Cross-border insolvency principles in terms of South African Law

André Boraine

Abstract:

Given South Africa's relatively large volume of international trade across the globe in general, and with many European Union member states in particular, a clear and predictable cross-border insolvency structure remains essential. South Africa is not a party to any cross-border insolvency treaty or convention, and its cross-border insolvency framework is primarily shaped by common law principles drawing from private international law and based on precedent. In this regard, comity, convenience, and equity play an essential role in shaping this area of our law. The High Courts have discretionary powers to recognize foreign estate representatives but will protect local creditors, too. Although the Cross-Border Insolvency Act of 2000, based on the MLCBI, has been enacted, it will only apply to countries designated by the Minister of Justice. In the context of the Cross-Border Insolvency Act, the Minister's discretion is restricted by the notion of reciprocity, which is a significant determinant for electing designated States. Since its inception more than 20 years ago, no State has been designated yet. Nevertheless, the Act, once activated, will introduce a dual system. In this respect, foreign estate representatives hailing from designated States will enjoy the benefits of its framework, whilst those from non-designated States will remain governed by the discretionary and thus less predictable common law approach. Given its largely procedural focus, the Cross-Border Insolvency Act also leaves some substantive matters unaddressed, necessitating reliance on common law principles to deal with the same. Legislative updates are needed to align with modern insolvency practices, including incorporating recent UNCITRAL Model Laws on insolvency-related judgments and group insolvencies. The activation of the Act – preferably by scrapping the designation/reciprocity clause and further reforms aiming to harmonize South Africa's cross-border insolvency

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law with international standards while addressing unique local considerations, remains a matter of high importance in this area of our law.

Keywords: South Africa, Common Law, recognition, discretion, debtor's property, MLCBI, reciprocity

A. General

The purpose of this chapter is to explain the principles governing the South African cross-border insolvency dispensation.[1] With this discussion as a backdrop, pertinent issues in the current dispensation are noted. The aim is to alert other jurisdictions which may be contemplating the reform or revision of their cross-border insolvency rules to problem areas in the South African dispensation. It may also be stated that although there is not a high number of cross-border insolvency matters emanating from South Africa currently, a clear and predictable set of rules remains imperative given the large volumes of international trade between South Africa and its various trading partners in Europe[2] the Americas and the East for instance, and its position in Africa.

Because there are differences between local insolvency regimes and related legal principles – e.g., the law of securities and the entrenched principle of territoriality in cross-border insolvency – there is no uniform universal approach towards cross-border insolvency matters. In their approaches to this topic, States have traditionally tended to lean towards territoriality although modern needs may require a more universalist approach. Where assistance in cross-border insolvency is granted, the systems may be classified as modified universality or as cooperative or modified territoriality[3]

1 For general discussions of this topic, see Kunst/Boraine/Burdette, Chap.17; Bertelsmann et al, Chap. 30.
2 For an overview of South African trade with EU Member States, see for instance <https://www.southafricanmi.com/eusa.html>.
3 Civil law countries are said be more inclined to take a territorial approach to jurisdiction and that common law countries are more supportive of universalism – See LoPucki, Cornell Law Review 1990, 2216 et seqq; Omar International Company and Commercial Law Review 2002, 416 et seqq; IIR 2002, 173 et seqq; Westbrook St Louis University Law Journal 1995, 753 et seqq; Texas Law Review 2018, 1473 et seqq. Due to the lack of global consensus, the reality is that States rather follow hybrid approaches that may have shades of both, hence terms like 'modified universalism' and 'modified' or 'co-operative territorialism' have emerged. Regarding a practical explanation of

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In an earlier constitutional dispensation in South Africa, the Foreign Trustees and Foreign Liquidators Recognition Act of 1907 – a statutory enactment that applied in the former Cape Colony – provided that the then Supreme Court could recognise the appointment of a foreign representative. Although this Act no longer forms part of South African law some of its principles have survived on the basis of precedent[4]

Currently, South African common law based on principles of international private law and precedent, must be considered and applied in this area of South African law. Based on comity, convenience, and equity, a South African High Court is entitled to recognise the appointment of a foreign representative.[5] The principles of private international law (conflict of laws) are important, especially regarding the treatment of property situated in South Africa and where the insolvency case has an international element.[6]

South Africa enacted the MLCBI as the Cross-Border Insolvency Act 42 of 2000 on 8 December 2000. Although the Act came into force on 28 November 2003,[7] it is, for all practical purposes, not yet in operation. This may be ascribed to the designation and reciprocity clause in the local version, which limits the application of the Act to states to be designated by

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modified universality see *Singularis Holdings v Price Waterhouse Coopers* [2014] UKPC 26:'... a recognised principle of the common law. It is founded on public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of local businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on the basis that will be recognised and effective internationally'.

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

5 *Ex parte BZ Stegmann* 1902 TS 40; *Re Estate Morris* 1907 TS 657; *Ex Parte Steyn* 1979 (2) SA 309 (O); *Ward v Smit & Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA). On comity and convenience as factors to be considered by the Court rather than strict requirements, see also *Ex parte Palmer NO: In re Hahn* 1993 (30 SA 359 (C) at 362J and 363H; and on convenience and equity see *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd* 1998 3 SA 175 (SCA) at 179F and *Deutsche Bank AG v Moser and Another* 1999 (4) SA 216 (C) 219H-I and. See also Smith/Boraine ABI LR, 2002, 135 (177–187).

6 Bertelsmann *et al*, p. 731. Regarding the application of choice of law principles in general, see Fletcher, p. 3 et seqq.

7 By virtue of Proclamation No R 73 of 2003 as published in GG 25768 of 27 November 2003.

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the Minister of Justice. The Act will thus only apply to designated countries and no state has yet been so designated.[8]

The introduction of a designation system based on reciprocity in the Cross-Border Insolvency Act, means that South African law will have a dual approach to the recognition of foreign insolvency orders – representatives from designated countries will fall under the procedure prescribed by the Cross-Border Insolvency Act once it is in operation; whilst representatives from non-designated countries will have to follow the general-law route based on common law and precedent.

When a South African estate representative, either a trustee or liquidator, wishes to trace assets belonging to a South African insolvent in a foreign country, the laws of that country will determine if and how he or she must apply for recognition in that jurisdiction (an outward-bound request), or whether a concurrent proceeding may be opened in the foreign jurisdiction.

In summary, the current dispensation allows foreign representatives from any foreign jurisdiction to approach a South African High Court with an inward-bound request to apply for assistance in the form of a recognition order authorising him or her to trace property and deal with it. The ultimate aim is to realise the property and to use the proceeds for the benefit of the foreign creditors but subject to the rights of local creditors.[9] The discretion of the court hearing a recognition application plays an important role and is said to be absolute. This makes the outcome of a request for assistance less predictable.

B. The framework of South African insolvency law

I. General

To explain the cross-border insolvency dispensation of a particular jurisdiction it is useful to have some background on the operation of its legal system and its local insolvency framework. The South African legal system stems from Roman-Dutch law, generally referred to as the South African common law. English law did, however, influence the law, most notably

8 See in general with regard to the Cross-Border Insolvency Act, Smith/Boraine ABI L Rev 2002, 138.
9 Smith SA Merc LJ 2002, 24.

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in areas of mercantile law and more specifically, the law of insolvency and company law. In general, the common-law principles apply, save in those instances where they have been replaced by legislation. The English precedent system also found its way into South African law. Although South African law is not codified, legislation, the common law in so far as legislation has not abolished or altered a particular rule, and precedents set by the High Courts are the primary sources of South African law.[10] The Constitution of the Republic of South Africa, 1996 – the supreme law of the land – contains a bill of rights against which the courts may test the constitutionality of legislation.[11]

When turning to the law of insolvency, it is interesting to note that the Insolvency Ordinance of Amsterdam of 1777 is cited as the foundation of South African insolvency law.[12] The first local insolvency legislation was, however, introduced in 1829 in the former Cape Colony and was based on English bankruptcy law.[13] Ordinance 6 of 1843 (Cape), which abolished the concept of *cessio bonorum,*[14] replaced the 1829 Ordinance and formed the statutory basis for Insolvency Ordinances of the former pre-union republics of South Africa – i.e., the Transvaal, Orange Free State, and Natal. In 1916, after the establishment of the former Union of South African in 1910, the Insolvency Act of 1916 was adopted as the first uniform insolvency law for the whole of the then Union. Currently, the law relating, in the main, to insolvent individuals, is governed by the Insolvency Act 24 of 1936[15] which Act came into force on 1 July 1936.

Although largely regulated by the Insolvency Act of 1936 which addresses the sequestration of individuals and related matters, South African insolvency law is fragmented in that it is not contained in one single piece of legislation. Regarding corporate bankruptcy, the former Companies Act 61 of 1973[16] and the Close Corporations Act 69 of 1984 contain sections that dealt with the winding-up (or liquidation) of companies and close corpo-

10 Kleyn/ Viljoen, p. 50.
11 Idem, p. 56. The South African Constitution, 1996.
12 See also *Fey NO and Whiteford NO v Serfontein* 1993 (2) SA 605 (A).
13 Wessels, p. 670. This Ordinance retained some of the Dutch practices, like *cessio bonorum* i.e. a surrendering by the debtor of his estate to his creditors.
14 Ibid.
15 Hereinafter the 'Insolvency Act of 1936'. See in general Kunst/ Boraine/ Burdette and Bertelsmann *et al* regarding comprehensive discussions of mainly the Insolvency Act of 1936.
16 Hereinafter the 1973 Companies Act, or the Companies Act of 1973.

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rations, respectively. These provisions were, however, not comprehensive and, as regards insolvent companies or close corporations, certain sections of these Acts applied certain provisions in the Insolvency Act of 1936 and South African common-law provisions to the liquidation or winding-up of insolvent companies or close corporations. The 1973 Companies Act, bar its Chapter XIV, was replaced by the Companies Act 71 of 2008[17] as from 1 May 2011. The 2008 Act brought about certain amendments regarding the winding-up and liquidation of companies and close corporations. The cross-references and interpretational difficulties of all the applicable insolvency rules governing insolvent companies can at times be confusing.[18] Suffice to say that the 2008 Companies Act does not provide comprehensively for the winding-up or liquidation of insolvent companies and that it set a process in motion to phase out close corporations as a business form. A new business rescue procedure was introduced by the 2008 Companies Act to replace judicial management under the 1973 Companies Act as a formal rescue procedure.

There are also special provisions applicable to the winding-up of other legal entities such as banks, insurance companies, cooperatives and municipalities in various other pieces of legislation.[19] In the latter instances, there are generally specific sections in the respective Acts that deal with the winding-up or administration of such institutions whilst they are debt-stressed. In addition to these statutory enactments, precedents and common-law principles also apply in the absence of specific statutory provisions. The Insolvency Act of 1936, however, remains the principal source of South African insolvency law while the other legislation merely makes certain provisions of the Insolvency Act applicable.

The review of our insolvency law with a view to addressing issues in the system and also ultimately enacting a single unified piece of insolvency legislation to cover personal, corporate, and cross-border insolvency has been on-going for several years. In 1987 the South African Law Commission embarked on an investigation of the law of insolvency in its entirety. A Project

17 Hereinafter the 2008 Companies Act, or the Companies Act of 2008.
18 See in general Boraine/ VanWyk De Jure 2013, 644 (683); and see *AJVH Holdings (Pty) Ltd and Others v Steinhoff International Holdings NV and Others* (7978/2020; WCC; 5 October 2021 regarding specific interpretational problems relating to the winding-up of external companies.
19 See S. 68 of the Banks Act 94 of 1990; Ss. 42-43 of the Long-Term Insurance Act 52 of 1998;Ch. IX of the Co-Operatives Act 14 of 2005 (as amended) and Part 3 of Ch, 13 of the Local Government: Municipal Finance Management Act 56 van 2003.

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Committee was appointed to conduct and direct the review as 'Project 63'. A series of working papers dealing with selected topics for discussion, followed by reports, culminated in the Draft Insolvency Bill of 1996.[20] The Report and Draft Bill replaced the first draft which the South African Law Reform Commission published in 2000. In 2003 the Cabinet approved the idea of a single unified Insolvency Act that would apply to various types of debtor – both natural person debtors (individuals) and corporate and other entities. Still, apart from more recent working documents from the Department of Justice and Constitutional Development, a formal Reform Insolvency Bill is yet to be published.

For purposes of cross-border insolvency law, the new legislation will aim to include cross-border insolvency rules as a separate chapter rather than it remaining a loose-standing piece of legislation as is currently the case. It is hoped that the designation and reciprocity clause will also be removed in the new legislation.

II. Functionaries in an insolvent estate

The High Courts of South Africa have jurisdiction to grant insolvency orders, i.e., sequestration orders with regard to debtors as defined in the Insolvency Act,[21] and winding-up or liquidation orders in relation to companies and close corporations.[22]

20 The 1996 Draft Insolvency Bill and Explanatory Memorandum were published for comment by the South African Law Commission as the 'Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum' Working Paper 66 Project 63 (1996), hereinafter the 'Draft Insolvency Bill' and 'Explanatory Memorandum' respectively. See further Boraine/van der Linde TSAR 1998 (Part 1), 621 et seqq; TSAR 1999 (Part 2), 38 et seqq.

21 The definition of 'debtor' in connection with the sequestration of the debtor's estate, includes a (natural) person, i.e. an individual, and also a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, but excludes a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies.

22 Although not a fully fledged specialised insolvency court, a Dedicated Insolvency Court was initiated in the Gauteng Local Division of the High Court in Johannesburg as a pilot project in terms of Practice Directive DJP/390/2024/lt dated 10 March 2025, and expanded to Pretoria as from January 2026. It should, however, also be noted that, in the case of companies unable to pay their debts, winding-up may be initiated by means of a special resolution of shareholders in terms of s 352 of the Companies Act 61 of 1973.

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It is important to note that the administration of the insolvent estates of individuals, as well as other debtors such as companies, takes place under the supervision of the Master of the High Court.[23]

Although the Master of the High Court has several statutory duties – including the supervision of insolvent and deceased estates – this office cannot be seen as an insolvency regulator in the true sense of the term.[24]

In the case of sequestration of the estate of a debtor as defined in the Insolvency Act of 1936, a trustee is appointed (or in the case of a company or close corporation a liquidator) to take charge of the administration of the respective estates.

Local estate representatives, trustees, or liquidators are, in principle, elected at the first meeting of creditors by those creditors who have proved their claims. However, the ultimate responsibility of appointing such an elected trustee or liquidator rests with the Master. In practice, creditors nominate persons who generally accept appointment as trustees or liquidators, to be appointed as trustees or liquidators even before the first meeting of creditors has been held (this is the so-called 'requisition' practice). The Master has an unfettered discretionary statutory power to appoint such a nominee as a provisional trustee or liquidator to take *interim* control of the insolvent estate.[25]

Although trustees and liquidators need no special licence to act as such under South African law, the Master of the High Court issues directives regarding appointment requirements. The Master keeps lists of persons who are eligible for appointment. They usually hail from trust companies or firms of accountants or attorneys. As the local estate representative, an appointed trustee or liquidator must provide security to the Master for the proper execution of his or her duties.

In corporate insolvency, the Companies and Intellectual Property Commission (CIPC) also has certain statutory duties relating to winding-up and business-rescue proceedings. Apart from prescribing qualifications for business-rescue practitioners, section 138 of the 2008 Act also prescribes a licensing system for business-rescue practitioners issued by the CIPC.

23 The Master of the High Court is a public official whose functions include the supervision of the administration of insolvent estates by appointing trustees or liquidators, giving them directions as to certain aspects of the administration of insolvent estates and confirming the formal estate accounts.

24 Calitz/Boraine TSAR, 728 (744 et seq).

25 Van Rensburg De Rebus 1988 70 et seq; Calitz/Burdette TSAR 2006, 721, (733–751); Loubser SA Merc LJ 2007, 123 (124–139).

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C. Inward and outward requests for recognition

I. Rules pertaining to property

The South African system allows for inward and outward-bound requests for recognition and assistance by foreign and local estate representatives, respectively. Such requests or applications from elsewhere must be directed to a division of the South African High Court. One of the reasons for seeking such assistance is to trace the property of the insolvent debtor located in a different jurisdiction with a view to administering it for the benefit of the estate creditors. A South African court will consider the purpose of the recognition but it is not essential that the foreign insolvent has property located in South Arica as the need to conduct an insolvency examination may also provide the basis required.[26]

The meaning of 'property' in the Insolvency Act[27] is relevant to this discussion and can be misunderstood upon a first reading. In terms of the definition it includes all types of property, wherever situated in South Africa. This means that a sequestration order granted by a specific South African High Court applies to property wherever situated in South Africa. [28] It does not limit property to assets situated in South Africa. As regards property in a foreign jurisdiction, the common-law rules of private international law apply.[29] These rules, which entitle an estate representative to deal with property situated in a foreign jurisdiction, will, according to local law, apply in the case of property situated outside the borders of South Africa

26 See *Moolman v Builders & Developers* (*Pty*) *Ltd* (*in provisional liquidation*)*: Jooste intervening* 1990 (1) SA 954 (A); and see *Lehane NO v Lagoon Beach Hotel* (*Pty*) *Ltd* 2015 (4) SA 72 (WCC) at para 56 as approved on appeal in *Lagoon Beach Hotel* (*Pty*) *Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA) at para 51.

27 See the definition of 'property' in S. 2 of the Insolvency Act of 1936. Bertelsmann *et al* at p. 733 indicates that this definition intends to ensure that a sequestration order issued by a specific division of the High Court will extend to all such property of the debtor wherever situated in South Africa.

28 This definition defines property that may form part of the insolvent estate in wide terms and makes it clear that all property in South Africa will be included when any South African High Court division issues a local sequestration order – even where such property is situated outside the boundaries of a specific division of such court – see *Sackstein NO v Proudfoot SA* (*Pty*) *Ltd* 2003 (4) SA 348 (SCA), and *cf Viljoen v Venter NO* 1981 (2) SA 152 (W) at 154F. It has no bearing on property located outside South Africa.

29 This principle has been confirmed in precedents over the years in judgements such as *Trustee of Howse, Sons & Co v Trustees of Howse, Sons & Co and Others* 1884 3 (SC) 14; *Ex parte Stegmann* 1902 TS 40; and *Re Estate Morris* 1907 TS 657 666. See further

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(outward-bound situation) where a local representative applies to a foreign jurisdiction for recognition, as well as in the case of a request by a foreign representative to be recognised in South Africa (inward-bound situation).

Whether the property in the foreign jurisdiction is movable or immovable and whether the debtor is an individual or a company may have a bearing on the legal status of the property under South African private international law.[30] This is because there is a rule applicable to the property of individual debtors subject to formal insolvency which provides that their movable property wherever situated vests in the estate representative if the insolvency order was issued in the jurisdiction where the debtor is domiciled.[31] However, in the case of immovable property the rule dictates that the *lex loci rei sitae* will apply.[32] In theory, these rules imply that

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Samsudin v Berrange NO 2005 (3) SA 529 (N); *Viljoen v Venter NO* 1981 (2) SA 152 (W) and *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C).

30 The legal position is succinctly summarised in *Ex parte BZ Stegmann* 1902 TS 40 at 47–48, where Innes, JP stated: 'Regarding, then, a decree of insolvency, not as an ordinary judgment, but as an order *sui generis,* we find two rules of private international law clearly applicable. The one is that an order of insolvency duly made at the domicile of a debtor places in the hands of his trustees for administration all the movable property of the insolvent wherever situated. This rule is recognised by almost every civilised nation... and it is often justified or explained as being an instance of the effect of the maxim, *mobilia personam sequuntur.* But it seems, to say the least of it, doubtful whether the ex-territorial [this should be extra-territorial, but I do not have access to the case report] recognition of a bankruptcy order, as affecting movables, sprang simply from an application of the above maxim. A thorough investigation of the history of the practice would probably show that the fiction which the maxim embodies originated, among other causes, from a desire to justify the placing of foreign movables under the jurisdiction of the judge of an insolvent's domicile which comity and convenience demanded. The second of the rules referred to is that immovable property is governed by the *lex rei sitae,* and that an order of sequestration made by the judge of an insolvent's domicile does not vest in his trustee the right to administer any immovable property located outside the jurisdiction. Such property can only be dealt with by invoking, in some form or other, the authority of the Courts of the territory where it is situated. This rule is approved by the tribunals of the great majority of countries; more particularly, it has the sanction of the laws both of England and of Holland.' See also Smith 2002 SA Merc LJ 2002, 19–31; and Franco SA Merc LJ 2003, 27 (28–38).

31 See *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32 at para 23, relying on *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C).

32 *Mavromati v Union Exploration Import (Pty) Ltd* 1947 (4) SA 192 (A); *Hymore Agencies Durban(Pty)Ltd v Gin Nih Weaving Factory* 1959 (1) SA 180 (D). See also Smith/Ailola 1999 SA Merc LJ 1999, 192 (193–195); Smith SA Merc LJ 2002 17 (29–31); Olivier/Boraine CILSA, 2005, 373 (379–380); Smith/Boraine 2002 ABI LR 2002, 135 (181).

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all the movable property of such an individual will automatically vest in his or her insolvent estate wherever situated, whilst a foreign jurisdiction must first grant assistance in the form of a recognition order concerning immovable property situated outside the jurisdiction where the insolvency order commenced.

There is also a difference in the application of this rule in South African insolvency law as in terms of section 20 of the Insolvency Act, the property of the debtor vests in the trustee in the case of the sequestration of the estate of an individual, whilst company property remains vested in an insolvent company but the liquidator obtains control over it.[33] Strictly speaking, it would then not be essential for the estate representative to obtain recognition in a foreign jurisdiction to administer movable property as mentioned in the first instance but located in the foreign jurisdiction, but recognition will be required for immovable property. In the case of an insolvent company, it is however imperative for the estate representative to at least obtain recognition to deal with either movable or immovable property within South Africa.[34]

The theoretical position is thus that other than the position with movable property where such recognition is deemed a mere formality, recognition in the case of immovable property is essential. Despite these theoretical differences in approach regarding the type of property, the type of debtor, etcetera, recognition will in practice be required in all the instances described.[35] In considering requests for recognition and assistance South African courts have an absolute discretion in granting or declining assistance.[36] If the representative fails to secure this recognition the property remains vested in the insolvent.[37]

33 S. 361 of the Companies Act of 1973.

34 See 1998 (3) SA 175 (SCA) for an explicit ruling in this regard. See also 1993 (3) SA 359 (C) at 362J and 363H; See also ( ) 2016 (3) SA 145 (SCA) at para 26–27; and Smith PELJ, 2016, 12–19.

35 1993 3 SA 359 (C) at 362F, as referred to with approval in (Case No. 1109/2024) [2026] ZASCA 32 at paras 20-23

36 See 1902 TS 40 at 52: '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 such order. The matter is entirely one for its own discretion.' See also 1993 (3) SA 359 (C) at para 27, as endorsed in See (Case No. 1109/2024) [2026] ZASCA 32 at para 22 See further Smith/Boraine ABI LR 2002, 135 (178–189); and Smith 2002 SA Merc LJ 2002, 17 (24–32).

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It is thus submitted that recognition is nevertheless required in both instances and that a declaratory order is also, in practice, required in the case of movable property.[38]

After recognition has been granted, the foreign representative may, in principle, deal with local assets and related matters such as interrogations. A South African High Court may impose conditions on the foreign representative to safeguard the rights and interests of local creditors.[39] If recognition is refused by a South African court or if no application is made, a (foreign) creditor may, in principle, apply for the sequestration or winding-up of the estate in this jurisdiction – subject to local legal requirements being met in this regard.

In an inward-bound situation where the appointment of a foreign estate representative seeks to be recognised by a South African court, he or she may administer the local property as authorised by the local court order. To this end, the South African court may also set conditions to protect the rights and interests of local creditors[40] as South Africa favours a more territorial approach – once termed a 'modified territorial' approach.[41] Such terms and conditions, amongst others, may prescribe how notice must be given to interested parties by, for example, publishing a notice in local newspapers and in the *Government Gazette*.[42]

Where the South African court refuses to grant recognition of the appointment of the foreign representative to deal with property located in South Africa, the only alternative is to apply for a local insolvency order and open a local concurrent insolvency process. However, to do so the person

37 *Mavromati v Union Exploration Import (Pty) Ltd* 1947 (4) SA 192 (A); *Hymore Agencies Durban(Pty)Ltd v Gin Nih Weaving Factory* 1959 (1) SA 180 (D).

38 *Ex parte Palmer NO: In re Hahn* 1993 3 SA 359 (C) at 362F. See also *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32 at paras 20 -23 where the Supreme Court of Appeal referred to the principles set out in the Palmer case with approval.

39 See *Ex Parte Steyn* 1979 (2) SA 309 at 312 F.

40 Ibid. See also *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32 at para 23.

41 See Smith SA Merc LJ 2002, 34 who uses the term 'modified territoriality' for the South African position. *Cf* the judgment in *Lehane NO v Lagoon Beach Hotel* (*Pty*) *Ltd* 2015 (4) SA 72 (WCC), at paras 46–47, approved on appeal in *Lagoon Beach Hotel* (*Pty*) *Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA), being fairly recent precedents that still followed a more territorial approach in principle by not accepting the automatic worldwide stay following an American bankruptcy order as envisaged by s 362 of the US Bankruptcy Code of 1978.

42 Ibid.

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who attempts to open the procedure must meet all the local requirements prescribed by South African insolvency legislation.[43]

II. The South African procedural rules to deal with cross-border insolvency matters

The High Courts of South Africa have jurisdiction to deal with requests from foreign estate representatives for recognition under local law. Such a request is made by application by the foreign representative to a local division of the High Court in accordance with local rules governing the jurisdiction of the divisions of the High Courts.[44] As mentioned, this relief is based on comity, convenience, and equity.[45]

Recognition applications to a local High Court generally involve foreign insolvency orders – akin to South African sequestration or liquidation orders – which can be viewed as orders initiating collective debt-collecting procedures.

Although there are not many reported cases on the acknowledgement of foreign pre-insolvency orders, it appears that in the absence of statutory provisions, South African courts may be reluctant to assist in such instances. In *Cooperativa Muratori Cementisti v Companies and Intellectual Property Commission*[46] the Supreme Court of Appeal intimated that cross-border recognition may only be available to foreign liquidators or the like, but not to some other types of representatives such as Judicial Commissioners executing a statutory (bankruptcy) composition or scheme

43 For an explanation of these requirements, see Kunst/ Boraine/ Burdette, Chs 2 and 3 regarding the process of sequestration, and Nagel et al, paras. 35.86 – 35.104.

44 Since there are a number of divisions of the High Courts in South Africa, the local rules pertaining to jurisdiction to determine which particular division to approach must be followed. In such a cross-border matter it may be the court where the property of the foreign debtor is located. See in general on the jurisdiction of the High Courts of South Africa, Theophilopoulos/Van Heerden/Boraine/Rowan, Ch. 5.

45 See *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32 at para 21, relying on *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C); and *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* [2015] ZASCA 210; [2016] 1 All SA 660 (SCA); 2016 (3) SA 143 (SCA). On the notion of comity see also the American judgment in *Hilton v Guyot* 1895 159 US 113 163–164, and see Smith/Boraine ABI LR *2002,* 135 (177–187).

46 [2020] JOL 49000 (SCA) at paras 32–33. See in general Boraine Brics Law Journal *2020*, 85; and Smith/Boraine, CILSA *2002*, 1.

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of arrangement sanctioned by a foreign court in terms of foreign company or bankruptcy laws.

1. Inward-bound applications for recognition

a. General procedural considerations

As indicated, the foreign representative of a foreign insolvent debtor subject to an insolvency order issued by a foreign jurisdiction may only administer the property of the debtor in South Africa if his or her appointment has been recognised by a local High Court. From a practical point of view, it does not really matter whether the debtor is an individual or a company, or whether the insolvency order was issued in the jurisdiction where the debtor is domiciled. The reason is that the foreign representative will, in general, have to be recognised before being allowed to administer the movable and immovable property of the foreign debtor located in South Africa. This principle applies even where the movable property in fact vests in the foreign representative in terms of the applicable rules of private international law as explained above.[47]

In the absence of statutory measures applying to such applications, it is accepted that South African courts derive their powers to entertain the applications for recognition from considerations of comity, convenience, and equity.[48] The South African courts have a discretion to grant recognition or not, and the court hearing the matter may also set conditions for granting recognition. The courts will, in principle, attempt to protect the interests of local creditors. The recognition order authorises the foreign representative to administer property located in the court's jurisdiction, but it may also provide additional tools for the foreign representative by enabling him or her to make use of certain insolvency-law mechanisms to preserve and trace property, and to obtain information concerning property and trans-

47 Ibid.

48 See *Ex parte Stegmann* 1902 TS; *Re Estate Morris* 1907 TS 657; *Chaplin v Gregory* (*or Wyld*) 1950 (3) SA 555 (C); *Ex parte Steyn* 1979 (2) SA 309 (O); *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C); *Ex parte LaMonica v In re Eastwind Development SA* (*Baltic Reefers Management Ltd intervening*) [2010] JOL 24783 (WCC); and see *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32.

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actions entered into by the debtor through examinations available under South African insolvency laws.[49]

The interests of local creditors will generally include the furnishing of security to the Master of the High Court for the proper administration of the property as allowed for in the court order. The court hearing the matter may first issue a provisional order in the form of a rule *nisi* which must be brought to the attention of the creditors to allow them an opportunity to be heard on the matter before recognition is granted.[50] In such an instance, the court may grant an interim protection order regarding the property. Where possible, and in line with the constitutional imperative of due process,[51] the debtor should also be granted an opportunity to be heard unless he, she, or it has agreed to the local process.

As a rule, local courts will only consider the recognition of the appointment of a foreign representative if the foreign proceeding is a final proceeding.[52] However, in exceptional circumstances a court *may* assist in the provisional appointment of a foreign representative to protect the property of the foreign debtor on an *interim* basis.[53]

Based on public policy considerations, South African courts will not in principle, assist in enforcing foreign tax claims on behalf of a foreign revenue authority or foreign penal orders such as fines for criminal offences.[54]

From a civil procedural point of view, the duly appointed foreign estate representative will thus, in principle, have *locus standi* to apply to a South African court to be recognised as such. The *locus standi* is based on the proper appointment in the foreign jurisdiction, usually where the debtor is

49 For example, see *Ex parte Stegmann* 1902 TS; *Re African Farms Ltd* 1906 TS 373; *Moolman v Builders & Developers* (*Pty*) *Ltd* (*in provisional liquidation*)*: Jooste intervening* 1990 (1) SA 954 (A); *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) at 360–365; *Herman NO v Tebb* 1929 CPD 65; *Ex parte Steyn* 1979 (2) SA 309 (O); *Ex parte LaMonica v In re Eastwind Development SA* (*Baltic Reefers Management Ltd intervening*) [2010] JOL 24783 (WCC); and also *Lehane NO v Lagoon Beach Hotel* (*Pty*) *Ltd* 2015 (4) SA 72 (WCC) at paras 5, 45, 47 and 48, approved on appeal in *Lagoon Beach Hotel* (*Pty*) *Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA) at paras 21, 22 and 33.

50 See eg, *Ex parte Stegmann* 1902 TS at 50; *Ex parte Motam's Trustees* (1905) 22 SC 353; and *Chaplin v Gregory* (*or Wyld*) 1950 (3) SA 555 (C).

51 See S. 34 of the 1996 Constitution.

52 See eg *Bekker NO v Kotzé and Another* 1996 (4) SA 1287 (NmHC); *cf Bekker NO v Kotzé and Others* 1996 (4) SA 1293 (NmHC).

53 Ibid.

54 *Cf Priestly v Clegg* 1985(3) SA 955 (T).

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domiciled and where the insolvency order was issued.[55] Since there are various divisions of the High Court in South Africa, the foreign representative must, in principle, approach the division of this court where the property of the foreign debtor is located or where the debtor resides or is located.[56] The South African court has an absolute discretion to grant the recognition order. The courts also allow some flexibility in that recognition could be granted under exceptional circumstances and by reason of convenience, to a foreign representative appointed by a court within whose jurisdiction the insolvent is not domiciled.[57] It is to be noted that the modern terminology of main and non-main (or secondary) proceedings is not yet used in local judgments. Some support has been expressed for a single-forum approach based on the place of domicile of the debtor.[58] The term 'ancillary' has also been used when a foreign representative sought some assistance from a South African court to prevent the dissipation of property located in South Africa.[59]

In general, and as pointed out, where the rights and interests of third parties, e.g., local creditors, may be affected by the application they must be notified of the application.[60] The court will, in practice, first issue a rule *nisi* before the order becomes final to allow interested parties who may be affected to be heard on the application.[61]

The application is based on the fact that the foreign representative has been appointed on the strength of a foreign insolvency procedure. In this regard, the foreign representative will have to prove this to the court and also indicate the aim of the relief he or she is seeking in South Africa.

The essence of the court order is to recognise the appointment of a foreign representative elsewhere. The court order is also the authority that

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55 See *Lehane NO v Lagoon Beach Hotel* (*Pty*) *Ltd* 2015 (4) SA 72 (WCC) at paras 55–57, approved on appeal in *Lagoon Beach Hotel* (*Pty*) *Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA) at para 27.

56 See in general Smith/Boraine 2002 ABI L Rev 2002, 35 (180–181).

57 *Lagoon Beach Hotel* (*Pty*) *Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA) at para 56 for a reference to *Re Estate Morris* 1907 TS 657 at 666 for a *dictum* that recognition could be granted to a foreign representative appointed by a Court within whose jurisdiction the insolvent debtor was not domiciled when exceptional circumstances and exceptional considerations of convenience were present.

58 *Ward v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 179 G-I.

59 *Lehane NO v Lagoon Beach Hotel* (*Pty*) *Ltd* 2015 (4) SA 72 (WCC) at para 45.

60 See further Kunst/ Boraine/ Burdette, para 17.3.2.1 in this regard.

61 Ibid.

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allows the foreign representative to act within the borders of South Africa, but only to the extent which the order allows. It should be noted that unlike the appointment of a local estate representative by the Master of the High Court, the Master does not issue a formal letter of appointment to a foreign representative once recognition has been granted but the court order is endorsed indicating that security has been furnished as required by the Master.

b. Discretion of the court to recognise foreign appointments

The granting of recognition to a foreign estate representative to allow him or her to trace and administer South African-based property is said to be a discretionary matter for the court hearing the application. Although the discretion of the court is wide and said to be absolute, recognition will, in principle, be granted where the interests of comity, convenience, and equity require the court to assist.[62] The court may thus apply a balance of convenience test in deciding whether to grant the recognition order or not.[63]

In general, it is the appointment of a foreign estate representative in the foreign jurisdiction that is to be recognised by a South African court rather than the recognition of the foreign insolvency order.[64] In this context, it must be noted that foreign insolvency orders are not treated on exactly the same footing as the enforcement of foreign judgments since a foreign

62 For examples, see *Ward v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA); *Ex parte LaMonica v In re Eastwind Development SA* (*Baltic Reefers Management Ltd intervening*) [2010] JOL 24783 (WCC) at para 12. See also *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32 at para 22 referring to *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C); and also *Lagoon Beach Hotel v Lehane* [2015] ZASCA 210; [2016] 1 All SA 660 (SCA); 2016 (3) SA 143 (SCA) para 27.

63 As stated in *Ex parte BZ Stegmann* 1902 TS 40 at 44: '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 such order. The matter is entirely one for its own discretion.' See also *Lehane NO v Lagoon Beach Hotel* (*Pty*) *Ltd* 2015 (4) SA 72 (WCC) at paras 80–86, approved on appeal in *Lagoon Beach Hotel* (*Pty*) *Ltd v Lehane NO and Others* 2016 (3) SA 145 (SCA) at para 32 and for a useful discussion on this aspect, see O'Brien, p. 16.

64 In terms of the Cross-Border Insolvency Act, the foreign proceeding will be recognised, see S. 15(1).

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insolvency order does not merely settle a dispute between litigants but may affect the rights of third parties who were not parties before the foreign court.[65] It should further be noted that foreign insolvency proceedings may also be based on extra-judicial procedures in terms of which an insolvency process is initiated and not necessarily on a court order as such.[66]

Although in dealing with the insolvency of individuals South African law distinguishes between where the foreign representative intends to deal with locally-situated movable as opposed to immovable property, in reality he or she must in all instances first be recognised[67] before he or she will be permitted to administer the property of a foreign debtor located in South Africa.[68]

c. Effect of recognition

As we have seen, a recognition order does not equate with a local sequestration or liquidation order. However, to the extent that the foreign estate representative is permitted to administer property situated in South Africa, the effect of the two is somewhat similar.[69]

It remains important to note that the foreign estate representative derives his or her powers and duties from the provisions of the court order which also determine the effect of actions performed under the order.[70]

The ultimate aim is to trace the property of the foreign debtor located in South Africa with the view of using that property to pay the creditors

65 See *Ex parte B Z Stegmann* 1902 TS 40 at 44.

66 See *Ex parte Gettliffe and Another: In re Dominium Reefs Ltd* 1965 (4) SA 75 (T) and *Re African Farms Ltd* 1906 TS 373 at 381–382.

67 See *Liquidator Rhodesian Plastics* (*Pvt*) *Ltd v Elvinco Plastic Products* (*Pty*) *Ltd* 1989 (1) SA 858 (C) at 869C–D, as approved by the Appellate Division of the High Court in *Moolman v Builders & Developers* (*Pty*) *Ltd* (*in provisional liquidation*)*: Jooste intervening* 1990 (1) SA 954 (A) at 959H–I.

68 O'Brien, p.14, argues that recognition is also required in case of movable property even though the foreign insolvency order was issued by the jurisdiction of domicile of the debtor. Further on this point see at *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) 362E–F.

69 *Ex parte Steyn* 1979 (2) SA 309 (O). See also *Herman NO v Tebb* 1929 CPD 65 at 76 and *Chaplin NO v Gregory* 1950 (3) SA 555 (C) 562A–B. Recognition will thus not initiate a moratorium, hence both local and foreign debtors will still in principle be allowed to enforce their claims, but *cf Re African Farms Ltd* 1906 TS 373, and further see *Hassan and Another v De Villiers Berrange NO* [2006] JOL 17346 (SCA), 2012 6 SA 329 (SCA); an Smith/Boraine ABI L Rev 2002, 185.

70 See the content of such an order set out in para 3.2.1.5.

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in the foreign jurisdiction. In this situation, however, a conflict of interests may arise where the foreign debtor also has creditors in South Africa who are not part of the foreign insolvency process. The local procedure of recognition will thus generally include some protective measures for South African-based creditors.

It is submitted that the recognition order will not allow the foreign representative to rely on the South African voidable transactions under the South African Insolvency Act of 1936 in that the relevant statutory provisions require formal commencement of local sequestration or liquidation as a pre-requisite.

The court order may, however, apart from also allowing the foreign representative to administer the locally-situated property, also allow him or her to conduct an insolvency interrogation or examination regarding transactions of the foreign debtor in this jurisdiction or to allow other legal mechanisms used to trace property in South Africa.[71]

Once the property has been gathered, it should be realised with the view of settling the debts of local creditors in accordance with the insolvency appropriation or distribution rules as authorised by the court order. Local creditors should be allowed an opportunity to give input at special meetings and should also have an opportunity to prove their claims. The position of local creditors versus that of foreign creditors regarding the appropriation of the proceeds of the property is not always that clear but will be further discussed below. As indicated earlier, South African courts will not allow claims to enforce fines for foreign offences or tax claims due and owing by the foreign debtor due to public policy considerations.[72]

d. The protection of interests of local creditors

In a recognition order the South African courts will protect the interests of local creditors by ensuring that they are aware of the process that will enable the foreign estate representative to deal with South African-based

71 *Ex parte LaMonica v In re Eastwind Development SA* (*Baltic Reefers Management Ltd intervening*) [2010] JOL 24783 (WCC).

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

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property and to provide them with the opportunity to oppose the application.[73]

To protect the local creditors further, the recognition order may state that no property may be transferred from this jurisdiction before the administration costs of the process and debts of local creditors have been paid. In such an instance, the Master of the High Court will be tasked to certify payment before any property of the foreign debtor may be transferred from South Africa.[74]

Foreign creditors will have to prove their claims, and the foreign estate representative will not be entitled to claim collectively on their behalf.[75] Their status as creditors will be determined by South African law; in other words, preferences or priorities and security rights will be established by South African law.[76]

In a recent judgment, namely *Scheer v Wagner N.O. & Others*,[77] the Supreme Court of Appeal had to consider the interplay between section 116 of the Insolvency Act of 1936 and the common-law principles governing the recognition of a foreign estate representative, as well as the implications of such recognition in the context of cross-border insolvency. The matter concerned concurrent insolvency proceedings arising from the sequestration of the insolvent's estate in Austria in 2017. As the insolvent also owned property in South Africa, his local estate was subsequently sequestrated in South Africa in 2018. Wagner, the Austrian estate representative, obtained recognition from the South African High Court,[78] and sought the transfer of surplus funds from the South African insolvent estate to Austria after the claims of local creditors and the costs of administration had been satisfied.[79]

73 See *Moolman v Builders & Developers (Pty) Ltd* 1990 (1) SA 954 (A); *Ex parte Steyn* 1979 (2) SA 309 (O). The first-mentioned case dealt with a foreign company liquidated elsewhere, whilst the latter case dealt with the sequestration of an individual.

74 See in this regard *Re Greatrex & Son Ltd* 1907 TS 538 at 540; *In re Melliar, Smith and Co, Ex parte Hooper* 1922 CPD 116 at 121; *Ex parte Gettliffe and Another: In re Dominium Reefs Ltd* 1965 (4) SA 75 (T) 77H-78F; and *Ex parte Steyn* 1979 (2) SA 309 (O) 311H-312D; and *Moolman v Builders & Developers (Pty) Ltd*, 1990 (1) SA 954 (A), at 957F-958D.

75 Bertelsmann et al, p. 742–743.

76 *Ex parte Steyn* 1979 (2) SA 309 (O) at 312 B-D.

77 (Case No. 1109/2024) [2026] ZASCA 32.

78 *Wagner NO v Gijsbers NO* 2024 (6) SA 296 (WCC).

79 *Scheer v Wagner N.O. & Others* (Case No. 1109/2024) [2026] ZASCA 32, para 35.

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The insolvent's claim to the surplus in the South African estate was dismissed on appeal, and Wagner's entitlement to the surplus was confirmed. The Court accordingly held that section 116 of the Insolvency Act, which provides for surplus funds to be paid into the Guardians' Fund administered by the Master of the High Court until the insolvent individual has been rehabilitated, does not apply where a recognised foreign estate exists and remains deficient in satisfying the claims of foreign creditors, provided that the expenses of the South African estate have been met and the claims of local creditors have been paid.[80]

The judgment thus confirms that section 116 coexists with, and does not displace, the common-law principles of international comity. Relying on earlier precedent, the Court affirmed that a recognised foreign trustee or estate representative may recover surplus assets situated in South Africa for distribution among foreign creditors, once the claims of South African creditors and the local costs of administration have been satisfied.[81] This judgment is regarded as confirming South Africa's alignment with international insolvency principles and promoting fairness and cooperation in the distribution of assets across jurisdictions.[82]

e. The contents of a recognition order

In general terms, and with reference to relevant provisions in local insolvency legislation, a recognition court order should cover the following matters relevant to the specific application:

- the recognition of the appointment of the foreign representative as such;
- the duration of the order;
- the general powers of the foreign representative;
- compliance with the requirements for the opening of a bank account to deal with local funds;
- the security to be afforded by the foreign representative to the satisfaction of the Master of the High Court;
- the service of the order on relevant parties;

80 Ibid, para 35 for a finding by the Court that section 116 does not override the common law principles in this regard.

81 Ibid, paras 20-23, 31,35 and 38.

82 See Cremen at https://www.coxyeats.co.za/LegalUpdates/View/20251/Cox-Yeats-Secures-Landmark-SCA-Judgment-on-Cross-Border-Insolvency

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- supervision by the Master and practical arrangements regarding the administration of the order and the submission of estate accounts to the Master;
- the court order being subject to amendment by the court; and
- special conditions regarding:
  - meetings of creditors;
  - proof, admission, and rejection of claims;
  - plans for distribution;
  - prohibition of the transfer of property from South Africa without the written permission of the Master of the High Court;
  - treatment of local creditors and their claims; and
  - the rights and specific powers of the foreign representative.

The powers bestowed on the foreign estate representative on recognition in relation to the tracing of assets and the holding of examinations, for example, are drawn from local insolvency legislation regulating the sequestration of the estates of individuals and the liquidation of companies.[83] These powers required by the foreign representative to administer the property in South Africa are set out in the court order. The court order granted in *Ex parte Steyn*[84] is a good example of an order granted for the recognition of a foreign sequestration order relating to the insolvent estate of an individual debtor. The order in *Moolman v Builders & Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening,*[85] serves as a good example regarding recognition of a foreign representative in case of a company in liquidation.

III. Outward-bound request

In the case of a South African insolvency order, the local estate representative appointed by the Master of the High Court may need to administer the property of a local debtor situated in a foreign jurisdiction. The local

83 This approach to expand the powers of a foreign representative by incorporating specific provisions of insolvency legislation as initiated in *Re African Farms Ltd* 1906 TS 373 was not followed in the judgment of the Privy Council in *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 36 (10 November 2014), [2015] 2 WLR 971 at paras 78–83 where the Privy Council refused to follow a similar approach. See also Smith Obiter, 2016, 167 (168–186).

84 1979 (2) SA 309 (O).

85 957F–958D read with 962A-C.

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estate representative will then have to follow the cross-border rules of the foreign jurisdiction to acquire the authority to deal with the property of the debtor in that jurisdiction. In this regard strict compliance with the laws and procedures of the foreign jurisdiction is required.

The relevant rules of the foreign jurisdiction may require a letter of request or a process-in-aid from a South African court, in which case the local representative must approach a local court to request such assistance.[86] It is submitted that when required, the local representative must establish reasonable grounds to justify the institution of the proceedings in the foreign jurisdiction.[87]

South Africa is currently not party to any cross-border insolvency treaty and it is doubtful if it will initiate such a treaty given the disinterest shown to activate the Cross-Border Insolvency Act of 2000, being the locally adopted version of the MLCBI. In this regard it is interesting to note that South Africa is designated as a 'relevant country' for purposes of recognition under section 426 of the Insolvency Act 1986 (England),[88] and is eligible to use the English Cross-Border Insolvency Regulation of 2006, being their version of the MLCBI. Even these facts have, for instance not prompted the South African Government to designate England for purposes of the Cross-Border Insolvency Act – even though England is a significant trading partner as well. Consequently, when a South African estate representative wishes to follow up on the property of a local debtor subject to a local insolvency order in the UK, he or she may rely on the section 426 procedure for recognition of the South African procedure which is, in effect, tantamount to recognition. Such representatives may

86 See *Ex parte BZ Stegmann* 1902 TS 40, at 50–53; *Insolvent Estate James, James & Co* (1907) 28 NLR 123 at 124; and *Gardener v Walters: In re Ex Parte Walters* [2002] 3 All SA 702 (C) where the Court granted the request to allow a local representative to enable the local representative the opportunity to investigate the disappearance of large sums of monies of an insolvent company.

87 In the judgment in *Gardener v Walters: In re Ex Parte Walters* [2002] 3 All SA 702 (C) at 810 the court stated that, '[i]f a liquidator is *bona fide* of the view that proceedings should be taken in another country, it should be his decision, and his alone.' In this regard the court did not follow the approach in *Ex parte Wessels and Venter NNO: In re Pyke-Nott's Insolvent Estate* 1996 (2) SA 677 (O) that the applicant had to establish some *prima facie* case to convince the court that the granting of the letter of request was necessary for the representative to exercise his or her functions as liquidator in the foreign jurisdiction.

88 See s 426 of the English Insolvency Act of 1986. See further Mallach De Rebus 1994, 771; Polonsky SALJ 1996, 109; and Smith/Ailola SA Merc LJ, 1999 193 (95).

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also rely on the 2006 Insolvency Regulation, the English iteration of the MLCBI.

D. The opening of concurrent local insolvency proceedings and related matters

The principle that a foreign representative must at least be recognised as such before attempting to deal with property situated in South Africa, and that the granting of such recognition remains a discretionary matter for the local court to be exercised on the basis of comity, convenience, and equity is entrenched.[89] It is interesting to note that South African courts will be prevented from denying a local sequestration order based on a consideration of convenience in case of a foreign debtor coming from a designated state as envisaged in the Cross-Border Insolvency Act – which, for all practical purposes, is not yet in operation.[90]

Should the application for recognition fail, the opening of a local insolvency order in relation to the South African-based property (estate) of the foreign debtor, either through sequestration or liquidation depending on the type of debtor, could be considered. Save where a special resolution by shareholders to place a company in voluntary liquidation has been taken,[91] application must be made to a South African court under South African law to initiate all such insolvency orders. The person who brings the application, be it a foreign or a local creditor or representative, must have the required *locus standi* to do so.[92] It must be noted that a foreign

89 For examples, see *Re Estate Morris* 1907 TS 657; *Ex parte BZ Stegmann* 1902 TS 40 at 52; *Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation): Jooste intervening* 1990 (1) SA 954 (A); *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C); and *Ward v Smit & Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 179D-G; *Ex parte LaMonica v In re Eastwind Development SA (Baltic Reefers Management Ltd intervening)* [2010] JOL 24783 (WCC) at para 12.

90 See S. 149(2) of the Insolvency Act of 1936. It is submitted that the Cross-Border Insolvency Act should be integrated as a chapter in the envisaged new, unified insolvency legislation, in order to counter this type of fragmentation that is so prevalent in South African insolvency regulation.

91 See S. 352 of the Companies Act of 1973.

92 See *Morley v Pederson* 1933 TPD 304; *Goode, Durrant & Murray (SA) Ltd and Another v Lawrence* 1961 4 SA 329 (W); *Deutsche Bank AG v Moser and Another* 1999 (4) SA 216 (C); and *cf Hassan and Another v De Villiers Berrange NO* [2006] JOL 17346 (SCA), 2012 (6) SA 329 (SCA).

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representative will not have *locus standi* to apply for a local insolvency order based solely on his or her appointment.

When local insolvency proceedings have been opened where a foreign insolvency order is also in place, there will be concurrent insolvency proceedings running against the same debtor, and the Master of the High Court will appoint a South African estate representative to administer the South African-based property. In such an instance, one would expect the foreign and local estate representatives to cooperate. But practical difficulties may arise in the absence of statutory principles to govern the concurrent proceedings. A protocol between the estate representatives may be useful, but it is unclear to what extent a local court will sanction this as the insolvency legislation makes no provision for such a protocol and it is also uncertain to what extent a local court will sanction such a process between the estate representatives.[93] In view of the judgment in *Scheer v Wagner N.O. & Others*,[94] it is also now clear that a foreign estate representative may apply for recognition to participate in a local insolvency proceeding, *in casu*, to claim surplus funds on behalf of the foreign creditors.

It should further be noted that the South African court hearing a full-blown South African insolvency application, be it for sequestration or liquidation, has a discretion to grant or deny the insolvency order. If abuse of process is suspected[95] the court will refuse to assist. Depending on the context, alternative and less drastic measures than formal insolvency to deal with the debtor's debt may be considered. In general, the notion of convenience may also persuade a local court that the insolvency would more appropriately be addressed in a foreign jurisdiction.

Recently there have been interesting South African judgments addressing the treatment of foreign companies permitted to run local branches termed 'external companies'. Although not being incorporated in South Africa, these external companies must register a business address in the country[96] and may participate in the South African economy as if they are local

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93 In confirming a local (secondary, concurrent) liquidation order against an external company operating in South Africa, whilst the foreign company was already in liquidation in its jurisdiction of origin, the Supreme Court of Appeal in *Ward v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 179 G-I, maintained the local order as issued by the Court *a quo* but remarked by way of an *obiter dictum* that the benefits of a single *concursus creditorum* was obvious.

94 (Case No. 1109/2024) [2026] ZASCA 32 as discussed above.

95 See further Kunst/Boraine/Burdette, Ch.2 para 2.1.5.

96 S 23 of the Companies Act of 2008.

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companies. Although registration of an external company in South Africa does not establish a separate legal *persona*, in these instances the affairs of such a company may be wound-up in South Africa as an independent entity even if the foreign entity is not wound-up in the jurisdiction of incorporation or where its centre or main interest is situated. Withdrawal or suspension of the liquidation in the country of incorporation, for whatever reason, also does not affect the South African liquidation process as such.[97] Accordingly, in relation to the winding-up of an external company, there may be concurrent liquidation processes relating to the same company – one in the country of the company's incorporation regarding the foreign company incorporated elsewhere; and the external branch in South Africa where the company holds its registered address as an external company.[98] Even where it is not possible to liquidate a foreign company doing business in South Africa other than through its local branch, and, for instance, where jurisdiction for a local court cannot be established, a sequestration order in terms of the Insolvency Act of 1936 may be considered as the company may under such circumstances qualify as a 'debtor' as defined in section 2 of the Insolvency Act of 1936.[99]

E. Recognition of foreign statutory discharge procedures

At times the question arises to what extent South African law will acknowledge a discharge of debt following a foreign rehabilitation or scheme of arrangement or compromise.

In the case of individuals, it is accepted that such a foreign rehabilitation will extinguish debts incurred or payable in the country where the rehabilitation has been granted and to the extent allowed by that system.[100]

As discussed above, various established principles confirmed by precedent over many years are entrenched regarding assistance by South African courts rendered in the case of foreign insolvency orders relating to the

97 See the judgments in *Ward v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 183H-J, and *Sackstein NO v Proudfoot SA* (*Pty*) *Ltd* 2003 (4) SA 348 (SCA).

98 Ibid.

99 *Lawclaims* (*Pty*) *Ltd v Rea Shipping Co SA: Schiffcommerz Aussenhandelbetrieb Der VVB Schiffbau intervening* 1979 (4) SA 745 (N) at 750.

100 *Cf Cape of Good Hope Bank (In Liquidation) v Mellé* 10 SC (1893) 280; *Dyer v Carlis* 4 Official Reports (1897) 67.

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liquidation of the property of insolvent company debtors. Lately, questions have emerged concerning the acknowledgement by South African courts of statutory schemes of arrangements or compromises sanctioned in foreign jurisdictions to the extent that such foreign company debtors have both South African-located property and a presence in South Africa.[101] This is an extremely important issue in cross-border matters as the foreign procedure is generally aimed at rescuing the corporate debtor and it is accepted that some level of discharge of debt is generally required to rescue a financially-ailing company. In the absence of a statutory regime providing rules for such an eventuality, it appears difficult to do this in South African law. It is doubtful whether a foreign scheme of arrangement or compromise entered into by the foreign company debtor in its home jurisdiction will in fact be acknowledged by South African law.[102] Apart from procedural difficulties that may arise in the absence of legislation, the notorious 'Gibbs rule' may also come into play.[103]

Following a recent judgment of the Supreme Court of Appeal,[104] it is now also clear that external branches of foreign companies doing business in South Africa which experience financial distress are not eligible for the relief provided by the South African business rescue procedure in Chapter 6 of the 2008 Companies Act.

It is submitted that the cross-border insolvency-related position regarding external companies in South Africa is currently unsatisfactory and warrants further consideration. The fact that the Cross-Border Insolvency Act of 2000 is not yet operational (see above) is a contributory factor in this regard. This aspect is, however, problematic in many jurisdictions.

F. The Cross-Border Insolvency Act 42 of 2000

I. General background

As mentioned, the MLCBI was enacted in South African law as the Cross-Border Insolvency Act 42 of 2000. The Cross-Border Insolvency Act came

101 See in general *Cooperativa Muratori Cementisti v Companies and Intellectual Property Commission* [2020] JOL 49000 (SCA), and see further Smith/ Boraine CILSA 2002, 1 et seqq.
102 Smith/ Boraine CILSA 2002, 1 (23–29).
103 Ibid, 1 (37–39).
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into force on 28 November 2003. However, this Act does not yet apply in practical terms, as the South African version of the MLCBI was adjusted not only to fit the local legal system, but also to subject the operation of the statute to designated jurisdictions and the principle of reciprocity. Section 2(2) thus clearly states that the Act applies only to states designated by the Minister of Justice and Constitutional Development. It is trite that no country has yet been designated, even though the Act was signed into law in 2003.[105] As some states may be designated in future and others not, South Africa is heading for a dual system in that the common-law principles will apply to non-designated states and the Cross-Border Insolvency Act to the designated states.[106] It is submitted that a dual system is not desirable and detracts from the idea of having clear rules in place. It is nevertheless hoped that when new insolvency legislation is enacted it will include cross-border rules and that the legislature will see fit to abandon the designation/reciprocity clause.

This notwithstanding, the Cross-Border Insolvency Act – which is largely aligned with the MLCBI's aims, *inter alia*, to provide effective mechanisms for dealing with cases of cross-border insolvency, to regulate the jurisdiction of the South African High Courts in this regard, and to provide for related matters. The Act is intended to strengthen cooperation between South African and foreign courts in the administration of insolvent estates; to protect creditors and other interested persons, including the insolvent; to facilitate the rescue of financially troubled businesses; and to protect investments and preserve employment.[107] The UNICTRAL Model Law follows an approach of modified universalism and in this regard the South African version should adopt a similar approach.[108] These are all noble aims which sit well with international thought and local imperatives.

Structurally, the Act resembles the Model Law save for the use of certain terminology unique to South African insolvency law. Section 1 is the definitions section, and it holds the key to the application of several important matters, such as the type of debtors and the type of insolvency or insolvency-related matters which fall within the Act.

For the purposes of this contribution, the Cross-Border Insolvency Act will not be discussed in its entirety but certain focal points which may be

105 See Kunst/ Boraine/ Burdette, para 17.1 et seqq; and Bertelsmann *et al,* para 30.1 et seqq.
106 See in general Smith/Boraine ABI LR 2002, 138 et seqq.
107 See the Preamble to the Act.
108 See Olivier/Boraine CILSA, 2005 387.

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important to law reform and to other states busy revising their cross-border insolvency rules are considered. Some comparisons between the current South African set of rules and the Act are also highlighted.

II. The aims and structure of the Cross-Border Insolvency Act

The Act consists of 34 sections divided into six chapters. Chapter 1, sections 1–8, cover the interpretation of the Act and fundamental principles. Chapter 2 sections 9–14 address access to South African courts by foreign representatives and foreign creditors. The recognition of foreign proceedings and relief are found in Chapter 3, sections 15- 24; while Chapter 4, sections 25–27, govern cooperation with foreign courts and foreign representatives. Chapter 5, sections 28–32 address concurrent proceedings; and Chapter 6, sections 33 and 34 are general provisions including the 'hotchpotch rule aimed at a fair distribution of the proceeds of the property to both the local and foreign creditors.'.

In line with the text of the MLCBI the Act applies:[109]

(a) where a foreign court or representative seeks South African assistance in a foreign proceeding; or, conversely
(b) where such assistance is requested in a foreign court in proceedings under the laws of the Republic relating to insolvency (a 'local proceeding');
(c) where a foreign and a local insolvency proceeding run concurrently in respect of the same debtor; or
(d) where creditors or other interested (foreign) persons apply to commence or to participate in a local insolvency proceeding.

The Act grants representatives and creditors from designated foreign jurisdictions certain advantages, including:

(a) direct and speedy access by foreign representatives to courts in the Republic[110] and recognition of foreign representatives or creditors.

109 Cross-Border Insolvency Act, S. 2(1).
110 Ibid, Ss. 9, and 11, 12, 13(1) and 24.

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(b) clarity with regard to the ranking of the claims of foreign creditors (by stating that their ranking will not be lower than the claims of local non-preferent creditors).[111]
(c) similar notification as local creditors for foreign creditors.[112]
(d) *locus standi* for a foreign representative upon recognition of foreign proceedings, to institute proceedings to set aside dispositions of the debtor's property in the Republic.[113]

III. Important terminology and application of the Cross-Border Act

The Act contains definitions of certain core terms. Some are similar to those in the MLCBI,[114] while others link the Act to South African concepts, procedures, etc.[115] The definition section is important in that it also provides a set of terminology not currently entrenched in South African cross-border legal terminology – although local commentators sometimes use certain of these terms to explain current aspects of the common-law dispensation. It is submitted that the establishment of uniform terminology is important as it can also be used on a global scale to develop this area of international insolvency law.

The term 'foreign state' defines 'state' as a state designated by the Minister[116] in terms of the provisions of section 2(2) of the Act. This definition, of course, ties in with the reciprocity clause as discussed elsewhere.

Given that the type of foreign proceedings to which the enacted version will apply is central to all cross-border dispensations, the Act defines 'foreign proceedings' to mean collective judicial or administrative proceedings in a foreign state, including interim proceedings, pursuant to a law relating to insolvency, in which the assets and affairs of the debtor are subject to

111 Ibid, S. 13(2).
112 Ibid, S. 14(1).
113 Idem, S. 23(1).
114 These S.1 definitions are: 'establishment'; 'foreign court'; 'foreign main proceedings'; 'foreign non-main proceedings'; 'foreign proceedings'; and 'foreign representative'. For some comparisons between terms stemming from the MLCBI and other instruments like the recast EIR, and the definitions in the Cross-Border Insolvency Act, see Chitimira obiter 2018, 173 (174 et seqq).
115 See the following definitions in S. 1 of the Cross-Border Insolvency Act: 'court'; 'curator of an institution'; 'foreign State'; 'Minister'; 'receiver'; and 'Republic'.
116 As defined in S. 1 of the Act as being the member of the South African Cabinet in charge of the administration of justice.

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control or supervision by a foreign court for purposes of reorganisation or liquidation. The intention is that the foreign proceeding should be governed by foreign insolvency law under which a debtor's assets and affairs are controlled or supervised by a foreign court for re-organisation or winding-up. This provision is wide and it may be read to cover any type of insolvency proceedings and any type of debtor – individuals and even banks and insurance companies. In this respect the Act envisages a wider application than the MLCBI. It is also clear that it may also relate to reorganisation, i.e. business rescue. It is submitted that the inclusion of entities like banks and insurance companies should be revisited.

Foreign proceedings will be 'foreign main proceedings' where the proceedings take place in the State where the debtor has the centre of his, her or its main interests, i.e. the *COMI*. This term was not known to South African law prior to the enactment of this Act, although concepts such as domicile, the registered office of a company, or main place of business were all relevant for purposes of jurisdiction and various other aspects concerning debtors.

Similarly, the term 'foreign non-main proceedings' defined as proceedings other than foreign main proceedings, emanating from a state where the debtor has an establishment, is also a novel term in South African cross-border insolvency law.

A 'foreign representative' is defined in section 1(*h*) as a person or body authorised in foreign proceedings to administer the reorganisation or winding-up of the debtor's assets or affairs, or to act as a representative of the foreign proceedings. Although the Act contains no definition of a 'local representative' – save in relation to a 'curator'[117] and a 'receiver'[118] – reference is made in section 4 of the Act to such a representative as including a 'trustee', 'liquidator', and 'judicial manager', each of whom, it is submitted, will bear their ordinary meanings within the context of the Insolvency Act and the former 1973 Companies Act.[119] To the extent that the Cross-Border

117 'Curator' is defined in S.1 of the Act as a person appointed as such in terms of the provisions of S. 6 of the Financial Institutions (Investment of Funds) Act 39 of 1984, S. 69 of the Banks Act 94 of 1990, or S. 81 of the Mutual Banks Act 124 of 1993.

118 'Receiver' is defined in S.1 of the Act as a person appointed by the court to administer a compromise or arrangement under S. 311 of the Companies Act of 1973. It must be noted that this section is no longer in force since the 1973 Act has been repealed, bar Ch. XIV.

119 'Trustee' is defined in S. 2 of the Insolvency Act 24 of 1936, and 'liquidator' and 'judicial manager' are defined in S. 1 of the repealed Companies Act of 1973. It must

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Insolvency Act refers to terminology and procedures in the 1973 Companies Act, it must be noted that this Act, except for provisions relating to liquidation in chapter 14 of this Act, has been repealed and replaced by the 2008 Companies Act. It is clear that this must be rectified since procedures such as judicial management and the section 311 compromise and scheme of arrangement have been replaced by the business rescue and statutory compromise provided for in Chapter 6 of the 2008 Companies Act.

The definition of 'court' in section 1 read with section 4 of the Act, makes it clear that it means South African High Courts referred to in section 166(*c*) of the Constitution of the Republic of South Africa, 1996. The relevant 'foreign court' is a judicial or other authority competent to control or supervise foreign proceedings.

It is notable that the definition section does not define 'property' for purposes of this Act. The inclusion of such a definition may be useful in view of the current common-law rules.[120]

The intention in interpreting the Act is clear in that section 8 states that the Act must be interpreted with due regard to its international origin[121] and to 'the need to promote uniformity in its application and the observance of good faith'. In order not to limit the assistance to be granted to foreign representatives, section 7 provides that the Act is not to be interpreted so as to preclude a court or an insolvency representative from providing additional assistance to a foreign representative under any other South African law.[122]

The Act applies to both inward-bound requests involving cross-border matters and cases where local representatives wish to seek help elsewhere.[123]

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however be noted that only Ch. 14 of the 1974 Companies Act still applies but the rest of this Act has been repealed. It is clear that the Cross-Border Insolvency Act needs an update in this respect.

120 See Smith/Boraine 2002 ABI LR 2002, 135 (175); Chitimira Obiter 2018, 173 (194).

121 The reference in S. 8 to the 'international origin' of the Act is a reference to the MLCBI.

122 This rule is in fact reinforced by s 233 of the Constitution, 1996 which provides that all legislation must be interpreted to accord with international law rather than to conflict with it.

123 As to the latter, in the judgment of *Wessels and Venter NNO, Ex parte: In re Pyke-Nott's Insolvent Estate* 1996 (2) SA 677 (O) the local representatives intended to recover assets in the United Kingdom. The Court, however, rejected the request as no *prima facie* case, nor a reasonable prospect of succeeding in this quest could be established. *Cf. Gardener v Walters: In re Ex parte Walters* [2002] 3 All SA 702 (C) at 810, where the Court followed a different approach and stated: '[i]f a liquidator

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In addition to the so-called 'inward-bound' and 'outward-bound' requests to which the Act applies, it also regulates concurrent proceedings,[124] proceedings a foreign creditor or another interested person from a foreign State initiates here, or a local proceeding in which such a creditor or person wishes to intervene in the Republic.[125]

By virtue of the requirement of reciprocity in relation to the designation of foreign states to which it will apply, the Act is more limited in its application than the MLCBI.

Section 3 of the Act provides that if a provision of the Act conflicts with an obligation of the Republic arising out of a treaty or other agreement to which it is a party with another state and which has been enacted into law by virtue of section 231(4) of the Constitution, the provisions of the treaty or agreement will take precedence.[126] South Africa is not currently party to any such insolvency treaty although it has been suggested that such a treaty between South Africa and its neighbouring countries should be considered.

Section 6 of the Cross-Border Insolvency Act provides that a court may refuse to take any action envisaged by the Act which manifestly infringes the Republic's public policy. It must be noted that this public policy-provision allows the courts some discretion to refuse assistance as provided for in the Act. It is, however, submitted that its application will only become clear once the Act is applied.

IV. Reciprocity and designation

In terms of section 2(2)(*a*), the Act applies only in relation to states designated by the Minister of Justice and Constitutional Development by notice in the *Government Gazette*.[127] The Minister may designate a state only if he or she is satisfied that the recognition accorded by the law of that state

is *bona fide* of the view that proceedings should be taken in another country, it should be his decision, and his alone'. The Cross-Border Insolvency Act is also less restrictive in this regard and will be more aligned with the approach in the *Gardener* case. See also Smith/Ailola SA Merc LJ 1999 192 at 194.

124 See Ch. 5 of the Cross-Border Insolvency Act.

125 S. 13(1) of the Act.

126 At present, South Africa is not a party to any such a treaty or convention.

127 Mohan IIR 2012, 200 (209) states the South African version 'appears to be the most restrictive'. See also Smith/Boraine 2002 ABI LR 2002, 135 (186–205); Franco SA Merc LJ, 2003, 27 (33–43); Olivier/Boraine CILSA 2005, 373 (379–388).

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justifies the application of the Act to foreign proceedings in that state.[128] The Minister may also, again by notice in the *Gazette*, withdraw any such designation.[129] All such notices must also be approved by Parliament before their publication. A withdrawal by the Minister of any such notice does not affect any pending legal proceedings which will continue as if the notice had not been withdrawn.[130]

Consequently, although the Act has been promulgated and came into force on 28 November 2003, its provisions will not take effect until such time as the Minister has designated states to which it is to apply in terms of section 2(2).[131]

The requirement of the designation of states to which the Act will apply stems from the principle of reciprocity on which this section in the Act is based. Thus, if foreign states wish to avail themselves of the benefits accorded them by this Act, they will, in turn, have to extend the same benefits under their systems to South African representatives and creditors. The effect of the system of designation is that a dual system will operate in terms of which the law and rules applicable at the date of commencement of the Act will govern cross-border insolvency matters between South Africa and non-designated states, while the Cross-Border Insolvency Act will apply in relation to cases involving designated states.[132]

It is submitted that this provision in the Cross-Border Act does not reflect the spirit of the MLCBI and can be seen as a significant impediment to its usefulness as a more flexible and predictable cross-border insolvency dispensation. It is further submitted that the public policy exception provided by both the Act and the Model Law could address any inappropriate requests that a local court may receive within the context of assistance with cross-border insolvency. This ill-conceived provision will hopefully be discarded in time.

128 S. 2(2)(*b*) of the Cross-Border Insolvency Act. See also Yamauchi IIR 2007, 145 (169).

129 Ibid, S. 2(2)(*c*).

130 Ibid, S. 2(5) (inserted by S. 30 of the Judicial Matters Second Amendment Act 55 of 2003 with effect from 31 March 2005).

131 In *Ex parte van Straten* (22678/14) [2014] WCC (19 December 2014) a local High Court granted recognition to a foreign estate representative from Namibia whilst the application relied on the provisions of the Cross-Border Insolvency Act. It is submitted that this judgment was granted in error and should in fact have been set side since no State has been designated yet – see Boraine THRHR 2020, 622 et seqq.

132 Smith/Boraine ABI L Rev 2002, 138 (191).

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When considering states that have already enacted the MLCBI, only a few – of which South Africa is one – have opted for some kind of reciprocity clause. Other states that have included reciprocity dispensations, albeit in different formats, in their locally-enacted Model Law versions are Mauritius, Mexico, the British Virgin Islands, Romania, and Uganda.[133]

It is interesting that Zimbabwe, a state neighbouring on South Africa, adopted a negative type of reciprocity in that their Minister of Justice may designate to which states their version of the Model Law will not apply.[134] It is submitted that this approach is more acceptable where the enacting state insists on a reciprocity clause of some sort.

It is also interesting that the Draft Cross-Border Insolvency Bill which preceded the Act, did not contain this clause and its scope of application mirrored that of the Model Law.[135] A commentator has indicated that the reciprocity clause followed concerns raised by some local Societies of Advocates who argued that states who would benefit from the Cross-Border Insolvency Act might not reciprocate.[136] The idea of the clause was thus to compel other states to reciprocate.

Another concern raised was that foreign creditors would share in the distribution of the proceeds of local property. Reciprocity was viewed as a way of ensuring equal treatment by the foreign jurisdiction in an outward-bound case.[137]

The final concern raised was that the granting of a recognition order could be abused in that a foreign creditor could attempt to enforce a judgment in South Africa that would otherwise not be enforceable – 'like a foreign tax claim or a punitive claim'.[138]

Interestingly, the South African Law Reform Commission held the view that notions of either 'comity' or 'reciprocity' would create uncertainty and possibly defeat the objectives of the Act. The Commission's view was that the courts should deal with the concerns raised by the Society of Advocates if and when they arise in practice relying on the strength of the discretion permitted by the legislation.

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133 Dos Santos Ch. 4. para 4.1.

134 See Ss. 152(3) and (4) of the Zimbabwean Insolvency Act 7 of 2018.

135 See the South African Law Reform Commission Report (1999) *Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters*: Project 121, 23 – Annexure at 23–41.

136 Dos Santos Ch. 3. para 2.3.2.

137 Ibid.

138 Ibid.

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Dos Santos[139] refutes the argument of the Society of Advocates. She argues that:

(a) First, the public policy consideration could be evoked in relevant instances which could serve as a sufficient basis for a refusal to recognise proceedings.
(b) Second, the Society has confused the recognition and enforcement of foreign judgments with solely recognising an insolvency proceeding.
   i. In this regard, she notes that the principles of the recognition of foreign judgments cannot be applied directly to insolvency judgments, as 'a foreign bankruptcy order does not merely settle a dispute between litigants but also affects the rights of third parties who were not parties before the foreign court'.[140]
   ii. She also points out that the Model Law 'was promoted as having a procedural effect as opposed to a substantive effect that might have included automatic recognition and enforcement or effects'.[141]

There are, however, also arguments in favour of reciprocity, notably that reciprocity may compel states which have not enacted the MLCBI to do so.[142] Another argument in favour of the concept is that the interrelation between private and public international law should be considered in recognising foreign judgments. Where states do not reciprocate, for example, a deadlock could arise were local estate representatives to refuse to cooperate with foreign representatives from non-reciprocating states. Yamauchi[143] notes that the inclusion of reciprocity could result in a 'stalemate' where neither party will recognise the other and advises states which have enacted reciprocity to repeal it.

Whilst South Africa currently has a positive form of reciprocity, it is interesting to note that its neighbouring state, Zimbabwe, enacted a new unified Insolvency Act in 2018 which includes the Model Law as a Chapter to their new Insolvency Act. As pointed out above, in principle this Act applies to all states, but the Zimbabwean Minister of Justice may exclude specific states from this benefit.[144]

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139 Ibid.
140 Ibid, and with reference to Kunst/ Boraine/Burdette para 17.3.2.3.
141 Dos Santos para 2.3.2 referring to Mevorach (2018) 102, where she cites *Bank of Western Australia v Henderson* (2011) FMCA 840.
142 Dos Santos, Ch. 3 para 2.3.2.
143 IIR 2007, 145 (179).
144 Ss. 152(3)-(4) of the Zimbabwean Insolvency Act 7 of 2018.

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A sobering thought regarding the notion of reciprocity comes from Associate Judge Randall who states: 'The Model Law enshrines reciprocity subject to its provisions.'[145]

V. Recognition of foreign proceedings, representatives, and foreign creditors and some effects

1. Recognition and relief

The Act provides that a foreign representative may apply to a South African High Court for recognition *of the foreign proceedings* in which he or she has been appointed. When compared to the current common-law positions, the Act makes it clear that it is the foreign proceeding rather than the appointment of the foreign representative that must be recognised.

Such an application must be accompanied by relevant documentary evidence including a statement of all foreign proceedings that he or she is aware relate to the debtor.[146] The court may presume that documents accompanying the application are authentic and that the debtor's registered office or habitual residence is the centre of its, his, or her main interests.[147] The important point here is that, unlike the common-law position, the court hearing the matter will have no discretion to deny the request if the foreign representative comes from a state designated under the Act and if recognition does not militate against local public policy, provided that he or she produces the proof of appointment etcetera as prescribed.

Once recognition has been granted, the foreign representative may take part in a local proceeding.[148] He or she may also intervene in any proceeding to which the debtor is a party.[149] Upon recognition of a foreign proceeding, the foreign representative acquires *locus standi* to initiate legal action to set aside any disposition that is available to a South African trustee or liquidator.[150]

145 *Legend International Holdings Inc (as debtor in possession of the assets of Legend International Holdings Inc) v Legend International Holdings Inc* (2016) VSC 308 para 53.
146 Cross-Border Insolvency Act, S. 15.
147 Ibid, S. 16(2) and (3).
148 Ibid, S. 11 and 12.
149 Ibid, S. 24.
150 Ibid, S. 23.

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Likewise, foreign creditors may participate in local insolvency proceedings,[151] they enjoy a measure of equality with local creditors in that their claims may not be subordinated to claims of local creditors,[152] and they must be informed of local proceedings.[153]

2. Interim (provisional) discretionary relief

On application by the foreign representative, the court may also grant urgent provisional relief pending the outcome of the recognition application to protect the debtor's assets or the creditor's interests. 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 additional relief available under South African law.[154]

3. Effects of the recognition of a foreign main proceeding

The recognition of a foreign proceeding as a foreign main proceeding has the following effects: it stays local individual proceedings as to the debtor's affairs and also execution against his or her assets; the debtor's right to dispose of assets is stayed; and the right of the debtor to transfer, encumber, or otherwise dispose of assets is suspended.[155]

In terms of section 20(2) the stay is subject to sections 20, 23 and 75 of the Insolvency Act of 1936 and sections 341 and 359 of the Companies Act of 1973. The stay, however, does not 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.[156]

Section 21 also authorises the court that grants the recognition order to: stay proceedings and execution; suspend the debtor's right of disposition; allow the examination of witnesses and the collection of evidence; and en-

151 Ibid, S. 13.
152 Ibid, S. 13(3).
153 Ibid, S. 14.
154 Ibid, S. 19(1) read with S. 21(1)(c), (d) and (g).
155 Ibid, S. 20(1), and see S. 21.
156 Ibid, S. 20(3)-(4).

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trust the administration or realisation of assets to the foreign representative or a designated person. The court may even permit the distribution of the debtor's local assets if it is convinced that local creditors are protected. It may also set conditions when granting relief in terms of section 19 or 21, and alter or amend the relief granted, either at the request of an interested person or on its own initiative but is obliged to protect creditors and others, including the debtor.[157]

The foreign representative will have standing to initiate any legal action to set aside a disposition that is available to local representatives in terms of the insolvency laws of South Africa. In the case of the *non-main proceedings*, the court must be satisfied that the legal action relates to assets which under local law should be administered in the foreign non-main proceedings. It is submitted that this provision may pose some practical difficulties in that it does not indicate the commencement date of insolvency which is required to calculate certain prescribed periods as provided for in the South African dispensation.[158]

VI. Cooperation between local and foreign courts

Chapter 4 of the Act compels local courts to 'cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a trustee, liquidator, judicial manager, curator, or receiver'.[159] Courts may communicate and seek information or help directly from foreign courts or representatives. Under the supervision of the High Court, local representative are expected to act in a similar fashion, and section 26 grants them the same right of direct communication with foreign courts and representatives.[160]

It is submitted that the proper implementation of cooperation envisaged may call for the introduction of specific rules of court. However, these principles will lead to a more flexible approach and enable local courts to deal with collaboration more effectively.

157 Ibid, S. 22.
158 See Ss. 26 and 29 of the Insolvency Act relating to dispositions without value and voidable preferences for instance.
159 Cross-Border Insolvency Act, S. 25(1).
160 Ibid, S. 27 for various forms of cooperation.

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VII. Concurrent proceedings

The Cross-Border Insolvency Act also covers concurrent proceedings by enabling the launch of a local insolvency proceeding once a South African court has recognised a foreign proceeding. The effects of the local proceeding will then be limited as prescribed and directions as to the administration of the concurrent proceedings provided.[161] The foreign representative will also have *locus standi* to bring a local proceeding.

Provision is made for any relief already granted in foreign non-main proceedings to conform to a foreign main proceeding that is subsequently recognised.[162] Once the foreign main proceeding has been recognised by the High Court, the debtor is rebuttably presumed to be insolvent for the purposes of institution of a local proceeding.[163]

The use of protocols to assist the local and foreign representatives in administering the estate assets to the benefit of all the creditors may, for example, also become a feature of our local practice in this regard.

Section 32 is an attempt to prevent the double payment of the same claim in case of concurrent proceedings.

VIII. Outward-bound requests

Section 5 of the Act authorises an insolvency representative, such as a trustee or liquidator, to act in a foreign state in respect of South African insolvency proceedings insofar as the laws of the foreign state permit. It appears, in light of this section, that the local estate representative will not require a formal letter of request issued by a South African court, but the foreign state may, of course, set certain requirements in this regard.

G. New cross-border instruments

The MLCBI has celebrated its 25th anniversary since its adoption in 1997. To date, it has been enacted in the national legal systems of 48 states. In general, this Model Law provides a procedural basis on which to deal

161 Ibid, Ss. 25–30.
162 Ibid, Ss. 30(*a*)-(*c*).
163 Ibid, S. 31.

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with recognition in cross-border insolvency and certain related assistance procedures.

It has nonetheless emerged clearly that there are certain gaps in the MLCBI.[164] In order to address some of these, UNCITRAL has released two further model laws: the Model Law on Recognition and Enforcement of Insolvency-Related Judgments of 2018[165] and the Model Law on Enterprise Group Insolvency of 2019.[166] Both these model laws are intended to build on the MLCBI by addressing certain aspects not initially covered.

The Model Law on Recognition and Enforcement of Insolvency-Related Judgments of 2018 aims to assist states in equipping their laws with a framework of provisions for recognising and enforcing insolvency-related judgments that will facilitate the conduct of cross-border insolvency proceedings.[167]

The Model Law on Enterprise Group Insolvency[168] was designed to expand on extant UNCITRAL insolvency texts to equip states with modern legislation addressing the domestic and cross-border insolvency of multiple debtors that are members of the same enterprise group, thus strengthening existing platforms.

These three Model Laws have complementary characteristics: they use similar terminology and definitions and rely on similar frameworks to achieve their goals.[169] Although it is envisaged that the three Model Laws could be enacted separately, the logical route would be to combine them as a single cross-border platform. To this end, UNCITRAL has also released an illustrative text in the Consolidated Text of the MLCBI, the MLIJ and the MLEG of 2021.[170]

164 See Mevorach European Business Organization Law Review 2021, 283 (315).

165 See at https://uncitral.un.org/en/texts/insolvency/modellaw/mlij

166 See at https://uncitral.un.org/en/MLEGI

167 It became clear that there is a need for this, for instance in the UK a distinction is drawn between the recognition of foreign insolvency proceedings and enforcement of insolvency related judgments. The judgment in *Rubin v Eurofinance* [2012] UKSC 46, [2013] 1 AC 236, serves as an example where a UK Court maintained its territorial approach by denying assistance in relation to a foreign insolvency related judgment.

168 See at https://uncitral.un.org/en/MLEGI

169 See MLCBI Guide paras. 1–4; MLIJ Guide paras. 1, 35–41; and MLEG Guide paras. 1–3 and 14.

170 Consolidated Text of the of the MLCBI, the MLIJ and the MLEG <https://uncitral.un.org/en/consolidated-text-uncitral-model-laws-cross-border-insolvency-recognition-and-enforcement>.

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H. Summary and conclusion

South African cross-border insolvency law is currently based on principles of common law and on precedents set by our courts. In this regard, the principles of private international law play a significant role – especially in relation to the status of property.[171] A local High Court may consider an inward-bound application to be recognised in South Africa by a duly appointed foreign estate representative to allow him or her to trace assets of a foreign insolvent debtor in this jurisdiction. The ultimate aim of this recognition is to realise the assets and use the proceeds for distribution amongst the foreign creditors, or for a related object such as conducting an insolvency examination.[172]

The definition of the term 'property' in section 2 of the Act does not include property in a foreign jurisdiction, but in terms of common-law principles of international private law, movable property of a local insolvent situated in a foreign country will vest in the local insolvent estate if the estate is sequestrated by the court where the insolvent is domiciled.[173] If a debtor's estate includes immovable property over which a foreign representative wishes to secure control and which is situated in a foreign country, the foreign representative cannot secure control unless and until his or her appointment as a representative has been recognised by relevant foreign court in terms of the relevant principles of the foreign jurisdiction. If the foreign representative fails to secure recognition, the immovable property remains vested in the insolvent. Contrary to the situation with movable property – where such recognition is regarded as a mere formality – the recognition in the case of immovable property is essential and the courts have an absolute discretion to deny or grant such an application. In *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd*[174] the court nevertheless stated that the local representative must apply for recognition where he or she has to deal with either immovable property or movable property situated in a foreign country and this is the practical situation.

An application for recognition will be considered on the basis of comity and the local courts will apply convenience and equity when exercising

171 See para 3.1 above.
172 Ibid and see para 3.2.1 above.
173 See para 3.1 above.
174 1998 (3) SA 175 (SCA).

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their discretion to recognise the foreign estate representative.[175] The court's discretion is said to be absolute which makes the process somewhat unpredictable in practice.[176] In this sense a territorial approach is followed. However as South African law does allow for some assistance to foreign estate representatives, the country's approach can be regarded as a modified form of territoriality. In view of the recent judgment of the Supreme Court of Appeal in *Scheer v Wagner N.O. & Others*,[177] it is nevertheless clear that the local courts are alive to the application of cross-border insolvency principles aimed at assisting foreign estate representatives, while still protecting the interests of local creditors.

Because there is no applicable legislation in this regard to deal with the recognition and its consequences, or with related or ancillary relief such as (interim) stays of execution, the tracing and preservation of property that may at present also be considered,[178] the current dispensation is somewhat unpredictable and unsatisfactory from a contemporary perspective.

Important features of the South African dispensation are that the foreign estate representative derives his or her powers from the court order. In this regard, the local courts may impose conditions for recognition – especially with a view to protecting the interests of local creditors by, for example, by requiring the foreign representative to provide security to the Master of the High Court for: the proper execution of his or her duties in terms of the recognition order and informing the local creditors of the proceeding and allowing them to prove claims with a view to obtaining payment from the locally-situated property of the foreign insolvent debtor.

Should the request for recognition fail, the representative will have to consider opening a concurrent insolvency proceeding in terms of South African insolvency law.[179] The foreign estate representative will not have *locus standi* to apply for a local insolvency order based solely on his or her appointment as such, and will have to meet all the local statutory requirements for such orders.

On 8 December 2000, South Africa enacted an adapted version of the UNCITRAL Model Insolvency Law as the Cross-Border Insolvency Act 42 of 2000. This Act came into force on 28 November 2003 but will take

175 See para 3.2.1.1 above.
176 See para 3.2.1.2 above.
177 (Case No. 1109/2024) [2026] ZASCA 32 as discussed - see para C II,1 above.
178 See para 3.2.1.1.
179 See para 4 above.

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practical effect only once the Minister of Justice has designated states to which the Act applies under section 2 of the Act.[180] On formal designation of relevant countries, the Act will regulate this area of the law with regard to the designated countries. In contrast, non-designated countries will still be governed by the current rules described above.

Once states have been designated in terms of this Act, representatives and creditors from designated countries will enjoy improved assistance and protection under the Act than representatives and creditors from non-designated states. By introducing the notion of designation into the local version of the UNCITRAL Model Insolvency Law, a dual system has been created – one for designated countries and another for non-designated states. This is a factor to be considered by foreign states when they design cross-border insolvency rules to accommodate states such as South Africa as the Minister concerned is required to exercise a discretion based on reciprocity in designating states for purposes of the Act. The common law will nonetheless continue to play a role where the 2000 Cross-Border Act does not address a particular aspect that might arise.

It would, however, be a step forward if the envisaged new insolvency legislation were to scrap the designation and reciprocity clause. Furthermore, it would be more conducive to the development of this area of the law if the cross-border insolvency rules were to be included to form part of new unified insolvency legislation.

Once the Cross-Border Insolvency Act has been 'activated' this branch of South African law will be much clearer. For a start, there will be a clear field of application and a set of terminology that has gained some foothold in various other jurisdictions – especially where the MLCBI has been enacted and applied. To name but a few important terms would be the centre of main interest (COMI) and main and secondary proceedings. It must, however, be noted that some of the terms defined in the Cross-Border Insolvency Act are already dated due to new company legislation. Definitions referring to repealed concepts such as 'judicial management' and the former section 311 compromise and schemes of arrangement should be corrected. In this regard, it is submitted that the legislature should also ensure that all the types of insolvency – and perhaps pre-insolvency procedures envisaged to be covered by the Act – are properly provided for in an amended version.

180 See paras 6.1 and 6.4 above.

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When compared to the current position, foreign estate representatives will have *locus standi* to apply for recognition, and the South African courts will no longer have so wide a discretion to deny such relief provided that to do so does not militate against local public policy considerations. To the extent that the Cross-Border Insolvency Act may not deal with certain matters – e.g. the definition of property – the common-law principles will continue to apply.

It is notable that the Cross-Border Insolvency Act will apply to both individuals and corporate debtors, including banks and insurance companies. It is submitted that the legislature should rethink this carefully, especially as the insolvency of banks and insurance companies are highly specialised areas that are not addressed in the MLCBI.[181] The current approach of covering both personal and corporate insolvency is, however, supported in general terms.

Under the Cross-Border Insolvency Act both foreign estate representatives and foreign creditors will obtain certain rights to be informed of and participate in local proceedings. The Act is also clear that foreign creditors must be treated on an equal footing with local creditors.[182] This approach to strengthening equality amongst creditors on a cross-border basis is aligned with modern thinking and should be pursued in further developments in this regard.

The type of relief flowing from a recognition order is set out in the Act, and the local court may also provide some discretionary relief. The Act further provides for interim measures pending the outcome of the recognition order. All these measures will be a significant improvement on the current system. It may be asked whether the courts have sufficient discretion to deal with the many cross-border issues that may arise. It is submitted that the discretionary provisions in the Act aimed at assisting foreign representatives, creditors, and courts, read with the fact that the Act must be interpreted and applied with its international origin in mind, provides South African courts with fairly wide powers to develop areas of this law once the Act becomes operational. As mentioned, it must be remembered that the current common-law principles will remain relevant as they will still apply unless they have been replaced by the Act and in instances where the Act does not make provision for a particular matter.

181 See para 6.3 above.
182 See para 6.5.1 above.

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However, since the MLCBI and the Cross-Border Insolvency Act are, in the main, geared to provide procedural assistance rather than dealing with substantive insolvency principles, aspects concerning rights of security against the locally-situated property of the insolvent debtor and the treatment of unexecuted contracts are not dealt with in this Act. In such instances, the South African common law will continue to apply.

In the case of voidable dispositions, section 23 activates the use of the provision in the Insolvency Act that deals with such transactions. Still, it is submitted that the section should be amended to make it clear what will be deemed to be the date of formal insolvency (sequestration or liquidation) since this is a crucial element in establishing a cause of action for such claims. A recognition order for a foreign proceeding also does not cause a full *concursus creditorum* to set in as in the case of a concurrent local insolvency proceeding – this remains an important element of the claim.

The procedures for opening and administering concurrent proceedings have been firmly entrenched in the Act and the South African court will have to provide assistance where these principles apply. Of course, even under the current laws, a foreign debtor may be subject to a local insolvency proceeding where the local court may have jurisdiction, and the person bringing the application has the prescribed *locus standi* and meets the statutory requirements. The Cross-Border Insolvency Act extends the use of the latter local procedures to foreign representatives and creditors.[183] It is also clear that the courts will be obliged to cooperate and assist foreign representatives.

The notion of equal treatment of foreign creditors and greater clarity on the rules regarding the appropriation of the proceeds of the property located in South Africa between local and the foreign creditors are important improvements.[184]

The South African legislature will have to reconsider the field of application of the Cross-Border Insolvency Act since, in its current form, it will apply to individuals, companies, and banks and insurance companies.

In its current version, the Act also refers to some former rescue procedures, such as judicial management and the section 311 compromise/scheme of arrangement in the 1973 Companies Act which, save for its Chapter 14, has been replaced by the Companies Act of 2008. The 2008 Companies Act has its own business rescue and compromise procedures

183 See para 6.5 above.
184 See para 6.5.1 above.

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that have replaced those of the 1973 Act. In view of recent judgments on the treatment of foreign companies in South Africa in relation to rescue, including the recognition of foreign pre-insolvency procedures like schemes of arrangement with a view to assisting financially stressed foreign companies with a presence in South Africa, should be reconsidered.

As mentioned, UNCITRAL introduced new Model Laws to deal with foreign insolvency-related judgments and the treatment of groups of companies in a cross-border insolvency context.[185] These legislative model laws should be seriously considered with a view to incorporating and integrating them in new cross-border insolvency legislation to provide for the recognition of insolvency-related judgments and groups of companies as they serve to fill gaps in the current MLCBI.

In conclusion, it will be a vast improvement if the Cross-Border Insolvency Act can be implemented by either designating at least all our main trading partners. However, as things stand the Minister is restricted by the reciprocity provision – a better option would, therefore, be to scrap this provision. Furthermore, as discussed, there are other sections in the Act which are in need of amendment. But, for the time being, foreign states that wish to open their jurisdictions to local representatives need to operate under the current legal position in South Africa as broadly captured in this chapter. For the foreseeable future, and save for regional dispensations such as the EU and OHADA, it is clear that the enactment of a clear procedural framework subject to regular improvement is the way forward. The harmonisation of local insolvency and related laws will be a lengthy process in this evolutionary journey in which a largely procedural dispensation sets the tone for global reform.

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185 See para 7 above.

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