA CBA pertaining to the inward-bound request by a foreign representative to a domestic High Court for recognition of a foreign insolvency proceeding (see paragraph 3.2.1) and an outward-bound request by a domestic liquidator to a foreign court to deal with the debtor's assets that are located in a foreign jurisdiction (see paragraph 3.2.2).

3.2.1 The inward-bound request

Section 1(a) of the SA CBA, read with section 4, designates the High Court of South Africa as the competent court to deal with matters relating to CBI, as is the position in terms of the common law. Unlike the common law position, no jurisdiction is awarded to the magistrate's court, designating the High Court as the only court with the necessary jurisdiction to hear CBI matters. Chapter 2 of the SA CBA deals with the foreign representative and the foreign creditor's right of access to courts in the Republic. Section 9 enables the foreign representative to make a direct application to the High Court for relief in CBI proceedings. This provision aids the *Model Law's* objective to promote cooperation between foreign courts and also promotes a speedier, less complicated application procedure. The foreign representative no longer needs to follow the time-consuming procedures as required in terms of the common law and recognition is no longer left to the discretion of local courts based on comity, convenience and fairness.[268] The application procedure is expedited and allows fast action should it be necessary to stay individuals' legal claims against the

268 See also Olivier and Boraine 2005 *CILSA* 385.

debtors estate or to stay execution against its assets, among others.[269] The SA CBA enables the foreign representative to **commence local insolvency proceedings** in terms of the laws of the Republic as if he were appointed as such by a domestic court.[270] This right is made subject to the requirement that the High Court has granted the foreign representative permission to do so. Permission is obtained by way of application to the High Court for recognition of the foreign proceeding. However, as seen below, the foreign representative may apply to the court to commence insolvency proceedings even before the court has recognised the foreign proceedings.[271]

Chapter 3 of the SA CBA sets out the procedure for applying to the High Court and the subsequent effects of **recognition of the foreign proceeding**. In terms of section 15,[272] a foreign representative who is appointed as such in terms of a foreign proceeding may apply directly to a High Court in the Republic for the recognition of the foreign proceeding. Along with its application for recognition the foreign representative needs to provide the High Court with sufficient proof of the commencement of the foreign insolvency proceedings as well as of his appointment by the foreign court as foreign representative in the foreign proceedings. Either certified copy of the foreign court's decision commencing the foreign insolvency proceedings and appointing the foreign representative in said proceedings or a certificate from the foreign court confirming this information would be deemed sufficient.[273] These documents are presumed to be authentic unless proven otherwise and there is no burden on the foreign representative to prove said authenticity.[274] The foreign representative has the duty of disclosing all other foreign proceedings regarding the debtor that falls within its knowledge at the time of the application,[275] as well as any such proceeding that comes to his attention after the date that the application was made.[276]

269 Clift 2004 *Tulane Journal of International and Comparative Law* 321.
270 Section 11 of the SA CBA.
271 See discussion on section 19 of the SA CBA below.
272 Section 15(1) of the SA CBA.
273 Section 15(2) of the SA CBA.
274 Section 16(2) of the SA CBA.
275 Section 15(3) of the SA CBA.
276 Section 17(3) of the SA CBA.

Sub-section 17(1) of the SA CBA sets out the conditions in terms of which a foreign proceeding 'must' be recognised by the High Court. The word 'must' indicates that recognition in these circumstances is of a mandatory nature. This differs from the common law approach where the court has full discretion in deciding to recognise a foreign proceeding. Assuming that the application was brought in accordance with the provisions of section 15(2) of the SA CBA, the court must recognise the foreign proceeding only if the recognition of the foreign proceeding is not contrary to public policy in terms of section 6 of the SA CBA and if the court is satisfied that the foreign proceeding is an insolvency proceeding initiated by a foreign court in terms of the domestic insolvency laws of the foreign state with the purpose of reorganising or liquidating the debtor's assets.[277] Recognition is furthermore dependent on the requirement that the foreign representative has to be a foreign representative as defined in the SA CBA.[278] The duty to inform the court of any changes in its status as foreign representative rests on the foreign representative from the date of filing the application until the date on which the recognition order is granted.[279] In terms of the common law, however, no such duty exists.

If the foreign representative applies for the recognition of foreign proceedings that are taking place in the state where the debtor has its COMI,[280] the High Court must recognise the proceedings as foreign main proceedings.[281] If, on the other hand, an application is made in terms of a foreign proceeding taking place in the state where the debtor has an establishment as defined by section 1(c) of the SA CBA, the court must recognise the foreign proceedings as foreign non-main proceedings.[282]

In terms of section 17(3) of the SA CBA the High Court has a duty to decide as soon as possible whether or not to recognise the foreign proceedings, while section 19[283] provides for interim relief available to the foreign representative while the court is reaching such a decision. Interim relief in terms of section 19(1) is available to the

277 Hence a 'foreign proceeding' as defined in section 1(g) of the SA CBA.
278 Section 1(h) of the SA CBA defines the foreign representative. See paragraph 1.2 above for the definition of the 'foreign representative'.
279 Section 18(a) of the SA CBA.
280 See Chapter 2.2 on the COMI.
281 Section 17(2)(a) of the SA CBA.
282 Section 17(2)(b) of the SA CBA.
283 Section 19 of the SA CBA.

foreign representative only if such relief is urgently needed to protect the local assets of the debtor or if it is needed to protect the interests of the creditors.[284] The provisional relief[285] available to the foreign representative includes: staying execution against the assets of the debtor; placing the administration or realisation of the debtor's local assets with the foreign representative or another person designated by the court so as to protect the value of the assets where the value of said assets are in jeopardy; suspending the debtor's right to dispose of his assets; examining witnesses and taking evidence and; any other relief available in terms of the laws of the Republic.[286]

Relief of this nature would be denied if granting such relief would interfere with the administration of the foreign main proceedings.[287] The granting of relief is also dependent on the satisfaction of the court that the interests of the debtor, the creditors, as well as all other interested parties are protected.[288] In ensuring that this is the case, the court is entitled to impose such conditions as it deems necessary to reach this objective.[289] The common law in fact allows the foreign representative to apply for provisional relief while the court decides whether or not to recognise the order made by the foreign court. Consequently, pending the decision of the court, the foreign representative has no forms of relief at his disposal. Once the court reaches its decision on whether to recognise the foreign order, the interim relief granted is automatically terminated.[290]

Once the court has recognised the foreign proceedings, the foreign representative has the right to commence local insolvency proceedings in the Republic in terms of the insolvency laws of the Republic.[291] The foreign representative has standing to initiate actions to avoid or render ineffective acts that will be harmful to creditors.[292] The foreign representative will also be entitled to participate in local insolvency

284 Section 19(1) of the SA CBA.
285 Relief granted in terms of section 19 is of a provisional nature and will terminate once the application for recognition is decided on (see section 19(3) of the SA CBA).
286 Section 19(1) of the SA CBA read with sections 21(1)(c), (d) and (g).
287 Section 19(3) of the SA CBA.
288 Section 22(1) of the SA CBA.
289 Section 22(2) of the SA CBA.
290 Section 19(3) of the SA CBA.
291 Section 11 of the SA CBA.
292 Section 23 of the SA CBA.

proceedings regarding the debtor[293] and he will be entitled to intervene in any proceedings in the Republic to which the debtor is a party.[294] This means that the Australian liquidator may intervene in an action before the South African court in terms of which the debtor is, for example, accused of breach of contract.[295]

3.2.2 The rights of foreign creditors

The South African common law focuses on the protection of local creditors. Should the foreign representative intend to lay claim on any of the debtor's local assets, the court requires him to inform all local creditors of this intention by way of a rule *nisi*.[296] The SA CBA adds to the foreign representative's duties by obligating him to likewise inform all known foreign creditors of his intentions.[297] Unlike the common law, the SA CBA not only protects the rights of local creditors but also that of their foreign counterparts. In terms of the common law, the court generally protects local creditors by imposing certain conditions in terms of the realization of the debtor's property as well as the removal of the proceeds thereof from the Republic.[298] The SA CBA, on the other hand, allows the court to impose conditions that it sees fit in order to protect all known creditors, this includes both local and foreign creditors.[299] In terms of the SA CBA, foreign creditors, like the foreign representative, may initiate insolvency proceedings and participate in such proceedings in the Republic.[300] The SA CBA does not affect the ranking of the claims of local creditors.[301] Section 13 of the SA CBA states that foreign creditors' claims do not rank lower than the non-preferent claims of their local counterparts.[302] Therefore, the SA CBA does not alter the ranking of claims and it remains as it is in terms of the common law.[303] There is uncertainty in the common law whether or not local creditors will receive payment

293 Section 12 of the SA CBA.
294 Section 24 of the SA CBA.
295 At this stage it is uncertain what the effect would be if a South African liquidator (or trustee) also wants to intervene in the same proceedings.
296 Fourie *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika* 31.
297 Section 13(1)(a) of the SA CBA.
298 Fourie *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika* 31.
299 Section 22(2) of the SA CBA.
300 Section 13(1) of the SA CBA.
301 Olivier and Boraine 2005 *CILSA* 385.
302 Section 13(2) and (3) of the SA CBA.
303 Meskin *Insolvency Law and its Operation in Winding Up* 17-17.

before their foreign counterparts.[304] However, in *Re Bank National Benefit Assurance Co*[305] the court ruled that local insured, statutory and preferent creditors must be compensated before the proceeds of the debtors local assets may leave the Republic.[306] The difference between the common law and the SA CBA is that the common law affords all local creditors preferential treatment above foreign creditors, whereas the SA CBA aims to provide both local and foreign creditors equal treatment. In terms of the SA CBA, local creditors will not receive payment before their foreign counterparts purely based on their local status.

3.2.3 The outward-bound request

A liquidator appointed in a domestic insolvency proceeding with cross-border implications has to apply to the courts of the foreign state where the debtor's assets are located for assistance and recognition of the domestic insolvency proceedings as foreign main or foreign non-main proceedings (whatever the case may be). The local liquidator will be known as the foreign liquidator in the foreign jurisdiction and the domestic laws of the foreign state will bind him. Should a company incorporated in South Africa with its registered offices in the Republic be wound up, the Master of the High Court will appoint a liquidator. If the company in liquidation has assets in Australia the liquidator in his capacity as foreign representative of the company will apply to the local courts in Australia for recognition of the domestic insolvency proceedings (known as the foreign proceedings from an Australian legal perspective). The Australian *Cross-Border Insolvency Act* of 2008 (Aus CBA) governs CBI matters in Australia. This Act is based on the *Model Law* and will be discussed in Chapter 4 in greater detail.

3.3 Conclusion

The *Model Law* was designed to be adopted into a member state's national insolvency legislation to create greater legal certainty and promote a fair and efficient CBI approach that protects the interests of all parties involved. The *Model Law* aims

304 Meskin *Insolvency Law and its Operation in Winding Up* 17-11.
305 1927 (3) DLR 289.
306 Also see *In Re African Farms* 1906 TS 373 and Smith 2002 *SA Merc LJ* 32 in this regard.

to create a reciprocal approach by member states to CBI. By limiting the applicability of the SA CBA to certain designated states, the legislature has impaired the legal certainty that the *Model Law* strives to create. An advantage of the common law is that, unlike the provisions of the SA CBA, its principles apply to all states. The common law does not exclude any states or institutions from its scope. However, even though the reciprocity requirement of the SA CBA suppresses its goal, it does provide the foreign representative with a much clearer, much more comprehensive overview of the foreign representative's rights and responsibilities in terms of the debtor's local property. The fact that the legal position pertaining to the rights and obligations of the foreign representative is not set out in a concrete piece of domestic legislation impairs the foreign representative's ability to execute his duties easily and effectively. The foreign representative has to research the various sources of the common law to acquire knowledge of his rights and responsibilities in dealing with the debtor's assets that are located within the Republic.

Contrary to the SA CBA, the common law approach to CBI is mainly of a territorial nature and it places the majority of its focus on the protection of the rights of local creditors. Consequently, should a foreign representative approach the court in terms of the common law, his rights and responsibilities will be made subject to the protection of local creditors' rights. The SA CBA follows a universalist approach in terms of which the court of the 'home country' initialises insolvency proceedings and receives assistance in this matter from the foreign courts where the debtor has property. In terms of this approach, all parties to the CBI are afforded equal treatment. Both the common law and the SA CBA require the foreign representative to apply to the High Court for recognition of the foreign proceedings in order for him to deal with the debtor's South African-based property. The SA CBA makes specific mention of the fact that the foreign representative has the right to apply to the court directly without adhering to the time-consuming requirements that may be set out in the state's domestic legislation. The common law, however, requires the foreign representative to acquire a letter of request from the foreign court by which he was appointed, which must be submitted with his application for recognition. This requirement prolongs the application procedure substantially due to the fact that the foreign representative now has to apply to the foreign court to issue the letter of request. This is not required by the SA CBA, which makes the application procedure

less time consuming. Due to the generally urgent nature of the application regarding insolvency proceedings, a faster application proceeding is preferable.

The common law leaves the decision of whether to recognise an application for recognition to the sole discretion of the court. This approach further adds to the prevailing legal uncertainty due to the fact that, unlike the position in terms of the SA CBA, the foreign representative has no certainty that his application for recognition will be granted. In section 17, the SA CBA explicitly sets out a list of circumstances in terms of which the court will be obligated to recognise an application for recognition brought by the foreign representative. In this way the SA CBA promotes certainty for the foreign representative by guaranteeing recognition in certain circumstances. Once recognised, the SA CBA clearly sets out the foreign representative's rights and responsibilities. This simplifies the foreign representative's task by allowing him to rely on a single piece of legislation when administering the debtor's local assets. The foreign representative does not have such clarity in terms of the common law. In fact, ascertaining his rights and responsibilities in terms of the common law will require thorough research of domestic statutes and precedents.

It is evident from this chapter that the SA CBA provides the foreign representative with a much more comprehensive and well-defined overview of his rights and responsibilities when dealing with the debtor's local property. The fact that the common law position is so vague is disadvantageous as it leads to a more costly, prolonged insolvency process.

4 Cross-Border Insolvency in Australia

The Australian *Cross-Border Insolvency Act* of 2008 (Aus CBA) in which the *Model Law* is enacted came into operation in Australia on 1 July 2008.[307] Prior to the promulgation of this Act, Australia did not have any statutes that dealt with CBI matters specifically, nor was it a member of any conventions that dealt with related matters.[308] Corporate CBI matters were mainly addressed by specific provisions in

307 For the purposes of this Act the definition of 'Australia' in section 5(1) of the Aus CBA excludes the Territory of Christmas Island or the Territory of Cocos Islands.

308 CLERP8 2002 Date viewed 28 September 2013

Australia's corporate insolvency legislation.[309] The Australian *Corporations Act* of 2001 (the *Corporations Act*) is the fundamental statute in terms of which most Australian companies enter into existence.[310] The regulations for the winding-up of corporations are also set out in the said Act. The *Corporations Act* does not deal with CBI matters specifically, but Part 5.7 of the Act sets out provisions regarding the winding-up of foreign entities in Australia. Section 601CL[311] clearly sets out the provisions dealing with the termination of the business of a registered foreign company that is being wound up in its place of incorporation. However, the *Corporations Act* makes no mention of the foreign representative or his rights and obligations in CBI matters. This omission seriously complicates the inward-bound request procedure by the foreign representative, since the procedures to be followed are very unclear.

The rights and obligations of the foreign representative in terms of the *Corporations Act* will be discussed next. The researcher differentiates between the inward-bound request by a foreign representative for cooperation and recognition in terms of Australian law and the outward-bound request by an Australian liquidator to a foreign state for recognition. A discussion on the current prevailing legal position of the foreign representative in terms of the Aus CBA follows after that, also differentiating between the inward-bound and outward-bound request for recognition.

4.1 The legal position before 1 July 2008

4.1.1 The inward-bound request

4.1.1.1 Jurisdiction

In terms of the *Corporations Act*, 'court' is defined as the Federal Court or the Supreme Court of a state or territory.[312] Previously the requirement for Australian courts to have jurisdiction in the winding-up of a foreign company was that this

http://archive.treasury.gov.au/documents/448/PDF/CLERP8.pdf 19.

309 CLERP8 2002 Date viewed 28 September 2013 http://archive.treasury.gov.au/documents/448/PDF/CLERP8.pdf 19.

310 Mason 2006 *Melbourne ULR 145* 2.

311 S 601CL of the *Corporations Act*.

312 S 58AA of the *Corporations Act*.

company had to have assets within the court's jurisdiction.[313] Whether the presence of assets within the jurisdiction of the court is still a requirement for enabling courts to deal with the winding-up of a foreign company is uncertain.[314] Mason[315] feels that the requirement for jurisdiction should not be limited to the presence of assets within the jurisdiction. According to Purcell,[316] whether it would be 'just and equitable' (in terms of section 581(c)(ii)) for the court to wind up a foreign company should carry greater emphasis in determining whether a court should have jurisdiction. Harmer[317] is of the opinion that a foreign company merely has to carry on business within the jurisdiction of the court for the latter to have jurisdiction. Part 5.7 of the *Corporations Act* entitles Australian courts to wind up the Australian operations of foreign companies because Australian courts do not have an inbuilt jurisdiction to do so.[318] A 'Part 5.7 body' includes a foreign company that is registered in terms of Part 5B.2 Division 2 of the *Corporations Act* or that carries on business in Australia.[319] A foreign company is deemed to be carrying on business in Australia if it has a place of business in the state.[320] In terms of section 601CD(1) of the *Corporations Act*, a foreign company may not carry on business in Australia if it is not registered under Part 5B.2 Division 2 of the Act.

4.1.1.2 Cessation of a registered foreign company

If a foreign company is registered under Part 5B.2 Division 2 of the *Corporations Act*, such company is a 'registered foreign company' for the purposes of the Act. Should a foreign company qualify as such, the effect of its winding-up in its place of incorporation is set out in section 601CL(14) of the *Corporations Act*. When a registered foreign company is being wound up in its place of incorporation, the liquidator in the place where the company is incorporated may request the Australian court to appoint an Australian liquidator to assist in the winding-up of the corporation (an inward-bound request).[321] An interesting aspect of the Australian insolvency law

313 *Re Kailis Groote Eylandt Fisheries Pty Ltd (No 3)* (1977) 17 SASR 35.
314 Fletcher *Insolvency in Private International Law* 146.
315 Mason 1994 12 *C&SLJ* 182 at 183.
316 Purcell 2001 *AJCL Lexis 27* 4.
317 Harmer *Report for Australia* 28.
318 Purcell 2001 *AJCL Lexis 27* 7.
319 Quinlan and Harris 2011 www.allens.com.au/pubs/insol/pap3nov11.htm.
320 Purcell 2001 *AJCL Lexis 27* 3.
321 S 601CL(14)(b) of the *Corporations Act*.

is that a foreign company may only be wound up in terms of section 601CL if the company has already been or is in the process of being wound up in its place of incorporation.[322] It will therefore not be possible for a company incorporated in South Africa, with property and/or creditors in both Australia and South Africa, to be wound up in terms of section 601CL unless insolvency proceedings against the company have already been initiated in South Africa. The insolvency proceedings initiated in Australia in terms of section 601CL will act as auxiliary proceedings to the insolvency proceedings initiated in South Africa. Section 601CL thus indicates a universal approach to CBI making concurrent insolvency proceedings in the place of incorporation and Australia possible. In *Re English Scottish & Australian Chartered Bank*,[323] Judge Vaughan Williams concluded that the court of the state where the debtor is domiciled should act as the principal court in the governance of the liquidation of the debtor. This is generally accepted as the legal position in this regard.[324] However, this approach is contrary to the approach followed by the South African common law in terms of which the insolvency proceedings initiated in South Africa act as separate or stand-alone insolvency proceedings initiated in terms of the debtor's South African-based property. The South African common law protects the rights of its local creditors and merely allows a foreign representative to partake in the insolvency proceedings on behalf of the Australian-based creditors.

The foreign representative does not have the right to apply to the Australian court to recover and realise the foreign company's Australian-based assets personally, as is the case in terms of the Aus CBA. The representative will have to do so *via* the assistance of a local liquidator appointed by the court. This differs from the position pertaining to the South African common law in the sense that once the foreign representative's request for recognition has been approved by the South African High Court, he is entitled to deal personally with the debtor's South African-based property. In *Re Australian Federal Life and General Assurance Co Ltd*,[325] Judge Lowe stated that the local liquidator in an ancillary winding-up has the duty of securing and collecting the debtor's local assets and of making a list of the local

322 Mason 2006 *Melbourne ULR 145* 12. See paragraph 4.1.1.5 for a discussion on the procedures when a multi-national company is being wound up in Australia only.
323 [1893] 3 Ch 385 at 394.
324 Purcell 2001 *AJCL Lexis 27* 5.
325 [1931] VLR 317 at 320.

contributories and the claims of all local creditors of the debtor. These duties of the Australian liquidator are set out in sub-section (15) of section 601CL of the *Corporations Act*. In terms of sub-section 15(c), it is the Australian liquidator's duty to recover and realise all of the registered foreign company's property in its jurisdiction and to pay the net amount that it has recovered and realised to the liquidator in the place of incorporation.[326] The Australian liquidator is not entitled to pay any of the corporation's creditors in exclusion of the *concursus creditorum*, except if specifically ordered to do so.[327] In contrast, the South African common law allows for the protection of local creditors, and consequently the foreign representative's rights are made subject to such protection. In other words, the High Court may require that local (South African) creditors be compensated from the proceeds of the debtor's local assets before the foreign representative is allowed to seize the remaining proceeds from the realisation of the debtor's local assets for the benefit of the Australian-based creditors.

4.1.1.3 Cooperation between Australian courts and the foreign representative

Section 581 of the *Corporations Act* recognises the operation of the principle of comity in CBI matters. In terms of section 581(2) of the *Corporations Act*, the Australian court has the duty of acting in aid of certain prescribed countries in external administration matters.[328] The winding-up of a Part 5.7 body in a state other than Australia constitutes an external administration matter.[329] As mentioned above, section 581 only applies if an external administration matter has been instituted in another state.[330] South Africa is not listed as a so-called prescribed country.[331] In terms of subsection 581(2)(b), however, Australian courts are given the discretion to act in aid of all courts in states that are not designated by the Act but that have jurisdiction in an external administration matter.[332] Like the South African common

326 S 601CL(15)(c) of the *Corporations Act*.
327 S 601CL(15)(b) of the *Corporations Act*. This means that the foreign representative is not entitled to pay the local (Australian-based) creditors before he surrenders the net amount recovered to the foreign representative. This duty is made subject to the specific orders of court.
328 S 581(2)(a)(iii) of the *Corporations Act*.
329 S 580 of the *Corporations Act*.
330 Mason 2006 *Melbourne ULR* 12.
331 See Regulation 5.6.74 of the *Corporations Regulations* 2001.
332 S 581(2)(b) of the *Corporations Act*.

law, the *Corporations Act* gives the Australian court the discretion to decide whether to extend its cooperation to foreign courts and foreign representatives. In terms of the South African common law, the High Court will take into account the principles of comity, convenience and fairness in exercising this discretion.[333] It is uncertain on what the Australian court will base its decision to act in aid of a court that is not on the prescribed list. It seems to me that such decision is solely left up to the unfettered discretion of the court.

4.1.1.4 Letter of request

While not specifically required by section 581(2) of the *Corporations Act*, Judge Barrett states in *Re Independent Insurance Co Ltd*[334] that it is desirable that a foreign representative issue a letter of request to the court in order to aid the court in determining the nature of the requested cooperation. In *Rolfe v Transworld Marine Agency Company NV*,[335] Judge Tamberlin exercised his discretion by refusing to assist the Belgian court in terms of section 581(2)(b) of the *Corporations Act* of 1989 (as repealed by the *Corporations Act* 2001). Judge Tamberlin held that the court had the right to deny a foreign court assistance in terms of these provisions, should the foreign court's domestic legislation differ from that of Australia. In other words, should a foreign representative appointed in the South African-based insolvency proceedings regarding a debtor apply to the Australian court to attach the debtor's Australian-based assets, the Australian court may deny the foreign representative's request based on the fact that the South African legislation (with its Roman-Dutch common law background) that will govern the assets (once attached) is substantially different from the Australian domestic insolvency legislation (with its English common law background). Section 581(3) of the *Corporations Act* deals with the matter of receiving a letter of request from a foreign court to assist the foreign representative in the winding-up of a foreign company. In terms of this provision, the court has the right to exercise its discretion in this regard as if the matter had arisen within the court's jurisdiction. It seems that the court has a duty to act in aid of certain

333 See paragraph 3.1.3.1 above.
334 [2005] NSWSC 587.
335 (1998) 28 ACSR 117. In this case the debtor's Belgian trustees applied to the Belgian court for the court to petition the Australian court where the debtor had money for an order that the money held in Australia be handed over to the trustees in Belgium.

prescribed states. How it handles the request is left to its own unrestricted discretion.[336]

4.1.1.5 Winding-up a Part 5.7 body

Part 5.7 acts in addition to section 601CL of the *Corporations Act*. A Part 5.7 body may be wound up in terms of Part 5.7 of the *Corporations Act* even though such entity is already made subject to similar proceedings in its country of incorporation.[337] However, unlike section 601CL, Part 5.7 does not require that the company must already be made subject to winding-up proceedings in its place of incorporation in order to be wound up in terms of Part 5.7. A Part 5.7 body may be wound up by the Australian court in the following cases: If it has been deregistered or dissolved; if it is no longer able to settle its debts or if it no longer carries on business in Australia the court may wind-up the Part 5.7 body in terms of Part 5.7 of the *Corporations Act*;[338] if the court is of the opinion that it would be reasonable and fair that the Part 5.7 body be wound up;[339] if the *Australian Securities and Investments Commission* compiles a report stating that a Part 5.7 body should be wound up due to the fact that it cannot pay its debts or if it is of the opinion that it is in the public and/or the creditors' interest(s) that the Part 5.7 body be wound up.[340] Should the Part 5.7 body already be in the process of being wound up in its place of incorporation, the concurrent Australian-based insolvency proceedings will be auxiliary to the proceedings already commenced in the foreign state.[341] The court will make an auxiliary winding-up order in terms of the debtor's local assets should it be clear to the court that local creditors will be prejudiced should they be forced to prove their claims in the foreign court where winding-up proceedings are already ongoing.[342] Part 5.7 makes no mention of the rights and obligations of the foreign representative. However, section 581(3) does state that a foreign court is permitted

336 Quinlan and Robinson 2007 www.allens.com.au/pubs/insol/pap18mar07.htm 14.
337 S 582(3) of the *Corporations Act*.
338 S 583(c)(i) of the *Corporations Act*.
339 S 583(c)(ii) of the *Corporations Act*.
340 S 583(c)(iii) of the *Corporations Act*.
341 Morrison 1999 *15 QUTLJ* 115.
342 Morrison 1999 *15 QUTLJ* 115. S 582 shows a territorialist approach to CBI. This is in conflict with the general understanding that Australia's approach to CBI is of a universalist nature. It seems like this is the case when dealing with Australian-based companies. It appears that Australian courts, like the courts in South Africa, aim to protect their local creditors.

to apply to the court for aid in a foreign insolvency matter by way of a letter of request. It is my submission that section 581(3) should include a liquidator appointed in a foreign insolvency proceeding in this provision along with a foreign court due to the fact that said liquidator is generally responsible to handle all aspect of the winding-up proceedings in CBI matters. Section 601CL applies when a registered foreign company is being wound up in its place of incorporation and it allows the liquidator in its place of incorporation to obtain the cooperation of the Australian court in the winding-up of its Australian-based assets. Winding-up a company in terms of Part 5.7, on the other hand, entails the winding-up of an Australian-based company in terms of Part 5.7 of the *Corporations Act* due to the fact that such company is insolvent.

Australian legislation generally follows a fairly internationalist approach towards CBI by allowing for international cooperation between courts and between the court and the foreign representative. The court is nevertheless afforded a significant amount of discretion on CBI matters.[343]

4.1.2 The creditors' rights

In terms of section 587(1) of Part 5.7 of the *Corporations Act*, should a creditor so request the court has a right to stay all civil proceedings against the debtor (assuming that it is a Part 5.7 body) from the time that the application for the winding-up is made until the court has reached a decision on whether or not to grant the requested winding-up order. The *Corporations Act* does not make any mention of the rights and obligations of the foreign creditor.

4.1.3 The outward-bound request

In terms of section 581(4) of the *Corporations Act*, an Australian court may issue a letter of request to a foreign court that has jurisdiction in an external administration matter for assistance in and to be auxiliary to it in an external administration

343 Purcell 2001 *AJCL Lexis 27* 3.

matter.[344] Whether the requested aid is granted or the foreign proceeding is recognised will depend on the insolvency laws of the foreign jurisdiction. In terms of the South African common law, the High Court will require the foreign representative to provide the court with a letter of request to accompany his application for recognition of the foreign insolvency proceedings. The High Court has full discretion when deciding whether to recognise such foreign proceedings. As stated above, the court will keep in mind the principles of comity, convenience and fairness in exercising this discretion.

4.2 The Australian Cross-Border Insolvency Act (Aus CBA)

Lewis[345] emphasises that the Aus CBA is a stand-alone statute that does not replace or amend any existing legislation, but rather acts as a supplement thereto. The *Model Law* is included in Schedule 1 of the Aus CBA and is made subject to the provisions of the Act.[346] Part 2 of the Aus CBA sets out certain modifications to the provisions of the *Model Law*. Consequently, the provisions of the *Model Law* must be read with the provisions of Part 2 of the Aus CBA when applied to CBI matters. The *Corporations Act* was not replaced by the Aus CBA, but the provisions of the latter prevail over the provisions of Part 5.7 of the *Corporations Act* in the case of any inconsistencies.[347] On the other hand, the Aus CBA does not replace or prevail over the provisions of section 601CL but rather adds to them.[348] Thus, even after the commencement of the Aus CBA, the provisions of the *Corporations Act* continue to govern the procedures in the winding-up of foreign entities. In *McGrath & Another as Liquidators of HIH Insurance Ltd*[349] Justice Barrett came to the conclusion that the common law and the Aus CBA co-exists and that a liquidator has the right to choose which statute it would like to apply to the CBI matter. Judge Barrett made the following statement:

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344 An 'external administration matter' includes the winding-up of a part 5.7 body outside Australia. See section 580 of the *Corporations Act*.

345 Lewis 2011 http://www.jdsupra.com/legalnews/the-adoption-of-the-uncitral-model -law-o-01904/.

346 S 6 of the Aus CBA. All references made to the '*Model Law'* for the purposes of this chapter mean the *Model Law* is made subject to the Aus CBA.

347 S 22(1) of the Aus CBA.

348 S 22(2) of the Aus CBA.

349 [2008] NSWSC 881.

> There is no reason under our law why the liquidators should not take the course they wish to take or why this court should do otherwise than assist them.[350]

According to Murray,[351] a foreign representative does not necessarily have to apply to a foreign court in terms of the *Model Law* if it would be cheaper and quicker to apply for a letter of request in terms of the common law.[352] In my opinion, the level of procedural certainty and clarity that the *Model Law* provides - especially with regard to the position of the foreign representative - should be a good incentive for the foreign representative to rather act in terms of the Aus CBA than to apply by way of a letter of request in terms of the *Corporations Act*. The reason for this (as added earlier) is that the statutory position in terms of the *Corporations Act* does not give any clear guidance as to the rights and responsibilities of the foreign representative in CBI matters.

The position of the foreign representative, should he choose to apply to the court in terms of the Aus CBA, will be discussed in the next paragraphs . A distinction will be made between the inward-bound request by a foreign representative (more specifically, a foreign representative from South Africa) to an Australian court for assistance and recognition, and the outward-bound request by an Australian liquidator of an Australian company (being wound up by a domestic court) to a foreign court (specifically a South African court) for assistance in the winding-up procedures.

4.2.1 The inward-bound request

4.2.1.1 Jurisdiction

In line with the position in terms of the *Corporations Act*, the Federal Court of Australia and the Supreme Court of a state or territory have the competence to hear CBI matters concerning legal entities in terms of the Aus CBA.[353] In terms of article

350 *McGrath & another as Liquidators of HIH Insurance Ltd* [2008] NSWSC 881 par 18.
351 Murray 2011 Australian Insolvency Journal 46.
352 Murray 2011 Australian Insolvency Journal 46, in his summary of *Lawrence v Northern Crest Investments Limited (in liq)* [2011] FCA 672.
353 S 10(b) of the Aus CBA.

1(2)[354] of the *Model Law* banks and insurance companies are excluded from the application of the Aus CBA.

4.2.1.2 Application for recognition

The letter of request requirement in terms of the *Corporations Act* is eliminated by way of article 9 of the *Model Law* which states that a foreign representative has the right to direct access to the courts in Australia. The courts therefore have a duty to cooperate with the foreign representative to the maximum extent possible.[355] Unlike the SA CBA - in terms of which only specified states will fall within the scope of the CBA - the Aus CBA does not have any reciprocity requirements and therefore foreign representatives from all states are made subject to the provisions of the Act. Hence, even though a foreign representative is from a country like South Africa that does not afford an Australian foreign representative in an outward-bound request for recognition similar rights, this foreign representative will be treated the same way as a foreign representative from any member state.

Article 15 of the *Model Law* sets out the requirements for an application for the recognition of a foreign proceeding. The provisions are identical to the provision of section 15 of the SA CBA as set out in paragraph 3.2.1 above. However, sub-section (3) of article 15 is made subject to the provisions of section 13 of the Aus CBA. No such provision exists in terms of the South African CBA. In terms of section 13 any application for recognition of a foreign proceeding is to be accompanied by a statement setting out all foreign proceedings that fall within the foreign representative's knowledge. In terms of sub-section 13(b), the application must be accompanied by a statement identifying all foreign and Australian proceedings involving the debtor that falls within the foreign representative's knowledge.[356] All proceedings in terms of Chapter 5 and section 601CL of the *Corporations Act* regarding the debtor are also to be set out in such statement.[357] The foreign representative has an ongoing duty of disclosing to the court all substantial changes in the status of the foreign representative with regard to the foreign proceeding, as

354 As enacted in schedule 1 of the Aus CBA.
355 Article 25(1) of the *Model Law*.
356 Including any receivership or controllership in terms of s 9 of the *Corporations Act*.
357 S 13(c) of the Aus CBA 2008.

well as any new foreign proceeding involving the debtor.[358] This means that the foreign representative has the duty of informing the court of all South African-based insolvency proceedings regarding the debtor. Unlike the Aus CBA, the South African common law requires the foreign representative to obtain a letter of request from the court in his jurisdiction which he must submit to the South African High Court in requesting the court to recognise his appointment. Still, in terms of the South African common law there is no explicit duty on the foreign representative to inform the court of any foreign proceedings regarding the debtor.

The interim relief available to the foreign representative upon application for the recognition of a foreign proceeding in terms of article 19 of the *Model Law* is identical to the relief available in terms of section 19 of the SA CBA.[359] However, the foreign representative cannot apply for interim relief in terms of the South African common law. This means that, until the South African High Court has come to a decision on whether or not to recognise the foreign representative and the foreign proceedings, the foreign representative has no remedies at his disposal and cannot protect the interests of the creditors in the foreign proceedings.

Article 17 of the Aus CBA, identical to the South African version, sets out the circumstances in which a foreign proceeding shall be recognised by the court.[360] Similar to the South African CBA, the Aus CBA makes recognition subject to the public policy exception set out in article 6 of the *Model Law*.[361] A foreign proceeding will be recognised if that proceeding is a 'foreign proceeding' as defined in article 2(a) of the *Model Law* and if the foreign representative applying for recognition is a 'foreign representative' as defined in article 2(d) of the *Model Law*.[362] Recognition is further made subject to the application requirements set out in article 15(2) and the submission of such application to the relevant court as defined in section 10(b) of the Aus CBA.[363] Subsection 17(2) of the *Model Law* sets out the requirements for a foreign proceeding to be classified as either a foreign main or a foreign non-main

358 Article 18 of the Aus CBA 2008.
359 See paragraph 3.2.1 above.
360 Both the CBA and the Aus CBA 2008 adopted article 17 of the Model Law as is, without derogation.
361 Article 17(1) of the Aus CBA 2008.
362 Article 17(1)(a) and (b) of the Aus CBA 2008.
363 Article 17(1)(c) and (d) of the Aus CBA 2008.

proceeding. The *Federal Court (Corporations) Rules* 2000 in Regulation 15A.7 sets out requirements that the foreign representative has to comply with following the recognition of the foreign proceeding by the court in terms of article 17 of the *Model Law*.[364] This regulation also applies to the foreign representative in terms of any orders made under articles 19 and 21 of the *Model Law*. As soon as the order of recognition has been made, the foreign representative has the duty of entering the order and serving a copy of it on the defendant (the corporation in liquidation in this case).[365] In accordance with form 21,[366] the foreign representative furthermore has the duty of informing all Australian creditors of the defendant that are known to the foreign representative of the orders made against the defendant.[367] Notice that the order was made has to be published, in accordance with form 21, in a general local Australian newspaper that circulates daily in the state or territory where the corporation has it's principal place of business.[368] Apart from the application requirements set out in Chapter 3, the South African common law does not set out any specific requirements for a foreign proceeding to be recognised by the High Court. Unlike the Aus CBA, the South African common law leaves the decision whether to recognise a foreign insolvency proceeding up to the unfettered discretion of the court. The foreign insolvency proceedings do not have to adhere to specific requirements or fall within a defined category to be recognised by the court. For example, should A (a foreign representative appointed as liquidator in the South African insolvency proceedings) apply to the court in Australia for recognition of the foreign insolvency proceedings initiated in South Africa, the court will consider whether the 'foreign proceeding' and the 'foreign representative' can be defined as such in terms of articles 2 (a) and (d) of the *Model Law*, and whether the foreign proceeding is a foreign main or a foreign non-main proceeding. Once the foreign proceeding is recognised, the foreign representative has to perform the duties set out in Regulation 15A.7. On the other hand, should B (a foreign representative appointed as liquidator in the Australian insolvency proceedings) apply to the South African court for recognition of foreign insolvency proceedings initiated in Australia, the court will merely require B to provide it with sufficient proof of his appointment in

364 *Federal Court (Corporations) Rules* 2000, Reg 15A 7(1).
365 *Federal Court (Corporations) Rules* 2000, Reg 15A 7(1)(a) and (b).
366 As set out in Schedule 1 of the *Federal Court (Corporations) Rules* 2000.
367 *Federal Court (Corporations) Rules* 2000 Reg 15A 7(1)(c).
368 *Federal Court (Corporations) Rules* 2000 Reg 15A 7(1)(d).

the foreign insolvency proceedings as well as a copy of the order commencing such proceedings. The court does not differentiate between foreign main and foreign non-main proceedings.

Whether a foreign proceeding is a foreign main or a foreign non-main proceeding will depend on whether the debtor's COMI is located in the jurisdiction of the state where the foreign proceeding is taking place.[369] According to the *Explanatory Memorandum* of the *Cross-Border Insolvency Bill*,[370] Australian courts will determine the COMI by utilising international laws governing such determination.[371] If a foreign proceeding is confirmed to be a foreign main proceeding,

- all Australian-based actions against the debtor will be stayed;
- execution against all of the debtor's assets that are located in Australia will be stayed; and
- the debtor's right to encumber, dispose of and transfer its assets is suspended.[372]

This provision is identical to section 20 of the South African CBA. Section 16 of the Aus CBA causes the effect of the provisions of article 20(1) of the *Model Law* to be the same as if the stay of suspension arose in terms of Chapter 5 of the *Corporations Act*. In terms of the South African CBA, the provision is made subject to sections 341 and 359 of the *Insolvency Act* and it gives the foreign representative the right to request that the court modify or terminate the scope of the stay or suspension that has been imposed. The *Model Law*[373] does not make provision for the foreign representative to make a request to that extent.

Hur v Samsun Logix Corporation[374] was the first CBI application since the commencement of the Act to be brought before the Australian Federal Court.[375] This case is merely mentioned because it was the first - an ordinary application for the recognition of a Korean insolvency proceeding as a foreign main proceeding.

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369 See chapter 2 on the discussion on the debtor's COMI.
370 *Explanatory Memorandum*, *Cross-Border Insolvency Bill* 2008.
371 *Explanatory Memorandum*, *Cross-Border Insolvency Bill* 2008 1.7.
372 Article 20 of the *Model Law*.
373 As enacted in the Aus CBA.
374 *Hyun-Chul Hur v Samsun Logix Corporation* [2009] FCA 372.
375 Atkins S *Test Driving the Model Law on Cross-Border Insolvency in Australia: A Map of the Journey So Far* Viewed on 9 September 2012 https://insol.org/Fellowship/Fellows%20Article%20Q1%202011%20-%20Atkins.pdf.

The Act should cause CBI administration to be more cost effective and less time consuming.[376] According to Atkins,[377] the power and efficiency of the *Model Law* was highlighted in *Tucker v Aero Inventory*.[378] In this case, Mr Tucker and others were appointed as administrators of Aero Inventory in terms of the UK *Insolvency Act* of 1986. Aero Inventory owned movable assets in Australia and therefore the joint administrators made an application for the recognition of the UK proceedings in Australia under Article 17 of the *Model Law*[379] as well as for interim relief under article 19. At the final hearing of *Aero Inventory (No.2)*,[380] the court ordered that the UK proceeding be granted recognition in Australia as a foreign main proceeding in terms of article 17 of the *Model Law*. Within one day of the UK court making orders regarding the administration of Aero Inventory, the Australian court was able to do the same. This stands testament to the effectiveness of the guidelines and procedures embodied in the *Model Law*.

4.2.2 The outward-bound request

In terms of an outward-bound request for assistance made by an Australian liquidator to a foreign court the domestic laws of such foreign state will govern the process. An Australian liquidator applying to the High Court in South Africa for assistance would have to supply the court with a letter of request as discussed in paragraph 3.1.3.

4.3 Conclusion

Section 601CL of the *Corporations Act* deals with CBI cases where a foreign company is in the process of being wound up in its place of incorporation. In such

376 Reid C, Partner, Duncan Cotterill Lawyers Viewed on 3 September 2012 www.duncancotterill.com/index.cfm/1,144,522,43,html/Cross-border-insolvency-laws-smooth-the-way.

377 Atkins S *Test Driving the Model Law on Cross-Border Insolvency in Australia: A Map of the Journey So Far* Viewed on 9 September 2012 https://insol.org/Fellowship/Fellows%20Article%20Q1%202011%20-%20Atkins.pdf.

378 *Re Tucker, Aero Inventory (UK) Ltd v Aero Inventory (UK) Limited (2009) 76 ACSR 19.*

379 As enacted in the Aus CBA.

380 *Re Tucker, Aero Inventory (UK) Ltd v Aero Inventory (UK) Limited (No.2) (2010) 77 ACSR 510.*

cases, the liquidator appointed in the foreign insolvency proceedings may apply to the Australian court for assistance. For the purpose of this discussion 'A' is a company incorporated in South Africa and registered in Australia in terms of Division 2 of Part 5B.2 (known as a 'registered foreign company' and consequently a 'Part 5.7 body' in terms of the Act) and 'B' is the liquidator appointed by the South African court in the foreign winding-up proceedings. Section 601CL does not specify how B is to apply to the Australian court for assistance in the winding-up proceedings. For guidance in this regard one has to look at section 581 which deals with the cooperation of the Australian court with courts from external territories. South Africa is not a prescribed country in terms of section 581(2)(a) and therefore, in terms of subsection (b), the court has an absolute discretion deciding whether to act in aid of the South African court and consequently, B. Section 581 does give guidance regarding the method of applying to the Australian court for assistance. In terms of section 581(3), B may apply to the Australian court for assistance in the winding-up of A by way of a letter of request. Section 601CL(14)(b) acts in aid of a liquidator like B, who is applying for assistance from the Australian court but who is not from a prescribed country. It states that the court has an absolute duty to act in aid of B when A is in the process of being wound up in its place of incorporation, by appointing a local liquidator to recover and realise A's Australian-based assets and hand over the net value of the proceeds to B. Part 5.7 of the *Corporations Act* deals with the winding-up of a Part 5.7 body by the Australian court. It makes no mention of the rights of a foreign representative. Should a registered foreign company be wound up in terms of Part 5.7, B may apply to the Australian court for assistance by way of a letter of request. The court will use its discretion in deciding whether to grants such assistance. If the court decides to recognise the foreign proceedings in terms of which B was appointed, the Australian-based winding-up proceedings will be auxiliary to the South African-based proceedings taking place in A's place of incorporation. It is clear from above discussion that Part 5.7 is supplementary to the provisions of section 601CL.

Should the South African court or a liquidator appointed in South African liquidation proceedings wish to acquire the aid or cooperation of the Australian court, it has a choice of either applying to the Australian court for cooperation in terms of the Australian *Corporations Act* or it may make an application in line with the provisions

of the Aus CBA. It is my submission that it would be in the best interest of the foreign representative (or the South African court for that matter) to make an application in terms of the provisions of the Aus CBA *inter alia* due to the fact that, unlike the *Corporations Act*, last mentioned specifically sets out the rights and duties of the foreign representative. A further, very important reason for this submission is the fact that South Africa is not a so-called 'prescribed country' in terms of the *Corporations Act* and therefore the Australian court has an absolute discretion whether or not to act in aid of the foreign representative. The Aus CBA, on the other hand, treats all states equally and consequently the court will recognise the foreign representative's application for recognition should the application comply with the requirements set out in article 17(1) of the *Model Law*. Evidently the Aus CBA provides the foreign representative with greater legal certainty that the *Corporations Act*.

5 Conclusion

The objective of this research was to clarify the prevailing uncertainties regarding the rights and obligations of the foreign representative in CBI matters involving South African and Australia. After examining the relevant authorities, the following conclusion was reached.

As discussed, the SA CBA is not yet operational and will not take effect until the Minister of Justice has designated a state or states to which the provisions of the Act will apply. It is uncertain why the Minister has failed to do so until this point in time, but it is clear that he will not do so in terms of a state that does not provide South Africa with reciprocal rights regarding CBI. It is my submission that it would be in South Africa's best interest if the Minister were to designate Australia as a state for the purposes of the SA CBA, by reason of the fact that South Africa and Australia are parties to many shared CBI cases. This is due to the large number of transnational companies with assets and/or registered offices in both these states. Seeing that the Aus CBA does not require reciprocity for it to operate, makes Australia a viable option for the purpose of designation by the Minister of Justice. In other words, the Aus CBA automatically applies to South Africa and to all other states. By designating Australia, the Minister will ensure reciprocal rights and consequently legal certainty for trans-national companies with offices and/or

business dealings in both Australia and South Africa and, more importantly (for the purposes of this research), for the foreign representative and foreign creditors.

I believe that the *Model Law* has clarified the legal position of all interested parties in CBI matters. It has allowed the foreign representative to consult a single piece of legislation when he is faced with dealing with insolvency matters with cross-border implications. The *Model Law* sets out the procedures that the foreign representative is to follow, clearly. However, each state's substantive insolvency laws continue to govern insolvency matters in that state. The foreign representative must nevertheless consult the state's domestic legislation and previous decisions of court when dealing with CBI matters. The *Model Law* merely gives the foreign representative a clear vision of the procedures that he is to follow and how to follow them. This is a more 'user-friendly' system than the common law system that used to prevail in Australia and that continues to govern CBI matters in South Africa. The term 'user-friendly' is used because to my mind it is the best description of the system that has come into being since the *Model Law* has become part of member states' national legislation. A single, specific piece of legislation can now be used as opposed to multiple acts of legislation, decisions of court and precedents. This not only saves the foreign representative and courts time, but also money and frustration.

Once it comes into operation, the SA CBA will alter the foreign representative's legal position in CBI matters significantly. For example, the foreign representative will enjoy greater ease of access to local courts by being allowed to apply to the court directly, which significantly speeds up the application process. Like the South African common law, the Australian *Corporations Act* requires the foreign representative to acquire a letter of request from the court where he was appointed as such when he applies to the Australian court for assistance in or recognition of a foreign insolvency proceeding. This may be a time-consuming process due to the fact that the foreign representative has to depend on the foreign court to issue the letter of request before he is allowed to apply to the court for recognition. The Aus CBA does away with this requirement, allowing the foreign representative to apply for recognition by merely providing the court with a copy of the court order appointing him as the liquidator in the foreign proceedings, as well as with a certified copy of the court order

commencing the winding-up of the debtor. When inconsistencies occur, the Aus CBA prevails over the provisions of Part 5.7 of the *Corporations Act*. The foreign representative may decide to apply to the court by way of a letter of request, in other words in terms of the *Corporations Act*, or he may decide to lodge an application in terms of the Aus CBA. However, the Aus CBA does not replace the *Corporations Act* and seeing that section 581(3) of the *Corporations Act* does not fall within the provisions of Part 5.7 of the Act, the Aus CBA does not prevail over this section. The result is that section 581(3) and the Aus CBA co-exist and consequently the foreign representative has the right to choose whether he wants to apply to the Australian court for recognition in terms of the *Corporations Act* or the Aus CBA.

Should a company incorporated in Australia with offices and assets in South Africa (referred to as company A) be wound up by way of an order of the Australian court, the liquidator appointed as such in the Australian insolvency proceedings (known as 'B' for the purposes of this discussion) will have to keep the following in mind when he applies to the South African court to gain control of the debtor's South African-based assets: The South African common law makes a clear distinction between the debtor's movable and immovable property. In respect of the debtor's movable property, the courts follow the *mobilia sequuntur personam* principle, which implies that the liquidator appointed by the court where the debtor is incorporated automatically gains control over the debtor's movable assets that are located within the Republic. B nevertheless has the duty of applying to the South African High Court for permission to deal with the debtor's South African-based property. In the interest of protecting local creditors the High Court may impose certain conditions which the foreign representative will be required to adhere to before he will be permitted to attach, liquidate and remove the debtor's movable assets from the Republic. With regard to the immovable property of the debtor that is located within the Republic, B must apply to the High Court for recognition of the foreign insolvency proceeding in which he was appointed. Recognition is fully dependent on the court's discretion of whether or not to recognise the foreign proceedings. Once recognised, B will not be allowed to administer the immovable property in terms of the Australian domestic insolvency laws. B will have to deal with A's immovable property in terms of the South African common law. Using the same set of facts but assuming that A is a company incorporated in South Africa with offices and/or assets in Australia, B (the

liquidator appointed as such by the South African court) will have certian rights and obligations in terms of the Australian domestic legislation when applying to the Australian court to deal with A's Australian-based assets. In terms of the Australian *Corporations Act*, and more specifically section 601CL, if A has registered offices (registered in terms of this Act) in Australia, B may apply to the court to appoint an Australian liquidator to assist him in administering A's Australian-based assets. Australian domestic legislation does not differentiate between A's movable and immovable property. The same rules apply to both types of property. The Australian liquidator will collect all A's local property, realise it and hand over the proceeds to B who will then deal with the proceeds in terms of the South African common law.

As mentioned, B may choose to apply to the court in terms of the *Corporations Act* or in terms of the Aus CBA, whichever option he finds most appealing. In terms of the Aus CBA, B has the duty of applying to the Australian court for recognition of the South African insolvency proceedings in which he was appointed. B is allowed direct access to the Australian court. B has the duty of supplying the court with certified copies of the decision that commences the South African insolvency proceedings against A, as well as with a certificate from the South African court confirming B's appointment as the liquidator in the South African proceedings. Unlike the provisions of the *Corporations Act*, the Aus CBA does not require B to partake in the Australian-based insolvency proceedings by way of a locally appointed representative. B may apply to the court directly requesting any form of relief listed in article 21 of the *Model Law*.

The South African common law does not provide the foreign representative with provisional relief prior to the recognition of the Australian insolvency proceedings. The Australian *Corporations Act* does not make provision for any relief of this nature upon the request of the foreign representative either. The latter Act does, however, make provision for a provisional stay in proceedings against the debtor between the period of filing and application for the winding-up of a Part 5.7 body and the making of the winding-up order by the Australian court, provided that the application for the stay in proceedings is made by one or more of the debtor's creditors. The Aus CBA also makes provision for provisional relief upon request of the foreign representative. The Aus CBA does, however, make the granting of such relief subject to the

protection creditors. The available relief also includes the stay in proceedings against the debtor. Yet, unlike the interim relief available in terms of the *Corporations Act*, the court may order that the administration and realisation of the debtor's Australian-based assets be entrusted to the foreign representative until the court has reached a decision on whether or not to recognise the South African insolvency proceedings. Unlike the South African common law, the *Corporations Act* does not make provision for the protection of local creditors.

Once the court has recognised the Australian liquidator as a foreign representative, he is entitled to take part in and/or initiate any insolvency proceedings available to local liquidators in terms of the South African domestic insolvency legislation. The debtor will be treated as if being an insolvent in terms of the South African law. In terms of the Australian *Corporations Act*, on the other hand, if the South African liquidator made an application in terms of section 601CL, an Australian liquidator will act on behalf of the South African liquidator by collecting and realising all the debtor's Australian assets and handing over the net value of the proceeds to the South African liquidator. The latter is not permitted to personally initiate any proceedings or take any actions in terms of the *Corporations Act*. If the South African liquidator has made an application as foreign representative in terms of the Aus CBA, and if the South African insolvency proceedings are recognised as a foreign proceeding, the foreign representative will be entitled to apply to the Australian court for any form of relief as set out in article 21 of the *Model Law*.

BIBLIOGRAPHY

Literature

Adams and Fincke 2008-2009 Colum J Eur L

> Adams ES and Fincke J *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism* 2008-2009 *Columbian Journal of European Law* 43-87

Ailola *11 Stellenbosch Law Review*

> Ailola DA *The UNCITRAL Model Law on Cross-Border Insolvency: Its Efficacy and Suitability as a Basis for a SADC Convention* 2000 *Stellenbosch Law Review* 215

Bertelsmann *et al Mars: The Law of Insolvency in South Africa*

> Bertelsmann E *et al Mars: The Law of Insolvency in South Africa* 9th ed (Juta Cape Town 2008)

Botha and Stander 2011 *Journal for Juridical Science*

> Botha SJ and Stander AL *Die bepaling van die 'sentrum van hoofbelange' by oorgrens insolvensies: Is die Parmalat-benadering voldoende om die behoeftes van modern handel te bevredig?* 2011 *Journal for Juridical Science* 19-48

Bufford 2007 *Northwestern Journal of International Law and Business*

> Bufford SL *Centre of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice* 2007 *Northwestern Journal of International Law and Business* 351-420

Burman and Westbrook 1997 *International Legal Materials*

> Burman H and Westbrook JL *United Nations Commission on International Trade Law: Model Law on Cross-Border Insolvency: Introductory note*

Clift 2004 *Tulane Journal of International and Comparative Law*

> Clift J *The UNCITRAL Model Law on Cross-Border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency* 2004 *Tulane Journal of International and Comparative Law*

Cronin 1999 *Iowa Journal of Corporations Law*

> Cronin MT *Comment: UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem* 1999 *Iowa Journal of Corporations Law* 709

Fletcher *Insolvency in Private International Law*

Fletcher IF *Insolvency in Private International Law* 1st ed (Clarendon Press 1999)

Fletcher *Insolvency in Private International Law*

Fletcher I *Insolvency in Private International Law* 2nd ed (Oxford University Press 2007)

Fourie *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika*

Fourie EG *'n Vergelyking van die Oorgrens-Insolvensiewetgewing van Suid-Afrika met die van die Verenigde State van Amerika* (LLM-dissertation North-West University (Potchefstroom Campus) 2012)

Franco 2003 SA *Merc LJ*

Franco J *The Cross-Border Insolvency Act: Lifting the Barriers or Creating New Ones?* 2003 *South African Mercantile Law Journal* 27-42

Goode *et al Transnational Commercial Law*

Goode R *et al Transnational Commercial Law: Text, Cases and Materials* (Oxford University Press Oxford 2007)

Harmer *Report for Australia*

Harmer RW *Report for Australia* in Fletcher IF (ed) *Cross-Border Insolvency: Comparative Dimensions* (Mohr Siebeck 1992)

LoPucki 1999 *Cornell Law Review*

LoPucki LM *Cooperation in International Bankruptcy: A Post-Universalist Approach* 1999 *Cornell Law Review* 698-762

LoPucki 2000 *Michigan Law Review*

LoPucki LM *The Case for Cooperative Territoriality in International Bankruptcy* 2000 *Michigan Law Review* 2216-2251

Loubser 2003 SA Merc LJ

Loubser A *Aiding the Development of a New Insolvency Law in South Africa: the UNCITRAL Draf Legislative Guide on Insolvency Law* 2003 *South African Mercantile Law Journal* 396-406

Mason 1994 12 *C&SLJ* 182

Mason R *Australian Liquidation of Foreign Companies and Recognition of Foreign Insolvencies in Australia: Some Aspects of Cross-Border Corporate Insolvency* 1994 12 *Company & Securities Law Journal* 182

Mason 2006 *Melbourne ULR 145*

Mason R *Article: Local Proceedings in Multi-State Liquidations: Issues of Jurisdiction* 2006 *Melbourne University Law Review* (Melbourne University Law Review Association, Inc.)

Melunsky *Insolvency*

Melunsky LS *Insolvency* in Meskin PM and Wilson ABM (eds) *The South African Encyclopaedia of Forms and Precedents Volume 10* (Butterworths Durban 1972)

Meskin *Insolvency Law and its Operation in Winding-Up*

Meskin PM *Insolvency Law and its Operation in Winding-Up* (Butterworths, Durban 1990)

Meskin, Kunst and King *Insolvency Law*

Meskin PM, Kunst JA and King JC *Insolvency Law* (Butterworths Durban 2002)

Morrison 1999 *15 QUTLJ*

Morrison R *Avoiding Inherent Uncertainties in Cross-Border Insolvency: Is the UNCITRAL Model Law the Answer?* 1999 *Queensland University of Technology Law and Justice Journal* 103-125

Murray 2011 Australian Insolvency Journal

Murray M *Insolvency Case Summaries* 2011 *Australian Insolvency Journal* 46

Olivier and Boraine 2005 *CILSA*

Olivier M and Boraine A *Some Aspects of International Law in South African Cross Border Insolvency Law* 2005 *Comparative and International Law Journal of South Africa* 373-395

Purcell 2001 *AJCL Lexis 27*

Purcell J *Current Developments and Notes: Corporate international insolvency law at the crossroads* 2001 *Australian Journal of Corporate Law* (Lexis Nexis 2001)

Ragan 2010-2011 *Emory Bankr Dev J*

Ragan ACC *COMI Strikes a Discordant Note: Why U.S. Courts are Not in Complete Harmony Despite Chapter 15 Directives* 2010-2011 *Emory Bankruptcy Developments Journal* 117-168

Sharrock, Van der Linde and Smith *Hockly's Insolvency Law*

Sharrock R, Van der Linde K and Smith A *Hockly's Insolvency Law* 9th ed (Juta & Co, Ltd Cape Town 2012)

Silverman *ILSA Journal of International and Comparative Law*

Silverman RJ *Advances in Cross-Border Insolvency Cooperation: The UNCITRAL Model Law on Cross-Border Insolvency* 2000 *ILSA Journal of International and Comparative Law* 268

Smith 2002 *SA Merc LJ*

Smith A *Some Aspects of Comity and the Protection of Local Creditors in Cross-Border Insolvency Law: South Africa and the United States Compared* 2002 *South African Mercantile Law Journal* 17-63

Smith and Boraine 2002 *ABI Law Review*

Smith A and Boraine A *Crossing Borders into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law* 2002 *American Bankruptcy Institute Law Review* 138-215

Stander 1999 *THRHR*

Stander AL *'n Oplossing vir die hantering van transnasionale insolvensies?* 1999 *Journal of Contemporary Roman-Dutch Law* 508-529

Stander 2002 *Journal for Juridical Sciences*

Stander L *Cross-border insolvencies as a global economic problem* 2002 *Journal for Juridical Sciences* 27(2): 72-87

Stroebel *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies*

Stroebel LDM *Protocols as a Possible Solution to Jurisdiction Problems in Cross-Border Insolvencies* (LLM-dissertation North-West University (Potchefstroom Campus) 2006)

Trichardt 2002 *Flinders Journal of Law Reform*

Trichardt A *The Uncitral Model Law on Cross-Border Insolvency* 2002 *Flinders J. L. Reform*

Weideman and Stander 2012 *PER*

Weideman J and Stander AL *European and American Perspectives on the Choice of Law Regarding Cross-Border Insolvencies of Multinational Corporations – Suggestions for South Africa* 2012 *Potchefstroom Electronic Law Journal* 133-227

Wessels *International Insolvency Law*

Wessels B *Wessels Insolvency Law: International Insolvency Law* Volume X (Kluwer 2006 Netherlands)

Westbrook 2005 *Penn St Int'l L R*

Westbrook JL *Universalism and Choice of Law* 2005 Penn State International Law Review 625-637

Zulman 2009 *SA Merc LJ*

Zulman RH *Cross-Border Insolvency in South African Law* 2009 *SA Merc LJ* 804-817

Legislation

Australia

Cross-Border Insolvency Act 2008

Explanatory Memorandum, *Cross-Border Insolvency Bill* 2008 (The Parliament of the Commonwealth of Australia, Senate)

South Africa

Alienation of Land Act 68 of 1981

Companies Act 61 of 1973

Companies Act 71 of 2008

Cross-Border Insolvency Act 42 of 2000

Foreign Trustees and Foreign Liquidators Recognition Act of 1907

Insolvency Act 24 of 1936

Long Term Insurance Act 52 of 1998

UNCITRAL

UNCITRAL *Model Law on Cross-Border Insolvencies with Guide to Enactment* (New York United Nations 1999)

Internet sources

Anonymous 2002 *Corporate Law Economic Reform Program Proposal for Reform: Paper No.8 Cross-Border Insolvency: Promoting international cooperation and coordination* archive.treasury.gov.au/documents/448/PDF/CLERP8.pdf [date of use 7 October 2012]

Author Unknown 2002 www.treasury.gov.au/documents/448/PDF/CLERP8.pdf [date of use 9 September 2012]

Atkins S 2011 *Test Driving the Model Law on Cross-Border Insolvency in Australia: A Map of the Journey So Far* https://insol.org/Fellowship/Fellows%20Article%20Q1%202011%20-%20Atkins.pdf [date of use 9 September 2012]

Barker 2012 http://www.burmeisters.co.za/legal-articles/33-insolvency-articles/52-cross-border-insolvency.html

Barker N 2012 *Cross-Border Insolvency* http://www.burmeisters.co.za/legal-articles/33-insolvency-articles/52-cross-border-insolvency.html [date of use 10 October 2012]

Barrett RI 2005 *Cross-Border Insolvency – Aspects of the UNCITRAL Model Law* 2nd Annual Banking and Financial Services Law Association Annual Conference Cairns, 6-7 August 2005 http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_barrett060805 [date used 3 October 2012]

CLERP8 2002 http://archive.treasury.gov.au/documents/448/PDF/CLERP8.pdf [date of use 28 September 2013]

Del Castillo F *et al The Law of Cross-Border Insolvency Proceedings: A Brief Summary of its Sources, Development and Present Status* http://www.terralex.org/publication/p4e0f8da0de/the-law-of-cross-border-insolvency-proceedings-a-brief-summary-of-its-sources-development-and-present-status [date of use 23 March 2012]

Hargovan A *Centre of Main Interests Under the Australian Cross-Border Insolvency Act 2008: Lessons from the United States* www.austlii.edu.au/au/journals/JlALawTA/2008/3.pdf [date of use 1 *December 2011]*

Katz L Date Unknown *Cross-border insolvency and the recognition of foreign liquidators in South Africa* http://www.ens.co.za/newsletter/briefs/GRIR07Digital_extracts.pdf [date of use 20 September 2013]

Lewis G 2011 *The Adoption of the Uncitral Model Law on Cross-Border Insolvency: Its Potential Impact on Australia's Cooperation and Communication with Foreign Courts and Foreign Insolvency Practitioners* http://www.jdsupra.com/legalnews/the-adoption-of-the-uncitral-model -law-o-01904/ [date of use 6 August 2013]

Murray M *Cross-Border Insolvency – Letters of request* www.ipaa.com.au/default.asp?menuid=212&artid=574 [date of use 8 September 2012]

Quinlan M and Harris D 2011 *Focus: Winding Up Foreign Companies in Australia Not So Easy* www.allens.com.au/pubs/insol/pap3nov11.htm [date of use 25 September 2013]

Quinlan M, Robinson AA 2007 *Cross-Border Developments In Australia – An Update* www.allens.com.au/pubs/pdf/insol/pap18mar07.pdf [date of use 24 September 2012]

South African Law Commission Interim Report on Review of the Law of Insolvency: The Enactment in South Africa of UNCITRAL's Model Law on Cross-Border Insolvency Project 63 1999 http://salawreform.justice.gov.za/reports/r_prj63_crossborder_1999jun.pdf [date of use 20 October 2012]

United Nations Commission on International Trade Law (UNCITRAL) *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf [date of use 20 October 2012]

UNCITRAL Date Unknown INCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf [date of use 20 September 2013]

Case law

<u>Australia</u>

Gainsford v Tannenbaum [2012] FCA 904 2012 WL 3633600
Herman NO v Tebb 1926 CPD 65

Hyun-Chul Hur v Samsun Logix Corporation [2009] FCA 327

Lawrence v Northern Crest Investments Limited (in liq) [2011] FCA 672

McGrath & another as Liquidators of HIH Insurance Ltd [2008] NSWSC 881

Re Akers and Others v Saad Investments Co Ltd and Another [2010] 118 ALD

Re Australian Federal Life and General Assurance Co Ltd [1931] VLR 317

Re Tucker, Aero Inventory (UK) Ltd v Aero Inventory (UK) Limited (2009) 76 ACSR 19

Re Tucker, Aero Inventory (UK) Ltd v Aero Inventory (UK) Limited (No.2) (2010) 77 ACSR 510

Rolfe v Transworld Marine Agency Company NV (1998) 28 ACSR 11

European Union

European Union Council Regulation 1346 of 2000

South Africa

Deutsche Bank AG v Moser 1999 (4) SA 216 (C)

Die Meester v Protea Assuransiemaatskappy Bpk 1981 (4) SA 685 (T)

Ex parte Meinke 1954 (4) SA 391 (T)

Ex parte Palmer NO: In re Hahn 1993 (3) SA 359 (C)

Ex parte Robinson's Trustee 1910 TPD 25

Ex parte Steyn 1979 (2) SA 309 (O)

In Re African Farms 1906 TS 373

LaMonica v Baltic Reefers Management Ltd 2011 (3) SA 164 (WCC)

Re Bank National Benefit Assurance Co 1927 (3) DLR 289

Re English Scottish & Australian Chartered Bank [1893] 3 Ch 385

Re Kailis Groote Eylandt Fisheries Pty Ltd (No 3) (1977) 17 SASR 35

Rennie NO v Holzman 1989 (3) SA 706 (A)

Sackstein NO v Proudfoot SA (Pty) Ltd 2003 (4) SA 348 (SCA)

Trustee of Howse, Sons & Co v Trustees of Howse, Sons and Co, Jocelyne v Shearer & Hine 3 (SC)

Viljoen v Venter NO 1981 (2) SA 152 (W)

Ward & another v Smit & others: In re Gurr v Zambia Airways Corporation Ltd 1998 (3) SA 175 (SCA)

United States

Hilton v Guyot 1895 159 US 113