

SYSTEM OF REGULATION OF SOUTH AFRICAN INSOLVENCY LAW: LESSONS FROM THE UNITED KINGDOM

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SUMMARY

In order to assess the regulatory aspects of South African insolvency law it is necessary to examine the regulatory methodology of certain international jurisdictions in order to determine whether it is attainable, or even desirable, to bring about law reform in regard to the regulatory framework within South African insolvency law. South African insolvency legislation is deeply rooted in English law resulting in South African and English laws reflecting to a great extent similar legal philosophies and principles. Although the English regulatory framework may not suit the South African economic conditions in a strict sense, there are adequate similarities between the jurisdictions' historical, legal and cultural elements to constitute a distinct and identifiable process. The article commences with an overview of the historical development of State regulation in the United Kingdom (UK) and includes a discussion of the UK's present regulatory system. It then proceeds to discuss briefly the South African regulatory framework and concludes by providing some propositions for law reform.

1 INTRODUCTION

Regulatory frameworks in insolvency¹ law have been developed in different ways in different jurisdictions, reflecting the divergence in history, tradition and culture.² Internationally different regulatory and institutional models have emerged in order to provide the necessary checks and balances against the

¹ Globally the word "insolvency" is the more common term for such proceedings where a business debtor is involved, while "bankruptcy" would refer to the procedures to be applied to individuals. In South Africa in common parlance, the word "insolvency" refers to both individuals and corporate entities, while in the UK the term "bankruptcy" refers to the procedure relating to an individual. Cf Rajak "Creditors and Debtors – The Background to the Insolvency Legislation of 1986" 1990-1991 *King's College LJ* 17. In this article the words "insolvency" and "bankruptcy" are used interchangeably. See also Milman *Personal Insolvency Law, Regulation and Policy* (2005) 3.

² Martin "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation" 2005 *Boston College International & Comparative LR* 1.

misuse of an insolvency system.³ Regulation of insolvency administration and insolvency practitioners⁴ may be undertaken or overseen by a government department or agency or a public body, one or more private sector professional bodies or a combination of government and professional bodies. In brief there is no single model or guideline applicable; but the different systems are all directed at securing and assuring public confidence in the system of regulation and the process of insolvency.⁵

In the midst of a global economic slowdown resulting mainly from rising food and fuel prices, South Africa has evidently also been experiencing tightening economic conditions.⁶ The recent increases in interest rates by the Reserve Bank will in all probability see both liquidations and insolvencies remaining on an upward trend for the remainder of this year and possibly into 2009. The question is how the insolvency industry will respond to the various challenges associated with such an escalation. At the same time the general effectiveness of the South African insolvency system as a whole will be on trial.

The chapter on South African insolvency law reform commenced in the late 1980's and has not yet managed to conclude in the promulgation of efficient and effective insolvency law legislation.⁷ Insolvency laws and systems are increasingly being recognized as fundamental institutions essential for the development of credit markets and entrepreneurship in developing countries and in turn, those insolvency systems depend on the existence of sound and transparent institutional and regulatory frameworks.⁸ In determining whether it is attainable, or even desirable, to bring about law reform in regard to the regulatory framework within South African insolvency law, reference to other jurisdictions may be a useful benchmark.⁹

An accurate comparative study would *inter alia* include examining and understanding the historical, social, and economic environment of foreign legal systems as a stage set to the study of one central subject. The aim of this article is not to provide a detailed exposition or legitimate comparative study of English bankruptcy law, but rather to include an overview of the historical development, philosophy, and substantive law *vis-à-vis* its

³ Cf Wessels *Cross-border Insolvency Law – International Instruments and Commentary* (2007).

⁴ "Insolvency practitioner" is the generic term used in this study to refer to the appointed person in office responsible for the administration of the insolvent estate.

⁵ Joyce *The Role of Insolvency Regulators in the Past and in the Future* 4, presentation at the International Insolvency Conference, Singapore, March 2003. On file with the author.

⁶ The repo rate rose from 7% in May 2006 to 12% at the last hike in June 2008. The prime rate increased from 10.5% to 15.5%. See <http://www.statssa.gov.za> (accessed 2008-09-21).

⁷ See Burdette *Reform, Regulation and Transformation: The Problems and Challenges Facing South African Insolvency Industry*, presentation at the Commonwealth Law Conference, London, September 2005. On file with the author.

⁸ Joyce *The Role of Insolvency Regulators in the Past and in the Future* 2, presentation at the International Insolvency Conference, Singapore, March 2003. Cf Mistelis "Regulatory Aspects: Globalization, Harmonization, Legal Transplants and Law Reform – Some Fundamental Observations" 2000 *The International Lawyer* 1055 1057.

⁹ Burdette *Framework for Corporate Insolvency Law Reform in South Africa* (LLD thesis UP 2002) 77.

institutional and regulatory framework. In addition the South African regulatory framework will briefly be discussed and ultimately certain suggestions for law reform will be made.

2 THE REGULATORY FRAMEWORK IN THE UNITED KINGDOM¹⁰

2.1 General

The English commercial economy developed over a lengthy period of time with continued growth from the early beginnings of the industrial revolution to the present day society “striving hard to maintain a just balance between creditors on the one hand and the debtor on the other”.¹¹ Early English bankruptcy¹² laws described the bankrupt debtor as an anti-social, immoral character who regularly took advantage of creditors.¹³ The history of bankruptcy in England and Wales is thus filled with harsh penalties, imprisonment and even capital punishment.¹⁴ Since the disconsolate first years of English bankruptcy laws there seems to have been a harmonious progression from the stigmatisation of debtors to a recognition that creditor’s interests would be best served by affording the debtor a “fresh start”¹⁵ rather than a lingering battle with debt.¹⁶

From a formal perspective the main source of the English bankruptcy law is to be found in the Insolvency Act of 1986 (Insolvency Act 1986).¹⁷ The

¹⁰ The UK consists of three separate jurisdictions or law districts: (i) England and Wales; (ii) Scotland; and (iii) Northern Ireland. The term UK in this chapter is used generically to refer to the district of England and Wales.

¹¹ *Report on the Insolvency Law Review Committee, Insolvency Law and Practice* (Cork Report) Cmnd 8558, 1982, London: Her Majesty’s Stationery Office 1982. Cf Ramsay “Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales” 2006 *Theoretical Inquiries in Law* 625 659.

¹² Milman 3.

¹³ Bankruptcy Act of 1542 (34 and 35 Hen VIII, c. 4). Under the 1706 Act (4 and 5 Anne, c. 17) concealment of assets exposed the debtor to the death penalty; and Milman 24.

¹⁴ Rajak “The Culture of Bankruptcy” in Omar *International Insolvency Law: Themes and Perspectives* (2008) 18. Cf also Duffy “English Bankrupts 1571-1861” 1980 *American J of Legal History* 283.

¹⁵ A fundamental goal of the American federal bankruptcy laws enacted by Congress is to give debtors a financial “fresh start” from burdensome debts. Also confirmed in the United States (US) Supreme Court decision of *Local Loan Co v Hunt* 292 US 234, 244 (1934). For an in-depth discussion of the “Fresh Start” principle see Roestoff ‘n *Kritiese Evaluasie van Skuldverligtingsmaatreëls vir die Individu in die Suid-Afrikaanse Insolvensiereg* (LLD thesis UP 2002).

¹⁶ Rajak 18-19. See Ramsay “Bankruptcy in Transition: The Case of England and Wales – The Neo-liberal Cuckoo in the European Nest?” in Niemi-Kiesiläinen, Ramsay and Whitford *Consumer Bankruptcy in Global Perspective* (2003) 225.

¹⁷ Although it received the Royal Assent and became law on 30 October 1985, Government decided to delay implementation of all but a few of its provisions and to draw up a new Act, consolidating its provisions with those parts of the Companies Act 1985 dealing with receivership and winding-up. This effort became the Insolvency Act 1986. The Act received Royal Assent on 25 July 1986 and was brought into force on 29 December 1986. See Milman 23.

Insolvency Act 1986 was a significant example of innovative legislation, implementing the most comprehensive review of English bankruptcy law in over a century.¹⁸ Its provisions were largely based on the recommendations contained in the Report (Cork Report)¹⁹ of the Insolvency Law Review Committee (Cork Committee) and affected a fundamental reconstruction of the law relating to both personal and corporate insolvency.²⁰

The Insolvency Act 1986 has since been substantially amended²¹ of which Part 10 of the Enterprise Act 2002²² (Enterprise Act) has probably had the largest impact.²³ A key aspect of the reforms brought about by the Enterprise Act is the attempt to eliminate the stigma of bankruptcy for honest and unfortunate debtors and the establishment of an “enterprise -oriented, risk -taking, failure -tolerant business culture”.²⁴ This recent development serves as evidence that English bankruptcy law is moving swiftly towards a more liberal model of bankruptcy evidence by the United States’ (US) approach.²⁵

2 2 Historical overview of the development of state regulation in English bankruptcy law

Early English insolvency law had a distinctly pro-creditor orientation, and was noteworthy for its harsh treatment of defaulting debtors.²⁶ From the time of the Statute of Merchants in 1285 until the mid-19th century, imprisonment for debt

¹⁸ Sealy *Annotated Guide to the Insolvency Legislation* (2007) 1. For an overview of the English personal insolvency system read McKenzie and Walters “Consumer Bankruptcy Law Reform in Great Britain” 2006 *American J of Bankruptcy Law* 477.

¹⁹ See (fn 11) above. The aim is not to discuss the report in detail, but merely to highlight certain issues that are relevant to this article.

²⁰ For a detailed discussion of the recommendations included in the Cork Report (fn 11) read Fletcher *The Law of Insolvency* (1996) 18-20.

²¹ Eg, the Insolvency Act 1994; the Insolvency (no 2) Act 1994; the Insolvency Act 2000. Until recently, personal insolvency in the UK has remained largely uninfluenced by developments in Europe. This trend was overturned when the Human Rights Act of 1998 came into force in 2001. As far as the European Union (EU) was concerned it did not achieve a significant breakthrough until the EC Regulation on Insolvency Proceedings (EU Insolvency Regulation) took effect in 2002 (EC Regulation on Insolvency Proceedings 1346/2000 took effect on 31 May 2002). Essentially the EU Insolvency Regulation determines jurisdiction in cases of cross-border insolvency.

²² The Bill was introduced in the House of Commons in Spring of 2002 and received Royal Assent on 7 November 2002.

²³ The amended provisions resulted in the restriction of the use of the procedure of administrative receivership and provide for streamlined administration proceedings, the eventual abolition of administrative receiverships, and the abolition of the preferential claims of the State (Crown) in respect of certain taxes. See Walters “Personal Insolvency Law after the Enterprise Act: An Appraisal” 2005 *J of Corporate Law Studies* 65.

²⁴ Cf speech to British American Chamber of Commerce in New York in October 1998 by the then Trade Secretary, Peter Mandelson <http://www.dti.gov.uk/ministers/archived/> (accessed 2008-09-21). Cf Walters 2005 *J of Corporate Law Studies* 65.

²⁵ See Ramsay 225. For further reference to the emerging policy development see Insolvency Service consultation document *Bankruptcy: A Fresh Start – A Consultation on Possible Reform to the Law Relating to Personal Insolvency in England and Wales* (2000) as well as the White Paper *Productivity and Enterprise: Insolvency – A Second Chance* Cm 5234 (2001). Cf Walters 2005 *J of Corporate Law Studies* 65.

²⁶ See Duffy 1980 *American J of Legal History* 283.

was the order of the day.²⁷ Bankruptcy law in England has an ancient history dating back to the 16th century, while scholars of English bankruptcy law almost unanimously regard the Act of Parliament by Henry VIII in 1542²⁸ as the earliest legislation on the subject of bankruptcy law.²⁹

During the 16th century commerce escalated in Tudor England which subsequently prompted further statutory developments in bankruptcy law. The first law designed as a true bankruptcy statute rather than as a fraud prevention law was enacted in 1570.³⁰ During the period of this Elizabethan statute the administration of the bankruptcy laws was placed in the hands of Bankruptcy Commissioners as chosen by the Lord Chancellor.³¹ Although Bankruptcy Commissions were a creation of the Tudor system of administration they played a significant role in the development of the English regulatory system and also represented a certain configuration of law, society and order.³²

Since much of the substantive bankruptcy law was already established and generally accepted by 1800, most of those concerned with insolvency law reform in the Victorian period focused on amending the insolvency administration process and structures.³³ A series of bankruptcy statutes promulgated during the 19th century laid the foundation of modern English bankruptcy law.³⁴ The prevailing view at the beginning of the 19th century held that creditors should be at the helm of the process by selecting the assignees and controlling the fate of the debtors.³⁵ The abusive actions of private

²⁷ Tabb "The History of the Bankruptcy Laws in the United States" 1995 *American Bankruptcy Institute LR* 5. John Bunyan paints an unsympathetic picture of the life of the bankrupt in *The Life and Death of Mr Badman* (1680). Incidentally William Shakespeare's father was also a bankrupt but this did not seem to have any effect on the work of his son. See Milman 2.

²⁸ (34 and 35 Hen VIII, c. 4).

²⁹ Levinthal "The Early History of English Bankruptcy" 1934 *Univ of Pennsylvania LR* 104. The Act of 1542 was despite its title not concerned with bankruptcy as it is presently experienced but was primarily aimed at punishing debtors who were significantly referred to as "offenders". Cf Keay *Insolvency Law: Corporate and Personal* (2003) 8. It would be a mistake to perceive bankruptcy as a new phenomenon that first attracted legal attention in 1542. There are numerous recordings in English law going back to medieval times. See Milman 6.

³⁰ 13 Eliz., c. 7 (1570). Lewis "Can't Pay your Debts, Mate? A Comparison of the Australian and American Personal Bankruptcy System" 2001-2002 *Bankruptcy Development J* 297-299. This statute applied only to merchant debtors (traders), and defined what should be regarded as acts of bankruptcy in present day.

³¹ Lester *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and the Company Winding-Up in the Nineteenth Century England* (2003) 18.

³² Hicks and Ramsay "Law, Order and the Bankruptcy Commissions of Early Nineteenth Century England" 1987 *Tijdschrift voor Rechtsgeschiedenis* 124.

³³ During this period creditors had virtually full control over the administration of bankrupt estates through a system whereby Bankruptcy Commissioners appointed one or more creditors as assignees of the estate's assets. See Lester 12.

³⁴ Parliament's first attempt at a thorough investigation of the English insolvency law was a Select Committee set up in 1817-18. See Lester 19. Other reforms to the law of bankruptcy were brought about by the Bankruptcy Act 1824 (4 Geo IV, c 98.) and were consolidated in the Bankruptcy Act 1825 (5 Geo IV, c. 16). See also Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* (1986) par 3.08[1] 1-86.

³⁵ Milman 9.

assignees were, however, notorious and this deplorable state of affairs was challenged by several reformers.³⁶

Until the establishment of the first bankruptcy courts in 1831, bankruptcy fell within the province of the Chancery Courts and in particular the jurisdiction of the Bankruptcy Commissioners.³⁷ The notorious delays, with which proceedings in the Chancery Court were weighed down, rendered the system unpopular and with the view to providing more efficient and expeditious judicial services a bankruptcy court was established in London in 1831. The Act of 1831³⁸ also brought about another significant development by replacing creditor control with a government official attached to the London bankruptcy court.³⁹

During this period Parliament introduced a new notion described by the pejorative term of "officialism" into the centuries-old bankruptcy system.⁴⁰ In effect, it was now the courts who in the past had settled only disputes amongst creditors, who would be appointing "official assignees".⁴¹ Based on favourable reports regarding the success of the creditor dominated system in Scotland, creditor groups again regrouped at the end of the 1860s and started to lobby for reform. In response to the strong demands government subsequently dismantled the official system of administration and with the enactment of the 1869 English Bankruptcy Act⁴² the pendulum again swung in the opposite direction. Creditors took direct control over the bankruptcy process and the courts official assignees were replaced by creditor – nominated trustees.⁴³

The foundation of the modern English system of regulation of bankruptcy law was established when Joseph Chamberlain⁴⁴ became the president of the

³⁶ Such as Bentham and Brougham who in particular argued for State control. See Milman 9.

³⁷ These Commissioners had the power to commence the bankruptcy proceedings through the issue of a *fiat* and to conduct public hearings and essentially operated an administrative function. For an example of the ambit of the Commissioners' discretion and the reluctance of the courts to intervene see *Ex Parte King* (1805) 11 Ves Jun 417, (1806) 13 Ves Jun 181 and (1808) Ves Jun 127. See also Milman 7.

³⁸ (1 and 2 Will IV, c. 56).

³⁹ See Duns *Insolvency: Law and Policy* (2002) 25; and Skeel "The Genius of the 1898 Bankruptcy Act" 1999 *Bankruptcy Developments J* 321-341.

⁴⁰ See Lester 2; and Skeel *Debt's Dominion: The History of Bankruptcy Law in America* (2001) 38.

⁴¹ Outside London a statute of 1842 removed jurisdiction in bankruptcy from the hands of the county commissioners who were the counterparts of the original bankruptcy commissioners in London. Initially the bankruptcy jurisdiction was vested in the District courts, but under the Bankruptcy Court Act of 1847 certain County courts acquired exclusive control over bankruptcy outside London. This jurisdiction has been retained ever since in bankruptcy proceedings taking place outside the area formerly known as the London Bankrupt District, and renamed since 1986 as the London Insolvency District. Insolvency Act 1986 s 374. See Fletcher 25-26; and Lester 3.

⁴² (32 and 33 Vict, c. 71).

⁴³ Supervised by a creditors' committee of inspection. See Hicks and Ramsay 1987 *Tijdschrift voor Rechtsgeschiedenis* 124; and Skeel 1999 *Bankruptcy Developments J* 327; See also Lester 2.

⁴⁴ Joseph Chamberlain (8 July 1836 - 2 July 1914) was a British statesman. In his early years he was a successful businessman, a radically minded Liberal, a campaigner for educational

Board of Trade.⁴⁵ Chamberlain advocated a vision that the law had both to provide for the administration of the estate of the bankrupt but there was also a requirement for thorough and independent investigation into causes of insolvency in the public interests rather than leaving matters in the hands of creditors.⁴⁶ Chamberlain was convinced that there was a public role to be played in the administration of bankruptcy and went ahead to develop the proposals for a Bill that would later become the landmark Act of 1883.⁴⁷

The 1883 Bankruptcy Act translated to a more intense involvement by government in the bankruptcy system and basically affected a compromise based upon a combination of creditor and public control and the removal of the administrative functions from the courts.⁴⁸ The Act's proponents envisaged two main goals for government in its new role. The first task was the proper examination, through the Board of Trade, of the bankrupt's financial affairs and the circumstances surrounding his insolvency.⁴⁹ The second key feature of the official system was the State's responsibility to ensure the efficient management of the smaller bankruptcy estates.⁵⁰

The 1883 Act reasserted the State's supervisory role and also separated the judicial and administrative functions.⁵¹ The late 19th century eventually saw a stage where insolvency law, and especially the regulation of the insolvency system, took on a form that is still recognisable in present day English law,⁵² and the 1883 Act retained its influence right up to the time of the comprehensive assessment of bankruptcy law under the Cork report in 1982.⁵³

2.3 Insolvency regulation and the Cork Report

Over the years various committees⁵⁴ were established whose main task was to review certain aspects pertaining to English insolvency law.⁵⁵ In the early

reform and later on became President of the Board of Trade. See Tolmie *Corporate & Personal Insolvency* (2003) 11.

⁴⁵ Tolmie 39.

⁴⁶ *Ibid.*

⁴⁷ (46 and 47 Vict, c. 71); and Milman 10.

⁴⁸ Frieze *Personal Insolvency Law – In Practice* (2004) 1-2. Dalhuisen par 3.08[2] 1-88.

⁴⁹ Lester 290.

⁵⁰ The 1883 Bankruptcy Act provided that cases with relatively few assets were to be administered in a summary manner, with the Official Receiver serving as permanent trustee unless a creditor chose to nominate a non-official trustee. See Lester 292.

⁵¹ See Martin "Common-Law Bankruptcy Systems: Similarities and Differences" 2003 *American Bankruptcy Institute LR* 403; and Frieze 1.

⁵² The judiciary duties remained vested in the High Court and the county courts and the administrative functions were transferred to a new department entitled the Department of the Board of Trade which was set up under the Inspector-General in Bankruptcy. Later became known as the Department of Trade and Industry (DTI) and at present the Department for Business, Enterprise and Regulatory Reform (DBERR). See Fletcher 10.

⁵³ See fn 11 above.

⁵⁴ The committees that were formed to look into aspects of individual insolvency law were the Muir-Mackenzie Committee (1906 Cd 4068); the Hansell Committee (Cmnd 2326 1925); and the Blagden Committee (Cmnd 221 1957). See Fletcher 13; and Burdette (LLD thesis UP 2002) 84.

1970s the UK's accession to the membership of the EEC demanded that it negotiate with other member states concerning a draft EEC Bankruptcy Convention. In order to advise the Department of Trade and Industry, an advisory committee under chairmanship of Mr Kenneth Cork, as he then was, was appointed.⁵⁶ Cork's first report emphasised that a comprehensive review of the insolvency law⁵⁷ was required and in January 1977 the Review Committee on Insolvency Law and Practice (Cork Committee), again with Cork as chairman, was established.⁵⁸ The Cork Report in its final form produced a set of "aims of a good modern insolvency law".⁵⁹ The Report made out a vigorous case for fundamental reforms regarding the law of insolvency,⁶⁰ resulting in many of the recommendations finding their way into the Insolvency Act of 1986 (Insolvency Act).⁶¹

At the time of the Cork Committee's study, insolvency practitioners were not required to have particular qualifications and this state of affairs was identified by many as a major shortcoming in the regulatory system.⁶² The introduction of statutory regulation of insolvency practitioners was linked to a reduction of court involvement in certain areas of insolvency practice.⁶³ Following the government's preferred model of private self-regulating professionals within a statutory framework, the Cork Report recommended that the insolvency practice be subject to strict professional regulation.⁶⁴ The authors argued that improvement of "the standard of administration of insolvent estates" would be achieved by individuals acting as insolvency practitioners possessing minimum qualifications.⁶⁵

Although the Cork Report did conclude that it envisaged a reduced role for the Official Receiver in view of the Report's own proposals for an alternative debt relief structure, the Cork Committee generally supported the idea of a

⁵⁵ Fletcher 13. See also Burdette (LLD thesis UP 2002) 85-90 for a brief discussion of the Cork Report.

⁵⁶ Finch *Corporate Insolvency Law* (2002) 11.

⁵⁷ Similar reviews and reforms were taking place in other European and Commonwealth countries: Austria (1982); Denmark (1977); France (1984 and 1985); Italy (1979). Cf Aminoff "The Development of American and English Bankruptcy Legislation – From a Common Source to a Shared Goal" 1989 *Statute LR* 128 129.

⁵⁸ For a discussion of the events that led to the appointment of the Cork Committee, read Fletcher 14-15. The Cork Committee was given a very wide brief:

- a To undertake a total review of the law of insolvency, bankruptcy, liquidation and receiverships, and to consider reforms that are necessary or desirable;
- b to examine the possibility of formulating a comprehensive insolvency system, including the possibility of harmonising and integrating procedures;
- c to investigate the possibility of formulating less formal procedures as alternatives to bankruptcy and winding-up; and
- d to make recommendations.

⁵⁹ Finch "The Measures of Insolvency Law" 1997 *Oxford J of Legal Studies* 227. For a detailed discussion of the Cork recommendations read Fletcher 14-20.

⁶⁰ Fletcher 65.

⁶¹ See fn 20 above.

⁶² Murray Keay's *Insolvency Personal and Corporate Law and Practice* (2005) 34.

⁶³ Cork Report par 1003. Cf Tolmie 198.

⁶⁴ Carruthers "Professionals in Systemic Reform of Bankruptcy Law: The 1978 US Bankruptcy Code and the English Insolvency Act 1986" 2000 *American Bankruptcy LJ* 35 59.

⁶⁵ *The Times* 1982-04-04 49.

State-regulated insolvency system.⁶⁶ The Cork Committee viewed the institution of the Official Receiver as vital for the protection of the public interest and maintaining public confidence.⁶⁷ The convincing case argued by the Cork Report in favour of the role of the Official Receiver and the proposed statutory framework regarding insolvency practitioners, most certainly influenced the present day administrative and regulatory provisions as included in the Insolvency Act 1986.⁶⁸

2 4 The regulatory framework

2 4 1 *The insolvency service*

The regulatory system in England and Wales had in the past been described as “pervasively governmental and administrative in character”.⁶⁹ The present regulatory system in the UK and the bankruptcy system as a whole are affected by the comprehensive role played by the Insolvency Service as government agency in which the Official Receiver, responsible for conducting most of the administrative functions, is based.⁷⁰ Generally, it is rather the public administrator and not the judicial system which is responsible for virtually all important bankruptcy decisions and the detailed interpretations of statutory rules.⁷¹

The Insolvency Act 1986 represented the most comprehensive review of insolvency laws in the United Kingdom in over a century.⁷² As mentioned its provisions were largely based on the recommendations as enclosed in the Cork Report and it affected a fundamental modernization of the law relating to both personal and corporate insolvency.⁷³ The Insolvency Act 1986 also introduced several defining changes to the regulatory system of bankruptcy law in the UK and established the foundation for the present English regulatory framework.⁷⁴

The overall responsibility of insolvency law in England and Wales at present rests with the Department for Business, Enterprise and Regulatory

⁶⁶ Cork Report par 714-726, and Chapter 6. The Report's proposals for a Debt Arrangement Order did not subsequently form part of the enacted legislation.

⁶⁷ Cork Report par 716; and Milman 20.

⁶⁸ Fletcher highlights the fact that apart from the Law Commission of England and Wales not taking part in the reform process the Cork Committee also had limited resources and therefore little or no specially commissioned research or empirical studies were undertaken except that which the members themselves were responsible for. *Cf* Fletcher 17-20.

⁶⁹ Skeel 38.

⁷⁰ Insolvency Act 1986 ss 399-401 and Part 10 of Insolvency Rules 1986.

⁷¹ Martin 2003 *American Bankruptcy Institute LR* 367 376. See Niemi-Kiesiläinen “Introduction” in Niemi-Kiesiläinen; Ramsay and Whitford *Consumer Bankruptcy in Global Perspective* (2003) 11 (hereinafter referred to as Niemi-Kiesiläinen “Introduction”).

⁷² Sealy 1.

⁷³ For a detailed discussion of the recommendations included in the Cork Report; and see Fletcher 20.

⁷⁴ Fletcher 27.

Reform (DBERR).⁷⁵ This responsibility is discharged by the members of the Insolvency Service, an executive agency⁷⁶ within the DBERR,⁷⁷ under the overall direction of the Inspector General.⁷⁸ The Insolvency Service administers the system of Official Receivers throughout England and Wales and exercises a controlling and supervisory function with regard to all Official Receivers as well as private insolvency practitioners.⁷⁹

The Insolvency Service mainly acts as the interface between government and the various stakeholders in insolvency law and although the ultimate responsibility rests with the Secretary of State for DBERR (Secretary of State), the day-to-day responsibility of supervision is delegated to the Insolvency Service. The Insolvency Service thus delivers a wide range of often complex services which are linked to certain statutory functions, and operates mainly under a statutory framework – namely the Insolvency Acts 1986 and 2000, the Company Directors Disqualifications Act 1986, the Employment Rights Act 1996 and more recently the Enterprise Act of 2002.⁸⁰ The Insolvency Service describes itself as existing “to ensure that financial failure is dealt with fairly and effectively, encouraging enterprise and deterring fraud and misconduct”.⁸¹

The Insolvency Service, unusually for an executive agency, also holds the policy on insolvency for DBERR and government in general and is also responsible for advising the ministry in general on domestic, European Union (EU) and other international insolvency matters.⁸² The role of the Insolvency Service in the evaluation and development of insolvency law policy, procedures, and legislation represents a distinctive feature in relation to most other State regulators. In contrast, its US counterpart, the United States Trustee (US Trustee), plays no active part in the establishment of US bankruptcy policy.⁸³

⁷⁵ Established on 28 June 2007. Formerly known as Department of Trade and Industry.

⁷⁶ The concept of an executive agency was part of the new public management initiatives that were introduced in many Organization of Economic Cooperation and Development (OECD) countries in 1990s according to which Government should be run like a business, with a focus on outputs and quantification and a more competitive basis for providing public service. See Ramsay 2006 *Theoretical Inquiries in Law* 659.

⁷⁷ The Insolvency Service’s staff is based at a network of 38 Official Receiver Offices throughout England and Wales; the Enforcement Directorate and Headquarters in London, Birmingham, Manchester and Edinburgh; the Banking Section in Birmingham; and the Redundancy Payments offices in Edinburgh, Birmingham and Watford. As of 1st April 2006 Companies Investigation Branch of DBERR transferred to the Service and is based in offices in both London and Manchester. See also <http://www.insolvency.gov.uk> (accessed 2008-09-21) for the official homepage of the Insolvency Service.

⁷⁸ Fletcher 27.

⁷⁹ Fletcher 26.

⁸⁰ *The Insolvency Service Annual Report 2007-08 (Annual Report 2007-2008)* 3 <http://www.insolvency.gov.uk/guidanceleaflets/Guides.htm> (accessed 2008-09-21).

⁸¹ The Service deals with generally six operational areas: Official Receiver operations; enforcement; insolvency practitioner regulation; policy; redundancy payments and estate accounts. Cf Tolmie 205. See also *Annual Report 2007-2008*.

⁸² See *Guide to Insolvency Service* 18 <http://www.insolvency.gov.uk/pdfs/guidanceleafletspdf/guidetoIS.pdf> (accessed 2008-09-21).

⁸³ *Annual Report 2007-2008* 3. Several instances can be mentioned where the Insolvency Service has either been directly involved or has influenced the development of insolvency

2 4 2 Official receivers

As mentioned the Official Receiver, being appointed by the Secretary of State is a division of the Insolvency Service.⁸⁴ The Official Receiver is a civil servant who acts under directions, instructions and guidance from the Inspector-General, and less often the Secretary of State.⁸⁵ The Insolvency Act 1986 indicates that the Official Receiver's functions are to be performed, in relation to both personal and corporate insolvency, by persons appointed for this purpose by the Secretary of State.⁸⁶ As the English insolvency profession has shown little interest in the administration of the consumer debtor's estates, as it has not been possible to service this market profitably, the great majority of individual bankruptcy estates is processed by the Insolvency Service through the system of Official Receivers.⁸⁷

Section 400(2) of the Insolvency Act 1986 confers upon the Official Receivers the status of officers of court in relation to which they exercise the functions of their office.⁸⁸ Thus, whenever statutory provisions specify that certain actions are to be performed by the Official Receiver, in practice this suggests that the Official Receiver attached to the court exercising jurisdiction will undertake the requisite functions.⁸⁹ In all bankruptcy cases the Official Receivers perform an important investigatory function, as well as act as trustees in bankruptcy cases in the event that a private sector practitioner is not appointed or a vacancy in office occurs.⁹⁰ The Enterprise Act also made a number of significant administrative and procedural changes relating to the administration procedures of Individual Voluntary Arrangements (IVA's),⁹¹ and these amendments also affect the role of the Official Receiver.⁹²

legislation or policy, such as the establishment of a stakeholder working group in 2004 to consider how the Individual Voluntary Arrangement (IVA) regime could be improved. See Roestoff "Debt Relief for Consumers – The Interaction between Insolvency and Consumer Protection Legislation (Part II)" 2005 *Obiter* 99 for a discussion of the proposals made by the Service.

⁸⁴ Insolvency Act 1986 s 399(2).

⁸⁵ See *Guide to The Insolvency Service*.

⁸⁶ The statutory provisions relating to the Official Receivers are contained in Part XIV of the Insolvency Act 1986. See Insolvency Act 1986 s 399. *Cf* also Fletcher 27.

⁸⁷ There are presently 43 Official Receiver managing offices at 33 sites, organized into 7 regional groups under a regional director. See *Guide to The Insolvency Service* 10. See also Ramsay 2006 *Theoretical Inquiries in Law* 658.

⁸⁸ S 400(3) provides that in any event where the receiver is succeeded in relation to his current functions, any property vested in the former receiver will automatically be transferred to his successor.

⁸⁹ Fletcher 27.

⁹⁰ See especially Insolvency Act 1986 ss 131-133; 136; 287; 288-291; 295 and 300. See also Company Directors Disqualification Act 1986 ss 6; 7(1)(b). *Cf* Fletcher 27.

⁹¹ Insolvency Act 1986 ss 252-263. In the UK, the Individual Voluntary Arrangements (IVAs) are formal alternatives for individuals wishing to avoid petitioning for their own bankruptcy. The Enterprise Act 2002 also introduced the so called Fast-Track Voluntary Arrangement, a new streamlined arrangement for debtors who are already bankrupt. Schedule 22 of Enterprise Act inserted ss 263A-G after Insolvency Act 1986 s 263 and inserted s 389B after Insolvency Act 1986 s 389A.

⁹² Commenced after 15 September 2003.

One of the primary roles of the Official Receiver is to carry out investigations of the affairs of the insolvent. The Insolvency Service through its role as regulator of the Official Receiver plays an important role in investigatory and enforcement procedures⁹³ and subsequently makes a substantial contribution towards the aim of maintaining public confidence in the English insolvency system.⁹⁴ The Insolvency Service declares that “[O]ur enforcement regime aims to ensure that dishonest, reckless or irresponsible people are identified and dealt with in a timely manner. We rigorously pursue directors and bankrupts where there is evidence of financial misconduct or criminality.”⁹⁵

2.4.3 *The supervision and licensing of Insolvency Practitioners*

English law does not permit debtors who have become subject to the bankruptcy process to retain control of their assets. The law rather requires that in bankruptcy cases an independent person of proven professional ability be appointed to undertake this task and there is thus no “debtor in possession” model effective in this jurisdiction.⁹⁶ Reform of the insolvency practice and the formation of a new insolvency practitioner’s profession, were cornerstones of the Cork Committee’s Report.⁹⁷ The Cork Report argued strongly for the introduction of a system of centralised, ministerial control over all persons who are appointed to hold office in insolvency proceedings.⁹⁸

These recommendations were implemented by the Insolvency Act 1986 and mandatory licensing of all persons wishing to be recognised as insolvency practitioners was instated.⁹⁹ The classic approach of licensing professionals through statutory mandate was preferred.¹⁰⁰ As a result of the

⁹³ The Companies Investigation Branch (CIB) is part of the regulatory arm of the DBERR. Although CIB is located within the Insolvency Service, an Executive Agency of BERR, it is not limited to companies that have become insolvent. If the behaviour of the directors is such that they appear “unfit” to be directors, the CIB can apply to the Court for them to be disqualified from acting as company directors.

⁹⁴ Fletcher 165.

⁹⁵ *Annual Report 2007-2008* 15. A disqualification order is made by the court under the Company Directors Disqualification Act 1986. See <http://www.insolvency.gov.uk/directordisqualificationandrestrictions/whatisdisqualification.htm> (accessed 2008-09-21).

⁹⁶ A trustee in bankruptcy is appointed at an initial creditors’ meeting. Insolvency Act 1986 s 292(1)(a). See Milman 67. See also Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK*, presentation at INSOL Europe Annual Conference, Bucharest, Romania, September 2006. On file with author.

⁹⁷ Carruthers 2000 *American Bankruptcy LJ* 68.

⁹⁸ Fletcher 23. In Chapters 15, 16 and 17.

⁹⁹ Fletcher 28. Cf Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK* 1, presentation at INSOL Europe Annual Conference, Bucharest, Romania, September 2006.

¹⁰⁰ It should be noted that any person appointed in office in an insolvency proceeding by the court is acting as an officer of court and as such becomes subject to the duty to act honourably as dictated by the court in *Ex parte James* (1874) LR 9 Ch App 609:

“I am of the opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given to him by the Court and the Court regards him as its officer and he is to hold money in his hands upon trust for its equitable distribution among

government's wariness of professional monopolies, a hybrid of a profession was created that kept the government's hand in the formulation and enforcement of professional ethics, maintaining its capacity to adjust the rate of admissions into the profession.¹⁰¹

As mentioned the Insolvency Service is within the present statutory framework responsible for authorising and regulating the insolvency profession and thus the Insolvency Service exercises the licensing function on behalf of the Secretary of State.¹⁰² The scheme of regulation is consequently that of government-monitored self regulation and the regulatory structure consists of the following:

- a The Secretary of State for DBERR has powers to authorise practitioners directly or to delegate that power to professional bodies;¹⁰³
- b the Insolvency Service as an agent of the Secretary of State directly monitors authorised insolvency practitioners;¹⁰⁴
- c the Insolvency Service has jurisdiction to authorise insolvency practitioners who wish to provide services in the UK according to the EU Directive;¹⁰⁵

creditors. The Court, then finding that he has in his hands money which in equity belongs to someone else, ought to set example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people" (614).

¹⁰¹ Ramsay "Professionals in Systemic Reform of Bankruptcy Law: The 1978 US Bankruptcy Code and the English Insolvency Act 1986" 2000 *American Bankruptcy LJ* 35 71.

¹⁰² Norris *Insolvency Practitioner Regulation in the United Kingdom* presentation at Academics' Meeting INSOL Congress, Cape Town, April 2004. On file with the author. The role of the Insolvency Service can be described as *inter alia* to ensure that the recognised professional bodies have procedures in place to ensure that only fit and proper persons are granted licences, professional and ethical codes are applied, complaints procedures are in force, and an objective assessment of the conduct of insolvency practitioners is made on a regular basis by way of monitoring programmes. The Insolvency Service undertakes visits to the recognized bodies and in return the recognized bodies also have to make regular visits to the insolvency practitioners they have authorized.

¹⁰³ Insolvency Act 1986 s 391(2). The relevant order is the Insolvency Practitioners (Recognised Professional Bodies) Order 1986 (SI 1986/1764) under which the following bodies are recognised: The Chartered Association of Certified Accountants; The Institute of Chartered Accountants of England and Wales; The Institute of Chartered Accountants of Scotland; The Institute of Chartered Accountants of Ireland; The Insolvency Practitioners Association; The Law Society of Scotland; The Law Society. See Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK* 2-5, presentation at INSOL Europe Annual Conference, Bucharest, Romania, September 2006.

¹⁰⁴ Insolvency Act 1986 s 393(1) contains the power to grant or refuse the authorization to act as an insolvency practitioner. Insolvency Act 1986 s 396 introduces a more substantial procedure, which involves referring the case to the Insolvency Practitioners Tribunal (IPT). See also Fletcher 28.

¹⁰⁵ In the context of insolvency practitioners the EU Directive The European Communities (Recognition of Professional Qualifications) Regulations 2007 SI 2781 /2007 implement in part EU Directive 2005/36) providing that practitioners who have acquired professional qualifications in one relevant state (members of EEA & Switzerland) shall have access to that profession in the other relevant States. The Insolvency Service has jurisdiction to authorise insolvency practitioners who wish to provide services in Great Britain (GB), that is England, Wales and Scotland.

- d the Insolvency Service as an agent of the Secretary of State accredits those professional bodies which licence their members;¹⁰⁶ and
- e the professional bodies are responsible on terms agreed in memoranda of understanding (MoU) with the Secretary of State to oversee the professional and ethical standards, monitoring and discipline of those members who practise as insolvency practitioners.¹⁰⁷

The Insolvency Act of 1986 makes it a criminal offence punishable by imprisonment and/or fine to act as an insolvency practitioner¹⁰⁸ in relation to a company or individual when not qualified to do so.¹⁰⁹ Any applicant wanting to act as insolvency practitioner thus must obtain a licence to be authorised to act as such in one of two alternative manners, *viz* by virtue of membership of a recognized professional body, or by direct application to the Secretary of State.¹¹⁰ In both instances a licence will only be granted if a person has proved that he or she is a “fit and proper”¹¹¹ person, and has satisfied the prescribed requirements for education¹¹² and practical training and experience¹¹³ within the meaning of the Insolvency Act 1986.¹¹⁴

The direct licensing of insolvency practitioners by the Secretary of State is governed by similar eligibility criteria to those which the recognized professional bodies are required to impose in relation to fitness and propriety and education and training requirements.¹¹⁵ The system can best be

¹⁰⁶ Insolvency Act 1986 s 391(2) of the Insolvency Act provides that the Secretary of State may declare a body to be a recognized Professional Body if certain requirements are met.

¹⁰⁷ Norris *Insolvency Practitioner Regulation in the United Kingdom* 4, presentation at Academics' Meeting INSOL Congress, Cape Town, April 2004.

¹⁰⁸ Thus, in relation to a company a person acts as an insolvency practitioner by acting as its liquidator of a company, administrator or administrative receiver, or as the supervisor of a voluntary arrangement approved under Part I of the Insolvency Act 1986. In relation to an individual, a person will be acting as insolvency practitioner by acting as his trustee in bankruptcy or interim receiver of his property, or as permanent or interim trustee in the sequestration of his estate, or as supervisor of a voluntary arrangement proposed by him and approved under Part VIII of the Insolvency Act 1986.

¹⁰⁹ Insolvency Act 1986 s 389(1). Cf Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK* 6-8, presentation at INSOL Europe Annual Conference, Bucharest, Romania, September 2006.

¹¹⁰ The concept of acting as an insolvency practitioner is dealt with in Insolvency Act 1986 s 388. See Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK* 6-8, presentation at INSOL Europe Annual Conference, Bucharest, Romania, September 2006.

¹¹¹ According to Reg 6 of Insolvency Practitioners Regs 2005.

¹¹² Have passed the Joint Insolvency Examination set by the Joint Insolvency Examination Board.

¹¹³ A common standard among the accountancy bodies is at least 600 hours of insolvency experience over a period of three years.

¹¹⁴ Insolvency Act 1986 s 393(2).

¹¹⁵ Insolvency Act 1986 s 396-398. The UK recently introduced new Insolvency Regulations in regard to the regulation of insolvency practitioners. *Statutory Instrument* 2005 No. 524, the Insolvency Practitioners Regs 2005 which came into force on 1 April 2005. The UK recently introduced new Insolvency Regulations (Statutory Instrument 2005 No. 524, the Insolvency Practitioners Regs 2005) in regard to the regulation of insolvency practitioners which came into force on 1 April 2005. See also Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK* 6, presentation at INSOL Europe Annual Conference, Bucharest, Romania, September 2006.

described as “self-regulation within a statutory framework”, though the courts also retain supervisory jurisdiction over insolvency practitioners in relation to their conduct of individual appointments and their remuneration.¹¹⁶

2 4 4 *The role of the courts*

There has been a clear move in common law jurisdictions to transfer functions from the courts to the agency or authority with insolvency responsibility in order to eliminate the cost and almost inevitable delay in court proceedings.¹¹⁷ In many ways the courts are at the apex of the English system as they are able to, either out of their own decision or upon applications made by interested parties, direct how an insolvency administration is to be conducted. They are also to decide on contentious issues which may arise during the course of an insolvency administration. It is important to note that the courts in general only become involved in the initiation of the bankruptcy process and often do not have to be involved in the daily process of administration.¹¹⁸

The administration of personal and corporate insolvency matters has remained largely distinct, with bankruptcy matters being allocated at first instance to the High Court Registrars situated in court rooms designated as “bankruptcy courts”, while company winding-up proceedings are heard by judges or Registrars of the Chancery Division either in chambers or in the company court.¹¹⁹ It is thus only on appeals – either to a single judge of the Chancery Division or to the Court of Appeal – that cases from both of these two branches of insolvency law are likely to be heard by judges from the same group.¹²⁰

Over the years there have been a number of scholars who have supported the idea of a specialist insolvency tribunal, and the Cork Committee in its final commentary also recommended the establishment of a new insolvency court having exclusive jurisdiction in all insolvency matters.¹²¹ The proposal was, however, rejected at the time as a number of judges were opposed to such a development and viewed it as being categorized into a court with a specific jurisdiction.¹²²

¹¹⁶ Walters *The Licensing, Regulation and Supervision of Insolvency Practitioners in the UK* 6-7, presentation at INSOL Europe Annual Conference, Bucharest, Romania, September 2006.

¹¹⁷ *Overview of Insolvency* report at annual meeting of International Association of Insolvency Regulators, Mexico 2006 http://www.insolvencyreg.org/sub_publications/index.htm (accessed 2008-09-21).

¹¹⁸ Murray 30.

¹¹⁹ Fletcher 25.

¹²⁰ *Ibid.*

¹²¹ Cork Report par 1003; Milman 19-20; and Hunter *Insolvency Law & Practice* (1985) 102.

¹²² Carruthers 2000 *American Bankruptcy LJ* 63.

3 THE REGULATORY FRAMEWORK IN THE SOUTH AFRICAN INSOLVENCY LAW

South Africa does not have specialised insolvency courts and during the late nineties a high level Commission of Inquiry (Hoexter Commission) rejected proposals for specialised insolvency courts in South Africa.¹²³ The High Court in general deals with insolvency matters.¹²⁴ The role of the courts is mainly limited to the granting of orders which commences insolvency or winding-up proceedings, and they are not generally involved in routine matters or the day-to-day administration process.¹²⁵

The Master of the High Court (“Master”)¹²⁶ acts as the insolvency regulator in the South African insolvency law.¹²⁷ The Master is appointed in terms of the Administration of Estates Act¹²⁸ and is appointed to the area of jurisdiction of the High Court.¹²⁹ The office of the Master is staffed by civil servants in the employ of the Department of Justice and Constitutional Development (Department of Justice) and only persons with prescribed legal qualifications can be appointed as Master, Deputy Master or Assistant Master.¹³⁰ As a creature of statute the Master only has the powers granted to it by legislature and these powers must be found within the four corners of the Act, whether explicit or by implication.¹³¹ Notwithstanding the suggestion in the Master’s

¹²³ Third and final report of the *Commission of Inquiry into the Rationalization of the Provincial and Local Divisions of the Supreme Court* Report number RP 201/97 Pretoria: Government Printing Works 1997 Volume 1 Book 2 Part 3.

¹²⁴ The High Court in the main commercial centre, Johannesburg, has a commercial court which deals occasionally with cases involving insolvency. The courts have authority in the case of the winding up of companies to give directions regarding the administration of the winding up.

¹²⁵ In the case of individuals, the court issues rehabilitation orders (the procedure to discharge the insolvent debtor from insolvency) if the debtor does not wait for “automatic” rehabilitation after ten years.

¹²⁶ The title of Master of the High Court (then Master of the Supreme Court) was bestowed in legislation of the Cape of Good Hope enacted during English rule in 1828. See Calitz and Boraine “The Role of the Master of the High Court as Regulator in a Changing Liquidation Environment: a South African Perspective” 2005 *TSAR* 728.

¹²⁷ The Master holds no power to issue directives with statutory force and performs no active role in the drafting of bankruptcy legislation or policy development. Nonetheless, various supervisory functions are bestowed on it through Insolvency legislation *eg* the appointment and supervision of insolvency practitioners. For a detailed discussion of South African consumer insolvency law *cf* McKenzie-Skene “Reforming Insolvency Law: A Comparative Study of Scotland and South Africa” 2005 *Nottingham LJ* 17; Roestoff and Jacobs “Statutêre Akkoord voor Likwidasie: ’n Toereikende Skuldenaar-remedie” 1997 *De Jure* 189 204-207; Loubser “Ensuring Advantage to Everyone in a Modern South African Insolvency Law” 1997 *SA Mercantile LJ* 326; Boraine and Roestoff “Fresh Start Procedures for Consumer Debtors in South African Bankruptcy Law” 2002 *International Insolvency Review* 1; and Smith “The Recurrent Motive of the Insolvency Act – Advantage of Creditors” 1985 *Modern Business Law* 27.

¹²⁸ S 4 of the Administration of Estates Act 66 of 1965.

¹²⁹ Bertelsmann *et al* *Mars: The Law of Insolvency Law in South Africa* (2008) 29.

¹³⁰ S 2(2) of the Administration of Estates Act 66 of 1965.

¹³¹ *Cf* Bertelsmann *et al* 29. *Die Meester v Protea Assuransiematskappy Bpk* 1981 2 SA 685 (T) 690; and *De Lange v Smuts* 1998 3 SA 785 (CC) 853.

title that there is an association with the court, the Master is not part of the formal court structure.¹³²

It should be mentioned that although the Master is generally responsible for the supervision of the South African insolvency law, it is not the only discipline which the Master has to contend with. In addition to the regulation of insolvency law, the Master has, amongst others, the following functions: supervising the administration of estates of deceased persons, including the registration of wills; registration of trusts; supervising the administration of estates of minors and incapacitated persons and the administration of the "Guardian's Fund" where unclaimed monies and certain funds of minors and incapacitated persons are kept.¹³³

Although the different Acts dealing with insolvency¹³⁴ are interspersed with functions of the Master, in recent years, the appointment of provisional insolvency practitioners has undoubtedly elicited the most controversy.¹³⁵ Without considering the appointment of practitioners in detail it should be mentioned that South African insolvency legislation contains no formal criteria according to which an insolvency practitioner may be appointed, and lists only disqualifications. Upon commencement of the insolvency proceedings the Master has a discretion to, in accordance with the policy determined by the Minister,¹³⁶ appoint a provisional liquidator or trustee to administer the insolvent estate.¹³⁷ The provisional trustee will hold office until the appointment of a final trustee or liquidator at a first meeting of creditors.¹³⁸

The insolvency profession is, and always has been, one of the few unregulated¹³⁹ professions in South Africa.¹⁴⁰ Although there are voluntary

¹³² Any reference to Master in the Act must be taken to include also any Deputy Master, and any Assistant Master. S 153(2) of Insolvency Act.

¹³³ S 86-93 of Administration of Estates Act 66 of 1965. Cf Calitz and Borraine 2005 *TSAR* 728.

¹³⁴ Mainly the Insolvency Act 24 of 1936, the Companies Act 61 of 1973 and the Close Corporations Act 69 of 1984.

¹³⁵ See Calitz and Burdette "The Appointment of Insolvency Practitioners in South Africa: Time for change?" 2006 *TSAR* 721.

¹³⁶ S 158 (2) of Insolvency Act.

¹³⁷ A trustee is appointed for a natural person debtor and a liquidator for a company or close corporation. It has been stated that the Master has an unfettered and exclusive administrative discretion to appoint a provisional trustee of his choice. See *Lipschitz v Watrus NO* 1980 1 SA 662 (T) 671. See also Kunst *et al Meskin, Insolvency Law and its Operation in Winding-up* (loose-leaf edition, issue 19) par 4.1 4-1 (hereinafter "Meskin"); and Bertelsmann *et al* 165. Considering the fact that the exercising of such a discretion amounts to an administrative action by the Master, it is doubtful whether the Master still has an "unfettered discretion" in view of the provisions of section 5(1) of the Promotion of Administrative Justice Act 3 of 2000. At the very least the Master may be compelled to provide reasons for appointing a specific person, or refusing to appoint a specific person, as provisional trustee.

¹³⁸ S 40 of the Insolvency Act. In practice the Master has regard to "requisitions" by creditors which propose the person to be appointed by the Master as representative; and Bertelsmann *et al* 165. See also Calitz and Burdette 2006 *TSAR* 721 as to the practice followed. Insolvency practitioners do lodge insurance bonds in an amount set by the Master, to guarantee the proper performance of their duties.

¹³⁹ By "unregulated" is meant that there is no legislation regulating admission to, or participation in, the insolvency profession. Requirements such as minimum qualifications, practical experience, registration, codes of conduct, *etc.* are non-existent.

member organisations representing the interests of insolvency practitioners, membership of these organizations is not subject to any minimum qualification or experience requirements.¹⁴¹ In an attempt to establish some certainty in practice, the Master has over the years developed a register or a “Master’s Panel” to which the names of persons who, in his view, are qualified for appointment as a trustee or liquidator are added.¹⁴²

Even though the Master sets certain standards for inclusion in the Masters panel, again the criteria do not have any reference to a minimum of professional qualifications, experience or practical training. The main concern regarding the Master’s panel is that it does not have any legal status whatsoever.¹⁴³ Although the attempts of the Master to reconcile the statutory limitations with the practical reality of having to appoint an appropriate candidate to administer an estate could be appreciated, certain constitutional issues may also arise.¹⁴⁴

When comparing the duties and functions of the Master with the Insolvency Service, its counterpart in the UK, one notices substantial legal as well as structural differences. Without providing a detailed analysis, the most significant distinction is that although the Master is seen to be the protector of public interest, he plays no active or formal role in the drafting of legislation or the development of policy. On an administrative level the Master also lacks the power to oversee the administration of an insolvent estate personally. He merely oversees the conduct of the liquidators/ trustees whom he has appointed and has the power to remove them from office in certain circumstances.¹⁴⁵

Another significant factor when comparing the regulatory system of the UK and South Africa is evidently the statutory regulation of insolvency practitioners. While the UK has a statutory framework requiring the licensing of administrators either by one of seven recognised accountancy and legal bodies or directly by a government agency, the South African regulatory system is based on the non-statutory criteria applied by the Master when making appointments.

4 SUGGESTIONS FOR LAW REFORM

Even as far back as the 1880s senior staff members of the Board of Trade in England realized that the conceptual key to bankruptcy legislation is directly related to the State’s role in the administration of insolvent estates.¹⁴⁶ English

¹⁴⁰ See Calitz and Burdette 2006 *TSAR* 729.

¹⁴¹ At present the only two organizations are the Association of Insolvency Practitioners of Southern Africa (AIPSA) and the Association for the Advancement of Black Insolvency Practitioners (AABIP).

¹⁴² Calitz and Burdette 2006 *TSAR* 733.

¹⁴³ Calitz and Burdette 2006 *TSAR* 730.

¹⁴⁴ Burdette *Reform, Regulation and Transformation: The Problems and Challenges Facing South African Insolvency Industry* 6-9, presentation at the Commonwealth Law Conference, London, September 2005.

¹⁴⁵ S 60 of Insolvency Act.

¹⁴⁶ Lester 304.

lawmakers shared a vision that bankruptcy law is not only the concern of creditors but it affects the wider society, resulting in the acceptance that bankruptcy law should be viewed as a public policy measure. The link between the role of the State in protecting the public interest and the administration of bankruptcy estates is clearly illustrated *via* the strong administrative features of the English regulatory framework and the institutional support of bankruptcy law in general.

The future role of the institution of the Master as well as the statutory regulation of the insolvency industry has for years dominated the debate regarding South African insolvency law reform. The South African Law Reform Commission received a variety of comments on the 1996 Draft Insolvency Bill debating the role and function of the Master.¹⁴⁷ Some called for a diminished role to be played by the Master. Conversely there were arguments in favour of the services currently provided by the Master, regarding it as essential, given South Africa's largely poor and unskilled population.¹⁴⁸

Approximately R18 billion in value circulates through the offices of the Master annually,¹⁴⁹ and South Africa's economy as well as its role as market participant may be gravely affected if these funds are not administered expeditiously and efficiently. Globalisation and the rapid growth and development of international trade have also highlighted the need for sound, transparent and predictable insolvency and creditor rights systems. Although the current state of affairs in developing economies differ significantly from the respective situation in Western economies, the review of the regulatory framework in England and Wales underlines the significant role the State has to play in protecting public interest and acting as a buffer against the impact of insolvency on the community.

Historically South African insolvency law has rarely attracted the interests of Government, the commercial community or even legal scholars. However, the current regional and international economic climate has forced several organizations and financial institutions to deal with insolvency – related matters and challenges which impact on economic growth and development.¹⁵⁰ Insolvency laws and systems are increasingly being recognized as fundamental institutions necessary for the growth of credit markets and entrepreneurship in developing countries. In turn, these insolvency systems depend on the existence of strong and transparent

¹⁴⁷ The Report with a Draft Bill is http://www.doj.gov.za/salrc/reports/r_prj63c_insolv_2000apr.pdf (accessed 2008-09-21) (Report Project 63). See also Evans "Aspects of the Draft Insolvency Bill" 1999 *SA Mercantile LJ* 210.

¹⁴⁸ Calitz and Borraine 2005 *TSAR* 733.

¹⁴⁹ *Department of Justice and Constitutional Development Annual Report 2003/2004* http://www.doj.gov.za/reports/anr200304/0304anr_p2.pdf (accessed 2008-09-22).

¹⁵⁰ *Eg* placement of Saambou Bank Ltd under curatorship, in terms of s 69 of the Banks Act 94 of 1990, 9th February 2002; placement of Financial services business of Fidentia Asset Management (Pty) Ltd, Bramber Alternative (Pty) Ltd and Fidentia Holdings (Pty) Ltd under final curatorship in terms of s 5 of the Financial Institutions (Protection of Funds) Act 2001, 27 March 2007.

institutional and regulatory frameworks.¹⁵¹ The design and development of a strong central Government agency responsible for regulating South African insolvency law has therefore become vital in assuring public confidence in the system of regulation and supervision and the process of insolvency law.¹⁵²

Whether the proposed institution is founded on the contemporary English model, or whether the current South African framework is retained in a revised form, the importance of an independent in-depth investigation into the current South African regulatory system should be recognised. It is essential that this investigation takes place parallel to the ongoing insolvency and corporate law reform initiatives. The English regulatory framework operates in a highly progressive society and business climate and may not fit the South African economic conditions in a strict sense. There are, however, enough similarities between the two jurisdictions' historical, legal and cultural backgrounds to constitute a distinct and identifiable process, one that could lay the foundation for South African law reform.

Another significant factor in ensuring the positive perception of the South African insolvency law is the state of the insolvency profession. A notable feature of present day commerce is the recognition that insolvency administration has become a specialised discipline. A comparative analysis of laws in other jurisdictions, such as those discussed in this article, reveals that South Africa lacks a sufficient regulatory framework. The initiative to regulate the industry should not be viewed as a "watchdog" initiative, but rather an opportunity to reform the industry in order to give creditors confidence in the persons they appoint and by ultimately reducing the amount of supervision provided by the State.¹⁵³

The English licensing model has at times been criticized as overly complex and fragmentary, and although South Africa is in dire need of a proper regulatory framework, it is probably not necessary for an over-regulated environment such as to be found in the UK.¹⁵⁴ Having said that, the focus on professionalism, ethics, qualifications and experience might still provide a suitable benchmark when attempting to create a balance between the unique South African socio-economic environment and at the same time safeguarding public interest and fostering public confidence.

The Minister of Justice and Constitutional Developments in 2004 appointed a Ministerial Committee of Enquiry into the Liquidations Industry in South Africa. As yet the findings of this Committee have not yet been published or implemented.¹⁵⁵ It is, however, understandable that any remedial action

¹⁵¹ Joyce *The Role of Insolvency Regulators in the Past and in the Future 2*, presentation at the International Insolvency Conference, Singapore, March 2003.

¹⁵² *Ibid.* Cf Mistelis 2000 *The International Lawyer* 1057.

¹⁵³ Calitz and Burdette 2006 *TSAR* 739.

¹⁵⁴ Finch 168. Cf Walters and Seneviratne "Complaints Handling in the UK Insolvency Practitioner Profession" (2008), report prepared for the UK Insolvency Practices Council. On file with the author.

¹⁵⁵ The Minister of Justice and Constitutional Development, Ms BS Mabandla, appointed the Ministerial Committee of Enquiry in July 2004. In February 2005 the Committee submitted their report to the Minister, although this report has to date not been made public. Cf Calitz and Burdette 2006 *TSAR* 721.

recommended by this Committee or resulting from any other research effort will take a considerable time to execute and will in all probability only be implemented as part of the proposed Unified Insolvency Bill. It is therefore suggested that an attempt should be made to accomplish the statutory regulation of the South African insolvency profession through only minor amendments to the current Insolvency Act.¹⁵⁶ This course will ensure that the long overdue transformation and regulation of the insolvency profession could be undertaken on an urgent basis without the constraints of having to endure the entire parliamentary process.

5 CONCLUSION

In the past few decades a marked improvement in the quality of insolvency, debtor-creditor and secured transactions legislation in developing and middle-income countries can be reported. Often, however, the institutions (regulatory and judicial) needed to employ such legislation successfully fail in relation to established goals and benchmarks as modern laws in these areas are inherently dependent upon institutional support. "This disconnection between the quality of the 'law on the books' and the quality of its implementation is often referred to as the 'implementation gap' and is one of the most significant issues facing legal reformers and policy-makers today."¹⁵⁷

In developing and transitional countries, political interference, a lack of experience and resources, and the constraints imposed by weak enforcement agencies often make the task of legal drafting even more challenging.¹⁵⁸ South African law- and policy makers are at present standing at the threshold of introducing significant new legislation in both corporate and insolvency law disciplines.¹⁵⁹ Hopefully interested parties will seek to achieve a balance between the interests of debtors and creditors and the public while at the same time acknowledging the link between these interests and institutional structures and their capacities.

¹⁵⁶ See policy provision as inserted in s 18(1) of the Insolvency Act.

¹⁵⁷ Halliday *The Implementation Gap in Law and Development*, presentation at World Bank Seminar, June 2006. On file with author <http://web.worldbank.org> (accessed on 2008-09-21).

¹⁵⁸ See document on law reform published by the World Bank accessed via <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20745866~menuPK:1989592~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (accessed on 2008-09-21).

¹⁵⁹ See Companies Bill 61 of 2008 as introduced in the National Assembly (proposed section 75) with explanatory summary of Bill published in GG 31104 of 30 May 2008.