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The implications of *Lagoon Beach Hotel (Pty) Limited v Lehane* 2016 (3) SA 143 (SCA) for the South African Cross-Border Insolvency dispensation

by

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Summary

This mini-dissertation explores the implications of *Lagoon Beach Hotel (Pty) Limited v Lehane* 2016 (3) SA 143 (SCA) for the South African cross-border insolvency dispensation, as this case deals with the various problems that arise in cross-border insolvency. As a result of these problems and a certain amount of uncertainty when it comes to dealing with cross-border insolvency issues, many investors are reluctant to invest cross-border. This is due to the fact that multiple countries, each with their own laws concerning cross-border insolvency, are involved. Thankfully, the United Nations Commission on International Trade Law has provided a set of guidelines in this regard, namely the Model Law on Cross-Border Insolvency. Although South Africa has enacted the Cross-Border Insolvency Act 42 of 2000, and most of the provisions provided for in the Model law have been included in the legislation, the Act still remains inoperative.

Throughout this dissertation the *Lagoon Beach* case will therefore be critically analysed. The analysis will start off with a discussion of the common law, as it is currently the legal position in South Africa. Thereafter a detailed analysis will be conducted of the various orders of court of the *Lagoon Beach* case and how the courts differed or agreed in their approach. Finally, the *Lagoon Beach* case will be discussed in light of the Act and the issues in the case will be solved hypothetically by applying the Act to the problems discussed throughout the dissertation.

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Chapter 1: Introduction

1.1 Background of study

Cross-border insolvency[1] incorporates a vast number of problems and has therefore been the topic of discussion by various authors for many years. When an insolvent acquires assets in more than one state certain difficulties arise, as the different countries involved each have their own insolvency laws. For example, a debtor is domiciled in England, and has his 'Centre of Main Interest'[2] there as well, however he has a flat in Italy and a wine farm in South Africa, as a result of this, problems can arise due to a lack of predictability; the uncertainty when it comes to dealing with CBI issues. Consequently, many investors are reluctant to invest cross-borders, as they are unsure how their affairs will be dealt with when various jurisdictions are involved. One would thus firstly have to consider which laws to apply in such circumstances, whether there is statute regulating cross-border problems, or a treaty signed by a few countries, if not, the common law would be relied upon. Due to the absence of international treaties, where South Africa is a signatory, nothing substantial or binding has been implemented to regulate this matter. Countries have therefore been forced to rely on their domestic insolvency laws and private international law as a starting point.

This dissertation will therefore provide a brief overview of the current position followed in South Africa as well as the future of the CBI dispensation in South Africa. It is therefore, worth discussing one of the main reasons why problems arise in this area of law: the universality- versus territoriality approach. Many countries favour a universalist approach when dealing with CBI issues, meaning they prefer to have a single set of proceedings and all creditors are treated equally.[3] South Africa, on the other hand, tends to lean more towards a territorial approach, which favours a multiplicity of proceedings and is

[1] Hereinafter CBI.
[2] Hereinafter COMI.
[3] Kunst JA (2016) "Cross Border Insolvency" in Meskin *et al. Insolvency Law and its operation in winding-up* 17-1 (hereinafter Kunst JA (2016)).

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inclined to favour local creditors above foreign creditors.[4] It has however, been stated by authors that South Africa follows a modified territorial approach,[5] nevertheless it is forced to rely on common law as a starting point for dealing with CBI issues, as currently there is no treaty or operative legislation applicable in this regard.[6] The common law approach is therefore followed in South Africa when addressing issues such as the recognition of foreign trustees, the discretion of the courts, the protection of creditors, as well as the controversial principles of comity, equity and convenience that are ever present in international insolvency cases.[7]

It would be ideal to have a single set of rules and regulations governing this problem as a global CBI law could alleviate the problems that are currently faced, unfortunately no such law has been implemented. However, the United Nations Commission on International Trade Law[8] has established, as a point of departure, for many countries seeking some advice regarding this controversial issue, a draft model, namely the Model Law on CBI.[9] The Model Law provides guidelines in which the most controversial issues in CBI are addressed.[10] Many countries, including South Africa, have accepted the Model Law as a basis for their national legislation and thus we are heading in the right direction. Other countries such as the OHADA[11] countries[12] all have the same legal basis and thus establishing legislation based on the Model

[4] Kunst JA (2016) 17-1; Smith A (2002) "Some aspects of comity and the protection of local creditors in CBI Law: South Africa and the United States compared" *South African Mercantile Law Journal*: 14 21 (hereinafter Smith A (2002)).
[5] Smith A & Boraine A (2002) "Crossing Borders into South African Insolvency Law: from the Roman-Dutch jurists to the UNCITRAL Model Law" 10 *American Bankruptcy Institute Law review* 185 (hereinafter Smith A & Boraine A (2002)).
[6] Bertelsmann E *et al.* (2008) in MARS *The Law of Insolvency in South Africa* 9th edition 660.
[7] Smith A & Boraine A (2002) 137.
[8] Hereinafter UNCITRAL.
[9] Hereinafter the Model Law.
[10] Bertelsmann E *et al. op cit 6* at 660; Franco J (2003) "The Cross-Border Insolvency Act: lifting the barriers or creating new ones?" 27 *South African Mercantile Law Journal* 28 (hereinafter Franco J (2003)).
[11] OHADA stands for: Organisation for the Harmonization of Business Law in Africa
[12] 16 Countries are currently member states, namely: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. International Trade Forum Magazine Issue 4 (2002) Accessed from http://www.tradeforum.org/OHADA-Four-Years-On-One-Business-Law-for-16-African-Countries/ (29 November 2016).

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Law to deal with these matters was easier than in other jurisdictions.[13] The European Union also dictates ways in which CBI issues should be dealt with, however the COMI must be established in one of the European countries.[14]

South Africa is on the brink of providing a solution to this worldwide problem and is proactive in affording some relief to a few designated states as the Cross-Border Insolvency Act 42 of 2000[15] is based on the Model Law. The CBI Act appears promising in this regard as it addresses prominent issues of international insolvency faced on a day-to-day basis and it incorporates the main elements and principles the Model Law proposes. The CBI Act could therefore possibly change South Africa's current position of territoriality to a more universalist approach. However, unlike the position envisioned by the Model Law, the possibility of a dual system arises due to the designation provision in the CBI Act.[16] The CBI Act therefore remains inoperative since the Minister of Justice is yet to designate the relevant countries to which it applies.[17]

1.2 Methodology and chapters

This research project will be based on a literature study of the most important sources dealing with the CBI topic and will engage critically in CBI issues. The implications of *Lagoon Beach Hotel (Pty) Limited v Lehane*[18] for the South African CBI dispensation will be explored; this case, as many other cases, deals with the various problems that arise within this domain of law. There have been countless cases addressing the problems of CBI, however, this is the most recent case in South Africa. A critical analysis of the case will

[13] United Nations Information Services Vienna 28 September 2015 Accessed from http://www.unis.unvienna.org/unis/en/pressrels/2015/unisl222.html (5 November 2016).
[14] Library of the European Parliament: Cross-border insolvency law in the EU 21 February 2013 Accessed from http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130476/LDM_BRI(2013)130476_REV1_EN.pdf (5 November 2016)
[15] Hereinafter the CBI Act.
[16] S 2. The reciprocity clause in effect creates this problem, as the Act will only be applicable to specific designated states. Non-designated states will be forced to fall back on the common law approach.
[17] Stander L (2002) "Cross-Border insolvencies as a global economic problem" 27:2 *Journal for Juridical Sciences* 72 (hereinafter Stander L (2002)).
[18] 2016 (3) SA 143 (SCA) (hereinafter *Lagoon Beach* (SCA)).

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therefore be conducted, as it is one of the numerous cases that apply the current rules, namely the common law, to CBI issues. The second chapter will mainly focus on the current legal position of CBI in South Africa, by addressing a few of the problems mentioned in terms of the common law.[19] *Lagoon Beach* (SCA)[20] will be analysed in light of South Africa's current legal position in Chapter 3 by considering the various orders of court[21] and problems that arise when applying the common law to this specific case. The last chapter will address the CBI Act[22] in light of *Lagoon Beach* (SCA)[23] and hypothetically solve the issues found in the latest case of CBI in South Africa. Therefore, a critical analysis and an underlying comparative study will be conducted between the common law approach and the approach followed in the CBI Act when dealing with the issues mentioned.

1.3 Research questions

The following questions will be considered and answered in this mini-dissertation in order to address the greater problem that is stated above, which is consequently to determine the implications of *Lagoon Beach* (SCA) on the South African CBI dispensation.

1.3.1 What is the difference between a universality approach and a territoriality approach? What approach is followed in South Africa?

1.3.2 What is the current legal position in South Africa in terms of CBI issues?

1.3.3 How does the common law address the issues raised in *Lagoon Beach* (SCA)?[24]

1.3.4 How will the CBI Act[25] address issues such as:

[19] Bertelsmann E *et al. op cit 6* at 661. For further discussion see also, Smith A & Boraine A (2002) 137; Zulman RH (2009) "Cross-Border Insolvency in South African Law" 21 *South African Mercantile Law Journal* 804 (hereinafter Zulman RH (2009)); Kunst JA (2016) 17-1; Omar PJ (2002) "The Landscape of International Insolvency Law" 11 *International Insolvency Review* 173 (hereinafter Omar PJ (2002)).
[20] *Lagoon Beach Hotel (Pty) Limited v Lehane* 2016 (3) SA 143 (SCA) (hereinafter *Lagoon Beach Hotel v Lehane (SCA)*).
[21] *Lehane N.O v Lagoon Beach Hotel (Pty) Limited and Others* (2015) WCHC 3 (hereinafter *Lehane v Lagoon Beach Hotel* (WCC); *Lagoon Beach Hotel v Lehane* (SCA).
[22] 42 of 2000.
[23] *Lagoon Beach Hotel v Lehane (SCA).*
[24] *Ibid.*
[25] 42 of 2000.

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- *locus standi* of the representative,
- jurisdiction of the court,
- recognition of representatives,
- powers granted by the court to the representative,
- recognition of foreign proceedings,
- provisional relief granted to the representatives and
- protection of creditors?

1.3.5 How is the discretion of the court affected if the CBI Act[26] is applied?

1.3.6 How will the local as well as the foreign creditors be affected if the CBI Act is applied?

1.3.7 How does the reciprocity clause in section 2 of the CBI Act[27] affect the future of CBI in South Africa? Does this amount to a dualistic system?

1.4 Limitations of the study

Due to the restriction of the word count and the vast number of topics to cover as well as immeasurable sources to address, this mini-dissertation will merely be a brief outline and discussion of the most important issues. This research project will only discuss the CBI position of individuals and not corporate entities as *Lagoon Beach* (SCA)[28] deals exclusively with natural persons. This study is also limited to the most important CBI issues within South Africa and will therefore not be of a comparative nature in terms of various other jurisdictions.

1.5 Key words and references

A brief outline of the most important definitions, terms and acronyms used in this mini-dissertation is provided below, to ensure clarity for the reader. A few words that have been used interchangeably are also explained in this section.

- **"International insolvency"** and **"Cross-border insolvency"** will be used interchangeably.

[26] *Ibid.*
[27] 42 of 2000.

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- **"Foreign representative"** is also known as the foreign trustee who is appointed by the foreign court to handle the affairs of the debtor in South Africa. "Official assignee"[29] has also been used in the *Lagoon Beach* (SCA)[30] to refer to the foreign trustee/representative.
- **"Foreign court"** is a judicial or other authority that is competent to control or supervise the foreign proceedings.[31]
- **"Foreign proceedings"** are proceedings that are taking place abroad, in a foreign state and the affairs and assets of the debtor are subject to the control of a foreign court.[32]
- **"Foreign state"** is a state that has been designated by the Minister of Justice in terms of section 2(2).[33]
- The "**United Nations Commission on International Trade Law"**, will be abbreviated as UNCITRAL.
- **"Cross-border Insolvency**", will be abbreviated as CBI.

[29] *Lehane v Lagoon Beach Hotel* (WCC) at par 1.
[30] *Lagoon Beach Hotel v Lehane* (SCA).
[31] S 1(d).
[32] S 1(g).
[33] S 1(i).

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Chapter 2: The common law as the current CBI position in South Africa

2.1 Introduction

Since there is no global insolvency law or any treaties between South Africa and other jurisdictions that address this situation, South Africa relies on two possible sources, namely the common law and the CBI Act.[34] Due to South Africa not being a signatory to any treaty or convention to govern international insolvency law, private international law and domestic insolvency law has been the default procedure. However, due to each state determining its own procedures in terms of insolvency, problems arise as to how the various participants are to be treated.[35] As Paul Omar states:

> "The question of multiplicity of laws applicable to the resolution of disputes is a particularly important question to ask in international insolvency law and one to which the branch of private international law applied in insolvency does not always provide an answer."[36]

Furthermore, problems arise as not only are different domestic laws involved, but certain states adopt a universalist approach and others a more territorialist approach when dealing with CBI issues. It can be said that South African common law is based on the principle of comity, which according to Smith is the "universalist impulse," but on the other hand protecting local creditors is the "territorialist impulse."[37] Therefore it *seems* as if South Africa has adopted a blend between universalism and territorialism, yet the territorial approach remains stronger in South African law.[38]

South Africa therefore currently utilises the common law in order to deal with CBI issues. This is due to the absence of any statutory provisions, as the CBI Act[39] remains inoperative.[40] Although the CBI Act came into effect on 28

[34] 42 of 2000.
[35] Omar PJ (2002) 173.
[36] *Ibid*.
[37] Smith A (2002) 32.
[38] Bertelsmann E *et al. op cit 6* at 661, see also Smith A & Boraine A (2002) 185.
[39] 42 of 2000.
[40] Smith A & Boraine A (2002) 175.

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November 2003,[41] it is yet to be enforced and applied as law, since the Minister of Justice is required to designate certain states to which this Act applies.[42]

It is perhaps important to establish a point of departure when dealing with CBI issues. Firstly, it is paramount for the foreign representative who wishes to deal with the assets in another jurisdiction, to ensure he has *locus standi* to approach the court. This will be determined either in terms of legislation, a treaty or in the absence of the former methods, rely on the common law to establish *locus standi.* Secondly, the court, to which the foreign representative is applying, should have the necessary jurisdiction and this is once again determined by the common law in South Africa. It is significant to note that movable and immovable property is dealt with differently when it comes to CBI issues in South Africa, as will be seen in the discussion to follow.

Once the above requirements have been met, the foreign representative may approach the court and ask for recognition as well as the relief sought. Once the foreign representative is recognised, the court must clothe him/her with the necessary powers in order to operate effectively within South Africa. These powers include: attaching assets and disposing of them, taking the proceeds and distributing to the foreign creditors, attending meetings of creditors or interrogating creditors; however these powers could be subject to certain conditions and since South Africa follows a territorialist approach such conditions and restrictions will most likely be imposed. If a recognition order is not granted, a foreign representative may choose to bring a sequestration order instead; and consequently a concurrent procedure would then be opened in South Africa. The above requirements however, are all subject to the courts discretion and this once again reiterates territorialism. It is therefore necessary to distinguish between territorialism and universalism as different jurisdictions apply different principles and ultimately it could influence the outcome.

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[41] Bertelsmann E *et al. op cit 6* at 660.
[42] S 2, see also Smith A & Boraine A (2002) 186.

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2.2 Universalism vs Territorialism

Due to a number of states being involved and a large number of proceedings being instituted regarding a specific debtor, the insolvency process tends to become increasingly costly, absorbing many assets and consequently less funds are available for the ideal result.[43] The main aim would therefore be to minimise the amount of proceedings instituted in a specific regime, however, this is only possible in an ideal world as two contradictory approaches exist when CBI issues are addressed, namely the universality and territoriality model.[44]

The universality model deals with the debtor's assets and liabilities in one set of proceedings and aims to treat creditors from various legal regimes equally.[45] This approach would enable the court, where the debtor is domiciled or where COMI is, to obtain all of the debtor's assets, movable as well as immovable and deal with it in the foreign jurisdiction.[46] The effect of this is that it would prevent claims from being duplicated and litigation being multiplied, as the distribution of the debtor's estate will have an international effect.[47] The main advantage of the universal approach is that the various states would cooperate and creditors abroad as well as local creditors will be on an equal footing. However, the disadvantage of this is that local creditors will have to adapt to the differences in law, as all local assets will be dealt with by a foreign jurisdiction.[48] Thus the problem arises that if, for example, the United States[49] applies universality to their CBI issues, but South Africa favours territoriality, the US would not be able to force South Africa to conform to their universality principles, and in essence there is no point in only applying universality in one jurisdiction.

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[43] Omar PJ (2002) 173.
[44] Kunst JA (2016) 17-1.
[45] *Ibid*.
[46] Smith A (2002) 20.
[47] See *idem* at 21.
[48] *Ibid*.
[49] Hereinafter US.

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The territoriality model, on the other hand, stresses state sovereignty, as the proceedings are limited to the states' jurisdiction where the assets or liabilities are situated.[50] The states apply their domestic law to the assets and liabilities in their jurisdiction and thus seek to protect the local creditors' interests.[51] Many critics have referred to this approach as the "Grab Rule" as everyone tends to rush in and 'grab' all the assets they can find.[52] This poses a great disadvantage to foreign creditors as foreign insolvency laws are ignored and these creditors are left with a slim chance of recovering their claims.[53] This has led to a decrease in international transactions as companies and individuals abroad are unable to predict the outcome of an insolvency matter which adds to the risk as well as the cost of their transactions.[54]

A pure universalist approach is not possible according to Smith,[55] therefore most countries follow a combination of these two approaches. The most common position being "modified universalism".[56] This approach has been suggested in light of the USA's insolvency law, as the USA favours universality.[57] "Modified universalism" can be described as "an approach that seeks to achieve pragmatic results as close to the universalist ideal as possible."[58] Although this is the ultimate approach, South Africa follows a blend between universalism and territorialism, but leans towards a territorialism approach in most instances. This can be seen in the courts' approach when dealing with foreign representatives, as conditions are imposed when dealing with local assets in order to protect local creditors.[59] It can thus be said that South Africa follows a modified territorialism approach, as is illustrated in *Lagoon Beach* (SCA).[60]

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[50] Bertelsmann E *et al. op cit 6* at 661.
[51] Kunst JA (2016) 17-1; Smith A (2002) 21.
[52] Smith A (2002) 21.
[53] *Ibid*.
[54] *Ibid*.
[55] *Ibid*.
[56] See *idem* at 22.
[57] See *idem* at 20.
[58] Westbrook JL (2007) " Locating the eye of the financial storm" 32:3 *Brooklyn Journal for International Law* 1019 (hereinafter Westbrook JL (2007)) 1020.
[59] *Infra* par 2.5.
[60] *Lagoon Beach Hotel v Lehane* (SCA); Smith A & Boraine A (2002) 185.

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Bertelsmann E *et al.* refers to a further distinction that is worth mentioning. CBI issues can be dealt with in a single set of proceedings, which supports the universality approach as there is unity of proceedings. On the other hand, once multiple proceedings arise, it can be stated that this aligns with a territoriality approach.[61] Nevertheless it is paramount to consider which approach is favoured in each state as this determines the outcome of the issue at hand, for example, in this specific case, how the foreign property will be dealt with.

2.3 Local and foreign property

"Property" can be defined as movable or immovable property, wherever situated, within the Republic.[62] All property acquired before sequestration as well as after sequestration, but before rehabilitation, will vest in the insolvent estate.[63] Foreign property is not included in the definition in the Insolvency Act,[64] however it seems as though the legislature did not intend to confine the operation of this definition to a state's territorial jurisdiction only.[65] Thus, in terms of the common law principles of private international law, the foreign property could vest in the local insolvent's estate.[66] However it is not as simple as that, as a distinction must be drawn between the common law principles dealing with movable property on the one hand and immovable property on the other hand. This would in essence determine whether or not the foreign representative has the necessary *locus standi* and whether the court has the required jurisdiction to hear the matter.

Boraine states that the approach followed in terms of "property" seems to endorse the principle of territoriality since property as defined in section 2 is limited to the assets found in the Republic and the courts firstly protect the interests of the local creditors.[67] Another important aspect to take note of is

[61] Bertelsmann E *et al. op cit 6* at 661.
[62] Insolvency Act 24 of 1936, s 2.
[63] See *idem* at s 20(2).
[64] 24 of 1936.
[65] Bertelsmann E *et al. op cit 6* at 662.
[66] Boraine A (2015) Effects of sequestration in Nagel *et al. Commercial Law* 532 (hereinafter Boraine A (2015)).
[67] Smith A & Boraine A (2002) 176; Kunst JA (2016) 17-6.

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the fact that due to the absence of legislation, the common law as well as private international law applies when dealing with foreign property.[68]

2.3.1 Movable property

When dealing with movable property an important aspect to consider is a person's domicile, as an insolvent's movable assets, wherever situated, will automatically vest in the trustee where the court of his domicile has granted such an order.[69] As stated in *Ward*,[70] the reason for this is that the creation of a single *concursus creditorium* is more convenient as it allows for a fair division of property among the creditors.[71] This can be seen as a universalist approach, as creditors are treated equally and one jurisdiction maintains control over the movable property, wherever situated. In *Ex Parte Palmer* it was stressed that where a court other than the debtor's domicile has granted a sequestration order, recognition cannot be sought as the automatic vesting of movable property is governed by the principle *lex domicilii*.[72]

> "All our decisions hitherto have been based on the fact that a sequestration order which we recognised and enforced was made at the domicile of the insolvent…"[73]

However, in *Lagoon Beach* (SCA),[74] Navsa J held that the requirement of domicile is not always necessary, but this is only allowed in exceptional circumstances. It is certainly not a set precedent that a foreign trustee could be recognised based on comity and convenience regardless of considering the insolvent's domicile.[75] This can be traced back to the early case of 1907 in *Re Estate Morris*,[76] where it was held on appeal that a court other than the

[68] Kunst JA (2016) 17-5.
[69] Bertelsmann E *et al. op cit 6* at 663; Kunst JA (2016) 17-8.
[70] *Ward and Another v Smit and Others: In RE Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) (hereinafter *Ward v Smit*).
[71] *Ward v Smit* at 179; *Ex Parte Palmer NO: In RE Hahn* 1993 (3) SA 359 (C) 362 par E (hereinafter *Ex Parte Palmer*).
[72] *Ex Parte Palmer* par E.
[73] See *idem* at par I.
[74] *Lagoon Beach Hotel v Lehane* (SCA).
[75] See *idem* at par 31.
[76] *Re Estate Morris* 1907 (TS) (hereinafter *Re Estate Morris*).

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debtor's domicile could recognise a decree of sequestration, but due to the element of convenience this was not a highly favoured decision.[77]

In South Africa the court has the discretion whether or not to recognise the foreign representative, therefore the automatic vesting of property in a foreign representative does not eliminate the requirement of recognition in South Africa.[78] The trustee may expect the court to exercise its discretion in his or her favour in this regard,[79] as recognition in terms of movable property is not in theory strictly required, nevertheless it has been elevated into a principle through practise.[80] Therefore, as held in the *Moolman*[81] case, a foreign trustee "requires recognition before he is entitled to deal with *any* (own emphasis added) property…"[82] Once the trustee has been recognised, however subject to certain conditions, the court will assist the trustee to perform his duties effectively and to deal with the property in South Africa, by entrusting him with certain powers.[83]

2.3.2 Immovable property

In terms of the insolvent's immovable property, the foreign property will remain vested in the insolvent's estate since the *lex situs* governs this position.[84] This means that the law of the location of the immovable property will govern the property.[85] The issue regarding recognition of the trustee differs when dealing with movable and immovable property, as the trustee who wishes to deal with the immovable property in South Africa must obtain formal recognition from the High Court.[86] The recognition is no formality as

[77] *Ibid.*
[78] Kunst JA (2016) 17-8; *Ex Parte Palmer* at par E.
[79] Bertelsmann E *et al. op cit 6* at 664.
[80] *Ex Parte Palmer* par E; Bertelsmann *op cit 6* at 664.
[81] *Moolman v Builders & Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 (1) SA 954 (A) (hereinafter *Moolman v Builders & Developers*).
[82] See *idem* at 960.
[83] Bertelsmann E *et al*. *op cit 6* at 664.
[84] *Ex Parte Palmer* par E.
[85] Smith A & Boraine A (2002) 181.
[86] Bertelsmann E *et al. op cit 6* at 665.

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the court has an absolute discretion, based on comity, convenience and equity, to grant the trustee's recognition only in special circumstances.[87]

2.4 Procedural aspects

2.4.1 Inward-bound request vs outward-bound request

It is important to also distinguish between foreign main proceedings and foreign non-main proceedings, as well as an inward-bound request and an outward-bound request. The next scenario will be used as an example: the debtor has his COMI in Australia, but has assets in Ireland as well as South Africa. He is sequestrated in Australia and the foreign representative, who is appointed in Australia, wishes to attach and dispose of the assets in the other two jurisdictions to the benefit of the creditors in Australia. A foreign main proceeding is one in which the sequestration proceedings are instituted where the debtor's main interests are situated, thus Australia. It can be assumed that the habitual residence or domicile of the debtor would determine where his main interests are.[88]

This would entail that if the foreign representative wishes to dispose of the assets situated in Ireland as well as South Africa, an inward-bound request would be appropriate. An inward-bound request comes into play when a sequestration order has been granted in a foreign jurisdiction, Australia (where the debtor is domiciled or where is COMI is), and the foreign trustee or representative seeks firstly recognition and subsequently assistance from a South African High Court or the High Court of Ireland in obtaining and dealing with the property situated in the Republic. Thus the recognition application serves as a secondary proceeding to the foreign bankruptcy order.

On the other hand foreign non-main proceedings ensues in the place where the debtor only has an establishment.[89] "Establishment" can be described as

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[87] *Ex Parte Palmer* par E; *Ex Parte B.Z Stegmann* 1902 (TS) 40 48 (hereinafter *Ex Parte B.Z Stegmann);* Smith A & Boraine A (2002) 181.

[88] Guide to enactment of the UNCITRAL Model Law on CBI par 31 (hereinafter Guide to Enactment).

[89] Guide to Enactment par 32.

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"any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services."[90] Thus any proceedings opened in South Africa or Ireland would be regarded as non-main proceedings since the COMI is not in either of these jurisdictions. If any these two jurisdictions would like the assistance of the Australian court an outward-bound request is required. An outward-bound request thus ensues once a sequestration order has been granted in Australia and the South African or Irish trustee seeks to be recognised in Australia where the assets of the debtor are situated.[91] The local representative requests the Australian court to assist the South African or Irish Court in retrieving assets in the foreign state and thus the laws and procedures of the foreign state must be complied with.[92]

2.4.2 Recognition order and provision of powers

In terms of the common law, in order to recognise the foreign representative, the application must comply with certain requirements. Although the court has discretion to recognise foreign representatives, the court must be satisfied that the foreign court has appointed them as such, meaning that they have the necessary *locus standi.* Thus the foreign representative must provide the court with *letters of request*. These letters ought to first be authenticated by the Department of Foreign Affairs and then by the local consulate representative of the specific foreign state, however, in practice recognition has been granted without such letters.[93] Hence the foreign representative has the necessary *locus standi* and as discussed above, the court has the necessary jurisdiction.[94]

Once such a recognition application is granted the court will entrust the representative with the powers of a trustee or liquidator in terms of South African law. It must be noted that although the foreign representative has

[90] UNICTRAL Model Law on Cross-Border Insolvency, s 2(f).
[91] Kunst JA (2016) 17-7.
[92] Bertelsmann E *et al. op cit 6* at 672; Kunst JA (2016) 17-7.
[93] Bertelsmann E *et al. op cit 6* at 667.
[94] *Infra* par 3.2

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been recognised, this recognition order is not equal to a South African sequestration or liquidation order, as the court could impose, subject to its discretion, certain limitations to the foreign representative's powers.[95] If a recognition order fails for some reason, or the foreign representative chooses to do so, a sequestration order may be instituted in South Africa, resulting in a concurrent procedure to the sequestration order opened in another jurisdiction.[96] The advantage of having a full-blown sequestration order is that the foreign representative is treated as a trustee in terms of the Insolvency Act 24 of 1936. However, subject to the requirements of course; and most importantly the powers no longer have to be granted by a court, but the foreign representative is vested with these powers automatically since South African Insolvency Law applies in this regard.

Once the foreign representative is recognised, subject to the court's discretion, he may ask of the court to grant him certain powers and apply for the necessary relief. It is common for the courts to issue a rule *nisi* in this regard, as it serves as a temporary interdict in which the debtor cannot dispose of their assets.[97]

2.4.3 Equity, comity and convenience

Since there are no treaties or international conventions to govern the relationship between South Africa and other states, such as the EU regulation that applies to all European states, or OHADA that applies to certain African countries, it seems to be a dead end when dealing with CBI issues. However, there are still practical reasons, such as "necessity and usefulness" for applying foreign law.[98]

It can therefore be said, "South African Cross-border Insolvency law is based on the doctrine of comity."[99] Smith and Boraine quote Booysen J. as saying

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[95] *Infra* par 3.4.4.
[96] *Infra* par 4.10.
[97] Bertelsmann E *et al. op cit 6* at 667.
[98] *Ibid*.
[99] Smith A & Boraine A (2002) 177.

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that comity supplies the motive or reasons for a sovereign state to apply foreign law.[100] It must be stressed that this is not due to courtesy or respect for other sovereign states, but rather in order to protect the private individuals involved in this complicated process.[101] This comes down to reciprocity, where one state allows the operation of foreign law to be applied in its jurisdiction, with the underlying view that the same will be done for that state in another foreign state.

The court has an absolute discretion to decide whether or not the foreign representative is to be recognised in terms of South African law or not and additionally what powers to afford the foreign trustee, when they deal with the immovable property situated in South Africa.[102] This discretion is based on the elements of equity, comity and convenience.[103] It is important to note that these elements are not separate grounds for granting recognition to a trustee, but "comity and convenience [are] factor[s], which play a part in influencing the local court."[104] Therefore, comity is not an element analysed in itself, but rather the basis from which many decisions stem.[105]

It is clear therefore that the court that has jurisdiction over the immovable property, relying on the *lex rei sitae*, could refuse the recognition of the foreign trustee even though a judge of the debtor's domicile granted the order. However, if the elements of comity and convenience are considered, the court could exercise its discretion and allow the order of the judge, where the debtor is domiciled, to operate within the South African jurisdiction.[106]

There are certain factors, as mentioned by Zulman,[107] the court will take into account before recognising the foreign order. To name a few:

- The domicile of the insolvent at the time when recognition is requested.

[100] See *idem* at 178.
[101] *Ibid*.
[102] *Ex parte B.Z Stegmann* at 52.
[103] Bertelsmann E *et al. op cit 6* at 666.
[104] *Ex Parte Palmer* par F.
[105] Smith A & Boraine A (2002) 178.
[106] *Ex parte B Z Stegmann* at 52; for further discussion see Zulman RH (2009) 810.
[107] Zulman RH (2009) 810.

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- Whether exceptional circumstances and considerations of convenience are present if a court other than the court where the debtor is domiciled grants the foreign order.
- The interests of all the affected parties must be considered, namely the creditors in general as well as the insolvent.
- The number of creditors in the foreign state compared to those in South Africa.
- Whether or not there is movable and/or immovable property in South Africa.
- The value of the assets in the foreign state compared to the assets in South Africa.

It is evident that the court has a wide discretion in this regard as various factors could influence its decision to recognise the foreign representative and thereafter the decision as to what powers to entrust him with.

2.4.4 Effect and content of a recognition order

Once a trustee has applied to a High Court in South Africa and he has been recognised as a foreign representative by the court, the foreign debtor's local assets, both movable and immovable, will be dealt with in terms of South African law.[108] The debtor, although not an insolvent in terms of South Africa's jurisdiction, is treated as an insolvent in terms of South African Law.[109] Therefore, recognising the foreign trustee does not make the debtor an insolvent and nothing precludes local as well as foreign creditors from seeking a sequestration order as mentioned earlier.[110] Therefore, as in *Lagoon Beach* (SCA), the court held that the worldwide stay would not bar any creditors from seeking such litigation.[111]

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[108] Kunst JA (2016) 17-11.
[109] Ras C (2014) "Cross Border Insolvency Act 42 of 2000 in view of developments elsewhere" (LLM Dissertation University of Pretoria).
[110] Smith A & Boraine A (2002) 185; *infra* par 2.4.3.
[111] *Lagoon Beach Hotel v Lehane* (SCA) par 22.

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2.5 Local creditors vs foreign creditors

The hotchpot principle clearly states that if a creditor has recovered certain assets abroad, he is not entitled to a local claim unless he is willing and able to contribute to the common fund for distribution.[112] Therefore, Bertelsmann E *et al.* state that local creditors do not enjoy preference over foreign creditors simply because they are in the place where the assets are situated.[113] However, the exact rules regarding the payment of foreign creditors compared to local creditors is unclear, but it has been held that concurrent South African creditors have preference over foreign creditors in certain instances.[114] This is another major issue in CBI matters as this once again relates to uncertainty and unpredictability when it comes to dealing with various creditors' claims. It would be ideal to ensure the equality of creditors, but this could only be achieved if universality is applied across every jurisdiction.

South Africa follows a modified territoriality approach in this regard, as the High Court should impose certain conditions when granting a recognition order to the foreign representative in order to protect the local creditors.[115] Thus when the court grants the recognition order and entrusts the foreign representative with specific powers, these powers would be limited in certain instances in order to protect the local creditors. As Bertelsmann E *et al.* explain, once the foreign representative realises the South African assets, it will take place subject to the local creditors' rights. This is due to the fact that the assets may only be removed from the Republic once "various charges, costs and proved claims" have been paid, in other words, once security has been provided.[116]

Ex Parte Steyn[117] is a practical example of certain conditions imposed on the foreign representative in order to protect local creditors.[118] Augusto Moreira, the insolvent, was sequestrated in the Lesotho High Court and subsequently

[112] Bertelsmann E *et al. op cit 6* at 670.
[113] See *idem* at 669.
[114] Kunst JA (2016) 17-12.
[115] Bertelsmann E *et al. op cit 6* at 670.
[116] Bertelsmann E *et al. op cit 6* at 670.
[117] *Ex Parte Steyn* 1979 (2) SA 309 (O) (hereinafter *Ex Parte Steyn*).
[118] Ras C (2014) 16.

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Steyn was appointed as the trustee seeking recognition from the Orange Free State Court.[119] Once Steyn obtained the recognition to deal with the assets found in the Orange Free State, certain conditions were imposed, namely that he provide security to the satisfaction of the Master for administration and sequestration costs.[120] As well as the condition that the rights mentioned in the Insolvency Act[121] in favour of "the master, the creditor and an insolvent"[122] apply *mutis mutandis* in relation to the sequestration order granted by the Lesotho High Court as if the order was granted by the Orange Free State Court.[123] It is clear from the above conditions that in granting a recognition order, the court will aim to protect the local creditors before considering the foreign creditors. Consequently, a foreign creditor who has secured property in South Africa will not necessarily rank above other local creditors. In *Ex Parte Steyn*, Flemming J. held that:

> "Only a creditor whose whole cause of actions arose within the Republic of South Africa or who is an *incola* of the Republic of South Africa shall by virtue of the [recognition] order acquire any right to prove a secured or preferent claim."[124]

Ex Parte B.Z Stegmann[125] is another example in which the court held that local creditors must be protected. The court held that if there is no prejudice to the local creditors, the court would exercise its discretion and grant such an order, allowing the foreign trustee to deal with the assets.[126]

In several instances the court has granted a final order immediately, however, due to the fact that creditors abroad and local creditors are not treated equally in terms of South African common law, the courts direct a rule *nisi* as was mentioned earlier.[127] The rule *nisi*, once published in the *Government*

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[119] *Ex Parte Steyn* at 310.
[120] See *idem* at 311.
[121] 24 of 1936.
[122] *Ex Parte Steyn* at 311.
[123] See *idem* at 312.
[124] See *idem* at par C.
[125] *Ex parte B Z Stegmann*.
[126] See *idem* at 53 54.
[127] Bertelsmann E *et al. op cit 6* at 667.

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Gazette, allows all persons involved to show cause why it should not be granted and thus serves as a notification measure to ensure all creditors are aware of the proceedings underway.[128] Such an order will serve as a temporary interdict in order to prevent any assets from being disposed.[129]

Therefore, even though the exact position regarding foreign and local creditors seems unclear, it appears plausible to state that the common law aims to protect local creditors first before protecting the rights of those abroad, thus favouring a territorial approach.

2.6 Conclusion

Subsequently, Smith and Boraine describe South Africa's approach as "modified territoriality."[130] This is evident in the above discussion as South Africa leans towards protecting the local creditors before affording protection to foreign creditors.[131] Also, the wide discretion afforded to the courts in firstly recognising a foreign representative and then providing him with certain powers it deems necessary, emphasises that territoriality is favoured. However, elements such as comity and convenience have allowed for some degree of universalism as the court has a discretion in certain instances of CBI.[132] As explained in *Re Estate Morris*,[133] the decisive factor in granting recognition to a foreign representative is the element of convenience.[134]

Conversely, due to the CBI Act[135] still being inoperative, the common law, which favours territorialism, will still be applied to CBI issues. This is also the approach followed in *Lagoon Beach* (SCA)[136] that will be discussed throughout this dissertation. The CBI Act,[137] however, once operative it could be a step in the right direction and could possibly allow for a better blend

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[128] *Ibid*.
[129] *Ibid*; see *supra* par 2.2.
[130] Smith A & Boraine A (2002) 185.
[131] *Supra* par 2.5.
[132] *Supra* par 2.4.2.
[133] *Re Estate Morris* at 657.
[134] Smith A & Boraine A (2002) 182; *supra* par 2.3.1.
[135] 42 of 2000.
[136] *Lagoon Beach Hotel v Lehane* (SCA).
[137] 42 of 2000.

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between universalism and territorialism, and therefore opt for a more universalist approach.

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Chapter 3:

Analysis of *Lagoon Beach Hotel (Pty) Limited v Lehane* 2016 (3) SA 143 (SCA) and previous orders of court in light of the common law rules

3.1 Introduction

Lagoon Beach (SCA),[138] being the most recent case in terms of CBI issues, is a perfect example of how the courts have applied the common law to various issues in CBI. From the previous discussions it is quite pertinent to say that South Africa favours a territorial approach when it comes to these cross-border problems. This is important to take note of as the CBI Act could possibly alter this position, as will be seen later on in this dissertation. However, it is essential to first consider the facts of the case and thereafter the various orders of court as heard in the Western Cape High Court[139] as well as the Supreme Court of Appeal.[140]

The common law is the current position from which CBI issues are addressed, as the CBI Act[141] remains inoperative, despite it being enacted during 2000. The consequence thus is that South Africa still uses a strict territoriality approach when dealing with the prominent issues of CBI as will be seen in the case discussion below. This is due to the fact that South Africa has been forced to rely on common law principles and private international law when solving these ever increasing cross-border problems.

3.2 Facts of the case

The facts of *Lagoon Beach* (SCA) are as follow. The affairs of an Irish businessman, Mr Dunne, came under scrutiny for the first time on 9 March 2012 when the National Asset Management Agency Ltd obtained judgement against him in an Irish court for €185.3 million. During the course of time the Ultser Bank Ireland Ltd. also obtained judgement against him for €163

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[138] *Lagoon Beach Hotel v Lehane* (SCA).
[139] Hereinafter WCC.
[140] Hereinafter SCA.
[141] 42 of 2000.

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million.[142] To make matters worse, Mr Dunne was declared bankrupt in the United States (US) on 23 March 2013 and later in the Dublin High Court as well.[143] Mr Dunne, being an international businessman, had many holdings across the world; however, the main holding of significant importance is the Lagoon Beach Hotel in the Western Cape, South Africa.[144] Mr Dunne, organised his affairs through a network of companies across the world, one of these companies, Mavior, held the entire shareholding in Lagoon Beach Hotel (Pty) Ltd.[145] Mr Lehane, the foreign representative applying to the High Court, was of the opinion that the hotel in Cape Town was transferred to Mr Dunne's wife, by way of letters drafted during March 2005 and February 2008, solely to frustrate his creditors.[146] He was of the opinion that this amounted to an impeachable disposition and subsequently brought an application in Ireland to have this disposition set aside in order to recover the asset.[147]

Mr Lehane applied for recognition as the foreign trustee and thus requested to administer Mr Dunne's estate. Secondly, he requested the High Court grant an anti-dissipation order to prevent the sale of Lagoon Beach Hotel and lastly, he requested that the court grant him certain rights in terms of the Insolvency Act 24 of 1936.[148]

3.3 Legal questions

The courts considered various issues in both orders of court, however, for the purpose of this dissertation, only the most applicable questions and issues will be addressed, such as:

1. Are the issues of Mr Lehane's *locus standi* and Mr Dunne's domicile possible bars against recognition?
2. Does the disposition between Mr and Mrs Dunne amount to an impeachable disposition in terms of the Insolvency Act 24 of 1936?

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[142] *Lagoon Beach Hotel v Lehane* (SCA) par 1.
[143] *Ibid.*
[144] See *idem* at par 2.
[145] *Lehane v Lagoon Beach Hotel* (WCC) par 2
[146] See *idem* at par 28.
[147] *Lagoon Beach Hotel v Lehane* (SCA) par 7.
[148] *Lehane v Lagoon Beach Hotel* (WCC) par 6-7, *infra* par 3.4.1.

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3. Is this application subject to an automatic stay and how are the creditors affected?
4. How does the discretion of the court affect Mr Lehane's recognition? To what extent does the court have discretion to stay the sale of Lagoon Beach Hotel pending the proceedings in Ireland, and if so, what considerations are taken into account?

3.4 Western Cape High Court decision versus the Supreme Court of Appeal decision

3.4.1 *Locus standi* of Mr Lehane and the domicile of Mr Dunne

The issue regarding the *locus standi* of Mr Lehane was challenged by the respondents in the WCC as it was held that Mr Lehane would only obtain *locus standi* to institute proceedings in this court once he is recognised, thus until such time he has no *locus standi*. It was held that a foreign trustee would only be recognised by the High Court "in those instances where the bankrupt is domiciled in the state where the declaration of bankruptcy was issued."[149] It was contended by the respondents that Mr Lehane failed to prove that Mr Dunne was domiciled in Ireland at the time he was declared insolvent by the Dublin High Court.[150]

However, in terms of *Re Estate Morris*[151] the court held that in exceptional circumstances and by matter of convenience the court could appoint the trustee even if the insolvent was not domiciled in the jurisdiction from which the foreign trustee is applying.[152] The court held that due to the letter issued by Mr Dunne stating his intention to remain domiciled in Ireland despite his business in the US, Mr Lehane has established that Mr Dunne is in fact domiciled in Ireland.[153]

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[149] *Lehane v Lagoon Beach Hotel* (WCC) 52.
[150] *Ibid.*
[151] 1907 TS 657 at 666.
[152] *Lehane v Lagoon Beach Hotel* (WCC) par 56.
[153] See *idem* at par 53.

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In the SCA, the court again considered Mr Lehane's *locus standi* and whether or not Mr Dunne's domicile had any influence on the granting of the recognition order in the *court a qou*. The SCA held that it is well established that the Official Assignee (Mr Lehane) must first be recognised by a South African court in order to obtain the assistance of the High Court in dealing with the assets in the current jurisdiction.[154] By referring to *Ex Parte Palmer* the court discussed the rules regarding the different approaches in terms of recognising the foreign representative with regards to movable and immovable property.[155]

In terms of immovable property it was held that the *lex rei sitae* governs the position.[156] Mr Lehane therefore has to obtain formal recognition as a foreign trustee in order to deal with the immovable property in the Western Cape. However, Mr Dunne's domicile is only of importance, it seems, when dealing with movable property. It was confirmed by the court that formal application for a foreign trustee is not necessary when dealing with movable property, however, it has been "elevated into principle."[157]

One of the issues at hand was whether Mr Dunne was domiciled in Ireland or the US, as the granting of a recognition order is only permissible where the foreign trustee is appointed pursuant to the sequestration order where the insolvent is domiciled.[158] The court considered the letter by Mr Dunne (dated 14 May 2010) that clearly indicates his intention to consider Ireland as his place of domicile.[159] The court also held that even if Mr Dunne was not domiciled in Ireland, Mr Lehane could still be recognised as foreign representative as this "is not law set in stone."[160] However, this is not to be considered as authority that a court may grant the recognition solely based on comity and convenience, but exceptional circumstances must exist.[161]

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[154] *Lagoon Beach Hotel v Lehane* (SCA) par 26.
[155] See *idem* at par 27.
[156] *Ibid.*
[157] *ibid.*
[158] *Lagoon Beach Hotel v Lehane* (SCA) par 28.
[159] *Ibid.*
[160] *Lagoon Beach Hotel v Lehane* (SCA) par 31.
[161] *Ibid.*

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Therefore, although there is a degree of uncertainty regarding Mr Dunne's domicile, the SCA held that there are exceptional circumstances present to justify the South African High Court assisting Mr Lehane to protect the interests of Mr Dunne's creditors.[162] It was therefore not only a matter of comity and convenience, but also the fact that a *prima facie* case was made out for Mr Dunne being domiciled in Ireland.[163] The court held that Mr Lehane was thus properly recognised and the *court a qou* properly exercised its discretion in granting such recognition.[164]

It is evident that the *locus standi* of Mr Lehane was a pre-requisite before he would be recognised as well as whether or not the court has jurisdiction to hear this matter. Both of these requirements were confirmed as the courts came to the same conclusion that Mr Lehane has the necessary *locus standi* and Mr Dunne is domiciled in Ireland and also that the Western High Court has the necessary jurisdiction, since the Lagoon Beach Hotel is situated in its jurisdiction. However, the approach in coming to this conclusion differs, as the WCC focused more on the fact that domicile is not an absolute requirement for recognition[165] and due to convenience Mr Lehane could be recognised.[166] The SCA also considered this aspect but relied more strictly on the present common law principles, as it was re-emphasised that *locus standi* is paramount in granting recognition[167] to Mr Lehane. The principles of *lex domicilli* and *lex situs* were also reiterated as well as the universal principles of comity and convenience. However, it was stated that although comity and convenience play a role, "it is not a separate ground for granting such trustee recognition."[168]

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[162] See *idem* at par 32.
[163] *Ibid.*
[164] *ibid.*
[165] *Lehane v Lagoon Beach Hotel* (WCC) par 55.
[166] See *idem* at par 56.
[167] *Lagoon Beach Hotel v Lehane* (SCA) par 25.
[168] See *idem* at par 27.

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3.4.2 Disposition between Mr and Mrs Dunne

The second issue regarding the disposition of Lagoon Beach Hotel between Mr Dunne and Mrs Dunne is considered an impeachable disposition by Mr Lehane, as he contended that Mr Dunne had the intention to "defeat the right[s] of his creditors."[169] The court did not specifically address the issue of the impeachable disposition as it was clearly stated that the issue before the court is not to recover the assets (Lagoon Beach Hotel) due to a fraudulent transfer, but the issue is rather to *preserve* the assets, while the Dublin High Court decides whether or not this amounted to an impeachable disposition. [170] However, the court did state that the launching of the proceedings on an urgent basis is justified,[171] as Mr Lehane clearly illustrated that the transaction between Mr Dunne and Mrs Dunne was imminent and once concluded Mrs Dunne would pay whomever she pleased.[172] This would mean creditors across the world would suffer at the hands of this disposal.

Although the court did not elaborate on this issue it might be appropriate to consider this issue for a brief moment. As mentioned above, a fraudulent disposition emanates when the debtor disposes of property that either favours a specific creditor[173] or that decreases his assets and increases his liabilities and consequently amounts to the creditors being prejudiced.[174] The above transaction between Mr and Mrs Dunne, as evidenced by means of certain letters drafted to Mrs Dunne during March 2005 and February 2008,[175] is confirmation of a disposition without value in terms of section 26 of the Insolvency Act.[176] The disposition of Lagoon Beach Hotel meets the definition of a disposition without value in terms of South African Insolvency law as Mr

[169] *Lehane v Lagoon Beach Hotel* (WCC) par 28.
[170] See *idem* at par 45.
[171] See *idem* at par 31.
[172] See *idem* at par 30.
[173] Boraine A (2009) "Comparative notes on the operation of some avoidance provisions in a Cross-Border context" 21 *South African Mercantile Law Journal* 459. (hereinafter Boraine A (2009)). This is evidence of preference law as a pre-existing debt is settled by favouring a specific creditor.
[174] Boraine A (2009) 438. This is known as fraudulent conveyance law as there is no pre-exiting debt that needs to be settled but rather the debtor's actions have a direct influence on his state of insolvency.
[175] *Lehane v Lagoon Beach Hotel* (WCC) par 28.
[176] 24 of 1936.

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Dunne, without reasonable value,[177] bequeathed this asset to his wife with the sole intention to prejudice his creditors.[178] This is one of the sole reasons for the enactment of section 21 of the Insolvency Act, as the legislature intended to avoid these voidable dispositions between spouses and thus protect the interests of the creditors.[179] In terms of this section, the solvents spouses' assets, when married out of community of property, will also vest in the insolvent estate, thus ensuring no assets are kept out of reach of the creditors.[180] Although there are ways in which to avoid the setting aside of the disposition, these issues will not be discussed here as it has no relevance to the specific case.[181]

What is important to consider is the hypothetical situation of when the High Court of South Africa would be required to deal with this fraudulent transfer of Lagoon Beach Hotel. Voidable dispositions in CBI are an entirely new dilemma on its own and the reason for this is that what might be avoidable in one jurisdiction might not be in another.[182] Thus the question arises, whose law will be applied in such a scenario as Lagoon Beach (SCA), Ireland or South Africa? It is clear that a South African trustee is automatically granted the power to deal with voidable dispositions[183] in terms of section 26, as mentioned above, but will a foreign representative, once recognised, have this power? This problem arises, as the power to deal with voidable dispositions is only applicable once the debtor is sequestrated in South Africa as requested by the Insolvency Act.[184] The *actio Pauliana*, is a common law action that does not require prior sequestration as section 26 before dealing

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[177] Boraine A (2009) 456. "Value" has no technical meaning and would thus be interpreted in the ordinary sense of the word and consequently be the market price.
[178] *Lehane v Lagoon Beach Hotel* (WCC) par 28.
[179] Boraine A *et al.* (2015) "The pro-creditor approach in South African Insolvency Law and the possible impact of the Constitution" 3 *Nottingham Insolvency and Business Law e-Journal* 77, this is in line with the underlying approach of South Africa's insolvency law, favouring the creditors. If the insolvency procedure is not to the advantage of the creditors, the application will not be granted. Thus our territorial approach is strengthened in this regard as the insolvency system is entirely pro-creditor.
[180] *Infra* par 4.12.
[181] For further discussion see Boraine A (2009) 455.
[182] Boraine A (2009) 459.
[183] Insolvency Act 24 of 1936, ss 26, 29, 30, 31.
[184] 24 of 1936, s 26.

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with voidable dispositions.[185] It could therefore be an alternative to dealing with these fraudulent transactions. However, the foreign representative, in this case, Mr Lehane, will have to be granted the power to deal with the disposition in terms of South African law, and since South Africa follows a territoriality approach, this depends entirely on the court's discretion.[186] An alternative option would be to open a sequestration order in South Africa, hence the Insolvency Act[187] would apply and concurrent proceedings would be underway. Thus Mr Lehane would automatically be afforded the necessary powers, one of them being to deal with voidable dispositions.

The position regarding whose domestic laws to follow in such circumstances seems unclear,[188] however, according to Boraine it is safe to say that in most instances the country where the transaction took place and where the assets of the particular transaction are situated will apply.[189] It thus seems as if the South African court could have dealt with the situation between Mr and Mrs Dunne since the Lagoon Beach Hotel is situated in the Western Cape. However, as Mr Dunne's main place of business is cross border, the Dublin High Court dealt with the issue at hand.[190]

3.4.3 Worldwide stay and influence on the creditors

It was contended on behalf of the first respondent that due to the voluntary bankruptcy application applied for on 29 March 2013 in the US, all proceedings against Mr Dunne's estate would be stayed. It was also contended that the US' domestic law "applied extra territorially."[191]

As stated above, the issue before the court is to preserve the assets and prevent the disposition of Lagoon Beach Hotel, pending the decision of the

[185] Boraine A (1996) "Towards codifying the *actio Pauliana" South African Mercantile Law Journal* 8 220 (hereinafter Boraine A (1996)).
[186] Boraine A (2009) 463.
[187] 24 of 1936.
[188] For further discussion see Boraine A (2009) 435.
[189] Boraine A (2009) 464.
[190] For further discussion on the issue regarding the debtor's main interests, also known as "COMI", see Westbrook JL (2007) 1019.
[191] *Lehane v Lagoon Beach Hotel* (WCC) par 43.

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Dublin High Court. It was clear to the court that the proceedings before it are ancillary to the proceedings instituted in the Dublin High Court and to thus allow the stay of the proceedings would mean that no proceedings, including the one before the court, could be brought.[192]

The court referred to *Hymore Agencies Durban v Gin Hih Weaving Factory*[193] in which Henochsberg J held that a bankruptcy statute would only be in force in the state where it is enacted;[194] consequently it can be said that the worldwide stay would not bind South Africa in any way.[195] In *Hymore Agencies*[196] the court did add that due to the element of comity, it could be that such a statute may be recognised in another state, however the court saw no justification to do so in the current matter.[197]

In any event, Yekiso J held that the worldwide stay dealt with the fraudulent transfer of property and the matter before him does not consist of a fraudulent transfer of assets. Therefore, whether the worldwide stay would prevent the proceedings or not, would not be relevant in the given case.[198]

In the SCA, the aspect regarding the extra-territorially application of the worldwide stay was only briefly elaborated on. It was contended by the appellants that Mr Dunne's insolvent estate had to be dealt with by the trustee appointed in the US and thus Mr Lehane had no right to institute action in South Africa regarding Mr Dunne's assets, specifically Lagoon Beach Hotel.[199] Leach JA held that this court would not take judicial notice of the domestic laws of the US and neither would it consider what an Irish court considered as being the correct position.[200] However, it is important to note that the American and Irish bankruptcy officials assist one another in order to

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[192] See *idem* at par 45.
[193] 1959 (1) SA 180 (D).
[194] *Lehane v Lagoon Beach Hotel* (WCC) par 48.
[195] See *idem* at par 46.
[196] *Hymore Agencies Durban v Gin Hih Weaving Factory* 1959 (1) SA 180 (D) (hereinafter *Hymore Agencies Durban v Gin Hih Weaving Factory).*
[197] *Lehane v Lagoon Beach Hotel* (WCC) par 48.
[198] See *idem* at par 50.
[199] *Lagoon Beach Hotel v Lehane* (SCA) par 18.
[200] See *idem* at par 20.

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protect Mr Dunne's creditors and thus the only purpose of the anti-dissipation order was to benefit the creditors.[201] Therefore, the "effect of the worldwide stay can be lifted."[202]

From the above issue it is thus clear that South African courts favour a multiplicity of proceedings as although proceedings have been instituted in the US as well as in Ireland, the South Africa courts are dealing with the current issue in isolation and thus not considering the applications made elsewhere. Even though the courts are working together to protect the creditors, the essence of the matter is that of a territorial approach. The aim of this decision is to prevent the sale of the Lagoon Beach Hotel, with the purpose of protecting the creditors in South Africa, as once the hotel is sold, the money will disappear across the world, leaving the creditors empty handed. The domestic laws of the US and Ireland are not considered in this matter and once again a territorial approach is favoured.

3.4.4 Discretion of the court

A few of the most important issues at hand relate to the court's discretion as the court firstly decides whether or not to grant the recognition of the foreign trustee, then what powers to grant him, hence what limitations should be in place in terms of his recognition order and lastly whether or not to grant the interdict sought. It is essential that one consider what powers Mr Lehane has been granted in terms of this recognition order, once he has been recognised as a foreign representative, as this is a clear illustration that a territoriality approach is favoured by South African courts.

In Lehane (WCC), Mr Lehane amongst other things requested the High Court to grant him certain powers[203] as provided for in the Insolvency Act.[204] These powers included the right to attend creditor's meetings and to preside over the

[201] *Lagoon Beach Hotel v Lehane* (SCA) par 21.
[202] See *idem* at par 22.
[203] *Lehane v Lagoon Beach Hotel* (WCC) par 7.2.
[204] 24 of 1936.

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meetings,[205] to interrogate any said person at the meeting,[206] to take charge of the property of the insolvent estate[207] and to sell the aforementioned property after the second meeting with the creditors.[208] In addition, Mr Lehane requested the power to administer Mr Dunne's estate as if a sequestration order had been granted against him in South Africa.[209] This is of utmost importance as there is an important distinction between being a liquidator or trustee in South Africa that controls the sequestrated estate in terms of South African law and being a foreign representative that is granted the powers of a trustee as if the estate is sequestrated in South Africa.

If the estate of the insolvent is sequestrated within South Africa the trustee is automatically granted powers such as: the power to institute legal proceedings for the collection of debts, to receive partial payment by a debtor as payment for the full debt, to decide, with the authorisation of the master, whether or not the business of the insolvent should continue or not,[210] to sell any property of the insolvent estate after the second meeting with the creditors[211] and many others as provided for in the Insolvency Act.[212]

In this current situation, Mr Dunne's estate is not sequestrated in South Africa, but the court empowered Mr Lehane to control the assets as if this is the case. [213] In addition to this, the court granted Mr Lehane the power to administer Mr Dunne's assets within the Republic of South Africa and granting him all the rights contemplated in sections 64, 65, 66, 69 and 82 as he requested, however, in the Supreme Court of Appeal the court limited section 82 by stating that Mr Lehane would not be "entitled to sell any property belonging to Mr Sean Dunne without the leave of this Court."[214] It is thus evident that the authority to determine which powers are conferred on the

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[205] S 64.
[206] S 65.
[207] S 69.
[208] S 82.
[209] *Lehane v Lagoon Beach Hotel* (WCC) par 7.3.
[210] For further discussion see Boraine A (2015) 578.
[211] S 82.
[212] 24 of 1936, s 66.
[213] *Lehane v Lagoon Beach Hotel* (WCC) par 7.3.
[214] *Lagoon Beach Hotel v Lehane* (SCA) par 37.

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foreign trustee lies squarely within the court's discretion, once again emphasising the territorial approach followed in South Africa.[215]

Seeing that Mr Lehane has been recognised as the foreign trustee dealing with Mr Dunne's estate and being conferred certain powers in doing so, the court had to consider whether or not the interdict sought (to prevent the sale of Lagoon Beach Hotel) should be granted or not.[216] By considering the balance of convenience, it was contended on behalf of the first respondent that granting the interdict would prevent Mrs Dunne from completing her transaction of immovable property in the UK and thus she would forfeit £1 million.[217] However, the applicant responded by saying that the purpose of the interdict is not to interfere with the completion of Mrs Dunne's transaction in the UK, but rather to claim some of the proceeds she is said to receive upon the completion of the sale of the immovable property.[218] In addition, there would be no prejudice to the creditors of Lagoon Beach Hotel (Pty) Ltd as the creditors will be transferred to the new purchaser.[219]

The court agreed with the applicant and held that Mrs Dunne's transaction for the immovable property in the United Kingdom (UK) was concluded during March 2014, meaning she had other means of obtaining the resources in order to pay for the property as it was concluded before the sale of Lagoon Beach Hotel in July 2014.[220] The sale of Lagoon Beach Hotel would therefore not affect the said transaction. The court went further and stated that the applicant would be prejudiced if the interdict is not granted as once the

[215] In *Singularis Holdings Ltd V PriceWaterhouseCoopers* (Bermuda) (2014) UKPC 36 (10 November 2014), (2015) 2 WLR 971 par 29. The issue in this case was whether or not the Bermuda Court had the common law power to assist with the liquidation of a company in the Cayman Islands by forcing PWC to produce certain information even though there was no statutory basis for this. In short it was held by the Privy Council that the court possesses no such power as it goes beyond providing assistance to the foreign jurisdiction. This is due to the fact that the Cayman Court has no power whatsoever to request third parties to provide information other than that belonging to their offices. Thus the Cayman Court has no power to request such documents and therefore the Bermuda Court could not provide that which is not available in its own country. Consequently, to request a foreign court to do this would be beyond what constitutes "assistance" in this regard.
[216] *Lehane v Lagoon Beach Hotel* (WCC) par 80-82.
[217] See *idem* at par 80.
[218] See *idem* at par 82.
[219] See *idem* at par 83.
[220] *Lehane v Lagoon Beach Hotel* (WCC) par 84.

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transaction of Lagoon Beach Hotel was completed it would be close to impossible "to trace the flow of the proceeds" as Mrs Dunne has multiple companies across the world.[221] "The balance of convenience clearly favours the applicant."[222]

The SCA agreed with the *court a quo* and held that the WCC properly recognised Mr Lehane and also exercised its discretion properly in granting the interim interdict to prevent the sale of Lagoon Beach Hotel.[223] Consequently both courts came to the same decision and thus the appeal failed.[224]

3.5 Conclusion

The SCA judgement did not prominently divert from the WCC decision, but the SCA did add to certain of the issues addressed above as the SCA ultimately had to decide whether Mr Lehane had the necessary authority to institute the current proceedings. However, in conclusion it can be said that the SCA held that the appeal should fail as the court agreed with the approach followed in the WCC.

Mr Dunne's domicile, as well as Mr Lehane's *locus standi* and the High Court's jurisdiction was established and consequently Mr Lehane was properly recognised as a foreign representative and thus authorised to seek the assistance of the South African High Court subject to certain conditions.[225] The court has a discretion to grant such a recognition order based not solely on the facts before the court, but also by considering comity and convenience. The worldwide stay therefore had no influence on the current transaction as both bankruptcy officials from the USA and Ireland purposed to protect the interests of Mr Dunne's creditors.[226]

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[221] See *idem* at par 86.
[222] *Ibid.*
[223] *Lagoon Beach Hotel v Lehane* (SCA) par 33.
[224] *Ibid.*
[225] *Ibid, supra* par 3.4.2.
[226] *Supra* par 3.4.3.

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Based on both these orders of court it is evident that South African courts follow a territoriality approach as the court maintains the maximum discretion in all aspects regarding CBI issues.[227] Westbrook states that although maximum discretion allows the judge to achieve what the court considers the correct result, it is at the cost of "commercial tranquillity and efficiency."[228] However, with no operating legislation, the common law remains the basis from which these aspects are resolved and considered and therefore a lack of certainty and predictability in CBI issues continue, since the court maintains the power to determine the outcome. Conversely, this position might change once the CBI Act[229] becomes operative. The CBI Act will be applied hypothetically to the issues addressed above in order to ascertain the differences in approach and outcome in the next chapter.

[227] These issues being firstly whether or not to recognise the foreign representative and then secondly, once recognised what powers should be bestowed on the representative. Thus controlling who is recognised and then controlling how their power is exercised and consequently giving effect to the territorial approach. The court in exercising its discretion in these instances aim to protect local creditors and subsequently give effect to South African law.
[228] Westbrook JL (2007) 1024.
[229] 42 of 2000.

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Chapter 4:

The CBI Act 42 of 2000 and *Lagoon Beach Hotel (Pty) Limited v Lehane*

4.1 Introduction

According to Stander, there has been a significant increase in international transactions, which in turn has created an increase in cross-border insolvencies.[230] However, due to the absence of international treaties, there is a lack of predictable rules in handling these CBI cases.[231] This has led to a disincentive to invest abroad as there is no guarantee as to how these foreign investments will be dealt with in the case of a CBI. The CBI Act 42 of 2000[232] inspired by the United Nations Commission on International Trade Law's[233] Model Law on CBI, seems to offer some satisfactory answers in this regard.[234] The Act came into effect on 28 November 2003, however it remains inoperative, as the Minister of Justice is yet to designate specific states to which it applies.[235] Hence section 2(2) in the Act, known as the reciprocity clause, must still be given effect to.[236]

This chapter will briefly give an overview of the Act and consider the various implications the Act has on current CBI issues, considering both the advantages and disadvantages. The Act will be the vessel through which a few issues highlighted in *Lagoon Beach* (SCA)[237] will be addressed, since the case is currently addressed in light of the common law. Therefore, the Act will be used hypothetically to solve these issues as the assumption can be made that the US as well as Ireland will be among the countries designated by the relevant Minister of State.

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[230] Stander L (2002) 72.
[231] *Ibid*.
[232] For purposes of this chapter the Cross-Border Insolvency Act 42 of 2000, will be referred to as "the Act".
[233] Hereinafter UNCITRAL.
[234] Stander L (2002) 72.
[235] Bertelsmann E *et al. op cit 6* at 660.
[236] The CBI Act 42 of 2000.
[237] *Lagoon Beach Hotel v Lehane* (SCA).

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4.2 The UNCITRAL Model Law

In the absence of any international treaties or conventions to which South Africa is a signatory, the default position in solving CBI issues has been the common law. The UNCITRAL has, however, established a draft model, namely the Model Law on CBI[238] as a point of departure for many countries seeking advice in addressing these issues. This was promulgated in 1997[239] and many countries have used the Model Law in drafting their domestic laws on CBI.[240] The Model Law provides guidelines and a framework to courts on how to address CBI issues,[241] consequently assuring other jurisdictions that the decision made was not based on "local favouritism."[242] The Model Law proposes a "rigid procedural structure" and this in turn gives effect to one of the most important purposes of the Model Law, namely, greater transparency and predictability when it comes to foreign proceedings.[243]

4.3 Scope of application of the Act

The Act has used the Model Law as a basis and it can thus be said that the Act applies to four situations, namely:[244]

- In terms of an inward-bound request, when a foreign representative seeks the assistance of a South African High Court in foreign proceedings.
- In terms of an outward-bound request, when a South African court seeks the assistance from a foreign court in the local proceedings.
- Another situation is when concurrent proceedings are underway, thus proceedings in the foreign jurisdiction as well as the local jurisdiction.

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[238] Hereinafter the Model Law.
[239] Ras C (2014) 19.
[240] According to the International Bar Association, many countries have enacted legislation based on the Model law, namely, "Eritrea, Japan (2000), Mexico (2000), Poland (2003), Romania (2003), Montenegro (2002), Serbia (2004); South Africa (2000), Great Britain (2006), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005), and United States of America (2005)" Accessed from http://www.ibanet.org/LPD/Insolvency_Section/Insolvency_Section/SIRC_ProjectCrossBorderInsolvency.aspx (31 May 2016).
[241] Bertelsmann E *et al. op cit 6* at 660; Franco J (2003) 28.
[242] Westbrook JL (2007) 1024.
[243] *Ibid*.
[244] S 2(1)(a)-(d).

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- Lastly, where South African insolvency proceeding has already been instituted and a foreign representative or creditor requests to join the local proceedings.

The Model Law therefore provided a positive framework for the Act, as the Preamble of the Act states that it aims to, amongst other things, achieve greater legal certainty, protect the interests of all creditors and strengthen co-operation between courts. It is thus evident from the above that the Act tackles CBI issues from a more universalist approach, which is in strict contrast to the common law which favours a more territorial approach.[245] This is also due to the unity of proceedings that can be seen in the application of the Act as well as section 2(1)(d), where creditors from abroad can join insolvency proceedings without suffering a disadvantage.[246] This is a clear advantage and positive step towards giving effect to the Model Law. However, the drafters of the Act diverted from the Model Law's guidelines by adding a designation provision, also known as a reciprocity clause, which in turn limits its operation.[247]

4.4 Reciprocity clause

The reciprocity clause found in section 2 of the Act has changed the position of the Model Law and poses a disadvantage to South Africa in addressing these issues.[248] The Model Law in article 1(2) excludes certain banks and insurance companies; however, section 2 of the Act has excluded an entire legal system from being applied to CBI issues.[249] It is thus a deviation from what the Model Law intended as the Model Law contains no such provision.

By imposing this designation provision, the Act being operative depends on the Minister designating the specific states to which it applies. Therefore,

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[245] Smith A & Boraine A (2002) 185.
[246] See *idem* at 190.
[247] Bertelsmann E *et al. op cit 6* at 679.
[248] Smith A & Boraine A (2002) 190.
[249] See *idem* at 192.

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although the Act was passed during November 2003,[250] almost 13 years ago, the reciprocity requirement prevents the Act from being applied to CBI issues, as the Minister of Justice has, to date, not yet designated states in the *Government Gazette*.[251]

It is important to note that a "foreign state" is defined in the Act as 'a state designated under section 2(2),'[252] which means that unless the Minister is satisfied that the,

> "…foreign state recognises proceedings under the South African law on insolvency to the extent that it is justified to apply the CBI Act to foreign proceedings in that state,…"[253]

the state will not be recognised as a "foreign state" and the Act will not be applicable. This poses a great disadvantage, as foreign investors require adequate assurance that their claims will not be subject to inequality when a CBI case arises between two states.[254]

In the absence of the Act being applicable, due to a state not being a designated state, the common law on CBI will be applied.[255] This could lead to a dualistic system, as the Act could apply in certain instances and the common law will be the default position whenever the Act is not applicable or not capable of addressing a particular situation.[256] This could lead to unnecessary complications in an already uncertain domain of the law, as creditors would be treated differently. This would mean that designated states, under the CBI Act would not be ranked lower than concurrent creditors.[257] However, in terms of non-designated states, the common law applies and the foreign creditors will rank after the local concurrent creditors and the creditors form designated states.[258]

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250 Bertelsmann E *et al. op cit 6* at 660.
251 S 2(2)(a).
252 S 1(i).
253 Smith A & Boraine A (2002) 190.
254 Stander L (2002) 76.
255 Smith A & Boraine A (2002) 191.
256 *Ibid*.
257 Bertelsmann E *et al. op cit 6* at 679.
258 Bertelsmann E *et al. op cit 6* at 680, *infra* par 4.9.

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Thus, a seemingly smooth process in terms of the Model Law has moved to a complicated process, as this dualist system will create unnecessary problems according to Smith and Boraine.[259] It has to be emphasised that a choice between the common law and the Act being applicable to a situation, can be made even though the Act would apply, however, this will be ill advised as according to Smith and Boraine, the common law "invite[s] unnecessary complications."[260]

4.5 Access to courts in South Africa

Section 9 of the Act allows a foreign representative to directly access the High Court in order to seek relief. This is in contrast with the common law that requires the foreign representative to prove his *locus standi*, before approaching the court and seeking relief. With reference to the *Lagoon Beach*[261] case, this section would entail that Mr Lehane would not have been required to produce any "letters of request or diplomatic or consular communications."[262] Although not applicable to the relevant case, section 10 gives the foreign representative the power to apply for a sequestration order in terms of the Insolvency Act,[263] and consequently a concurrent procedure would be opened. It must also be noted that the Act clearly provides the foreign representative the right to intervene in any proceedings in which the debtor is a party, but only once the foreign proceedings have been recognised.[264] The foreign representative therefore has standing to initiate any legal action available under the South African insolvency laws, in which to set aside a disposition.[265]

Thus *locus standi* as well as the court's jurisdiction has been established as the Act in numerous sections provide for the foreign representative with

[259] Smith A & Boraine A (2002) 215.
[260] See *idem* at 186.
[261] *Lagoon Beach Hotel v Lehane* (SCA).
[262] Smith A & Boraine A (2002) 192.
[263] 24 of 1936.
[264] S 24.
[265] S 23(1).

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necessary *locus standi.* Mr Lehane may therefore request recognition, but before such recognition is granted, certain requirements must be met in terms of the Act.

4.6 Recognition of foreign proceedings

Chapter 3 of the Act deals with recognition of foreign representatives and has been referred to as the "engine room" of the Act as it contains most of the rules and regulations in terms of CBI issues.[266] Before a recognition order is granted it is important to distinguish between foreign main proceedings and foreign non-main proceedings as described in the Act.

The Act states that proceedings *must* be recognised, as either foreign main- or foreign non-main proceedings. Foreign main proceedings will be recognised if the main proceedings are taking place in the State where the debtor has the centre of his or her main interests.[267] Foreign non-main proceedings will occur if the debtor has an establishment within the meaning of section 1(c) in the foreign state.[268] The Act defines "establishment" as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.[269] This seems similar to the common law principles, however the fact that the proceedings *must* be recognised if these definitions are met, excludes the court's discretion in this regard.

The advantage of relying on the Act, instead of the common law, is that it is simpler and allows for a speedy solution when it comes to a foreign representative seeking recognition,[270] as section 17(3) states that an application for recognition must be decided upon on at the earliest possible time. This is due to the fact that South African courts' discretion is limited in this instance, as the foreigner will be recognised once the requirements of section 17(1) have been met. On the other hand, if the Act is not applicable,

[266] Smith A & Boraine A (2002) 193.
[267] S 17(2)(a).
[268] S 17(2)(b).
[269] S 1(c).
[270] Smith A & Boraine A (2002) 186.

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the default position, the common law, would apply and this allows for a much wider discretion when South African courts grant a recognition order.[271]

In terms of section 17(1), when the foreign proceedings are proceedings within the meaning of section 1(g), the foreign representative applying for recognition is a person or body in terms of section 1(h), the application meets the requirements of section 15(2)[272] *and* (own emphasis added) the application has been submitted to a court, then the court *must* (own emphasis added) recognise the foreign proceedings.[273]

The court may presume that any documents submitted in support of the above are authentic, whether or not they have been legalised, therefore no letters of request are required as in terms of the common law.[274] The court may also presume that unless there is evidence proving the contrary, the debtors registered office, or habitual residence is the centre of the debtor's main interests.[275]

Therefore, in *Lagoon Beach* (SCA), the Dublin High Court appointed Mr Lehane as the Official Assignee of Mr Dunne's insolvent estate on 29 July 2013. The Official Assignee is the equivalent of a trustee of a debtor's insolvent estate in the Republic.[276] Mr Lehane, through his investigations discovered that Mr Dunne was a shareholder of Mavior, a company in Ireland, but Mavior held the entire shareholding in Lagoon Beach Hotel (Pty) Limited.[277] Lagoon Beach Hotel (Pty) Limited was in the process of disposing of its immovable property and consequently Mr Lehane, amongst other things,

[271] *Ibid*.
[272] S 15(2): An application for recognition must include amongst other things, a certified copy of the decision commencing the foreign proceedings, a certificate from the foreign court affirming the existence of the foreign proceedings and appointment of the representative, or in the absence of the above evidence, any other evidence acceptable to the court that proves the above.
[273] S 17(a)-(d).
[274] S 16(2), Bertelsmann E *et al. op cit 6* at 667.
[275] S 16(3).
[276] *Lehane v Lagoon Beach Hotel* (WCC) par 1.
[277] See *idem* at par 2.

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applied for an anti-dissipation order, which would prevent the sale of the Lagoon Beach Hotel.[278]

From the above it is clear that *Lagoon Beach* (SCA) is an example of an inward-bound request and where non-main proceedings are taking place in South Africa. This is due to the fact that the main proceedings have been instituted in Ireland and Mr Lehane is seeking recognition in South Africa, in order to deal with the establishment, the hotel situated in the Western Cape. In the case of foreign non-main proceedings, the court must be satisfied that the legal action requested relates to the assets, which under the South African law should be administered in the foreign non-main proceedings.[279]

"Foreign proceedings" are defined as any collective or judicial proceedings in a foreign State, pursuant to a law relating to insolvency in which the assets and affairs of the debtor are subject to the control or supervision by a foreign court for the purpose of reorganisation or liquidation.[280] From this definition it is clear that Dublin High Court is in control of Mr Dunne's affairs, since Mr Lehane was appointed as the Official Assignee in 2013, thus the first requirement in section 17(1)(a) has been complied with.[281]

The second requirement of section 17(1) was an issue raised by the respondents in the *court a qou*.[282] This regarded the issue of Mr Dunne's domicile and whether or not Mr Lehane had *locus standi* to apply to this court.[283] It was argued that Mr Dunne was no longer domicile in Ireland as he has been a resident of the US since 2008, however, Mr Lehane presented a letter showing Mr Dunne's intention to be domiciled in Ireland and not the US.[284] The SCA as well as the *court a quo* held that domicile is not an absolute requirement for a foreign representative to seek recognition. Thus

[278] See *idem* at par 5.
[279] S 23(2).
[280] S 1(g).
[281] *Lehane v Lagoon Beach Hotel* (WCC) par 1.
[282] See *idem* at par 52.
[283] *Ibid.*
[284] *Lagoon Beach Hotel v Lehane* (SCA) par 28.

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such recognition will be granted in exceptional circumstances.[285] This clearly shows the court has a wide discretion when granting a recognition order in terms of the common law. However, in terms of section 17(1)(b), Mr Lehane also complies with the second requirement as he meets the definition of "foreign representative" in section 1(h). Mr Lehane is a person authorised in foreign proceedings to administer the assets or affairs of Mr Dunne and is acting as a representative of the foreign proceedings instituted in Ireland. The Dublin High Court has authorised Mr Lehane and the Deputy Official Assignee from the US supports this decision.[286] Therefore, Mr Lehane is a "foreign representative" in terms of the Act and thus the court's discretion is limited compared to the common law. Consequently, the second requirement has been complied with.

Mr Lehane has also complied with section 15(2) as he provided proof that he is authorised to act in his capacity. The court can presume that all documents lodged are authentic, as section 16(2) allows for such a presumption. Mr Lehane applied to the Western Cape High Court seeking assistance and thus complied with the last requirement of section 17(1).[287]

From this it is clear that the court's discretion is limited and the foreign proceedings must be recognised once all four requirements have been met. This allows for a speedy recognition in order to prevent the disposal of certain assets by the debtor.[288]

4.7 Relief upon application of the recognition order

Sections 19 and 21 are of utmost importance in the relevant case as these sections allow for a foreign representative to seek specific relief. Section 19 deals with provisional relief granted upon the application of recognition and would be granted if it is urgently needed to protect the assets of the insolvent

[285] See *idem* at par 31; *Lehane v Lagoon Beach Hotel* (WCC) par 55.
[286] *Lehane v Lagoon Beach Hotel* (WCC) par 28.
[287] *Lehane v Lagoon Beach Hotel* (WCC) par 6-7.3.
[288] Smith A & Boraine A (2002) 195.

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or the interests of the creditors.[289] Section 21 provides for relief that may be granted once the foreign representative has been recognised. Section 19 includes the staying of an execution of an insolvent's assets, entrusting the administration or realisation of the insolvent's assets in South Africa to the foreign representative as well as the other relief measures mentioned in section 21(1) (c), (d) and (g).[290] However, this relief terminates once the application for recognition is granted unless it is specifically extended under section 21(1)(f).[291] The court may also refuse to grant such relief if it would interfere with the administration of the foreign main proceedings.[292]

Therefore, this discretionary, provisional relief is granted even before the foreign representative has in fact been recognised.[293] However, the urgent relief will only be granted if it can be shown that it is required to protect the debtor's assets and consequently protect the creditors.[294] This urgent provisional relief may be granted in terms of section 19(1) or section 21, which are essentially the same.[295]

4.7.1. Powers granted upon recognition

As discussed in the previous chapter, the court has the sole discretion to determine the powers that are conferred upon the foreign representative once he is recognised in terms of the common law. This method once again emphasises the South African position when it comes to dealing with CBI issues, namely the territorial approach.[296] The CBI Act bestows on the foreign representative certain powers in order to provide for the speedy results that have been shown to be possible in applying the CBI Act, namely the right to participate in the local proceedings upon recognition.[297]

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[289] S 19(1), 21(1).
[290] S 19(1)(a)-(c).
[291] S 19(3).
[292] S 19(4).
[293] Smith A & Boraine A (2002) 194.
[294] *Ibid*.
[295] Smith A & Boraine A (2002) 194.
[296] *Supra* 3.4.4.
[297] S 12.

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However, section 20 provides for certain automatic effects once the court recognises the foreign main proceedings. Thus, once the proceedings currently underway in Ireland are recognised as foreign main proceedings, any commencement of legal actions against the debtor's assets, Mr Dunne, by individuals are stayed,[298] any execution against Mr Dunne's assets[299] as well as the right to transfer any assets[300] are stayed or suspended and lastly section 21 of the Insolvency Act[301] applies with regard to assets within South Africa, as though Mr Dunne has been sequestered by a South African High Court.[302]

The power to deal with voidable dispositions and to take control of the solvent spouse's assets is unique to the powers of the trustee where the estate of the insolvent has been sequestrated in South Africa. It is thus of significant importance that the Act provides the foreign representative with powers to deal with this. Firstly, Mr Lehane, will have legal standing to initiate any legal action to set aside a disposition,[303] meaning the transaction between Mr and Mrs Dunne. Secondly section 21 of the Insolvency Act[304] applies with regard to assets situated in the Republic, namely the Lagoon Beach Hotel.[305] This means that any assets of the spouse, Mrs Dunne, even if married out of community, shall vest in the Master and thereafter the trustee, as if it is property of the sequestrated estate.[306]. The situation regarding the assets of the solvent spouse could possibly amount to unfair discrimination based on gender or to unfair differentiation, but this was not specifically addressed in any of the cases.[307]

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[298] S 20(1)(a).
[299] S 20(1)(b).
[300] S 20(1)c)
[301] 24 of 1936.
[302] S 20(1)(d).
[303] S 23.
[304] 24 of 1936.
[305] S 20(1)(d).
[306] *Infra* par 3.4.2.
[307] Steyn discusses the possibility of equality issues in terms of this section as it could amount to discrimination based on gender. In *Harksen v Lane NO and Others* (1997) 11 BCLR 1489; (1998) (1) SA 300 (CC), Goldstone J for the majority held that this does not amount to unfair discrimination as section 21 protects the public interest and was thus in line with the underlying values of the right to equality. It thus seems that such an argument would not

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It is therefore clear that the foreign representative no longer has to apply for the necessary powers, as it is entrusted to him automatically by means of statute. Nevertheless, not all powers are provided for in the Act and due to this absence, the court will once again be the default position in order to determine the relevant powers. Consequently the situation is in the same position as before, when the CBI Act was inoperative and the efficiency of Mr Lehane is left to the discretion of the court in certain instances.[308]

4.7.2 Applicable relief in terms of *Lagoon Beach* (SCA)

The applicable relief in terms of *Lagoon Beach* (SCA)[309] would be staying execution against the debtor's, Mr Dunne's, assets[310] and entrusting the administration as well as the realisation of Mr Dunne's assets in South Africa to Mr Lehane.[311] This would allow Mr Lehane to provisionally apply for the staying of the execution of the Lagoon Beach Hotel and thus prevent the sale of the hotel currently underway. However, the court could refuse to grant such relief if the relief would interfere with the administration of foreign main proceedings in Ireland.[312] Once Mr Lehane complies with the requirements of section 17(1), he will be recognised as a foreign representative and the relief provided for in section 21 will apply. Consequently the relief granted under section 19(1) terminates.[313]

4.8 Protection of creditors

What must be highlighted, as explained by Smith and Boraine, is the possibility of a dualistic system, as mentioned above.[314] The common law as well as the Act could apply in certain instances, depending on the country involved. The common law does not afford the same protection to those

suffice, but could be explored further. For further discussion, see Steyn L (2004) "Human rights issues in South African Insolvency Law" 13:1 *International Insolvency Review* 6-9.
[308] Guide to Enactment par 116.
[309] *Lagoon Beach Hotel v Lehane* (SCA).
[310] S 19(1)(a).
[311] S 19(1)(b).
[312] S 19(4).
[313] S 19(3).
[314] Smith A & Boraine A (2002) 186.

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creditors of non-designated states as the Act provides for creditors of designated states and local creditors.

In terms of the common law it is clear that South Africa favours a territorial approach, which aims to protect the local creditors first. This is nevertheless also reflected in the Act, as section 21(2) states that upon the recognition of foreign proceedings, whether main or non-main, the court may at the request of the foreign representative, entrust all or part of the debtor's assets located in South Africa to the representative. However, the court must be satisfied that the interests of the local creditors are adequately protected. This is reinforced by section 22 as the Act again provides for the protection of the local creditors as the court may set certain conditions when granting relief in terms of sections 19 and 21.[315] This is similar to the *Ex Parte Steyn*[316] case, where the court imposed conditions in granting the order in order to protect the local creditors.[317] However, the Model Law's Guide to Enactment clearly states that section 22 was not enacted with the aim of limiting it only to local creditors, as the Model law aims to protect *all* creditors in order to ensure equality.[318] Section 21(2) and section 22 therefore seem to be in conflict as to what the Model Law intended.

Section 13 of the Act, gives effect to the latter statement, as it states that foreign creditors may not be ranked lower than non-preferent claims.[319] However, section 13(3) provides that the law and practise of the Republic on the ranking of claims regulate the ranking of claims in respect of assets in the Republic. There is no precedent for this in the Model Law, however, there seems to be confusion regarding the true intention of the legislature.[320] In South African Insolvency law, a preferent creditor, including a secured creditor, receives payment before concurrent creditors.[321] Therefore "non-

[315] S 22(1)-(3).
[316] *Ex Parte Steyn*.
[317] See *idem* at par 311, 312.
[318] Guide to Enactment par 198.
[319] S 13(2).
[320] Franco J (2003) 38.
[321] *Lagoon Beach Hotel v Lehane* (SCA).

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preferent", as stated in the Act, is synonymous with "concurrent".[322] This means that a foreign creditor might have a secured claim property in South Africa, but such a claim is not recognised in terms of South African Insolvency Law and thus the "secured foreign creditor" is ranked equally to a concurrent local creditor.[323] Thus it seems as though the Act can be interpreted to mean that foreign non-preferent creditors will be ranked above local concurrent creditors, but will rank below secured and statutory preferent creditors, however this remains open for interpretation by the courts.[324]

Therefore, although section 13 provides some protection to foreign creditors, section 22 protects local creditors. Both these sections are in conflict with one of the aims as stated in the Preamble of the Act, namely, to protect "the interests of *all* creditors."[325]

Lagoon Beach (SCA)[326] favours a strict territorial approach by applying the common law in which the local creditors are protected first. This is due to our Insolvency Act[327] which clearly states that the sequestration must be to the advantage of the creditors.[328] However, the Act tends to move towards a universalist approach as it seemingly aims to protect all creditors in terms of section 13 and the Preamble of the Act. Mr Lehane, therefore has the right to interfere in the sale of Lagoon Beach Hotel as the sale would be detrimental to Mr Dunne's creditors' and therefore applying for the anti-dissipation order is pivotal to securing the creditors' rights (consequently, not only the local creditors but foreign creditors as well). It is therefore of utmost importance that the courts assist each other in protecting the creditors' rights.

[322] Franco J (2003) 38.
[323] See *idem* at 39.
[324] *Ibid*.
[325] *Ibid*.
[326] *Lagoon Beach Hotel v Lehane* (SCA).
[327] 24 of 1936.
[328] Insolvency Act 24 of 1936 s 21(2)(a)-(e); Boraine A (2015) 540.

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4.9 Cooperation with foreign courts

Chapter 4 of the Act provides for the cooperation with foreign courts and foreign representatives.[329] The Act states that the South African court shall cooperate to the *maximum* (own emphasis added) extent possible with the foreign court and or representative.[330] This cooperation could either be direct or through a trustee, liquidator, judicial manager, curator or receiver.[331] The mentioned persons, may in performing their functions or duties, be subject to the supervision of the court.[332]

Mr Lehane must therefore in his capacity as foreign trustee, cooperate to the maximum extent possible with the Western Cape High Court in order to give effect to this section. The court must also, to the maximum extent possible, cooperate and assist the other foreign courts involved as well as Mr Lehane in fulfilling his objectives, namely to stay the execution of Lagoon Beach Hotel, and work hand in glove with the Irish courts to protect the interests of the creditors.[333]

4.10 Concurrent proceedings

In the case of concurrent proceedings, four situations arise. Firstly, in terms of section 28, if South African proceedings are instituted after the foreign main proceedings have been recognised, it is important that the debtor has assets within South Africa.[334] Sections 25 to 27 regulate these proceedings and the local proceedings "are then limited to [these] assets." [335] The second possibility is that South African proceedings can be instituted and then only foreign proceedings are instituted within South Africa.[336] The implication of the timing difference as to when the proceedings are instituted means that the relief granted, either in terms of section 19 or section 21, for the foreign

[329] Bertelsmann E *et al. op cit 6* at 689; Smith A & Boraine A (2002) 201.
[330] S 25(1).
[331] S 26(1).
[332] S 26(2).
[333] *Lagoon Beach Hotel v Lehane* (SCA) par 21.
[334] Smith A & Boraine A (2002) 202.
[335] *Ibid*.
[336] S 29(a).

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proceedings is limited, as the relief must always concur with the South African proceedings.[337]

The third instance that might arise in terms of concurrent proceedings is the opposite of the former and section 29(b) provides for foreign proceedings that have been recognised or recognition has been applied for and then only are proceedings instituted in South Africa. In this case relief will be granted in favour of the foreign proceedings in terms of section 19 or 21.[338] However, the High Court can terminate the relief granted if it does not concur with the South African proceedings.[339]

The last possible situation of concurrent proceedings is dealt with in section 30. This situation arises when several proceedings, regarding the same debtor, are instituted abroad and no local proceedings are underway.[340] What is important in this instance is that various types of concurrent proceedings are now applicable and must therefore be adjusted to one another.[341] Firstly, the foreign main proceeding's effects must be adjusted to the South African proceeding's effects.[342] Secondly, the foreign non-main proceedings must be adjusted to the foreign main proceedings and thirdly, if there are multiple foreign non-main proceedings, they must all be adjusted to another.[343] The court must therefore in all instances first consider the cooperation between the various parties as is provided for in terms of Chapter 4.

4.11 International obligations

Section 3 of the Act states that if a treaty or any other agreement has been enacted into law in terms of section 231(4) of the Constitution,[344] and any conflict arises with the CBI Act, the treaty or agreement will prevail.[345] Thus if

[337] Smith A & Boraine A (2002) 202.
[338] See *idem* at 203.
[339] *Ibid*.
[340] *Ibid*.
[341] Bertelsmann E *et al. op cit 6* at 689.
[342] *Ibid*.
[343] *Ibid*.
[344] The Constitution of the Republic of South Africa 1996.
[345] S 3.

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a treaty or agreement existed between South Africa and Ireland, the issues at hand would be dealt with in terms of the treaty and not the Act, but only to the extent that the Act is in conflict with the specific treaty. It is therefore encouraged to promote the idea of treaties between various states when dealing with CBI issues as it would allow for a harmonious approach when solving the current problems in *Lagoon Beach* (SCA) as both states will be on equal footing when dealing with the assets, creditors and the insolvent.

4.12 Conclusion

The CBI Act is definitely a step in the right direction towards equality for creditors and certainty for investors. Despite the absence of designated states, the Act provides meaningful solutions to CBI issues as it could allow for speedy and simpler solutions.[346] This is due to the fact that the Act provides for greater co-operation between various courts and creates some degree of certainty for foreign investors, as there is some guideline as to how their claims will be handled.[347] This was evident in the above discussion as *Lagoon Beach* (SCA) was addressed in light of the Act. It is unmistakable that the Act provides for some certainty when CBI issues arise and the court is provided with a proper framework in which to address these claims.

However, the Model Law's clear intention to follow a universal approach when dealing with CBI issues has not been adequately reflected in the Act.[348] Even though the Act provides for a multiplicity of proceedings at once and aims to strengthen the cooperation between the courts of other foreign states, as stated in the Preamble, a territorial approach is still reflected. In most instances it is apparent that local creditors are still favoured above foreign creditors and therefore the true advantage of a universalist approach is not provided for in the Act.

[346] *Supra* par 4.6.
[347] Franco J (2003) 42.
[348] 42 of 2000.

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Chapter 5: Conclusion

This mini-dissertation primarily focused on the main issues that are ever present in CBI cases. One of the main problems, as mentioned earlier, is the difference in approaches when it comes to dealing with these issues. There is no global CBI law and thus countries each apply their domestic law in terms of CBI. This has led to countless problems as creditors across the world are treated differently from one jurisdiction to another and thus legal uncertainty and unpredictability has always been a creditor's fate.[349] This lack of certainty when it comes to dealing with a specific insolvency claim has in turn created a reluctance to invest cross-border. It is therefore clear that there is a need for a universal approach on CBI. Although the UNCITRAL provided the Model Law on CBI and even though numerous states have used it as a basis for their domestic laws, the true intention of the Model Law is not always reflected.

South Africa, being on the brink of providing a solution to this problem in enacting the CBI Act,[350] has fallen in this exact trap of not applying the Model Law as intended. As a result, more problems are created, as the Act remains inoperative due to the reciprocity clause found in section 2.[351] In order for the Act to become operative, the Minister of Justice must still draw up a list of designated states; consequently South Africa still relies on the common law and private international law to address these problems.[352]

The common law follows a strict territorial approach, which favours a multiplicity of proceedings and tends to favour the local creditors above the foreign creditors.[353] It has been stated that South Africa follows a "modified territoriality approach" as on the one hand the local creditors are favoured, which stems from a territorial approach, but on the other hand, due to the

[349] *Supra* par 2.5.
[350] 42 of 2000.
[351] Supra par 4.4
[352] *Supra* par 2.3, 2.4.
[353] *Supra* par 2.5.

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universal elements such as comity and convenience, a degree of universalism is provided for.[354]

This mini-dissertation further explored the implications of the most recent case to deal with various CBI issues, namely *Lagoon Beach* (SCA) for the South African CBI dispensation.[355] The WCC as well as the SCA applied the strict common law principles and reinforced this idea that South Africa follows a territorial approach in dealing with these issues.[356] Although there were nuances in the approaches followed by the courts, both courts came to the conclusion that Mr Lehane should be recognised as a foreign trustee, subject to certain conditions and limitations of course, and thereafter the anti-dissipation order should be granted to prevent the sale of Lagoon Beach Hotel.[357] The courts reemphasised that in terms of the common law there is a difference in approach when dealing with movable and immovable property.[358] In addition to this, it is quite evident that the courts exercise a wide discretion in terms of the common law, as elements such as comity and convenience[359] played a crucial role in the court's decision. Firstly, in establishing Mr Lehane's *locus standi*; secondly, in recognising Mr Lehane; thirdly, in granting him with the necessary powers, in other words limiting his functions as a foreign representative and lastly in granting the interdict. It was held that the balance of convenience favoured Mr Lehane's position and consequently the creditors.[360]

It is therefore clear that in applying the common law, South Africa would not necessarily be open to the laws of other states or the opinions of foreign courts and therefore a multiplicity of proceedings arise and creditors are treated differently. Another consequence of the territoriality approach is the wide discretion afforded to courts, not only in recognising a foreign representative, but also in granting the foreign representative certain powers

[354] *Supra* par 2.4.2, 2.5.
[355] *Supra* chap 3.
[356] *Supra* par 3.4.
[357] *Supra* par 3.5.
[358] *Supra* par 2.3, par 3.4.1.
[359] *Supra* par 2.5, par 3.4.1.
[360] *Supra* par 3.4.4.

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to deal with the assets in South Africa.[361] This is in contrast to the CBI Act, which seems to lean towards a universalism approach. By hypothetically addressing the issues of *Lagoon Beach* (SCA) in light of the CBI Act, it became evident that the CBI Act provides for simpler procedures and speedy solutions, for example the Act affords the foreign representative with the necessary *locus standi,* thus reducing the court procedure to first determine this requirement as is required in terms of the common law.[362] Additionally the discretion of the court is limited when it comes to recognising a foreign trustee,[363] as once the requirements of section 17 have been met, the court *must* recognise the foreign trustee. Another advantage of the Act can be found in sections 19 and 21, that provides for certain relief as requested in the case of *Lagoon Beach* (SCA).[364] It would be as easy as proving that the urgent relief sought is to protect the debtor's assets and consequently the creditors in order for the relief to be granted.[365]

Another improvement of the Act and positive step towards universalism compared to the common law, is found in section 20. It provides the foreign representative with certain powers automatically,[366] and thus the court's discretion to determine what powers to grant is excluded in this regard. Therefore, instead of Mr Lehane applying to the court and requesting certain powers, he would amongst others, be granted the power to stop the sale of Lagoon Bach Hotel (Pty) Ltd and consequently deal with the possible fraudulent transaction in terms of section 21.[367] The CBI Act could therefore minimise the effect of the long procedure the court has to endure in firstly considering the facts, then delving into the common law, considering principles such as comity and convenience and then only using its discretion to recognise Mr Lehane, grant him powers and lastly grant the urgent relief sought.

[361] Supra par 3.4.2 and 3.4.4.
[362] *Supra* par 4.5.
[363] *Supra* par 4.6.
[364] Supra par 4.7.
[365] *Supra* par 4.7.
[366] *Supra* par 4.7.1.
[367] Supra par 4.13.

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Thus having a legislative framework to fall back on, allows for some degree of certainty as investors worldwide have a relative idea of how their claims will be dealt with. However, there is still a possibility that one would have to fall back on the default procedure, namely the common law, when dealing with a foreign trustee's powers. Although the CBI Act provides for certain powers as mentioned above, not all powers are provided for. Hence it is left to the court's discretion whether or not to grant powers such as allowing Mr Lehane to meet with creditors,[368] to interrogate witnesses,[369] or to enforce summonses.[370] Nevertheless, the CBI Act does provide for certain powers and that is already a positive improvement.

Therefore, the CBI Act is not perfect in itself and there is definitely room for improvement. Due to the reciprocity clause mentioned earlier, South Africa might end up with a dualistic system once the Act is operative.[371] This is due to the fact that the Act only applies to designated states, as stated in the *Government Gazette*, thus the common law will be the default procedure for non-designated states.[372] Therefore creditors of designated states will not rank below ordinary concurrent creditors in South Africa, but compared to creditors of non-designated states, the common law allows South African concurrent creditors to rank above foreign creditors.[373] This leads to another problem relating to creditors and their claims in terms of the CBI Act. It is clear that the CBI Act in its Preamble aims to protect *all* creditors and this is in line with the Model Law, however, sections 22 and 13(3) seem to once again favour local creditors above foreign creditors.[374] This remains open for interpretation and the exact position regarding creditors remains unclear.

Nevertheless, it is a certainty that the CBI Act aspires to protect foreign creditors, cooperate with foreign courts and aims to have some unity in proceedings. This idea stems from a universalist approach and is already a

[368] Insolvency Act 24 of 1936, s 64.
[369] See *idem* at s 65.
[370] See *idem* at s 66.
[371] *Supra* par 4.4.
[372] *Ibid.*
[373] *Supra* par 4.8.
[374] *Ibid.*

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step in the right direction. Although the CBI Act is still inoperative, the creditors and investors across the world can be at ease that once the CBI Act becomes operative, their claims will be dealt with in terms of a framework that is based on a universal Model Law, with the sole purpose of providing a rigid structure for the courts when dealing with these issues and thus creating transparency and predictability in proceedings.[375]

The researcher therefore concludes by stating that although South Africa still has a long way to go in, firstly designating states to which the CBI Act applies and then adjusting the CBI Act, by adding a few provisions[376] and providing clarity in certain instances, there is progress. As Westbrook states "we are several miles into our thousand mile endeavour to unify and improve one important aspect of globalization, the management of the general default of a multinational corporation."[377] Therefore, even though it has taken many years to get where South Africa is and it will probably take even more years to get where it wants to be, South Africa is moving in the right direction. As stated by Smith and Boraine, the CBI Act "is the beginning, not the end."[378]

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[375] *Supra* par 4.2.
[376] *Supra* par 4.7.1.
[377] Westbrook JL (2007) 1040.
[378] Smith A and Boraine A (2002) 214.

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Bibliography

Books and chapters in books

1. Bertelsmann E *et al.* (2008) *MARS-The Law of Insolvency in South Africa* 9th edition Cape Town: Juta.
2. Boraine (2015) Effects of sequestration in Nagel *et al. Commercial Law* Johannesburg: Lexis Nexis
3. Kunst JA (2016) Cross-border Insolvency in Meskin *et al. Insolvency Law and its operation in winding-up* Johannesburg: Lexis Nexis.

Case law

1. *Ex Parte Palmer NO: In RE Hahn* 1993 (3) SA 359 (C)
2. *Ex Parte B.Z Stegmann* 1902 (TS) 40
3. *Ex Parte Steyn* 1979 (2) SA 309 (O)
4. *Lagoon Beach Hotel (Pty) Limited v Lehane* 2016 (3) SA 143 (SCA).
5. *Lehane N.O v Lagoon Beach Hotel (Pty) Limited and Others* 2015 3 (WCHC)
6. *Moolman v Builders &Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening* 1990 (1) SA 954 (A)
7. *Re Estate Morris* 1907 (TS) 657
8. *Singularis Holdings Ltd v PricewaterhouseCoopers* (Bermuda) 2014 UKPC 36 (10 November 2014), (2015) 2 WLR 971
9. *Ward and Another v Smit and Others: In RE Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA)

Dissertations and theses

1. Ras C (2014) *Cross Border Insolvency Act 42 of 2000 in view of developments elsewhere*, LLM Dissertation, University of Pretoria.
2. Victoria W (2015) *The Reform of Namibia's Cross-Border Insolvency Framework,* LLM Dissertation, University of the Western Cape.

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Journal articles

1. Boraine A "Comparative notes on the operation of some avoidance provisions in a cross-border context" (2009) South African Mercantile Law Journal 435
2. Boraine A & Olivier M "Some aspects of international law in South African cross-border insolvency law" (2005) Comparative and International Law Journal of Southern Africa 373.
3. Boraine A *et al.* "The pro-creditor approach in South African Insolvency Law and the possible impact of the Constitution" (2015) 3 Nottingham Insolvency and Business Law eJournal 59.
4. Boraine A (1996) "Towards codifying the *actio Pauliana*" South African Mercantile Law Journal 8 220
5. Calitz J "Developments in the United States' consumer bankruptcy law: a South African perspective" (2007) Obiter 397.
6. Fletcher IF "International Insolvency: the way ahead" (1993) 2 International Insolvency Review 7.
7. Franco J "The Cross-border Insolvency Act: lifting the barriers or creating new ones?" (2003) 15 South African Mercantile Law Journal 27.
8. Loubser A "Aiding in the development of a new Insolvency Law in South Africa: the UNCITRAL Draft Legislative Guide on Insolvency Law" (2003) 15 South African Mercantile Law Journal 396.
9. Omar PJ "The Landscape of International Insolvency Law" (2002) 11 International Insolvency Review 173.
10. Rasmussen RK "A new approach to transnational insolvencies" (1997) 19:1 Michigan Journal of International Law 1.
11. Smith AD & Ailola DA "Cross-border insolvencies: an overview of some recent legal developments" (1999) 11 South African Mercantile Law Journal 192.
12. Smith A & Boraine A "Crossing Borders into South African Insolvency Law: from the Roman-Dutch jurists to the UNCITRAL Model Law" (2002) 10 American Bankruptcy Institute Law review 137.

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13. Smith A "Some aspects of comity and the protection of local creditors in Cross-border Insolvency Law: South Africa and the United States compared" (2002) 14 South African Mercantile Law Journal 17.
14. Stander L "Cross-border insolvencies as a global economic problem" (2002) 27:2 Journal for Juridical Sciences 72.
15. Steyn L "Human rights issues in South African Insolvency Law" (2004) 13:1 International Insolvency Review 25.
16. Westbrook JL "Locating the eye of the financial storm" (2007) 32:3 Brooklyn Journal of International Law 1019.
17. Zulman RH "Cross-border insolvency in South African Law" (2009) 21 South African Mercantile Law Journal 804.

Legislation

1. Cross Border Insolvency, Act 42 of 2000.
2. Insolvency Act, 34 of 1936.

International instruments

1. United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, 1997.
2. United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency with guide to Enactment and Interpretation, 2014.

Internet sources:

1. International Bar Association, SIRC Project: The UNCITRAL Model Law on Cross-Border Insolvency, Accessed from http://www.ibanet.org/LPD/Insolvency_Section/Insolvency_Section/SIRC_ProjectCrossBorderInsolvency.aspx (31 May 2016).
2. International Trade Forum Magazine Issue 4 (2002) Accessed from http://www.tradeforum.org/OHADA-Four-Years-On-One-Business-Law-for-16-African-Countries/ (29 November 2016).
3. Library of the European Parliament: Cross-border insolvency law in the EU 21 February 2013 Accessed from

http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130476/LDM_BRI(2013)130476_REV1_EN.pdf (5 November 2016).

4. United Nations Information Services Vienna, 28 September 2015 Accessed from http://www.unis.unvienna.org/unis/en/pressrels/2015/unisl222.html (5 November 2016).

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