

**SOUTH AFRICAN LAW COMMISSION**

**Project 63**

**INTERIM REPORT ON  
REVIEW OF THE LAW OF INSOLVENCY:  
THE ENACTMENT IN SOUTH AFRICA OF UNCITRAL'S  
MODEL LAW ON CROSS-BORDER INSOLVENCY**

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**June 1999**

(i)

To Dr A M Omar, M P, Minister of Justice

I have the honour to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's interim report on the **Review of the Law of Insolvency: The Enactment in South Africa of UNCITRAL's Model Law on Cross-Border Insolvency.**

**Mr Justice I Mahomed**  
**Chairperson**  
**17 June 1999**

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## **INTRODUCTION**

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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## SUMMARY OF RECOMMENDATIONS

1. As few changes as possible should be made in order to strive for a satisfactory degree of harmonisation and certainty (par 4.2).
2. No exclusion of entities such as banks or insurance companies are proposed (par 4.6).
3. Only terms that do not have an obvious meaning in the context of the insolvency law should be defined (par 4.9).
4. It should be made clear that the ranking of claims is left to South African insolvency law and not merely to South Africa's conflict of law rules (par 4.14).
5. It is important that the automatic effect of clause 20 create a breathing space without delay (par 4.18), but the court may at the request of the foreign representative or a person affected by the operation of clause 20 modify or terminate the scope of the stay and suspension of proceedings (par 4.19).
6. The question of the appointment of a local representative should be left to the court in accordance with the Model Law (par 4.25).
7. It should be made clear that the court has authority to indicate which South African rules should apply and modify such rules or set out conditions subject to which any rule should apply (par 4.35).
8. Section 149(1) of the Insolvency Act should be amended to indicate that foreign representatives and creditors have access to the court as provided in Chapter 2 of the Model Law and liquidation of the estate of a debtor is limited as provided in Chapter 5 of the Law (par 5.3).
9. The Commission recommends the enactment of the Bill in the Annexure to the report (par 6.2).

# **Enactment in South Africa of UNCITRAL'S Model Law on Cross-Border Insolvency**

## **1 Introduction**

1.1 On 15 December 1997 the General Assembly of the United Nations adopted a resolution, co-sponsored by South Africa, recommending that States review their legislation on cross-border insolvency and in that review give favourable consideration to UNCITRAL's<sup>1</sup> model law, bearing in mind the need for internationally harmonised legislation governing instances of cross-border insolvency. The resolution also recommended that all efforts be made to ensure that the Model Law together with the Guide to Enactment became generally known and available.

1.2 The Model Law was developed in close cooperation with the International Association of Insolvency Practitioners (INSOL) over a number of years and benefited from INSOL's expert advice during all stages of the preparatory work. Active consultative assistance during the formation of the Law was also received from Committee J of the Section on Business Law of the International Bar Association. UNCITRAL and INSOL held two international colloquia of insolvency practitioners, judges, government officials and representatives of other interested sectors in Vienna and Toronto where it was suggested that the work of UNCITRAL should have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings. Before the session of the Commission in May 1997, at which the Model Law was adopted, another international meeting of practitioners was held in New Orleans to discuss the draft text prepared by a Working Group. The participants were mostly judges, judicial administrators and government officials. They generally considered that the model legislation, when enacted, would constitute a major improvement in dealing with cross-border insolvency cases.

## **2 Invitation for comment**

2.1 On 25 May 1998 comments were invited from about 130 selected correspondents on the advisability of the enactment in South Africa of an adaptation of the Model Law attached to the

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1 United Nations Commission on International Trade Law.



invitation. The *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*<sup>2</sup> (hereafter the "Guide to Enactment") was also attached to the invitation for comment. The invitation with the Annexures were published on the website of the South African Law Commission on the Internet.<sup>3</sup> The responses to the invitation for comments are discussed below.

### 3 Support for enactment of the Model Law

3.1 There is strong support for the principle that an adaptation of the Model Law should be enacted in South Africa.

3.2 Judges A P Beckley and S P B Hancke of the Orange Free State High Court say in principle they are not aware of any reasons why the Model Law should not be enacted. On the contrary, they feel that it is to be recommended, having regard to the fact that "[a]n insolvency or bankruptcy statute is only in force in the State where it is enacted, though by the comity of nations assignments in bankruptcy in one State are sometimes recognised as effective in another"<sup>4</sup> and that special legislative provision has been made for the recognition of foreign sequestration orders and for foreign trustees. (See, eg, the so-called "Cork Report"; Sir Kenneth Cork, *Insolvency Law and Practice: Report of the Review Committee*, June 1982 CMND 8558 chapter 49.) They are also aware of similar provisions in other countries, including Australia, Zambia and Swaziland. Their views have been discussed with the Judge President and carry his approval.

3.3 A committee of the Society of Advocates of Natal, consisting of C J Pammenter SC and G D Harpur, believes that legislation of the type proposed is desirable. Although the effect of such legislation would be more or less the same as our common law regarding the recognition of foreign trustees, it would be desirable to have legislation in place which accords with corresponding legislation in countries which are South Africa's major trading partners.

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2 United Nations General Assembly A/CN.9/442 19 December 1997. The document is available on the internet at the following address: <http://www.un.or.at/uncitral/en-index.htm>

3 The address for these documents is <http://www.law.wits.ac.za/salc/media/media.html>

4 Per Wessels, J A, in *R v Eteberg* 1932 AD 142 at 145.

3.4 Judge Zulman makes the following recommendations in paragraph 20 of his *Final Report on Trans-National Insolvency*:<sup>5</sup>

3.4.1 It is, in his view, beyond doubt that there is, to use the words of Sir Donald Nicholls VC<sup>6</sup> "a crying need for an international insolvency convention. Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily".<sup>7</sup>

3.4.2 Now that South Africa has entered the world of nations as it were and with increasing commerce and the incidence, magnitude and complexity of cross-border insolvencies in recent years it seems to him to be essential for South Africa to be in step with the rest of the world. He believes that one can hardly expect foreign investors and persons who wish to do business with South Africa to be left with a situation where there is some uncertainty and indeed, in some cases, gaps in regard to a situation where a cross-border insolvency occurs.<sup>8</sup> It would be far preferable if they were able to have a ready source of reference to such law in a statute preferably a statute of universal application. In this latter regard the enactment by South Africa of the UNCITRAL Model Law is the first prize which South Africa should aim at.

3.4.3 It is clear to him from the literature which he has read on the subject and from his discussions with participants at the United Nations in the working group concerned with the drafting of the Model Law that the Model Law certainly enjoys the support of influential specialists in the field of insolvency in countries such as the United States of America, Canada, the United Kingdom, many European countries and countries in the East. The proposals in the Model Law as explained by Professor Westbrook and Judge Brozman are "modest" and make no attempt to "harmonise the substantive law of the

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5 Rand Afrikaans University Research Unit for Banking Law 1998.

6 *In re Paramount Airways Ltd (In administration)* [1993] Ch 223 (CA) at 239 A - D.

7 See paragraph 3.5.1 below.

8 See paragraph 3.5.2 below.

enacting jurisdictions".<sup>9</sup> This factor may well explain the broad consensus which was achieved among the countries who participated in drafting the Model Law. Of much significance, in his opinion, and of particular relevance to South Africa is the point made by Mr Burman to the Senate Sub-Committee that the adoption of the Model Law will "further the interests of fair treatment for investors, lenders and commercial borrowers across all borders and thus facilitate investment and trade".<sup>10</sup>

3.5 The New Zealand Law Commission recommends that New Zealand should adopt the Model Law<sup>11</sup> for, amongst others, the following reasons:

3.5.1 The ability to transact business globally and to move large amounts of money from state to state has created an economically borderless world which must, nevertheless, operate within the boundaries of sovereign nations.<sup>12</sup>

3.5.2 Doubts about recoverability on bankruptcy of loans made by offshore entities are likely to impact adversely on foreign investment.<sup>13</sup>

3.5.3 It is likely that countries seeking funding from the International Monetary Fund (IMF) will enact the Model Law because bankruptcy laws which treat foreigners fairly are a standard condition of the IMF; the United States has a significant influence on the administration of the Fund and the United States is likely to adopt the Model Law.<sup>14</sup>

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9 See paragraph 3.6 below.

10 Cf Jonathan L Flaxer "United States Senate Subcommittee Holds Hearings on UNCITRAL Cross-Border Insolvency Proposal" *Insol World* March 1998.

11 Law Commission *Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency?* Report 52 Wellington: February 1999, hereafter the "New Zealand report". Internet address: [www.lawcom.gov.nz/publications.html](http://www.lawcom.gov.nz/publications.html)

12 New Zealand report par 67 on page 24.

13 New Zealand report par 87 on page 31. See the remark quoted in paragraph 82 on page 29 that Wall Street analysts who assess how risky it is to invest in a particular developing country often look at the type of bankruptcy system in place.

14 New Zealand report par 84 on page 30.

3.6 The Model Law respects differences in national procedural laws and does not attempt a substantive unification of insolvency law.<sup>15</sup>

3.7 The New Zealand report points out<sup>16</sup> that in the United States the Model Law awaits reconsideration of other bankruptcy reforms in the Bill in which it has been placed and states that their enquiries have revealed that Australia, the United Kingdom and Canada are likely to consider adoption of the Model Law in the near future. On 5 May 1999 the United States House of Representatives passed Bill H.R.833, which includes the provisions of the Model Law adapted for inclusion in the United States Bankruptcy Code.<sup>17</sup>

#### **4 Proposals for Model Law adapted for enactment in South Africa**

##### **(a) Introduction**

4.1 The proposals of the South African Law Commission for the Model Law, adapted for enactment in South Africa, are reflected in the Annexure.

4.2 In line with paragraph 12 of the Guide to Enactment as few changes as possible have been made in the proposed adaptation in order to strive for a satisfactory degree of harmonisation and certainty.<sup>18</sup>

##### **(b) Clause 1 - exclusion of entities from operation**

4.3 Clause 1(2) of the Model Law makes provision for the exclusion of entities, such as banks or insurance companies, that are subject to a special insolvency regime, from the operation of the Model Law.

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15 New Zealand report par 124 on page 43.

16 Par 75 on page 26.

17 See Legislative News at [www.abiworld.org](http://www.abiworld.org) for progress on this Bill.

18 This approach is supported by the New Zealand report par 134 on page 46.

4.4 Section 1501 (c) of Bill H.R.833 introduced in the United States excludes the following:

4.4.1 A proceeding concerning an entity identified by exclusion in subsection 109(b) of the United States Bankruptcy Code. Clause 109(b) excludes a railroad, a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, licensed small business investment company, credit union, or industrial bank or similar institution which is an insured bank as defined in the Federal Deposit Insurance Act and a foreign insurance company, bank, savings bank, cooperative bank, etc, engaged in business in the United States.

4.4.2 An individual or an individual and such individual's spouse who have debts within the limits specified in section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence. The limits for an individual with regular income are non-contingent, liquidated, unsecured debts of less than \$250,000 and non-contingent, liquidated secured debts of less than \$750,000.

4.4.3 An entity subject to a proceeding under the Securities Investor Protection Act, a stockbroker subject to chapter 7 III of the Bankruptcy Code or a commodity broker subject to chapter 7 IV of the Code.

4.5 The exclusions in this United States Bill appear to be extensive and countries like Canada may be encouraged to follow suit. Banks which are subject to statutory management under the Reserve Bank Act are the only express exclusions recommended by the New Zealand report.<sup>19</sup> The reason is that if there is a bank insolvency in New Zealand which is likely to cause systemic financial failure it is necessary for New Zealand regulators to retain control of assets in New Zealand so that systemic difficulties can be minimised. The report expresses the view on current evidence that life insurance companies per se do not pose a sufficient threat of systemic financial failure to warrant exclusion from the Model Law.<sup>20</sup>

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19 Par 218 on page 69.

20 Par 141 on page 49.

4.6 Comment was invited on the question whether special insolvency regimes in South Africa, such as banks or insurance companies, should be excluded from the Model law. No submissions were received in this regard and no exclusions are provided for in the Bill.

**(c) Clause 2 - definitions**

4.7 Paragraph 72 of the Guide to Enactment points out that the expression "centre of main interests" in subparagraph (b) - definition of a foreign main proceeding - is used also in the European Union Convention on Insolvency Proceedings. It is conceded that it may be difficult to prove the centre of main interest, for example in the case of a multi-national company. However, clause 16(3) creates a rebuttable presumption that the debtor's registered office, or habitual residence in the case of an individual is the centre of the debtor's main interests. Although this will not solve all problems it appears to be the best available option.

4.8 The definition of "establishment" reads as follows:

- (f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Paragraph 75 of the Guide to Enactment points out that this definition is inspired by article 2(h) of the European Union Convention on Insolvency Proceedings. It is a precondition for the recognition of a foreign non-main proceeding that the debtor has such an establishment in the country in question. It is clearly intended to limit the recognition of such proceedings to countries with whom the debtor has a significant connection.

4.9 Paragraph 67 of the Guide to Enactment says that since the Model Law will be embedded in the national insolvency law, article 2 only needs to define the terms specific to cross-border scenarios. Thus, the Model Law contains definitions of the terms "foreign proceeding" (subparagraph (a)) and "foreign representative" (subparagraph (d)), but not of the person or body that may be entrusted with the administration of the assets of the debtor in an insolvency proceeding in the enacting State. To the extent that it would be useful to define in the national

statute the term used for such a person or body (rather than just using the term commonly employed to refer to such persons), this may be added to the definitions in the law enacting the Model Law. It is debatable whether it is advisable to define the terms "liquidator" and "trustee" in the adapted Model Law. The terms "curator" and "receiver" are defined because they do not have an obvious meaning in the context of "the laws of the Republic relating to insolvency". It is submitted that it is clear what is meant by "trustee" or "liquidator" with reference to the laws relating to insolvency. The same is true in respect of a "judicial manager".

**(d) Clause 4 - competent authority**

4.10 In New Zealand, Masters of the High Court are senior judicial officers who exercise all jurisdiction of a judge in chambers and specific court jurisdiction entrusted to them, including a good deal of the court's insolvency jurisdiction. The New Zealand report recommends that the Masters should have jurisdiction under the Model Law.<sup>21</sup>

4.11 The position of the Masters of the High Court in South Africa is different. Although they exercise some functions which may be performed by a High Court judge, they do not exercise court jurisdiction generally. No objections were received to a submission that it is not necessary or advisable to refer to the Master of the High Court or any other authority in clause 4 because the functions in the Act should be performed by the High Court.

**(e) Clause 13(2) - recognition of foreign creditors' secured claims**

4.12 One of the major bank's queries is whether or not it will be necessary to establish the manner in which foreign creditors' security for their claim against a debtor will be recognised in the Republic. A committee of the Society of Advocates of Natal, consisting of C J Pammenter SC and G D Harpur, says problems could arise as regards preferent claims. What would the position be if a creditor in the foreign proceedings had a claim which enjoys a preference in the country from which the proceedings emanated but which claim would not enjoy a preference in South Africa? They believe that section 13 does not properly cover this situation. If the draft Act remains as it is local creditors could be prejudiced if a foreign creditor's claim is allowed to enjoy a preference that it would not otherwise enjoy in South Africa. Accordingly they propose that

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21 Par 157 on page 53.

the draft Act should be amended to spell out that the foreign creditor's claim will only enjoy such preference as it would enjoy if it were a South African claim.

4.13 Clause 13(1) provides clearly that the ranking of claims is not affected by the clause. Clause 32 preserves the rights of secured creditors or creditors with rights *in rem*. Paragraph 199 of the Guide to Enactment says the payment of these claims depends on the law of the State where the proceeding is conducted and they are not affected by clause 32. Although there does not seem to be direct authority on the point, it has been remarked that "South African principles of private international law may be that rights in regard to the distribution of available assets fall to be decided according to the *lex fori*", in other words South African law (*Ex parte Steyn* 1979 (2) SA 309 (O) 311). In *Ex parte Meinke* 1954 (4) SA 391 (T) 395 the order contained the following:

That the admission and rejection of such claims, the liability of the company therefor to the extent of its assets in the Union of South Africa, and all questions of mortgage or preference in respect of such assets, shall be regulated by the law and practice of the Union of South Africa for the time being in insolvency;

4.14 It is submitted that the important matter of the ranking of claims should be left to South African insolvency law as is provided in clause 13(2), but that the application of South African law and not perhaps merely its conflict of law rules, should be stated beyond any doubt by adding the following subclause to clause 13:

(3) Without derogating from the application of the law and practice of the Republic generally, the ranking of claims in respect of assets in the Republic shall be regulated by the law and practice of the Republic on the ranking of claims.

**(f) Clause 17 - decision to recognise a foreign proceeding**

4.15 The Society of Advocates of South Africa (Witwatersrand Division), in comments by A P Rubens SC and David Leibowitz, says that the one aspect of the draft Act which causes concern is that it does not provide for reciprocity in two important senses:

4.15.1 It is not an explicit pre-requisite for obtaining an order under the draft Act that the "foreign proceeding" defined therein falls within the jurisdiction of a country having a



similar legislative instrument to the Model Act. The consequences of this is that protection and assistance may be afforded to foreign creditors and a foreign liquidator without South African creditors and the South African liquidator having access to the same assistance in the jurisdiction in which the foreign proceedings take place. In their view the Act ought only to be capable of being invoked in respect of foreign proceedings which take place in a jurisdiction which affords reciprocal rights to South African creditors and liquidators.

4.15.2 The Act provides for the participation of creditors in the foreign jurisdiction in the distribution of the debtor's assets in South Africa. It does not afford the reciprocal rights of participation to South African creditors in respect of the assets distributed pursuant to the foreign proceedings in question. In their view this creates an unnecessary potential for inequity as between creditors in the two different jurisdictions.

4.16 A committee of the Society of Advocates of Natal, consisting of C J Pammenter SC and G D Harpur, says section 17 read with section 6 of the draft Act has the effect of obliging a court to recognise a foreign proceeding unless it would be "manifestly contrary to public policy" to do so: the court is not vested with a discretion in the ordinary course as to whether or not to recognise a foreign proceeding; this would appear to be undesirable particularly having regard to the fact that the granting of a recognition order would have the automatic effect of prohibiting the commencement or continuation of legal proceedings against the debtor, execution against his assets etc (see section 20(1) of the draft Act) and could lead to abuses; the recognition order could also be a way of allowing a creditor to indirectly enforce a judgment in South Africa which would otherwise not be enforceable (i.e. for the reason that it is a foreign tax claim or a claim for punitive damages). They believe that these problems could be obviated if the court was given a wider discretion as to whether or not to grant a recognition order. To allow it to decline to grant recognition if it would be "manifestly contrary to public policy" as required by section 6 is, in their view, far too limited. They add that the draft Act provides for the recognition of all foreign insolvency proceedings provided they fall within the definition of "foreign proceedings" in section 2(a). There is no provision for requiring reciprocity. In the result the South African Courts would be obliged to recognise a foreign proceeding emanating from a country which would not

necessarily recognise South African proceedings. They believe therefore that the draft Act should be amended to make provision for requiring such reciprocity.

4.17 Except for the automatic recognition provided for in clause 20 any relief given by the court is in the discretion of the court and can be tapered to suit particular circumstances. Concerns about unfair treatment of local creditors or liquidators are certainly issues that can be addressed when the court exercises its discretion about the relief to be granted in a particular case. The view that the Model Law would entitle a creditor to enforce a claim for punitive damages against a South African estate, is not supported. Claims will certainly be admitted against the South African estate only if they are enforceable here. The enforcement of foreign revenue claims is a policy matter. The recognition of foreign revenue claims as concurrent claims in the adapted Model Law did not elicit unfavourable comment (footnote 4 of the adapted Model Law). However, the concerns expressed by these commentators deserve careful consideration.

4.18 The Guide to Enactment stresses that the outcome of an application should be predictable (cf paragraphs 13 and 16). It is very important that the automatic effects of clause 20 create a breathing space without delay (paragraph 32 of the Guide to Enactment). Requirements such as comity or reciprocity would probably impair the predictability of an application seriously and hamper the ability to obtain the minimum relief urgently. According to paragraphs 143, 149 and 150 of the Guide to Enactment: if recognition should in a given case produce results that would be contrary to the legitimate interests of an interested party, the law of the enacting State should provide possibilities for protecting those interests; sometimes it may be desirable for the court to modify or terminate the effects of article 20; it may be necessary to set out the grounds on which the court could modify or terminate the mandatory effects under article 20; it would be consistent with the objectives of the Model Law if an enacting State spells out provisions that govern this question and the procedure.

4.19 It is a policy question whether the automatic effects of recognition in clause 20 should be limited. It appears advisable to build in a safety valve in this regard. ***It is submitted that the proposed clause 20 (2) should be amended as follows (wording similar to clause 22(3) is used):***

(2) The scope, and the modification or termination, of the stay and suspension referred to in subsection (1) of this section are subject to the provisions of sections 20, 23 and 75 of the Insolvency Act, 1936 (Act No. 24 of 1936), and sections 341 and 359 of the Companies Act, 1973 (Act No. 61 of 1973) **and the court may at the request of the foreign representative or a person affected by subsection (1) modify or terminate the scope of the stay and suspension to the extent that it considers appropriate.**

**(g) Clause 18(a) - foreign representative to inform court of substantial change in status of foreign proceeding or foreign representative's appointment**

4.20 One of the major banks says that in their view any change of whatsoever nature should be reported.

4.21 It is acceptable to limit reports to changes in the status or foreign proceedings or the representatives' appointment, because the court would not be interested in less significant changes. Every change in the status of a foreign proceeding or foreign representatives' appointment is substantial and the interpretation of the word "substantial" may cause difficulty. *It is submitted that the word "substantial" in clause 18(a) of the Model Law (quoted above) should be deleted.*

**(h) Clause 19 - administration by foreign representative or other person designated**

4.22 Mr Sackstein, as chairperson of the insolvency committee of the Law Society of South Africa, thinks it is absolutely essential that a local representative must be nominated in the papers to represent the overseas trustee or liquidator. This is essential because there must be a local *domicilium* and the most sensible method would be to allow the applicant to designate to the court a person domiciled in the Republic to act on his or her behalf and this delegation should form part of the court order.

4.23 Section 22(2)(a) of the Administration of Estates Act 66 of 1965 provides that the Master may refuse to recognise the foreign appointment of an executor until the executor has chosen *domicilium citandi et executandi* in the Republic. In the case of a deceased who is neither ordinarily resident within the Republic nor the owner of any property other than shares, stocks, the right to dividends thereon, or any credit balance at any bank or other financial institution, or debentures or any right to interest thereon, the Master may in terms of section 25, after an affidavit in the prescribed form has been lodged by the foreign representative, dispense with

certain formalities if the Master is satisfied that no person in the Republic will be prejudiced. The affidavit<sup>22</sup> must give "the full name and address of any duly authorized agent in the Republic acting on behalf of the foreign representative". It is conspicuous that there is not an invariable requirement that an agent must be appointed.

4.24 Ron Harmer<sup>23</sup> refers to a misconception that the Model Law creates the opportunity for a foreign practitioner to administer an insolvency in the local jurisdiction. He says that clauses 19(1)(b), 21(1)(e) and 21(2) all provide that a foreign representative *or another person designated by the court* may be authorised to act. None of these provisions operate without a court order and the court has a discretion. He ventures to suggest that in most cases the local court will appoint a local practitioner to have the conduct (hopefully in co-operation with and not to the entire exclusion of the foreign practitioner) of the local insolvency. He points out that presently in many jurisdictions local laws provide that the only persons who may administer formal insolvency matters within the jurisdiction are persons who are qualified, experienced and registered or licensed to do so.

4.25 Section 55(d) of the South African Insolvency Act and section 372 (h) of the Companies Act disqualifies a person not resident within the Republic from being appointed as trustee or liquidator. However, it seems clear that a general provision that certain persons are disqualified from acting as liquidator will give way to a specific provision that the court may entrust the administration or realisation of a debtors assets to a foreign representative. According to *Ex parte Robinson's Trustee*<sup>24</sup> the qualifications of a liquidator are decided according to the law of the country where the liquidator was appointed and not the law where the appointment is recognised. It will be preferable in most cases to appoint a local representative with the foreign representative, but this would surely depend on the circumstances and, as is pointed out by Mr Harmer, the court has full power to make the order it thinks fit. Take the extreme example of a person who has no connection with South Africa except that the person hid some assets here.

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22 Administration of Estates Regulation 4 *Government Gazette* 3425 of 24 March 1972.

23 "Misconception to Myth" *Insol World* July 1998 page 3.

24 1910 TPD 25.

Surely it is not necessary to appoint a local representative in such a case and the court should consider entrusting the distribution of the debtor's South African assets to a foreign representative in terms of clause 21(2) of the Model Law. If this view is accepted the question arises whether the matter should be spelled out in the Model Law. *It is submitted that the question of the appointment of a local representative should be left to the court and that the provisions of the Model Law are sufficient in this regard.*

**(i) Clause 20(2) - scope, and the modification or termination, of the stay and suspension referred to in subclause 20(1)**

4.26 Provision is made in clause 20(2) of the Model Law for a reference to any provisions of the law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination of the stay of the commencement or continuation of actions or proceedings against the debtor, the stay of execution against the debtor's assets and the suspension of the right to dispose of assets of the debtor provided for in clause 20(1). The provision of clause 20(1) is clarified in the draft adaptation by referring to *legal* actions and proceedings

4.27 The New Zealand report takes the view that an approach to override the provisions of clause 20 is not desirable in New Zealand because each of the consequences which flow from clause 20 would occur as a result of most formal insolvency regimes in New Zealand. The court is given a discretion in New Zealand law to override the consequences of stay or suspension of rights.<sup>25</sup>

4.28 In South Africa the court is not always given a discretion with regard to the matters dealt with in clause 20(1). It is submitted that the position regarding local estates and recognition of foreign proceedings should be the same. The provisions of clause 20(1) are qualified by subjecting them in clause 20(2) to provisions of the Insolvency and Companies Acts dealing with the effect of insolvency proceedings on assets, the rights and obligations of the debtor and legal proceedings against the estate.

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25 New Zealand Report par 180 on page 59.

4.29 Section 21 of the Insolvency Act provides for the vesting of the assets of a "solvent" spouse of the debtor in the insolvent estate of the debtor until certain proof has been furnished regarding the way in which the assets were obtained. Mr Sackstein, on behalf of the Law Society of South Africa, is worried that section 21 may not be applicable. In terms of clause 21(1)(g) of the Model Law the court may grant any additional relief that may be available to a trustee under the laws of the Republic. However, Mr Sackstein feels that section 21 should apply automatically. The following clause has been inserted after clause 20(1)(d) of the Model Law:

- (d) section 21 of the Insolvency Act shall apply with regard to assets situated in the Republic to the same extent as if the insolvent was sequestrated by a court in the Republic.

**(j) Clause 21(1)(e) and 22(2) - administration of estate**

4.30 One of the major banks says with reference to clause 14(3) that the Model Law does not describe the manner (form) in which the claims by the foreign creditor are to be filed. (Clause 14(3) provides that a notification of commencement of a proceeding to foreign creditors must, inter alia, indicate a reasonable time for filing of claims and the place for filing and indicate whether secured creditors need to file their secured claims.) Mr Basil Nel of Price Waterhouse Coopers presumes that the role, duties, responsibilities and powers of the Master of the High Court under the Insolvency or Companies Act will as a result of the reference to the South African Insolvency Act in the adapted Model Law be applicable to the Model Law and that for this reason there is no need for a definition of the Master of the High Court. The Master of the High Court, Pretoria, says according to the Model Law no provision is made for any supervision of the actions of the foreign representative, security to be lodged, etc, once the foreign proceedings have been recognised. Perhaps it will be necessary to extend the application of the provisions of the Insolvency and Companies Acts to include more than those mentioned in clause 21(2). (Clause 21(2) provides that the court may entrust the distribution of the assets in the Republic to the foreign representative provided local creditors are adequately protected.) A committee of the Society of Advocates of Natal, consisting of C J Pammenter SC and G D Harpur, says orders granted in terms of the common law for the recognition of a foreign trustee almost invariably provide that the foreign trustees are obliged to put up security equal to the value of the debtors assets in South Africa. Although the court would, in terms of section 22 of the draft

Act be empowered to require such security, it would be preferable if the Act specifically spelt out that such security had to be provided.

4.31 Mr Sackstein says it is essential that the following aspect be dealt with in the Act which will make the practical implementation of the new legislation far easier:

4.31.1 Provision must be made to permit the local representative of the foreign trustee or liquidator to export the funds from time to time. Whether the exportation can be done merely by virtue of the order of court amplified by a certificate from the local representative or whether one will need the Master's consent for such exportation is something that one could debate. The former procedure seems to him to be more practical because the Masters Offices in this country has sufficient work on their hands not to be expected to examine accounts and vouchers for this purpose.

4.31.2 He does not believe that it is necessary for the local representative to furnish security to the Master; security or the equivalent in other countries, has in all likelihood been furnished by the trustee or liquidator in the country in which the Insolvency order was originally granted; security bonds are expensive and it is in all likelihood prolix to have an additional security bond in this country; the trustee or liquidator, in delegating his duties to a local person, would in all likelihood be covered by the security bond he holds in his country of domicile. In addition he does not think that there is any necessity at all to furnish security unless there are local creditors who prove claims.<sup>26</sup>

4.31.3 Mr Sackstein says in most of the insolvencies which come to South Africa, there are no creditors here at all so meetings cannot really be held because there would be no South African creditors present to vote for the passing of a report and the adoption of the resolutions. For this purpose, it is absolutely essential that as from the date of the court order the foreign representative and his delegee have all the necessary authorities which are otherwise obtained at the second meeting of creditors to

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26 Mr Sackstein refers to **Ex Parte Haslam: In re Shell Co of SA** 1961 (3) SA 904 (C), **Ex Parte Liquidator Shell Co of Rhodesia Ltd** 1964 (2) SA 223 (SR) and **Ex Parte Meinke** 1954 (4) SA 391 (T) and texts (Meskin at para 4.56).

- 4.31.3.1 institute actions and bring applications to court;
- 4.31.3.2 sell assets whether movable or immovable without having to approach the Master under the Insolvency Act for consent under section 80(bis) of that Act or under section 386 of the Companies Act.

The court order amplified by a certificate by the delegee should be sufficient for purposes of registration in the Deeds Office and the holding of a sale of movable assets which the Insolvent may have acquired in this country.

- 4.31.4 Mr Sackstein refers to the judgement of *Ex Parte Meinke*<sup>27</sup> and says the powers reflected in the order granted by Claydon J in practical terms set out what authority the appointee and his delegee would need to effectively discharge his duties.<sup>28</sup>
- 4.31.5 Mr Sackstein does not believe that there is any necessity to have a formal liquidation and distribution account in circumstances such as these. All that need be done is for the court order to authorise the trustee or liquidator or his delegee to proceed as if he enjoyed all the powers of a trustee or liquidator duly appointed under a South African insolvency, and to export the funds once he has collected same.
- 4.31.6 Mr Sackstein says the tariff of fees applicable in both the Insolvency Act and the Companies Act to remuneration should apply to Insolvencies which reach this country from across our borders.

4.32 The submission by Mr Sackstein that as a general rule no security need be lodged by the foreign representative, no accounts need to be lodged, no resolutions by creditors should be required, etc, cannot be accepted. It is risky to rely on the likelihood that a foreign representative is covered in South Africa by security lodged elsewhere. In fact in the similar case of the

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27 See the previous footnote.

28 Mr Sackstein in particular, refers to the following paragraphs of the order which he regards as important: on page 393H No 2 and on 394 from paragraph 4 - 12.



Administration of Estates Act 66 of 1965 the Master is given wider powers to call for security if the executor lives outside the Republic.<sup>29</sup> It can also not merely be accepted that there are no South African creditors and that resolutions by creditors and the lodging of accounts, or permission to transfer funds outside the Republic, etc, should be dispensed with. If the view is accepted that the Master does not have the time to examine accounts or that resolutions should be dispensed with if there are no creditors, this should be implemented in respect of purely South African estates as well. In some cases it may be advisable to dispense with certain requirements. The most important consideration appears to be the absence of creditors in South Africa. The three decided cases referred to by Mr Sackstein dealt with voluntary liquidations of solvent companies (two of them dealt with an exceptional case which was actually a change in corporate identity and not really a liquidation and in two of them no reasons were given for the order). The court was in two of the cases only prepared to dispense with certain requirements once notice had been given and no local creditors proved claims. The best approach will depend on the circumstances. Similarly to the policy behind sections 21 and 25 of the Administration of Estates Act referred to above, most requirements can be dispensed with once it appears that there are no known local creditors and circumstances indicate that there is no likelihood of local creditors.

4.33 The court has often exercised its authority in the case of the recognition of foreign representatives of insolvent estates to indicate in the court order the South African rules for the administration of such estates that would apply and any extra conditions or qualifications which the court deemed fit. An example of the type of order which the court will grant when a foreign representative applies for recognition is to be found in *Moolman v Builders & Developers (Pty) Ltd*.<sup>30</sup> The rights defined by the South African insolvency law (and if applicable the company law) in favour of the Master, a creditor, and an insolvent or company being wound up, in regard to

- meetings of creditors,
- proof, admission and rejection of claims,
- sale of assets,
- plans of distribution of proceeds, and
- the rights and duties of a trustee or liquidator in regard to those matters

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29 Proviso to section 23(2) and section 23(3).

30 1990 (1) SA 954 (A).

exist in relation to the administration as if the law applied thereto pursuant to a sequestration or winding-up order granted on the date of the recognition order. The foreign trustee or liquidator may be authorised to hold an enquiry into the affairs of the insolvent or company in terms of South African law even if the insolvent or company did not have any assets in South Africa. It is usually provided that the applicant provide security for the proper performance of his administration, that the order of recognition is subject to amendment by the court, that the applicant should comply with the provisions for the opening and operation of banking accounts and that funds may be transferred out of South Africa with the written permission of the Master.

4.34 The court will probably retain authority to make such orders if the Model Law is enacted, but comments by commentators indicate a need to state expressly in the Model Law that the court has authority to indicate which South African rules apply and which do not apply. It is not advisable for the Model Law to list the powers and duties which the court can grant to a foreign representative, because this can, as in the past, best be dealt with by the court in the light of the circumstances.

4.35 Clause 22 of the Model Law provides that the court may subject relief granted under clauses 19 or 21<sup>31</sup> to conditions it considers appropriate and clause 22 (3) provides that such relief may be modified or terminated. *It is proposed that the following subclause 21(4) should be inserted at the end of clause 21:*

(4) Without derogating from the application of rules of the Republic generally, in granting relief under this section the court shall indicate the rules of the Republic relating to the administration, realization or distribution of a debtor's estate in South Africa that will apply and may modify any such rules or set out conditions subject to which any such rule should be applied.

**(k) Clause 32 - concurrent dividends to foreign creditors**

4.36 The clause refers to "*secured claims or rights in rem*". Consideration was given to use "real right" or something similar, but the term "rights in rem" is probably more familiar to

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31 The relief in clause 21 includes entrusting the administration or realization of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court - clause 21(1)(e), or entrusting the distribution of all or part of such assets to the representative or other person - clause 21(2).

foreigners who may be affected by the legislation and South Africans who will deal with the legislation know what a right in rem is.

4.37 One of the major banks asks whether in a case where the other creditors of the same class have been paid proportionally more than the creditor referred to in clause 32 the creditor will have a right of recovery against the creditors or the liquidator. For ease of reference the clause is quoted here:

**Rule of payment in concurrent proceedings**

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

4.38 An equalising dividend is envisaged, similar to when a creditor has proved a claim too late to receive something under previous accounts. *It is submitted that clearly no right of recovery is envisaged and that this is acceptable.*

**(1) Clause 33 - commencement**

4.39 It is submitted that the Act can come into operation when published and that it is not necessary to delay commencement to a date fixed by proclamation or to enact transitional provisions.

**5 Amendments to the Insolvency Act**

5.1 Only minor amendments to the Insolvency Act 24 of 1936 appear to be necessary.

5.2 The proviso to section 149(1) of the Act provides that when it appears to the court

equitable or convenient that the estate of a person not domiciled in the Republic be sequestrated elsewhere, or that the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic, the court may refuse or postpone the acceptance of the surrender or the sequestration. This provision would be too simplistic if an adapted UNCITRAL Model Law on Cross-Border Insolvency is enacted in South Africa.

**5.3 *It is proposed that the following provisions should be substituted for section 149(1) of the Insolvency Act:***

- (1) The court shall have jurisdiction under this Act over every debtor and in regard to the estate of every debtor who-
- (a) on the date on which a petition for the acceptance of the surrender or for the sequestration of his estate is lodged with the registrar of the court, is domiciled or owns or is entitled to property situate within the jurisdiction of the court; or
  - (b) at any time within twelve months immediately preceding the lodging of the petition ordinarily resided or carried on business within the jurisdiction of the court:

Provided that when it appears to the court equitable or convenient ~~that the estate of a person not domiciled in the Republic be sequestrated elsewhere, or~~ that the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic, the court may refuse or postpone the acceptance of the surrender or the sequestration.

**(1A) Foreign representatives and creditors have access to the court as provided in Chapter 2 of the Cross-Border Insolvency Act, 19\_\_ (Act No. \_\_ of 19 \_\_) and liquidation of the estate of a debtor shall be limited as provided in Chapter 5 of that Act.**

## **6 Conclusion**

6.1 It is submitted that the enactment of the UNCITRAL Model Law on Cross-Border Insolvency should not be delayed until the recommendations for the review of the Insolvency Act are dealt with.

6.2 The Commission recommends the enactment of the Bill in the Annexure and the amendments to the Insolvency Act proposed in paragraph 5.3 above.

ANNEXURE  
UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY  
ADAPTED FOR ENACTMENT IN SOUTH AFRICA

GENERAL EXPLANATORY NOTE:

~~Crossed words in bold indicate omissions from provisions in the UNCITRAL Model Law~~

Words underlined and in bold with a grey background indicate insertions in the provisions recommended in the UNCITRAL Model Law

Some style and formatting changes have not been indicated. The footnotes are for information only and are not intended for inclusion in the Act

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**ACT**

~~To~~ **Preamble**<sup>32</sup> ~~The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of—~~

- (a) cooperation between the courts and other competent authorities of ~~this State~~ **the Republic** and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximization of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

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32 It is not customary to include a preamble in ordinary South African legislation. For ease of reference the "preamble" is reflected as a long title although it will probably be reflected in a memorandum on the objects of the Bill.

## Annexure: Model Law Adapted for Enactment in South Africa

CHAPTER I  
GENERAL PROVISIONS

**Scope of application**

1. ~~(1)~~ This ~~Law~~ **Act** applies where—

- (a) assistance is sought in ~~this State~~ **the Republic** by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) assistance is sought in a foreign State in connection with a proceeding under ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency**; or
- (c) a foreign proceeding and a proceeding under ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency** in respect of the same debtor are taking place concurrently; or
- (d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency**.

~~(2) This Law does not apply to a proceeding concerning *designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*.~~<sup>33</sup>

**Definitions**

2. For the purposes of this ~~Law~~ **Act**—

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33 Comment was invited on the question whether special insolvency regimes in the Republic, such as banks or insurance companies, should be excluded from the Act. No submissions were received and it is submitted that no exclusions are necessary.

**Annexure: Model Law Adapted for Enactment in South Africa**

- (a) "foreign proceeding" means 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;
- (b) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of **sub**paragraph (f) of this **article section**;
- (d) "foreign representative" means 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;
- (e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
- (f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.
- (g) "curator" means a curator appointed in terms of section 6 of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984), or section 69 of the Banks Act, 1990 (Act No. 94 of 1990), or section 81 of the Mutual Banks Act, 1993 (Act No. 124 of 1993);**
- (h) "receiver" means a receiver or other person appointed by the High Court to administer a compromise or arrangement under section 311 of the**



## Annexure: Model Law Adapted for Enactment in South Africa

**Companies Act, 1973 (Act No. 61 of 1973).****International obligations of ~~this State~~ the Republic**

3. To the extent that this ~~Law~~ Act conflicts with an obligation of ~~this State~~ the Republic arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

**Competent court or authority<sup>34</sup>**

4. The functions referred to in this ~~Law~~ Act relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by ~~[specify the court, courts, authority or authorities competent to perform those functions in the enacting State]~~ the High Court.

Authorization of ~~[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]~~ trustee, liquidator, judicial manager, curator, or receiver to act in a foreign State

5. A ~~[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]~~ trustee, liquidator, judicial manager, curator, or receiver is authorized to act in a foreign State on behalf of a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ the laws of the Republic relating to insolvency, as permitted by the applicable foreign law.

**Public policy exception**

6. Nothing in this ~~Law~~ Act prevents the court from refusing to take an action governed by this ~~Law~~ Act if the action would be manifestly contrary to the public policy of ~~this State~~ the Republic.

**Additional assistance under other laws**

7. Nothing in this ~~Law~~ Act limits the power of a court or a ~~[insert the title of the person or~~

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34 It is submitted that it is not necessary or advisable to refer to the Master of the High Court or any other authority because the functions contemplated in the Act should be performed by the High Court.

Annexure: Model Law Adapted for Enactment in South Africa

~~body administering a reorganization or liquidation under the law of the enacting State]~~  
**trustee, liquidator, judicial manager, curator, or receiver** to provide additional assistance to a foreign representative under other laws of ~~this State~~ **the Republic**.

### Interpretation

8. In the interpretation of this ~~Law~~ **Act**, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

## CHAPTER 2

### ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN ~~THIS STATE~~ **THE REPUBLIC**

#### Right of direct access

9. A foreign representative is entitled to apply directly to a court in ~~this State~~ **the Republic**.

#### Limited jurisdiction

10. The sole fact that an application pursuant to this ~~Law~~ **Act** is made to a court in ~~this State~~ **the Republic** by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of ~~this State~~ **the Republic** for any purpose other than the application.

#### Application by a foreign representative to commence a proceeding under ~~identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency**

11. A foreign representative is entitled to apply to commence a proceeding under ~~identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency** if the conditions for commencing such a proceeding are otherwise met.

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Participation of a foreign representative in a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency**

12. Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency**.

Access of foreign creditors to a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency**

13. (1) Subject to paragraph (2) of this **article section**, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency** as creditors in **this State** **the Republic**.

(2) Paragraph (1) of this **article section** does not affect the ranking of claims in a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency**, except that the claims of foreign creditors<sup>35</sup> shall not be ranked lower than ~~[identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims]~~ **non-preferent claims**.<sup>36</sup>

**(3) Without derogating from the application of the law and practice of the Republic generally, the ranking of claims in respect of assets in the Republic shall be regulated by the law and practice of the Republic on the ranking of claims.**

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35 An alternative provision refuses to recognise foreign tax and social security claims. Notwithstanding the rule that the courts of the Republic has no jurisdiction to entertain legal proceedings involving the enforcement of the revenue laws of another State (*Priestley v Clegg* 1985 (3) SA 955 (T)), it is submitted that the payment of foreign revenue claims as concurrent claims should be permitted.

36 According to the definition of "preference" in section 2 of the Insolvency Act 24 of 1936 a preferent claim is a claim with a statutory preferences or a secured claim.

**Annexure: Model Law Adapted for Enactment in South Africa**

**Notification to foreign creditors of a proceeding under ~~fidestify laws of the enacting State relating to insolvency~~ the laws of the Republic relating to insolvency**

14. (1) Whenever under ~~fidestify laws of the enacting State relating to insolvency~~ the laws of the Republic relating to insolvency notification is to be given to creditors in ~~this State~~ the Republic, such notification shall also be given to the known creditors that do not have addresses in ~~this State~~ the Republic. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall—

- (a) indicate a reasonable time period for filing claims and specify the place for their filing;
- (b) indicate whether secured creditors need to file their secured claims; and
- (c) contain any other information required to be included in such a notification to creditors pursuant to the law of ~~this State~~ the Republic and the orders of the court.

### **CHAPTER 3**

#### **RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF**

##### **Application for recognition of a foreign proceeding**

15. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

**Annexure: Model Law Adapted for Enactment in South Africa**

(2) An application for recognition shall be accompanied by—

- (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- (c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The court may require a translation of documents supplied in support of the application for recognition into an official language of ~~this State~~ the Republic.

**Presumptions concerning recognition**

**16.** (1) If the decision or certificate referred to in ~~article section~~ 15(2) indicates that the foreign proceeding is a proceeding within the meaning of ~~article section~~ 2(a) and that the foreign representative is a person or body within the meaning of ~~article section~~ 2(d), the court is entitled to so presume.

(2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

(3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

**Annexure: Model Law Adapted for Enactment in South Africa****Decision to recognize a foreign proceeding**

**17.** (1) Subject to **article section** 6, a foreign proceeding shall be recognized if—

- (a) the foreign proceeding is a proceeding within the meaning of **article section** 2(a);
- (b) the foreign representative applying for recognition is a person or body within the meaning of **article section** 2(d);
- (c) the application meets the requirements of **article section** 15(2); and
- (d) the application has been submitted to the court referred to in **article section** 4.

(2) The foreign proceeding shall be recognized—

- (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
- (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of **article section** 2(f) in the foreign State.

(3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

(4) The provisions of **articles sections** 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

**Subsequent information**

**18.** From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of—

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- (a) any **substantial** change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

**Relief that may be granted upon application for recognition of a foreign proceeding**

**19.** (1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—

- (a) staying execution against the debtor's assets;
- (b) entrusting the administration or realization of all or part of the debtor's assets located in ~~this State~~ **the Republic** to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (c) any relief mentioned in **article section** 21(1)(c), (d) and (g).

(2) ~~[Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]~~ **An order issued in terms of subsection (1) shall be dealt with as contemplated in section 17 of the Insolvency Act, 1936 (Act No. 24 of 1936), or subsections 357(1) and 357(4) of the Companies Act, 1973 (Act No. 61 of 1973).**

(3) Unless extended under **article section** 21(1)(f), the relief granted under this **article section** terminates when the application for recognition is decided upon.

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(4) The court may refuse to grant relief under this **article section** if such relief would interfere with the administration of a foreign main proceeding.

### Effects of recognition of a foreign main proceeding

**20.** (1) Upon recognition of a foreign proceeding that is a foreign main proceeding—

- (a) commencement or continuation of individual **legal** actions or individual **legal** proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- (b) execution against the debtor's assets is stayed; and
- (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
- (d) section 21 of the Insolvency Act shall apply with regard to assets situated in the Republic to the same extent as if the insolvent was sequestrated by a court in the Republic.**

(2) The scope, and the modification or termination, of the stay and suspension referred to in **paragraph subsection** (1) of this **article section** are subject to ~~*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph (1) of this article*~~ **the provisions of sections 20, 23 and 75 of the Insolvency Act, 1936 (Act No. 24 of 1936), and sections 341 and 359 of the Companies Act, 1973 (Act No. 61 of 1973) and the court may at the request of the foreign representative or a person affected by subsection (1) modify or terminate the scope of the stay and suspension to the extent that it considers appropriate.**

(3) **Paragraph Subsection** (1)(a) ~~of this article~~ does not affect the right to commence



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individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

(4) ~~Paragraph Subsection (1) of this article~~ does not affect the right to request the commencement of a proceeding under ~~*fidestify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency** or the right to file claims in such a proceeding.

**Relief that may be granted upon recognition of a foreign proceeding**

**21.** (1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

- (a) staying the commencement or continuation of individual **legal** actions or individual **legal** proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under **article section** 20(1)(a);
- (b) staying execution against the debtor's assets to the extent it has not been stayed under **article section** 20(1)(b);
- (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under **article section** 20(1)(c);
- (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- (e) entrusting the administration or realization of all or part of the debtor's assets located in ~~this State~~ **the Republic** to the foreign representative or another person designated by the court;

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- (f) extending relief granted under **article section** 19(1);
- (g) granting any additional relief that may be available to ~~*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*~~ **a trustee, liquidator, judicial manager, curator, or receiver** under the laws of ~~this State~~ **the Republic**.

(2) Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in ~~this State~~ **the Republic** to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in ~~this State~~ **the Republic** are adequately protected.

(3) In granting relief under this **article section** to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of ~~this State~~ **the Republic**, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

**(4) Without derogating from the application of rules of the Republic generally, in granting relief under this section the court shall indicate the rules of the Republic relating to the administration, realization or distribution of a debtor's estate in South Africa that will apply and may modify any such rules or set out conditions subject to which any such rule should be applied.**

**Protection of creditors and other interested persons**

22. (1) In granting or denying relief under **article section** 19 or 21, or in modifying or terminating relief under **paragraph subsection** (3) ~~of this article~~, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

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(2) The court may subject relief granted under **article section** 19 or 21 to conditions it considers appropriate.

(3) The court may, at the request of the foreign representative or a person affected by relief granted under **article section** 19 or 21, or at its own motion, modify or terminate such relief.

### Actions to avoid acts detrimental to creditors

23. (1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate ~~*[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation]*~~ **any legal action to set aside a disposition that is available to a trustee or liquidator under the laws of the Republic relating to insolvency.**

(2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the **legal** action relates to assets that, under the law of ~~this State~~ **the Republic**, should be administered in the foreign non-main proceeding.

### Intervention by a foreign representative in proceedings in ~~this State~~ **the Republic**

24. Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of ~~this State~~ **the Republic** are met, intervene in any proceedings in which the debtor is a party.

## CHAPTER 4

### COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

#### Cooperation and direct communication between a court of ~~this State~~ **the Republic** and foreign courts or foreign representatives

25. (1) In matters referred to in **article section** 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a ~~*insert the title of a person or body administering a reorganization or liquidation under the law of the*~~

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~~enacting State]~~ **trustee, liquidator, judicial manager, curator, or receiver.**

(2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

**Cooperation and direct communication between the ~~[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]~~ **trustee, liquidator, judicial manager, curator, or receiver** and foreign courts or foreign representatives**

26. (1) In matters referred to in **article section 1**, a ~~[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]~~ **trustee, liquidator, judicial manager, curator, or receiver** shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

(2) The ~~[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]~~ **trustee, liquidator, judicial manager, curator, or receiver** is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

**Forms of cooperation**

27. Cooperation referred to in **articles sections 25 and 26** may be implemented by any appropriate means, including—

- (a) appointment of a person or body to act at the direction of the court;
- (b) communication of information by any means considered appropriate by the court;
- (c) coordination of the administration and supervision of the debtor's assets and affairs;

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- (d) approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) coordination of concurrent proceedings regarding the same debtor.
- (f) ~~[the enacting State may wish to list additional forms or examples of cooperation].~~

**CHAPTER 5**

**CONCURRENT PROCEEDINGS**

Commencement of a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency** after recognition of a foreign main proceeding

28. After recognition of a foreign main proceeding, a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency** may be commenced only if the debtor has assets in ~~this State~~ **the Republic**; the effects of that proceeding shall be restricted to the assets of the debtor that are located in ~~this State~~ **the Republic** and, to the extent necessary to implement cooperation and coordination under **articles sections** 25, 26 and 27, to other assets of the debtor that, under the law of ~~this State~~ **the Republic**, should be administered in that proceeding.

Coordination of a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency** and a foreign proceeding

29. Where a foreign proceeding and a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency** are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under **articles sections** 25, 26 and 27, and the following shall apply—

- (a) when the proceeding in ~~this State~~ **the Republic** is taking place at the time the

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application for recognition of the foreign proceeding is filed,

- (i) any relief granted under **article section** 19 or 21 must be consistent with the proceeding in ~~this State~~ **the Republic**; and
  - (ii) if the foreign proceeding is recognized in ~~this State~~ **the Republic** as a foreign main proceeding, **article section** 20 does not apply;
- (b) when the proceeding in ~~this State~~ **the Republic** commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
- (i) any relief in effect under **article section** 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in ~~this State~~ **the Republic**; and
  - (ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in **article section** 20(1) shall be modified or terminated pursuant to **article section** 20(2) if inconsistent with the proceeding in ~~this State~~ **the Republic**;
- (c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of ~~this State~~ **the Republic**, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

**Coordination of more than one foreign proceeding**

**30.** In matters referred to in **article section** 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under **articles sections** 25, 26 and 27, and the following shall apply—

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- (a) any relief granted under **article section** 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- (b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under **article section** 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;
- (c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

### Presumption of insolvency based on recognition of a foreign main proceeding

**31.** In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency**, proof that the debtor is insolvent.

### Rule of payment in concurrent proceedings

**32.** Without prejudice to secured claims or rights *in rem*<sup>37</sup>, 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 ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency** regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

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37 Consideration can be given to using "real right" or something similar, but the term rights *in rem* is probably more familiar to foreigners who may be affected by the legislation and the South Africans who will deal with the legislation probably know what a right *in rem* is.

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**CHAPTER 6**

**SHORT TITLE AND COMMENCEMENT**

**Short title**

**33. This Act shall be called the Cross-Border Insolvency Act, 199 .**<sup>38</sup>

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38 It is submitted that the Act can come into operation when published and that it is not necessary to delay commencement to a date fixed by proclamation or to enact transitional provisions.