TOWARDS MODIFIED UNIVERSALISM: THE RECOGNITION AND ENFORCEMENT OF CROSS-BORDER INSOLVENCY JUDGEMENTS AND ORDERS IN MALAWI

LL.M (COMMERCIAL LAW) THESIS

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UNIVERSITY OF MALAWI
CHANCELLOR COLLEGE

SEPTEMBER, 2013

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LL.B (HONS) MALAWI

Submitted to the Faculty of Law, University of Malawi in partial fulfilment of the requirements for the degree of Masters in Commercial Law

UNIVERSITY OF MALAWI

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DECLARATION

I, **KALEKENI ELSON KAPHALE**, declare that **'TOWARDS MODIFIED UNIVERSALISM: THE RECOGNITION AND ENFORCEMENT OF CROSS-BORDER INSOLVENCY JUDGMENTS AND ORDERS IN MALAWI'** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: _____

KALEKENI ELSON KAPHALE

20/09/13

CERTIFICATE OF APPROVAL

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ABSTRACT

There is consensus that cross-border insolvency laws need to be effective and efficient. To do this, they must ensure the goals of achieving certainty and predictability on private international law questions; the maximisation of the debtor's estate for distribution to creditors; speed and efficiency; fostering cooperation and communication between local and foreign courts and insolvency practitioners as well as aiding the reorganisation or rescue of ailing enterprises. Malawi currently has no statute dealing with cross-border insolvency and relies on the English common law as the only source of law on this subject. Part X of the Insolvency Bill 2013 of Malawi, now before the legislature, adapts the UNCITRAL Model Law on Cross-border Insolvency to govern the recognition and enforcement of cross-border insolvency judgments and orders in Malawi. This thesis has the main objective of critically examining whether the proposed change in the legal regime on cross-border insolvency in Malawi is justified and meets the goals of effectiveness and efficiency and if not, what improvements or alternatives need to be considered.

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LIST OF ABBREVIATIONS

COMI – Centre of main interests

UNCITRAL – The United Nations Commission on International Trade Law

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(b) European Union

The European Council Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000

(c) North American Free Trade Area

Principles of Cooperation in Transnational Insolvency Cases among Members of the North American Free Trade Agreement

(d) OHADA

Uniform Act Organising Collective Proceedings for Wiping Off Debts

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Morguard Investments Limited v De Savoye [1990] 3 SCR 1077

:) Malawi

Bauman, Hinde and Co Ltd v David Whitehead and Sons Ltd [1998] MLR 24

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Mphumeya [1923-60] 1 MLR 344

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Nyali Limited v Attorney General [1955] 1 AllER 646

Paramount Airways Limited, Re [1993] Ch 223

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Trepca Mines Ltd, Re [1960] 1 WLR 1273

(f) United States of America

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CHAPTER ONE

INTRODUCTION

1.1 Aims of the Study

Malawi has no statute on the recognition and enforcement of cross-border insolvency judgments and orders. It is also not party to any international treaty on the subject.[1] Its only source of law on this subject is the English common law.[2]

One of the sub themes under the Malawi Growth and Development Strategy[3] is the achievement of sustainable economic growth through an enabling environment for private sector led growth. The long term goal is one of attaining increased foreign and domestic investment and the medium term outcome is that of increasing foreign direct investment. In its report titled 'Closing a Business in Malawi' the Investment Climate Advisory Services of the World Bank[4] noted that Malawi's insolvency laws do not contain any effective cross-border insolvency provisions. It observed that considering Malawi is focusing on increasing international trade and foreign direct investment, the lack of modern and efficient cross-border insolvency laws could be problematic in the long term. The report therefore recommended that the UNCITRAL Model Law on Cross-border Insolvency (the Model Law) be adapted for inclusion in a new insolvency statute for Malawi.

Malawi is proposing to follow in the footsteps of South Africa,[5] Great Britain[6] and 17 other countries[7] who have modernised their cross- border insolvency laws through the adoption of

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[1] See Chapter Three, infra.
[2] See Chapter Three, infra.
[3] http://www.malawi-invest.net/docs/Downloads/MalawiGrowth&DevelopmentStrategyAugust2006.pdf accessed on 5th April, 2013.
[4] The World Bank Investment Climate Advisory Services, *Doing Business: Closing a Business in Malawi* , April 2010
[5] Cross Border Insolvency Act 2000.
[6] Schedule 1 to the Cross Border Insolvency Regulations 2006.
[7] Australia (2008); Canada (2005); Colombia (2006); Eritrea (1998); Greece (2010); Japan (2000); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Poland (2003); Republic of Korea (2006); Romania (2002); Serbia (2004); Slovenia (2007); South Africa (2000); Uganda (20110; Great Britain(2006); British Virgin Islands (2006); United States of America (2005). See http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html accessed on 11th May, 2013.

the Model Law. It has tabled in Parliament the Insolvency Bill 2013[8] (the Act) that, among other things, in Part X thereof adapts the Model Law.

This thesis has the main objective of critically examining whether the common law that Malawi currently uses fulfils the goals of a modern and efficient cross-border insolvency legal regime[9] and if not, whether the proposed change in the law in Malawi is justified.

1.2 The Meaning and Nature of Insolvency[10]

Insolvency has been defined as a situation where a debtor is unable to pay his or her debts.[11] Insolvency must be distinguished from ordinary debt collection actions which involve only the debtor and creditor. With insolvency, the debtor's inability to pay his debts raises a matter of general collective concern amongst all his creditors.[12] This brings in the need to ensure the orderly distribution of the debtor's estate among all the creditors.

1.3 Cross-border Insolvency and the Conflict of Laws

Insolvency systems and laws differ in every country because domestic insolvency laws usually 'reflect(s) the nation's historical, social, political and cultural needs.'[13] As international trade increases, individuals and corporations may have assets, debtors and creditors in different countries.[14] In the event of insolvency, several conflict of law questions that affect all creditors arise. These include: '(i) which court has jurisdiction to declare a company insolvent? ; (ii) will the courts or the appointed administrator where such proceedings are commenced have the power over foreign assets of the insolvent debtor, and if so, will they have easy access in calling in all the assets to the benefit of all the creditors? ; (iii) whether and to what extent all creditors regardless of their location, will be treated

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[8] The Insolvency Bill was published in the Malawi Gazette Supplement of 19th April, 2013 and is yet to be passed. Section 1 thereof provides that it may be cited as the Insolvency Act 2013 when it comes into force on a date to be designated by the Minister. Throughout this work, the Insolvency Bill 2013 will therefore be referred to as ' the Act'. Comments on 'the Act' throughout this work are therefore based on the Insolvency Bill 2013.

[9] These are: certainty and predictability on private international law questions; speed; fairness to all creditors; aiding cooperation and communication among courts and insolvency practitioners; and, aiding rescue and reorganisation.

[10] Sometimes generally referred to as bankruptcy.

[11] Ian Fletcher, *The Law of Insolvency* (4th edn, Sweet and Maxwell 2009) 1. Insolvency is determined using the balance sheet and cash flow tests, both of which leave room for some uncertainty and debate: Andrew Keay and Peter Walton, *Insolvency Law* (2nd edn, Jordan's 2008) 16

[12] Fletcher, ibid, page 2. ' The essence of a bankruptcy regime is the imposition of collective proceedings which halt individual creditor collection efforts and attempt to preserve whatever going concern value the firm may have for the benefit of all creditors as a group. It is a mechanism for the adjustment or collection of debts on behalf of all creditors and other interested parties': Look Chan Ho, ' Anti – Suit Injunctions in Cross Border Insolvency: A Restatement' [2003] International and Comparative Law Quarterly 695 ,720

[13] Benhajj Shaaban Masoud, 'Legal Challenges of Cross Border Insolvencies in Sub Saharan Africa with Reference to Tanzania and Kenya: A Framework for Legislation and Policies' (PhD thesis, Nottingham Trent University 2012) 17.

[14] S. Chandra Mohan, 'Cross Border Insolvency: Is the UNCITRAL Model Law the Answer? [2012] International Insolvency Review 199.

equally alongside local ones; (iv) the extent to which the local court might recognise foreign insolvency proceedings; (v) whether different courts in different jurisdictions are likely to cooperate in calling in the insolvent debtor's assets; (vi) the manner in which the assets are to be dealt with in the event of concurrent proceedings in multiple jurisdictions; (vii) the law applicable in matters of substance and procedure; and (viii) whether local courts have power over an insolvent foreign company.'[15]

1.4 The Goals of an Effective Cross-border Insolvency Legal Regime

The above stated conflict of law questions are pertinent not only because of the diversity of insolvency laws but also because there is no universally enforceable unified legal framework on cross-border insolvency.[16] This situation has been observed to be undesirable and in need of redress as cross-border insolvency cases need to be disposed of with speed and efficiency to prevent dismemberment of the debtor's estate and there is also need for greater certainty and predictability to encourage the flow of trade and investment.[17] Cooperation between national courts and practitioners to achieve efficiency and maximise creditor's returns is also of great importance.[18] Obviously, an investor would be wary of making huge investments in a country where, in the event of the borrower's insolvency, the investor would not know whether the money or assets in the foreign jurisdiction would be available to him; how long the insolvency proceedings in the foreign jurisdiction would take; which laws as regards distribution or avoidance of transactions would apply; whether he would be entitled to participate in the foreign insolvency proceedings; or, whether the foreign jurisdiction would be able to facilitate or cooperate in rescue efforts.

1.5 The Quest for An Effective and Efficient Cross-border Insolvency Legal Regime

Quite apart from efforts elsewhere,[19] members of the then European Community, now the European Union, commenced efforts towards coming up with a law regulating cross-border insolvency issues in the 1960's. This culminated, almost 40 years later, into the European Council Regulation on Insolvency Proceedings[20] (the Regulation). The Regulation is binding on all member states of the European Union except Denmark and covers several aspects of

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[15] Masoud, *Op cit*, 24.
[16] Ibid.
[17] The Insolvency Service, *The Implementation of the UNCITRAL Model Law on Cross Border Insolvency in Great Britain* [2005] 4, available at http://www.insolvencydirect.bis.gov.uk accessed on 17th June 2013.
[18] Fernando Locatelli, ' International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross Border Insolvency an Answer for Brazil? (An Economic Analysis of its Benefits to International Trade)' [2008] Law and Business Review of the Americas 313
[19] Like in the Americas and French Speaking Africa and Asia.
[20] Council Regulation (EC) No 1346/2000

cross-border insolvency like the recognition and enforcement of foreign insolvency judgments, cooperation and communication, concurrent proceedings, choice of law, jurisdiction and so on.[21]

Noting the absence of an effective and uniform law on cross-border insolvency, the United Nations Commission on International Trade Law (UNCITRAL) came up with the Model Law which was endorsed by the United Nations General Assembly in December, 1997.[22] The Model Law provides a legislative guide for countries to modify their laws to ensure consistency of insolvency laws and practices between different countries.[23] Its purpose is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of: (a) cooperation between courts and insolvency practitioners; (b) greater legal certainty for trade and investment; (c) fair and efficient administration of cross-border insolvencies; (d) protection and maximisation of the value of the debtor's assets; and (e) rescue or reorganisation of financially troubled enterprises.[24]

1.6 Research Questions

This thesis aims to answer the following main question: Does Part X of the Act improve on the prevailing common law regime in Malawi on the recognition and enforcement of cross-border insolvency judgments and orders?

To answer this question, the thesis will firstly critically examine the common law position on the recognition and enforcement of cross-border insolvency judgments and orders and discuss whether it: (i) provides adequate certainty and predictability on private international law questions arising in cross-border insolvency cases; (ii) prevents the dismemberment of the debtor's estate to maximise creditors' collection efforts; (iii) facilitates the speedy disposal of cross-border insolvency cases; (iv) facilitates rescue and reorganisation; and (v) facilitates cooperation and communication between local and foreign courts and insolvency administrators. Secondly, it will consider, in comparison with the Regulation whether the

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[21] See generally, Fletcher, *Op. cit*, Chapter 31.

[22] Copy available at http://www.uncitral.org/en/uncitral_texts/insolvency/1997Model.html accessed on 18th June, 2013. Other multilateral efforts at creating uniform cross border insolvency laws include: The EC Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000) and the ' Principles of Co-Operation in Transnational Insolvency Cases among the Members of the North American Free Trade Agreement' adopted by the ALI in May, 2000- see Fletcher, ibid, pages 987 and 988. French Speaking Countries in West Africa under OHADA also have harmonised their Insolvency Laws through the ' Uniform Act Organising Collective Proceedings for Wiping Off Debts' Part IV of the Act deals with ' International Collective Proceedings'

[23] Paragraph [11] of the Guide to the Enactment of the Uncitral Model Law on Cross Border Insolvency available at http://www.uncitral.org/en/uncitral_texts/insolvency/1997Model.html accessed on 18th June, 2013.

[24] These goals are similar to those identified in section 1.4. above.

Model Law and Part X of the Act when placed side by side with adaptations of the Model Law by South Africa and Great Britain: (i) creates certainty and predictability on private international law questions arising in a cross-border insolvency situation; (ii) prevents the dismemberment of the debtor's estate to maximise creditors' collection efforts; (iii) facilitates speedy disposal of cross-border insolvency cases; (iv) facilitates rescue and reorganisation; (v) facilitates cooperation and communication between local and foreign insolvency courts and practitioners.

1.7 Hypothesis

This thesis makes three assumptions. The first one is that the English common law does not meet all the goals and objectives of a modern and effective cross-border insolvency legal regime. The second one is that (modified) universalism[25] is the ideal regime to achieve most of the goals and objectives of an efficient and effective cross-border insolvency legal regime. The third assumption is that Malawi's adaptation of the Model Law will help it improve its legal regime on cross-border insolvency to address the shortfalls in the common law.

To test the above hypotheses, an identification of the essential characteristics of an effective cross-border insolvency regime will be undertaken followed by a critical study of the English common law to determine whether it meets all the identified characteristics. If any shortfalls are identified, the thesis will then proceed to analyse the Model Law and Part X of the Act in comparison with the Regulation and its adaptation by South Africa and Great Britain to determine whether they fare any better than the common law.

1.8 Research Methodology

The study has adopted a doctrinal approach within the qualitative methodology[26] of legal research. It has focused primarily on discussing the content of the common law on cross-border insolvency as well as the content of the Model Law and Part X of the Act. There has been no necessity for data collection and analysis; hence no resort to quantitative methodology. In the comparative and analytical stages, resort is had to critical legal analysis but all within the qualitative tradition.

The study has mostly relied on the technique of desk or library research using primary sources like statutes, treaty law and case law as well as secondary sources in the form of scholarly articles and books. This has been done in physical libraries in Malawi as well as over the internet. Documents have been studied and analysed. No field research was felt

[25] Which is the theoretical model on which the Model Law is based.

[26] See generally: Alan Bryman, 'The Debate about Quantitative and Qualitative Research: A Question of Methodology?' (1984) 35:1 The British Journal of Sociology 75.

necessary in view of time constraints and discussions with the person contracted to draft the Act[27] proved impossible as he was reportedly out of the country. However, some contacts with officials from the Ministry of Trade[28] were done in the formative stages of the thesis to discover what materials and literature were available to inform the decision to draft the Act.

The major limitation to the study was the dearth of books, journals and case authorities on the subject of insolvency in the physical law libraries in Malawi. Internet research also posed a challenge as the Faculty of Law of the University of Malawi had not subscribed to any electronic legal libraries. Hence the materials that were accessed on the internet were only those that were freely available on line.

1.9 Justification for the Study

There has hitherto been no discourse, doctrinal or critical, on the current position of the law on cross-border insolvency in Malawi. Much as there is literature analysing the Model Law, Malawi's proposed adaptation thereof has not been the subject of any academic study. Hence this study is timely and very relevant as it will provide useful insights into the strengths and weaknesses of Part X of the Act and may inform legislators and other stakeholders on improvements to be made to it.

1.10 Structure of the Study

This thesis contains five chapters. This is the introductory chapter. Chapter Two will outline the theoretical foundations of insolvency law and discuss the dominant approaches to cross-border insolvency. It will identify the goals of a modern cross-border insolvency legal regime and make a judgment as to which theoretical approach best realises them. Chapter Three will give a descriptive and critical analysis of the English common law's position on cross-border insolvency to determine whether it meets the goals of a modern cross-border insolvency regime. Chapter Four will then discuss the Model Law and Part X of the Act in comparison with the Regulation and adaptations of the Model Law by South Africa and Great Britain to critically evaluate if they create a better legal regime for cross-border insolvency than the common law. If any weaknesses are identified, ways of improving them will be suggested and Chapter Five will conclude.

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[27] Mr. Justice Kenyatta Nyirenda.
[28] Mr. Cyprian Kambili, in particular.

CHAPTER TWO

AIMS OF INSOLVENCY LAW AND THE THEORETICAL APPROACHES TO CROSS-BORDER INSOLVENCY

2.1 Introduction

This chapter will begin by discussing the various aims and essential features of domestic insolvency law. There will then follow a brief discussion of the necessity for a cross-border insolvency legal regime in which the essential features of an effective cross-border insolvency legal regime will be identified. Later, the chapter discusses the major theoretical approaches to cross-border insolvency before each approach is analysed critically to identify an approach that is better suited for achieving the efficient handling of cross-border insolvency cases. The result of this exercise will feed into the analysis, in later chapters, of the common law and the Model Law based cross-border insolvency regimes to determine which theoretical framework each of these legal regimes fits into and the extent to which each of the legal regimes contains the identified features of an efficient cross-border insolvency legal regime.

2.2 Aims of Insolvency Law

Among the identified aims of insolvency law are the following:

(a)Creditor Maximisation

Professors Baird and Jackson have advocated the theory that insolvency laws aim at preventing individual creditors' rush to 'grab' the assets of the insolvent estate, thereby dismembering it.[29] They postulate that insolvency proceedings, being collective, should aim at maximising the value of the insolvent estate for the benefit of all creditors and should therefore only concern themselves with those who have property rights in the assets of the

[29] Douglas Baird and Thomas Jackson, ' Corporate Reorganisations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 University of Chicago Law Review 97, 100-101.

insolvent firm.[30] A collective insolvency proceeding ' is directed towards reducing the costs associated with diverse ownership interests and encouraging those with interest in the firm's assets to put those assets to the use the group as a whole would favour.' [31]

The dismemberment of the debtor's estate is discouraged and speed and efficiency in its disposal are encouraged to avert the reduction of the value of the estate available for distribution to creditors. The theory can be criticised for focusing on creditors only.

(b)Communitarian Theory

Professor Gross advocates a multi-focused theory of bankruptcy that takes care of the interests of the whole community that would be affected by an enterprise's bankruptcy. This would include employees, suppliers, customers, nearby property owners, tax authorities and so on.[32] She posits that issues like corporate rescue and reorganisation are driven not only by creditors' collection drives but also concerns for the community. This theory has been criticised on the basis that the definition of the community is too broad and it is difficult to judge between competing community interests when deciding whether to proceed to liquidate or reorganise an enterprise.[33]

(c) Multiple Values Theory

Elizabeth Warren posits that she 'sees bankruptcy as an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among different actors. Bankruptcy encompasses a number of competing – and sometimes conflicting – values in this distribution...No one value dominates, so that bankruptcy policy becomes a composite of factors that near on a better answer to the question, How shall the losses be distributed?'[34] Warren herself admits that the theory she has offered is complex, elastic, interconnected and

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[30] Ibid, 103

[31] Ibid, 103.

[32] Karen Gross, 'Taking Community Interests Into Account in Bankruptcy: An Essay' (1994) 72 Washington University Law Quarterly 1031, 1032.

[33] Barry S. Schermer, ' Response to Professor Gross: Taking the Interests of the Community Into Account in Bankruptcy- A Modern Tale of Belling the Cat' [1994] Washington University Law Quarterly 1049, 1051-1052.

[34] Elizabeth Warren, ' Bankruptcy Policy' [1987] 54 University of Chicago Law Review 775, 777. At page 788, she states that 'reorganisation does not only serve the interests of creditors- older employees who could not have retrained for other jobs, customers who would have to resort to less attractive, alternative suppliers of goods and services, suppliers who would have lost current customers, nearby property owners who would have suffered declining property values, and States and Municipalities that would have faced shrinking tax bases'. She also notes on page 800 that 'bankruptcy is designed to solve difficult distributional choices, not just mere collectivism'

'for which I can neither predict outcomes nor even fully articulate all the factors relevant to a policy decision.'[35]

(d) Contractualism

There is also the theory of 'contractualism'[36] whose advocates depict a model of bankruptcy as a system designed to mirror the agreement one would expect creditors and other stakeholders to form amongst themselves were they to negotiate such an agreement from an *ex ante* position.[37]

Amongst these theories, the dominant theory is the creditor maximisation theory as it reflects reality more closely than the others[38] through the availability of estate dismemberment preventing automatic moratoria on the presentation of bankruptcy petitions in most bankruptcy legislations.[39] The anti deprivation rule or the rule against setting off is another facility that achieves the same purpose.[40] On the other hand, the availability of priority rules on the distribution of the debtor's estate suggests that bankruptcy laws serve to protect interests other than those of creditors in the strict sense. The availability of rescue and reorganisation provisions in bankruptcy laws better explains the communitarian and the multiple values theories. In essence, the theories show that bankruptcy laws aim to avoid dismemberment of the debtor's estate, attain its efficient disposal and, as much as possible, cater for various other societal interests through rescue and reorganisation.

That said, the theories form different ways of looking at the *raison d' etre* for a single multifaceted phenomenon and each theory makes sense from the particular vantage point of the observer.

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[35] ibid, 811.
[36] Donald Korobkin, ' Contractualism and the Normative Foundations of Bankruptcy Law' (1993) 71 Texas Law Review 541
[37] Ibid, at 542. Korobkin offers an alternative contractualism model where the negotiators do their bargaining without knowing the positions they will find themselves in when the debtor becomes bankrupt i.e whether as creditors, employees etc. That way, he says, the various parties affected would have negotiated a fair deal.
[38] It also aligns itself very well with the history of bankruptcy laws which originate from the debtor's acts of fleeing from his creditors or keeping house to escape from creditors: See generally, Israel Tremain, ' Escaping the Creditor in the Middle Ages' (1927) 43 Law Quarterly Review 230; Israel Tremain, ' Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law' (1938) 52 Harvard Law Review 189.
[39] See for example, sections 110 and 111 of the Act.
[40] See *British Eagle International Airlines Limited v Compagnie Nationale Air France* [1975] 1 WLR 758

2.3 Common Features among the Various Theoretical Aims of Insolvency Law

Masoud analysed these various theoretical approaches and came up with the view that they reveal, among others, the following common points:[41] (i) insolvency systems involve collective action aimed at ensuring value maximisation to designated beneficiaries and despite differences in choice of beneficiaries, each view would want to maximise value to its named beneficiaries; (ii) cooperation is necessary in maximising value for the beneficiaries; (iii) there is an apparent emphasis on efficiency; (iv) there is an apparent lack of explicit reference to cross-border insolvency.

In essence, insolvency law and policy are guided by a panoply of considerations, both economic, social and arguably, political that aim at preserving the debtors estate and maximising its value, not only for creditors, but for a large array of beneficiaries, who directly or indirectly have an interest in the insolvent debtor's estate either as a going concern under reorganisation or in liquidation. The bankruptcy system's preservation or maximisation of the value of the debtor's estate; its efficiency, fairness to equally situated stakeholders and speed in dealing with the insolvent debtor's estate seem to be the underlying considerations to the various theories and these would imply the need for cooperation and communication.

That none of the above theoretical aims of insolvency law may be all encompassing but each may have an element or two of the identified aims of insolvency law is reflected in the Cork Report[42] which lists various aims of insolvency law that reflect elements of each theory. The World Bank's approach is similar.[43]

2.4 The Necessity for a Cross-border Insolvency Law System

Where, as in modern times, trade is globalised and the flow of capital knows no boundaries, the need for cross-border insolvency laws is much more urgent as the world is 'one market' in need of a cross-border insolvency legal system that is 'symmetrical to the market'.[44] Arguably, for the very reasons that there is need for a domestic insolvency law regime, there

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[41] Masoud, *Op. cit,* 21-22.
[42] *Report of the Insolvency Law Review Committee* ('Cork Report '), (Cmnd 8558 ,1982) paragraph 198.
[43] The World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (2001) available at http://www.worldbank.org/ifa/ipg_eng.pdf accessed on 24th June, 2013.
[44] Jay Lawrence Westbrook, ' A Global Solution to Multinational Default' (2000) 98 Michigan Law Review 2276, 2283.

would also be need for a cross-border insolvency law regime in view of the growing number of trade activities and flow of investments between nations.[45]

There seems to be an agreement that the goals of the international bankruptcy system do reflect those of a domestic one and that its features include: predictability so that lenders can price credit accurately; maximisation of the value of the bankruptcy estate; facilitation of reorganisation; speed and efficiency; and fairness or equitable distribution among equally situated creditors.[46] However, cross-border insolvency law does have goals and policies that go beyond those of domestic insolvency in the sense that the interface between various legal, political and economic systems among international players would bring in political and socio economic dimensions that would not necessarily concern domestic insolvency law. Issues like the protection of local creditors, respect for the local sovereign and its laws, as well as public policy concerns raise their head in cross-border insolvency more prominently than they would in domestic insolvency. Rescue and reorganisation would also be approached using different considerations under each of the two insolvency regimes. This notwithstanding, for as long as there is international trade and investment, there will be need for the formulation of a viable and efficient cross-border insolvency law theory that advances the interests of trade whilst paying regard to local political interests.

2.5 Territoriality and Universality as Dominant Approaches to Cross-border Insolvency Law

Two diametrically opposed approaches to cross-border insolvency dominate the discourse in this field.

(a)Territorialism

Territorialism is where the assets of the insolvent debtor located in a particular jurisdiction are administered according to the law and in the courts of the country where they are located. Where the debtor owns assets in different jurisdictions therefore, the creditors will have to

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[45] A. Kipnis, ' Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency' [2008] Denver Journal of International Law and Policy 155 ,156-158; see P.R. Thulasidhass, 'Role of Public International Law in a Cross Border Insolvency Regime: An Overview' (2012) 2 -3 (available at http://www.bepress.com/thulasidhass_thulasidhass/1 accessed on 26th June, 2013), where he states that ' In the absence of an effective international legal regime the uncertainty of multinational default poses a serious threat to international business transactions' and that ' a (settled international insolvency law) is a critical element in the global legal framework for the functioning of markets'.

[46] Lynn M. Lo Pucki, 'Cooperation in International Bankruptcy: A Post Universalist Approach' (1998-1999) 84 Cornell Law Review 696, 703.

commence multiple insolvency proceedings in each jurisdiction where particular assets are located and each of these will be dealt with according to the *lex situs*. Choice of courts and choice of law in that case are solely based on the location of the assets.[47]

(b)Universalism

Universalism regards the world as one global market in need of one market symmetrical law to govern the world wide assets of the debtor.[48] The home jurisdiction of the insolvent debtor is the controlling jurisdiction for a bankruptcy proceeding and it will supply the law and the controlling forum worldwide. Assets located in other jurisdictions would be repatriated to the debtor's home country or be subject to ancillary proceedings conducted under the substantive bankruptcy law of the home country, which is the controlling jurisdiction.[49] There is thus the need for cooperation and communication so as to administer the debtor's worldwide assets. In a world where there are multinational corporations with various functions spread across different jurisdictions, the quest for the debtor's home country does cause significant problems as will be shown later.

(c)Brief Critique of the Two Theories

Sovereignty and the desire by the sovereign to protect its local interests - both of which are political considerations - are the underpinnings of territorialism whilst universalism is premised on market symmetry.[50]

Under universalism, small local creditors would be disadvantaged as they have to be forced to file their claims in a foreign jurisdiction and not the local one whose laws they are used to.[51] Territorialism is claimed to be more predictable as the identity of the court that will deal with a particular asset and the law that it will apply are known from the location of the asset. Further, the cost of litigation is relatively cheaper compared to a large consolidated international case that would have to be decided under universalism.[52] Critics of territoriality claim that it is inefficient and costly as it would result in a multiplicity of cases in each

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[47] Ksenia V. Proskurshenko, ' Chapter 15 Cross Border Insolvency: Is it True to its Universalism Aspirations?' (2005) 5:1 Rutgers Business Law Journal 96, 98.
[48] Westbrook, *Op. cit* , page 2283.
[49] Proskurshenko, *Op. cit* , page 98.
[50] Masoud, *Op. cit* , 29; Westbrook, *Op. cit* , 2283.
[51] Andrew T. Guzman, ' International Bankruptcy: In Defence of Universalism' (1999) 98 Michigan Law Review 2177, 2180.
[52] Kipnis, *Op. cit*, page 157.

location where the debtor's assets are located. This diminishes the value of the debtor's estate.[53] It is also said to frustrate reorganisation as there is no proper mechanism for coordination between courts in different countries.[54]On the other hand, it is argued that universalism maximises the value of the debtor's estate as one court administers the entire estate of the debtor under one law and imposes a worldwide moratorium against the debtor's assets. This fact also caters for predictability, the accurate pricing of debt ex ante, and a coordinated disposition of the debtor's assets is made possible by having one controlling jurisdiction. Creditors are also likely to be treated more equally. It avoids the duplicated administrative costs that are there in multiple proceedings under territorialism and to the extent that foreign creditors are accommodated, it creates an incentive for lending or investment across-borders.[55]

Much as territorialism is the approach adopted in most jurisdictions and universalism is the ideal, academically driven theory with political challenges to encounter, arguably, both theories have features in them that, if carefully blended, can lead to a workable and acceptable cross-border insolvency theory.

2.6 Modified Universalism

Territorialists have to contend with the fact that in the real world, local assets may not be enough to settle claims by local creditors who may have to prove their claims in foreign countries. Similarly, universalists have to contend with the reality that local sovereigns will not easily allow foreign laws to apply in their countries or to repatriate local assets before local claims are settled.

Both the territorialist and universalist camps have realised the folly of insisting on pure forms of their theories and this realisation has led to the blunting of the sharp edges of each theory through the conception of middle of the road theories of cooperative territoriality[56] and modified universality[57] respectively. 'Modified universalism accepts the central premise of universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts the discretion to evaluate the fairness of the home country procedures

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[53] Harold S. Burman, ' Harmonisation of International Bankruptcy Law: A United States Perspective' (1996) 64 Fordham Law Review 2543, 2551.
[54] Guzman, *Op. cit*, 2202.
[55] Frederick Tung, ' Is International Bankruptcy Possible' [2001] Michigan Journal of International Law 1, 11.
[56] Lo Pucki, *Op. cit* , 697.
[57] Westbrook, *Op, cit* , 2276.

and to protect the interest of local creditors'.[58] Hence, local courts where the debtor has an establishment would administer ancillary proceedings and would have the discretion to protect local creditors' interests under specific guidelines. The territorialist response – cooperative territorialism- still provides for separate proceedings in each country where the debtor's assets are located but gives the local courts discretion to cooperate with foreign courts. The guidelines for such cooperation are non-existent. Any cooperation is therefore entirely discretionary.[59]

Modified universalism retains some of the efficiencies of pure universalism but also incorporates aspects of territoriality through secondary proceedings and the court's discretion to protect local creditor interests through these.[60]

2.7 Conclusion

This chapter has discussed the aims of a domestic insolvency regime and, by the same token, of a cross-border insolvency regime being the preservation of the debtor's estate for distribution to creditors, the prevention of its dismemberment and its speedy distribution. The preservation of employment and various other interests also features in the aims of an insolvency law system and this is reflected in its emphasis on rescue. Cross-border insolvency would have similar aims, apart from keeping an eye on local creditor interests and public policy concerns. A cross-border insolvency legal regime must be predictable, efficient, fair and be supported by cooperation and communication between courts and practitioners. It must also be supportive of rescue efforts. Territorialism seems to have many elements that render it an inefficient, unpredictable and costly approach to cross-border insolvency in the wake of increased global trade and investment. It also has no mechanisms to support cross-border rescue efforts. Universalism seems to be the ideal system but is has severe political and practical constraints to surmount. Moving forward, a compromise system combining both elements seems to be slowly taking root in the form of modified universalism.

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[58] Ibid, 2301. The United States Bankruptcy Court stated in *Re Maxwell Communication Corporation*, 170 BR 800 (Bankr SDNY 1994) that the United States courts have adopted modified universality as the approach to international insolvency saying: '...the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors.' See also for the United Kingdom: *Mc Grath and Another v Ridell and Others* [2008] UKHL 21, at [30] per Lord Hoffman.

[59] See generally, Lo Pucki, *Op. cit* , 750-751.

[60] Kent Anderson, ' The Cross Border Insolvency Paradigm: A Defence of the Modified Universal Approach Considering the Japanese Experience' [2000] U. Pa. J. Int'l. Econ. L. 679, 692.

The next chapter will interrogate the English common law, locating its position within the theoretical framework and questioning its capacity to fulfil the identified goals and features of an efficient and effective cross-border insolvency legal regime.

CHAPTER THREE

THE EFFICACY OF THE COMMON LAW CROSS-BORDER INSOLVENCY LEGAL REGIME

3.1 Introduction

This chapter builds on the observations made in the previous chapter that a modern cross-border insolvency legal regime must cater for certainty and predictability, aim at maximising the value of the debtor's estate by preventing its dismemberment and assist in its speedy disposal through among others, promoting cooperation and communication between courts and insolvency practitioners. It must also, where possible, cater for rescue and reorganisation. The chapter begins by identifying the common law as the only source of law governing cross-border insolvency in Malawi. It will then discuss its content on the subject before analysing its efficacy as a cross-border insolvency legal regime.

3.2 Reception of English Law in Malawi

British Central Africa[61] received English law in 1902.[62] These laws were: (i) statutes of general application[63] applicable to England and Wales as at 11th August, 1902; (ii) the substance of the common law; and (iii) doctrines of equity.[64] The continued validity of these received laws has been made possible through subsequent enactments amongst which are:[65]Article 83 of the Nyasaland (Constitution) Order - in - Council 1961; Article 18(2) of the Nyasaland (Constitution) Order - in - Council 1963; Section 15(a) of the Malawi Independence Order 1964; and section 15 of the Republic of Malawi (Constitution) Act 1966.

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[61] As Malawi was then called.
[62] Article 15(2) of the British Central Africa (Order - in -Council) 1902.
[63] In the Nigerian case of *Attorney General v J. Holt* (1910) 2 N.L.R. 1 the court held that an English statute which was only applied by certain courts and which was valid only for a certain part of the population could not qualify as a statute of general application.
[64] See generally Franz von Benda- Beckmann, *Legal Pluralism in Malawi- Historical Development 1858-1970 and Emerging Issues,* (Kachere Monographs No. 24, 2007) 56
[65] In chronological order.

Section 200 of the Republic of Malawi Constitution 1994 provides for the continued validity of the common law, and arguably the other existing laws.[66]

3.3 Statute Law

Prior to 11th August, 1902 no statute of general application dealt with cross-border insolvency.[67] Two statutes enacted after 1902 dealt with cross-border individual money judgments. These are: the Judgments Extension Ordinance 1912; and, the Service of Process and Execution of Judgments Act 1957. These two statutes are still applicable in Malawi as existing law.[68]

There is no treaty for the mutual recognition of cross-border insolvency judgments between Malawi and any country in the world.

The Companies Act 1984 and its predecessor Companies Acts did not deal with cross-border corporate insolvency. As regards personal insolvency, the Bankruptcy Act 1967[69] empowers courts to recognise foreign bankruptcy orders. However, for this to happen, the President must gazette countries whose bankruptcy orders Malawi will recognise.[70]

3.4 The Common Law

3.4.1 General Principles for the Recognition of Foreign Judgments in personam and Foreign Judgments in rem

At common law, English courts have recognised and enforced foreign judgments, initially based on the theory of comity, and later on the basis of the doctrine of obligation.[71] This latter doctrine has it that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which the judgment is given, which

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[66] Unless amended or repealed by an Act of Parliament or declared unconstitutional by a competent court.
[67] See generally, Fletcher, *Op. cit*, Chapter 29.
[68] *Bauman, Hinde and Co Limited v David Whitehead and Sons Ltd* [1998] MLR 24.
[69] The Act does not deal with corporate insolvency.
[70] Section 148 of the Bankruptcy Act 1967. So far only Uganda has been gazetted: See *Johannes Z. Muller and Others v. Ockert P. Pretorius,* High Court of Malawi, Commercial Division, Lilongwe District Registry, Commercial Case No. 17 of 2010 (Unreported) where the High Court of Malawi refused to recognise and enforce a bankruptcy order made by a South African Court.
[71] *Russell v Smith* (1842) 9 M & W 810; *Adams v Cape Industries Plc* [1990] Ch. 433 at 552-553;Lawrence Collins et al (ed), *Dicey & Morris:The Conflict of Laws (* 13th edn Sweet and Maxwell 2000) 469. It is stated that one advantage of the doctrine of obligation is that it eliminates the need to seek for reciprocity: PM North and JJ Fawcett, *Cheshire and North Private International Law (* 12th edn Butterworths 1992) 346.

the courts are bound to enforce. However, anything which negatives that duty or forms a legal excuse for not performing it would be a defence to the action.[72]

For judgments *in personam*,[73] it is recognised that a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of recognition only in cases where the debtor was present in or submitted to the jurisdiction of the foreign court.[74] A court of a foreign country has jurisdiction to give a judgment *in rem*[75]capable of enforcement or recognition in England if the subject matter of the proceedings wherein that judgment was given was immovable or movable property which was at the time of the proceedings situate in that country.[76] Further, a court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovable property situate outside of that country.[77]

The rationale for the rules for recognition of judgments *in personam* seems to be grounded on the public policy considerations requiring fairness and due process.[78] The foreign court which pronounced the judgment must have had jurisdiction in the international sense over the defendant by being entitled to summon the defendant before it and subject him to judgment.[79] As for the judgments *in rem*, the same rationale relating to the competence of the foreign court to pronounce judgment over the subject matter applies.[80]

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[72] *Schibsby v Westenholz* (1870) L.R. 6 Q.B. 139, 149-150; In *Adams v Cape Industries plc* [1990] Ch. 433. It was held that though some notion of the doctrine of comity informed the decision to recognise and enforce a foreign judgment, the courts do largely recognise such foreign judgments primarily based on the doctrine of obligation as the courts have not limited their jurisdiction to confer recognition only on judgments from countries that would reciprocate the English court's gesture.

[73] An action in personam is designed to settle the rights of the parties as between themselves, e.g. a contract action or a tort action- PM North and JJ Fawcett, *Op cit* , Chapter 11.

[74] Collins, *Op. cit* , 487, 488 lists four instances in which an English court would at common law recognise a judgment in personam rendered by a foreign court. These are: (i) where the judgment debtor was, at the time the proceedings were instituted, present in the foreign country; (ii) if the judgment debtor was claimant, or counterclaimed, in the proceedings in the foreign court; (iii) if the judgment debtor, being the defendant in the foreign court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; and (iv) if the judgment debtor, being the defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country. See *Adams v Cape Industries*, *Op. cit*; *Emanuel v Symon* [1908] KB 302.

[75] Defined as a judgment of a court of competent jurisdiction determining the status of a person or thing (as distinct from the particular interest in it of a party to the litigation. Such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided – *Lazarus- Barlow v Regent Estates Co Ltd* [1949] 2 KB 465, 475.

[76] *Re Trepca Mines Limited* [1960] 1 WLR 1273, 1277.

[77] Collins, *Op. cit*, 509.

[78] See generally Rebecca R. Zabaty, ' *Rubin v Eurofinance*: Universal Bankruptcy or a Comity of Errors?' (2011) 111 Columbia Law Review Sidebar 38.

[79] *Pemberton v Hughes* [1899] 1 Ch 781, 790.

[80] PM North and JJ Fawcett, *Op. cit* , 363.

To obtain recognition in England, a fresh action must be commenced based on the judgment.[81] The plaintiff can then apply for and obtain summary judgment on the basis that the defendant has no defence to the claim.[82] English rules as to jurisdiction and to service of writs will have to be satisfied in the recognition action.[83]

3.4.2 The Recognition and Enforcement of Cross-border Insolvency Judgments and Orders

The common law provisions on cross-border insolvency operate in parallel with local statutory and community law provisions.[84]

Fletcher states that English courts have always been ready to accord recognition and assistance to foreign insolvency proceedings[85] and English law has historically been supportive of the tenets of universalism.[86] The exact length and breadth the courts have to go to satisfy the universalist ideal however has not been well defined by the courts. Despite this aspiration to universalism, English courts have insisted on strictly following the common law principles on recognition of foreign judgments. Canada, on the other hand, has moved away from these requirements in favour of a mere showing of a real and substantial connection between the debtor and the foreign jurisdiction. Three English decisions and one Canadian decision will illustrate recent developments in the common law on the subject.

(a)Cambridge Gas

In *Cambridge Gas*[87] a group of insolvent Isle of Man companies went into voluntary Chapter 11[88] proceedings in the United States. The Chapter 11 plan of reorganisation which was approved by the US Bankruptcy Court in New York provided for the group's shares to vest in the creditors. The US court then formally asked for assistance of the Isle of Man High Court to give effect to this plan vesting the shares in the creditors. This was objected to by a shareholder of the holding company, a Cayman Islands company on the basis that the New

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[81] ibid, 347.
[82] Ibid, 348.
[83] *Perry v Zissis* [1977] 1 Lloyd's Rep 607.
[84] *Re Stanford International Bank* [2009] EWHC 1441 (Ch), [100]; *Rubin and Another v Eurofinance*[2012] UKSC 46, [25] - [29].
[85] Fletcher, *Op. cit* , 887. Recognition is granted both as regards the judgment pronouncing the debtor insolvent but also as regards ancillary order for example, transaction avoidance orders. The rules for both do not differ at common law.
[86] ibid, 888.
[87] *Cambridge Gas Transportation Corporation v Official Committee for Unsecured Creditors of Navigator Holdings* [2006] UKPC 26.
[88] Chapter 11 of the United States Bankruptcy Code adopted the Model Law.

York court order could not affect its rights in property in Isle of Man shares as the holding company had itself never submitted to the personal jurisdiction of the New York court. The holding company succeeded in the Isle of Man High Court and lost in the Court of Appeal. It then appealed to the Privy Council. It argued that the New York order was either a judgment *in rem* or *in personam*. If *in rem*, it could not affect title in shares in the Isle of Man. If *in personam*, it was only binding on persons over whom the New York court had jurisdiction and as the holding company never appeared in the New York court, the court had no jurisdiction over it and the ensuing Chapter 11 plan could not be recognised by the Isle of Man court at common law.[89]

Hoffman, J found both positions of law regarding judgments *in rem* and *in personam* to be correct. He, however, held that the New York court judgment was neither a judgment *in rem* or *in personam* as it was not determining the rights of parties but was a creditors' collection effort in an insolvency. Having in mind the common law universalist approach he held that the Isle of Man court should proceed to recognise and enforce the Judgment of the New York Bankruptcy Court and to assist the creditors to give effect to the plan.[90]

Much as it advanced the agenda of universalism, the decision can be criticised for compromising due process requirements and also the principle that judgments *in rem* can only be delivered by courts where the subject matter is located.

(b)Mc Grath

In *Mac Grath and Anor v Riddel and others*[91] Australian liquidators of an Australian group of insurance companies with assets and creditors in England sought the repatriation of its English assets to Australia to be distributed according to Australian priority rules which differed from the English ones. An Australian Judge sent a letter to the High Court of Justice in London asking that the provisional liquidators appointed in England be directed to remit the assets to the Australian liquidators for distribution. The question for the court was whether English courts could accede to that request. The House of Lords granted the request to remit the assets. Though some judges[92] based the repatriation on section 426 (4) of the

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[89] See Look Chan Ho, ' Navigating the Common Law Approach to Cross Border Insolvency' (2006) 22 Insolvency Law and Practice 217.
[90] The decision that insolvency judgments are neither in rem nor in personam received severe criticism from, among others, Look Chan Ho, ibid.
[91] [2008] UKHL 21.
[92] For example Lord Scott and Lord Neuberger

Insolvency Act 1986,[93] the majority comprising Lord Hoffman, Lord Phillip and Lord Walker based it on existing judicial practice founded on the principles of universality[94] which required that English courts should, so far as is consistent with justice and United Kingdom public policy, cooperate with the courts in the country of the principal liquidation to ensure that all of the company's assets are distributed to its creditors under a single system of distribution.[95] This entailed a disapplication of local priority rules.[96] The relevant considerations in ordering the repatriation were that the companies under liquidation were primarily Australian companies[97] and the English creditors knew in advance when placing the policies with the Australian insurance company that it was likely that distribution in an insolvency would follow Australian priority rules.[98] Further, it was held that the Australian rules of distribution could not be said to be in conflict with United Kingdom public policy.[99]

Much as the repatriation of the assets regardless of differences in priority rules is truly reflective of universalist theory, the fact that this is conditioned on public policy considerations brings in a dose of territorialism, making the common law approach more of a modified universalism than pure universalism.

(c)Re Cavell[100]

Cavell Insurance had applied to the Chancery Division of the High Court of Justice of the United Kingdom for approval of a scheme of arrangement. The court granted an initial order in the application, ordering Cavell to convene a meeting of its creditors affected by the scheme and providing for the location and notice to be given for the meeting. The question to be decided in the Court of Appeal for Ontario was whether the initial order could be properly

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[93] It provides that ' The Courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having corresponding jurisdiction in...any relevant country..' Australia was designated by the Minister as a 'relevant country'.

[94] *Mac Grath and Anor v Ridell and Others, Op. cit*, [6] , [9] [42] [46] . The decision to remit local assets was primarily based on section 426 of the Insolvency Act, 1986 but Lord Hoffman was of the view that such a power also existed at common law.

[95] In *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors of Navigator Holdings PLC, Op. cit,* at [16] Lord Hoffman states that the English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.

[96] Ibid, Lord Hoffman at [19]

[97] Ibid, Lord Phillip at [42]; Lord Hoffman at [36]

[98] Ibid, Lord Hoffman [33]

[99] Ibid, Lord Hoffman at [36]; Lord Phillip at [42]; Lord Scott at [62]; Lord Neuberger at [80]

[100] *Re Cavell Insurance Co* [2006] CanLii 16529 (ON CA)

recognised in Ontario. The High Court of Ontario had issued an order recognising the United Kingdom order and adding further conditions to implement the order. This was an appeal against the recognition orders based on the grounds, among others, that some Canadian creditors were not served with originating process for the United Kingdom proceedings and that the 'real and substantial connection' test was not met.

The Court of Appeal for Ontario based its decision to recognise the United Kingdom order on the principle of comity.[101] It was its view that the common law rules on recognition and enforcement of a foreign judgment must be modernised to accommodate the increasingly transnational nature of commercial transactions. The court ignored the common law rules regarding the recognition of foreign judgments in favour of a new approach that only required the defendant to have a real and substantial connection with the jurisdiction where the judgment was given and if it would be orderly and fair to those against whom recognition and enforcement was being sought to confer such recognition. Though the United Kingdom proceedings had not been served on the appellants, the court noted that they had notice of these by letter and in any case, the order made in the United Kingdom would not prejudice the appellants who had connections with the United Kingdom and the order would not prejudice their rights in any way as it merely called for a creditors' meeting to be set up in Canada.

(d)Rubin

The 2012 United Kingdom Supreme Court decision of *Rubin and another v Eurofinance* (Rubin)[102] reversed *Cambridge Gas.*

The question for the court was whether anti avoidance orders obtained in foreign insolvency proceedings in the United States of America and in Australia were enforceable in England. In both cases, the persons against whom recognition was sought had not appeared in the foreign courts and therefore had not submitted to their jurisdiction. The central question for determination was whether as a matter of policy, the court should, in the interests of universalism, devise a rule of recognition and enforcement of judgments in insolvency proceedings which is more expansive and more favourable to insolvency practitioners than

[101] This was on the basis of *Morguard Investments Limited v. De Savoye* [1990] 3 SCR 1077.
[102] [2012] UKSC 46.

the traditional common law rule, or should leave it to legislation preceded by necessary consultation.[103]

The court refused to relax the common law rules for recognition of insolvency orders *in personam*. It stated that there are no different rules for recognition of judgments *in personam* in insolvency cases and in non-insolvency cases and saw no reason for different or preferential treatment for insolvency cases. The *Cambridge Gas* decision was held to be a radical departure from substantially settled law[104]. The Canadian approach was also rejected as inapplicable in England.

The *Rubin* decision was a reaffirmation of the public policy need for due process which lies at the root of the common law rules for recognition and enforcement of foreign judgments. The negative side of *Rubin* is that fraudulent persons who would have conducted transactions liable to be avoided may escape the net of the law by simply staying away from the courts. Such fraudulent intent can, however, be countered using the same public policy tool.

In summary therefore, English common law supports universalism but requires presence or submission to the foreign jurisdiction before *in personam* insolvency orders are recognised and for *in rem* orders, it requires that the assets the subject matter of the order must be located in the jurisdiction of the court that makes the order.

The remainder of this chapter will test the common law's efficacy by analysing whether it provides the much needed certainty and predictability, efficiency, aids cooperation and communication and facilitates rescue and reorganisation.

3.5 Does the Common Law Meet the Goals of a Modern Cross-border Insolvency Legal Regime?

(a)*Certainty and Predictability*

To begin with, it is not always easy to distinguish between *in personam* and *in rem* judgments.[105] Secondly, though local assets may be repatriated to the 'principal

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[103] Ibid, [91]
[104] Ibid, [128]
[105] See generally, Look Chan Ho, ' Navigating the Common Law Approach to Cross Border Insolvency' (2006) 22 Insolvency Law and Practice 217.

liquidation'[106] there exist no rules for identifying it. There is not even a single presumption that applies to identify the home jurisdiction.

Predictability will be affected by the pre - condition requiring presence or submission to jurisdiction as the debtor may decide not to present itself in or submit to the jurisdiction where the order is made despite the fact that there may be a real and substantial connection between him and the jurisdiction. In that case, the judgment or order will not be recognised or enforced. Creditors will not know in advance whether persons against whom judgments or orders may be made will be present in or submit to the jurisdiction. Arguably, the public policy tool can be used to defeat such fraudulent intent, though it is uncertain whether in that case the real and substantial connection test of Canada would be resorted to.

There will also be an issue at common law regarding choice of law in transaction avoidance proceedings. Certainty in avoidance laws is crucial as such laws most often reflect domestic beliefs and values.[107] On this point, it has been observed that 'English (common law) choice of law rules are primitive.'[108] The case of *Re Paramount Airways Limited*[109] suggests that the courts could use the 'sufficient connection' test to identify the applicable law. However, the test has several components to it such as: the residence or place of business of the defendant; his connection with the insolvent; the nature and scope of the transaction to be impugned; the nature and locality of the plaintiff involved; the circumstances in which the defendant became involved in the transaction or received a benefit from it or acquired the property in question; whether he acted in good faith; and so on.[110] Such a plethora of considerations clearly indicates that it is possible any two courts may not give equal value to similar factors and this affects predictability of the applicable law.

What priority rules will apply may, however, not pose problems because unless the assets are repatriated, local rules will apply.[111]

Then, crucially, there is also a problem as to the lack of a clear definition of insolvency proceedings that will be subject to recognition and reliefs at common law. A uniform

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[106] *Mc Grath, Op. cit* , [10]
[107] Claudia Tobler, ' Managing Failure in the New Global Economy: The UNCITRAL Model Law on Cross Border Insolvency' (1999) 22:2 Boston College International and Comparative Law Review 383, 394.
[108] Look Chan Ho, ' Conflict of Laws in Insolvency Transaction Avoidance' [2008] Singapore Academy of Law Journal 343
[109] [1993] Ch 223.
[110] ibid, 240.
[111] *Mc Grath, Op. cit* , [14]

definition that would guide all courts would help to identify which proceedings to render assistance to. The common law also has no provisions regarding which categories of insolvency practitioners would be granted access to local courts. Further, it is not clear at common law whether the grant of access to local courts does not expose foreign insolvency practitioners or the insolvent debtor to the jurisdiction of the local courts for purposes other than recognition.

Finally, the common law is malleable. Canada has been able to modify the common law rules of recognition to embrace the 'real and substantial connection' test. That Malawi can do the same appears possible from Lord Denning's dictum in *Nyali Limited v Attorney General*[112] where he advocated the principle that in the 'far off lands' applying the common law, the people must have a law which they themselves will understand and respect and the common law must therefore be modified by local judges. Malawian courts may therefore have the opportunity to choose whether to remain with the English approach to recognition or to go for the Canadian one or even come up with their own. This creates uncertainty.

(b)Creditor Asset Maximisation

The fact that absence from or non submission to the foreign jurisdiction will lead to non recognition of *in personam* foreign insolvency judgments or orders [113] may mean that where a debtor chooses not to be present in the foreign jurisdiction, any avoidance orders that may be made against him will not be recognised locally. This not only facilitates fraud, but also keeps the assets that would be subject to the avoidance order unavailable for distribution to creditors.

The common law does not provide for automatic moratorium against the debtor's assets on the recognition of a foreign insolvency proceeding from the home jurisdiction. These are only available at statute and Malawi has none on cross-border insolvency. If any moratorium is to be issued, this can only be at the court's discretion. This situation places the debtor's estate at risk of dismemberment or dissipation.

At common law, recognition proceedings in cross-border insolvency matters have to be commenced like any other ordinary recognition action. No special rules exist for them. The

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[112] [1955] 1 AllER 646. In the Malawian case of *Mphumeya v R* [1923-60] 1 MLR 344 it was held that the common law must be interpreted in light of the customary situation.

[113] *Rubin, Op. cit.*

period between the filing of the recognition action and the making of the recognition order or any stay order is uncertain and this would lead to wastage of the insolvent debtor's estate.

The other factors that may affect the maximisation of the debtor's estate are public policy concerns. In *Mc Grath*, Lord Hoffman acknowledged that though local assets have been and may be repatriated to foreign jurisdictions as happened in *Re Bank of Credit and Commerce International SA No 10*[114] this is subject to UK public policy considerations. The exact ambit of such public policy was not delimited and remains a fluid concept at common law and may thus be used to reject recognition of foreign avoidance orders and repatriation of local assets to foreign jurisdictions.

(c)Speedy Disposal of Cases

With no ready-made and well agreed upon rules regarding which proceedings will be recognised and on filing which papers and by which functionaries, the speed at which cases of cross-border insolvency will be dealt with at common law remains uncertain and there is also no rule for fast - tracking them. Further, the common law's lack of set mechanism for cooperation and coordination between courts and foreign insolvency practitioners affects the speedy disposal of cross-border insolvency cases.

(d)Cooperation and Communication

As cross-border insolvency cases involve several courts and practitioners in different countries, cooperation and communication among them is paramount. There are however, no rules at common law that make cooperation mandatory or communication equally so. There is no framework for such, and where this happens, it does so out of principles of comity with no set rules and guidelines.[115] In some instances such cooperation and communication has happened within the framework of the common law with great results.[116] However, the absence of such an obligation to communicate and cooperate at common law creates room for discretion and confusion and may hamper reorganisation efforts and cause dissipation of the debtor's assets.

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[114] [1997] Ch 213,247.

[115] *Mc Grath, Op. cit* , [6]

[116] Jay Lawrence Westbrook, ' Comment: A More Optimistic View of Cross Border Insolvency (1994) 72:3 Washington Law Quarterly 947, at 950. Westbrook states at page 950 of his article that communication in the *Maxwell Communications Corporation* case was said to have ' proved essential to maintaining the value of the enterprise to be sold and to avoiding the ruinous cost and delay through transnational litigation'

(e)Rescue and Reorganisation

Formal rescue and reorganisation is a creature of statute.[117] Statute creates the framework in which it must take place.[118] Within the common law tradition, there are no rules that govern corporate rescue and reorganisation and the common law does not have facilities or specific provisions for it. However, though communication and cooperation are not mandatory at common law, the fact that courts and practitioners have communicated with each other within the universalist regime means that rescue and reorganisation may be possible. The absence of the automatic stay creates a situation where the debtor's estate may be dismembered during the recognition process and hence defeat any rescue efforts.[119] Discretionary urgent interlocutory injunctions or stay orders may prevent this.[120]

3.6 Conclusion

In this chapter, it has been observed that English common law provisions on the recognition and enforcement of cross-border insolvency judgments and orders, though based on modified universalism, leave a lot of scope for uncertainty and unpredictability regarding the identity of the home jurisdiction, choice of law and on several other fronts. With no framework making cooperation and communication mandatory, coordination of proceedings becomes problematic and the lack of automatic moratoria does affect the maximisation of the debtor's estate and may hamper rescue and reorganisation efforts.

The common law is also inefficient as the recognition procedures use the framework for ordinary actions. Malawi therefore has reason enough to improve the legal position to make the law more suited for modern cross-border insolvency practice.

In the next chapter, the Model Law and Malawi's adaptation thereof will be examined in a comparative setting to determine if they provide a better legal regime than the common law.

[117] Informal ones would happen by way of agreement but bringing creditors in different countries to agree would be a nightmare.
[118] See for example Chapter 11 of the United States Bankruptcy Code and Part III of the Insolvency Act.
[119] Tobler, *Op. cit* , 411.
[120] See Order 29 Rules of the Supreme Court, 1965; *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

CHAPTER FOUR

THE MODEL LAW AND ITS ADAPTATION BY MALAWI

4.1 Introduction

In the previous chapter, the common law regime on cross-border insolvency has been observed to leave a lot of room for uncertainty and unpredictability. It has also been found to be inefficient. It has no guidelines for cooperation and coordination between courts and insolvency practitioners and does not fully support rescue and reorganisation drives. This chapter will critically discuss the Model Law and its proposed adaptation by Malawi[121] to consider whether they meet the goals of a modern cross-border insolvency regime better than does the common law, and if not, what the shortfalls are and how these can be addressed. Comparative references to the Regulation and the adaptation of the Model Law by Great Britain and South Africa will be made.

4.2 Aims of the Model Law and the Act

The Model Law[122] and the Act[123] aim to provide mechanisms for cooperation between courts and insolvency practitioners; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies protecting multiple interests including those of creditors and debtors; protection and maximisation of the debtor's estate and the facilitation of rescue thereby protecting and preserving employment. The Model Law and the Act are therefore fulfilling of both the creditor's bargain as well as the multiple values theoretical aims of insolvency law. Their stated goals also coincide with the features of a modern cross-border insolvency law discussed in Chapter Two.

4.3 Scope of Application of the Model Law and the Act

The Model Law and the Act apply where a foreign court or insolvency representative seeks assistance in an Enacting State in relation to a foreign proceeding. They also apply in cases of

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[121] In this chapter and the next, unless expressly stated, references to the Act shall mean references to Part X of the Insolvency Bill 2013.

[122] See the Preamble to the Model Law.

[123] And so, too the South African and Great Britain Cross Border Insolvency legislation.

concurrent proceedings involving the same debtor in several states and to cases where a creditor or other interested person in a foreign state wants to commence or participate in an insolvency proceeding in the Enacting State.[124]

It is permissible for an Enacting State to exclude the applicability of the Model Law to some enterprises that are governed by special insolvency regimes[125] and Malawi has opted to exercise this right under section 3 of the Act. The whole of the Act in Malawi, including its cross-border insolvency provisions will not apply to financial institutions as defined under the Financial Services Act unless provided otherwise in that statute.

4.4 Important Definitional and Interpretational Issues

The Model Law and the Act apply in relation to foreign proceedings which are defined as collective[126] judicial or administrative proceedings in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency[127] in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purposes of reorganisation or liquidation.[128] This definition embraces the recognition of the main insolvency order or judgment as well as interim or ancillary orders like schemes of arrangement and rescue or reorganisation orders.[129] It appears though, that foreign avoidance

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[124] Article 1(1) of the Model Law and section 317 of the Act.

[125] Article 1(2) of the Model Law. Great Britain excluded a whole host of financial and utility institutions under Article 1(2) to Schedule 1 of its Cross Border Insolvency Regulations 2006. South Africa does not. Article 1(2) of the Regulation excludes insurance companies and other financial institutions.

[126] It was held in *Re Stanford International Bank Limited* [2010] EWCA Civ 137 that as proceedings commenced in the United States by the Securities Exchange Commission to safeguard the debtor's assets were not ''collective'' in the sense that they were not geared at securing the assets of the debtor for the benefit of all its creditors, they could not be recognised under the Cross Border Insolvency Regulations 2006 of Great Britain. Look Chan Ho, ' Misunderstanding the Model Law; Re Stanford International Bank' [July/ August 2011] Butterworths Journal of International Banking and Financial Law, 395 has questioned this decision on the basis that a Ponzi scheme that the debtor was running is insolvent from day one. Much as this may be the case, for as long as the proceedings were not meant to cater for the interests of the whole body of creditors, the decision was correct.

[127] *Re Betcorp Limited* 400 BR 266 (Bankr D Nev 2009) decided under Chapter 15 of the United States Bankruptcy Code held that even voluntary winding up proceedings qualify for recognition provided they are being conducted under a law relating to insolvency. Look Chan Ho, ' Recognising an Australian Solvent Liquidation under the UNCITRAL Model Law: In Re Betcorp' [2009] JIBLR 418 has criticised this decision on the basis that the preparatory material to the Australian Act that adapted the Model Law excluded solvent liquidations and so does the Regulation which *Re Betcorp* also cited. It is argued that the fact that a solvent liquidation may easily be converted into an insolvent one on realising that the company is insolvent makes it safer to include solvent liquidations under the ambit of the Model Law. Unlike the Model Law, the Regulation only applies to insolvent proceedings as shown under Article 1(1) thereof.

[128] Article 2(a) of the Model Law and section 318(1)(e) of the Act.

[129] The common law is no different as *Re Cavell*, *Op. cit* , dealt with schemes of arrangement; *Cambridge Gas*, ibid, with orders for transfer of shares upon an insolvency and *Mc Grath* , ibid with a request for repatriation of

orders cannot be directly recognised but the foreign insolvency practitioner is given the right, upon recognition of a foreign proceeding, to commence avoidance proceedings in Malawi.[130] Two types of foreign proceedings can be recognised. These are foreign main proceedings that take place in a place where the debtor has its centre of main interests (COMI)[131] and foreign non main proceedings that take place in a place where the debtor has an establishment.[132] The COMI is not defined under the Model Law but is presumed, unless there is proof to the contrary, to be at the registered office of the debtor, or in the case of an individual, at his place of habitual residence.[133] The Act, however, does define the COMI under section 318(1) (a) to be the debtor's registered office or habitual residence in the case of an individual despite having the presumption as well.[134] This, as will be shown below, is a grave discrepancy that needs correcting.

Though the Model Law and the Act do not say which jurisdiction will be responsible for determining where the debtor's COMI lies, the recognising court will have to make the determination when the application is made to it for recognition as the applicant will have to apply for recognition of either a foreign main or a foreign non main proceeding. There is no obligation under the Model Law or the Act for the recognising court to be bound by declarations of COMI made by other jurisdictions. Where proceedings commenced in a jurisdiction where the debtor has his registered office are sought to be recognised, the COMI presumption in Article 16(3) of the Model Law and section 332(3) of the Act will be triggered unless there is proof to the contrary. This presupposes that interested third parties are free to offer contrary evidence to rebut the COMI presumption. Of course in the case of Malawi, there will be issues as to whether to apply the presumption or whether the High Court will be bound by the COMI definition in section 318(a) of the Act. There may however arise situations, as will be discussed below, where it is possible for courts in different

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assets consequent upon an insolvency. It is important that the order sought to be recognised must be made pursuant to a law relating to insolvency.

[130] Section 339 of the Act and article 23 of the Model Law.

[131] Article 2(b) of the Model Law and section 318(1)(f) of the Act.

[132] Article 2(c) of the Model Law and section 318(g) of the Act. The establishment is defined as any place of operations where the debtor carries out a non transitory economic activity with human means and goods and services. Most of the terms in this definition are not defined. Please note that the Cross Border Insolvency Regulations 2006 of Great Britain use the term 'assets' in place of 'goods' in its definition of an establishment. The Regulation carries the same definition of establishment as the Model Law- see Article 2(h).

[133] Article 16(3) of the Model Law and section 332(3) of the Act. The same case applies under the Regulation whose article 3 uses the same presumption as does the Model Law. However, paragraph [13] of the Preamble to the Regulation states that ' the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

[134] Section 332(3) of the Act.

jurisdictions to arrive at different judgments as to the location of the COMI for the same multinational enterprise. This is undesirable and runs contrary to the certainty and predictability part of the Model Law's statement of objectives.[135]

Article 3 of the Model Law provides that to the extent that the Model Law conflicts with an international treaty or agreement by the Enacting State, the latter shall prevail. Great Britain,[136] South Africa[137] and Malawi[138] have retained this provision but Malawi's is worded unhappily as it states that where there is a conflict 'the provisions of section 211 of the Constitution shall apply.' Section 211(1) of the Constitution provides that any international agreement entered into after the commencement of the (1994) Constitution shall form part of the law of the Republic if so provided by an Act of Parliament. This section does not state whether local statutes will have priority over the treaty or international agreement or the other way round or whether they shall have equal status. As the treaty or international agreement will become law in Malawi if so provided by an Act of Parliament it will arguably assume the same rank as statutory law. None will have priority over the other but could have inconsistent provisions. As any treaty on cross-border insolvency that Malawi shall enter into will come after the Act [139] the treaties shall be read as having amended the Act to the extent of any inconsistency by virtue of the proviso to section 200 of the Constitution which provides that any laws currently in force may be amended or repealed by an Act of Parliament or be declared unconstitutional by a competent court.[140] Common law rules of statutory interpretation also render the same result.[141] Section 319 of the Act is therefore saying, albeit in a torturous manner, the same thing as Article 3 of the Model Law is saying.

Every country will choose a court which will perform functions under the Model Law.[142] In the case of Malawi, it is the High Court of Malawi, Principal Registry.[143]

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[135] Section 316 (b) of the Act and paragraph (b) of the preamble to the Model Law.
[136] Article 3 to Schedule 1 of the Cross Border Insolvency Regulations 2006
[137] Section 3 of the Cross Border Insolvency Act 2000
[138] Section 319 of the Act.
[139] Since there are no treaties on cross border insolvency that Malawi is a party to, as shown in Chapter Three, supra.
[140] See also Francis Bennion, *Statutory Interpretation*, 4th edition (Butterworths Lexis Nexis 2002) page 243 which states that where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provision of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them.
[141] Ibid.
[142] Article 4 of the Model Law.

Like under the common law[144] the court may refuse to take action governed by the Model Law or the Act if the action would be manifestly contrary to the public policy of the Enacting State.[145] The Guide to the Enactment of the Model Law[146] states[147] that in many Enacting States, the exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees. For example, in the United States of America, it has been held in *Re Dr Jurgen Tofi*[148] that on the basis of public policy grounds, recognition would not be granted in the United States of America to a Private Mail Interception Order issued by German and United Kingdom courts where the order was obtained in the absence of the debtor as he was not served with the application.[149] This was in emphasis of the need to follow due process, quite apart from preventing breach of privacy rights. In *Re Gold and Honey*[150] recognition was refused on public policy grounds where foreign insolvency proceedings had been commenced in breach of an automatic stay order.[151] Public policy objections have not been upheld, for example, where the objector stated that granting recognition deprived them of a right to a jury trial in a situation where the court felt that their trial rights were not unduly prejudiced by the absence of a jury;[152] and also where it was shown that local creditors would receive less in foreign proceedings or the costs of liquidation would deplete the debtor's assets when recognition was granted.[153] It is hoped that a similar restrictive approach to the public policy exception will be adopted by Malawi.

Article 8 of the Model Law and section 324 of the Act mandate due regard to be paid to the international origin of the Model Law and to the need to promote uniformity in its application and the observance of good faith.

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[143] Section 320 as read with section 2 of the Act. This will only be the Principal Registry because Rule 2(2) of the Courts (High Court) (Procedure in District Registries) Rules states that a writ or other originating process relating to probate or to the registration of foreign judgments shall not be issued out of a District Registry.

[144] *Mc Grath, Op. cit.*

[145] Article 6 of the Model Law and section 322 of the Act.

[146] Listed in section 318 (2) as an interpretational tool for Part X of the Act.

[147] Paragraph 87 of the Guide to Enactment. Article 89 states that the use of the word ' manifestly' underscores the need for the restrictive interpretation of the public policy exception.

[148] 453 B.R. 186 (Bankr. S.D.N.Y. 2011)

[149] On the importance of due process and the right to be heard see *Re Eurofood IFSC* [2006] Ch 508 at [66]

[150] 410 B.R. (Bankr. E.D.N.Y. 2009)

[151] Omar Shahid, ' The Public Policy Exception: Has section 1506 Been a Significant Obstacle in Aiding Foreign Bankruptcy Proceedings?' (2010) The Journal of International Business and Law 175, 197.

[152] In *Re Ephedra Products Liability Litigation*, 349, B.R. 333 (SDNY 2006)

[153] *In Re Ernst and Young, Inc*, 383 B.R. 773(Bankr. D. Colo. 2008); See also *Mc Grath*, ibid; *In Re Qimonda AG*, 2011 Bankr LEXIS 4191 (Bankr ED Va October 28 2011)

4.5 Access to Local Courts

Foreign representatives have a right to apply directly to courts in Malawi[154] without exposing themselves or the debtor's foreign assets or affairs to the jurisdiction of local courts for other purposes.[155] Foreign representatives may also commence proceedings upon meeting conditions for such[156] and they can participate, post recognition, in a proceeding regarding a debtor.[157] Foreign creditors are also granted access to local proceedings under the Act[158] and may after the grant of recognition commence avoidance action in Malawi.[159] Where local laws demand creditor notification, known foreign creditors are required to be notified.[160]

4.6 Conditions for Recognition of Foreign Proceedings under the Model Law and the Act

The Model Law and the Act have very clear conditions preceding recognition. These simply require that the proceeding must be a foreign proceeding within the meaning of the Model Law[161] and the Act;[162] that the application must be made by a foreign representative upon production of: a certified copy of the decision commencing the foreign proceeding and appointing him or a certificate from foreign court affirming the existence of the foreign proceeding or his appointment; or in the absence of either, any other evidence acceptable to the court of the existence of the foreign proceeding and of his appointment as a foreign representative.[163]

This brings us to question whether the common law conditions *sine qua non* the recognition of foreign insolvency judgments still apply to Malawi. On a reading of section 323 of the Act and Article 7 of the Model Law this does not seem to be the case because the common law will only be available to provide 'additional assistance' and this cannot be construed to mean that common law conditions preceding recognition have survived the enactment of the Act.

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[154] Article 9 of the Model Law and section 325 of the Act.
[155] Article 10 of the Model Law and section 326 of the Act.
[156] Section 327 of the Act and Article 11 of the Model Law.
[157] Section 328 of the Act and Article 12 of the Model Law
[158] Section 329 of the Act and Article 13 of the Model Law.
[159] Section 339 of the Act and Article 23 of the Model Law.
[160] Section 330 of the Act and Article 14 of the Model Law.
[161] Article 2(a) of the Model Law.
[162] Section 318(e) of the Act.
[163] Articles 9 and 15 of the Model Law and sections 325 and 331 of the Act.

As they are clearly inconsistent with the express provisions of the Act, they are deemed to have been invalidated. Since the common law conditions to recognition of *in personam* judgments involve respect for the important constitutional concept of due process, one could possibly argue that the public policy exception can be used to refuse recognition of judgments or orders that did not observe due process considerations. As due process is a fundamental principle of constitutional law, it could easily filter through even the most restrictive definition of the public policy exception. This possibility however, conflicts with the Model Law and the Act's very clear conditions preceding recognition. There is need for the Model Law and the Act to specifically address this issue.

It also remains to be seen whether, by reason of the Model Law and the Act, judgments *in rem* that fit into the definition of a foreign proceeding would be recognised even if not made by a court within whose jurisdiction the property the subject matter of the judgment is located. A reading of the Model Law and the Act suggests that this is possible, subject to any public policy considerations that there may be.

4.7 Recognition and Reliefs

Foreign representatives are granted a right to apply for recognition of foreign proceedings upon fulfilling some formal requirements.[164] There are presumptions of authenticity regarding the formal documentation to be filed and this aids speedy recognition.[165]

The court has the power to grant urgent relief like moratoria and the appointment of a person to protect and preserve the value of the assets.[166] Automatic moratoria ensue upon the recognition of a foreign main proceeding[167] whilst discretionary reliefs that include moratoria may be granted on recognition of any foreign proceeding including a foreign non main proceeding.[168] These reliefs may be modified or terminated.[169] The courts may also entrust the distribution of all or part of the debtor's assets to the foreign representative or other person appointed by it in foreign main or non main proceedings, provided it is satisfied that the interests of local creditors are adequately protected.[170] The courts must have in mind the

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[164] Article 15 of the Model Law and section 331 of the Act.
[165] Article 16(2) of the Model Law and section 332(2) of the Act.
[166] Article 19 of the Model Law and section 335 of the Act.
[167] Article 20 of the Model Law and section 336 of the Act.
[168] Article 21 of the Model Law and section 337 of the Act.
[169] Article 20(2) of the Model Law. Section 336(2) of the Act.
[170] Article 21(2) of the Model Law. Section 337(2) of the Act.

interests of creditors, other interested persons, including the debtor when granting the reliefs.[171] This fulfils both the creditors' bargain as well as the communitarian theoretical aims of insolvency. Where a foreign proceeding has been recognised, the foreign representative attains standing to initiate avoidance proceedings in Malawi.[172]

The power of the court or a practitioner to provide additional assistance to a foreign insolvency practitioner under other laws of the Enacting State is not limited by the Act.[173] In Malawi this means that in terms of assistance to be provided, the common law will complement the Act.

4.8 Cooperation and Communication with Foreign Courts and Representatives

Courts are mandated to cooperate to the maximum extent possible and are entitled to engage in direct communication.[174] This also applies to insolvency representatives though their cooperation maybe subject to judicial supervision.[175]

4.9 Concurrent Proceedings

The Model Law allows concurrent proceedings to be commenced in the state in which the debtor has assets and the effect of those proceedings is limited to such local assets. These must be coordinated with the foreign main or non main proceedings.[176]

4.10 Significant Differences Between the Model Law and the Act

Article 1(2) of the Model Law allows the exclusion of some institutions from the applicability of the Model Law and in section 3 of the Act Malawi has excluded financial institutions. South Africa has adopted a different approach to Malawi in section 1 of its Cross-border Insolvency Act 2000 where there is no exemption allowed.

Malawi's choice to have an iron cast definition of the COMI in section 318(1) (a) of the Act is an area of significant difference with the Model Law. South Africa and Great Britain are not with Malawi in this experiment.

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[171] Article 22(1) of the Model Law; section 338(1) of the Act.
[172] Article 23 of the Model Law. Section 339 of the Act.
[173] Article 7 of the Model Law and section 323 of the Act.
[174] Article 25 of the Model Law and section 341 of the Act.
[175] Article 26 of the Model Law and section 342 of the Act.
[176] Articles 28 and 29 of the Model Law and section 344 and 345 of the Act.

For the sake of further guiding local courts on interpretational aids, the Act has included section 318(2) which has provided for the use of *travaux preparatoires* and any specific practice guides from UNCITRAL as well as the Guide to Enactment as references. This is a welcome difference between the Act and the Model Law. Both South Africa and Great Britain do not have provisions similar to section 318(2) of the Act.

Another difference is in the wording of the provision as to the relationship between the Act and inconsistent treaty provisions. The confusion that Malawi has bred in section 319 has been avoided by Great Britain[177] and South Africa.[178]

To avert potential problems on the ranking of foreign creditors, section 13(3) of the Cross-border Insolvency Act 2000 of South Africa was grafted into its adaptation of article 13 of the Model Law and it provides that without derogating from the application of the law and practice of the Republic generally, the ranking of claims in respect of assets in the Republic is regulated by the law and practice of the Republic on the ranking of claims. Section 329(2) of the Act is saying exactly the same thing as section 13(3) of the South African Act. Unlike South Africa however, Malawi has, following Great Britain,[179] added a subsection (3) to its adaptation of article 13 of the Model Law to provide that a claim (of a foreign creditor) shall not be challenged solely for being a claim by a foreign tax or social security authority but such a claim may be challenged for being a penalty or on any other ground that a claim may be challenged under the Act, and this includes the public policy ground.

The other notable difference between the Model Law and the Act occurs in section 336(3) of the Act, which goes beyond Article 20 of the Model Law to provide that without prejudice to sub - section (2), the stay and suspension granted on the recognition of a foreign main proceeding shall not affect any right to take any steps to enforce security over the debtor's property or the right of a creditor to set off[180] its claim against the claim of the debtor.[181] This

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[177] In article 3 of Schedule 1 to the Cross Border Insolvency Regulations 2006.

[178] In section 3 of the Cross Border Insolvency Act 2000.

[179] Article 13(3) to Schedule 1 to the Cross Border Insolvency Regulations 2006

[180] Thereby giving secured creditors a prior right to enforce their security against the debtor's estate. A creditor's right of set off seems to now be available at common law to well organised contractual schemes made in good faith and not in anticipation of an insolvency by reason of the Australian case of *International Air Transport Association v Ansett Australia Holdings Limited* [2008] HCA 3 and the United Kingdom House of Lords decision of *Belmont Park Investment (Pty) Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing, Inc* [2011] 3 WLR 521. Malawi's additional material under Article 20 therefore clearly aligns itself well with the current common law position on set off and also contains, by reason of section 280 of the Act, the safeguards protecting mutual good faith transactions not made in anticipation of an insolvency.

provision seems to go against the common law rule against setting off individual creditor claims, but the common law position has now been modified to allow for set off rights.[182]

Finally, the stay against proceedings on the recognition of a foreign main proceeding also does not affect the right to commence or continue any criminal proceedings or any action or proceedings by a person or body having regulatory, supervisory or investigative functions of a public nature, being an action or proceedings brought in exercise of those functions.[183] This provision is not available under Article 20 of the Model Law.

There are typing errors in the Act that need to be addressed. Section 332(1) refers to a foreign proceeding as having been defined under section 317(g) when the same is defined under section 318 (e). The same section incorrectly refers to a definition of a foreign representative in section 317(h) which is non - existent. That definition is found in section 318(1) (h). Similar errors occur in section 333(1) (a) which wrongly refers to a definition of a foreign proceeding as being found in section 318(g) instead of section 318 (1) (e). Section 333(1) (b) wrongly refers to a definition of a foreign representative in section 318(h) instead of section 318(1) (h). Section 333(2) (b) wrongly refers to the definition of an establishment in section 317(d) instead of section 318(1) (c). Section 335 and section 337 bear a similar side note. The Model Law has the same error and this needs to be looked into. Finally, section 341 (1) refers to section 317(1) when that section has no sub - sections at all. This error is repeated under section 346. It is hoped these errors are cleared before the Bill passes into law.

The remainder of the chapter will discuss whether the choice by Malawi to switch from the common law to the Model Law is justified.

4.11 An Appraisal of the Model Law and the Act

(a)Positioning Within the Major Theoretical Approaches

The Model Law and, consequently, the Act contain features of both universalism and territorialism. The identification of one proceeding taking place in the debtor's COMI as the

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[181] Provision also found in Article 20(3) to Schedule 1 of the Cross Border Insolvency Regulations 2006 of Great Britain. It is however, absent from section 20 to the Cross Border Insolvency Act 2000 of South Africa.

[182] See *British Eagle International Airlines Limited v Compagnie Nationale Air France* [1975] 1 WLR 758; *Money Markets International Stockbrokers Limited v London Stockbrokers Limited and Another* [2001] EWHC 1052.

[183] Section 336(4)(b) of the Act. A similar provision is available in Article 20(4) of the Cross Border Insolvency Regulations 2006 of Great Britain but not available under section 20 to the Cross Border Insolvency Act 2000 of South Africa.

foreign main proceeding and the fact that this will entail an automatic stay of proceedings and execution[184] is redolent of universalism, and so is the fact that the foreign representative can be allowed to repatriate the debtor's assets to the home country.[185] The presumption of insolvency in Article 31 of the Model Law emanating from the recognition of foreign main proceedings introduces the concept of acceptance of outcome differences by different jurisdictions, a fact that also underlies the universalist theory.[186] However, the Model Law stops short of full universalism by not requiring that the home country's laws will be the governing laws in all cross-border insolvency proceedings involving the debtor.[187] It does not deal with issues of applicable law at all or of which jurisdiction should be the only one fitting to open main insolvency proceedings, like the Regulation does.[188] It also falls short of full universalism as the proceedings in the COMI are not the controlling proceedings in the insolvency litigation and it allows for the opening of concurrent secondary proceedings in jurisdictions where the debtor has an establishment.[189] Though this is the case, insolvency practitioners in non main proceedings have to coordinate and cooperate with those in main proceedings and the reliefs have to be synchronised. The fact that courts in Enacting States can choose not to recognise foreign proceedings or provide reliefs on public policy grounds[190] coupled with the imperative on local courts to adequately protect the interests of local creditors[191] mean that there is a dose of territorialism in the Model Law[192]. Here, what Pottow describes as sovereign 'pride' is allowed some room to play in allowing for the protection of local public policy, and what he terms local 'greed' is sated through protection of the interests of local creditors.[193]

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[184] Article 20 of the Model Law and section 336 of the Act.

[185] Article 21(2) of the Model Law.

[186] John Pottow, ' Procedural Incrementalism: A Model for International Bankruptcy' (2005) 45:4 Virginia Journal of International Law 936 ,971,978.

[187] Hanna L. Buxbaum, ' Rethinking International Insolvency: The Neglected Role of Choice of Law Rules and Theory' (2000) 36 Stanford Journal of International Law 23.

[188] Under Article 3(1) and Article 4(1).

[189] Article 28 of the Model Law and section 344 of the Act. These are however limited to assets located in that State and must be coordinated with the foreign main proceedings- see Article 29 of the Model Law and section 345 of the Act

[190] Article 6 of the Model Law and section 322 of the Act.

[191] Article 21(2) of the Model Law and section 337(2) and section 339(4) of the Act.

[192] Although the content of the public policy exception is not defined and so are local creditor interests undefined.

[193] See generally John Pottow, ' Greed and Pride in International Bankruptcy: The Problem of and Proposed Solutions to 'Local Interests'?' (2006) 104:8 Michigan Law Review 1899.

The Regulation leans more towards universalism as only the country where the COMI is located has jurisdiction to open main insolvency proceeding[194] and the COMI jurisdiction supplies the applicable law, except for local assets in a secondary proceeding.[195] The COMI jurisdiction does not supply the applicable law under the Model Law and the Model Law does not regulate primary jurisdiction rules. The fact that the Regulation operates in a common market could explain this disparity with the Model Law which is aimed at all willing adoptees in the world, regardless of common geographic or economic factors.

The Model Law and the Regulation's modified universalistic slant can be compared to the common law which recognises a home jurisdiction to which assets can be repatriated and would refuse to confer recognition or repatriate assets where local public policy is contravened.[196]

(b)Form

Unlike the common law which is judge made, needs to be discerned from judgments of varying lengths and complexity, may be capable of adaptation in various jurisdictions and heavily relies on judicial whim as has been demonstrated in *Cambridge Gas*, *Rubin* and *Re Cavell,* the Model Law, the Regulation and the Act are in written text and therefore have a higher degree of certainty as to meaning and content, to say nothing of levels of accessibility.

(c)The Reciprocity Question

The Model Law and the Act do not have any reciprocity requirements in them unlike Section 2(2) (a) of the Cross-border Insolvency Act 2000 of South Africa. Though the South African provision has been justified on the fear that local assets may be surrendered to foreign jurisdictions,[197] the fact that the Model Law and the Act have provisions for the protection of the interests of local creditors serves to allay those fears.[198] Malawi cannot therefore make out a case for a reciprocity provision.

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[194] Article 3(1) of the Regulation.
[195] Articles 4(1) and article 28 of the Regulation.
[196] *Mac Grath, Op. cit.*
[197] Sandile Khumalo, *Op. cit.*
[198] Article 21(2) of the Model Law and section 337(2) of the Act.

(d)Certainty and Predictability

(i)The COMI Question

The COMI serves different functions under the Model Law and the Regulation with the Regulation using the concept to determine the jurisdiction to open insolvency proceedings and also the applicable law[199] whilst under the Model Law the concept merely determines whether the foreign proceedings that are submitted for recognition are to be recognised as foreign main proceedings and hence trigger the availability of automatic reliefs. The Model Law only gives rules relating to access to courts, recognition and reliefs and communication and cooperation and has nothing to do with choice of law and jurisdiction issues.[200]

The COMI concept is central to the Model Law as once this is located and proceedings emanating from there are recognised, it opens the tap for automatic reliefs like the moratoria. The availability of automatic reliefs for non main proceedings will depend on judicial discretion and a bit of time and resources may be wasted, with the attendant dismemberment of the debtor's estate in invoking it. The COMI provides certainty and foreseeability for creditors at the time they enter into a transaction.[201] Both the Regulation and the Model Law do not define this fundamental concept but create a presumption, unless the contrary is proved, that the COMI is located at the registered office of the company. Unlike under the Regulation where the preamble points to third party discernment of where the COMI is located as a guiding tool[202] in the COMI location exercise, [203] there is no such preambular or other interpretative guidance under the Model Law.

Different courts and different jurisdictions have interpreted the COMI their own way, with Australian courts initially following the third party based approach followed by the European

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[199] Articles 3(1) and 4(1) and 4(2) of the Regulation. Under Article 3(1) the courts of the Member State in the territory of which the debtor's COMI is situated shall have jurisdiction to open insolvency proceedings and under Article 4, the law applicable to insolvency proceedings and their effects shall be that of the Member State in the territory of which such proceedings are opened. This includes the law that relates to avoidance of transactions- article 4(2)(m) of the Regulation.

[200] Look Chan Ho, ' Conflict of Laws in Insolvency Transaction Avoidance' (2008) 20 Singapore Academy of Law Journal 343.

[201] *Re Stanford International Bank Limited* [2010] EWCA Civ 137, [62]. See also Alexandra Ragan, ' COMI Strikes a Discordant Note: Why US Courts Are Not In Complete Harmony Despite Chapter 15 Directives' (2010) 27 Emory Bankruptcy Developments Journal 117,132. This is doubtful for the Model Law, however, as this thesis observes below.

[202] Preamble (13) to the Regulation.

[203] This, though, did not prevent the incidence of litigation on COMI location as evidence by *Re Eurofoods IFSC* [2006] Ch 508 where Irish and Italian courts both claimed jurisdiction to the cross border insolvency proceedings.

Court of Justice in *Eurofood*[204] before changing tune two years later and opting for a test involving a (very unhelpful and time consuming) 'broad and factual' inquiry.[205] In the United States, in *Bear Stearns*[206] the court was of the view, following *Eurofood,* that the debtor's COMI was located at the place where the debtor conducted the administration of his interests on a regular basis and was therefore ascertainable by third parties, generally. It listed factors to help in COMI determination as: the location of the debtor's headquarters; the location of those who direct the debtor's company; the location of the debtor's primary assets; the location of the majority of the debtor's creditors, or at least those affected by the case; and applicable law in relation to disputes that might arise between the debtor and the creditor. Such a cocktail of factors is very unhelpful as the weight to be given to each is not designated and two courts may arrive at different results gazing at the same facts. In *Re Betcorp Limited*[207] whilst acknowledging the decision in *Bear Stearns* which held that the location of the COMI involves considering various factors, the court held that courts do not apply a rigid formula or consistently find one factor dispositive. Instead they analyse a variety of factors to discern, objectively, where a particular debtor has its principal place of business. This inquiry examines the debtors' administration, management and operations along with whether reasonable and ordinary third parties can discern or perceive where the debtor is conducting these various functions. English courts[208] did emphasise the need to have regard not only to what the debtor is doing but also what he would be perceived to be doing by an objective observer in determining the location of the COMI.

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[204] *Ackers v Saad Investments Co Ltd (In Official Liquidation*) (2010) 118 ALD 498. Look Chan Ho criticises such an approach in view of the fact that COMI serves different functions under the Model Law and the Regulation- See Look Chan Ho, ' Recognising an Australian Insolvent Liquidation under UNCITRAL Model Law: *In Re Betcorp'* [2009] JIBLR 418. This criticism may not be entirely correct as third party views on where the COMI is located cannot be entirely ignored under the Model Law and these are not excluded either. In any event, creditors , including potential creditors, can fall into the category of third parties.

[205] *Gainford, In Re Tannenbaum v Tannenbaum* (2012) FCA 904.

[206] In *Re Bear Stearns High Grade Structured Credit Strategies Master Fund* (389 BR 325 (SDNY 2008))128

[207] 400 BR 266 (Bankr D Nev 2009)292.

[208] *Re Stanford International Bank Limited* [2010] EWCA Civ 137, [62]. The Court Appeal stated that it saw nothing in both the Regulation and the Model Law requiring different meanings to be given to the phrase COMI. Though this could be true, the Court of Appeal went a step out of line when it opined that under both the Model Law and the Regulation, the concern is that persons dealing with the debtor should be able to know before insolvency which law would govern the eventual insolvency of their counterparty. Whilst this may be true of the Regulation, it is not so with the Model Law as COMI has no choice of law allocative function. See: Look Chan Ho, ' Misunderstanding the Model Law: *Re Stanford International Bank'* (2011) Butterworths Journal of International Banking and Financial Law 395.

It is therefore difficult to fashion a completely predictable rule that is uniformly interpreted to provide a solution to the location of the COMI.[209] Problems in achieving a unified COMI definition are no doubt exacerbated by the lack of a single international court to deal with all issues arising under the Model Law.[210] It is not difficult to imagine a situation where different jurisdictions may arrive at different results regarding the location of the same debtor's COMI.[211] Perhaps here, it would have better if the Model Law had a provision making it mandatory for other jurisdictions to defer to prior COMI determinations by other jurisdictions though this bears with it the risk of a race to the courts. Note, too, that the COMI definition has not been crafted with the multinational enterprise in mind and yet the COMI locative problems get more pronounced when dealing with such enterprises.[212]

The COMI, fashioned to function as a sceptre that points to the jurisdiction of the foreign main proceeding, has sadly transmogrified itself into a spectre. The resulting locative problems may delay recognition of proceedings or wrongly subject the creditor to mere discretionary relief on filing of proceedings which may either be refused, or be granted late and hence lead to debtor assets dismemberment. It is suggested that the discretionary relief ought to be granted liberally whenever there is a possibility that COMI location will take time to be determined.

Another argument taken against the COMI concept is that it encourages forum shopping.[213] This will be especially so where the ultimate aim to relocate the COMI is to have the foreign representative transfer the debtor's assets to a jurisdiction with, say, favourable priority rules or transaction avoidance rules.

That said, however, companies and individuals have the freedom to relocate and to conduct the management of their affairs in whatever way they please. The world still has divergent insolvency laws and it ought not to be an issue for a company to relocate its COMI except where fraud by the debtors is intended in which case the public policy exception under the Model Law may, arguably, be used to refuse to recognise a newly acquired COMI that was

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[209] José M Garido, ' No Two Snowflakes the Same: The Distributional Question in International Bankruptcies' (2011) 46 Texas International Law Journal 459 ,472.
[210] Alexandra Ragan, *Op. cit* , 165 -166.
[211] Typifying the example of COMI jurisdictional scrambles is the famous *Eurofoods* case, ibid.
[212] Irit Mevorach, ' On the Road to Universalism: A Comparative and Empirical Study of The UNCITRAL Model Law on Cross Border Insolvency' (2011) 12 European Business Organisation Law Review 517, 526.
[213] Adrian Walters and Anton Smith, ' ' Bankruptcy Tourism' under the EC Regulation on Insolvency Proceedings: A view from England and Wales' (2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630890 accessed on 21st July, 2013.

intended to thwart creditor collection efforts.[214] Another argument for the status quo is that definitional exactitude, as often happens in revenue statutes, spawns a multi- million dollar avoidance industry where actors adopt a mechanistic approach to fit into or evade statutory prescriptions. Rather than have a fixed definition for COMI, it may be advantageous to have a loose definition that seeks to garner the views of on- lookers as to what, from the debtor's actions, they make of the location of its COMI.

Malawi has departed from merely having a COMI presumption[215] to, in the same Act[216] defining it as the debtor's registered office, or habitual residence in the case of an individual. This scenario is problematic as where a term is clearly defined; there will not be any need for any presumption, presumptions by their nature being conclusions which must be drawn in the absence of contrary evidence.[217] It is suggested that because of the flexibility of the presumption, Malawi should delete the definition of COMI and retain the presumption.

(ii)Choice of Law and Jurisdiction to Open Main Proceedings

The Model Law and the Act do not specify that the recognition of foreign main proceedings signifies a choice of the applicable law in those foreign main proceedings.[218] They also do not dictate which jurisdiction has the sole right to open main insolvency proceedings though the fact that only proceedings commenced where the COMI is located can be main proceedings gives such a clue. There is therefore an indirect jurisdiction rule. This is unlike the position under the Regulation.[219]There is no choice of law rule under the Model Law or the Act, meaning that unless assets of the debtor are repatriated to the debtor's COMI, local laws in the Enacting State will probably govern their distribution in terms of priorities[220] and will also supply the law relating to avoidance[221] of fraudulent transactions, for instance.[222] Choice of law under the Model Law and the Act, however, depends on conflict of law rules in the

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[214] See, for example, *Shierson v Vlieland- Boddy* (2005) 1 WLR 396.
[215] Section 332 (3) of the Act.
[216] Section 318(a) of the Act.
[217] PJ Schwikkard and SE Van Der Merwe, *Principles of Evidence*, (3rd Edition, Juta 2010) 498.
[218] *In Re SPhinX Ltd* 351 BR 103, 115-116 (S.D.N.Y. 2006)
[219] See Article 3 of the Regulation.
[220]Unlike under articles 4(1) and 4(2) of the Regulation. However there are lots of exceptions to article 4 of the Regulation, for example under articles 6, 8, 9, 10, 11, 13, 14 and 15 of the Regulation which refer to the law of the State where recognition is sought and not the law of the COMI as the governing law thereby diluting the content of article 4 of the Regulation.
[221] Look Chan Ho, ' Conflict of Laws in Transaction Avoidance' (2008) 20 Singapore Academy of Law Journal 343.
[222] Sefa M Franken, 'Cross Border Insolvency: A Comparative Institutional Analysis' available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2047399 accessed on 20th July, 2013.

Enacting State, if any. As the assets of the debtor may be located in different jurisdictions and, in the case of movable assets, may change location, the investor will obviously face difficulties predicting which priority or avoidance laws will apply to which assets of the debtor on insolvency. This situation may also tempt debtors to forum shop. On this aspect of uncertainty in applicable law, the common law does not fare any better as it has no elaborate rules on this either[223] and quite apart from an inclination to apply territorial laws does have recourse to the 'sufficient connection' test[224] which is far from predictable.

(iii)Third Party Rights and Security Interests

Unlike the Regulation, the Model Law and the Act are entirely silent on the treatment of third party rights *in rem*[225]. The Model Law is silent on security interests but the Act, unlike the common law, does provide for them.[226]

(iv) Local Creditor Interests

It remains to be seen how the High Court of Malawi will treat the protection of local creditor interests where foreign insolvency laws leave them exposed to receive less. Would they follow the *Mc Grath* and *Re Ernst and Young, Inc.* approach and repatriate the assets of the debtor to the foreign jurisdiction nonetheless or would they refuse to repatriate local assets to satisfy local creditor interests? Using section 337(2) of the Act,[227] the High Court is mandated not to repatriate local assets to foreign jurisdictions until it is satisfied that local creditor interests are adequately protected. Though this is the case, Malawi courts would be urged to have regard to the international character of the Model Law and the fact that local creditors may one day have to collect their debts in foreign jurisdictions. When such a day comes, the local creditors will wish the foreign jurisdiction did not strictly adhere to the principle in their equivalent of section 337(2).

(e)Creditor Maximization

Unlike under the common law, the adoption of an automatic or discretionary moratorium procedure in Enacting States when a filing for recognition has been made is an important

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[223] Look Chan Ho (2008) *Op. cit,* 344; Tobler, *Op. cit,* 393.
[224] See for example, *Re Paramount Airways Limited* [1993] Ch. 223.
[225] Article 5 of the Regulation.
[226] Section 336(3)(a) of the Act.
[227] Article 21(2) of the Model Law.

contribution against the dismemberment of the debtor's estate.[228] Though recognition processes may arguably take time due to definitional problems of the COMI, the fact that there is provision for temporary and urgent relief[229] provides some assurance against dismemberment of the debtor's estate. The presumptions in section 332(1) and (2) of the Act do also assist in hastening the recognition process and preventing the wastage of the debtor's estate unlike the position at common law where no such presumptions exist. The foreign representative's right to institute avoidance actions also assists in creditor maximization[230] and so does his right to intervene in local insolvency proceedings involving the same debtor.[231]

(f)Rescue and Reorganisation

The devices of urgent discretionary relief and the automatic relief granted under the Model Law and the Act coupled with the mandate of courts and insolvency practitioners to cooperate and communicate create the optimum conditions in which to conduct any corporate rescue efforts. The ability of the foreign representative to move the debtor's assets to another jurisdiction also helps in that regard. The only problem with the Model Law and the Act though is that they do not deal specifically with the conditions under which a decision to either liquidate or rescue will be justified and have no provisions as to when rescue efforts need to be abandoned. This weakness may lead to loss of time and assets by creditors. There is no equivalent framework for automatic moratoria and mandatory cooperation and communication requirements at common law.

4.12 Conclusion

A weakness of the Model Law is that it is not in a treaty format.[232] Enacting States can adapt it to suit their domestic policy needs. It does not deal with choice of law or choice of jurisdiction issues. This compromises certainty and predictability. However, all factors considered, the Model Law goes a long way to lay the foundation for a coherent system for

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[228] Tobler, *Op. cit* , 386.
[229] Article 19 of the Model Law.
[230] Article 23 of the Model Law.
[231] Article 24 of the Model Law.
[232] Sir Nicholas Browne- Wilkinson VC stated in *Re Bank of Credit and Commercial International* [1992] BCLC 570, 577 that it was a matter of profound regret that there was no international convention regulating international insolvency; In *Re Paramount Airways Limited* [1993] Ch 233, 239 Sir Donald Nicholls, VC said that there was ' a crying need for an international insolvency convention.'

the treatment of procedural issues in cross-border insolvency cases, most notably in the areas of rights of access to local courts in Enacting States, the recognition of insolvency judgments and orders, the availability of reliefs and communication and cooperation. It also is better suited to assist in cases of reorganisation and rescue.

The facilities for cooperation and communication, which are mandatory, surpass anything which the common law can offer and the moratorium ensures creditor maximisation and facilitates reorganisation and rescue efforts. There is the COMI confusion under the Model Law, but this is nothing compared to the uncertainties that prevail under the common law regime which has no presumptive definition of the home jurisdiction.

In sum, for the moment, the Model Law and the Act are the proverbial half loaf that is better than none at all.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS ON THE WAY FORWARD

5.1 Introduction

This chapter summarises the whole thesis by firstly highlighting the essential features of a cross-border insolvency legal regime and discussing whether the common law meets them. The chapter then discusses in summary whether the Model Law and the Act are any better than the common law in that regard. It will then give proposals for reform to address any identified shortfalls.

5.2 The Basic Features of a Modern Cross-border Insolvency Legal Regime

There is an apparent convergence of thought that modern cross-border insolvency regimes must mirror domestic ones in maximising the value of the debtor's estate for the benefit of creditors, and other interested parties, both local and foreign; that this value maximisation can be achieved through cooperation and communication between local and foreign courts and insolvency practitioners; further, that modern cross-border insolvency systems need to be efficient.[233] The need for certainty and predictability in a cross-border insolvency legal regime has been highlighted by the World Bank[234] as this factor has a direct impact on the efficiency of any such regime. Equitable treatment between local and foreign creditors has also been highlighted.[235]

In sum, a cross-border insolvency legal regime must: (a) ensure the maximisation of value the debtor's estate by prevent its dismemberment or dissipation; (b) be effective and efficient; (c) facilitate rescue or reorganisation; (d) cater for cooperation and communication between local and foreign courts and insolvency practitioners; (e) be predictable and certain.

5.3 The Suitability of the Common Law Regime

Malawi has had no statutory law on cross-border insolvency. It has solely relied on the common law.[236] The common law suffers several defects that compromise its ability to fulfil the above goals.

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[233] Massoud, *Op. cit* , 21-22; *Report of the Insolvency Law Committee* (' Cork Report'),(Cmnd 8558 1982), paragraph 198; The World Bank, Principles and Guidelines for Effective Insolvency and Creditor Rights Systems' available at http://www.worldbank.org/ifa/ipg_eng.pdf accessed on 24th June, 2013.

[234] The World Bank, Ibid.

[235] Lynn M. Lo Pucki, ' Cooperation in International Bankruptcy: A Post Universalist Approach' (1998-1999) 84 Cornell Law Review 696, 703.

[236] See Chapter 3.

Firstly, it is not easy to distinguish between *in personam* and *in rem* judgments and orders[237] and the requirement of presence in or submission to jurisdiction as conditions preceding recognition are open to abuse by fraudulent debtors.

Secondly, the common law's deference to the home jurisdiction is affected by its lack of rules for identifying it.[238] It also lacks rules for defining which proceedings to recognise as insolvency proceedings and which categories of foreign insolvency practitioners to give assistance to. The conditions under which foreign insolvency practitioners will be granted access to local courts also remains open to judicial discretion.[239]

Thirdly, it is unclear which laws will be applied to avoidance proceedings or generally. The case of *Re Paramount Airways*[240] suggests the use of the 'sufficient connection' test in choice of law matters but this test too, has so many facets with no guide as to which aspect must be given what weight in the reckoning.

Fourthly, the absence of automatic moratoria on the grant of recognition of proceedings for recognition means that assets of the debtor could be easily dissipated whilst seeking discretionary relief.[241] This will also affect rescue and reorganisation efforts.

Fifthly, recognition proceedings take the form of an ordinary court action. This is cumbersome and may lead to time wastage and asset dissipation.

It will also be noted that there are no set guidelines for communication and cooperation between local and foreign courts and insolvency practitioners and no rules governing coordination of proceedings.

The common law, being judge made law, also allows for an element of uncertainty as a readily available and easily accessible source of law making those that seek to know its position on any aspect of cross-border insolvency go through either lengthy and sometimes contradictory court judgments or multiple secondary sources like text books.

All the above factors compromise the efficiency and effectiveness of the common law regime on cross-border insolvency.

5.4 The Model Law and the Act are better than the Common Law

The major advantage of the Model Law and the Act over the common law is that they are in writing and the contents are thus readily. This is a factor that goes to certainty, an essential

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[237] Look Chan Ho, (2006) *Op. cit.*
[238] Chapter Three.
[239] Ibid.
[240] [1993] Ch. 223.
[241] Chapter Three of this thesis.

attribute of modern cross-border insolvency legal regimes. This certainty is somehow compromised as Enacting States are permitted to adapt its contents to suit their whims.[242] However this facility was aimed at achieving some 'buy in' into the Model Law. Enacting States are also at liberty to exempt some industries from the applicability of the Model Law.[243] A measure of disharmony will therefore arise by reason of this provision but as some countries have special insolvency regimes for some enterprise sectors, this provision is essential.

The Model Law and the Act have clear provisions and guidelines on recognition and these would facilitate speedy recognition as there are presumptions that are deployed to aid the process. Speedy recognition would aid the prevention of dismemberment of the debtor's estate. The Model Law and the Act also have the facility of both automatic and speedy moratoria; promote access to courts by foreign representatives; provide for recognition of foreign insolvency orders and reliefs; mandate cooperation and communication between foreign and local courts and practitioners; as well as the coordination of concurrent proceedings. They are also facilitative of rescue. These aspects are missing from the common law. In essence, the Model Law and the Act have many elements that would facilitate a modern and efficient cross-border insolvency regime than the common law.

The positive features aside, it is noted that the lack of a precise definition of the COMI concept severely compromises certainty and predictability in the Model Law and the Act, despite the presumptions in sections 332(1) and (2) of the Act[244] and affects the speed at which recognition may be attained. Though this is the case, this could be necessary to ensure a well informed 'third party observer guided' COMI determination. On COMI or home jurisdiction certainty, the common law fares worse as it does not even have any guidelines or presumptions for its determination. This situation may prolong litigation and delay repatriation of assets.

The Model Law and the Act do not lay down rules on choice of law and jurisdiction. This, however, does not prevent Enacting States from laying these down in their adaptations of the Model Law if they would want to improve on certainty and predictability.[245] Provisions on

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[242] *Guide to Enactment of the Model Law*, ibid. And the adaptations do affect the ultimate goal of harmonisation of national laws on recognition and enforcement of cross border insolvency judgments and orders.

[243] Article 1(2) of the Model Law

[244] And Article 16(1) and (2) of the Model Law.

[245] Though Malawi's choice of law rules are a set of factors that need to be weighted by a court as has been shown in *Re Paramount Airways Limited, Op. cit* , it is not unusual for legislation to outline a number of factors

third party rights *in rem* also need to be infused into any Model Law adaptations by Enacting States.

There is adequate guidance on the public policy exception question, though more guidance needed to have been made relating to the extent of protection of local creditor interests.

The lack of specific mention of rescue and reorganisation is also lamentable as such a subject matter ought not to be attended to by the side winds of moratoria and communication and cooperation provisions. Reading a statute as acting in aid of rescue when it does not expressly provide for that in its text can pose some challenges. It is conceded, however, that specific provisioning for rescue and reorganisation may not be appropriate in a part of a statute dealing with private international law issues.

5.5 Conclusion and Proposals on the Way Forward

The common law was ill equipped to meet modern standards for cross-border insolvency laws. Malawi needs a statute on cross-border insolvency and Part X of the Act, which is an adaptation of the Model Law, is the best it can get as a model for its cross-border insolvency law regime, more so because the Model Law has so far been adopted by a few states and is open to adaptation by more.

Malawi needs to amend Part X of the Act to remove the fixed definition of the COMI. It will do well, however, to leave the COMI presumption intact. Malawi may consider creating more certainty and predictability by including choice of law rules in the Act.

In conclusion, save for the few areas mentioned above that need to be looked into, the enactment of Part X of the Act will be a step in the right direction for Malawi.

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that may have to be brought to bear to arrive at a conclusion. See for example, Order 1 Rule 2 and Order 1 Rule 3 of the High Court (Commercial Division) Rules made under the Courts Act of Malawi.

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