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DECLARATION

I, Victoria Weyulu, declare that "The Reform of Namibia's Cross-Border Insolvency Framework" is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.



Victoria Weyulu

13 MAY 2015



.....
Prof. Riekie Wandrag

.....
Date

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DEDICATION

To my son:

Levi Hangula Veya Shilongo



LIST OF ABBREVIATIONS

COMI	Centre of Main Interests
EU	European Union
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
OHADA	Organization for the Harmonization of Business Law in Africa
SADC	Southern African Development Community
SALC	South Africa Law Commission
UNCITRAL	United Nations Commission on International Trade Law
UK	United Kingdom
USA	United States of America



KEYWORDS

Insolvency

Cross-Border Insolvency

UNCITRAL

UNCITRAL Model Law on Cross-Border Insolvency

Insolvency Reform in Namibia

Insolvency Proceedings in Namibia

Cross-Border Insolvency Reform in Africa



TERMS AND DEFINITIONS

Bankruptcy	Bankruptcy may be used to refer to the ‘bringing to an end or otherwise subjecting to external control, a debtor’s freedom to continue to enter into credit-related transactions’ due to the inability to pay his or her debts. ¹ In many jurisdictions, it is used to distinguish personal insolvency from corporate insolvency. ² The paper will avoid using this distinction however, and will use the word ‘insolvency’ to refer to both personal and corporate insolvency.
Creditor	A creditor is ‘a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings’. ³
Insolvency	A debtor is considered to be insolvent when his liabilities, fairly estimated, exceed his assets, fairly valued. ⁴ However, a debtor is not treated as an insolvent for legal purposes unless his estate has been sequestrated by an order of the court. ⁵
Cross-Border Insolvency	The terms ‘international insolvency,’ ‘transnational insolvency’ or ‘cross-border insolvency’ are used interchangeably to denote a situation where

¹ Rajak H ‘The Culture of Bankruptcy’ in Omar P (ed) *International Insolvency Law: Themes and Perspectives (Markets and the Law)* (2008) 3. Harry Rajak is a Professor at the University of Sussex and has written widely on corporate insolvency issues in both the UK and South Africa.

² For example, in Australia, bankruptcy is a term used to refer to the insolvency of natural persons which is regulated by the Bankruptcy Act, 1966 (Cth) while insolvency is a term used to refer to corporate insolvency under the Corporations Act, 2001 (Cth).

³ UNCITRAL ‘Legislative Guide on Insolvency Law’

http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html (accessed on 07 August 2013).

⁴ Sharrock R et al *Hockly’s Insolvency Law* 8 ed (2006) 3.

⁵ Sharrock R et al (2006) 3.

a debtor has assets and liabilities in two or more jurisdictions and is therefore the subject of insolvency proceedings in one more than one jurisdiction.⁶

Debtor A debtor is a ‘person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies’.⁷ As a matter of principle therefore, the provisions of the Insolvency Act, 1936 do not apply to companies or close corporations.⁸ This paper however, uses the term ‘debtor’ to define legal entities such as companies and close corporations as well as natural persons who are engaged in business activities, such as traders or merchants.

Sequestration Order The main purpose of a sequestration order according to *Walker v Syfret* is to crystalise the debtor’s position, so that the hand of the law is placed upon his estate.⁹ Once a sequestration order is granted it creates a *concursus creditorum*, taking the rights of the general body of creditors into consideration. Thereafter, no transaction can be entered into with regard to the debtor’s estate by a single creditor to the prejudice of the general body.

⁶ Zulman RH ‘Cross-Border Insolvency in South African Law’ (2009) 21/5 *South African Mercantile Law Journal* 803. Justice Ralph Zulman is a retired judge of the South African Supreme Court of Appeal. He served as a member of a committee of the United Nations (UN) concerned with drafting the Model Law. He also recommended the adoption of the Model Law by South Africa during his tenure as chair of the South African Law Commission (SALC). Finally, Justice Zulman also played an instrumental role in the New Zealand Law Commission’s Report on whether New Zealand should adopt the Model Law and his work in all these capacities prove useful to this paper. See also Trichardt A ‘The UNCITRAL Model Law on Cross-Border Insolvency’ (2003) 6 *Flinders Journal of Law Reform* 98.

⁷ Section 1 of the Insolvency Act, 1936 (Act No. 24 of 1936). Unless otherwise indicated legislation referred to is that of Namibia.

⁸ Companies and close corporations are wound-up by the relevant provisions of the Companies Act, 2004 (Act No. 28 of 2004) and the Close Corporation Act, 1988 (Act No. 26 of 1988). Nonetheless, provisions of the Insolvency Act, 1936 are applicable to the winding-up of companies and close corporations that are unable to pay their debts.

⁹ 1911 AD 141.

Liquidation or Winding-up	Liquidation or winding-up refers to the dissolution of a company or close corporation in terms of Chapter 14 of the Companies Act, 2004 and Part IX of the Close Corporations Act, 1988 respectively. ¹⁰
Trustee	A trustee is required to collect all of the debtor's assets and arrange for the sale of those assets and distribute the proceeds thereof amongst the creditors in order of the ranking outlined under the Insolvency Act, 1936. ¹¹
Liquidator	A liquidator is required to realise the assets of the legal entity and to distribute the proceeds to satisfy the costs of the liquidation and the claims of creditors and distributes any remaining amounts among the shareholders according to their rights and interests in the company. ¹²
Foreign Insolvency Representative	A foreign insolvency representative is a representative (whether a trustee or liquidator) from any state, country or territory other than Namibia who is charged with the collection of the debtor's estate for distribution to creditors.
Property	The general rule is that all movable and immovable property situated in Namibia forms part of the debtor's insolvent estate. ¹³ However, not all property belonging to a debtor is available for distribution to creditors of the insolvent estate. Sections 23, 79 and 82 of the Insolvency Act, 1936 provide an indication of property that may be excluded or exempted

¹⁰ Companies Act, 2004 (Act No. 28 of 2004) and the Close Corporations Act, 1988 (Act No. 26 of 1988).

¹¹ Section 40 of the Insolvency Act, 1936.

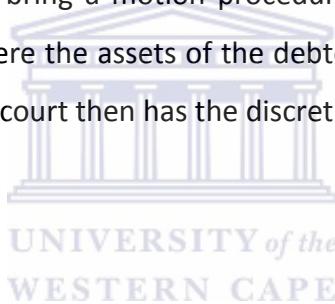
¹² Section 347 of the Companies Act, 2004.

¹³ Section 2 of the Insolvency Act, 1936.

from the insolvent estate.¹⁴ For purposes of facilitating the efficient resolution of cross-border insolvency disputes in Namibia, the paper will use the word ‘property’ to refer to both movable and immovable property belonging to a debtor, wherever situated, subject to the exclusions and exemptions identified in sections 23, 79 and 82 of the Insolvency Act, 1936.¹⁵ This definition of ‘property’ will be used interchangeably with the word ‘assets’ throughout the paper.

Recognition

A foreign insolvency representative is required to apply for recognition with the High Court of Namibia in order to administer any of the debtor’s assets that are situated in the country. In essence, such a representative will have to bring a motion procedure application to the High Court of Namibia where the assets of the debtor are located or where the debtor resides. The court then has the discretion to grant or refuse recognition.



¹⁴ Evans RG *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (unpublished doctorate thesis, University of Pretoria, 2008) 214 – 215. Evans argues that the ‘provisions of the Insolvency Act regarding the actual property that may be collected on behalf of the creditors of the insolvent estate, or that which is excluded or exempt from that estate, and the definition of such property, are not always clear’. Evans gives the example of the uncertainty that prevails in respect of insurance policies, inheritance, property of spouses of debtors and the debtor’s income.

¹⁵ Act No. 24 of 1936. According to Amoo SK *Property Law in Namibia* (2014) 1, property, in modern property jurisprudence refers to both movable and immovable assets of a person or a legal subject and includes both corporeal and incorporeal things, for example, rights (interests) in a close corporation and (shares) in a company and copyright.

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CHAPTER ONE:

INTRODUCTION TO NAMIBIA'S CROSS-BORDER INSOLVENCY FRAMEWORK

1.1 Introduction

Cross-border insolvency occurs when a debtor who is domiciled or living in one country, becomes the subject of the insolvency law of another country where he has assets and liabilities.¹⁶ Imagine a debtor from Namibia who has assets and liabilities in South Africa and Angola, and against whom insolvency proceedings have been opened in all three countries.

Obviously, all these countries will have different insolvency laws in place that may be applied in respect of this one debtor. Ultimately, several challenges will confront the courts in all three jurisdictions regarding the manner in which this debtor's property should be collected and for whose benefit it should be distributed. In order to do so, the courts will have to determine the applicable law to the proceedings. Zulman correctly submitted that cross-border insolvencies are 'contentious because they transcend the confines of a single legal system so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements in the case'.¹⁷

There are various approaches to resolving cross-border insolvency which include:¹⁸

- (a) Treaties (whether bilateral or multilateral);
- (b) Conventions;

¹⁶ Ailola D 'Recognition of Foreign Proceedings, Orders and Officials in Insolvency in Southern Africa: A Call for a Regional Convention' (1999) 31/1 *Comparative and International Law Journal of Southern Africa* 60. The late David Ailola was a Professor at the University of South Africa who was instrumental in developing cross-border insolvency jurisprudence for South Africa.

¹⁷ Zulman RH 'Cross-Border Insolvency in South African Law' (2009) 21/5 *South African Mercantile Law Journal* 804.

¹⁸ See generally Westbrook JL et al *A Global View of Business Insolvency Systems* (2010) 246. Jay Lawrence Westbrook is a professor at the School of Law at the University of Texas where he teaches a course on bankruptcy law amongst others. He was appointed by the Bankruptcy Court as amicus curiae in the large international insolvency litigation of *Maxwell Communication Corp plc v Société Générale plc* (*In re Maxwell Communication Corp plc*) 170 B.R. 800 (Bankr. S.D.N.Y. 1994).

- (c) The European Union (EU) Regulation that applies to EU member States;
- (d) The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (Model Law); and
- (e) Domestic laws, including the common law principles regarding the recognition of foreign insolvency representatives.

There is no universal response to cross-border insolvency because ultimately, each country protects different national interests in the event of insolvency. So each country will apply a different approach to addressing cross-border insolvency that is in line with the interest it seeks to protect. However, these different legal approaches often which causes a lot of confusion and uncertainty especially where they affect one debtor. This is because creditors do not often know the applicable law to the insolvency proceedings. This affects their ability to prove claims, especially where the insolvency proceedings have only been opened in a foreign jurisdiction.

The Guide to Enactment and Interpretation of the Model Law (hereinafter the Guide to Enactment) went on to note that a number of consequences flow from the application of different and inharmonious legal approaches to cross-border insolvency which:¹⁹

- (a) hampers the rescue of financially troubled businesses;
- (b) are not conducive to a fair and efficient administration of cross-border insolvencies;
- (c) impeded the protection of the assets of the insolvent debtor against dissipation;
- (d) hindered maximisation of the value of the assets of the insolvent debtor; and
- (e) the absence of predictability in the way in which insolvency cases were administered both impeded the flow of capital and acted as a disincentive to cross-border investment.

¹⁹ UNCITRAL 'Model Law on Cross-Border Insolvency and Guide to Enactment' available at <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> (accessed on 25 October 2014).

Namibia has not signed any treaties or conventions regarding how it will address cross-border insolvency issues. The Insolvency Act, 1936 serves as the principal source of Namibia's insolvency law and primarily deals with the sequestration of natural persons and partnerships.²⁰ Suffice to say, the Insolvency Act, 1936 does not contain any provisions to address cross-border insolvency issues.²¹ The relevant law is found only in the country's common law which applies rules of international private law and precedent to address issues arising from cross-insolvency disputes.²²

This paper argues that there is a need for an improved cross-border insolvency regime as the common law principles applied in Namibia are outdated and thus ill-equipped to deal with present-day complex issues of cross-border insolvency. The lack of literature on issues of cross-border insolvency belies the importance of cross-border insolvency in African developing countries like Namibia who seek to encourage trade and investment in the hope of achieving economic development. In the final section of chapter one, the paper will consider the Model Law as the basis needed to develop clear, fair and predictable rules to effectively deal with the various aspects of cross-border insolvencies in Namibia.

This argument is substantiated in the following manner:

Chapter One will look at the current Namibian cross-border framework and introduce the key issues that arise in a cross-border insolvency dispute. It will further look to the shortcomings of the Insolvency Act, 1936 and examine the current common law principles employed to resolve

²⁰ Act No. 24 of 1936 as amended by the Insolvency Amendment Act, 2005 (Act No. 12 of 2005). The Insolvency Act, 1936 is informed by Roman-Dutch common law and other pieces of legislation such as the Companies Act, 2004 and the Close Corporations Act, 1988 which regulate the liquidation and winding-up of companies and close-corporations respectively. However, as previously explained, provisions of the Insolvency Act, 1936 are applicable to the winding-up of companies and close corporations that are unable to pay their debts as contemplated by the Companies Act, 2004 and the Close Corporations Act, 1988.

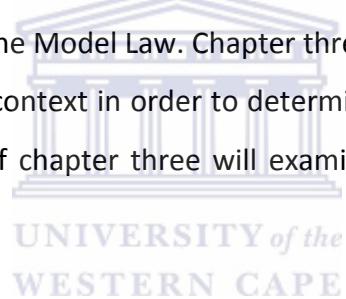
²¹ Act No. 24 of 1936.

²² Oppong RF '*Private International Law in Commonwealth Africa*' (2013) 268.

issues of cross-border insolvency in Namibia with a view to determining the relevance of the Model Law in the development of effective cross-border insolvency laws.²³

In **Chapter Two** the paper will provide a theoretical background to the theories of cross-border insolvency which have influenced the various insolvency approaches across the world. Chapter Two will also consider the objects that insolvency laws should strive to meet in order to justify the need for cross-border insolvency reform in Namibia.²⁴

The crux of the problem is addressed in **Chapter Three** which considers the desirability of adopting the Model Law as part and parcel of the broader Namibian insolvency framework. First, chapter three discusses the role of UNCITRAL in the harmonisation and modernisation of international trade laws. Secondly, it will consider the development of the Model Law and the four key principles underpinning the Model Law. Chapter three will also consider the benefits of the Model Law from a Namibian context in order to determine whether Namibia should adopt its provisions. The final section of chapter three will examine the challenges to enacting the provisions of the Model Law.



In **Chapter Four** the paper will examine the manner in which South Africa and Malawi have adopted the Model Law and highlight key changes from these promulgations.

Finally, in **Chapter Five** the paper will discuss the lessons that Namibia can derive from the experience of both South Africa and Malawi. Chapter five will also outline the recommendations for the manner in which Namibia should enact the Model Law.

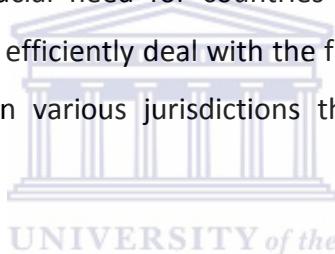
²³ Act No. 24 of 1936.

²⁴ Act No. 24 of 1936.

1.2 Problem Statement

With the continued expansion of globalisation as well as international and regional trade and investment, the inevitable issues of cross-border insolvency have received considerable interest and have been widely commented upon.²⁵ For example, there has been a widespread reform of cross-border insolvency laws around the world in response to the Global Financial Crisis (GFC) of 2008 which saw the collapse of the Lehman Brothers, a global financial services firm with several subsidiaries situated in numerous jurisdictions.²⁶

Similarly, the proliferation of cross-border insolvency cases, including the well-known case of *Maxwell Communication Corp, Société Générale (In re Maxwell Communication Corp)* demonstrated that there is a crucial need for countries to develop effective cross-border insolvency frameworks in order to efficiently deal with the failure of companies and individuals who have assets and liabilities in various jurisdictions that have an impact on economic growth.²⁷



It is true that a company incorporated in one jurisdiction may engage in transnational investments, acquire assets and incur liabilities in a foreign jurisdiction in the course of trade and investment.²⁸ This is especially true for many Namibian companies who have interests stretching beyond their home jurisdiction.²⁹ Although there are a number of benefits that can

²⁵ See for example Westbrook JL et al *A Global View of Business Insolvency Systems* (2010) 228 where he argues that ‘the common and worldwide need for regulating this phenomenon in some detail is becoming, more and more, an indispensable task for any legislator—with predictably increasing intensity as a consequence of constantly intensifying globalization’.

²⁶ Wolf A ‘A Global Cross-Border Insolvency Framework for Financial Institutions’ (2015) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562866 (accessed on 12 February 2015).

²⁷ 93 F.3d 1036 (2d Cir. 1996). This case involved a media empire with headquarters in England and with corporate entities and assets in the United Kingdom (UK), the United States of America (USA), and Canada. It involved numerous insolvency proceedings in both the UK and the USA and brought to the forefront the importance of developing a system for dealing with international insolvencies.

²⁸ Francis A ‘Cross-border Insolvency in East Asia: Formal and Informal Mechanisms and UNCITRAL Model Law’ in Tomasic J (ed) *Insolvency Law in East Asia* (2006) 536.

²⁹ Examples of some Namibian companies who operate throughout Africa include the Roads Contractor Company, Namibia Diamond Trading Company and Trustco Group Holdings Limited.

be gained from the expansion of businesses to other jurisdictions, such expansion comes with associated risks that, unfortunately, sometimes lead to the failure of companies.³⁰ In such a case where the company becomes insolvent, the creditors will be interested in including these assets that are situated in another jurisdiction in order to increase the dividend they will receive from the insolvency proceedings.³¹ That is not to say, however, that issues of cross-border insolvency are limited to major international companies; such issues also occur in other cases when individuals establish residence and sometimes businesses in foreign jurisdictions.³²

While it is certainly the case that most domestic insolvency laws provide procedures for the sequestration or liquidation of insolvent debtors, it has been argued that many insolvency laws are ill-equipped to deal with the complexity of cross-border insolvency problems and as a result do not provide a mechanism for the worldwide assets of a debtor to be administered effectively and in a predictable manner.³³

Instead, there is a global need to standardise these domestic insolvency laws in order to facilitate a more efficient international trade law regime. To this end, the paper argues that the Model Law should be considered as a timely and much needed text that would make great strides to alleviating the difficulties faced in cross-border insolvencies. Obviously, dealing effectively with the failure of companies who have assets and liabilities in foreign jurisdictions

³⁰ Mohan SC ‘Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?’ (2012) 21/3 *International Insolvency Review* 200.

³¹ Westbrook JL (senior author) ‘Cross-border Considerations’ in Westbrook JL (ed) *A Global View of Business Insolvency Systems* (2010) 227 – 265.

³² See for example the South African High Court matter between *Lehane N.O. v Lagoon Beach Hotel (Pty) Ltd and Others Case 15678/2014* heard in the Western Cape Division during 22, 23, 26, 29 and 30 September 2014 and 1 October 2014. In this matter the debtor was not a corporate entity, but rather a natural person who was the subject of insolvency laws from various jurisdictions.

³³ Clift J ‘The UNCITRAL Model Law on Cross-Border Insolvency-A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency’ (2004) 12 *Tulane Journal of International and Comparative Law* 309. Ms Jenny Clift is a senior legal officer of the UNCITRAL Secretariat. She assists UNCITRAL’s working groups in the preparation and drafting of their documents and was particularly instrumental in the drafting of the Model Law.

may therefore be key to encouraging international trade and investment, particularly for emerging and developing economies such as Namibia.³⁴

What are these complex issues that can arise in a cross-border insolvency dispute? The case of *Sackstein NO v Proudfoot SA (Pty) Ltd* demonstrates the problems which typically arise in a cross-border insolvency dispute.³⁵ A brief summary of the facts is useful. In this matter, Tsumeb Corporation Limited (TCL) was a Namibian company with an external branch registered in South Africa. Both companies were liquidated and distinct liquidators were appointed for the insolvency proceedings in Namibia and later in South Africa. Suffice to say, neither one of the liquidators appointed applied for recognition in the foreign country in which the company had assets and liabilities. Ultimately, the Namibian company was subsequently discharged from liquidation in consequence of a scheme of arrangement entered into with its creditors in terms of section 311 of the Namibian Companies Act, 1973 which was in operation at the time.³⁶

Sackstein, the South African appointed liquidator applied to set aside some of the payments made to the defendant, Proudfoot SA (Pty) Ltd by the Namibian company in terms of a contract to provide consulting services during the period when the latter was placed under provisional liquidation in Namibia. According to Smith & Boraine, the proper means of claiming the disposition of property would have been through an application for recognition in Namibia, in order to invoke the Namibian avoidance provisions.³⁷

The question that arose before the court a quo was whether Sackstein was entitled to set aside the payments made to the defendant as voidable dispositions by a company situated outside

³⁴ Omar PJ ‘Insolvency Law Initiatives in Developing Economies: The OHADA Uniform Law’ available at <http://www.iiiglobal.org/component/jdownloads/viecategory/647.html> (accessed 3 October 2014). Paul Omar is a Professor of International and Comparative Insolvency Law. He teaches on Company Law and Commercial Law (LLB), Cross-Border Insolvency Law and Comparative Corporate Rescue (LLM) at the College of Business Law & Social Sciences, Nottingham Law School.

³⁵ 2003 (4) SA 348 SCA.

³⁶ Act No. 61 of 1973.

³⁷ Smith A & Boraine A ‘The Grab Rule Foils the Foreign Liquidator in His Own Jurisdiction’ (2002) 14 SA Merc LJ 570. Professor Andre Boraine is the dean at the Law Faculty of the University of Pretoria and is renowned for his contribution to the jurisprudence of South Africa’s insolvency development.

South Africa.³⁸ On appeal, the South African Supreme Court of Appeal found that Sackstein had the requisite standing to proceed with his action against the defendant in a South African court and concluded that in terms of South African law, an external company may be wound-up by the court like any other domestic company by virtue of section 337 of the Companies Act, 1973 which includes an external company.³⁹ Such an external company can be liquidated as an independent entity regardless of the fact that the company to which it relates in a foreign country has not been liquidated. The court then went on to explain that this does not however create two legal personalities, as it is still one company registered in two different countries.⁴⁰

Against this backdrop, the following choice-of-law questions arise:

- Which court can commence insolvency proceedings against the external company?
- What law will apply to these insolvency proceedings?
- Can and should there be separate proceedings for the parent company and its external company?
- What is the law applicable to the manner in which assets and claims should be dealt with where there are concurrent proceedings in two jurisdictions?
- Will a winding-up order granted by either the Namibian or the South African courts extend to the foreign assets of the debtor, so that foreign creditors may be precluded from attaching those foreign assets?

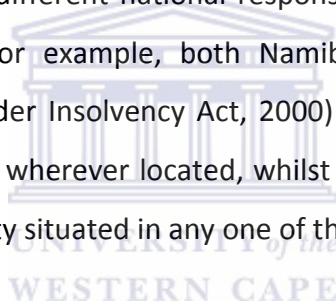
³⁸ Smith A & Boraine A (2002) 569. According to the authors, Blieden J found that Sackstein was not trying to gather the South African assets of Tsumeb SA but to impeach transactions carried out in Namibia. By relying on the doctrine of territoriality, the Local Witwatersrand Division ruled in favour of Proudfoot SA (Pty) Ltd and held that a South African liquidator had no power to impeach dispositions made by a company situated in a foreign country as this was solely an act of the Namibian company and that a liquidator's power to impeach could only be exercised in respect of a transaction in their respective country.

³⁹ Section 337 of the Companies Act, 1973 provided that 'in this Chapter, unless the context otherwise indicates- 'company' includes a company, external company and any other body corporate.'

⁴⁰ Smith A & Boraine A (2002) 570 argue that the principle of universality emerged in the treatment of TCL as a single company. However, this principle was in fact tempered by territorial realities based on separate *concursum creditorum*. Therefore the judgment was correct in holding that the disposition had to be attached in the jurisdiction in which it had been made.

- What is the extent to which both the Namibian as well as the South African courts will recognise foreign insolvency proceedings and the status of foreign insolvency representatives?
- What are the priorities rendered to the creditors of the parent company vis-à-vis to those of its external company?
- Should foreign creditors be entitled to equal treatment with local creditors?

Apart from demonstrating the key issues that can arise from a cross-border insolvency dispute, there is another valuable lesson to be gleaned from the *Sackstein* case. Both the court a quo and the court of appeal relied on the competing theories of ‘universality’ and ‘territoriality’ to propose solutions to the key issues posed above.⁴¹ As will be shown in chapter two of this paper, these theories reflect the different national responses to how cross-border insolvency issues should be addressed.⁴² For example, both Namibia and South Africa (before the commencement of the Cross-Border Insolvency Act, 2000) apply the universality principle to the movable assets of the debtor, wherever located, whilst adopting a territorialistic approach to the debtor’s immovable property situated in any one of these jurisdictions.



Nonetheless, issues in cross-border insolvencies are not always that simple. Usually, there are a number of conflicting claims arising from different jurisdictions and the alleviation of these difficulties depends upon the development of a proper framework which provides greater cooperation between courts of the various countries in which the debtor has assets, as well as fair and efficient administration of cross-border insolvencies that protects the interests of creditors as well as the debtors. This is certainly the reason why the Namibian framework deserves some criticism: because it lacks clear and specific rules to address cross-border insolvencies.⁴³

⁴¹ These theories of cross-border insolvency are discussed in Chapter Two of this paper.

⁴² See generally Howcroft NJ ‘Universal vs. Territorial Models for Cross-Border Insolvency: The Theory, the Practice, and the Reality that Universalism Prevails’ (2008) 8 *U.C. Davis Business Law Journal* 366 – 420.

⁴³ Boraine A ‘Study Guide: Nature and Sources of International Insolvency Law’ (2014) available at https://www.insol.org/_files/Fellowship%20Class%20of%202014%20-

The relevant law that deals with issues of cross-border insolvency is only found in the common law of the country, which applies principles of international private law.⁴⁴ However, in spite of the common law principles used, there is a problem with a lack of clear and specific rules to address cross-border insolvency issues. As such, Namibia cannot effectively address the issues demonstrated in *Sackstein* above in a consistent and predictable manner as long as it continues to apply common law principles to resolve cross-border insolvency issues.⁴⁵

1.3 Research Question and Research Objectives

The object of the paper is to determine whether or not Namibia should adopt the Model Law. The answer to this central question requires a comprehensive examination of the following research objectives:

- (a) To determine the current cross-border insolvency landscape in Namibia and whether it requires reform.
- (b) To identify and critically analyse the features of the Model Law and the challenges of adopting the Model Law.
- (c) To establish how other African countries have adopted the Model Law and what lessons can Namibia derive from their examples.

[%202015/Literature/Session%20One/Studyguide_Insol_Course_ABoraine_2014.doc](#) (accessed on 23 February 2015). Boraine contends that South Africa blends the two models of universality and territoriality in that it allows the local courts to assist foreign insolvency representatives, but leans strongly towards the territoriality model in that the South African insolvency legislation seeks to protect local creditors. The same can be argued for Namibia, particularly if one has regard to the need for recognition of foreign insolvency representatives and the object of the Insolvency Act, 1936 for the sequestration of a debtor's estate to be of advantage to creditors.

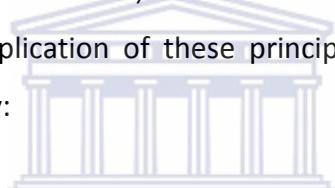
⁴⁴ The Administration of Justice Proclamation, 1919 (Proclamation 21 of 1919) introduced Roman-Dutch law to Namibia which is now constitutionally recognised as the common law of the country in terms of Article 66 of the Namibian Constitution.

⁴⁵ Boraine A & Roestoff M 'The Treatment of Insolvency of Natural Persons in South African Law: An Appeal for a Balanced and Integrated Approach' in Cissé H et al (Eds) *The World Bank Legal Review: Fostering Development through Opportunity, Inclusion and Equity* (2014) 61. Boraine & Roestoff argue that debtors or investors will seek legal certainty in the course of trade and investment and creditors will be interested in where they would get the most return for their credit and where they are provided with the certainty of such return.

- (d) To propose recommendations for the reform of Namibia's cross-border insolvency framework and for the adoption of the Model Law.
- (e) To raise an awareness about the importance of cross-border insolvency issues even in a Namibian context.

1.4 Significance of the Problem

As previously stated, the Insolvency Act, 1936 is the principal source of Namibia's insolvency law.⁴⁶ However, the point of departure remains that the scope of application of the Insolvency Act, 1936 is limited only to property that is situated within Namibia and does not deal with the property of a debtor that is located in a foreign jurisdiction.⁴⁷ It follows from this that when issues of cross-border insolvency do arise, Namibian courts can only apply principles of international private law. The application of these principles of international private law is demonstrated in the following way:



In the case of an outward-bound request where a sequestration order is granted by the Namibian High Court, a debtor is *ipso facto* divested of all immovable property that is situated in Namibia, as well as all movable property, wherever situated.⁴⁸ However, this sequestration order has no effect on the debtor's immovable property that is situated in a foreign country and a local trustee or liquidator is required to apply for recognition in the foreign jurisdiction in which the debtor has immovable assets.⁴⁹ In this case, the local trustee must comply with the laws and procedures of the foreign jurisdiction. Alternatively, the trustee or liquidator may

⁴⁶ Act No. 24 of 1936.

⁴⁷ The definition of 'property' in section 2 of the Insolvency Act, 1936 includes all types of property, both movable and immovable, situated in Namibia.

⁴⁸ Section 20 of the Insolvency Act, 1936 deals with the effects of sequestration. However, Smith A & Boraine A (2002) 572 argue that the rule on vesting of movables applies only to natural persons and not to legal entities. It is trite law that a foreign liquidator needs to seek recognition from the court before being able to deal with the company's assets, movable or immovable.

⁴⁹ Strydom JP held in *Bekker NO v Kotze and Another* 1994 NR 373 that 'the necessity for recognition of the trustee of an insolvent estate will always exist if the insolvent has immovable property in a foreign jurisdiction [for the reason that] at common law a sequestration order has no effect per se on immovable property situated in a foreign country' [emphasis added]. Such property remains vested in the insolvent.'

consider the opening of other secondary (concurrent) insolvency proceedings in that foreign jurisdiction if recognition is not granted.⁵⁰

On the other hand, in an inward-bound request, where the sequestration order is granted by a court of a foreign jurisdiction, a foreign insolvency representative is automatically vested with the debtor's movable property that is situated in Namibia.⁵¹ This means that Namibia recognises the extra-territorial effect of foreign insolvency orders. However, the foreign insolvency representative will be required to apply for recognition to the High Court of Namibia in order to administer any of the debtor's immovable assets which are situated in the country.⁵²

The application for the recognition of foreign insolvency representatives is not a legislated principle, and in the absence of an applicable treaty or specific legislation, recognition is regulated by the common law dealing with principles of international private law and precedent.⁵³ In this regard, the case of *Oliver NO v Insolvent Estate D Lidchi*, shows that the Namibian High Court has absolute discretion to grant or refuse an application for recognition.⁵⁴

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However, it is generally accepted that Namibian courts will exercise this discretion on the basis of comity or convenience.⁵⁵ Should the foreign insolvency representative not succeed in

⁵⁰ Olivier M & Boraine A 'Some Aspects of International Law in South African Cross-Border Insolvency Law' (2005) *CILSA* 373.

⁵¹ *Oliver No v Insolvency Estate D Lidchi* 1998 NR 31 at 38 Strydom, JP (as he then was), held that 'although it is not strictly necessary for trustees laying claim to movable assets in a country other than the country of the insolvent's domicile where the sequestration order was obtained, to apply for recognition, such application is invariably made and the need to apply for formal recognition has now been elevated into a principle'.

⁵² According to the High Court in *Bekker No v Kotze* 1994 NR 373, 'a sequestration order granted by the Court of the debtor's domicile ipso facto divests the insolvent of all his movable property, wherever situated'.

⁵³ Oppong RF (2013) 268. With regard to the application of the common law, Article 66(1) of the Namibian Constitution provides that 'both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law'.

⁵⁴ 1998 NR 31.

⁵⁵ Zulman RH (2009) 809. See also the leading case of *Ex parte BZ Stegmann* 1902 TS 40 where Ines J is quoted stating 'But, on the other hand, the same Court, acting from motives of comity or convenience is equally justified in allowing the order of the judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of the such order'. See also *Moolman v Builders & Developers (Pty) Ltd (In Provisional Liquidation)*:

obtaining recognition, particularly for the reason that the foreign insolvency proceedings in which he was appointed was not opened in a country of the debtor's domicile, then he or she or any other creditor of the debtor may apply for the sequestration or winding-up (as the case may be) of the estate of the debtor in Namibia.⁵⁶

Still, even if the Namibian courts apply principles of international private law to address the issues caused by cross-border insolvencies, it does not mean that the challenges of cross-border insolvencies are in any way diminished. Obviously, there are a number of problems that bedevil the value of international private law as a tool for resolving cross-border insolvency disputes.⁵⁷

The first is the exercise of the discretion given to the court in granting recognition.⁵⁸ In this regard Ailola correctly argues that the requirements and conditions for recognition of foreign insolvency representatives and even of foreign proceedings continue to change over time.⁵⁹ For example, in addition to the considerations of comity and convenience, Namibian courts have shown that they will recognise foreign insolvency representatives only where a debtor is domiciled within the jurisdiction of the foreign court in which the sequestration order was granted or where the debtor has submitted to the jurisdiction of that court.⁶⁰

Jooste Intervening 1990 (1) SA 954 (A) on the criterion of comity and convenience in the recognition of foreign representatives.

⁵⁶ Meskin PM et al *Insolvency Law and its Operation in Winding-up* (2006) 17 – 5. The local sequestration of the (foreign) debtor's estate should be distinguished from the recognition of a foreign representative's appointment. In the former case, regard must be had of section 149 of the Insolvency Act, 1936 which gives the Namibian court the discretion to refuse or postpone the acceptance of the surrender or the sequestration of a debtor's estate based on the principles of equity or convenience.

⁵⁷ Ailola D 'The UNCITRAL Model Law on Cross-Border Insolvency: Its Efficacy and Suitability as a basis for a SADC Convention' (2000) 2 *Stellenbosch Law Review* 216.

⁵⁸ Ailola D 'Recognition of Foreign Proceedings, Orders and Officials in Insolvency in Southern Africa: A Call for a Regional Convention' (1999) 31/1 *Comparative and International Law Journal of Southern Africa*, 63. Ailola argues that although South African courts traditionally recognise foreign trustees on the basis of comity and convenience, there is no certainty nor consistency to date as these requirements continue to change over time.

⁵⁹ Ailola D (1999) 63.

⁶⁰ *Bekker NO v Kotze and Others* 1994 NR 345. Even then, Zulman RH (2009) 810 argues that this list continues to expand in size as new factors are continuously considered by the courts. These include, inter alia, the domicile of the insolvent at the time the recognition is sought; the presence of movable and/or immovable property of the debtor; the interests of creditors generally; the commonality of the local and foreign systems of law; the number and value of foreign of foreign creditors compared to local creditors and the provisions made for local creditors under the foreign sequestration order to prove their claims.

Ailola goes on further to explain that ‘while there is no evidence to show that the discretion of the judges was ever exercised capriciously or without regard to the rules of fairness and objectivity, there can be no escape from a perception that a criteria based on discretion is, in a constitutional state, rather unsatisfactorily and dangerous.⁶¹ In other words, the discretion of the courts in granting recognition is not always exercised uniformly or consistently and so rules of international private law cannot provide a comprehensive regime of clear and predictable criteria to efficiently and adequately address cross-border insolvency problems.⁶²

The other problem is that rules of international private law have been unable to ensure certainty in the equal treatment of creditors across national lines.⁶³ Nadelmann argues for example, that the status of the law [in international trade] is wholly unsatisfactory, from the viewpoint of creditor equality when the assets of the debtor are not all situated in the country in which the insolvency proceedings have been instituted.⁶⁴ This is especially true when the foreign insolvency representative cannot collect the debtor’s assets or conditions are attached to the administration of those assets.⁶⁵ In this case, the local creditors will have an advantage or ‘underhand preference’ over the debtor’s assets because normally, they have better knowledge of the local assets and can be quicker in attaching them.⁶⁶ It follows from this that the absence of a predictable cross-border insolvency law means that Namibia will not be able to facilitate

⁶¹ Ailola D (1999) 63.

⁶² See also the Guide to Enactmet at page 21 ‘Approaches based purely on the doctrine of comity or an exequatur do not provide the same degree of predictability and reliability as can be provided by specific legislation, such as contained in the Model Law.’

⁶³ Gropper A ‘The Payment of Priority Claims in Cross-Border Insolvency Cases’ (2011) 46/3 *Texas International Law Journal* 559. According to Gropper, the application of diverging principles of international private law results in the unfair treatment of creditors.

⁶⁴ Nadelmann KH ‘Legal Treatment of Foreign and Domestic Creditors’ (1946) 11 *Law and Contemporary Problems* 697. Dr. Nadelmann was a research scholar and a faculty member at the Harvard Law School. He was also considered an expert on comparative law.

⁶⁵ Nadelmann (1946) 698.

⁶⁶ Nadelmann (1946) 698.

access to finance and encourage foreign investment if it does not improve the expectations of creditors about the outcome of cross-border insolvency proceedings.⁶⁷

The paper argues that the most effective solution to the problems of applying ineffective principles of international private law as well as diverse legal approaches to issues of cross-border insolvency would be to harmonise or standardise the various insolvency laws. The Model Law is perhaps the most effective way to harmonise and standardise insolvency laws in order to remove the obstacles faced in this area of law. Several African countries such as South Africa, Mauritius and Uganda have adopted provisions of the Model Law. As will be shown in chapter five of this paper, Namibia can derive important lessons from the adoption of the Model Law by these countries.

While it is true that the Model Law has been welcomed generally by a number of global institutions and individuals who have recommended its adoption by member States, there are those who argue that there will be difficulties in achieving uniform cross-border insolvency laws in practice.⁶⁸ For instance, Mohan contends that uniform procedural cross-border insolvency laws which the Model Law seek to achieve, ‘ignores the complex manner in which domestic insolvency laws interact with a range of other laws that are intimately linked to a country’s commercial, financial and social fabric’.⁶⁹ The same view is shared by Masoud who argues that there can be no ‘one-size-fits-all’ approach to cross-border insolvency law and countries should be wary of importing ‘foreign laws’ into the domestic realm without considering the potential

⁶⁷ The World Bank ‘Doing Business 2014: Economy Profile of Namibia’(2014) available at <http://openknowledge.worldbank.org/bitsream/handle/10986/16204/19984.pdf?sequence=1> (accessed on 30 October 2014) 203.

⁶⁸ See for example Howcroft NJ ‘Universal vs. Territorial Models for Cross-Border Insolvency: the Theory, the Practice, and the Reality that Universalism Prevails’ (2008) 8/1 *U.C. Davis Business LJ* 373. Howcroft argues that uniformity may not be viable, ‘in view of different circumstances and policy priorities of each sovereign state whose insolvency laws may implicate a case’.

⁶⁹ Mason RF ‘Cross-border insolvency and legal transnationalisation’ (2012) 21/2 *International Insolvency Review* 113.

influence on local policies, priorities and culture of the various countries.⁷⁰ This is in itself is not very surprising given the small number of UNCITRAL member States who have not adopted the Model Law.⁷¹

While the paper accepts that it may be difficult to harmonise cross-border insolvency laws, it is important that the discussion of cross-border insolvency regulation revolve within the global context in which it arises.⁷² The most desirable view, to the extent possible, would be that the same rules apply to everybody. This is due to the fact that it is of great importance that creditors are provided with greater legal certainty in the event of a cross-border dispute and above all, that the distribution of the debtor's estate takes place in an efficient fashion with minimal costs. The harmonisation of cross-border insolvency laws will enable national laws to be transparent, clear and most importantly predictable. Moreover, harmonisation would encourage trade and investment and foster economic growth and development for many countries that rely on Foreign Direct Investment (FDI) such as Namibia.



Thus perhaps whilst Namibia is in the process of reviewing, reforming and developing its insolvency laws, valuable lessons can be gleaned from the experiences and challenges of countries in the adoption of the Model Law.⁷³ This is particularly important given the increasing trade between Namibia and other economies both regionally and globally which will increase the likelihood and expected frequency of cross-border insolvency cases in the country. As such, the paper submits that there should be a sense of integrating and improving the principles of

⁷⁰ Masoud BS *Legal Challenges of Cross-Border Insolvencies in Sub-Saharan Africa with reference to Tanzania and Kenya: A Framework for Legislation and Policies* (unpublished doctorate thesis, Nottingham Trent University 2012) 199.

⁷¹ UNCITRAL 'Status of Model Law on Cross-Border Insolvency' available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (accessed on 25 October 2014). Of UNCITRAL's 60 member States, only 20 have adopted the UNCITRAL Model Law on Cross-Border Insolvency since its inception in 1997, including two African countries; South Africa and Uganda, with Kenya following soon pending the finalization of the Kenyan Insolvency Bill.

⁷² Garrido JM 'No Two Snowflakes the Same: The Distributional Question in International Bankruptcies' (2011) 46(3) *Texas International Law Journal* 465 – 466.

⁷³ The Namibian Law Reform and Development Commission (LRDC) has undertaken the review of the Insolvency Act, 1936 as of 2013.

international private law in order to establish a proper and effective framework for resolving the challenges of cross-border insolvencies and that the Model Law should be viewed as the basis needed to develop clear and predictable rules to effectively deal with the various aspects of cross-border insolvencies in Namibia. It would be wrong to wait for cross-border insolvencies to become commonplace before considering the development of Namibia's common law in so far as it relates to cross-border insolvency.

1.5 Research Methodology

In order to determine whether or not Namibia should adopt the Model Law, the paper will employ a mixed-type of research methodology. This will include a desktop research method as well as a legal comparative method which will use both primary and secondary research sources such as legislation, case law, journal articles and internet sources.⁷⁴

The problems of cross-border insolvencies have an international dimension which many other countries have faced and continue to face in their domestic cross-border insolvency laws. The use of a comparative research method will look at the legal systems of South Africa and Malawi in order to propose a solution for the development of Namibia's new cross-border insolvency framework.

Whilst it is true that South Africa and Namibia share close legal ties by virtue of their colonial history, the comparative study of South Africa's cross-border insolvency framework is intended to form part of this paper's discussion only in so far it can demonstrate where Namibia can improve and avoid some of the uncertainties perpetuated by the South African Cross-Border Insolvency Act, 2000 which is modelled on the Model Law.

⁷⁴ Wilson G 'Comparative Legal Scholarship' in McConville M & Chui W.M (Eds) *Research Methods for Law* (2007) 87 – 103.

In a nutshell, it has been shown in this chapter that there is a multiplicity of issues that arise when cross-border insolvency disputes occur. The paper argued that the principles of international private law used by the Namibian courts to resolve these issues are outdated and do not respond to the pace of change in the global economy to provide predictable and efficient procedures.

Against this backdrop, in chapter two the paper will consider the cross-border insolvency theories of universality and territoriality which have shaped and influenced the various approaches to insolvency laws around the world. Furthermore, chapter two will also consider the objects that insolvency laws should strive to meet in order to justify the need for cross-border insolvency reform in Namibia.

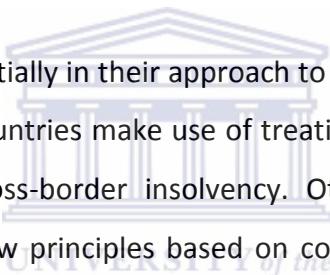


Chapter Two:

The Development of Cross-Border Insolvency Law and the Need for Reform

2.1 Introduction

Whenever a cross-border insolvency dispute arises, it is true that a number of complex issues arises. Chapter one showed that these issues relate to the jurisdiction of the courts to open insolvency proceedings against the debtor and the jurisdiction to administer the debtor's property. There is also the question of the applicable law to be applied in the proceedings, the number of insolvency proceedings that may ensue in respect of one debtor and the priorities rendered to local and foreign creditors.



Inevitably, countries differ substantially in their approach to addressing these complex issues of cross-border insolvency. Some countries make use of treaties, conventions or even the Model Law to address questions of cross-border insolvency. Other countries apply cross-border insolvency statutes or common law principles based on comity. These diverse approaches to cross-border insolvency are influenced and shaped by two diametrically opposed approaches to cross-border insolvency which have dominated the discourse in this field: universalism and territorialism.

While it is true that universalism and territorialism provide important benchmarks which any reform initiative should take into account when prioritising the specific needs and values of various countries, they do not however, in the paper's view, solve the question of which approach is most effective to address cross-border insolvency, given both their shortcomings. Instead, these theories have justified the diverse and conflicting national responses to cross-border insolvency demonstrating the increasing need for harmonising cross-border insolvency laws in order to ensure that cross-border insolvency disputes are addressed in a coordinated and predictable manner.

There are various ways in which cross-border insolvency laws can be harmonised. One way is to identify common standards or objectives that insolvency laws should meet in order to effectively address the problems of cross-border insolvencies. UNCITRAL, the World Bank, as well as the International Monetary Fund (IMF) have for example, developed standards or objectives of insolvency law based on best international practise in order to provide recommendations and guidelines for insolvency law reform initiatives. In fact, the World Bank encouraged countries to enact the Model Law as an effective and expeditious way to achieve these objectives.⁷⁵ Similarly, IMF also encouraged countries to take appropriate steps to resolve cross-border insolvency issues and invited countries to adopt the Model Law as an effective means of achieving these objectives.⁷⁶ Finally, even Masoud agrees that by adopting the Model Law, it is possible to overcome the theoretical gap between universalism and territorialism.⁷⁷

Another approach to harmonising cross-border insolvency laws is at the regional level through Regional Trade Arrangements (RTAs) such as the European Council Regulation No. 1346/2000/EC on Insolvency Proceedings (EC Regulation) and the Organisation for the Harmonisation of Commercial Law in Africa (OHADA) Uniform Law. Nonetheless, the impact of these regional treaties has been limited and the paper argues that cross-border insolvency regulation especially within the Southern African Development Community (SADC) to which Namibia is a member will be ineffective. The most desirable way in which harmonisation of cross-border insolvency laws can be achieved, in the paper's view, is through the adoption of the Model Law.

⁷⁵ World Bank 'Principles and Guidelines for Effective Insolvency and Creditor Rights System' available at http://www.worldbank.org/ifa/ipa_eng.pdf (accessed on 10 October 2014).

⁷⁶ International Monetary Fund Legal Department 'Orderly & Effective Insolvency Procedures Key Issues' available at <http://www.imf.org/external/pubs/ft/orderly/> (accessed 10 October 2014).

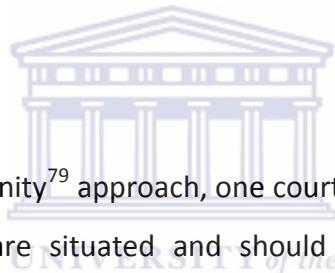
⁷⁷ Masoud BS *Legal Challenges of Cross-Border Insolvencies in Sub-Saharan Africa with reference to Tanzania and Kenya: A Framework for Legislation and Policies* (unpublished doctorate thesis, Nottingham Trent University 2012) 50.

Chapter two will examine the theories of cross-border insolvency and consider the need for cross-border insolvency reform in Namibia with a view to determining whether Namibia should or should not adopt the Model Law.

2.2 Theories of Cross-Border Insolvency

The central premise confronting the classification of whether universalism or territorialism should govern cross-border insolvencies relates to the question of whether an insolvency proceeding that commenced in one jurisdiction should provide for a single legal regime to deal with all aspects of a debtor's assets on a worldwide basis or whether it should only be confined to the assets within the jurisdiction in question.⁷⁸

2.2.1 Universalism



In terms of a pure universalist or unity⁷⁹ approach, one court should have control over all of the debtor's assets wherever they are situated and should apply its own domestic laws to determine the consequences of sequestration or liquidation such as the priorities among creditors.⁸⁰ This court is usually situated in the 'home' country of the debtor's place of incorporation or domicile, or sometimes the country in which the debtor may have assets or liabilities.⁸¹ Once insolvency proceedings have commenced in this court, the role of other is to assist the insolvency representative of the home country and may not initiate subsequent

⁷⁸ Goode R & Goode RM *Principles of Corporate Insolvency Law* 4 ed (2011) 782.

⁷⁹ Mason R 'Local Proceedings in a Multi-State Liquidation: Issues of Jurisdiction' (2006) 30(1) *Melbourne University Law Review* 147. The cross-border insolvency theories of universalism and territorialism are often used interchangeably with the terms 'unity' and 'plurality'. Although connected, they require separation. Mason distinguishes between these principles in that 'unity' and 'plurality' relate to jurisdiction and particularly to the number of courts that will have jurisdiction to open insolvency proceedings against a debtor. Conversely, 'Universalism' and 'territoriality' relate to the multi-state effects of those insolvency proceedings.

⁸⁰ Howcroft NJ 'Universal vs. Territorial Models for Cross-Border Insolvency: The Theory, the Practice, and the Reality that Universalism Prevails' (2008) 8 *U.C. Davis Business Law Journal* 370.

⁸¹ Westbrook JL 'A Global Solution to Multinational Default' (2000) 98(1) *Michigan Law Review* 2280.

insolvency proceedings in respect of the same debtor.⁸² The result of this approach is that all creditors, both local and foreign, pursue their claims in the same forum.⁸³

2.2.2 Territorialism

By contrast, a pure territorialist or pluralist approach is based on the view that each country has the exclusive competence to initiate insolvency proceedings and to administer the debtor's assets that are situated within its jurisdiction, using its own insolvency laws without having regard to other insolvency proceedings in respect of the same debtor that have commenced in other countries.⁸⁴ In the more extreme versions of the theory, the right to participate in the distribution of the debtor's estate would be restricted to local creditors.⁸⁵ Territorialism is therefore underpinned by the desire and political consideration of the sovereign to protect its local interests.⁸⁶



In the absence of specific regulation governing cross-border insolvencies, territoriality is often the applicable rule in many countries.⁸⁷ Namibian courts for example, apply the *lex loci rei sitae* (or simply *lex situs*) doctrine to a debtor's immovable property that is located in a foreign jurisdiction.⁸⁸ This is in contrast to a sequestration order granted by the Namibian High Court, which divests the debtor of all his movable property wherever situated, which is in a sense universal.

⁸² Boraine A 'Study Guide: Nature and Sources of International Insolvency Law' available at https://www.insol.org/_files/Fellowship%20Class%20of%202014%20-%202015/Literature/Session%20One/Studyguide_Insol_Course_A_Boraine_2014.doc (accessed on 23 February 2015).

⁸³ Clarke LM & Goldstein K 'Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies' (2011) 46/3 *Texas International Law Journal* 517.

⁸⁴ Masoud BS (2012) 28.

⁸⁵ Fletcher I '[L'enfer, C'est Les Autres": Evolving Approaches to the Treatment of Security Rights in Cross-Border Insolvency](#)' (2011) 46(3) *Texas International Law Journal* 496. Professor Ian Fletcher referred to this as the so-called 'ring-fencing.'

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⁸⁷ Filho PFC 'Cross-Border Insolvency Law in Brazil' (2010) 32(1) *Houston Journal of International Law* 104.

⁸⁸ See the case of *Bekker NO v Kotze and Another* 1994 NR 373 where the court held that 'at common law a sequestration order has no effect per se on immovable property situated in a foreign country'.

2.2.3 Advantages and Disadvantages of Cross-Border Theories

While insolvency laws across countries invariably encompass characteristics of either universalism or territorialism, both approaches have their strengths and weaknesses nonetheless.

Professor Westbrook, arguably the major proponent for universalism, advances powerful arguments in favour of universalism as the ‘correct’ approach.⁸⁹ First, he makes the point that the value of the debtor’s assets is maximised for equal distribution to all creditors where the national borders are ignored.⁹⁰ Secondly, Westbrook argues that unlike multiple insolvency proceedings ensuing from a territorial approach, there is a unified and coordinated regime under universalism for the collection and realisation of those assets that will facilitate certainty and predictability in the event of a cross-border dispute.⁹¹ Thirdly, universalism facilitates the reorganisation of legal entities that ‘is even more dependent for its efficacy on the existence of a single regime under which it can be conducted’.⁹² Finally, Westbrook contends that it would be difficult for the various courts involved in a cross-border dispute to effectively cooperate with one another under a territorial model as the recovery of creditors ‘will turn on the fortuitous or manipulated location of assets and the results will be highly unpredictable ex ante’.⁹³

Still, universalism does not come without considerable practical problems. Professor Lynn LoPucki, the leading protagonist of the universalist approach, argues that the universalist approach depends on there being a standard test for attributing international jurisdiction that

⁸⁹ Westbrook JL (2000) 2328.

⁹⁰ Goode R & Goode RM (2011) 783. The authors detail the claimed advantages of universalism according to Westbrook.

⁹¹ Goode R & Goode RM (2011) 783.

⁹² Goode R & Goode RM (2011) 783.

⁹³ Goode R & Goode RM (2011) 783.

is applied uniformly by all countries across the world.⁹⁴ However, it is not always easy to establish the ‘debtor’s home country, place of incorporation or the debtor’s centre of main interests’ (COMI) under universalism.⁹⁵ When this is uncertain, problems arise as to which court should have the jurisdiction to hear and administer the one set of insolvency proceedings as required by the universality model. At the same time, the ranking of creditors may differ from country to country. The question of whether foreign creditors will be placed at the same rank as that of local creditors in the main proceeding is often dubious, especially where national insolvency laws favour the protection of local creditors over others.

LoPucki uses the unreported judgment of *C.I.B.C. v. Bramalea Inc.* to show the consequences of one court’s exercise of jurisdiction over subsidiaries of an insolvent parent company, which were not insolvent and were situated in different jurisdictions.⁹⁶ In this matter, a Canadian parent company filed for insolvency in a Canadian insolvency court, which then assumed jurisdiction over subsidiaries in the United States of America (USA) that had not filed for insolvency in either jurisdiction, in order to control and maximise all of the assets for the benefit of the company’s creditors.⁹⁷ LoPucki argues that the universalist approach used in this case defies the predictability that it strikes to achieve and instead creates confusion between the creditors of the parent company and those of subsidiaries, particularly when the subsidiaries are not undergoing insolvency proceedings themselves.⁹⁸

It appears that universalism is wholly dependent on foreign cooperation for the effectiveness of its claim to extraterritorial application.⁹⁹ This is what LoPucki meant when he noted that ‘one

⁹⁴ LoPucki LM ‘Cooperation in International Bankruptcy: A Post-Universalist Approach’ (1999) 84(1) *Cornell Law Review* 704.

⁹⁵ LoPucki LM (1999) 714. LoPucki used the example of the well-known case of *Maxwell Communication Corp plc v. Société Générale plc (In re Maxwell Communication Corp plc)* 170 B.R. 800 (Bankr. S.D.N.Y. 1994), in which Maxwell had its headquarters in the U.K. while the bulk of its assets were situated in the U.S.

⁹⁶ LoPucki LM (1999) 719.

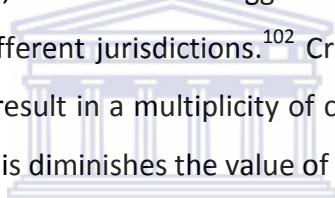
⁹⁷ *C.I.B.C. v. Bramalea Inc.* 1995 CanLII 7420 (13 December 1995), Superior Court of Justice (Ontario, Canada).

⁹⁸ LoPucki LM (1999) 719.

⁹⁹ Mason RF ‘Cross-Border Insolvency Law: Where Private International Law and Insolvency Law Meet’ in Omar P (ed) *International Insolvency Law: Themes and Perspectives (Markets and the Law)* (2008) 49.

court plays the tune, and everyone else dances'.¹⁰⁰ However, usually, what happens is that another country will not dance to any claim of extra-territorial effect as its own law will dictate whether another country's law can apply and have effect within its jurisdiction. In the absence of a cross-border insolvency treaty or convention between countries, universalism may be subject to manipulation and abuse by debtors through 'forum shopping' which enables them to tactfully place assets in certain jurisdictions thereby rendering them less accessible (or wholly inaccessible) to creditors who are based elsewhere. This is why countries may be 'averse to allowing foreign laws to operate with extraterritorial effect in relation to property that is located within their jurisdiction'.¹⁰¹

Conversely, the strengths of territorialism are perhaps best reflected by the weakness of universalism. In its original form, territorialism suggests a total lack of coordination and cooperation between courts in different jurisdictions.¹⁰² Critics of territoriality claim that it is inefficient and costly, as it would result in a multiplicity of cases in each jurisdiction where the debtor has assets.¹⁰³ Ultimately, this diminishes the value of the debtor's estate.¹⁰⁴



A cross-border insolvency legal regime must be predictable, efficient, fair and followed by cooperation and communication among courts in different jurisdictions to facilitate the maximisation of the value of the debtor's assets for the collective benefit of all creditors. Territorialism seems to have many elements that render it an inefficient, unpredictable and costly approach to cross-border insolvency in the face of increased global trade and investment. Moving forward, it seems that a compromise between universalism and territorialism should be considered.

¹⁰⁰ LoPucki LM (1999) 699.

¹⁰¹ LoPucki LM & Weybrach WO 'A Theory of Legal Strategy' (2000) 49(1) *Duke Law Journal* 1405 -1486.

¹⁰² Garrido JM 'No Two Snowflakes the Same: The Distributional Question in International Bankruptcies' (2011) 46(3) *Texas International Law Journal* 467. Professor José M. Garrido, is a professor of commercial and corporate law at the University of Castilla La Mancha and served as senior counsel for the World Bank since 2009. He is an internationally recognized specialist in insolvency and creditor rights, as well as in corporate and financial law.

¹⁰³ Westbrook JL (2000) 2328.

¹⁰⁴ Filho PFC (2010) 105.

2.2.4 Alternative Approaches to Cross-Border Insolvency Regulation

Unfortunately, the weaknesses and strengths of both universalism and territorialism demonstrates that neither one is often used in isolation.¹⁰⁵ As a result, alternatives to both approaches have been widely discussed. One of these is modified universalism, which, although accepts the central premise of universalism that there should be a single insolvency proceeding administered by a single court to deal with the debtor's assets on a worldwide basis, allows foreign courts to determine whether or not 'non-main' or 'secondary' insolvency proceedings should be commenced.¹⁰⁶ In making this decision, foreign courts may consider how the 'main' insolvency proceeding may affect its local creditors.¹⁰⁷

The theoretical advantages of modified universalism are reflected in instruments like the Model Law as well as the EU Regulation on Insolvency Law, which allow access of foreign insolvency representatives and foreign creditors, recognition of foreign insolvency proceedings as well as for cooperation and coordination amongst the courts from different jurisdictions.¹⁰⁸ In addition, both systems allow the courts commencing non-main or secondary proceedings to refuse cooperation that would prejudice its local creditors.¹⁰⁹ The result of this is that the debtor's assets should be distributed according to essentially the same priorities of creditors where both local and foreign creditors are recognised on the same basis.¹¹⁰

One other alternative to universalism and territorialism is 'cooperative territorialism'. In this approach, each court still has the competence to administer the assets of the debtor, which are situated in the country of its jurisdiction, but unlike in a pure territorial approach, it enables the

¹⁰⁵ See generally Howcroft NJ (2008) 372 – 375.

¹⁰⁶ Mason RF (2008) 51. According to Mason modified universalism is 'similar to pure universalism in that the assets of the debtor, wherever situated, are pooled together and administered by one court, but it also allows individual countries to evaluate the fairness of that proceeding, and to open local proceedings if necessary'.

¹⁰⁷ Howcroft JL (2008) 370.

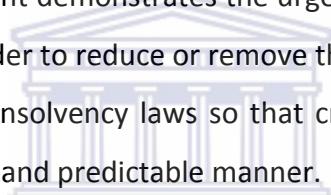
¹⁰⁸ Garrido JM (2011) 472.

¹⁰⁹ LoPucki LM (1999) 728. LoPucki argues correctly however, that foreign countries refusing to cooperate could constrain the power of the main court to administer the assets worldwide.

¹¹⁰ LoPucki LM (1999) 728.

courts from different jurisdictions in which the debtor has significant assets, to commence several independent insolvency proceedings according to its own local insolvency law.¹¹¹ In this instance, foreign creditors are allowed to participate in any local insolvency proceedings under the priority scheme determined by that particular court.¹¹²

Regrettably, no consensus has been reached as to what the correct approach to cross-border insolvency should be. Suffice to say, every country is therefore justified to rely on either theory of cross-border insolvency or a combination of both as the basis for how it will address issues of cross-border insolvency depending upon national interests protected. The result of this consequence is that there will continue to be diverse and inconsistent national responses to how cross-border insolvencies should be addressed. The potential conflict with jurisdictions applying different rules of treatment demonstrates the urgent need for countries to harmonise cross-border insolvency laws in order to reduce or remove the obstacles to trade created by the disparities between the national insolvency laws so that cross-border insolvency insolvencies can be addressed in a coordinated and predictable manner.



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The best way in which to achieve the harmonisation and convergence of the diverse cross-border insolvency laws would be to identify common standards or objectives that insolvency laws should meet and to measure these against any cross-border insolvency reform initiative.

2.3 The Objectives or Standards of Insolvency Law

While there is no perfect model that a country can simply adopt, global institutions such as the World Bank, IMF and UNCITRAL have developed certain standards or objectives that would have a global effect of harmonising the substantive aspects of different national insolvency law

¹¹¹ LoPucki LM (1999) 742.

¹¹² Garrido LM (2011) 472.

systems. A harmonised insolvency system will ensure consistency in application, interpretation and enforcement worldwide.¹¹³ These objectives reveal the following common points:

1. Key objectives of an effective and efficient insolvency law based on the UNCITRAL Legislative Guide on Insolvency Law;¹¹⁴
2. Principles for Effective Creditor Rights and Insolvency Systems produced by the World Bank;¹¹⁵ and
3. General Objectives and Features of Insolvency Procedures established by the IMF.¹¹⁶

In principle, these institutions argue that insolvency laws should provide measures for the following:

- Provision of certainty in the market to promote economic stability and growth;
- Ensuring a transparent and predictable insolvency law;
- direct access of foreign insolvency representatives to local courts;
- a clear and speedy process for obtaining recognition of foreign insolvency representatives and of foreign insolvency proceedings;
- The equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors;
- The recognition of existing creditor rights and establishment of clear rules for ranking of priority claims;
- a moratorium or stay at the earliest possible time in every country where the debtor has assets;

¹¹³ Masoud BS (2012) 59.

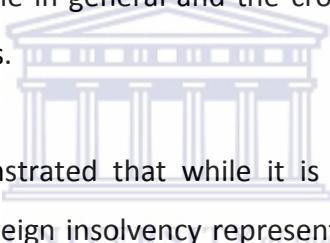
¹¹⁴ The UNCITRAL 'Legislative Guide on Insolvency Law' available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (accessed on 04 April 2015).

¹¹⁵ World Bank 'Principles and Guidelines for Effective Insolvency and Creditor Rights System' available at http://www.worldbank.org/ifa/ipa_eng.pdf (accessed on 10 October 2014).

¹¹⁶ International Monetary Fund Legal Department 'Orderly & Effective Insolvency Procedures Key Issues' available at <http://www.imf.org/external/pubs/ft/orderly/> (accessed 10 October 2014).

- The protection and maximising of the value of the debtor's property for the benefit of all interested parties and the economy in general; and
- Striking a balance between liquidation and reorganization.¹¹⁷

Without doubt, these standards should form the basis upon which insolvency laws are developed and improved. The challenge for any country therefore, is to balance these key objectives when developing insolvency legislation. Does Namibia's insolvency framework achieve these objectives? If the Insolvency Act, 1936 of Namibia, coupled with the common law principles currently used to resolve cross-border insolvencies, adequately deals with these objectives, then there will be no need to reform Namibia's cross-border landscape and to adopt the Model Law. In the next section of chapter two, the paper will consider whether or not the current Namibian insolvency regime in general and the cross-border insolvency framework in particular speak to these objectives.



In chapter one the paper demonstrated that while it is true that Namibian common law provides for the recognition of foreign insolvency representatives, the common law regime is entirely discretionary and lacks clear and comprehensive rules for providing access to foreign insolvency representatives and equitable treatment for all creditors, irrespective of their domicile.

Notwithstanding the fact that the Insolvency Act, 1936 does not contain any provisions regarding cross-border insolvency, the judgment in *Walker v Syfret* suggests that the main objects of the Insolvency Act, 1936 are as follows:¹¹⁸

1. To ensure the equitable distribution of the debtor's assets among his or her creditors in order of their ranking; and

¹¹⁷ These objectives are based on the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights System and the UNCITRAL Legislative Guide on Insolvency Law, which incorporates the benchmarks of all previous harmonisation efforts including the IMF's Orderly & Effective Insolvency Procedures Key Issues.

¹¹⁸ *Walker v Syfret* 1911 AD 141 at 166.

2. To vest the rights of the debtor in the Master of the High Court or the trustee from the moment insolvency commences so no transactions can thereafter be entered into to the prejudice of the general body of creditors.

It is also understood that the Insolvency Act was passed for the benefit of creditors and not for the relief of harassed debtors.¹¹⁹ From this analysis, it is clear that the history of Namibia's insolvency law specifies a creditor oriented approach which is even more so evident given the requirement that the sequestration be of advantage to creditors.¹²⁰

While in principle there is nothing wrong with protecting the interests of creditors in general and local creditors in particular, there is often always the probability that even pro-creditor insolvency laws may differ regarding the way they address the respective rights of secured, preferential and unsecured or concurrent creditors who are situated in different jurisdictions.¹²¹ Notwithstanding that the priorities of creditors may differ across national boundaries, the IMF argues that whereas secured creditors are given preference for their claims against the debtor's estate, unsecured creditors may benefit from a rehabilitation procedure that will maximize the value of the debtor's assets and, therefore, the value of the unsecured creditors' claims.¹²² Unfortunately, the current focus and culture of Namibia's corporate insolvency law is not geared towards the rehabilitation of viable businesses.

The only forms of business rescue or rehabilitation provisions can be found in Chapters 12 and 15 of the Companies Act, 2004 that make provision for schemes of arrangement (compromise)

¹¹⁹ See the dictum expressed by Holmes J in *Ex parte Pillay* 1955 (2) SA 309 (N) where he states that 'The machinery of voluntary surrender was primarily designed for the benefit of creditors, and not for the relief of harassed debtors'.

¹²⁰ See sections 6(1)(a) and 10(1)(a) of the Insolvency Act, 1936 which require that sequestration be of advantage to creditors. This requirement is not defined by the Insolvency Act, 1936 but has been interpreted by the court in *Nedbank v Thorpe* (7392/2007) [2008] ZAKZHC 72 to mean that there must be a reasonable prospect that some pecuniary benefit will result to creditors.

¹²¹ International Monetary Fund 'Report on Orderly & Effective Insolvency Procedures' available at <http://www.imf.org> (accessed on 05 March 2015).

¹²² International Monetary Fund 'Report on Orderly & Effective Insolvency Procedures' available at <http://www.imf.org> (accessed on 05 March 2015).

and judicial management.¹²³ However these forms of business rescue provisions remain significantly underutilised in Namibia, leaving liquidation as the preferred and most often used procedure to assist companies who are unable to pay their debts or meet their obligations.

Although it is not the object of this paper to delve into a discussion on whether or not Namibia should develop a modern and effective business rescue model, it must nonetheless be emphasised that business rescue and insolvency go hand-in-hand so a discussion of cross-border insolvency reform should necessarily facilitate the provision of the rehabilitation of viable businesses as a stepping stone to achieving the key objective of maximising the debtor's assets for the benefit of all creditors and the economy in general.¹²⁴ Obviously, certainty of such return affects also the availability of credit not only by Namibian investors, but also by investors around the world seeking to fund companies who seek like to invest in the country.¹²⁵ It is against this background that the relevance for developing and adopting the Model Law as part of Namibia's domestic insolvency law should become more imminent than ever before.¹²⁶

From the above, it is clear that the common law rules used to address cross-border insolvency issues are outdated and thus ill equipped to deal with the modern-day complexities of cross-border insolvency cases. The continued use of these rules to address questions of cross-border insolvencies perpetuates uncertainty, inconsistencies and unpredictability as to those issues concerning cross-border insolvency. Undeniably, an insolvency system plays a vital role in a modern market economy. A strong insolvency system contributes to the efficient use of

¹²³ Act No. 28 of 2004. However, much has been written about the failure of judicial management as an effective business rescue too. The case of *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* 2001 (2) SA 727 (C) provides a useful summary of the problems associated with judicial management as a business rescue procedure.

¹²⁴ UNCITRAL 'Legislative Guide on Insolvency Law' available at

http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html (accessed on 21 April 2014).

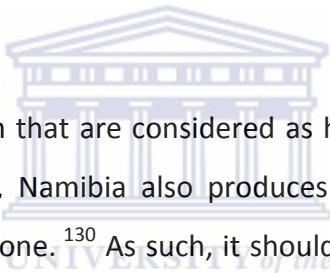
¹²⁵ Boraine A & Roestoff M 'The Treatment of Insolvency of Natural Persons in South African Law: An Appeal for a Balanced and Integrated Approach' in Cissé H et al (eds) *The World Bank Legal Review: Fostering Development through Opportunity, Inclusion and Equity* (2014) 61. Boraine & Roestoff argue that debtors or investors will seek legal certainty in the course of trade and investment and creditors will be interested in where they would get the most return for their credit and where they are provided with the certainty of such return.

¹²⁶ The World Bank stated that the most effective and expeditious way to achieve the objectives of cross-border insolvency laws was to enact the Model Law on Cross-Border Insolvency.

resources and hence, fosters economic growth. The system also helps underpin investors' confidence and financial stability. It is thus the paper's humble submission that the time is ripe to pave the road to ensure that Namibia's insolvency system is effective and responsive.

2.4 The Need for Reform

Namibia is considered not only one of the world's key players in the production of diamonds, but also the fourth-largest exporter of non-fuel minerals in Africa.¹²⁷ For example, Namdeb Diamond Corporation Ltd currently is the dominant producer of diamonds in Namibia and employs over 1600 employees.¹²⁸ The revenue generated through the sale of diamonds has played a central role in building the social and physical infrastructure of an independent Namibia.¹²⁹



Apart from diamonds and uranium that are considered as her most salient commodities from an export revenue point of view, Namibia also produces gold bullion, blister copper, lead concentrate, salt and dimension stone.¹³⁰ As such, it should come as no surprise that Namibia attracts and relies on a substantial sum of Foreign Direct Investment (FDI) from multinational companies that operate in Namibia's significant mining sector.¹³¹ In 2013 for example, the

¹²⁷ KPMG 'Namibia: Country Mining Guide' available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/mining-country-guides/Documents/namibia-mining-guide.pdf> (accessed 09 March 2015). According to KPMG, Namibia is amongst the world's top 10 diamond producers.

¹²⁸ Namdeb Diamond Corporation Ltd website available at <http://www.namdeb.com/> (accessed 17 March 2015).

¹²⁸ Chamber of Mines of Namibia website available at <http://www.chamberofmines.org.na/> (accessed 17 March 2015).

¹²⁹ Chamber of Mines of Namibia website available at <http://www.chamberofmines.org.na/> (accessed 17 March 2015). It must be noted that notwithstanding the contribution to the country's GDP, the mining sector employs only 2% of the total labour force, given the capital-intensive nature of its activities.

¹³⁰ KPMG 'Namibia: Country Mining Guide' available at

<http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/mining-country-guides/Documents/namibia-mining-guide.pdf> (accessed 09 March 2015).

¹³¹ In no particular order, the examples of mining companies in Namibia are the Rio Tinto group, Vedanta plc, Ocean Diamond Mining, Diamond Fields Namibia, Sakawe Mining Corporation, Diaz Exploration, AngloGold Ashanti, Paladin Energy Ltd, Epangelo Mining Company (Pty) Ltd and Namdeb Diamond Corporation (a joint venture between the Namibian government and the De Beers conglomerate), which is considered the largest taxpayer and second-largest employer in the country.

mining sector alone contributed 9.3% to Namibia's Gross Domestic Product (GDP) and generated revenue worth N\$20.93 million.¹³²

Notwithstanding the economic significance of mining companies, there is often the risk that, unfortunately, sometimes leads to their failure. For instance, the demise of Tsumeb Corporation Ltd (TCL) is well documented in the Namibian media.¹³³ TCL was a consortium formed to take over the copper mining operations at the Tsumeb Mine.¹³⁴ Its mining and smelting operations came to an end when the company was finally liquidated in 1998.

Another mining company, Ongopolo Mining and Processing (Pty) Ltd subsequently purchased TCL before it too, found itself facing insolvency.¹³⁵ A few years later, Ongopolo signed an agreement to sell the majority shareholding of its copper mining operations at the Tsumeb Mine to Weatherly International. However, Weatherly International was also forced to suspend mining activities due to the decline in the world copper prices.¹³⁶ To date, Dundee Precious Metals Inc, a Canadian mining and processing company with its headquarters in Toronto, Canada now own the Tsumeb Smelter.¹³⁷

This factual scenario demonstrates two important consequences. The first is that insolvency is closely related to the economic development and growth of countries and that a country's insolvency system may be used to assess the risk of doing business there. Namibia was ranked

¹³² The Chamber of Mines Namibia 'Welcome to the Chamber of Mines' available at <http://www.chamberofmines.org.na/> (accessed on 17 March 2015).

¹³³ See for example Menges W 'Mining Giant Swallows Bitter Namibian Pill' *The Namibian* 15 March 1999.

¹³⁴ Tonchi VL et al *Historical Dictionary of Namibia* 2 ed (2012) 426. During its tenure, TCL built the Tsumeb Smelter to treat the ore extracted from the mine, enabling the production of different types of metals, including blister copper, lead, silver, cadmium, antimony and arsenic trioxide and developed other mines such as Kombat and Matchless, Asis Ost and West and Otjihase.

¹³⁵ Morris JH *Going for Gold: The History of Newmont Mining Corporation* (2010) 78. Morris states that Ongopolo was unable to repay its substantial bank loans, and its audited statements of June 2005 showed liabilities in excess of N\$520 million.

¹³⁶ Tonchi VL et al (2012) 426.

¹³⁷ Dundee Precious Metals website available at <http://www.dundeeconomics.com/English/operations/processing/tsumeb-smelter/overview/default.aspx> (accessed on 17 March 2015).

35th on a global list of copper ore producers, however, copper output has declined significantly since the demise of TCL.¹³⁸ Secondly, it demonstrates that there are numerous stakeholders whose interests must be accommodated during insolvency proceedings. An effective insolvency regime should therefore balance the interests of all stakeholders and consider whether or not a financially distressed company should be rehabilitated or liquidated in order to safeguard the interests of creditors such as the employees and investors.

The Government's vision for Namibia's economy is outlined in Vision 2030.¹³⁹ Vision 2030 sets out the government's commitment to enhance the standard of living and to improve the quality of life for all Namibians by transforming the Namibian political and economic landscape in areas such as land reform, housing, the environment, health and the general economy.¹⁴⁰ The significant relationship between insolvency law and economic growth highlights the role of government to ensure the development of an effective cross-border insolvency regulatory framework to transform the general economy by ensuring the availability of capital.¹⁴¹

However, the World Bank's *Doing Business Report* shows that Namibia is ranked 81 from 189 economies on the ease of resolving insolvency.¹⁴² According to this report, resolving insolvency in Namibia takes 2 and half years on average and costs creditors 14.5% of the debtor's estate,

¹³⁸ KPMG 'Namibia: Country Mining Guide' available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/mining-country-guides/Documents/namibia-mining-guide.pdf> (accessed 09 March 2015).

¹³⁹ The Government of the Republic of Namibia 'Vision 2030 ' available at <http://www.gov.na/vision-2030> (accessed on 24 March 2014).

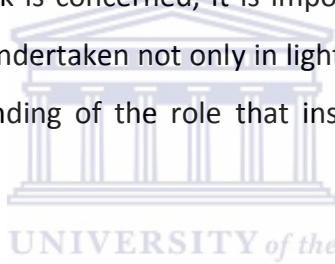
¹⁴⁰ The Government of the Republic of Namibia 'Vision 2030 ' available at <http://www.gov.na/vision-2030> (accessed on 24 March 2014).

¹⁴¹ Garrido M (2014) 111. Garrido described the relationship between insolvency law and economic development as follows: 'Insolvency law serves several important functions in an economy. It is a useful instrument to reallocate assets to more productive uses, and an appropriate reorganization or debt-restructuring framework provides instruments to preserve valuable businesses under distress'.

¹⁴² The World Bank Group 'Doing Business 2015: Going Beyond Efficiency Economy Profile 2015 Namibia' available at <http://www.doingbusiness.org/~media/giawb/doing%20business/documents/profiles/country/NAM.pdf> (accessed on 07 April 2015).

with the most likely outcome being that the company will be sold as piecemeal sale.¹⁴³ In addition, it also shows that the average recovery rate is 35.2 cents on the dollar.¹⁴⁴ This means that recovering investments is relatively costly and takes much longer compared to other countries like South Africa, Mauritius and Botswana.¹⁴⁵

The increasing interrelationship between Namibia and other economies, as well as the ever-growing international trade and investment, demonstrates that every jurisdiction - even smaller ones, like Namibia - must consider regulating not only the purely domestic insolvencies but also cross-border insolvency cases which have an impact on its economic performance. The reality of cross-border insolvencies is that national insolvency systems are tied to and interact daily with the systems of their global trading partners. In as far as the development of an effective cross-border insolvency framework is concerned, it is important that the review of Namibia's insolvency framework should be undertaken not only in light of the objectives identified above, but also with the clear understanding of the role that insolvency law plays in its economic development.¹⁴⁶



2.5 Harmonisation Through Regional Instruments APE

Harmonisation is not a phenomenon that is confined to the efforts of the international community. Some countries have considered the harmonisation of cross-border insolvency laws

¹⁴³ The World Bank Group 'Doing Business 2015: Going Beyond Efficiency Economy Profile 2015 Namibia' available at <http://www.doingbusiness.org/~media/giawb/doing%20business/documents/profiles/country/NAM.pdf> (accessed on 07 April 2015).

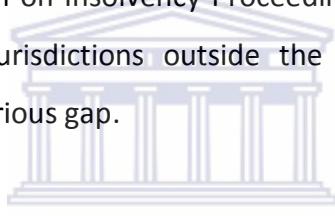
¹⁴⁴ The World Bank Group 'Doing Business 2015: Going Beyond Efficiency Economy Profile 2015 Namibia' available at <http://www.doingbusiness.org/~media/giawb/doing%20business/documents/profiles/country/NAM.pdf> (accessed on 07 April 2015).

¹⁴⁵ The World Bank Group 'Doing Business 2015: Going Beyond Efficiency Economy Profile 2015 Namibia' available at <http://www.doingbusiness.org/~media/giawb/doing%20business/documents/profiles/country/NAM.pdf> (accessed on 07 April 2015). South Africa is ranked at 39, Mauritius at 43 and Botswana at 49.

¹⁴⁶ Garrido M 'The Role of Personal Insolvency in Economic Development: An Introduction to the World Bank Report on the Treatment of the Insolvency of Natural Persons' in Cissé H et al (eds) *The World Bank Legal Review: Fostering Development through Opportunity, Inclusion and Equity* (2014) 111. Garrido described the relationship between insolvency law and economic development as follows: 'Insolvency law serves several important functions in an economy. It is a useful instrument to reallocate assets to more productive uses, and an appropriate reorganization or debt-restructuring framework provides instruments to preserve valuable businesses in distress'.

from a regional perspective, taking into account that regional integration between economies is considered a useful tool in achieving sustainable economic growth in both developed and developing countries. A very good example of cross-border insolvency regulation at the regional level is the EU Regulation on Insolvency Proceedings and the OHADA Uniform Law.

The EU Regulation on Insolvency Proceedings establishes a framework for insolvency proceedings within the European Union (EU). It outlines common rules regarding the jurisdiction of courts to commence insolvency proceedings, the applicable law and the recognition of a court's decision where a debtor, whether a company, a trader or an individual becomes insolvent.¹⁴⁷ There is no question that a greater degree of harmonisation can be achieved within the EU since regulations are by their nature binding instruments within the EU.¹⁴⁸ However, the EU Regulation on Insolvency Proceedings does not deal with the issue of how insolvencies arising from jurisdictions outside the European Community should be addressed.¹⁴⁹ This, in itself, is a serious gap.



OHADA was established to harmonise the various business laws of member countries in order to attract FDI and foster regional economic integration and development.¹⁵⁰ To date, OHADA has adopted nine uniform acts, one of which is the Uniform Act organising Insolvency and Liquidation Proceedings. Articles 247 to 256 of this Uniform Act organising Insolvency and Liquidation contains Proceedings deals with international insolvency and allows judgments of courts in any member country to have full extra-territorial effect in other member countries provided that these have been published in the public registers of the country in which enforcement is sought.¹⁵¹ However, this does not prevent the opening of insolvency

¹⁴⁷ Omar PJ 'Insolvency Law Initiatives in Developing Economies: The OHADA Uniform Law' available at <http://www.iiglobal.org/component/jdownloads/viecategory/647.html> (accessed 3 October 2014).

¹⁴⁸ Omar PJ 'Insolvency Law Initiatives in Developing Economies: The OHADA Uniform Law' available at <http://www.iiglobal.org/component/jdownloads/viecategory/647.html> (accessed 3 October 2014).

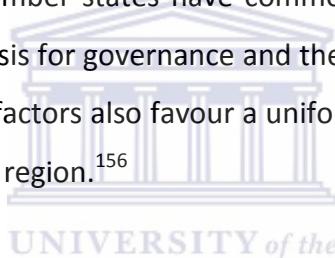
¹⁴⁹ Kargman ST 'Emerging Economies and Cross-Border Insolvency Regimes: Missing BRICs in the International Insolvency Architecture (PartII)' (2013) 7(1) *Insolvency and Restructuring International* 6.

¹⁵⁰ Doris NL 'Regionalism: Lessons the SADC may learn from OHADA' (2012) 75(1) *THRHR* 260.

¹⁵¹ Omar PJ 'Insolvency Law Initiatives in Developing Economies: The OHADA Uniform Law' available at <http://www.iiglobal.org/component/jdownloads/viecategory/647.html> (accessed on 07 April 2015).

proceedings affecting the same debtor in other member countries.¹⁵² Insolvency representatives are required to provide evidence of a qualification to act in order to have access to the courts of any member country.¹⁵³ It is however important to understand that OHADA Uniform Acts enjoy precedence over nationally-enacted business laws, which implies that a member country becomes automatically bound by the provisions of the treaty and the Uniform Acts upon ratification of the OHADA Treaty.¹⁵⁴

Should a similar approach be adopted for SADC? Ailola has been the biggest proponent of a SADC cross-border treaty, and to this end concluded that SADC has more uniting than dividing factors that favour a uniform SADC cross-border insolvency convention since at least six of the SADC member States practice Roman-Dutch law and have similar insolvency statutes.¹⁵⁵ Ailola went on to explain that SADC member states have common colonial roots, similar economic policies, accept democracy as a basis for governance and the converging languages and cultural attributes of the countries, which factors also favour a uniform approach to regulating issues of cross-border insolvency within the region.¹⁵⁶



In the same way, Doris also recently proposed the development of a uniform insolvency law approach for SADC to regulate cross-border insolvency disputes.¹⁵⁷ By following the example of the (OHADA), Doris encouraged the SADC communities to harmonise cross-border insolvency law through the establishment of SADC cross-border treaty in order to facilitate international trade and investment.¹⁵⁸

¹⁵² Omar PJ 'Insolvency Law Initiatives in Developing Economies: The OHADA Uniform Law' available at <http://www.iiglobal.org/component/jdownloads/viewcategory/647.html> (accessed on 07 April 2015).

¹⁵³ Omar PJ 'Insolvency Law Initiatives in Developing Economies: The OHADA Uniform Law' available at <http://www.iiglobal.org/component/jdownloads/viewcategory/647.html> (accessed on 07 April 2015).

¹⁵⁴ Doris NL (2012) 262.

¹⁵⁵ Ailola D (2000) 223.

¹⁵⁶ Ailola D (2000) 223.

¹⁵⁷ Doris NL 'Development of a Uniform Insolvency Law in SADC: Lessons from OHADA' (2013) 243/2 *Journal of African Law* 1 – 24.

¹⁵⁸ Doris NL (2013) 6.

The problem with this approach is that unlike the supranationality created by the EU and the Common Court of Justice and Arbitration to ensure that there is uniformity and consistency in the legal interpretation of the OHADA laws,¹⁵⁹ a SADC cross-border insolvency treaty ignores the fact that the relationship between SADC law and the national law of individual SADC member states is still to a large extent determined by the constitutions of individual countries.¹⁶⁰ From a theoretical perspective, the relationship between SADC law and the national laws of its member States is either regulated by a dualist or monist approach to law.

Article 144 of the Namibian Constitution for example, has the effect of incorporating the general rules of public international law and international agreements in Namibia's domestic law. The Supreme Court confirmed Namibia's monist approach and held in *Kauesa v The Minister of Home Affairs* that the ratification by Namibia of the African Charter on Human and People's Rights was directly applicable in Namibia's municipal law as it created rights and duties which individuals could rely upon.¹⁶¹



The position is slightly different from other SADC member States. According to *Republic of Angola v Springbok Investments (Pty) Ltd*, Kirby J held that Botswana follows a dualist approach and Botswana was thus required to ratify and domesticate treaties or conventions for them to be binding under Botswana's municipal law.¹⁶² Although the paper does not dispute the fact that regional collaborations and coordination through RTAs can facilitate the harmonisation of cross-border insolvency laws, it argues nonetheless that the lack of consensus regarding the supremacy of the SADC treaty among the SADC communities means that harmonisation will take a long time to achieve.

Instead, this paper argues that individual countries like Namibia should follow the examples of Malawi, Mauritius, Seychelles, Kenya, South Africa and Uganda and lead the example by

¹⁵⁹ Doris NL (2013) 20.

¹⁶⁰ The SADC Treaty has no provision on the supremacy of SADC law in the countries of its member States.

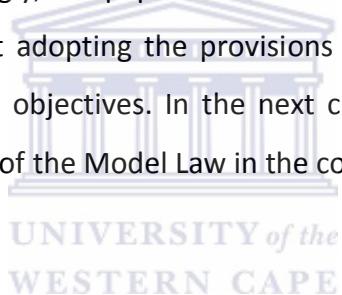
¹⁶¹ 1995 NR 175 (SC).

¹⁶² [2005] 2 B.L.R. 159.

adopting the Model Law. If Namibia enacts the Model Law it will become part of Namibia's domestic law like any other law. In this manner, no question of ratification or applicability can arise. Through this, the Model Law can be used as a vehicle to address the failure and gaps of the common law approach to cross-border insolvency.

2.6 Conclusion

In a nutshell, chapter two looked at the theories of cross-border insolvency that underlie the various national responses. The paper argued that neither theory adequately addresses the complexities of cross-border insolvency. As a result, the paper submitted that the identification of insolvency law objectives should be used as yardsticks to determine the efficiency of existing insolvency laws in place. Accordingly, the paper found that the Namibian framework does not achieve these objectives and that adopting the provisions of the Model would be the most expeditious way to achieve those objectives. In the next chapter, the paper will look at the essential elements and challenges of the Model Law in the context of the Namibian framework.



CHAPTER THREE:

THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

3.1 Introduction

In the previous chapter, the thesis examined the theories of cross-border insolvency as well as the objectives of insolvency law. Chapter three considered the need for cross-border insolvency reform in Namibia in light of the objectives of insolvency law and concluded that the most expeditious way to achieve these objectives was to enact the Model Law. As a result, this chapter will look at the essential elements and challenges of the Model Law from a Namibian perspective.

3.2 The Role of UNCITRAL in Cross-Border Insolvency

The United Nations General Assembly established UNCITRAL in 1966 to promote and further the progressive harmonisation and unification of international trade law by preparing and promoting the use of legislative and non-legislative instruments in a number of key areas of commercial law.¹⁶³ The terms harmonisation and unification are defined by UNCITRAL in this way:¹⁶⁴

‘Harmonisation may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. Unification may be seen as the adoption by States of a common legal standard governing a particular aspect of international business transactions.’

Although used interchangeably, the aims of harmonisation and unification are not the same. Unification focuses on replacing two or more conflicting rules that are applicable to the same

¹⁶³ United Nations General Assembly ‘Resolutions Adopted by the General Assembly during its Twenty-First Session’ available at <http://www.un.org/documents/ga/res/21/ares21.htm> (accessed on 18 March 2015).

¹⁶⁴ UNCITRAL ‘A Guide to UNCITRAL: Basic facts about UNCITRAL’ available at https://www.uncitral.org/uncitral/en/about_us.html (accessed on 17 March 2015).

international legal transaction with a single rule.¹⁶⁵ Harmonisation on the other hand, seeks to coordinate different legal systems by ‘eliminating major differences and creating minimum requirements or standards’.¹⁶⁶

Both chapters one and two of this thesis have discussed the importance of harmonisation and the need thereof. While it is true that many countries have various laws in place – whether in the form of statutes, treaties, conventions or common law – to address the problems of cross-border insolvency, the inconsistencies between these different legal approaches often adversely affects international trade and cross-border investment. These inconsistencies relate to the various national interests protected by countries. Whereas one jurisdiction designs insolvency law as a tool to satisfy the interests of creditors, another one might shape the insolvency law in such a way as to grant a debtor the possibility of a fresh start through business rescue provisions.¹⁶⁷ Thus, the need to harmonise international trade laws, particularly where these concern cross-border insolvencies, is to reduce or remove the obstacles to trade created by the disparities between the national laws governing international trade transactions and to apply common standards across national boundaries to ensure certainty, efficiency, fairness and predictability in the resolution of cross-insolvency disputes.¹⁶⁸

The present goal of UNCITRAL is less ambitious than that of unifying international trade law nonetheless. Instead, UNCITRAL now seeks to harmonise and modernise international trade law in order to enhance legal certainty and predictability.¹⁶⁹ The idea behind the development of the Model Law is to harmonise the various conflicting and inadequate domestic cross-border insolvency laws so that countries can effectively and efficiently work to assist one another and

¹⁶⁵ UNCITRAL ‘Yearbook Volume I: 1968’ available at <http://www.uncitral.org/pdf/english/yearbooks/yb-1968-70-e/vol1-p13-17-e.pdf> (accessed on 12 April 2015).

¹⁶⁶ Bhatia KL *Textbook on Legal Language and Legal Writing* (2010) 243.

¹⁶⁷ Westbrook JL (2010) 244.

¹⁶⁸ Stephan PB ‘The Futility of Harmonization and Unification in International Commercial Law’ available at http://papers.ssrn.com/paper.taf?abstract_id=169209 (accessed on 18 March 2015).

¹⁶⁹ See Block-Lieb S & Halliday T ‘Harmonization and Modernization in UNCITRAL’s Legislative Guide on Insolvency Law’ (2007) 42(3) *Texas Law Journal* 476 for a distinction between ‘harmonisation’, ‘unification’, and ‘modernisation’.

to cooperate in the resolution of cross-border insolvency disputes in a more coordinated and predictable manner.¹⁷⁰

It is important that when discussing the harmonisation of laws however, a distinction is made between laws of supranational organisations, such as the EU, OHADA and those from classical international organisations, such as the United Nations.¹⁷¹ Instruments produced by UNCITRAL may only become binding law after a country has decided to adopt it, either through ratification or by domestic enactment.¹⁷² Thus, harmonisation is voluntary and takes full account of the sovereignty of its member countries as well as the diversity of substantive national laws on insolvency that reflects different stages in the social and economic development. This characteristic explains why it is often difficult to achieve consensus on substantive issues such as cross-border insolvency law, which relies on the acceptability of its texts to achieve wide adoption.

3.3 Overview of the Model Law



The Model Law is a short and procedural legislative template that is made up of 32 Articles.¹⁷³ It seeks to promote cooperation between the courts and other competent authorities and foreign states involved in cases of cross-border insolvency; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; protection and

¹⁷⁰ Article 1 of the Guide to Enactment.

¹⁷¹ Faria JAE ‘Legal Harmonization through Model Laws: The Experience of UNCITRAL’ available at http://www.justice.gov.za/alreasa/conferences/2005sa/papers/s5_faria2.pdf (accessed on 07 April 2015).

¹⁷² Faria JAE ‘Legal harmonization through Model Laws: The Experience of UNCITRAL’ available at http://www.justice.gov.za/alreasa/conferences/2005sa/papers/s5_faria2.pdf (accessed on 07 April 2015).

¹⁷³ Cronin MT ‘UNCITRAL Model Law on Cross-Border Insolvency: Procedural Approach to a Substantive Problem’ (1998) 24(1) *The Journal of Corporation Law* 710. According to Cronin, ‘[The Model Law] is not aimed at changing insolvency law itself but at levelling the playing field by allowing a State to apply its own substantive law to property within its jurisdiction. It leaves each State to determine its own substantive insolvency laws, but requires that State, once it has established those laws, to allow foreign representatives equal, simple, and fast access to those laws.’ [Emphasis added].

maximisation of the value of the debtor's assets; and to facilitate the rescue of financially troubled businesses, thereby protecting investment and preserving employment.¹⁷⁴

In order to promote these objectives, the Model Law applies to and provides solutions for the following cross-border insolvency situations:¹⁷⁵

- (a) inward-bound requests for recognition of a foreign proceeding;
- (b) outward-bound requests from a court or insolvency representative in the enacting State for recognition of an insolvency commenced under the laws of the enacting State;
- (c) coordination of proceedings taking place concurrently in two or more States; and
- (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State.

It does not constitute a treaty, but rather a recommendation for how countries should form their cross-border insolvency systems and as a result, countries are free to incorporate what it observes as appropriate.¹⁷⁶ In deciding what to incorporate, it is noteworthy that the Model Law does not distinguish between consumer and non-consumer insolvency. This means that both legal entities and natural persons, whether traders, merchants or those who do not carry out any business activity, may be subject to the procedure contemplated by the Model Law. Similarly, countries have a choice to limit the application of the Model Law to banking or insurance companies that may be subject to special insolvency regimes.¹⁷⁷

¹⁷⁴ The Preamble of the Model Law.

¹⁷⁵ Article 1 of the Model Law.

¹⁷⁶ In the event that the provisions of the Model Law conflicts with a country's international treaty obligation, Article 3 of the Model Law provides that the requirements of the treaty should prevail.

¹⁷⁷ Article 1(2) of the Model Law. Banking institutions are for example, regulated by the Banking Institutions Act, 1998 (Act No. 2 of 1998) which also provides for the winding-up and judicial management of banking institutions in Namibia.

The Model Law contains an explanatory ‘Guide to Enactment and Interpretation’ (hereinafter the ‘Guide to Enactment’) which is intended to assist countries with how the Model Law may be incorporated into a municipal, pre-existing, insolvency law regime.¹⁷⁸

In the next section, the paper will consider the four key principles of the Model Law which facilitate the efficient resolution of cross-border insolvencies. This chapter will also evaluate the benefits of adopting the Model Law in a Namibian context. The final section of this chapter will examine the challenges to enacting the provisions of the Model Law.

3.4 The Four Key Principles underpinning the Model Law

The Model Law identifies and focuses on four key areas in the field of cross-border insolvency in which international cooperation may be possible:

- Access of Foreign Insolvency Representatives and Creditors to Local Courts (Chapter II);
- Recognition of Foreign Insolvency Proceedings (Chapter III);
- Relief to Assist Foreign Insolvency Proceedings (Chapter III); and
- Cooperation and Coordination with Foreign Courts and Foreign Insolvency Representatives where the Debtor’s assets are located (Chapters IV and Chapter V).

These key principles underscore the key objectives to insolvency law identified in chapter two of this thesis in order to facilitate international trade and investment. The manner in which they do so is considered below:

¹⁷⁸ Majumdar AB ‘The UNCITRAL Model Law on Cross-Border Insolvency’ (2009) 2(1) *India Law Journal* 10.

3.4.1 Access

The key objectives discussed in chapter two requires insolvency laws to provide foreign insolvency representative as well as foreign creditors with direct access to local courts. Furthermore, the objectives also require equitable treatment of similarly situated creditors and the recognition of existing creditor rights including the establishment of clear rules for ranking of priority claims. Chapter II of the Model Law provides for the circumstances in which foreign insolvency representatives and foreign creditors have rights of access to local courts. It gives foreign insolvency representatives and foreign creditors the right to apply directly to a local court to participate in or to commence insolvency proceedings under the substantive laws and jurisdiction of that country.¹⁷⁹

Although it gives foreign representatives and foreign creditors the right of direct access, Article 11 of the Model Law does not modify any substantive conditions under which an insolvency proceeding can be commenced in the local country. Chapter II also gives foreign creditors the right to be notified in much the same way as local creditors will have to be notified in order to establish their claims.¹⁸⁰

Moreover, Article 13(2) of the Model Law makes it clear that access to local courts by foreign creditors does not affect the ranking of claims under local insolvency law. But, Article 13(2) does require that, at a minimum, foreign creditors receive the same treatment as concurrent creditors, unless they are in a class of creditors in which domestic creditors would also be subordinated.¹⁸¹

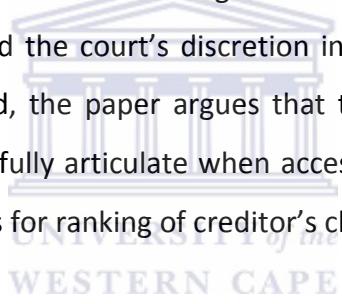
¹⁷⁹ Article 9 of the Model Law entitles a foreign representative to the right to apply directly to a local court to commence insolvency proceedings under Article 11 or to participate in local insolvency proceedings in terms of Article 12. Article 13 entitles foreign creditors to commence and participate in local insolvency proceedings.

¹⁸⁰ Article 14 requires notification to be given to foreign creditors to enable them to initiate and participate in insolvency proceedings.

¹⁸¹ Chan Ho L 'Overview' in Chan Ho L (ed) *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (2012) 9. Even if the Model Law requires the equal treatment of all creditors, be it foreign or local creditors, an alternative approach to the wording of Article 13(2) allows for an exception to the principle of non-discrimination when it comes to foreign revenue and other public law claims. In Namibia for example, Inland Revenue is

It is trite that foreign representatives are required to apply for recognition in order to administer any of the debtor's assets situated in Namibia.¹⁸² It is only after recognition has been refused that a foreign insolvency representative will be allowed to commence local insolvency proceedings in terms of Namibia's local insolvency law. If chapter II of the Model Law is adopted, then Namibian courts will be able to provide direct access to foreign insolvency representatives and foreign creditors in a transparent and predictable manner. Adopting chapter II of the Model Law will also ensure that similarly situated creditors – whether local or foreign – are treated equally or not less favourable than concurrent creditors in terms of local insolvency law.

Adopting the Model Law's provisions on direct access does not mean that the existing common law principles concerning the requirements of recognition of foreign insolvency representatives would be limited at all. Nor would the court's discretion in determining whether recognition should be granted or not. Instead, the paper argues that the Model Law gives Namibia the opportunity to delineate and carefully articulate when access can be granted and further, the opportunity to establish clear rules for ranking of creditor's claims.



3.4.2 Recognition

The key objectives discussed in chapter two also require insolvency laws to provide clear and speedy processes for obtaining recognition of foreign insolvency representatives and of foreign insolvency proceedings. In this regard, chapter III of the Model Law provides for the recognition of foreign proceedings in which a foreign insolvency representative has been appointed and for associated relief. All that is required for an application for recognition of a foreign insolvency proceeding is a certified copy of the (court) decision commencing the foreign insolvency proceeding and appointing the said foreign insolvency representative, as well as a certificate

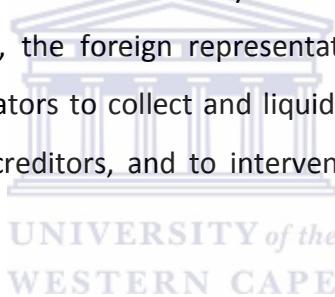
considered a preferred creditor in terms of the Insolvency Act, 1936 and is allowed to prove a claim against the debtor's estate like any other creditor. However, Namibian courts will not adjudicate foreign offences or tax claims.

¹⁸² *Oliver No v Insolvent Estate D Lidchi* 1998 NR 31 (HC) at 38.

from the foreign court affirming the existence of the foreign insolvency proceeding and of the appointment of the foreign insolvency representative.¹⁸³

Once these requirements have been met, a local court may make an order recognising the foreign insolvency proceeding as either a foreign main proceeding, if the application is from a country of the debtor's Centre of Main Interests (COMI), or as a foreign non-main proceeding if the application emanated from a country where the debtor only has an 'establishment'.¹⁸⁴

There are a number of requirements that must be met before a foreign insolvency representative can be recognised in Namibia. As previously shown in chapter one of this thesis, these requirements are determined by the discretion of the court, although the courts are guided in their discretion by considerations of comity and convenience. Once the High Court of Namibia has granted recognition, the foreign representative will generally have the same powers as local trustees or liquidators to collect and liquidate the estate assets, to distribute the proceeds among the estate creditors, and to intervene in any proceeding in which the debtor is a party.



A very important consideration when it comes to recognition is that a Namibian court has the discretion to impose further conditions on the foreign insolvency representative even after recognition has been granted, in order to safeguard the interests of local creditors.¹⁸⁵ This means that the court may require that the claims of local creditors to be discharged first out of the local assets before the foreign insolvency representative will be allowed to repatriate any surplus to satisfy foreign creditors.¹⁸⁶

¹⁸³ Article 15 of the Model Law.

¹⁸⁴ Article 17 of the Model Law.. An 'establishment' is defined by section 2(f) of the Model Law as any 'place of operations where the debtor carries out a non-transitory economic activity with human means and goods and services'. The debtor's COMI not defined in the Model Law but is based on a presumption in terms of Article 16(3) of the Model Law that it is the registered office or habitual residence of the debtor.

¹⁸⁵ *Ex parte Steyn* 1979 (2) SA 309 (O).

¹⁸⁶ Meskin PM et al *Insolvency Law and its Operation in Winding-up* (2013) 17 – 11. According to Meskin, the common law rules regarding the payment of foreign creditors vis-à-vis local creditors is not clear. He argues that even concurrent creditors may have preference over foreign creditors.

The goal of the Model Law is to establish simple procedures for recognition and to provide certainty with respect to the decision to recognise. Against this backdrop, the paper argues that the speed at which recognition occurs will depend not only on the procedural aspect of recognition, but in large also on the conditions for recognition that are as precise as possible. Thus, the enactment of Chapter III in Namibia will provide an excellent opportunity for Namibia to articulate the common law requirements for recognition, the precise procedure required obtaining such recognition and finally, the powers of the foreign insolvency representative after recognition has been granted.

3.4.3 Relief

The main significance of distinguishing between the recognition of a foreign insolvency proceeding as either a foreign main or non-main proceeding lies in the type of relief that may be granted by the local court. The key objectives of insolvency law require courts to enforce a moratorium or stay at the earliest possible time in every country where the debtor has assets. The relief contemplated in Chapter III of the Model Law applies to three distinct situations:

First, interim relief may be granted by the local court upon application for recognition in order to protect those assets within the local court's jurisdiction.¹⁸⁷ Secondly, automatic relief may be granted upon the recognition of the foreign proceedings as a main proceeding.¹⁸⁸ Finally, the local court may, at the request of the foreign representative, grant discretionary relief in respect of both foreign main and non-main proceedings.¹⁸⁹ However, it is noteworthy that once

¹⁸⁷ Article 19 of the Model Law.

¹⁸⁸ The key elements of automatic relief provided in terms of Article 20 of the Model Law include a stay of actions by any creditor, a stay of enforcement concerning the debtor's assets and a suspension of the debtor's right to transfer or encumber his assets.

¹⁸⁹ Article 21 of the Model Law provides a non-exhaustive list of the types of relief that may be granted upon the recognition of a foreign proceeding as either a main or non-main proceeding. These include for instance, the stay of proceedings and suspension of the debtor's power to dispose of assets, to the extent that such relief is not already in place as the consequence of recognition of a foreign main proceeding, and the examination of witnesses and taking of evidence. In addition, a local court may entrust the administration or realisation of all or part of the debtor's local property to the foreign representative or to another person it appoints.

the local court determines the main proceeding, any actions taken in relation to the non-main proceedings are to be made consistent with any remedies granted in the main proceeding.¹⁹⁰

The relief contemplated by the Model Law is not prescriptive, and the exact scope and contours of the relief resulting from recognition of a foreign insolvency proceeding can be aligned with the relief that is already available under local insolvency law. However, even then, in any decision to grant or deny relief, the court must be satisfied that the interests of the creditors and other interested parties, including the debtor, are adequately protected and as a result, may even subject any relief granted to such conditions it considers appropriate.¹⁹¹

The effects of a sequestration order are considered in sections 20, 23, and 75 of the Insolvency Act, 1936.¹⁹² Principally, a sequestration order divests the debtor of his or her estate, and vests it in the Master of the High Court and then in the trustee when appointed.¹⁹³ In addition, a sequestration order automatically stays all civil proceedings against the debtor and also stays the execution of judgments against the debtor once the messenger of court becomes aware of the insolvency.¹⁹⁴ This means that creditors are prevented from effecting any remedy against the debtor or his or her property, or from initiating or continuing with any execution or other procedure for the satisfaction of a claim that may be proved in the liquidation or sequestration procedure.¹⁹⁵ However, it is not clear whether all creditors in this instance also refer to secured creditors who may still able to continue to enforce their claims in liquidation even where the debtor is placed under judicial management.¹⁹⁶

¹⁹⁰ Zumbro PH ‘Cross-border Insolvencies and International Protocols – an Imperfect but Effective Tool’ (2010) 11(2) *Business Law International* 159.

¹⁹¹ Article 22 of the Model Law.

¹⁹² Act No. 24 of 1936.

¹⁹³ Section 20(1)(a) of the Insolvency Act, 1936.

¹⁹⁴ Section 20(1)(b) and (c) of the Insolvency Act, 1936.

¹⁹⁵ Creditors can apply for the termination of the stay of the civil proceedings. However, in order to be granted this relief the creditor must satisfy the requirements of section 75(1) of the Insolvency Act, 1936 or section 364 of the Companies Act, 2004.

¹⁹⁶ In terms of section 434 of the Companies Act, 2004 a stay in execution under judicial management is only effected with court approval.

From this it is clear that the application of the stay applies automatically by operation of law. The paper submits however, that Namibia's legal framework does not specify all the relief measures available to creditors and the requirements for them. Based on this submission, the paper argues that the enactment of Chapter III of the Model Law will provide a useful opportunity for Namibian courts to determine with more specificity, the provisional and automatic measures that may be available to creditors upon recognition of foreign insolvency proceedings. In particular, this will also provide a further prospect for Namibia to clearly define the exceptions to the general rule on stay orders during liquidation/sequestration and the position of secured creditors during liquidation/sequestration.

The UNCITRAL Legislative Guide on Insolvency Law for example, states that where secured creditors are excluded from the scope of stay orders, then some flexibility may be required in cases where the trustee or liquidator is able to achieve a better result that maximizes the value of the debtor's assets for the collective benefit of all creditors if the stay is extended to secured creditors.¹⁹⁷ Where a stay order has been imposed over secured creditors to enable the maximisation of assets, then it should be of limited, specified duration, striking a proper balance between creditor protection and objectives of insolvency law.¹⁹⁸ If the secured creditor is not adequately protected against the risk of loss or depreciation of the assets covered by the security interest, then the creditor should be able to apply to the court for relief from the stay, as the law recognises, but the law should also establish the grounds and the criteria that the secured creditor needs to meet in order to obtain relief from the stay.¹⁹⁹

3.4.4 Cooperation and Coordination

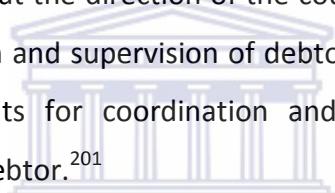
¹⁹⁷ The UNCITRAL 'Legislative Guide on Insolvency Law' available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (accessed on 04 April 2015).

¹⁹⁸ The UNCITRAL 'Legislative Guide on Insolvency Law' available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (accessed on 04 April 2015).

¹⁹⁹ The UNCITRAL 'Legislative Guide on Insolvency Law' available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (accessed on 04 April 2015).

Finally, the key objectives require the protection and maximisation of the value of the debtor's property for the benefit of all interested parties and the economy in general. Chapters IV and V of the Model Law deals with coordination between local and foreign insolvency proceedings concerning the same debtor and facilitates coordination between two or more foreign proceedings involving the same debtor. It requires courts in different jurisdictions to cooperate – either directly or through representatives – to the maximum extent possible with both foreign and local representatives on issues governed by the Model Law.²⁰⁰

Cooperation in this context implies, under the circumstances provided by the Model Law, that a single debtor's insolvent estate will be administered fairly and efficiently, with a view to maximising benefits to creditors. The possible means for achieving cooperation may be through the appointment of person to act at the direction of the court; communication of information; the coordination of administration and supervision of debtor's assets and affairs; the approval or implementation of agreements for coordination and the coordination of concurrent proceedings regarding the same debtor.²⁰¹



There are also several provisions of the Model Law that address the coordination of concurrent insolvency proceedings. The recognition of a foreign main or non-main proceeding does not prevent the commencement of local proceedings.²⁰² When local proceedings have been commenced against the same debtor, then the effects of this proceeding should extend only to those assets of the debtor that are situated within the local court's jurisdiction.²⁰³

If one has to consider the Model Law's provisions on cooperation in a Namibian context, it is firstly important to mention that there is no statutory provision for Namibian courts to cooperate or to assist foreign courts in the administration of foreign insolvency orders. This

²⁰⁰ Article 25 and 26 of the Model Law.

²⁰¹ Article 27 of the Model Law.

²⁰² Article 28 of the Model Law.

²⁰³ Article 29 of the Model Law. The Model Law calls for maximum cooperation and coordination of relief between the courts of different jurisdictions when there are concurrent insolvency proceedings against the same debtor.

matter is often left entirely to the discretion of the courts.²⁰⁴ Here, the judgement of Innes J in the leading case of *Ex parte BZ Stegmann* must be noted:

‘But, on the other hand, the same Court, acting from motives of comity or convenience is equally justified in allowing the order of the judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of the such order’.

Although this discretion of the court is based on principles of comity or convenience, it obviously creates uncertainty as to when and under what circumstances a court will have jurisdiction to cooperate and coordinate with courts from different jurisdictions in cases of cross-border insolvency. There are a number of advantages to Namibia relying on a statute enacting the Model Law, which expressly defines the powers of Namibian courts, rather than relying on its common law to render assistance to foreign courts and foreign insolvency representatives. If Namibia were to enact the Model Law’s provisions on cooperation and coordination, then it will be able to provide an express and predictable legislative framework that conforms to international norms for effective regulation of cross-border insolvencies thereby facilitating international trade and investment.

Does Namibia stand to lose or gain from adopting the Model Law? Save for some administrative costs of enacting the Model Law as part and parcel of the Namibian insolvency framework, this paper submits that that Namibia in fact tends to benefit considerably should it adopt the Model Law. If one looks at the problems associated with cross-border insolvency that have been identified in chapters one and two of this paper, then the following issues will come up:

- jurisdiction to initiate proceedings against a debtor;
- the choice of law to be applied in the insolvency proceedings;

²⁰⁴ An indication of the cooperation that the courts are willing to give the foreign representative appears from the appellate judgment in *Moolman v. Builders & Developers (Pt.) Ltd (in provisional liquidation): Jooste Intervening* 1990 (1) SA 954 (A).

- whether there should be multiple/concurrent proceedings and the law applicable to such multiple/concurrent proceedings;
- the recognition of foreign sequestration or winding-up orders;
- the powers of foreign representatives upon recognition; and
- the priorities of foreign creditors *vis à vis* local creditors.

How does the Model Law address these problems? The discussion of the four principles underpinning the Model Law reveals the following:

First, the Model Law does not limit the jurisdiction of local courts to sequester or to liquidate the estates of local debtors who are domiciled or incorporated in that country. Nor does the Model Law limit the jurisdiction of a local court to sequester or liquidate the estate of a foreign debtor who may have assets situated within its jurisdiction, even where no foreign insolvency proceedings have been commenced against this foreign debtor.²⁰⁵ When foreign insolvency proceedings have been instituted against a foreign debtor in his or her country of domicile or incorporation, or in a country in which the debtor has an establishment, then the local court is first obliged to expeditiously recognise (or not) the foreign insolvency proceeding as either foreign main or non-main, secondly to grant the foreign insolvency representative as well as any foreign creditors the right of direct access and ancillary relief and finally, to cooperate and coordinate with the foreign court in respect of the debtor's assets for the benefit of all his or her creditors. However, the Model Law still requires the different courts to coordinate, cooperate and to assist one another in cases where the foreign insolvency proceeding has been commenced in a country in which the debtor only has assets.

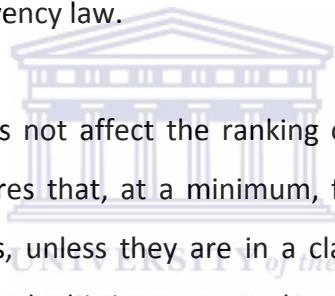
Secondly, by not limiting the jurisdiction of courts to open insolvency proceedings, the Model Law recognises that multiple or concurrent proceedings may occur in different countries where

²⁰⁵ Section 149 of the Insolvency Act, 1936 gives the High Court of Namibia the jurisdiction to sequester or liquidate the estate of foreign debtors when it appears equitable or convenient.

the debtor may have a connection. Thus, it requires the courts of these countries to coordinate any relief granted and to cooperate and assist one another.

Thirdly, the Model Law outlines the procedure for the application of recognition. Although it is left to the substantive insolvency laws of the various countries to determine when recognition will be granted, it seeks transparency in the way that recognition is granted or refused.

Fourthly, the Model Law only proposes the kind of powers that may be granted to foreign insolvency representatives upon recognition. As previously mentioned, the relief contemplated by the Model Law is not prescriptive, and the exact scope and contours of the relief resulting from recognition of a foreign insolvency proceeding can be aligned with the relief that is already available under local insolvency law.



Finally, while the Model Law does not affect the ranking of creditors under local insolvency proceedings, it nonetheless requires that, at a minimum, foreign creditors receive the same treatment as concurrent creditors, unless they are in a class of creditors in which domestic creditors would also be subordinated. This is to ensure that both foreign and local creditors are treated with some measure of equality in the distribution of the debtor's estate.

These benefits for international trade and cross-border investment cannot be overlooked. In the paper's view, Namibia should formalise the jurisdiction of the High Court of Namibia to grant not only access, recognition and relief to foreign insolvency representatives and foreign creditors but also to assist and cooperate with foreign courts in the event of a cross-border insolvency dispute, by way of enactment of the Model Law. Not only would this increase the efficiency and transparency of the courts when addressing cross-border insolvency matters, it will also ensure that when debtors and creditors assess Namibia's jurisdiction on insolvency law and its capacity to address cross-border elements as part of their risk assessment in doing

business there, they will find that it has a predictable legal system that conforms to international standards of best.²⁰⁶

What the Model Law does not however address is the choice of law that is applicable to the insolvency proceedings. This is because generally, the applicable law for any insolvency proceedings is the law of the country in which the sequestration or liquidation order has been issued. The *lex (forum) concursus* or the forum law determines the consequences of insolvency proceedings, which include for example, the powers of a trustee, liquidator or foreign insolvency representative to administer the debtor's estate and the bases of distributing this estate to creditors. Owing to this, all that the Model Law seeks to achieve is a standardised procedure in how the *lex concursus* operates in order to ensure that cross-border insolvencies are especially addressed in a coordinated and predictable manner.

Be that as it may, the Model Law is not without its problems.

3.5 Challenges of the Model Law

One of the major challenges of the Model Law is the result of its status as a non-binding instrument that relies on the voluntary acceptance and adoption by individual countries in order for it to be binding. Since it is not a treaty or convention but a recommended legislative text, it does not compel adoption or implementation of any or all of its provisions. In fact, the Guide to Enactment states that in incorporating the text of a model law into its system, a country may modify or leave out some of its provisions.²⁰⁷ However, the challenge with this flexible approach may well have encouraged countries to deviate from the provisions of the Model Law, despite UNCITRAL's pleas not to do so.²⁰⁸ Ultimately, the deviation from the

²⁰⁶ Mason RF 'Cross-border Insolvency and Legal Translation' (2012) 21(2) *International Insolvency Review* 112.

²⁰⁷ Article 25 of the Guide to Enactment.

²⁰⁸ Mohan SC (2012) 216. Mohan notes nonetheless that if the making of changes were not possible, many of the countries who have adopted the Model Law with various changes may well not even have done so.

provisions of the Model Law affects the degree of, and certainty about harmonisation that can be achieved.

Another challenge of the Model Law is the reciprocity requirement that some countries impose when enacting the Model Law.²⁰⁹ While the Model Law is not based on reciprocity, it does not rule it out, and as a result, ‘more than a third of the countries that have presently adopted the Model Law in some form or the other have nonetheless introduced a reciprocity requirement’.²¹⁰ The requirement for reciprocity entails the mutual exchange of privileges in such a way that any country will have to adopt the Model Law in order to benefit from the laws of the countries that have adopted it.²¹¹

The paper shares the view that the reciprocity requirement contradicts the objectives of the Model law to achieve cooperation. Khumalo noted that ‘countries that cannot benefit from the Model Law are left in the same position as they were prior to the adoption of the Model Law, with foreign and unfamiliar rules and procedures which are for the most part inappropriate or outdated’.²¹² Thereby, it creates the same uncertainty that the Model Law is trying to eliminate and leaves the international law on cross-border insolvency with considerable disparities. Therefore, in order to achieve a satisfactory degree of harmonisation and certainty, countries are recommended to make as few changes as possible when incorporating the Model Law into their legal systems.²¹³

A third challenge of the Model Law is the consequence of non-recognition of foreign insolvency proceedings. In terms of the Model Law, foreign main proceedings are instituted in the jurisdiction where the debtor has its COMI whilst non-main proceedings are commenced in a

²⁰⁹ UNCITRAL ‘Status of Model Law on Cross-Border Insolvency’ available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (accessed on 25 October 2014).

²¹⁰ Mohan SC (2012) 208.

²¹¹ Khumalo S (2004) 27.

²¹² Khumalo S (2004) 28.

²¹³ Article 20 of the Guide to Enactment.

country where the debtor has an establishment. The consequences of Chapter III is that if the debtor does not have a COMI nor an "establishment" in Namibia for example, but only has assets in the country, then the Namibian High Court may not have the jurisdiction to recognise the application for recognition as either a main or non-main proceeding and that insolvency proceeding will thus not be eligible for any relief contemplated under Chapter III.²¹⁴ Thus, certain questions may arise in the case of non-recognition:

1. Does the debtor's property in Namibia form part of the estate of the main proceedings in another foreign country in which the debtor has a COMI?
2. Will the local creditors have to prove their claims and take part in the foreign insolvency proceedings, when foreign insolvency proceedings have been instituted?

So while it is true that the Model Law seeks only the harmonisation of procedural cross-border insolvency laws, it touches upon the very substantive insolvency laws of countries nonetheless, and sometimes exacerbating uncertainty where the expected outcome is not what was contemplated by its provisions.

A fourth challenge to the Model Law is the definition or criterion for what constitutes cooperation. Cooperation involves the communication of courts from different jurisdictions with both foreign and local representatives in such a way that the debtor's estate is handled in a way that is in the best interests of all parties involved.²¹⁵ Westbrook argues that the challenge however, is to determine the exact definition of what is in the best interests of all parties involved because countries often protect different national interests when it comes to

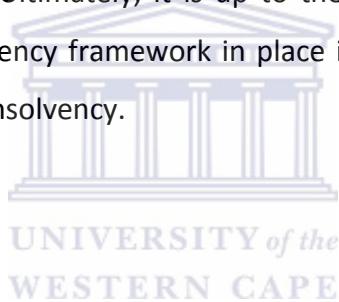
²¹⁴ Weidemann J & Stander AL (2012) 15(5) *Potchefstroom Electronic LJ* 203.

²¹⁵ Westbrook JL (2010) 243.

insolvency law.²¹⁶ Given these differences, there is need for a common definition of what should be achieved through such cooperation.

On another point, the paper agrees that the provision of relief measures granted in terms of the Model Law coupled with the obligation of courts and insolvency to cooperate and communicate create optimum conditions in which to conduct any business rescue efforts. The only problem with the Model Law however is that it does not specifically deal with the requirements under which a decision to either liquidate or rescue will be justified and it contains no provisions as to when rescue efforts need to be abandoned. Some jurisdictions, including South Africa make provision for business rescue provisions in the event of liquidation and there are certain specified conditions in place to determine whether or not a company should be liquidated or rescued. Ultimately, it is up to the enacting country like Namibia to ensure that it has a proper insolvency framework in place in order to compliment the Model Law's provisions on cross-border insolvency.

3.6 Conclusion



Despite its shortcomings, the Model Law has the potential to advance cooperation between courts and the coordination of various insolvency proceedings pertaining to a debtor who is the subject of insolvency laws in various jurisdictions. It will facilitate the ease of access for foreign insolvency representatives as well as foreign creditors in Namibian courts.

The time has come for the Namibian government to give effect to its support for the Model Law and adopt it as part of the Namibian law. If Namibia enacts the Model Law, creditors will realise a higher percentage of their claims compared to the average recovery rate of 34.9 cents on the

²¹⁶ Westbrook JL (2010) 244. Westbrook highlights the difference between insolvency laws which aim to protect creditors (i.e. pro-creditor insolvency systems) and those that aim to protect the debtor (i.e. pro-debtor systems) by availing business rescue provisions, for example.

dollar.²¹⁷ This will lead to more confidence among investors, traders, and banks, which will benefit Namibia's economy.

Still, the paper agrees that whether or not the Model Law would make a significant difference to the way Namibia currently deals with cross-border insolvency issues depends not only in the manner or extent in which Namibia adopts its provisions, but also largely on its degree of acceptance by other jurisdictions with whom Namibia has a trading relationship. The next chapter will consider the manner in which South Africa and Malawi have adopted the Model Law. This comparative study will guide Namibia in the manner in which it should incorporate the provisions of the Model Law.



²¹⁷ The World Bank 'Doing Business 2014: Economy Profile of Namibia' available at <http://openknowledge.worldbank.org/bitsream/handle/10986/16204/19984.pdf?sequence=1> (accessed on 30 October 2014) 93. The World Bank Doing Business Report ranks Namibia at 85 in the ranking of 189 economies on the ease of resolving insolvency.

CHAPTER FOUR:

COMPARATIVE STUDY

4.1 Introduction

In the previous chapter, the thesis considered the essential elements and challenges of the Model Law from a Namibian perspective. Chapter three concluded that the ultimate success of the Model Law and the achievement of its objectives are heavily dependent upon whether, and in what manner, countries choose to enact it. It is therefore useful to have an overview of the experiences of some of the African countries which have already enacted or are proposing to enact the Model Law. The aim of chapter four therefore, is to demonstrate the manner in which South Africa and Malawi in particular, have adopted the Model Law.

4.2 South Africa

Even if South Africa is not a member of UNCITRAL, it was one of the very first countries to adopt the Model Law in the form of the Cross-Border Insolvency Act, 2000 (hereinafter the ‘Act’).²¹⁸ The Act consists of six chapters on access, recognition of foreign courts and foreign representatives as well as on cooperation and concurrent proceedings.²¹⁹ Due to space and time however, it will be impossible to discuss all the various provisions of the Cross-Border Insolvency Act, 2000 in detail. Yet it may be useful to give an overview of some of the substantive provisions of the Act.

Prior to the discussion of the contents of the Act, it must be emphasized that the Cross-Border Insolvency Act, 2000 introduces the requirement of reciprocity.²²⁰ Although the term ‘reciprocity’ has no universal meaning, the concept may be thought of as ‘we’ll recognise and

²¹⁸ Mohan SC (2012) 12.

²¹⁹ Act No. 42 of 2000.

²²⁰ In terms of section 2(2)(a) of the Cross-Border Insolvency Act, 2000, the Act applies in South Africa in relation to those countries designated by the Minister of Justice. Designation is accorded on the basis of reciprocity.

enforce your judgments and orders if you will recognise and enforce ours'.²²¹ Therefore, if foreign countries want to avail themselves of the benefits accorded to them by the Cross-Border Insolvency Act, 2000, they will in turn, have to extend the same benefits under their insolvency systems to South African insolvency representatives and creditors.²²²

Despite the lapse of almost 15 years since the passing of the Cross-Border Insolvency Act, 2000 countries have been designated yet, rendering the Act effectively inoperative. The effect of such designation is that a dual system will operate in terms of which the Roman-Dutch common law in regard to international private law and precedent will govern cross-border insolvency cases between South Africa and non-designated countries, while the Cross-Border Insolvency Act, 2000 will apply in relation to cases involving designated countries.²²³

According to the South African Law Commission (SALC), the reasons for including reciprocity as a requirement in the Act was based on the concerns that South Africa should not allow representatives of a foreign state easy access to South Africa's cross- border procedures while South Africans may find it very difficult and expensive to obtain similar recognition in the state in question.²²⁴ In addition, the requirement of reciprocity apparently ensures the protection of local creditors, trustees and liquidators.²²⁵

²²¹ Yamauchi KD 'Should Reciprocity Be a Part of the UNCITRAL Model Law on Cross-Border Insolvency?' (2007) 16(1) *International Insolvency Review* 146.

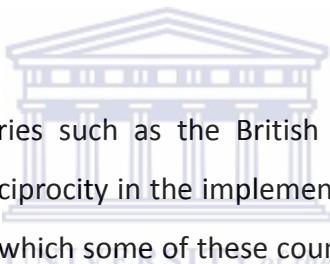
²²² Meskin PM et al *Insolvency Law and its Operation in Winding-Up* (2013) 17 – 14(3). See also Mohan SC (2012) 12 who argues that the South African approach to reciprocity appears to be the most restrictive as the Act applies only to those countries designated by the Minister of Justice. The mere adoption of the Model Law by another country is therefore no guarantee of reciprocity under South African law until such time that a country has been designated in terms of section 2(2)(a) of the Act.

²²³ Bertelsmann E et al *Mars The Law of Insolvency in South Africa* 9 ed (2008) 679. According to the authors, 'one result of such a dualistic system will be that, under the Act, creditors from designated countries will rank no lower than South African concurrent creditors, but under South African common law, creditors from non-designated countries will rank after the South African concurrent creditors and the creditors from designated countries'. See also Katz L 'Cross-border insolvency and the recognition of foreign liquidators in South Africa' available at https://www.ensafrica.com/newsletter/briefs/GRIRO7Digital_extracts.pdf (accessed on 17 April 2015).

²²⁴ South African Law Commission (Project 63) *Interim Report on the Review of the Law on Insolvency: The Enactment in South Africa of UNCITRAL's Model Law on Cross-Border Insolvency* (1999) para 4.15.1.

²²⁵ South African Law Commission (Project 63) *Interim Report on the Review of the Law on Insolvency: The Enactment in South Africa of UNCITRAL's Model Law on Cross-Border Insolvency* (1999) para 4.15.2. South Africa is considered to embody a pro-creditor system that seeks to protect the interests of local creditors. The SALC was

Even so, this requirement of reciprocity is a significant deviation from provisions of the Model Law.²²⁶ Zulman regards the requirement of reciprocity as a serious flaw, which is not in the spirit of the Model Law.²²⁷ He argues that the difficulty with reciprocity, like comity, is that these considerations are usually political in nature: thus, a particular country may be acceptable at one point in time and unacceptable at another.²²⁸ Similarly, Clift criticises reciprocity not only because it has generally proven to be a useless means of achieving harmonisation, but also because creditors and other stakeholders in the insolvency proceedings who have limited capacity to influence the legislative policy of their governments should not be penalised because of that policy.²²⁹ Therefore, it can be argued that the requirement of reciprocity introduces unnecessary uncertainty to the question of recognition in cross-border insolvency cases.



South Africa follows other countries such as the British Virgin Islands, Mauritius, Mexico, Romania and Spain that require reciprocity in the implementation of the Model Law.²³⁰ After a comparison of the various ways in which some of these countries require reciprocity, Yamauchi argues that introduction of reciprocity leaves countries with the same lack of predictability and potential unfairness that the Model Law was seeking to alleviate.²³¹ He adds that because of the protective measures contained in the Model Law, the requirement of reciprocity of any sort

concerned that the Model Law seeks to protect mostly foreign creditors and insolvency representatives, leaving local creditors susceptible to inequality when foreign insolvency proceedings are instituted in South Africa.

²²⁶ The Model Law does not provide for reciprocity but it does not also expressly rule it out.

²²⁷ Zulman RH (2009) 816.

²²⁸ Zulman RH (2009) 817.

²²⁹ Clift J 'The UNCITRAL Model Law on Cross-Border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency' (2004) 12 *Tulane Journal of International & Comparative Law* 343

²³⁰ Mohan SC (2012) 12. Spain did not formally adopt the Model Law, but it does support the requirement of reciprocity in its insolvency legislation.

²³¹ Yamauchi KD (2007) 179. See also Khumalo S (2004) 27 who argues that countries that cannot benefit from the Model Law are left in the same position as they were prior to the adoption of the Model Law, with foreign and unfamiliar rules and procedures which are for the most part inappropriate or outdated. In this way, the requirement of reciprocity therefore contradicts the objectives of the Model law to achieve cooperation.

is not necessary.²³² Yamauchi concludes that 'Countries should adopt the Model Law, with no reference to reciprocity of any sort. Those countries that have included reciprocity provisions should consider repealing those provisions immediately'.²³³

In the next section, the thesis will give an overview of the Cross-Border Insolvency Act, 2000.²³⁴

Chapter 1: Interpretation and Fundamental Principles

The Model Law excludes from its operation certain specialised institutions such as banks and insurance companies that may be subject to special insolvency regimes.²³⁵ The Cross-Border Insolvency Act, 2000 deviates from this provision of the Model Law in that it does not restrict the types of debtors that it will apply to.²³⁶ For South Africa, the inclusion of banks and insurance companies under the Cross-Border Insolvency prove to be problematic.

Part IV of South Africa's insurance Acts provide for the winding-up of insurance companies.²³⁷ The Banks Act, 1990 contains special provisions relating to the winding-up or judicial management of banks.²³⁸ Although the latter Act also incorporates the winding-up provisions of the Companies Act, 2008, it makes provision only for the Registrar of banks to initiate and oppose insolvency proceedings.²³⁹ Thus, coordination between the Registrar of Banks and foreign insolvency representatives will be required, which may obstruct and prolong the

²³² Yamauchi KD (2007) 179.

²³³ Yamauchi KD (2007) 179.

²³⁴ Act No. 42 of 2000.

²³⁵ Article 1(2) of the Model Law.

²³⁶ According to the South African Law Commission (Project 63) *Interim Report on the Review of the Law on Insolvency: The Enactment in South Africa of UNCITRAL's Model Law on Cross-Border Insolvency* (1999) para 4.6, no comments were received on the question whether special insolvency regimes in South Africa, such as banks or insurance companies, should be excluded from the Model law and therefore no exclusions are provided for in the Act.

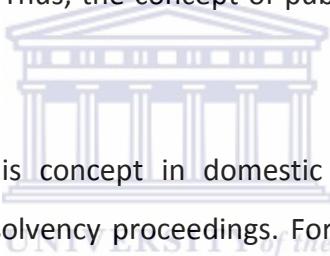
²³⁷ The Long-Term Insurance Act, 1998 (Act No. 52 of 1998) and the Short-Term Insurance Act, 1998 (Act No. 53 of 1998). Both Acts also incorporate the relevant provisions of the Companies Act, 2008 in respect of the winding-up of insurance companies.

²³⁸ Section 68 of the Banks Act, 1990 (Act No. 94 of 1990).

²³⁹ Section 68 of the Banks Act, 1990.

process of enforcement altogether as foreign insolvency representatives will have to acquaint themselves with the special rules for the winding-up of banks.

Furthermore, the language in section 6 of the Act states that South African courts may refuse to carry out an action falling under the Act if this is contrary to public policy.²⁴⁰ Although this section complies with Article 6 of the Model Law, the concept of ‘public policy’ is not defined in either the Model Law or the Act.²⁴¹ Generally, it represents the public opinion of a particular community at a particular time but there is no universal definition as it is grounded in the domestic laws of countries. In South Africa, considerations of public policy can be found in legislation, the common law, good morals or the public interest and have since 1994 been anchored primarily in fundamental values enshrined in the South African Constitution, particularly in the Bill of Rights.²⁴² Thus, the concept of public policy is given a broad meaning under South African law.²⁴³



The lack of properly defining this concept in domestic insolvency laws has far-reaching consequences for cross-border insolvency proceedings. For example, O’Flynn states that U.S. courts have held that the potential for U.S. creditors to get less money than a foreign creditor as a result of a foreign insolvency proceeding is not enough to properly invoke the public policy exception.²⁴⁴ Will South African courts come to a similar conclusion? Clearly, the Cross-Border Insolvency Act, 2000 should comprehensively define those circumstances which may manifestly be contrary to public policy.

²⁴⁰ Section 6 of the Cross-Border Insolvency Act, 2000.

²⁴¹ According to Mohan SC (2012) 6, Article 6 of the Model Law does not define public policy as ‘the notion of public policy is grounded in national law and may differ from State to State’.

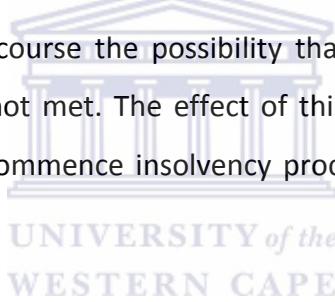
²⁴² Hawthorne L ‘Public Policy: The Origin of a General Clause in the South African Law of Contract’ (2013) 19(2) *Fundamina* 306.

²⁴³ In terms of the Guide to Enactment, ‘It is important to distinguish between the notion of public policy as it applies to domestic affairs and the notion of public policy as it is used with respect to matters of international cooperation and the question of recognition of effects of foreign laws [which must be understood more restrictively than domestic law]’. [Emphasis added].

²⁴⁴ O’Flynn MR ‘The Scorecard so Far: Emerging Issues in Cross-Border Insolvencies Under Chapter 15 of the U.S. Bankruptcy Code’ (2012) 32(2) *Northwestern Journal of International Law & Business* 413.

Chapter 2: Access of Foreign Representatives and Creditors

Chapter two of the Cross-Border Insolvency Act, 2000 gives foreign insolvency representatives the right to directly access South African Courts by commencing and participating in local insolvency proceedings provided that they have obtained recognition.²⁴⁵ In contrast to Chapter 2 of the Model Law, the Act states that it is only after recognition has been granted that foreign insolvency representatives acquire *locus standi* to set aside voidable dispositions in terms of local insolvency law and may also intervene in any proceeding in which the debtor is a party.²⁴⁶ The requirement of recognition under the Act does not prohibit the right of foreign insolvency representatives to directly access the courts. Due to the fact that the requirements for recognition are largely based on the common law and precedent, it is often difficult for foreign insolvency representative to establish with relative ease and certainty what these requirements should be. However, there is of course the possibility that recognition may not be granted where certain requirements are not met. The effect of this refusal is that foreign insolvency representatives may be able to commence insolvency proceedings in terms of South African insolvency law.



Chapter two of the Cross-Border Insolvency Act, 2000 also provides foreign creditors with the right to directly access local courts and copies the wording of Article 13 of the Model Law verbatim. Accordingly, the ranking of creditors' claims will be based on the *lex fori*, i.e. South African insolvency law (as opposed to South Africa's conflict of law rules), subject to the requirement that the claims of foreign creditors will not be ranked lower than concurrent creditors.²⁴⁷ In this manner, the Cross-Border Insolvency Act, 2000 intends to bring about an equitable system of distribution that takes into account of the interests of foreign creditors in ways not achieved by the common law.²⁴⁸

²⁴⁵ Sections 9, 10, 11, 12 and 13 of the Cross-Border Insolvency Act, 2000.

²⁴⁶ Sections 23 and 24 of the Cross-Border Insolvency Act, 2000.

²⁴⁷ Section 13(3) of the Cross-Border Insolvency Act, 2000.

²⁴⁸ Smith A & Boraine A 'Crossing Borders into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law' (2002) 10(1) *American Bankruptcy Institute Law Review* 215.

Chapter 3: Recognition of Foreign Courts and Foreign Representatives

As with Article 19 of the Model Law, South African courts will also be empowered to grant urgent provisional relief pending the outcome of the recognition application in order to protect the debtor's assets or the interests of creditors.²⁴⁹ This relief would include a stay of execution; the entrusting of the administration or realisation of assets to the representative or another designated person; suspension of the debtor's right to dispose of his or her assets; the examination of witnesses and the taking of evidence; or any other conditional relief that is already available under South African law.²⁵⁰ Even if countries are given the discretion to determine the scope of relief measures, South Africa has included the minimum relief measures that are 'required' by the Model Law.

The most controversial aspect of Chapter three deals with effects of recognition of a foreign main proceeding. In terms of section 25 of the Act, it stays local individual proceedings as to the debtor's affairs and also execution against his or her assets and the debtor's right to dispose of assets is stayed, the right of the debtor to transfer, encumber or otherwise dispose of assets are suspended.²⁵¹ The stay does not however, affect the rights of creditors to begin individual actions or proceedings for preserving a claim against the debtor, to request the opening of a local insolvency proceeding, or to file claims in that proceeding despite the stay.²⁵²

As previously mentioned in chapter three of this thesis, the Model Law encourages local cross-border insolvency laws to provide some flexibility with regards to the question whether secured creditors should be excluded or included in the stay orders particularly where it is clear that a trustee or liquidator is able to achieve a better result that maximises the value of the debtor's assets for the collective benefit of all creditors if the stay is extended to secured creditors.

Clearly, the Cross-Border Insolvency Act, 2000 ignores this plea.

²⁴⁹ Section 19(1) of the Cross-Border Insolvency Act, 2000.

²⁵⁰ Section 19(1) read with sections 21(1)(c), (d) and (g) of the Cross-Border Insolvency Act, 2000.

²⁵¹ Act No. 42 of 2000.

²⁵² Section 20(3) – (4) of the Cross-Border Insolvency Act, 2000.

Chapter 4: Cooperation with Foreign Courts and Foreign Representatives

Chapter four prompts the South African courts to ‘cooperate to the maximum extent possible with foreign courts or foreign representatives, by communicating directly with trustee, liquidator or judicial manager, curator, or receiver.²⁵³ The manner in which this cooperation may be implemented is through the appointment of a person or body to act at the direction of the court, through communication of information, through the coordination of the administration and supervision of the debtor’s assets and affairs, through the approval or implementation by courts of agreements concerning the coordination of proceedings and through the coordination of concurrent proceedings regarding the same debtor.²⁵⁴

This obligation of local and foreign courts to cooperate and communicate with insolvency representatives creates an optimal condition in which business rescue efforts can be conducted. However, the Model Law does not specifically deal with the business rescue. Chapter six of the South African Companies Act, 2008 introduced a business rescue regime into South African law with a view to replace the judicial management of companies.²⁵⁵ This business rescue procedure enables a company which is in financial distress to place itself under the supervision of a business rescue practitioner who will attempt to assist it to make a financial recovery in such a way that it continues to exist on a ‘solvent basis’.²⁵⁶ It is not the object of this chapter to discuss whether or not this new business rescue regime is successful or not. However, the paper is making the point that ultimately, it is up to the enacting country to ensure that it has a proper insolvency framework in place providing for the rescue of businesses in order to compliment the Model Law’s provisions on cross-border insolvency.

²⁵³ Section 25(1) of the Cross-Border Insolvency Act, 2000.

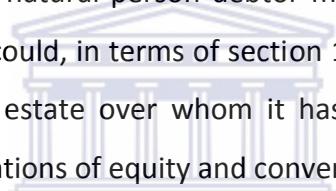
²⁵⁴ Section 27 of the Cross-Border Insolvency Act, 2000.

²⁵⁵ Act No. 71 of 2008.

²⁵⁶ Act No. 71 of 2008.

Chapter 5: Concurrent Proceedings

Chapter five enables local proceedings to be commenced once a foreign proceeding has been recognised by a South African court.²⁵⁷ However, the effects of the local proceeding will then be limited as prescribed to the local assets of the debtor.²⁵⁸ Whenever local insolvency proceedings are taking place concurrently regarding the same debtor, then section 29 of the Cross-Border Insolvency Act, 2000 prompts courts to seek cooperation and coordination as directed in chapter 4 of the Act and to coordinate any relief granted in either proceeding.²⁵⁹ Foreign insolvency representatives or foreign creditors can apply for the commencement of local insolvency proceedings in terms of South African insolvency law if recognition is not granted provided that the local statutory requirements are met. If these requirements are met, then the local estate of a foreign natural person debtor may for instance be sequestered in South Africa. However, the court could, in terms of section 149, refuse to accept the surrender or sequestration of the debtor's estate over whom it has jurisdiction (or a foreign natural person debtor) based on considerations of equity and convenience.



Chapter 6: General Provisions

Section 149 of the South African Insolvency Act, 1936, regulates the jurisdiction of the provincial or local division of the South African High Court to grant sequestration orders.²⁶⁰ In terms of section 149 of the Insolvency Act, 1936 the jurisdiction of the court over a debtor is determined by the fact that the debtor, at the date of the application, owns or is entitled to property situated within the jurisdiction of the court or that he or she was resident or carried on business within the jurisdiction of the court during the preceding 12 months.

²⁵⁷ Section 28(1) of the Cross-Border Insolvency Act, 2000.

²⁵⁸ Section 28(2) of the Cross-Border Insolvency Act, 2000.

²⁵⁹ Act No. 42 of 2000.

²⁶⁰ Act No. 24 of 1936. Namibia inherited the Insolvency Act, 1936 from South Africa, however, any amendments in South Africa to the Act from the date of Namibia's independence are not applied in Namibia.

The Cross-Border Insolvency Act, 2000, amended section 149.²⁶¹ Now, section 149 gives South African courts the discretion to refuse to sequester the debtor's estate (whether a local or foreign debtor) based on the principle of convenience where the debtor comes from a non-designated country. Local courts however, have no such discretion in the case of a foreign debtor from a designated country.

While the submissions above provide some understanding of the Cross-Border Insolvency Act, 2000, the Act is however not yet in force. Until the Minister designates specific countries in terms of section of the Cross-Border Insolvency Act, and in the absence of any treaty regarding the reciprocal recognition and enforcement of foreign proceedings, South Africa will continue to apply rules of the Roman-Dutch common law to address cross-border insolvencies.

In South Africa, insolvency law is contained primarily in the Insolvency Act, 1936.²⁶² The Insolvency Act, 1936 deals with the sequestration of natural persons and partnerships. Like Namibia, South Africa draws a distinction between the sequestration of natural persons and partnerships on the one hand, and the liquidation and winding-up of legal entities on the other hand. The liquidation and winding-up of legal entities is regulated by the Companies Act, 2008.²⁶³ However, the winding-up provisions of the Companies Act, 2008 cannot on their own be applied in the total administration of an insolvent company so the provisions of the Insolvency Act, 1936 are used in the liquidation or winding-up of companies who are unable to pay their debts.²⁶⁴ Apart from these statutes, precedents and Roman-Dutch common-law principles also apply in the absence of specific statutory provisions.

Due to the shared history between Namibia and South Africa, the rules of Roman-Dutch common law regarding the recognition of foreign insolvency representatives are quite

²⁶¹ Section 33 of the Cross-Border Insolvency Act, 2000.

²⁶² Act No. 24 of 1936.

²⁶³ Act No. 71 of 2008.

²⁶⁴ See generally Burdette D 'The Application of the Law of Insolvency to the Winding-up of Insolvent Companies and Close Corporations' (2003) 66(4) *Journal of Contemporary Roman-Dutch Law* 591 – 609.

similar.²⁶⁵ Like Namibia, South African courts require the recognition of a foreign insolvency representative before he or she will be allowed to administer local property of the debtor.²⁶⁶ South African courts will exercise discretion to grant recognition that is largely based on considerations of comity and convenience.²⁶⁷ However, it appears that the shortcomings of applying the common law that have been discussed in chapter one of this thesis also characterise the South African cross-border insolvency regime until such a time that countries are designated by the Minister of Justice as required by the Cross-Border Insolvency Act, 2000.²⁶⁸ In light of these submissions, the paper argues that the adoption of the Cross-Border Insolvency Act, 2000 did nothing to promote certainty, efficiency and predictability in the handling of cross-border insolvency cases. This is especially true, given the requirement for reciprocity that the Act has introduced.

4.3 Malawi



Malawi is among the world's Least-Developed Countries (LCDs) with a GDP of about US\$3.683 billion in 2013.²⁶⁹ Although it relies extensively on the agricultural sector that employs more than eighty per cent of the country's labour force, the services sector is significant for the country as it contributes more than fifty per cent towards its GDP.²⁷⁰

²⁶⁵ Boraine A 'Some Notable Divergences in the Development of South African and Namibian Insolvency Law' available at <http://hdl.handle.net/2263/15695> (last accessed 14 October 2013). Boraine submits that 'it is a well-known fact that the legal systems of South Africa and Namibia, or rather the former South West Africa, were rather identical until the advent of independence of the latter on 21 March 1990'.

²⁶⁶ See *Priestly v Clegg* 1985 (3) SA 955 (T).

²⁶⁷ *Ex parte BZ Stegmann* 1902 TS 40.

²⁶⁸ Zulman RH (2009) 810 argues that comity and convenience are not the only factors South African considers to date. The list continues to expand in size as new factors are continuously considered by the courts. The unascertainability of the precise requirements for recognition perpetuate uncertainty and unpredictability for the part of foreign insolvency representatives and creditors.

²⁶⁹ CIA 'World Fact Book' available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (accessed on 15 April 2015).

²⁷⁰ CIA 'World Fact Book' available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (accessed on 15 April 2015). Notable industries in the services sector include the banking sector, education, health services, retail, telecommunications and tourism.

In terms of Vision 2020, a policy framework that sets out the long-term development perspective for the country, Malawi is focusing on attracting foreign capital and promoting and encouraging infrastructure investment as one of the objectives to elevate the country to a middle-income country by the year 2020.²⁷¹

The *Doing Business Report* rated Malawi at 166 out of 185 economies on the ease of resolving insolvency.²⁷² This Report is significant because it evaluates the adequacy of Malawi's existing legal framework that is applicable to the liquidation of cross-border businesses. Thus, the rating of 166 demonstrates a lack of modern and efficient cross-border insolvency laws that may prove problematic to attracting FDI in Malawi.

Like Namibia, Malawi does not have a statute on the recognition and enforcement of foreign insolvency representatives and proceedings.²⁷³ Instead, Malawi uses English common law rules to address issues of cross-border insolvency.²⁷⁴ However, in his thesis, Kaphale argues that English common law does not meet all the goals and objectives of a modern and effective cross-border insolvency legal regime.²⁷⁵ In particular, Kaphale argues that the following are the reasons for this basis:

²⁷¹ The Republic of Malawi 'An Integrated ICT-Led Socio-Economic Development Policy for Malawi' available at <http://www.youngictadvocates.org/downloads/Malawi-ICT-Policy-Draft-8-7-03.pdf> (accessed on 15 April 2015).

²⁷² The World Bank Group 'Doing Business 2015: Economy Profile Malawi' available at <http://www.doingbusiness.org/~media/giawb/doing%20business/documents/profiles/country/MWI.pdf> (accessed on 15 April 2015).

²⁷³ Kaphale KE *Towards Modified Universalism: The Recognition of Enforcement of Cross-Border Insolvency Judgments and Orders in Malawi* (Unpublished LLM thesis, University of Malawi, 2013) 17. Kalekeni Kaphale is Malawi's current Attorney-General who has been in office since July 2014. According to Kaphale, personal insolvency is regulated by the Bankruptcy Act 1967 which empowered Malawian courts to recognise foreign bankruptcy orders. However, for this to happen, the President must gazette countries whose bankruptcy orders Malawi will recognise.

²⁷⁴ Kaphale KE (2013) 17.

²⁷⁵ Kaphale KE (2013) 17. It must be noted here that although a substantial body of literature has developed in recent years in the area of cross-border insolvency, this scholarship has been dominated by scholars from the U.S. and Europe, so that a perspective from African countries is lacking. Kaphale's thesis has been instrumental in providing the much needed information on Malawi's current position regarding cross-border insolvency issues.

1. English common law requires the presence or submission to the foreign jurisdiction before judgments *in personam* can be recognised or enforced.²⁷⁶ In order for the courts to recognise and enforce judgments *in rem*, it requires that the assets which form the subject matter of the order must be located in the jurisdiction of the court that makes the order.²⁷⁷ Kaphale argues that it is however, not always easy to differentiate between *in personam* and *in rem* judgments and hence, determine the jurisdiction of the local courts.²⁷⁸
2. When recognition is granted, local courts allow the debtor's local assets to be sent to the 'principal place of liquidation'.²⁷⁹ Kaphale argues that there are no rules in place to identify the home jurisdiction or the principal place of liquidation and hence, there is sometimes no certainty as to where the debtor's local assets should be repatriated to.²⁸⁰
3. The English common law is always evolving, and as a result, it permits Malawian courts to develop the common law and even to modify it.²⁸¹ Kaphale argues that this may in future create ambiguity as to the applicable law that must be applied by the local courts when dealing with cross-border insolvency disputes.²⁸²
4. English common law does not provide for automatic relief measures upon the recognition or enforcement of foreign insolvency proceedings.²⁸³ Like the position in Namibia, automatic relief measures are issued at the court's discretion. Kaphale argues

²⁷⁶ Kaphale KE (2013) 18.

²⁷⁷ Kaphale KE (2013) 18.

²⁷⁸ Kaphale KE (2013) 23.

²⁷⁹ Kaphale KE (2013) 23.

²⁸⁰ Kaphale KE (2013) 24.

²⁸¹ Section 10(2) of the Constitution of the Republic of Malawi, 1994 recognises the evolving character of the common law and mandates Malawian courts to have due regard for the principles and provisions of the Constitution when applying and developing the common.

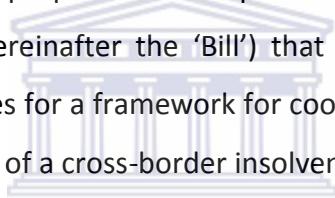
²⁸² Kaphale KE (2013) 25.

²⁸³ Kaphale KE (2013) 25.

that this places the debtor's estate at the risk of dissipation.²⁸⁴ The lack of automatic relief measures also adversely affects the maximisation of the value of the debtor's assets for the benefit of all his or her creditors.

5. At present, there is no mandatory framework for the cooperation and communication of local courts with foreign courts in other jurisdictions.²⁸⁵ Malawian courts often rely on principles of comity with no established rules and guidelines.²⁸⁶ Notwithstanding that in some instances local courts have relied successfully on comity in order to cooperate and communicate with foreign courts, Kaphale argues that the absence of a clear framework for cooperation and communication only creates room for discretion and confusion.²⁸⁷

These are the reasons why Malawi proposed the adoption of the Model Law in the form of Part X of the Insolvency Bill, 2014 (hereinafter the 'Bill') that is currently with Parliament.²⁸⁸ In summary, Part X of the Bill provides for a framework for cooperation between Malawian courts with foreign countries in the event of a cross-border insolvency dispute.



In particular, the Insolvency Bill, 2014 provides for the right of foreign insolvency representatives to commence local insolvency proceedings, provided that the conditions for local insolvency proceedings have been met, and further, the right to participate, after recognition has been granted, in local proceedings regarding the debtor.²⁸⁹ The Insolvency Bill, 2013 also grants access to foreign creditors in the participation of local insolvency proceedings and the right to be notified where the local insolvency law demands creditor notification.²⁹⁰

²⁸⁴ Kaphale KE (2013) 25.

²⁸⁵ Kaphale KE (2013) 26.

²⁸⁶ Kaphale KE (2013) 26.

²⁸⁷ Kaphale KE (2013) 26.

²⁸⁸ Insolvency Bill, 2014 as revised on 8 February 2013.

²⁸⁹ Section 327 and 328 of the Insolvency Bill, 2014.

²⁹⁰ Section 329 and 330 of the Insolvency Bill, 2014.

In order for recognition to be granted, the Bill requires an application to be made by a foreign insolvency representative to the local court in respect of a foreign insolvency proceeding in which he or she was appointed.²⁹¹ In deciding whether or not recognition should be granted, section 333 of the Bill does not make reference to the English common law rules of recognition so local courts may no longer be guided by the common law requirements that had to be met in order for recognition to be granted.²⁹²

The paper submits that this may perhaps not be a correct interpretation of the Model Law. Because it is a procedural legislative template, the Model Law does not take away the power of local courts to attach conditions for recognition, whether these conditions are derived from common or statutory law. The purpose of this provision in the Model Law is to merely ensure that the procedure for recognition is expeditious as possible, so that no time is wasted to protect the debtor's assets for the benefit of all creditors. If the correct interpretation of section 333 of the Bill does not permit Malawian courts to articulate common law requirements then it infringes upon Malawi's sovereignty to make laws pertaining to cross-border insolvency issues and this is not the spirit of the Model Law at all.

Despite that, a key objective of the provisions on recognition is to determine the circumstances under which automatic relief measures may be granted. Significantly, recognition of a foreign main proceeding introduces immediate and automatic relief. Although the Model Law defines an establishment, it does not define what constitutes COMI although the latter is based on a presumption in terms of Article 16(3) of the Model Law that it is the registered office or habitual residence of the debtor. Malawi has departed from relying on this presumption and instead, defines it in section 318(1)(a) of the Bill as the 'debtor's registered office, or habitual residence in the case of an individual'. Kaphale argues however, that the rigidity of this definition may be problematic considering that the flexibility of a presumption enables the

²⁹¹ Section 331 of the Insolvency Bill, 2014.

²⁹² Kaphale KE (2013) 33.

courts to draw conclusions in the absence of contrary evidence and proposed the retention of the presumption.²⁹³

The Bill addresses the shortcomings of the English common law rules in Malawi by expressly empowering Malawian courts to grant provisional relief at the request of the foreign insolvency representative.²⁹⁴ Once the Malawian courts have granted recognition of a foreign main proceeding, then an automatic stay of proceedings comes into operation.²⁹⁵

Lastly, the Bill mandates Malawian courts to cooperate to the maximum extent possible through direct communication with foreign courts.²⁹⁶ This obligation applies to both local and foreign insolvency representatives as well.²⁹⁷ When there are concurrent insolvency proceedings against the same debtor, then both local and foreign courts are required to coordinate the relief granted in either local or foreign insolvency proceeding.²⁹⁸

A notable difference between South Africa's Cross-Border Insolvency Act, 2003 and the Malawian Insolvency Bill, 2014 is that the automatic stay of proceedings in terms of the Bill does not affect the right of secured creditors to enforce their claims or the right of creditors to set-off claims against those of the debtor.²⁹⁹ Although insolvency laws take different approaches to the application of automatic stay orders to claims by secured creditors, it is argued that insolvency laws should be flexible enough to allow the maximisation of the value of the debtor's assets for the collective benefit of all creditors in such a way that secured creditors are also covered by the stay.³⁰⁰

²⁹³ Kaphale KE (2013) 43.

²⁹⁴ In terms of section 335 of the Insolvency Bill, the following relief may be granted upon application for recognition of a foreign proceeding: stay of execution and/or the appointment of a person to protect and preserve the value of the assets. However, it suffices to say that the courts are not limited in the type of relief that it may grant to foreign insolvency representatives.

²⁹⁵ The effects of recognition of a foreign main proceeding are discussed in section 336 of the Insolvency Bill, 2014.

²⁹⁶ Section 341 of the Insolvency Bill, 2014.

²⁹⁷ See section 342 of the Insolvency Bill, 2014.

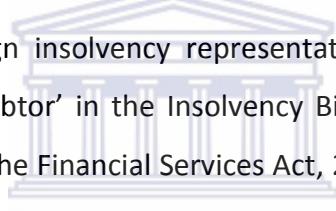
²⁹⁸ Division V of the Insolvency Bill, 2014 deals with concurrent proceedings.

²⁹⁹ Section 336(3) of the Insolvency Bill, 2014.

³⁰⁰ See Chapter Two of this thesis which discussed the 'Objectives of Insolvency Law'.

Another difference between the Malawian Insolvency Bill, 2014 and the Cross-Border Insolvency Act, 2000 lies in the type of debtor that is covered by its provisions. In South Africa, the Cross-Border Insolvency Act, 2000 applies to financial institutions that may be subject to specialised insolvency regimes.³⁰¹ In Malawi, this is not the case. Financial institutions are excluded from the application of the Insolvency Bill, 2014.³⁰² Malawi's Financial Services Act, 2010, regulates the winding-up of financial institutions.³⁰³ In terms of section 72(2) of the Financial Services Act, 2010 it is only the registrar who is allowed to make an application to the court for the winding-up of financial institutions.³⁰⁴

In addition, the registrar, or any other person appointed or approved by the registrar becomes the liquidator of the estate of the financial institution to be liquidated.³⁰⁵ These requirements cannot be reconciled with the objective of the Model Law and even of the Insolvency Bill, 2014 to allow speedy access of foreign insolvency representatives and the separation of these financial institutions from the 'debtor' in the Insolvency Bill, 2014 is therefore warranted.³⁰⁶ Even the ranking of claims under the Financial Services Act, 2010 is not the same as the ranking of creditors in terms of the Insolvency Bill, 2014 or common law.³⁰⁷



The most significant distinction between the Cross-Border Insolvency Act, 2000 and the Insolvency Bill, 2013 is the requirement for reciprocity. According to Kaphale, Malawi could not make out a case for the requirement of reciprocity especially considering the fact that the Insolvency Bill, 2013 like the Model Law, contains provisions for the protection of the interests

³⁰¹ Section 20(3) – (4) of the Cross-Border Insolvency Act, 2000.

³⁰² Section 3 of the Insolvency Bill, 2014.

³⁰³ Act No. 26 of 2010. Financial institutions are defined in section 2 of the Financial Services Act, 2010 and include banks, insurance companies, microfinance institutions as well as pension funds.

³⁰⁴ Act No. 26 of 2010.

³⁰⁵ Section 72(6) of the Financial Services Act, 2010.

³⁰⁶ A 'debtor' is defined in section 318(1)(b) of the Insolvency Bill, 2014 as 'any company, individual, partnership, sole proprietorship or other entity that may be wound up, placed under company reorganization or declared bankrupt under the provisions of this [Bill]' [emphasis added]. Neither the Model Law nor the Cross-Border Insolvency Act, 2000 define what or who may constitute a debtor. Suffice to say, the definition of debtor is important as it shows to whom the Act or Bill will apply to.

³⁰⁷ Section 72(8) of the Financial Services Act, 2010.

of local creditors to allay any fears of prejudice. This is not surprising given the fact that there is no requirement of reciprocity in the Model Law. Although countries adopting the Model Law are not required to grant recognition, the Model Law does not envisaged that local courts will deny recognition of a foreign insolvency proceeding solely on the grounds that the same foreign court would not provide equivalent relief to an insolvency representative from the local country.³⁰⁸

While the brief discussion of Malawi's Insolvency Bill, 2014 provides some insight into the manner in which the country proposes to adopt the Model Law; the Bill is nonetheless not yet in force. Until the Bill is passed by the Malawian Parliament, and in the absence of any treaty regarding the reciprocal recognition and enforcement of foreign proceedings, Malawi will continue to apply rules of the English common law to address cross-border insolvencies, despite the shortcomings identified above.

4.4 Conclusion

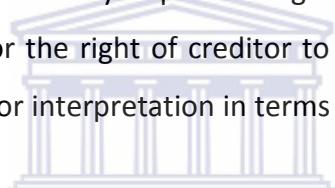
In reviewing its cross-border insolvency regime, Namibia has the option of following the example of South Africa, Malawi and other African countries like Kenya, Mauritius, Seychelles and Uganda, who have adopted or are proposing to adopt provisions of the Model Law. Although it is not suggested that Namibia should blindly follow the lead of any particular country, the review of the Model Law in South Africa and Malawi indicated that the Model Law is the best attempt thus far to deal with the problems of cross-border insolvencies.

However, as previously mentioned, the success of the Model Law depends on the manner and the extent to which it is adopted. Although both South Africa and Malawi have adopted the Model Law in the form of the Cross-Border Insolvency Act, 2000 and Part IX of the Insolvency

³⁰⁸ See UNCITRAL 'Model Law on Cross-Border Insolvency: The Judicial Perspective' available at http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf (accessed on 19 April 2014).

Bill, 2013, the manner in which they have done so differs. This chapter demonstrated that the Cross-Border Insolvency Act, 2000 and the Insolvency Bill, 2013 distinguish between the types of debtors covered by the provisions. In South Africa, the Act applies to financial institutions while financial institutions are excluded from the application of the Insolvency Bill, 2013 in Malawi.

In addition, both statutes provide for the right of foreign insolvency representatives as well as foreign creditors to directly access the respective courts. Similarly, both countries will recognise a foreign insolvency representative if an application containing the requisite documentation is submitted to the local courts. South African courts would still rely on the substantive common law requirements for recognition while Malawian courts would not. The Insolvency Bill, 2013 specifically provides that an automatic stay of proceedings does not affect the right of secured creditors to enforce their claims or the right of creditor to set-off claims against those of the debtor. This question is left open for interpretation in terms of the Cross-Border Insolvency Act, 2000.



Chapter four found that the most significant distinction between the statutes is the requirement for reciprocity. While South Africa requires reciprocity as a condition for designation in terms of the Cross-Border Insolvency Act, 2000, Malawi does not. This means that Malawian courts will not deny the recognition of foreign insolvency proceedings solely on the basis that a foreign court will not provide equivalent relief to local insolvency representatives from Malawi.

The next chapter will summarise the thesis and based on the lessons that it can learn from the manner in which South Africa and Malawi have adopted the Model Law, give recommendations for the way forward in Namibia.

Chapter Five:

LESSONS FOR NAMIBIA AND RECOMMENDATIONS FOR THE WAY FORWARD

5.1 Introduction

The overriding object of this thesis was to determine whether or not Namibia should adopt the Model Law. In order to accomplish this object it was necessary to examine further objectives. Determining what Namibia's current cross-border insolvency regime entails and whether it requires reform assumed a high degree of importance in this thesis. Related to that effort, it also became necessary to evaluate the essential features of the Model Law and the challenges of adopting the Model Law from a Namibian perspective.

Once these fundamental steps were achieved, the thesis was able to establish the lessons that Namibia can derive from the examples of other African countries who have adopted or are proposing to adopt the Model Law. This chapter provides a summary of the thesis by determining the lessons that Namibia can derive from the enactment of the Model Law by other countries and will suggest the recommendations for the way forward.

5.2 Lessons for Namibia

The thesis has shown how globalisation poses complex challenges for insolvency law, particularly where it crosses national boundaries. These challenges of cross-border insolvency law relate to the jurisdiction of courts in different countries where a debtor may have assets or liabilities to open insolvency proceedings and to administer the debtor's property. Courts also have to determine the applicable law to the insolvency proceedings, the number of insolvency proceedings that may ensue in respect of one debtor and the priorities that will be rendered to local and foreign creditors.

The thesis demonstrated that countries differ in their approach to addressing these issues. However, these diverse approaches to cross-border insolvency make it difficult for insolvency

representatives to pursue and collect the debtor's assets for the benefit of all creditors. The absence of predictability in the way in which cross-border insolvency cases are administered by these diverse approaches impede the flow of capital and cross-border investment.

5.2.1 The Shortcomings of Namibia's current Framework on Cross-Border Insolvency Law

The Insolvency Act, 1936 is the principal statute regulating the sequestration of natural persons and partnerships in Namibia.³⁰⁹ However, the Insolvency Act, 1936 provides no guidance in the way in which cross-border insolvency disputes should be addressed.³¹⁰ Instead, the thesis has shown that Namibian courts apply Roman-Dutch common law rules to the recognition and enforcement of foreign insolvency representatives and proceedings.

While it is true that these common law rules go some way towards addressing some of the problems of cross-border insolvencies, the thesis argued that the discretion of the courts in determining whether or not recognition should be granted is not always exercised uniformly or consistently. This is especially true because the criteria relied upon for the recognition of foreign insolvency representatives and proceedings are not certain or predictable as new factors are continuously considered by the courts. This uncertainty affects the ability of foreign insolvency representatives as well as foreign creditors to access Namibian courts.

Furthermore, the thesis demonstrated that since the object of the Insolvency Act, 1936 is to protect local creditors, it ignores the possibility of rehabilitating businesses that may maximise the value of the debtor's assets. This is particularly true, given the current focus and culture if Namibia's corporate insolvency is not geared towards the rehabilitation of viable businesses, which should go hand-in-hand with the discussion of cross-border insolvency reform.

Likewise, the thesis argued that rules of common law have been unable to secure the equal treatment of creditors across national boundaries. The thesis concluded that inefficiency of

³⁰⁹ Act No. 24 of 1926.

³¹⁰ Act No. 24 of 1936.

these antiquated common law rules is detrimental to international trade and investment as this adversely affect the availability of credit all over the world.

5.2.2 The Objectives of Cross-Border Insolvency Law

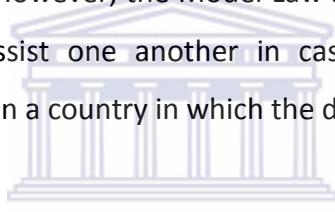
In view of the inconsistencies and weaknesses of the common law discussed above, the thesis proposed for the harmonisation of cross-border insolvency laws in such a way that these laws achieve minimum standards or objectives of cross-border insolvency. International organisations such as UNCITRAL, the World Bank and IMF argue that cross-border insolvency laws should provide certainty in the market in order to promote economic stability and growth; ensure transparent and predictable rules; provide measures for granting direct access to foreign insolvency representatives and creditors; treat similarly situated creditors equally; establish clear rules for the ranking of creditor's claims; grant automatic and urgent relief measures in every country where the debtor may have assets so as to maximise the value of the debtor's assets for the benefit of all creditors and the economy in general; and finally, cross-border insolvency laws must strike balance between sequestration or liquidation and reorganisation.

The thesis argued that these objectives should form the basis upon which insolvency laws are developed and improved and accordingly submitted that the Model Law should be viewed as the basis needed to develop a regime of predictable standards that effectively deal with the various aspects of cross-border insolvencies.

5.2.3 The Solutions presented by the Model Law

The discussion of the four principles underpinning the Model Law in chapter three of the thesis showed how the Model Law addresses the complex challenges of cross-border insolvency.

First, the Model Law does not limit the jurisdiction of local courts to sequester or to liquidate the estates of local debtors who are domiciled or incorporated in that country. Nor does the Model Law limit the jurisdiction of a local court to sequester or liquidate the estate of a foreign debtor who may have assets situated within its jurisdiction, even where no foreign insolvency proceedings have been commenced against this foreign debtor.³¹¹ When foreign insolvency proceedings have been instituted against a foreign debtor in his or her country of domicile or incorporation, or in a country in which the debtor has an establishment, then the local court is first obliged to expeditiously recognise (or not) the foreign insolvency proceeding as either foreign main or non-main, secondly to grant the foreign insolvency representative as well as any foreign creditors the right of direct access and ancillary relief and finally, to cooperate and coordinate with the foreign court in respect of the debtor's assets for the benefit of all his or her creditors. However, the Model Law still requires the different courts to coordinate, cooperate and to assist one another in cases where the foreign insolvency proceeding has been commenced in a country in which the debtor only has assets.



Secondly, by not limiting the jurisdiction of courts to open insolvency proceedings, the Model Law recognises that multiple or concurrent proceedings may occur in different countries where the debtor may have a connection. Thus, it requires the courts of these countries to coordinate any relief granted and to cooperate and assist one another.

Thirdly, the Model Law outlines the procedure for the application of recognition. Although it is left to the substantive insolvency laws of the various countries to determine when recognition will be granted, it seeks transparency in the way that recognition is granted or refused.

Fourthly, the Model Law only proposes the kind of powers that may be granted to foreign insolvency representatives upon recognition. As previously mentioned, the relief contemplated by the Model Law is not prescriptive, and the exact scope and contours of the relief resulting

³¹¹ Section 149 of the Insolvency Act, 1936 gives the High Court of Namibia the jurisdiction to sequester or liquidate the estate of foreign debtors when it appears equitable or convenient.

from recognition of a foreign insolvency proceeding can be aligned with the relief that is already available under local insolvency law.

Lastly, while the Model Law does not affect the ranking of creditors under local insolvency proceedings, it nonetheless requires that, at a minimum, foreign creditors receive the same treatment as concurrent creditors, unless they are in a class of creditors in which domestic creditors would also be subordinated. This is to ensure that both foreign and local creditors are treated with some measure of equality in the distribution of the debtor's estate.

Undeniably, this shows that there are a number of advantages to Namibia relying on a statute enacting the Model Law which expressly defines the powers of Namibian courts, rather relying on common law to render assistance to foreign courts and foreign insolvency representatives. First, it will enable the Namibian courts to delineate, with more certainty and predictability, the circumstances under which access and recognition can be granted to foreign creditors and foreign representatives. Secondly, the Model Law provides a useful opportunity for Namibian courts to determine with more specificity, the provisional and automatic measures that may be available to creditors and foreign representatives upon recognition of foreign insolvency proceedings. Finally, adopting the Model Law's provisions on cooperation and coordination will enable the Namibian courts to expressly provide for a predictable legislative framework that conforms to international standards for effective regulation of cross-border insolvencies.

5.2.4 The Challenges of the Model Law

While it is true that the Model Law is an effective tool for cross-border insolvency, it is not without its shortcomings nonetheless. The first is that the Model Law is a flexible instrument, so countries may modify it or leave out some of its provisions when incorporating it. This flexibility may have encouraged countries to deviate from the spirit of the Model Law and to introduce requirements for reciprocity, which affects the degree of, and certainty about harmonisation that can be achieved. Similarly, the Model Law does not define what constitutes cooperation.

This means that courts may still address cross-border insolvencies in such a way that serves its own interests because all countries will protect different national interests. Finally, the Model Law does not provide clear guidelines as to what should happen when courts do not recognise foreign insolvency representatives or proceedings.

Despite its shortcomings, the thesis argued that Namibia should not shy away from adopting the Model Law as the benefits to be gained from adopting the Model Law far outweigh the challenges. By adopting the Model Law, Namibia would strengthen her involvement and standing in the global economy and will be following in the footsteps of other African countries such as Mauritius, Seychelles, South Africa and Uganda as well Kenya and Malawi who have already proposed to incorporate the provisions of the Model Law as part of their domestic law. Obviously, however, the mere enactment of the Model Law does not guarantee its success. The paper has shown that the successful adoption of the Model Law depends largely, and to what extent individual countries chooses to adopt its provisions.

5.2.5 Lessons from South Africa and Malawi

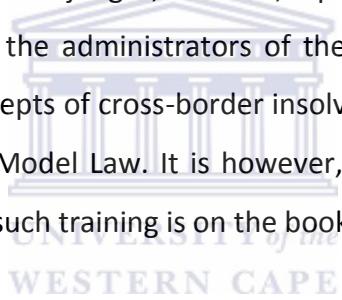
The example of South Africa and Malawi demonstrates some significant lessons for Namibia. The first choice to be made by Namibia is to determine whether to retain provisions of the Insolvency Act, 1936 as well as the common law rules dealing with aspects of cross-border insolvency or whether to repeal the existing law affecting cross-border insolvency issues so that the Model Law is the only statute under which foreign insolvency proceedings may be recognised. South Africa has adopted an entirely new statute for cross-border insolvency, leaving the sequestration of natural persons and partnerships under the Insolvency Act, 1936 as well as the winding-up of companies under the Companies Act, 2008 intact.³¹² Malawi on the

³¹² The Insolvency Act, 1936 (Act No. 24 of 1936) and the Companies Act, 2008 (Act No. 71 of 2008) respectively.

other hand, has decided to enact an Insolvency Bill that would deal with the insolvency of both natural and legal persons.³¹³

Although it is not the object of the thesis to discuss the unification of insolvency law in Namibia, it is important to point out that Namibia, like South Africa, has a fragmented approach to regulate the insolvency of natural persons and legal entities that cause unnecessary confusion and duplication.³¹⁴ It may therefore be worthwhile for Namibia to consider the coordination of the different pieces of legislation.³¹⁵

Secondly, the successful introduction a cross-border regime will depend on already having the necessary supporting infrastructure in place to implement such regime.³¹⁶ This may require training relevant stakeholders, such as judges, trustees, liquidators and public officials like the Master of the High Court who is the administrators of the Insolvency Act, 1936 in order to familiarise them with the key concepts of cross-border insolvency generally as well as the more specific, technical aspects of the Model Law. It is however, not evident from the example of South Africa and Malawi whether such training is on the books for its stakeholders.



Finally, the question of reciprocity is a controversial one at best. As previously stated, the Model Law does not require reciprocity but does not rule it out either. This has prompted several countries, including South Africa to include the requirement of reciprocity in the

³¹³ Insolvency law in Malawi is governed under two statutes. For personal insolvency, there is the Bankruptcy Act that was enacted in 1967 and still remains in force. Corporate Insolvency provisions are in the Companies Act, 1984. There has been a new Companies Act passed in 2013. This new Companies Act does not contain any insolvency provisions as these will now be dealt with under the Insolvency Bill, 2014 that is now before Parliament.

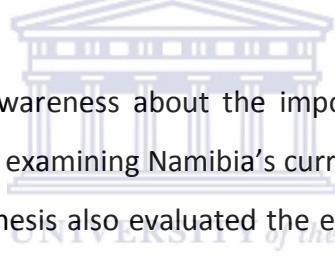
³¹⁴ Burdette D (2003) 594. Burdette argues that the winding-up provisions of the Companies Act, 2008 cannot on their own be applied in the total administration of an insolvent company so the provisions of the Insolvency Act, 1936 are used in the liquidation or winding-up of companies who are unable to pay their debts.

³¹⁵ Keay A 'To Unify or not to Unify Insolvency Legislation: International Experience and the latest South African Proposals' (1999) 32(1) *De Jure* 71. According to Keay, a unified insolvency system with common procedures would be simpler and would result in greater efficiency, simplification through the avoidance of duplication, and a reduction in costs. It would also simplify the Companies Act and the Close Corporations Act making insolvency readily understood by the community and by less experienced practitioners, while giving recognition to insolvency law as a separate field of law that would facilitate its further development.

³¹⁶ Kargman ST (2013) 8.

adoption of the Model Law. Malawi on the other hand, could not justify that such a requirement is necessary, considering the fact that the Model Law has put measures in place for the protection of local creditors.

While it is true that the legal systems of Namibia and South Africa are similar, the paper does not believe that Namibia should follow the South African approach of designating beneficiaries of the Model Law on the basis of reciprocity. The difficulty with reciprocity, like comity, is that it is usually political in nature: a particular country may be acceptable at one point in time and unacceptable at another.³¹⁷ This causes uncertainty as a dual system will apply where some cross-border insolvency proceedings will be subject to the provisions of the Model Law while others will be addressed using the common law, despite the problems already discussed of applying common law rules to issues of cross-border insolvencies.



In a nutshell, this thesis raised awareness about the importance of cross-border insolvency issues from a Namibian context by examining Namibia's current cross-border insolvency regime whether it requires reform. This thesis also evaluated the essential features of the Model Law and the challenges of adopting the Model Law from a Namibian perspective. Finally, the thesis established how other African countries have adopted the Model Law and the lessons Namibia derive from their examples.

In light of the conclusion reached that Namibia should adopt the Model Law, the next section of the thesis will propose the recommendations for the adoption of the Model Law in Namibia.

5.3 Recommendations

1. The paper recommends that the adoption of the Model Law should take the form of a separate statute, which does not form part of the Insolvency Act, 1936.

³¹⁷ Zulman RH (2009) 817.

2. The statute enacting the Model Law should be the only piece of legislation by which recognition and enforcement of foreign insolvency proceedings can be granted. This means that the statute enacting the Model Law will not just be a procedural document, but must articulate those conditions and other requirements of common law upon which recognition will be granted. This means that it will no longer be appropriate for the common law rules especially on recognition to exist concurrently with the statute enacting the Model Law.

3. Section 149 of the Insolvency Act, 1936 should be amended to reflect the jurisdiction of the Namibian High Court in cross-border insolvency cases. Section 149 of the Insolvency Act, 1936 should also indicate that foreign insolvency representatives and creditors have direct access to Namibian courts as provided in chapter 2 of the Model Law.

4. In adopting the Model Law, as few changes as possible should be made in order to strive for a satisfactory degree of harmonisation and certainty. However, the scope of the statute enacting the Model Law should exclude financial institutions such as banks and insurance companies which are subject to special regimes.³¹⁸

5. Only those specific terms of the Model Law that do not have an obvious meaning in the context of Namibia's insolvency law should be defined in the statute enacting the Model Law. These terms include 'COMI', 'establishment', 'foreign representative', 'foreign proceeding', 'foreign main proceeding', and 'foreign non-main proceeding'.

6. The statute enacting the Model Law should state that the enforcement of foreign revenue and penal claims is excluded from its operation, as it is a public policy exception in terms of Article 6 of the Model Law.

³¹⁸ Banking institutions are for example, regulated by the Banking Institutions Act, 1998 (Act No. 2 of 1998) which also provides for the winding-up and judicial management of banking institutions in Namibia.

7. The statute enacting the Model Law should make it clear that the ranking of creditors' claims will be determined in terms of sections 93 to 104 of the Insolvency Act, 1936.³¹⁹ However, it should expressly provide that foreign creditors, who meet the requirements for secured creditors under the Insolvency Act, 1936 will also be treated as such in Namibia, and those claims of other foreign creditors which do not qualify as secured claims should not rank below that of local concurrent creditors.³²⁰ That being said, the statute enacting the Model Law should similarly protect the right of local creditors to receive dividends from the debtor's assets before these are repatriated to a foreign country for the satisfaction of foreign creditors.

8. The stay of proceedings should automatically stay the claim of secured creditors as well in order to give the insolvency representative a chance to maximise the value of the debtor's assets. However, the court may at the request of the insolvency representative or people affected by the stay of proceedings modify or terminate the scope of the stay of proceedings.

9. In the same way, it will also be useful for the statute enacting the Model to coordinate any relief measures with the effects of sequestration under the Insolvency act, 1936 and the relief measures under section 364 of the Companies Act, 2004.³²¹

10. Finally, there is a need for guidance as to how the considerations of communication by Namibian courts with foreign courts or foreign insolvency representatives can be implemented in practise, particularly where judges adjudicating the dispute have no experience in communicating with foreign courts.

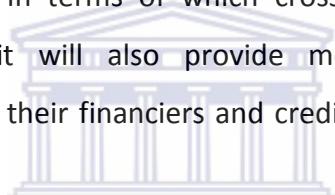
³¹⁹ Act No. 24 of 1936.

³²⁰ Act No. 24 of 1936.

³²¹ Act No. 28 of 2004.

5.4 Conclusion

Globalisation and the increasing international trade and investment have raised the awareness of the potential impact of cross-border insolvencies on the economies of nations. As we have seen throughout the thesis, many of the issues arising from cross-border insolvency disputes stem from the lack of an international legal and institutional framework addressing the shortcomings of the diverse and unconnected national responses to cross-border insolvency issues. The Model Law is ‘a revolutionary step towards a simpler, more efficient international insolvency regime’ which provides a good example for how countries may structure their cross-border insolvency legislation.³²² It leaves it to each country to consider whether and to what extent it makes use of its provisions. Once it is implemented, the Model Law will allow the courts to have clearer guidance in terms of which cross-border insolvency issues can be addressed. Equally important, it will also provide more certainty, predictability and transparency to foreign investors, their financiers and creditors as to what will happen in the event of a cross-border dispute.



Namibia does not have a regime for addressing cross-border insolvencies. In this day and age, Namibia cannot expect foreign investors and persons who wish to do business with Namibia to be left with uncertainty and sometimes gaps in the event of a cross-border insolvency dispute. This is particularly true, given Namibia’s vision to promote economic growth and development through the formulation and implementation of appropriate policies to attract investment and increase trade. As Locatelli correctly points out ‘although economic strategy and a political scenario are the central keys for country development, a combination of these with predictable and reliable commercial legislation are also crucial for economic and social growth’.³²³

³²² Cronin MT (1998) 725.

³²³ Locatelli F ‘International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of its Benefits on International Trade)’ (2008) 14(2) *Law and Business Review of the Americas*’ 346.

This is the reason why it is crucial for Namibia to be in step with the rest of the world and to adopt the provisions of the Model Law and to ensure the implementation of the Model Law within its domestic sphere. Without the enactment of the Model Law, Namibia will continue to apply outdated and inharmonious common law rules in cross-border insolvency disputes which will be detrimental towards the goal of not only, the achievement of certainty and predictability in cross-border situations but the overall goal to attract investment in the country.



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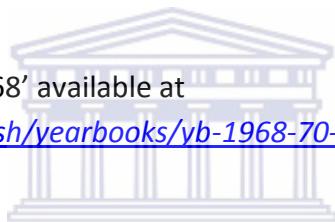
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