



**REPUBLIC OF NAMIBIA**

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**LAW REFORM AND DEVELOPMENT COMMISSION**

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**DISCUSSION PAPER  
ON ISSUES RELATING TO THE  
INSOLVENCY ACT, 1936  
(Act No. 24 of 1936)**

**LRDC 32  
February 2015  
Windhoek, Namibia  
ISSN 1026-8405  
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# LAW REFORM AND DEVELOPMENT COMMISSION

The Namibian Law Reform and Development Commission (the LRDC) is a creature of statute established by **Section 2** of the **Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991)**.

The core mandate of the Commission is to undertake research in connection with all branches of law and to make recommendations for the reform and development thereof.

The current Commission members are–

Mr S Shanghala, Chairperson  
Adv J Walters, Ombudsman

Under section 3 of the Law Reform and Development Commission Act, 1991, Commissioners are appointed by the President. Previous Commissioners ceased to hold their office when their term of office for three (3) years lapsed on November 8, 2013. They were –

Ms Dianne Hubbard;  
Mr Nixon Marcus;  
Ms Damoline Muroko;  
Ms Yvonne Dausab; and  
Mr Raywood Rukoro

The Secretary to the Commission is Mr J.T. Namiseb who heads the Directorate of Law Reform, an organizational component in the Ministry of Justice. The Directorate of Law Reform serves as Secretariat to the Commission, assisting the Commission in the exercise of its powers and the performance of its duties and functions under the Law Reform and Development Commission Act, 1991. The Commission and Secretariat are housed on the 1st Floor, Mutual Platz Building, Post Street Mall, Windhoek.

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The Report on the Observance of Standards and Codes Insolvency Creditor/Debtor Regime (ICR ROSC)

## FOREWORD

Insolvency is not something that many people think about as we go about our lives, yet it is part and parcel of our lives more than we may know. The same way divorce as a procedure for exiting a marriage is in place, so is the insolvency legislation for commercial interaction. Citizens engage in commercial activities in as much as they engage in social interactions. When things go astray, insolvency through liquidation should not become a 'death trap' for folks *ad infinitum*. Equally, for a developing economy like Namibia, it is clear that entrepreneurs will make money and lose money, yet how quickly they can be rehabilitated is central to the success of the economy.

Further, the complexity with which the Namibian economy has evolved demands that the laws regulating insolvency are modernized and brought up to date to match the reality of the times. The reality of the intertwined cross border corporate existence between South Africa and Namibia also lays upon Namibia a contingent risk of cross border insolvency problems in the absence of a legal framework that ensures that reciprocal recognition of claims and *locus standi* for Namibian creditors will be made when an entity undergoes insolvency proceedings in South Africa.

Through UNCITRAL, the world is discussing whether there is a need for a convention on cross border insolvency to buttress the proposals espoused under the Model Law on Cross Border Insolvency, which sadly, has not really received widespread adoption by countries around the world. There is certainly a need to be prepared for cross border insolvency interaction. Namibia is one of those countries that still applies an insolvency legislation that is out-dated and is geared towards insolvency more than it is towards the rescue of ailing businesses. Gleaning from the paths traversed by others, it is clear that certain policy determinations will have to be made, such as whether or not Namibia will maintain a duality of systems, different for natural persons and for companies/corporations. Will we simply reform the insolvency laws or will we form new insolvency laws *à la* Australia?

It is also clear that there needs to be a relook into the decision as to whether the banking sector should regulate itself exclusively without further interference during

insolvency processes, consumer rights may have to be protected from more instruments and positions than one. Should insolvency practitioners (without exclusive reference to legal practitioners specializing in insolvency matters) be registered and regulated? Should another body be created for these purposes?

From the discussion contained herein, the LRDC is acquitted for having insisted that the reform need not focus merely on certain sections of the Insolvency Act, 1936 alone, and that there be a wholesale reform of the said legislation and perhaps other concomitant laws. In this regard, the LRDC is indebted to the World Bank for dispatching a team of competent lawyers with global experience, including Professor Andre Boraine, the Dean of the Law Faculty of the University of Pretoria in South Africa, who conducted the ROSC with the assistance of the LRDC's nominated local lawyer, Mr Adolf Denk.

The LRDC places before the Namibian public, the Discussion Paper as well as its attachment so that the Namibian public, in the reform process, may be guided by it. It is envisaged that a workshop will be held in the near foreseeable future whereat the ROSC will be presented to the participants, and whereat the high level questions will be posed for input and guidance which will then inform the legal drafting process, leading into the section 9 of the LRDC Act, 1991 Report to the Minister of Justice.

The LRDC will continue to monitor activities in the area of insolvency across the globe from the vantage position of Namibia being a Member of UNCITRAL, and in particular, Group V (Insolvency), tasked with setting the agenda in the field of insolvency. In doing so, the involvement of private sector members will be welcome in accordance with the needs of the LRDC. Consultations will be sought so that Namibia's contribution at the global level will be well informed.

As a developing country undergoing reform in its internal insolvency laws, the question needs to be asked: Why had we never adopted the model law on cross border insolvency? Was it because it was not obligatory? Were we simply unaware of it? Is it because the statistics reveal very few insolvencies actually occurring in Namibia? Should the world adopt a convention on the matter? I leave these questions for the reader.



Finally, given the technical nature of this subject, all shortcomings contained in this document are to be ascribed to me, whilst I remain thankful to the hard work and eagerness with which Victoria Weyulu exhibited then only as a law student, later on to lead law students into the research that led to the drafting of this Discussion Document.

With this publication, the LRDC has demonstrated how versatile it can be, and just how much can be done with so little. This would have never been achieved without the commitment of the men and women, boys and girls who devote their time to the LRDC and as Chairperson, I will forever be indebted to them for ensuring that during my tenure, just as much of published work could have been produced as was produced by the LRDC since 1991 to November 9, 2010 when I was appointed by President Pohamba.

A handwritten signature in black ink, appearing to read 'S. Shanghala', enclosed in a thin black rectangular border.

Sakeus Edward Twelityaamena Shanghala  
Chairperson: Law Reform and Development Commission

## TABLE OF ABBREVIATIONS

ARITA	Australian Restructuring Insolvency & Turnaround Association
BoN	Bank of Namibia
CMA	Common Monetary Union
ICR	Insolvency Debtor/Creditor Regime
IMF	The International Monetary Fund
IPA	The Insolvency Practitioners Association of Australia
ISDA	The International Swaps and Derivative Association
LRDC	The Law Reform and Development Commission
MLR	Ministry of Lands and Resettlement
MSMEs	Micro, Small and Medium Enterprises
NAMFISA	Namibia Financial Institutions Supervisory Authority
OECD	Organization for Economic Co-operation and Development
ROSC	The World Bank Report on the Observance of Standards and Codes Insolvency Creditor/Debtor Regime (ICR ROSC)
UNCITRAL	The United Nations Commission on International Trade Law
SACU	Southern African Customs Union
SADC	Southern Africa Development Commission
SALC	The South African Law Commission
SARIPA	South Africa Restructuring and Insolvency Practitioners Association
SOEs	State Owned Enterprises
SMEs	Small and Medium Enterprises

## 1. INTRODUCTION

1.1 The Bank of Namibia (BoN) made a proposal to the Law Reform and Development Commission (LRDC) on 25 September 2012 with a view to amend sections 35 and 46 of the Insolvency Act, 1936.<sup>1</sup>

1.2 Section 35 of the Insolvency Act, 1936 provides for the uncompleted acquisition of immovable property before the sequestration of a debtor's insolvent estate. In particular, section 35 states as follows:

**35 Uncompleted acquisition of immovable property before sequestration**

If an insolvent, before the sequestration of his estate, entered into a contract for the acquisition of immovable property which was not transferred to him, the trustee of his insolvent estate may enforce or abandon the contract. The other party to the contract may call upon the trustee by notice in writing to elect whether he will enforce or abandon the contract, and if the trustee has after the expiration of six weeks as from the receipt of the notice, failed to make his election as aforesaid and inform the other party thereof, the other party may apply to the court by motion for cancellation of the contract and for an order directing the trustee to restore to the applicant the possession of any immovable property under the control of the trustee, of which the insolvent or the trustee gained possession or control by virtue of the contract, and the court may make such order on the application as it thinks fit: Provided that this section shall not affect any right which the other party may have to establish against the insolvent estate, a non-preferent claim for compensation for any loss suffered by him as a result of the non-fulfilment of the contract.

1.3 Simply put, section 35 of the Insolvency Act, 1936 gives a trustee the power to do one of the following:

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<sup>1</sup> Insolvency Act, 1936 (Act No. 24 of 1936). The proposal by the Bank of Namibia was submitted in conjunction with the Bankers Association of Namibia.

### 1.3.1 To enforce a contract for the purchase of immovable property:

If the trustee decides to enforce the contract, then both the debtor and creditor are bound to perform any outstanding obligations thereunder.<sup>2</sup>

### 1.3.2 To repudiate<sup>3</sup> a contract for the purchase of immovable property:

If the trustee repudiates the contract, then the creditor would have no right to demand performance from the trustee, and can only sue the insolvent estate for any damages, which he can prove to have suffered as a concurrent creditor.<sup>4</sup>

1.4 Section 46 of the Insolvency Act, 1936 regulates set-off between an insolvent debtor and his/her creditor.<sup>5</sup> Section 46 provides for the following:

#### **46 Set-off**

If two persons have entered into a transaction the result whereof is a set-off, wholly or in part, of debts which they owe one another and the estate of one of them is sequestrated within a period of six months after the taking place of the set-off, or if a

<sup>2</sup> The Insolvency Act, 1936 does not define who or what constitutes a creditor. The United Nations Commission on International Trade Law, (UNCITRAL) *Legislative Guide on Insolvency Law* [web document] (2004). Available at:

<[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html)>, last accessed on 07 August 2013 defines a “creditor” as a natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings. The Law Reform and Development Commission (LRDC) accepts this definition throughout this Discussion Paper.

<sup>3</sup> Repudiation is the refusal to honor an agreement or debt, in this sense it is the giving of notice by the trustee that the debtor does not intend to comply with obligations; it amounts to a refusal to perform and may be done expressly or impliedly.

<sup>4</sup> The Insolvency Act, 1936 considers the ranking of creditors under of sections 95 to 103 and makes provision for three distinct types of creditors, namely; *secured creditors* who hold security for their claim over a specific asset or assets of the company; *preferent creditors* whose claims are not secured but nevertheless still rank above the claims of concurrent creditors; and lastly, *concurrent creditors* who do not hold any form of advantage over other creditors and are paid out of the balance of the free residue of the estate.

<sup>5</sup> C. Visser *et al.*, *Gibson South African Mercantile & Company Law* (8<sup>th</sup> Ed) (South Africa, Cape Town: Juta & Co. Ltd, 2003), p.103. The authors in this particular publication define *set-off* as a common law method by which contractual and other debts may be extinguished. Set-off comes into operation when:

- 1) two parties are reciprocally indebted to each other;
- 2) both debts are due and legally payable; and
- 3) both debts are liquidated debts.

A debt is due if its payment is not subject to any conditions. It is liquidated if it is for a sum certain in money or it can be readily established with reasonable certainty. The purpose of section 46 of the Insolvency Act, 1936 is to prohibit post-insolvency set off between a debtor whose estate is under sequestration and his creditor.

person who had a claim against another person (hereinafter in this section referred to as the debtor) has ceded that claim to a third person against whom the debtor had a claim at the time of the cession, with the result that the one claim has been set-off, wholly or in part, against the other, and within a period of one year after the cession the estate of the debtor is sequestrated; then the trustee of the sequestrated estate may in either case abide by the set-off or he may, if the set-off was not effected in the ordinary course of business, with the approval of the Master disregard it and call upon the person concerned to pay to the estate the debt which he would owe it but for the set-off, and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set-off had taken place.

1.5 This means that where the insolvent debtor and creditor have liquidated claims against each other and the debtor is sequestrated within a period of 6 (six) months after the taking place of set-off, the trustee may either elect to abide by the set-off or, with the approval of the master, disregard it if he or she can show that the set-off was not effected in the ordinary course of business.<sup>6</sup>

1.6 The proposals for the amendment of sections 35 and 46 are derived from South Africa's Insolvency Amendment Act, 1995.<sup>7</sup> The purpose of this amendment is "to amend the Insolvency Act, 1936, so as to provide for the protection of participants in the South African financial markets in the event of insolvency."<sup>8</sup>

1.7 If the same amendments are to be adopted in Namibia, it would mean that creditors, particularly creditors which are financial institutions, will be able to apply set-

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<sup>6</sup> An approach was formulated in *Van Zyl & Others NNO v Turner & Another NNO 1998 (2) SA 236 (C)* to determine whether a transaction was 'in the ordinary course of business' or not. In this case the court stated that "one of these principles is that the test is an objective one. The Court must ask itself whether, given all the circumstances under which the deposition was made, it is in accordance with ordinary business methods obtaining amongst solvent men of business. Regard must therefore be had to all the circumstances, including the actions of both parties to the transaction. As appears from the formulation of the principle, the fact that one of the parties to the transaction was insolvent at the time is, however, to be excluded from the circumstances which are relevant."

<sup>7</sup> Insolvency Amendment Act, 1995 (Act No. 32 of 1995).

<sup>8</sup> *Vide* the long title of the Insolvency Amendment Act, 1995.

off and the closeout netting of debts.<sup>9</sup> In this manner, it is endeavoured that the amendment of sections 35 and 46 will prevent trustees appointed under the Insolvency Act, 1936 from electing to abide by some transactions and from refusing to abide by others.

1.8 The Law Reform and Development Commission Act, 1991 establishes the LRDC.<sup>10</sup> Section 6 of the Law Reform and Development Act, 1991 outlines the objects of the LRDC as follows:

## **6 Objects of Commission**

The objects of the Commission shall be to undertake research in connection with and examine all branches of the law of Namibia and to make recommendations for the reform and development thereof, including –

- (a) the repeal of obsolete or unnecessary enactments;
- (b) the consolidation or the codification of any branch of the law or the introduction of other measures aimed at making the law more readily accessible;
- (c) the integration or harmonization of the customary law with the common and statutory law; and
- (d) new or more effective procedures for the administration of the law and the dispensing of justice;
- (dA) the enactment of laws to enhance respect for human rights as enshrined in the Namibian Constitution or to ensure compliance with international legal obligations; and
- (e) to advise the Minister in regard to any matter which the Minister may refer to

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<sup>9</sup> ISDA has created a standardized contract called the ISDA Master Agreement to regulate derivative transactions. Possibly the most important aspect of the ISDA Master Agreement is the provision for closeout netting under Section 6(e). The enforceability of the closeout netting provisions is vital to financial institutions active in the derivatives market since the ability to net allows them to allocate capital only against the net figure they would have to pay on close-out of an ISDA Master Agreement rather than the gross amount. At present, this closeout netting of debt is susceptible to challenge by virtue of section 46 of the Insolvency Act, 1936. The International Swaps and Derivatives Association (ISDA) is a trade organization of participants in the market for over-the-counter derivatives (a financial contract which *derives* its value from the performance of another entity such as an asset, index, or interest rate, called the "underlying").

<sup>10</sup> Section 2 of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991).

it.

1.9 In principle, this mandate requires the LRDC to review, reform and develop Namibia's legal landscape. The review, reform and development of Namibia's laws is made in the spirit of the Namibian Constitution, statutory laws, customary laws, Roman-Dutch common law, as well as international law and any international instruments to which Namibia is a party.<sup>11</sup>

1.10 Article 1(6) of the Namibian Constitution states that "this Constitution shall be the Supreme Law of Namibia", and therefore all laws must trace their legitimacy from the Namibian Constitution. Article 144 of the Namibian Constitution states that "unless otherwise provided by the Constitution or an Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia." The Namibian Constitution is therefore the supreme source of law and it also provides for the integration and application of international law.

1.11 Namibia is a state member to the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL was established in 1966 with the object to promote and further the progressive harmonization and unification of the law of international trade by preparing and promoting the use of legislative and non-legislative instruments in key areas of international trade and commercial law.<sup>12</sup>

1.12 One of the more relevant subject-areas of UNCITRAL for the purposes of this discussion is the activities and publications prepared by Working Group V (Insolvency)

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<sup>11</sup> S.K. Amoo, *An Introduction to Namibian Law: Materials and Cases* (Windhoek: Macmillan Education Namibia, 2009) p. 54. Amoo provides an overview of the hierarchy of law in Namibia from the Constitution through to case law, legislation, and regulations in chapter two of this book. In the review, reform and development of Namibia's legislation, the LRDC considers the sources of law of Namibia.

<sup>12</sup> The United Nations Commission on International Trade Law (UNCITRAL), *A Guide to the United Nations Commission on International Trade Law: Basic facts about the United Nations Commission on International Trade Law* [web document] (2013) <[https://www.uncitral.org/uncitral/en/about\\_us.html](https://www.uncitral.org/uncitral/en/about_us.html)>, last accessed on 21 April 2014.

on insolvency law.<sup>13</sup> Working Group V (Insolvency) is mandated to coordinate the efforts not only of those countries that do not have efficient and effective insolvency regimes and need to develop such, but also for countries that had undertaken or that envision undertaking the process of modernizing and reviewing their national insolvency systems.<sup>14</sup>

1.13 The Working Group promotes this mandate by preparing a number of documents that deal with the core features for a strong insolvency regime.<sup>15</sup> One of these documents is the *Legislative Guide: Parts 1 & 2* which deal with a number of issues that are relevant for this Discussion Paper.<sup>16</sup> The Legislative Guide looks at the key objectives of an insolvency law, structural issues such as the relationship between

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<sup>13</sup> *ibid.* UNCITRAL's work is organized and conducted at three levels: the first level is UNCITRAL itself, or the Commission. The second level is the Working Groups of UNCITRAL (consisting of UNCITRAL Members) who to a large extent, undertake the development of the topics on UNCITRAL's work program, while the third is the Secretariat which assist the Commission and the Working Groups in the preparation and conduct of its work. UNCITRAL has established six working groups one of which is Working Group V (Insolvency).

<sup>14</sup> The United Nations Commission on International Trade Law, 34<sup>th</sup> Session held in Vienna on 25 June – 13 July 2001, Report on UNCITRAL-INSOL-IBA Global Insolvency Colloquium (Vienna, 4 – 6 December 2000). This document can be accessed from the UNCITRAL website at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V01/813/44/PDF/V0181344.pdf?OpenElement> last accessed on 21 April 2014.

<sup>15</sup> Since its inception, Working Group V (Insolvency) has prepared the following documents over the years:

**Model Laws:**

UNCITRAL Model Law on Cross-Border Insolvency (1997).

**Legislative Guides and Recommendations:**

UNCITRAL Legislative Guide on Insolvency Law, parts 1, 2, 3 and 4.

**Explanatory texts:**

UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (2011); and  
UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).

<sup>16</sup> The United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law* [web document] (2004). Available at:

<[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html)>, last accessed on 21 April 2014. The UNCITRAL Legislative Guide provides a comprehensive statement of the key objectives and principles that should be reflected in a State's insolvency laws. It is intended to inform and assist insolvency law reform around the world, providing a reference tool for national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations. The advice provided aims at achieving a balance between the need to address a debtor's financial difficulty as quickly and efficiently as possible; the interests of the various parties directly concerned with that financial difficulty, principally creditors and other stakeholders in the debtor's business; and public policy concerns, such as employment and taxation. The Legislative Guide assists the reader to evaluate the different approaches and solutions available and to choose the one most suitable to the local context.



insolvency law and other laws, the types of mechanisms available for resolving a debtor's financial difficulties and the institutional framework required to support an effective insolvency regime.

1.14 The challenge for Namibia is to provide a platform where these topical issues can be debated, discussed and addressed effectively. So apart from looking to amend sections 35 and 46 of the Insolvency Act, 1936 there remains an urgent need to address weighty issues raised in the UNCITRAL Legislative Guide so as to ensure that the reform of Namibia's legal insolvency framework is indeed informed by international practice of best standards.

1.15 The main objective of this Discussion Paper is to identify and discuss key issues that arise in the development of an orderly and effective insolvency regime for Namibia. In doing so, the Discussion Paper intends to raise awareness about the importance of having a strong and effective insolvency regime in the pace of change in the global economy.

1.16 Furthermore, this Discussion Paper is informed by consultative stakeholder meetings conducted by the LRDC and the World Bank from 01 July 2013 to 10 July 2013 with the purpose to assist the LRDC in the identification of challenges within Namibia's legal insolvency framework, as well as the subsequent Report on the Observance of Standards and Codes (ROSC) which draws from it key areas for improvement in order to set priorities for legal and institutional reform.<sup>17</sup>

1.17 The LRDC envisages that the publication and circulation of this Discussion Paper to the relevant stakeholders will culminate in input and contributions during a workshop, which will craft the outline of and inform the contents of a draft Bill and/or amendments to the Insolvency Act, 1936.

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<sup>17</sup> The ROSC is herewith attached as Annexure "B".

## 2. BACKGROUND TO NAMIBIA'S LEGAL INSOLVENCY FRAMEWORK

2.1 The colonial legacy of Namibia abetted the shaping of the country's jurisprudence in many respects. Namibia was declared a German Protectorate in 1884 and a Crown Colony in 1890, where after it became known as South West Africa.<sup>18</sup> It remained a German colony until it was declared a Protectorate of South Africa in terms of the Peace Treaty of Versailles which was signed on 28 June 1919.<sup>19</sup>

2.2 An important feature of the South African administration over Namibia was the Treaty of Peace and South West Africa Mandate Act, 1919.<sup>20</sup> The Treaty of Peace and South West Africa Mandate Act, 1919 gave effect to the mandate of South West Africa and delegated the administration thereof to the Governor-General of South Africa, giving the Governor-General legislative and executive powers over Namibia. Conversely, the Governor-General appointed an Administrator-General in terms of the Treaty of Peace and South West Africa Mandate Act, 1919 and delegated to the Administrator-General essentially the same legislative powers over South West Africa.

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<sup>18</sup> S.K. Amoo and I. Skeffers 'The Rule of Law in Namibia', in *Human Rights and the Rule of Law*, (Windhoek: Macmillan Namibia, 2010) 17-38 at 17.

<sup>19</sup> S. Akweenda, *International Law and the Protection of Namibia's Territorial Integrity: Boundaries and Territorial Claim* (The Hague, the Netherlands: Kluwer Law International, 1997), 35.

<sup>20</sup> (Act No. 49 of 1919).

<sup>21</sup> Maritz J astutely summarized the Treaty of Peace and South West Africa Mandate Act, 1919 in ***Gemfarm Investments (Pty) Ltd v Trans Hex Group Ltd 2009 (2) NR 477 (HC)*** as follows: "the Union Parliament authorised the Governor-General by section 1 of the Treaty of Peace and South West Africa Mandate Act, 1919 to make such appointments, establish such offices, issue such proclamations and regulations and do such things as appear to him to be necessary for giving effect, so far as concerns the Union, to any of the provisions of the said Treaty or to any Mandate issued in pursuance of the Treaty to the Union with reference to the territory of South West Africa and, subject to section 4, to –  
(a) repeal, alter, amend or modify any laws in force within South West Africa including such proclamations as have been or may be promulgated during the military occupation thereof;  
(b) make new laws applicable to the said territory;  
(c) delegate his authority in this behalf to such officer in the said territory as he may designate to act under his instructions" by proclamation at any time.

Maritz J stated further that the Governor-General appointed the Administrator of the Territory in the exercise of his powers and delegated essentially the same legislative powers to him to be exercised "subject always to such instructions as may from time to time be issued for his guidance by proper authority".

2.3 In effect, this means that the Treaty of Peace and South West Africa Mandate Act, 1919 coupled with the Proclamation, 1921<sup>22</sup> empowered the Governor-General and the Administrator-General to, *inter alia*, make new laws for South West Africa and to apply South African statutes by Proclamation thereto. It is in this manner that the Insolvency Act, 1936 found application in the Namibian legal system.<sup>23</sup> Section 158ter of the Insolvency Act, 1936 confirms the application of the Insolvency Act, 1936 as follows:

**158ter Application of Act to South-West Africa**

This Act and any amendment thereof shall apply also in the Territory, including that portion of the Territory known as the Eastern Caprivi Zipfel and referred to in subsection (3) of section three of the South-West Africa Affairs Amendment Act, 1951 (Act 55 of 1951).

2.4 After independence in 1990, the Namibian Constitution retained all existing laws, thus retaining significant portions of law enacted by either the South African Parliament, the South African President or the Administrator-General.<sup>24</sup> Most importantly, Article 140(2) of the Namibian Constitution brought an end to the legislative and executive powers granted to the Governor-General and Administrator-General of South Africa by providing as follows:

**Article 140 The Law in Force at the Date of Independence**

(1) ...

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<sup>22</sup> (Proclamation 1 of 1921).

<sup>23</sup> The administration of the Insolvency Act, 1936 was transferred to South West Africa by the Executive Powers (Justice) Transfer Proclamation (AG 33/1979, as amended), dated 12 November 1979.

<sup>24</sup> Article 140(1) of the Namibian Constitution states that "Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court".

(2) Any powers vested by such laws in the Government, or in a Minister or other official of the Republic of South Africa shall be deemed to vest in the Government of the Republic of Namibia or in a corresponding Minister or official of the Government of the Republic of Namibia, and all powers, duties and functions which so vested in the Government Service Commission, shall vest in the Public Service Commission referred to in Article 112 hereof.

2.5 The object of Article 140(2) of the Namibian Constitution corresponds with the purpose of the Recognition of the Independence of Namibia Act, 1990 which recognizes the Republic of Namibia as “a sovereign and independent state.”<sup>25</sup> Section 2(1) of the Recognition of the Independence of Namibia Act, 1990 provides that:

“The Republic shall cease to exercise any authority in the Territory referred to in the Treaty of Peace and the South West Africa Mandate Act, 1919.”

2.6 The Recognition of the Independence of Namibia Act, 1990 thus relinquished any and all of South African authority over Namibia from 21 March 1990, effectively concluding the effect of South African laws in Namibia.<sup>26</sup>

2.7 In the absence of any repeal or amendment by an Act of Parliament, the Insolvency Act, 1936 continues to govern the estate of insolvent persons and partnerships in Namibia and further, details the procedure for sequestration, and the rights of various creditors.<sup>27</sup> In broad and generic terms, a person or partnership is insolvent when he/she/it is unable to pay his/her/its debts.<sup>28</sup> In legal terms, however,

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<sup>25</sup> (Act No. 34 of 1990). The Recognition of the Independence of Namibia Act, 1990 is a statute of the Parliament of South Africa and was assented to by State President F. W. de Klerk on 20 March 1990 and came into force on 21 March 1990.

<sup>26</sup> With the exception of the territory of Walvis Bay, which was resolved later.

<sup>27</sup> The Insolvency Amendment Act, 2005 (Act No. 3 of 2005) amends the Insolvency Act, 1936 in a number of respects but a review of the Insolvency Act, 1936 as a whole is yet to be seen in Namibia.

<sup>28</sup> R, Sharrock, *et al.*, *Hockly's Insolvency Law* (8th Ed.) (South Africa, Cape Town: Juta & Co Limited, 2006), p.3.

the test for insolvency is whether or not the debtor's liabilities, fairly estimated, exceed his/her/its assets, fairly valued.<sup>29</sup> Inability to pay debts is, at most, merely evidence, not conclusive in itself, of insolvency.<sup>30</sup>

2.8 As with South Africa, Namibian insolvency law is not contained in a single statute. Instead, insolvency law is affected and informed by subsequent legislation such as the Companies Act, 2004<sup>31</sup> and the Close Corporations Act, 1988,<sup>32</sup> which deal with the liquidation and winding-up of companies and close corporations respectively. Apart from these statutory enactments, precedents and principles of common law also apply in the absence of specific statutory provisions.<sup>33</sup>

2.9 From the outset, the Discussion Paper considers it useful to provide an exposition of the existing legislative framework which provides for the sequestration of the estate of natural persons and the winding-up and liquidation of companies and close corporations. This is necessary in order to ascertain the key drivers for reform.

## **2.10 The sequestration of a debtor's estate under the Insolvency Act, 1936**

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<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.* According to the authors of this particular publication, a person who has insufficient assets to discharge his liabilities, although he satisfies the test for insolvency, is not treated as insolvent for legal purposes unless his estate has been sequestrated by an Order of Court. A sequestration order is a formal declaration that a debtor is insolvent. The term "sequestration" should be used only with reference to a person's estate. It is the debtor's estate that is sequestrated, not the debtor himself. On the other hand, both the debtor's estate and the debtor himself may properly be described as insolvent.

<sup>31</sup> The Companies Act, 2004 (Act No. 28 of 2004), this legislation repealed the Companies Act, 1973 (Act No. 61 of 1973).

<sup>32</sup> The Close Corporations Act (Act No. 26 of 1988).

<sup>33</sup> Section 1(1) of the Administration of Justice Proclamation, 1919 (Proclamation 21 of 1919) states that "the Roman-Dutch law as existing and applied in the Province of the Cape of Good Hope at the date of coming into effect of this Proclamation shall, from and after the said date, be the common law of the Protectorate, and all laws within the Protectorate in conflict therewith shall, to the extent of such conflict and subject to the provision of this section, be repealed".

2.10.1 The Insolvency Act, 1936 makes provision for two ways in which an individual debtor's estate may be sequestered; either through voluntary sequestration or compulsory sequestration. These two methods are explained below.<sup>34</sup>

(a) **Voluntary surrender – Section 3(1):**

The debtor, personally or through an agent, may apply to the High Court for acceptance of the surrender of his/her estate.

(b) **Compulsory sequestration – Section 9(1):**

A creditor or creditors who each have a liquidated claim of not less than N\$100 (or their agent) may apply to the High Court for the sequestration of the debtor's estate.<sup>35</sup>

2.10.2 The granting of a sequestration order in each circumstance is based on a number of statutory requirements. The requirements for the acceptance of a debtor's voluntary surrender are outlined in section 6 of the Insolvency Act, 1936 which states the following:

**6 Acceptance by court of surrender of estate**

(1) If the court is satisfied that the provisions of section four have been complied with, that the estate of the debtor in question is insolvent, that he owns realizable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestered, it may accept the surrender of the debtor's estate and make an order sequestering that estate.

<sup>34</sup> The Insolvency Act, 1936 does not define the term 'sequestration'. The Act only defines a 'sequestration order' as any order of court whereby an estate is sequestered and includes a provisional order, when it has not been set aside. The Oxford Advanced Learner's Dictionary by A. S. Hornby, *Oxford Advanced Learner's Dictionary* (Oxford: Oxford UP, 2010), p. 1333, defines the term 'sequester' as taking control of somebody's property or assets until a debt has been paid. It is derived from the Latin term *sequestrare*, which means to set aside or surrender.

<sup>35</sup> A liquidated claim, according to James, T.R. Gibson et al., *South African Mercantile Law* (8th ed). (South Africa, Pretoria: Juta & Company Ltd, 2003), p. 544, is "a claim the amount of which is ascertained, or which can clearly and promptly be established, provided that it has accrued, and it need not be due at the date of hearing the application".

(2) If the court does not accept the surrender or if the notice of surrender is withdrawn in terms of section seven, or if the petitioner fails to make the application for the acceptance of the surrender of the debtor's estate before the expiration of a period of fourteen days as from the date specified in the notice of surrender, as the date upon which application will be made to the court for the acceptance of the surrender of the debtor's estate, the notice of surrender shall lapse and if a curator bonis was appointed, the estate shall be restored to the debtor as soon as the Master is satisfied that sufficient provision has been made for the payment of all costs incurred under subsection (2) of section five.

2.10.3 The requirements for the compulsory sequestration of a debtor's estate are set out under section 10 of the Insolvency Act, 1936. Section 10 states the following:

**10 Provisional sequestration**

If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie-

- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
  - (b) the debtor has committed an act of insolvency or is insolvent; and
  - (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
- it may make an order sequestrating the estate of the debtor provisionally.

2.10.4 It appears from the number of statutory requirements provided by the Insolvency Act, 1936, that there is a heavier burden of proof which rests on the debtor in an application for the surrender of his/her estate to establish the requirement of 'advantage to creditors.'<sup>36</sup>

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<sup>36</sup> In a compulsory sequestration, the creditor only needs to prove to the court that there is reason to believe that it will be to the advantage of creditors of the debtor if his or her estate is sequestrated.

If advantage to creditors cannot be shown in an application for the surrender of a debtor's estate, then a court will refuse to grant that order.<sup>37</sup>

2.10.5 In determining whether the sequestration will be to the advantage of the creditors, the courts often consider whether creditors will receive a pecuniary benefit. Tshabalala JP in **Lynn & Main Inc. v Naidoo** stated the following regarding the requirement of a pecuniary benefit:<sup>38</sup>

“In my opinion, the facts put before the court must satisfy that there is reasonable prospect – not necessarily likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the Insolvency Act, 1936 some may be revealed or recovered for the benefit of creditors, then that is sufficient.”

2.10.6 Unlike in an application for the surrender of a debtor's estate, the Insolvency Act, 1936 contemplates two distinct stages in an application for compulsory sequestration – a provisional stage and a final stage. The High Court hearing the matter has the discretion to grant a provisional sequestration order after it is satisfied that the requirements prescribed under section 10 of the Insolvency Act, 1936 have been *prima facie* complied with.<sup>39</sup>

2.10.7 If the court makes an order provisionally sequestrating the estate of a debtor, it must simultaneously grant a *rule nisi* calling upon the debtor to appear on a day

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<sup>37</sup> See **Nedbank v Thorpe (7392/2007) [2008] ZAKZHC 72** where K Pillay J stated that the facts put before the Court must satisfy it that there is a reasonable prospect that some pecuniary benefit will result to creditors.

<sup>38</sup> (Case No. 10259/04), heard in the High Court of South Africa, Natal Provincial Division on 12 August 2005 at p. 311.

<sup>39</sup> In **Julie Whyte Dresses (Pty) Ltd v Whitehead 1970 (3) SA 218 (D)** Muller, J stated that “It is clear that section 10 of the Insolvency Act vests the Court with a discretion to be exercised judicially upon a consideration of all the facts and circumstances of the case. In proper circumstances the Court may refuse to make a provisional sequestration order, although all the requirements of section 10 have *prima facie* been established by the petitioner. This must be so in view of the serious consequences that flow from the making of a provisional sequestration order.”



indicated in the rule and to show cause as to why his/her estate should not be sequestrated finally.<sup>40</sup> After the court is satisfied that the applicant(s) has established the requirements for compulsory sequestration on a balance of probabilities, it will grant a final order of sequestration in terms of section 12 of the Insolvency Act, 1936.

2.10.8 In **Bank Windhoek Limited v Jacobs** the court distinguished between the burden of proof for the grant of a provisional order of sequestration and the burden of proof for the grant of a final sequestration order.<sup>41</sup> Smuts J held the following in this regard:<sup>42</sup>

“In a provisional order for sequestration there need only be *prima facie* proof of the three facts which are to be present whereas at a final order stage a more positive degree of persuasion is required”.<sup>43</sup>

2.10.9 Once granted, the final sequestration order crystallises the insolvent’s position by divesting the debtor of all his assets and all civil proceedings instituted by or against him/her are stayed until the appointment of a trustee.<sup>44</sup> Furthermore, the Master of the High Court is called upon to administer the debtor’s insolvent estate and to appoint a provisional trustee until a trustee is appointed at the first meeting of the creditors of an insolvent estate in terms of section 40.<sup>45</sup>

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<sup>40</sup> Section 11 of the Insolvency Act, 1936.

<sup>41</sup> (A 208/2013) [2014] NAHCMD 26 (29 January 2014).

<sup>42</sup> *ibid*, at p. 8.

<sup>43</sup> The three factors considered by the High Court in **Bank Windhoek Limited v Jacobs (A 208/2013) [2014] NAHCMD 26 (29 January 2014)** were the following:

(a) the applicant has established claims against the respondent in excess of N\$100; and  
(b) the respondent has committed an act of insolvency or is insolvent; and  
(c) there is reason to believe that it will be to the advantage of respondent’s if this estate is sequestrated. These are the same requirements outlined under section 10 of the Insolvency Act, 1936.

<sup>44</sup> The effect of sequestrating the estate of an insolvent is discussed under section 20 of the Insolvency Act, 1936. Even if the debtor is divested of his estate, he/she retains a general competency to make binding agreements under section 23(2) of the Insolvency Act, 1936.

<sup>45</sup> A provisional trustee is appointed by the Master of the High Court under section 18 of the Insolvency Act, 1936.

2.10.10 The trustee is required to collect all of the debtor's assets and to take steps to set aside voidable transactions entered into by the debtor before sequestration.<sup>46</sup> The trustee must then arrange for the sale of the debtor's assets and distribute the proceeds thereof amongst the creditors in order of the ranking outlined under the Insolvency Act, 1936.<sup>47</sup>

2.10.11 The insolvency of a party comes to an end when the party in question is rehabilitated.<sup>48</sup> Rehabilitation as a legal process is governed by the Insolvency Act, 1936 under sections 124 to 127 and its effect is to put an end to the debtor's sequestration. According to Boraine & Roestoff, "sequestration coupled with rehabilitation under the Insolvency Act, 1936 are the only formal statutory procedures that provides for a discharge of debt of overburdened debtors."<sup>49</sup>

2.10.12 The debtor can apply for the rehabilitation of his/her estate under the following circumstances:

**(a) At any time**

A debtor may apply to the court for an order for his rehabilitation in terms of section 124(1) of the Insolvency Act, 1936 if an offer of composition is made and accepted by  $\frac{3}{4}$  of creditors in number and value, and after payment has been made or security given, or after all creditors' claims and sequestration costs are paid in full.<sup>50</sup>

<sup>46</sup> Some of these transactions are outlined under sections 35 and 46 of the Insolvency Act, 1936.

<sup>47</sup> The Insolvency Act, 1936 considers the ranking of creditors under of sections 95 to 103 and makes provision for three distinct types of creditors, namely: secured creditors who hold security for their claim over a specific asset or assets of the company; preferent creditors whose claims are not secured but nevertheless still rank above the claims of concurrent creditors; and lastly, concurrent creditors who do not hold any form of advantage over other creditors and are paid out of the balance of the free residue of the estate.

<sup>48</sup> Section 129 of the Insolvency Act, 1936.

<sup>49</sup> Andre Boraine and Melanie Roestoff, 'The Treatment of Insolvency of Natural Persons in South African Law,' *The World Bank Legal Review, Volume 5: Fostering Development through Opportunity, Inclusion, and Equity*, [web document] (2013) Available at: < [http://dx.doi.org/10.1596/978-1-4648-0037-5\\_ch4](http://dx.doi.org/10.1596/978-1-4648-0037-5_ch4) >, last accessed on 30 March 2014, p. 93.

<sup>50</sup> The provisions of section 25(1) of the Insolvency Act, 1936 also state that the insolvent estate vests in the trustee until a composition has been reached or rehabilitation granted.

(b) **Six months**

Under section 124(3) of the Insolvency Act, 1936, a debtor may apply to the court for an order for his rehabilitation after 6 (six) months of sequestration if no claims have been proven against the estate, provided the debtor has not been convicted of certain offences and has not previously been sequestered.

(c) **Twelve months**

If the debtor has not been convicted of certain offences and has not previously been sequestered, he/she may apply for rehabilitation after 12 months have elapsed from the date of the Master's confirmation of the first trustee's account in the estate.<sup>51</sup>

(d) **Three years**

Section 124(2)(b) of the Insolvency Act, 1936 allows a debtor who has previously been sequestered, to apply to the court for an order for his rehabilitation after 3 (three) years have lapsed from the date of the Master's confirmation of the first trustee's account of the estate, provided that the debtor has not been convicted of committing certain offences.

(e) **Five years**

If the debtor has been convicted of certain offences, section 124(2)(c) of the Insolvency Act, 1936 states that he/she may not apply for rehabilitation until five years have lapsed from the date of his/her conviction.

(f) **Ten years**

The debtor is automatically rehabilitated after the expiration of ten years under section 127A of the Insolvency Act, 1936. His/her automatic rehabilitation is however, contingent upon the application of an interested person to the court to order otherwise.

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<sup>51</sup> Section 124 (2)(a) of the Insolvency Act, 1936.

2.10.13 The effect of rehabilitation is to put an end to the effects of sequestration so as to enable the debtor to make a fresh start. It is, however, evident from the sequestration process outlined above that the procedure under the Insolvency Act, 1936 is aimed to ensure the orderly and fair distribution of the debtor's assets for the benefit of his/her creditors and not for the relief of the debtor himself/herself.

2.10.14 A recurring challenge in the development of an orderly and effective insolvency regime is the balancing of the interests between the creditors on the one hand and the interests of the debtor on the other hand. It is the LRDC's view that Namibia needs to analyse the efficiency of balancing the interests of both the debtor and the creditors and should also consider whether it needs to introduce alternative debt relief measures to assist over-burdened debtors.

## **2.11 The liquidation and winding-up of companies under the Companies Act, 2004**

2.11.1 The definition of a "debtor" in section 2 of the Insolvency Act, 1936 does not include companies and close corporations.<sup>52</sup> As a result, the Companies Act, 2004 as well as the Close Corporations Act, 1988 outline the framework for Namibia's corporate insolvency.<sup>53</sup>

2.11.2 A company can be wound up in one of two ways, namely winding-up by the court and voluntary winding-up.<sup>54</sup> A winding-up by the court commences and comes into effect when the application is filed with the Registrar of Court.<sup>55</sup> According to

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<sup>52</sup> When companies declare insolvency, we refer to the winding-up or liquidation of the entity rather than sequestration which applies only to individuals. Winding-up or liquidation means the procedure that must be followed to:

- (a) sell the company's assets;
- (b) pay the company's debts; or
- (c) divide any money left over between the members of the company.

<sup>53</sup> Companies Act, 2004 (Act No. 28 of 2004) and the Close Corporations Act, 1988 (Act No. 26 of 1988).

<sup>54</sup> Section 348 of the Companies Act, 2004 distinguishes between the modes of winding-up a company.

<sup>55</sup> Section 353 of the Companies Act, 2004.

section 349 of the Companies Act, 2004, the court has the power to wind-up a company under the following circumstances:<sup>56</sup>

- (a) the company has by special resolution resolved that it be wound up by the Court;
- (b) the company commenced business before the Registrar certified that it was entitled to commence business;
- (c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;
- (d) in the case of a public company, the number of members has been reduced below seven;
- (e) 75 per cent of the issued share capital of the company has been lost or has become useless for the business of the company;
- (f) the company is unable to pay its debts as described in section 350;
- (g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs; or
- (h) it appears to the Court that it is just and equitable that the company should be wound up.

2.11.3 The Companies Act, 2004 goes as far as stipulating who can apply for a court order to wind up the company. In this regard, section 351 of the Companies Act, 2004 states that an application to wind-up the company can be made by the company, one or more creditors, one or more of the members, or jointly by any combination of the above.

2.11.4 The voluntary winding-up of a company is commenced and effected by the filing of a special resolution with the Registrar of Companies.<sup>57</sup> The resolution must indicate whether it is a voluntary winding-up by creditors or by the members of the company. In order to qualify as a voluntary winding-up by the members of the company, the company must either have no debts or must be able to provide security

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<sup>56</sup> Evidently, the winding-up or liquidation of a company can take place for reasons other than insolvency. These circumstances are outlined under section 349 of the Companies Act, 2004.

<sup>57</sup> Section 357 of the Companies Act, 2004.

for the payment of all debts within twelve months from the date of filing the resolution.<sup>58</sup>

2.11.5 Creditors will usually bring a request to wind-up the company in the event where a company is unable to pay its debts.<sup>59</sup> The inability of the company to pay its debts is considered under section 350 of the Companies Act, 2004.

**350 When company is deemed unable to pay debts**

(1) A company or body corporate is deemed to be unable to pay its debts if-

(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than the prescribed amount then due-

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of anybody corporate not incorporated under this Act, has served that demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of that body corporate or in some other manner as the Court may direct,

and the company or body corporate has for 15 days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that not sufficient disposable property has been found to satisfy the judgment, decree or order or that any disposable property found did not on sale satisfy the process; or

(c) it is proved to the satisfaction of the Court that the company is unable to

<sup>58</sup> Section 355 of the Companies Act, 2004.

<sup>59</sup> Section 356 of the Companies Act, 2004 provides for the voluntary winding-up of creditors and states as follows:

(1) A voluntary winding-up of a company is a creditors' voluntary winding-up if the resolution contemplated in section 354 so states, but that resolution is of no force and effect unless it has been registered in terms of section 208; and

(2) Unless otherwise provided, in a creditors' voluntary winding-up, the liquidator may without the sanction of the Court exercise all powers by this Act given to the liquidator in a winding-up by the Court, subject to any directions which may be given by the creditors.

pay its debts.

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court must also take into account the contingent and prospective liabilities of the company.

2.11.6 Sections 344 and 422 of the Companies Act, 2004 make the law of insolvency applicable to companies that are unable to pay their debts and require the law of insolvency to be applied where the Companies Act, 2004 does not contain a provision dealing with a specific matter. Section 344 specifically provides as follows:<sup>60</sup>

**344 Law of insolvency to apply with the necessary changes**

In the winding-up of a company unable to pay its debts the law relating to insolvency must, in so far as it is applicable, with the necessary changes, be applied in respect of any matter not specially provided for by this Act.

2.11.7 A liquidation places a company under judicial protection. As at the date of liquidation, either through a winding-up by the court or through a voluntary liquidation, all the property of the company concerned are deemed to be in the custody and under the control of the Master of the High Court until a provisional liquidator has been appointed and has assumed office.<sup>61</sup> Similarly, all legal proceedings by and against the company are suspended and any civil attachment of any assets belonging to the company after the commencement of the winding-up become void.<sup>62</sup>

2.11.8 A liquidator appointed under the Companies Act, 2004 must realize the assets of the company and distribute the proceeds to satisfy the costs of the liquidation and the claims of creditors and distributes any remaining amounts among the shareholders

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<sup>60</sup> Companies Act, 2004.

<sup>61</sup> Section 366 of the Companies Act, 2004. A provisional liquidator is appointed by the Master of the High Court at the first meeting of creditors in accordance with section 375 of the Companies Act, 2004. Section 376 of the Companies Act, 2004 outlines the circumstances under which a final liquidator is appointed.

<sup>62</sup> Section 364 of the Companies Act, 2004.

according to their rights and interests in the company.<sup>63</sup> When a liquidator has performed all the duties prescribed by the Companies Act, 2004 and complied with all the requirements set by the Master of the High Court, then he/she may apply in writing to the Master of the High Court for a certificate to that effect.<sup>64</sup>

2.11.9 When the affairs of the company have been completely wound up, the Master of the High Court sends a certificate to that effect to the Registrar of Companies and a copy of it to the liquidator.<sup>65</sup> The Registrar of Companies records the date of dissolution and publishes a notice to that effect in the *Government Gazette*.<sup>66</sup> The company's legal existence is then terminated on the date of publication in the *Government Gazette*.<sup>67</sup>

2.11.10 The Companies Act, 2004 provides for alternatives to liquidation and winding; judicial management of the company and a compromise between the company and its creditors. These are explained briefly below:

#### **Judicial Management**

Judicial management is a concept introduced by the Companies Act, 2004 as a business rescue provision. The object of judicial management is to remove the need for liquidation and to enable a company which is unable to pay its debts or is unable to meet its obligations as a result of mismanagement or other special circumstance, to become a successful business concern if there is reasonable probability that if the company is placed under judicial management it would be enabled to pay its debts or meet its obligations.<sup>68</sup>

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<sup>63</sup> Section 347 of the Companies Act, 2004.

<sup>64</sup> Section 391 of the Companies Act, 2004.

<sup>65</sup> Section 425 of the Companies Act, 2004.

<sup>66</sup> *ibid.*

<sup>67</sup> According to Ian Cox, *South Africa: The Dangers Of Deregistration*, [web document] (2012). Available at: <<http://www.mondaq.com/x/174154/Corporate+Company+Law/The+Dangers+Of+Deregistration>>, last accessed on 26 May 2014, "dissolution is the final step that consigns a juristic personality to oblivion. All rights and obligations which once vested in the entity are brought to an end. They do not exist in limbo, awaiting a possible restoration".

<sup>68</sup> Section 433 of the Companies Act, 2004 deals with the circumstances in which company may be placed under judicial management.



Any person who, under section 351 of the Companies Act, 2004 is entitled to make an application to court for the winding-up of the company is entitled under section 433(2) of the Companies Act, 2004 to bring an application to court for a judicial management order of the company.<sup>69</sup>

In terms of section 438(2) of the Companies Act, 2004 the court considers the opinions of the members of the company, the reports of the provisional judicial manager, the Master of the High Court, and the Registrar of Companies in order to decide whether or not to grant the final judicial management order.<sup>70</sup>

The main effect of judicial management is to place a moratorium on the debt payments of the company.<sup>71</sup> At the same time, the directors of the company are divested of their powers to control the company and a judicial manager is appointed by the court with the aim of rectifying the financial problems experienced by the company, enabling it once again to become a successful concern.<sup>72</sup>

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<sup>69</sup> The overriding consideration, which will influence the court in deciding whether or not to grant a judicial management order is whether the applicant can demonstrate that the company has a reasonable prospect of being able to surmount its present difficulties and thrive. Trollip J in the case of ***Bahnemann v Fritzmor Exploration (Pty) Ltd 1963 (2) SA 249 (T)*** stated that “It is clear that the respondent should be placed in liquidation unless the Court is satisfied that judicial management would in the circumstances be preferable or more appropriate. Generally, where a company is unable to pay its debts, an unpaid creditor has a right *ex debito justitiae* to have it placed in liquidation. Consequently, the alternative procedure of judicial management must be regarded as an extraordinary and special procedure”.

<sup>70</sup> Erasmus J in ***Ladybrand Hotel (Pty) Ltd v Segal and Another 1975(2) SA 357 (O)*** mentioned three aspects that play a pivotal part in the determination of whether a final order of judicial management can be granted. First, the lack of information brought before the court. This information includes trading and profit and loss accounts over a few months which give a true reflection of the conduct of the company as regards various rates, taxes and future foreseen expenditures. Second, the merits of the application for judicial management or such information as might be gathered from the papers. This includes the opinions of the creditors, and members of the company, the report from the judicial manager, the report from the Master of the High Court and the Registrar of Companies which will all be weighed up by the court. Finally, the affidavits of the provisional judicial manager. This is a factual report based on the observations and opinions of the judicial manager.

<sup>71</sup> George Mutsa Museta, *The Development of Business Rescue in South African Law*, [web document] (2011). Available at: <<http://upetd.up.ac.za/thesis/available/etd-09102012-141143/unrestricted/dissertation.pdf>>, last accessed on 10 June 2014. Museta defines a moratorium as ‘a temporary stopping of an activity through some form of agreement’.

<sup>72</sup> A provisional judicial manager is appointed under section 434 of the Companies Act, 2004 and assumes offices and the duties under section 436 until a final judicial manager is appointed under the Companies Act, 2004.

The judicial manager or any person having an interest in the company may apply for the cancellation of the judicial management order.<sup>73</sup> The cancellation of a judicial management order may be granted if it appears to the court that the purpose of a judicial management order has been fulfilled or, that for any reason it is undesirable that that order should remain in force.<sup>74</sup> In cancelling a judicial management order the court is directed by section 447(2) of the Companies Act, 2004 to give any directions which are necessary for the resumption of the management and control of the company by the officers of the company, including directions for the convening of a general meeting of members for the purpose of electing directors of the company.

Even if judicial management exists as an alternative to the liquidation or winding-up of a company, stringent requirements must be met before a court will grant an order for the company's judicial management. This is evident from the case of ***Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd*** where the court found that a judicial management order cannot be easily granted, as judicial management is an extraordinary remedy that had to be treated by the courts as such.<sup>75</sup> In this event, an applicant seeking an order for the judicial management of a company has to demonstrate that a reasonable probability exists that, if given the protection of judicial management, the company would be able to pay its debts and be restored to a successful concern. Often, proving this requirement is not an easy task and many companies eventually find themselves under liquidation in any event,

If Namibia agrees that judicial management has not proved to be a useful business rescue tool in practice, then the question remains as to what can be done to keep financially troubled companies afloat so as to stave off liquidations and winding-up procedures that result in the dissolution of companies.

### **Compromise and arrangement between company, its members and creditors**

<sup>73</sup> The cancellation of a judicial management order is provided for under section 447 of the Companies Act, 2004.

<sup>74</sup> *ibid.*

<sup>75</sup> 2001 (2) SA 727 (C).

The main object of section 317 of the Companies Act, 2004 is to rearrange the company's liabilities by compromise. Although the Companies Act, 2004 defines an 'arrangement', it does not define a 'compromise'.<sup>76</sup> In the case of ***Mbambus v Motor Vehicle Accident Fund***, Van Niekerk J accepted the definition of a compromise as 'an agreement between litigants for the settlement of a matter in dispute'.<sup>77</sup> Similarly, the ROSC goes further by stipulating that 'a compromise (*transactio*) is an agreement to settle a dispute over rights or to modify undisputed rights where a difficulty exists over their enforcement'.<sup>78</sup>

In terms of the Companies Act, 2004, a court may order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, on the application of the company itself or any creditor or member of the company or, in the case of a company being wound up, of the liquidator, or if the company is subject to a judicial management order, of the judicial manager, where any compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them.<sup>79</sup>

If the compromise or arrangement is agreed to by a majority in number representing three-fourths in value of the creditors or class of creditors, and votes of members or class of members present and voting (in person or by proxy), then a court may sanction the compromise or arrangement.<sup>80</sup> The nature of a sanctioned compromise or

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<sup>76</sup> An 'arrangement' is defined in section 317(1) of the Companies Act, 2004 as 'a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods'.

<sup>77</sup> (Case No I 3299-2007) [2013] NAHCMD 2 (14 January 2013).

<sup>78</sup> ROSC, 52.

<sup>79</sup> Section 317(2) of the Companies Act, 2004. In ***Ex parte De Villiers NO: In re Carbon Developments (Pty) Ltd (in Liquidation) 1993 (1) SA 493 (A)*** at 508 Goldstone JA held that the court must be satisfied that the offer of compromise is *prima facie* fair and reasonable and that it should be placed before the creditors for their consideration before it will order a meeting for the consideration of the compromise.

<sup>80</sup> Section 317(3) of the Companies Act, 2004. According to section 317(6), the court, in determining whether the compromise or arrangement should be sanctioned or not, must have regard to the number of members or members of a class present or represented at the meeting referred to in footnote 76 above, voting in favour of the compromise or arrangement and to the report of the Master containing full particulars regarding any contraventions or offences, suspected contraventions or offences in terms of section 406(2) of the Companies Act, 2004 and a report as to whether or not any director or officer or past director or officer of the company is or appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company under the Companies Act, 2004.

arrangement was considered by the Supreme Court in ***Weatherly International PLC v Bruni and Others***.<sup>81</sup> In this case, Chomba AJA had this to say:

“Once a Court has sanctioned the compromise or scheme of arrangement, the compromise or arrangement becomes binding on all, even those who have not consented to it.”

One advantage of a compromise under the Companies Act, 2004, at least from the perspective of the directors of a company, is that a director, who might otherwise have been faced with personal liability for a company's debts by reason of his/her being party to reckless or fraudulent trading in accordance with section 430 of the Companies Act, 2004, will escape accountability if a compromise is entered into between the company and its creditors in terms of which the company's debts are extinguished. This position is confirmed in the decision of ***Freidlein Company (Pty) Ltd v Simaan and Others*** whereby Kathree-Setiloane J stated that “in the circumstances, I am of the view that upon the sanctioning and implementation of an offer of compromise and scheme of arrangement, in terms of which creditors are deemed to have ceded their claims against the company to the proposer, any rights which they might have against representatives of the company, in terms of section 424(1) of the Companies Act, 1973 [equivalent to section 430 of the Companies Act, 2004] are extinguished, (Emphasis added).”<sup>82</sup>

A significant disadvantage of a compromise however, is that creditors are not subject to a moratorium and the company is still exposed during these proceedings to liquidation (if it is not already in liquidation). So as with the application for a judicial management order, compromises remain significantly underutilized in Namibia, leaving liquidation as the preferred and most often used procedure to assist companies who are unable to pay their debts or meet their obligations.<sup>83</sup>

<sup>81</sup> (SA 80/2011) [2013] NASC 16 (15 November 2013).

<sup>82</sup> (2009/45807) [2012] ZAGPJHC 16 (8 February 2012).

<sup>83</sup> The ROSC confirms this view of the LRDC when it reports at pages 79 – 80 that ‘at present, it appears that judicial management is hardly ever used. As noted elsewhere, the current practice in Namibia is heavily weighted towards liquidation. There is little practice of rehabilitation – with the lack of uptake of the compromise and judicial management procedures’.

2.11.11 The dissolution of companies affects not only creditors but also a multiplicity of interests, including the interests of the companies' members, employees, directors and officers and the public interest in the proper administration of companies. The democratic dispensation in Namibia as a well as the pace of change in the global economy, demands the need for the introduction of effective company rescue provisions.<sup>84</sup> However, these provisions will require careful consideration of the special requirements of the Namibian economy in order to reach a conclusion as to what is best for the country.

## **2.12 The liquidation and winding-up of close corporations under the Close Corporations Act, 1988**

2.12.1 The Close Corporations Act, 1988 provides for the establishment and winding-up of close corporations in Namibia.<sup>85</sup> In terms of the Close Corporations Act, 1988 the provisions of the Companies Act, 2004 are relevant and must be applied to the winding-up of close corporations in respect of any matter not specifically provided for in the former.<sup>86</sup>

2.12.2 As with companies, close corporations may be wound up voluntarily or by an order of court.<sup>87</sup> A close corporation may be wound up voluntarily if all its members agree to a voluntary winding-up and sign a written resolution to that effect.<sup>88</sup> A corporation may be wound up by a court under the following circumstances:<sup>89</sup>

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<sup>84</sup> The Discussion Paper considers the introduction of business rescue provisions in Chapter 5.

<sup>85</sup> (Act No. 26 of 1988).

<sup>86</sup> Section 66(1) of the Close Corporations Act, 1988 states that 'the provisions of the Companies Act which relate to the winding-up of a company, including the regulations made thereunder, (except sections 337, 338, 344, 345, 346(2), 347(3), 349, 364, 365(2), 367 to 370, inclusive 377, 387, 389, 390, 395 to 399, inclusive, 400(1)(b), 401, 402, 417, 418, 419(4), 421, 423 and 424), shall apply *mutatis mutandis* and in so far as they can be applied to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.'

<sup>87</sup> The Close Corporations Act, 1988 (Act No. 26 of 1988) incorporates the applicable sections of the Companies Act, 2004 dealing with winding-up proceedings by reference. The applicable sections of the Companies Act, 2004 should therefore be read as if it prescribes the proceedings for both Companies and Close Corporations.

<sup>88</sup> Section 67(1) of the Close Corporations Act, 1988. Section 67(4) provides that a resolution by members for the voluntary winding-up of the close corporation will not take effect until it has been registered by the Registrar of Companies.

<sup>89</sup> Section 68 of the Close Corporations Act, 1988.

- (a) members having more than one half of the total number of votes of members, have so resolved at a meeting of members called for the purpose of considering the winding-up of the corporation, and have signed a written resolution that the corporation be wound up by a Court;
- (b) the corporation has not commenced its business within a year from its registration, or has suspended its business for a whole year;
- (c) the corporation is unable to pay its debts,<sup>90</sup> or
- (d) it appears on application to the Court that it is just and equitable that the corporation be wound up.<sup>91</sup>

2.12.3 The Master of the High Court will appoint a liquidator as soon as a resolution for the voluntary winding-up of the close corporation has been registered with the Registrar of Companies or when a provisional order for the winding-up of a close corporation has been given by the court.<sup>92</sup> The liquidator has a duty to investigate the personal liability of members to make repayments and, where necessary, to take steps to enforce the repayment and to establish whether any member or other person is jointly and severally liable for the debts of the close corporation.<sup>93</sup>

2.12.4 When the affairs of a close corporation have been completely wound up, the Master of the High Court will send a certificate to this effect to the Registrar and a copy thereof to the liquidator. The Registrar will then record the date of dissolution and publish a notice to this effect in the *Government Gazette*.

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<sup>90</sup> According to section 69, a close corporation is unable to pay its debts if-

(1)(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for twenty-one days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the corporation is returned by a sheriff, or a messenger of a magistrate's court, with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order, or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts.

(2) In determining for the purposes of subsection (1) whether a corporation is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the corporation.

<sup>91</sup> Section 68 of the Close Corporations Act, 1988.

<sup>92</sup> Section 74(2) of the Close Corporations Act, 1988.

<sup>93</sup> Sections 70 and 73 of the Close Corporations Act, 1988.

2.12.5 As with the Companies Act, 2004, the Close Corporations Act, 1988 also provides an alternative to the liquidation and winding-up processes through the offer of a composition. A composition is an agreement not only between the insolvent debtor and his or her creditors but also between the creditors themselves in terms of which the creditors agree to accept partial payment of their claims in full and final settlement.<sup>94</sup> As far as the Insolvency Act, 1936 is concerned, an insolvent debtor may make an offer of composition to his or her trustee at any stage after the first meeting of creditors.<sup>95</sup> The trustee must consider the offer and if he or she is of the opinion that the creditors will accept, he or she notify them of the offer and convenes a general meeting of creditors to vote on the issue. Once accepted, the composition binds every person who was given due notice and any person who was entitled to vote at the meeting called for that purpose. The acceptance of the composition can divest the liquidator of the close corporations property and re-invest it with the latter.<sup>96</sup>

2.12.6 Many Small and Medium Enterprises (SMEs) in Namibia take the form of close corporations.<sup>97</sup> The Government identified SMEs as having the potential for significant employment-creation thereby contributing to the overall economic growth of Namibia.<sup>98</sup> In fact, the Indian Institute of Corporate Affairs describes SMEs as the

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<sup>94</sup> C.G. Van der Merwe and J.E. Du Plessis (eds), *Introduction to the Law of South Africa* (The Hague: Kluwer Law International, 2004), p. 200.

<sup>95</sup> Section 120(1) of the Insolvency Act, 1936. Section 72 of the Close Corporations Act, 1988 provides that the provisions of sections 119, 120, 123 and 124(1) and (5) of the Insolvency Act, 1936 shall *mutatis mutandis* apply to close corporations in respect of the procedure and effect of composition made.

<sup>96</sup> Section 120(2) of the Insolvency Act, 1936. The Close Corporations Act, 1988 provides in section 72(2)(a) that the provisions of sections 119, 120, 123 and 124(1) and (5) of the Insolvency Act, 1936 shall *mutatis mutandis* apply in respect of the procedure and effect of composition made.

<sup>97</sup> SMEs are defined by the Ministry of Trade & Industry according to the number of employees and turnover. Businesses operating in the manufacturing sector and employing fewer than ten people with an annual turnover of N\$1,000,000-00 qualify for SME status. On the other hand, businesses operating in the provision of services and employing fewer than five people with an annual turnover of N\$250,00-00 can also qualify for SME status. SMEs can take the form of a sole proprietorship or an association of persons or a partnership as well. The fact that the registration process for close corporations at the Ministry of Trade & Industry provides for a simpler and cheaper option for many entrepreneurs means that close corporations are often the preferred form of conducting business as an SME.

<sup>98</sup> Herbert Jauch, *The Role of SMEs in Employment Creation and Economic Growth: Lessons from Other Countries*, [web document] (2010) < <http://vivaworkers.org/wp-content/uploads/2013/02/SMEs-and-Development-2010.pdf> >, last accessed on 11 June 2014.

backbone of the industrial economy, the drivers of developing and developed economies, and even the engine of growth for industry.<sup>99</sup>

2.12.7 The business failure of SMEs in itself should not bar the entrepreneur from carrying on business activities in viable fields of operation that will benefit the Namibian economy. The provision for the liquidation and the winding-up of close corporations means that close corporations that become insolvent will most likely be dissolved. It is this lack of an effective insolvency legal framework that has been identified as one of the obstacles in the growth of SMEs in Namibia.<sup>100</sup>

2.12.8 In fact, the ROSC agrees with the view of the LRDC that despite the importance of SMEs for emerging markets, with the exception of liquidation provisions, little has been done in Namibia to address the lack of effective alternative measures available to enterprises who are unable to pay their debts or to meet their obligations. Furthermore, the UNCITRAL Working Group V (Insolvency Law) provides that the mechanisms provided by the UNCITRAL Legislative Guide are not sufficient to address all of the needs of MSMEs in light of the significant impact that MSMEs have on the economy and on economic development.<sup>101</sup>

2.12.9 The Government's vision for Namibia's economic growth and industrialization demonstrates the role that SMEs can play in the transformation of Namibia into a

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<sup>99</sup> The Indian Institute of Corporate Affairs, Achieving Effective & Efficient Insolvency Regimes for Small and Medium Enterprises, *Emerging Insolvency Framework in India: Issues & Options*, [web document] (2010) < [http://www.iica.in/images/confdetailpaper/Country\\_Report\\_on\\_Corporate\\_Insolvency\\_laws.pdf](http://www.iica.in/images/confdetailpaper/Country_Report_on_Corporate_Insolvency_laws.pdf) >, last accessed on 20 June 2014.

<sup>100</sup> Herbert Jauch, *The Role of SMEs in Employment Creation and Economic Growth: Lessons from Other Countries*, [web document] (2010) < <http://vivaworkers.org/wp-content/uploads/2013/02/SMEs-and-Development-2010.pdf> >, last accessed on 11 June 2014.

<sup>101</sup> The working group considered the mechanisms suitable for the insolvency of micro, small and medium-sized enterprises (MSMEs) at its 45<sup>th</sup> session held from 21 – 25 April 2014, New York. This document can be accessed from the United Nations Commission on International Trade Law, (UNCITRAL) *Mechanisms suitable for the Insolvency of Micro, Small and Medium-sized Enterprises* [web document] (2014) <[http://www.uncitral.org/uncitral/en/commission/working\\_groups/5Insolvency.html](http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html)>, last accessed on 15 June 2014.



knowledge-based society.<sup>102</sup> In order to increase the number of SMEs in the country, Namibia may benefit by considering the development of an efficient insolvency regime which allows the SMEs to close down their business quickly and efficiently so as to enable the quick distribution of its assets among the creditors so that it can be dissolved and the economic assets deployed in the enterprise redeployed in more viable activity. This will inevitably bring more flexibility to the economy and provide significant opportunities for the development of new businesses, ideas and skills.

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### **3. STAKEHOLDER INPUT AND RECOMMENDATIONS**

3.1 The following is the input received by the LRDC at the consultative stakeholder meetings held between 01 – 10 July 2013 regarding the review and reform of the Insolvency Act, 1936:

#### **3.1.1 The Creditors' interest in the Administration of the Insolvent Estate**

3.1.1.1 There is a lack of interest on the part of creditors in the administration of insolvent estates due to the time it takes to wind up insolvent estates and the possibility for concurrent creditors to receive any benefit in the winding-up or sequestration of the insolvent estate.

#### **3.1.2 The Prohibition of Post-Insolvency Set-Off/Netting**

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<sup>102</sup> The Government of the Republic of Namibia, *Vision 2030* [web document] (2004), < <http://www.gov.na/vision-2030> >, last accessed on 24 March 2014. Namibia's Vision 2030 was launched in June 2004 by the Founding President, Dr Sam Nujoma. The Vision's rationale is to provide long-term policy scenarios on the future course of development in the country at different points in time up until the target year of 2030.

3.1.2.1 The prohibition of post-insolvency set-off means that financial institutions will write off vast amounts of money and have no further legal recourse to recovery, except to become a concurrent creditor with no hope of receiving any benefit from the winding-up or sequestration of the insolvent estate.

3.1.2.2 The power conferred by the Insolvency Act, 1936 to trustees enables the latter to 'cherry-pick' which transactions to uphold and which to repudiate, often to the detriment of financial institutions who avail credit to the debtor. In terms of close-out netting, a foreign entity would not be protected against the insolvency of a local entity under the Insolvency Act, 1936.<sup>103</sup> This would inhibit foreign companies to do business in Namibia with Namibian entities and ultimately obstruct the flow of international trade in the country.

### **3.1.3 The Regulation and Administration of Insolvency Practitioners or Administrators**

3.1.3.1 There is no statutory body for the control of insolvency practitioners in Namibia. Many of the insolvency practitioners are attorneys and accountants who are subject to discipline by their respective statutory professional bodies.

3.1.3.2 The establishment and incorporation of a statutory body to regulate and administer insolvency practitioners would address persistent complaints that some practitioners are incompetent and even dishonest and would ensure impartiality.

### **3.1.4 The Unification of Insolvency Legislation**

3.1.4.1 The Insolvency Act, 1936 applies, in so far as it is applicable in the winding-up of a company unable to pay its debts in respect of any matter not specifically provided for in the Companies Act, 2004. Where the Companies Act, 2004

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<sup>103</sup> *Vide* footnote 9.

specifically provides for winding-up however, the provisions often differ from the provisions of the Insolvency Act, 1936 in form and in respect of substance or principle.

3.1.4.2 The substantial differences between the provisions that apply to insolvency and those that apply to the winding-up of companies are historically due to the distinguished differences between natural and corporate persons. A unified insolvency legislation to deal with the insolvency of all entities and persons in Namibia, *i.e.* natural persons, partnerships, companies, close corporations and even the State Owned Enterprises (SOEs) would go a long way to ensure that our insolvency legislation will increase transparency, fairness, consistency and efficiency.

### **3.1.5 Balance the Interests of both Creditors and Debtors in Insolvency Proceedings**

3.1.5.1 Modern insolvency laws should seek to strike a balance between the rights of creditors and giving debtors an opportunity to make a fresh start, while at the same time expecting debtors to act honestly and to assist in the winding up of their insolvent estates.

3.1.5.2 A fresh start for debtors means Namibia must introduce effective rehabilitative procedures to assist viable companies.

### **3.1.6 The use of Modern Technology in Insolvency Proceedings**

3.1.6.1 The improved use of information technology in the area of insolvency law will bring about a state where a third party would be able to acquaint itself with details concerning the liquidation or sequestration of a particular individual or legal entity much more quickly.

3.1.6.2 In addition, insolvency proceedings must take cognisance of the rate at which information technology is growing and in particular the various means for

communication developed in the process of this growth such as notice by telefax and electronic mail, and the electronic transfer of funds in commercial transactions.

3.2 The inputs and recommendation received open the floor for further consultation on a complete and holistic review of the Insolvency Act, 1936.

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## 4. THE CONTEXT FOR REFORM

4.1 In the past 20 years there have been a number of significant developments concerning insolvency law and practice in Common Law countries.<sup>104</sup> Insolvency law provides the legal basis for regulating the affairs of individuals and legal entities who are unable to pay their debts, or whose liabilities exceed their assets.<sup>105</sup> The Insolvency Act, 1936 in particular aims to sequestrate the estate of insolvent debtors for the benefit of creditors.<sup>106</sup> All the same, it appears that the current framework of Namibia's insolvency law exists primarily for the benefit of creditors and not for the relief of harassed debtors.<sup>107</sup>

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<sup>104</sup> Andrew Keay "To Unify or not to Unify Insolvency Legislation: International Experience and the latest South African Proposals", *De Jure*, 1 (1999), pp. 62-79.

<sup>105</sup> R, Sharrock, Kathleen van der Linde & Alastair Smith, *Hockly's Insolvency Law* (8th Ed.) (South Africa, Cape Town: Juta & Co Limited, 2006), p.3. The authors considered the meaning of insolvency and state that "in broad and generic terms, a person or partnership is insolvent when he is unable to pay his debts. In legal terms, however, the test for insolvency is whether or not the debtor's liabilities, fairly estimated, exceed his assets, fairly valued. Inability to pay debts is, at most, merely evidence, not conclusive in itself, of insolvency".

<sup>106</sup> Innes CJ in *Walker v Syfret NO 1911 AD 141* explains the object of the Insolvency Act, 1936 as "to ensure a due distribution of assets among creditors in order of their preference".

<sup>107</sup> Apart from the dictum expressed by Holmes J in *Ex parte Pillay 1955 (2) SA 309 (N)* where he states that "(t)he machinery of voluntary surrender was primarily designed for the benefit of creditors, and not for the relief of harassed debtors", the objective behind the liquidation and winding-up procedures under the Companies Act, 2004 and the Close Corporations Act, 1988 is to realise the assets, pay off the liabilities and distribute the surplus as expeditiously as possible. By implication, our insolvency regime is geared towards protecting the interests of creditors.

4.2 Since the introduction of the Insolvency Act, 1936 in Namibia, there has only been one significant review of insolvency law which culminated in the Insolvency Amendment Act, 2005.<sup>108</sup> Although the Insolvency Amendment Act, 1973 constitutes a key review of insolvency law in Namibia, the Insolvency Act, 1936 is still based on the framework and general principles of South Africa's Insolvency Law, 1936.<sup>109</sup> Significantly, the framework upon which our insolvency legislation is based has been questioned in the land of its origin, South Africa, where the review of insolvency law resulted in the publication of two draft Bills and Explanatory Memoranda in 1996 and 1999 respectively.<sup>110</sup>

4.3 Today, the object of the Insolvency Act, 1936 exhibits a fragmented insolvency legal framework that is impractical and inconsistent with the international best practice of balancing the varying interests of both the creditor and the debtor through the provision of debt relief measures.<sup>111</sup> This inconsistency, on its own merits, necessitates the review of insolvency law in Namibia as a priority.

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<sup>108</sup> Act No. 12 of 2005.

<sup>109</sup> The Insolvency Amendment Act, 2005 (No. 12 of 2005) amends the Insolvency Act, 1936 by inserting and deleting certain definitions and references to laws that are not applicable in Namibia. Furthermore, the Insolvency Amendment Act, 2005 abolishes the requirement that certain notices be published in newspapers; it provides for the prescription of certain forms, amounts, fees and tariffs by the Minister by regulation; it adjusts certain provisions to be compatible with the Namibian Constitution and other laws of Namibia; it increases certain amounts specified in the Insolvency Act, 1936; it deletes certain provisions which are no longer applicable; it provides for certain notices to be given by registered post; it provides for the termination of an employee's contract of service in accordance with the Labour Act, 2007 (Act No. 11 of 2007); it provides for the convening of a special meeting of creditors for the purpose of interrogating an insolvent; it provides that when a trustee disputes a claim, the trustee is required to furnish the claimant with reasons; it provides that the High Court of Namibia may on application authorize the appointment of a person as trustee who is disqualified on certain grounds; it provides for the deletion of the qualification that the Master of the High Court of Namibia need not give the actual reason for declining to confirm the election of a trustee; it requires an insolvent to give notice of the intention to apply for rehabilitation to all known creditors and to specify the assets of the insolvent estate; it abolishes the requirement that an insolvent must keep proper records in Dutch or German; it extends the Minister's power to make regulations; it substitutes certain expressions and repeals the Schedules to the Insolvency Act, 1936.

<sup>110</sup> See The South African Law Commission Report: Project 63 on the Review of Insolvency Law containing Explanatory Memoranda (Volume 1) and Draft Insolvency Bill (Volume 2) [web document] (2000) < [http://www.justice.gov.za/salrc/reports/r\\_prj63\\_insolv\\_2000apr.pdf](http://www.justice.gov.za/salrc/reports/r_prj63_insolv_2000apr.pdf) >, last accessed on 17 June 2014.

<sup>111</sup> According to Anthony I. Idigbe and Okorie Kalu, *Insolvency & Restructuring – International: Best practice and tailored Reforms in African insolvency: Lessons from INSOL* [web document] (2012) <<http://www.internationallawoffice.com/newsletters/detail.aspx?g=c8981483-aa46-495c-aec7-ff585991ab93>>, last accessed on 12 February 2014, an effective insolvency regime in the context of most African countries is described as one that is flexible enough to assist a struggling debtor without

4.4 The review of our legal insolvency framework should be undertaken with the understanding of the role that insolvency law plays in the economic development of any country. Garrido discusses the association between insolvency law and economic development as follows:<sup>112</sup>

“Insolvency law serves several important functions in an economy. It is a useful instrument to reallocate assets to more productive uses, and an appropriate reorganization or debt-restructuring framework provides instruments to preserve valuable businesses under distress”.

4.5 As stated previously in this Discussion Paper, the Government’s vision for Namibia’s economy is cemented in its Vision 2030.<sup>113</sup> Vision 2030 outlines the government’s commitment to enhance the standard of living and to improve the quality of life for all Namibians by transforming the Namibian political and economic landscape in areas such as land reform, housing, the environment, health and the general economy.<sup>114</sup> The significant relationship between insolvency law and economic growth highlights the role of government to ensure the development of an effective regulatory framework to transform the general economy.<sup>115</sup>

4.6 In order to develop an effective insolvency regulatory framework, reform across the world illustrates the imperative need for each country to engage in the holistic law reform of insolvency legal frameworks. A holistic approach to insolvency law reform looks at the broader picture of how individuals, partnerships as well as companies and close corporations are sequestrated, liquidated and wound-up and the

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sequestrating his estate and one that is business rescue oriented without sacrificing the interests of creditors.

<sup>112</sup> Jose M. Garrido, *The Role of Personal Insolvency in Economic Development: An Introduction to the World Bank Report on the Treatment of the Insolvency of Natural Persons*, The World Bank Legal Review, Volume 5: *Fostering Development through Opportunity, Inclusion, and Equity*, [web document] (2013), < [http://dx.doi.org/10.1596/978-1-4648-0037-5\\_ch4](http://dx.doi.org/10.1596/978-1-4648-0037-5_ch4) >, last accessed on 30 March 2014, p. 111.

<sup>113</sup> The Government of the Republic of Namibia, *Vision 2030* [web document] (2004), < <http://www.gov.na/vision-2030> >, last accessed on 24 March 2014.

<sup>114</sup> *ibid.*

<sup>115</sup> The need for an insolvency framework manifests itself in all societies in which access to credit becomes the foundation for the development of economic activities.

need for introducing rescue provisions to assist enterprises which encounter difficulties that they might be able to overcome.

4.7 This Discussion Paper identifies key issues that arise in the development of an orderly and effective insolvency regulatory framework for Namibia. In doing so, the Discussion Paper raises awareness about the importance of having an orderly and effective insolvency regime in a changing global economy and sets the framework for detailed consultations to ensure that what is undertaken is a holistic review of Namibia's insolvency laws.

## 5. CHALLENGES FOR REFORM

5.1 The effective regulation of insolvency regulatory frameworks in any society is an ever-changing challenge. One of the obvious challenges is to achieve the 'right' balance of competing interests between creditors and insolvent debtors in the sequestration, liquidation and winding-up processes.<sup>116</sup> Evans explains this challenge in the following manner:<sup>117</sup>

“An efficient insolvency law mechanism must strike a balance between the interests of all stakeholders, taking into account also the interests of the relevant social, political and other policy considerations that impact on the economic and legal aspects of insolvency proceedings”.

5.2 Although the insolvency laws of countries differ in many important respects, there are general legal considerations that must be in place to offer protection to both creditors and debtors. The Legal Department of the International Monetary Fund (IMF) identifies two overall objectives for an effective insolvency regime that recognises the

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<sup>116</sup> Mary-Alice Brady, 'Balancing the Rights of Debtors and Creditors: §522 (f) (1) of the Bankruptcy Code', *Boston College Law Review*, 39/5/5 (1998), p. 1215.

<sup>117</sup> Roger G. Evans, 'Part 1: Introduction', *A Critical Analysis of problem areas in respect of Assets of Insolvent Estates of individuals* [web document] (2009), Available at: <<http://upetd.up.ac.za/thesis/available/etd-05242009-143134/>>, last accessed on 15 November 2013.

interests of creditors and debtors in the sequestration, liquidation and winding-up processes:<sup>118</sup>

### **General Objectives and Features of Insolvency Procedures**

The first overall objective is *the allocation of risk among participants in a market economy in a predictable, equitable, and transparent manner*. The achievement of this objective plays a critical role in providing confidence in the credit system and fostering economic growth for the benefit of all participants. For example, in terms of the creditor-debtor relationship, the ability of a creditor to commence insolvency proceedings against a debtor as a means of enforcing its claim reduces the risk of lending and, thereby, increases the availability of credit and the making of investment more generally. An insolvency law also serves to allocate risk among different creditors, also for the benefit of borrowers. For example, if the insolvency law affords secured creditors special treatment vis-à-vis unsecured creditors, such treatment protects the value of security, which may be particularly important for those debtors that, because of their credit risk, cannot obtain (or cannot afford) unsecured credit.

The second objective of an insolvency law is to protect and maximize value for the benefit of all interested parties and the economy in general. This objective is most obviously pursued during rehabilitation procedures as a way to enhance the value of creditors' claims through the going-concern value of the enterprise, and also as a means of providing a "second chance" to the shareholders and the management of the debtor.

5.3 The challenge therefore is to find a balance that effectively meets the needs of these parties. In so doing, insolvency laws must nevertheless, set forth clear rules and

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<sup>118</sup> The International Monetary Fund, the Legal Department, *Orderly & Effective Insolvency Procedures: Key Issues*, [web document] (1999). Available at: <http://www.imf.org/external/pubs/ft/orderly/> , last accessed on 20 June 2014.



provide for predictable results so that creditors and debtors can plan their future relationship.<sup>119</sup>

5.4 Another challenge to be considered in the development of an effective insolvency regime is the question of how the reform of the Insolvency Act, 1936 will modify other substantive laws.<sup>120</sup> There can be complex interplay between insolvency law and other legal regimes, as the reform of Namibia's insolvency regime affects many pieces of legislation including (but not limited to) the following statutes:<sup>121</sup>

5.4.1 Companies Act, 2004 (Act No. 28 of 2004);<sup>122</sup>

5.4.2 The Close Corporations Act, 1988 (Act No. 26 of 1988);<sup>123</sup>

5.4.3 The Credit Agreements Act, 1980 (Act No. 75 of 1980);<sup>124</sup>

5.4.4 The Usury Act, 1968 (Act No. 73 of 1968);<sup>125</sup> and

5.4.5 The Income Tax Act, 1981 (Act No. 24 of 1981).

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<sup>119</sup> Mary-Alice Brady, 'Balancing the Rights of Debtors and Creditors: §522 (f) (1) of the Bankruptcy Code', *Boston College Law Review*, 39/5/5 (1998), p.1215.

<sup>120</sup> The United Nations Commission on International Trade Law, UNCITRAL *Legislative Guide on Insolvency Law* [web document] (2004). Available at: <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html)>, last accessed on 21 April 2014.

<sup>121</sup> *ibid.* The UNCITRAL Legislative Guidelines on Insolvency Law state that other 'relevant laws may include labour laws that provide certain protections to employees, laws that limit the availability of set-off and netting, laws that limit debt-for-equity conversions and laws that impose foreign exchange and foreign investment controls that could affect the content of a reorganization plan.'

<sup>122</sup> The relationship between insolvency law and company law becomes relevant in the liquidation and winding-up procedures of companies under the Companies Act, 2004. Any reformative effort to the Insolvency Act, 1936 must thus consider the impact that such reform will have on the Companies Act, 2004.

<sup>123</sup> As with companies, the relationship between insolvency law and close corporations is evident from the liquidation and winding-up procedures of close corporations under the Close Corporations Act, 1988.

<sup>124</sup> The Credit Agreements Act, 1980 regulates certain transactions in terms of which movable goods are purchased or leased on credit or certain services that are rendered on credit. It also repeals the Hire Purchase Act, 1942. The relationship between insolvency law and credit agreements is self-explanatory: insolvency results in the failure to repay credit. Without effective procedures that are applied in a predictable manner, creditors may be unable to collect on their claims, which will adversely affect the future availability of credit.

<sup>125</sup> The Insolvency Act is the legal basis upon which an individual's solvency is examined and how their estate is dealt with. The implication on the Usury Act, 1968 is that when one is declared insolvent, they are limited by law to enter into certain financial transactions, as governed by the Usury Act, 1968. Section 5(3) of the Usury Act, 1968 on 'limitation of sum recoverable from borrower, credit receiver or lessee' states that in any proceedings in terms of the Insolvency Act, 1936, no moneylender or credit grantor or lessor shall prove a claim in respect of a money lending transaction or a credit transaction or a leasing transaction for any sum for which in terms of this section he cannot obtain judgment.

5.4.5.1 The Common Law position on the taxability of gross income is as a result of the definition of *income*, in that such includes debts and rights of action. This position is confirmed by the case of **Lategan v Commissioner for Inland Revenue** wherein Watermeyer J stated that ' . . . the word "amount" must be given a wider meaning, and must include not only money, but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value' and that 'if this view be correct, then the taxpayer's income for taxation purposes includes not only the cash which he has received, or which has accrued to him, but the value of every other form of property which he has received or which has accrued to him, including debts and rights of action.'<sup>126</sup>

5.4.5.2 This view was confirmed in the case of **Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd**<sup>127</sup> when the Appellate Division of South Africa<sup>128</sup> commented that income is 'every form of property earned by the taxpayer, whether corporeal or incorporeal which has a money value.... including debts and rights of action.'

5.4.5.3 Thus if the claim of a creditor is considered a debt, it is taxable under law in the hands of the creditor. However, if such claim is considered as a bad debt, it is no longer taxable in the hands of the creditor. Should the reform of the insolvency laws not provide that all debts owed by an insolvent become non-taxable in favour of the creditors? Should the reform clarify whether such non-taxability arises by operation of the insolvency (upon sequestration) or by the rehabilitation of the insolvent as per section 129 of the Insolvency Act, 1936? Should the reform not provide for the relief of tax obligations on all unsatisfied claims over debts as being bad debts? Should such relief apply to the total sum of the debt or a portion thereof?

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<sup>126</sup> 1926 CPD 203.

<sup>127</sup> 1990 (2) SA 353 (A).

<sup>128</sup> Walvis Bay remained part of South Africa until 1994.

5.5 The challenge is to ensure that these statutes complement one another to provide for an effective insolvency procedure that sets forth clear rules and provide for predictable results.

5.6 Apart from the foreseeable challenges outlined above, the reform of Namibia's insolvency regime will also have to take cognisance of issues such as institutional capacity, social, cultural, historical factors and political economy aspects that may also feature.<sup>129</sup>

## **6. ISSUES FOR DISCUSSION**

6.1 The Discussion Paper identifies the following issues and challenges in the development of an orderly and effective insolvency regime:

### **6.2 The Need for a Unified Legislative Approach to Regulate Insolvency and Creditor Rights in Namibia**

6.2.1 One of the issues which the legislature has to consider when looking at implementing a major change to its insolvency laws is whether to include provisions dealing with the insolvency of individuals and those dealing with corporate insolvency in one piece of legislation (and what form that legislation will take) or whether to separate provisions and place them in different statutes.<sup>130</sup> A unified legislative approach to regulate insolvency law is based on the premise that it is possible to have one Act dealing with the insolvency of individuals, partnerships, trusts, companies, close corporations and other legal entities. The form of legislation can be important to determine how effective insolvency legislation will be.

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<sup>129</sup> Mary-Alice Brady, 'Balancing the Rights of Debtors and Creditors: §522 (f) (1) of the Bankruptcy Code', *Boston College Law Review*, 39/5/5 (1998), p.1215. Capital gains tax may be a specific subject worthy of consideration under the fiscal policy yet relevant to commerce and in particular, insolvency.

<sup>130</sup> Andrew Keay "To Unify or not to Unify Insolvency Legislation: International Experience and the latest South African Proposals", *De Jure*, 1 (1999), pp. 62-79.

6.2.2 The advantages of having a unified insolvency legislation were considered by Keay in his article “To unify or not to unify insolvency legislation: International Experience and the latest South African Proposals”.<sup>131</sup> Keay states the following grounds for the justification of a unified insolvency approach:<sup>132</sup>

Many aspects of insolvency relating to individuals and corporations are, or could and should be, the same; a unified system with common procedures would be simpler and would result in greater efficiency, simplification through the avoidance of duplication, and a reduction in costs; it would simplify the Companies Act and the Close Corporations Act; a unified system would be much more readily understood by the community and by less experienced practitioners; and it would give recognition to the law of insolvency as a separate field of the law and would facilitate its further development.

6.2.3 As previously stated in Chapter Two of this Discussion Paper, although the Insolvency Act, 1936 forms the basis of our insolvency legislation, it only finds application to individuals and partnerships and where a company or close corporation is being wound up one has to turn to the Companies Act, 2004 or the Close Corporations Act, 1988 in order to find the provisions relating to these entities.<sup>133</sup> These latter Acts are then “connected” to the Insolvency Act, 1936 by means of “connecting provisions” that make insolvency law applicable to legal entities. It is precisely the fact that our insolvency legislation is interspersed between a number of Acts that begs the question of whether Namibia should introduce a unified legislative approach to regulate the insolvency of natural persons and legal entities.

6.2.4 There is no doubt that this fragmented approach in regulating the insolvency of natural persons and legal entities can cause unnecessary confusion and duplication. In fact, after reviewing the existing legal and regulatory framework for Namibia, the

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<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*, p. 71.

<sup>133</sup> Section 344 of the Company Act, 2004 makes provisions of the Insolvency Act, 1936 applicable to the winding-up of companies, with the necessary changes, and section 66 of the Close Corporations Act, 1988 makes the provisions relating to winding-up of the Companies Act, 2004 applicable to close corporations, including the applicability of the Insolvency Act, 1936.

ROSC shows that Namibia's insolvency regime suffers the complexities that characterize the original South African model, in that the provisions applicable to insolvency proceedings are dispersed across different statutes that also belong to different periods.<sup>134</sup> One is therefore forced to consult principles of common law, precedent as well as other pieces of legislation to get a comprehensive picture of the relevant insolvency structures in place within Namibia. As a final point the ROSC recommends that "an effort should be made to coordinate the different pieces of legislation".<sup>135</sup>

6.2.5 Across our borders, the South African Law Commission (SALC) has admitted that a single statute would go a long way towards simplifying insolvency law in South Africa.<sup>136</sup> As with Namibia, the South African law regulating the insolvency of natural persons is contained substantially in the Insolvency Act, 1936.<sup>137</sup> The Insolvency Act, 1936 is not a complete statement of the law of insolvency and is informed by the Companies Act, 2008<sup>138</sup> which governs the winding-up and reorganisation of companies and by the Close Corporations Act, 1984<sup>139</sup> which regulates the winding-up and liquidation of close corporations.

6.2.6 In 1987, the SALC commenced a wholesome investigation of the law of insolvency and produced two draft Bills and an Explanatory Memoranda for comment during 1996 and 1999 respectively.<sup>140</sup> While the SALC was in the final stages of its insolvency law review project, it mandated a research project aimed at the merger of the liquidation provisions of companies and close corporations into the insolvency

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<sup>134</sup> ROSC, p. 3.

<sup>135</sup> *ibid*, p. 36.

<sup>136</sup> See the South African Law Commission Report: Project 63 on the Review of Insolvency Law containing Explanatory Memoranda (Volume 1) and Draft Insolvency Bill (Volume 2) [web document] (2000). Available at: <[http://www.justice.gov.za/salrc/reports/r\\_prj63\\_insolv\\_2000apr.pdf](http://www.justice.gov.za/salrc/reports/r_prj63_insolv_2000apr.pdf)>, last accessed on 17 June 2014.

<sup>137</sup> (Act No. 24 of 1936).

<sup>138</sup> (Act No. 71 of 2008).

<sup>139</sup> (Act No. 69 of 1984).

<sup>140</sup> See the South African Law Commission Report: Project 63 on the Review of Insolvency Law containing Explanatory Memoranda (Volume 1) and Draft Insolvency Bill (Volume 2) [web document] (2000). Available at: <[http://www.justice.gov.za/salrc/reports/r\\_prj63\\_insolv\\_2000apr.pdf](http://www.justice.gov.za/salrc/reports/r_prj63_insolv_2000apr.pdf)>, last accessed on 17 June 2014.

legislation.<sup>141</sup> On the much-debated issue of uniform provisions for corporate and individual insolvencies, the SALC has retained its preference for uniform provisions for all corporate and individual insolvencies, with nuances for banks, insurance companies, pension funds, medical funds, building societies and co-operatives where such differences are justified by structural requirements.<sup>142</sup> In support of this position, the SALC advances some of the following arguments:<sup>143</sup>

A unified Act would be more user friendly for foreign investors;

Unnecessary differences between corporate and individual insolvencies are mostly inexplicable and complicate matters;

It is easier to amend a single Act than separate Acts administered by different Ministers and considered by different portfolio committees; and

A unified Act will reduce the likelihood of harmony and foster harmony.

6.2.7 The South African approach shows that the existence of different, often unconnected legal procedures to regulate various persons and debt-scenarios and enforcement may work against the effectiveness of debt-enforcement within the insolvency and creditor area. However, despite the consistent approach that has been adopted in a number of countries to unify insolvency provisions, other countries – most notably Australia – have noted that separate insolvency statutes provide debtors and creditors with additional flexibility to achieve a successful solution to insolvency.

6.2.8 Like Namibia, Australia follows a dualistic insolvency regime with separate insolvency legislation dealing with personal insolvency on the one hand and corporate

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<sup>141</sup> See David Burdette, The University of Pretoria, Faculty of Law, Centre for advanced Corporate and Insolvency Law, *Final Report Containing Proposals on a Unified Insolvency Act: Part 1 Final Report and Explanatory Memorandum* [web document] (January 2000). Available at: <[http://www.justice.gov.za/master/m\\_docs/insolve-unified-insolvency-report-up.pdf](http://www.justice.gov.za/master/m_docs/insolve-unified-insolvency-report-up.pdf)> last accessed on 07 August 2013.

<sup>142</sup> *ibid.*

<sup>143</sup> *ibid.* According to the Final Report Containing Proposals on a Unified Insolvency Act, there are certain institutions such as banks and insurance companies which are not governed by the provisions contained in the Insolvency Act, 1936 or the Companies Act, 2008 or the Close Corporations Act, 1984 even though such institutions are for example, companies. These specific types of institutions have provisions in their governing sector legislation which regulate their winding-up or judicial management. In Namibia, banking institutions are wound up under the provisions of the Banking Institutions Act, 1998 (Act No. 2 of 1998). However, portions of the Banking Institutions Act, 1998 incorporate the provisions of the Companies Act, 2004 in relation to the manner in which banking institutions are wound up.

insolvency on the other.<sup>144</sup> In 1988, the Australian Law Reform Commission (ALRC) produced the Harmer Report which provided the first opportunity in Australia for a comprehensive review of its insolvency laws.<sup>145</sup> The Harmer Report considered the possibility of recommending whether the law affecting both individual and corporate insolvency should be integrated into one piece of legislation. Although it did not consider the issue of unification to be of major significance, the Harmer Report contains valuable information regarding the approach that can be taken when deciding whether or not to introduce a unified insolvency statute. It notes the following as some of the reasons for not implementing a unified insolvency statute:

Irreconcilable differences;<sup>146</sup>

Jurisdictional difficulties;<sup>147</sup>

Reform and not 'form' important;<sup>148</sup> and

National companies' legislation.<sup>149</sup>

6.2.9 Despite the election not to adopt a unified insolvency statute for Australia after the publication of the Harmer Report of 1988, various reviews have since considered the issue on the merits of merging corporate and personal insolvency law.<sup>150</sup> In

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<sup>144</sup> The Commonwealth Bankruptcy Act, 1966 deals with personal insolvency and chapter five of the Commonwealth Corporations Act, 2001 deals with corporate insolvency.

<sup>145</sup> The Harmer Report is available at the Australian Law Reform Commission Report No. 45 General Insolvency Enquiry [web document] (1988) Available at: <<http://www.alrc.gov.au/report-45>>, last accessed on 13 July 2013.

<sup>146</sup> *ibid.* According to the Harmer Report, there are many different policy considerations in corporate insolvency and personal bankruptcy, which may give rise to necessary variations in the legal frameworks. As a result, it will be difficult to bring about complete unity of insolvency legislation.

<sup>147</sup> In an Australian context, a single statutory insolvency statute would mean that only one government (that of the Commonwealth of Australia) would have effective control of insolvency policy, and changes could be made more expeditiously. However, if a unified insolvency legislation would have to be administered by the federal (or commonwealth) government, this may possibly give rise to constitutional and political issues.

<sup>148</sup> The Harmer Report saw the reform of both individual and corporate insolvency as being more important than the unification of the provisions. It is available at the Australian Law Reform Commission Report No. 45 General Insolvency Enquiry [web document] (1988) Available at: <<http://www.alrc.gov.au/report-45>>, last accessed on 13 July 2013.

<sup>149</sup> *ibid.* The Harmer Report found that the uniformity of substantive laws was seen to be more important than the merger of provisions into one Act.

<sup>150</sup> See for example Australia, Trade Practices Commission, *Study of the Professions: Legal* (Canberra: The Commonwealth Government of Australia, Public Service, 1994) as well as the Australia, Working Party, *Review the Regulation of Corporate Insolvency Practitioners* (Canberra: The Commonwealth Government of Australia, Public Service, 1997). These reviews recognise that there were some

particular, the Insolvency Practitioners Association (IPA) (now called the Australian Restructuring Insolvency & Turnaround Association (ARITA)) of Australia continue to express concern that the different regulatory treatment of the administration of personal insolvency and corporate insolvency of companies is impeding the efficient conduct of the insolvency regime and imposing an unnecessary regulatory burden on insolvency practitioners.<sup>151</sup>

6.2.10 The IPA advances the following arguments in favour of a unified insolvency approach:<sup>152</sup>

practitioners operating in both areas would benefit from time and cost savings as a result of having to understand and deal with only one set of common provisions, and procedures;

there would be less complexity and scope for error;

government cost savings in a unified scheme, including the potential for consolidating regulatory responsibilities and a single system for the registration of practitioners within a single department or agency;

there is often a significant interaction or overlap (and/or common issues to consider) between personal and corporate insolvency, particularly when dealing with small or micro businesses;

the current system can also pose difficulties for members of the public, especially creditors (most frequently institutional creditors) that need to be aware of the differing rules between corporate and personal insolvency depending on the sort of administration of which they are creditors; and

many aspects and fundamental concepts of insolvency are common to both the corporate and personal areas and insolvency law can be viewed as a distinct field of law, rather than a part of company or commercial law.

6.2.11 Inevitably, the question that now needs to be answered is whether Namibia should introduce a unified insolvency legislation or should it retain the current system

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advantages in having more uniform regulation, but none went as far as recommending a single regulatory framework.

<sup>151</sup> Australian Productivity Commission, Annual Review of Regulatory Burdens on Business: Business and Consumer Services Sector, Chapter 4: Regulatory Barriers for Occupations, [web document], (2010) Available at: < [http://www.pc.gov.au/data/assets/pdf\\_file/0014/102047/business-consumer-services-report.pdf](http://www.pc.gov.au/data/assets/pdf_file/0014/102047/business-consumer-services-report.pdf) >, last accessed on 23 June 2014, 169 - 176.

<sup>152</sup> *ibid.*



of dual legislation governing both corporate and individual insolvency? In principle, there are likely to be efficiencies in having a single insolvency statute for both areas of insolvency law: the merger of statutes of relevant provisions into one comprehensive insolvency Act could increase transparency, fairness, consistency and efficiency. However, there could also be various complexities associated with unifying insolvency legislation.

6.2.12 In analysing whether or not to adopt a unified insolvency statute, Namibia must have regard to some of the following important considerations:

- (a) Who will constitute a debtor in the unified Insolvency Act?
- (b) Which Ministry will administer the unified Insolvency Act?
- (c) What will be the scope of the powers of liquidators and trustees under the unified Insolvency Act?
- (d) How will debtors (or their creditors) institute insolvency proceedings?
- (e) Which Namibian courts shall have jurisdiction over the insolvency proceedings?
- (f) What would be the role of the Master of the High Court in the insolvency of both parties?<sup>153</sup>

6.2.13 Apart from these considerations, Namibia needs to critically analyse and determine whether the unification of insolvency legislation would bring about the effective reform of both personal and corporate insolvency law. In other words, would adopting a unified Insolvency Act address the concerns raised by the stakeholders?

### **6.3 The Need to Reform the Law concerning Secured Transactions over Movable property in order to bring Namibia in line with International Best Practices**

6.3.1 The need for insolvency regulation stems from the availability of and access to credit.<sup>154</sup> Often, the ability to give security influences not only the cost of credit but

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<sup>153</sup> Currently the Master of the High Court is the administrator of insolvent estates

<sup>154</sup> See R. Oluitan, *Bank Credit and Economic Growth: The Nigerian Experience* [web document] (2007), Available at: <<http://www.csae.ox.ac.uk/conferences/2009-EdiA/papers/094-Oluitan.pdf>>, last accessed on 14 October 2013.

also, in some cases, whether credit will be available at all. Inefficient secured transactions laws deter international financial organizations and banks from extending credit and investment.<sup>155</sup> Many studies conducted by the World Bank over a number of years have demonstrated that developing countries whose laws do not permit non-possessory security in movable property face a serious impediment to economic development.<sup>156</sup> The ROSC explains this principle as follows:<sup>157</sup>

“One of the pillars of a modern credit economy is the ability to own and freely transfer ownership interests in land and land use rights, and to grant a security interest (such as a mortgage or charge) to credit providers with respect to such interests and rights as a means of gaining access to credit at more affordable prices”.

6.3.2 In Namibia, financial and banking institutions which provide credit to commercial enterprises tend to rely on the use of land and immovable assets in general as the basis for their lending. In other words, financial and banking institutions granting capital or credit, require a security right over immovable property to mitigate the risk of loss resulting from a default in payment by entitling the financial or banking institution to claim the value of the immovable property encumbered by the security right as a back-up source of repayment. For example, if a business that borrows capital on the security of its building fails to repay the loan, a financial or banking institution with a security right in that building will be entitled to obtain possession and dispose of the equipment and apply the proceeds to the outstanding balance. As the risk of loss from default is mitigated, access to credit is expanded, quite often on more favourable terms.

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<sup>155</sup> N. Orkun Akseli (Ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (United States of America, New York: Cambridge University Press, 2013) p, 3.

<sup>156</sup> Security interests at common law are either possessory or non-possessory, depending upon whether the secured party actually needs to take possession of the collateral. A non-possessory security is a legal claim against an asset in order to secure payment of the debtor's obligation which does not require the creditor to hold physical possession of the asset in question but only a legal right.

<sup>157</sup> ROSC, p. 27.

6.3.3 The mortgage bond is the most widely used instrument for the creation of a security interest over immovable property in Namibia. Amoo defines a mortgage in this manner:<sup>158</sup>

“A mortgage is a real right in respect of immovable property of another, securing a principal obligation between a creditor and a debtor. This real right is created in the deeds registries pursuant to an agreement between the parties. The agreement is normally known as the mortgage bond and contains the rights and liabilities of the mortgagee and the mortgagor.”

6.3.4 The Deeds Registries Act, 1937 requires the registration of real rights in immovable property in the Deeds Registry because they pertain to rights and obligations over legal objects or *res in commercio* and need to be documented.<sup>159</sup> In ***Namib Building Society v Du Plessis***, Du Toit AJ stated that a mortgagee should in principle be entitled to realise the property over which a mortgage bond was registered for the very purpose of securing the debt on which he or she sued.<sup>160</sup> Such a mortgagee has advanced money on the understanding that he or she would have a preferential claim on the proceeds of the mortgaged property.

6.3.5 Although the security object in a real security may be movable or immovable, Namibian law does not recognise non-possessory security over movable assets, which substantially limits the forms of security that can be taken over movable property.<sup>161</sup> For example, it is possible to register a general notarial bond over all movable property but this form of security is only perfected on taking possession of the secured assets.<sup>162</sup> Whilst financial and banking institutions are likely to require this form of security as part of an overall security package (because it does afford some preferred rights to the financial and banking institutions over other creditors upon the

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<sup>158</sup> Samuel K. Amoo, *Property Law in Namibia* (Pretoria: Pretoria University Law Press, 2014) p, 44.

<sup>159</sup> Section 63(1) of the Deeds Registries Act, 1937 (Act No. 47 of 1937).

<sup>160</sup> 1990 NR 161 (HC).

<sup>161</sup> Namibian law allows for the use of different techniques for the creation of security interests over movable property. The most common forms of security taken over movable property are notarial bonds, cessions, pledges, suretyships, guarantees and liens. However, it requires the perfection of these security rights through possession of the movable asset.

<sup>162</sup> A notarial bond is defined in section 102 of the Deeds Registries Act, 1937 as “a bond attested by a notary public hypothecating movable property generally or specially.”

insolvency of a debtor), the holder of a general notarial bond does not become a secured creditor until possession is taken on an enforcement.

6.3.6 The overall assessment of the regime for the creation of security interests over movable assets in Namibia shows some shortcomings that is reflected in the high degree of discomfort of financial and banking institutions with the use of movable security. The ROSC states the following on the lack of confidence in lending on this basis:<sup>163</sup>

A modern credit economy should broadly support all manner of modern forms of lending and credit transactions and structures, with respect to utilizing movable assets as a means of providing credit protection to reduce the costs of credit. A mature secured transactions system enables parties to grant a security interest in movable property, with the primary features that include:

Clearly defined rules and procedures to create, recognize, and enforce security interests over movable assets, arising by agreement or operation of law;

Allowance of security interests in all types of movable assets, whether tangible or intangible (e.g. equipment, inventory, bank accounts, securities, accounts receivables, goods in transit; intellectual property, and their proceeds, offspring and mutations); including present, after-acquired or future assets (including goods to be manufactured or acquired); wherever located and on a global basis; and based on both possessory and non-possessory interests;

Security interests related to any or all of a debtor's obligations to a creditor, present or future, and between all types of persons;

Methods of notice (including a system of registration) that will sufficiently publicize the existence of security interests to creditors, purchasers, and the public generally at the lowest possible cost; and

Clear rules of priority governing competing claims or interests in the same assets, eliminating or reducing priorities over security interests as much as possible.

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<sup>163</sup> ROSC, p. 30.

6.3.7 Needless to say, movable assets constitute a major source of business finance and are widely accepted as collateral in developed and developing economies.<sup>164</sup> The need and benefits for financial markets to modernise their secured transactions laws that govern the use of movable property as security can therefore not be overlooked.<sup>165</sup>

6.3.8 Several organizations, among them the World Bank, the European Bank for Reconstruction and Development, the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT) have sought to encourage the enactment of laws on secured transactions which will encourage banks and other financiers to extend credit and thereby promote economic growth.<sup>166</sup>

6.3.9 UNCITRAL has produced a Legislative Guide on Secured Transactions.<sup>167</sup> The general aim of this legislative instrument is to recommend a functional, integrated and comprehensive approach to the concept of security in order to ensure that the legal rights of creditors, debtors and third parties are subject to a common legal framework regardless of the form of the transaction, the type of encumbered asset, the nature of the secured obligation or the status of the parties.<sup>168</sup> In this context, the legislative guide intends to assist both developed and developing economies in reforming their laws.

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<sup>164</sup> International Trade Centre, *Increasing Access to Credit: Reforming Secured Transaction Law. Technical Paper*, [web document] (2009) Available at: <<http://www.intracen.org/WorkArea/DownloadAsset.aspx?id=37611>> last accessed on 16 March 2014.

<sup>165</sup> *ibid.*

<sup>166</sup> N. Orkun Akseli (Ed), *Availability of Credit and Secured Transactions in a Time of Crisis* (United States of America, New York: Cambridge University Press, 2013) p, 3.

<sup>167</sup> The United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Secured Transactions [web document] (2007), Available at: <[http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670\\_Ebook-Guide\\_09-04-10English.pdf](http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf)>, last accessed 24 March 2014.

<sup>168</sup> *ibid.*, p. 27.

6.3.10 The Legislative Guide proposes that parties must be enabled to create a security right in their movable assets in an uncomplicated and efficient manner so as to enhance the amount of credit that can be made available and reduce the costs of such credit. As a result, it recommends the imposition of minimal formalities on the creation of a security right in the following manner:

(a) a security right should be capable of being created simply by an agreement between the grantor and the secured creditor without the need for a transfer of actual possession of the encumbered asset to the secured creditor;

(b) the agreement must, at a minimum, indicate the intent of the parties to create a security right, identify the parties and describe the secured obligation and the encumbered assets (but those are the only requirements);

(c) the agreement must be in writing only if it is not accompanied by a transfer of actual possession of the encumbered asset to the secured creditor; and

(d) the required form of writing must be flexible and include electronic means of communication.

6.3.11 By dispensing with the need for a transfer of possession of an encumbered asset to create a security right over movable property, the Legislative Guide on Secured Transactions increases access to credit by enabling an enterprise to utilize the full range of its present and future assets as security. This recognition by the UNCITRAL Secured Transactions Guide of non-possessory security rights also enhances consumer access to credit, since it enables consumer grantors to take immediate possession of assets acquired on secured credit terms.

6.3.12 Finally, the Legislative Guide on Secured Transactions proposes the enactment of a law that creates a filing registry which sets forth clear and concise guides to

registration and searching procedures in order to make a security right over movable property effective against third parties.<sup>169</sup>

6.3.13 Businesses have an expectation from the law, and the State has a responsibility to establish a financial and legal framework which understands the barriers to access to finance, and to address these barriers. Namibia needs to address the challenges posed by an inefficient secured credit regime and explore the best possible avenues to overcome these difficulties by examining the international legal standards set by international institutions and international legislative bodies, to the extent to which these may be used to help reform the law of credit and security. It suffices to say that the LRDC favours the empowerment of the previously disadvantaged through reforms of this nature which can immediately enhance access to credit and capital for all with less controversy than the controversial black economic empowerment labelled efforts.

#### **6.4 The need to reform the law concerning secured transactions necessitates a modern and accessible registry at the Deeds Registry which records and provides notice of security interests over movables to promote certainty and predictability in the system**

6.4.1 It has been stated in this Discussion Paper that access to secured credit provides a key source of capital for economic growth. Although the legal and regulatory framework is essential to any secured transactions system, the efficacy of a secured transactions law also requires an effective registration mechanism for interests in movable property in order to remove the barriers that exist to financing based on movable property as security.<sup>170</sup> The ROSC explains this as follows:<sup>171</sup>

“There should be an efficient, transparent and cost-effective means of providing notice of the possible existence of security interests in regard to the borrower’s movable assets, with

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<sup>169</sup> *ibid*, p. 149. The United Nations Commission on International Trade Law, *UNCITRAL Guide on the Implementation of a Security Rights Registry* [web document] (2014). Available at: <<http://www.uncitral.org/pdf/english/texts/security/Security-Rights-Registry-Guide-e.pdf>>, last accessed on 29 June 2014, sets out guidelines for the implementation of such a registry.

<sup>170</sup> ROSC, p. 32.

<sup>171</sup> ROSC, p. 35.

registration in most cases being the principal and strongly preferred method, with some exceptions. The registration system should be reasonably integrated, easily accessible and inexpensive with respect to recording requirements and searches of the registry, and should be secure.”

6.4.2 The establishment of a central registry serves the critical purpose of maintaining a reasonable degree of certainty and transparency of security rights in movable assets. A secured creditor such as a financial or banking institution needs to publish or perfect their real right in the debtor’s property in order for it to be effective against third parties. Most security rights can be made effective against third parties by registration of a notice of the security right in a general security rights registry.

6.4.3 In addition to the UNCTRAL Legislative Guide on Secured Transactions, UNCITRAL adopted the UNCITRAL Guide on the Implementation of a Security Rights Registry to provide the urgently needed guidance to Member States with respect to the establishment and operation of security rights registries.<sup>172</sup> The UNCITRAL Guide on the Implementation of a Security Rights Registry recommends the establishment of a publicly accessible registry in which information about the potential existence of a security right in a movable asset may be registered and a public registry that establishes the priority of the security right.<sup>173</sup> Accordingly, it proposes for the registry to be as follows:

- Electronic;
- Centralized;
- Accessible by the public for a modest fee; and
- Accessible electronically.

6.4.4 The Deeds Registries Act, 1937 makes provision for a centralized deeds registry in Windhoek, which serves the whole of Namibia, and a separate one for the Rehoboth area where indigenous rights in land, including mortgage bonds in such

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<sup>172</sup> The United Nations Commission on International Trade Law, UNCITRAL *Guide on the Implementation of a Security Rights Registry* [web document] (2014) Available at: <<http://www.uncitral.org/pdf/english/texts/security/Security-Rights-Registry-Guide-e.pdf>>, last accessed on 29 June 2014.

<sup>173</sup> *ibid.*



rights are registered.<sup>174</sup> As previously indicated in this Discussion Paper, the Deeds Registries Act, 1937 only makes provision for the registration of real security rights over immovable property.<sup>175</sup> Nevertheless, there is no centralized registry in Namibia that contains a database for all security rights over movables property that can be accessed by the public and the Deeds Registry is still very much paper-based.

6.4.5 The importance of introducing reforms in the area of secured transactions with the objective of increasing access to credit for businesses is crucial to removing barriers to accessing credit. It is thus timely for Namibia to consider the establishment of a centralized notice-based register of security interests over movable assets that would allow searches by the public as a means to providing the requisite legal structures through which movable assets in emerging markets can be effectively used as collateral in order to significantly improve access to finance by those firms that need it the most.

## **6.5 The need for Namibia to provide various debt restructuring options and to review the administration order in terms of section 74 of the Magistrates' Courts Act of 1944**

6.5.1 Debt restructuring is a process that allows a debtor facing cash flow problems and financial distress to reduce and renegotiate debts in order to improve or restore liquidity and rehabilitate so that the debtor can continue operations. Namibian law provides for a debtor in financial trouble to apply for the administration of his or her estate under court supervision.

6.5.2 The administration order is available to a debtor who is unable to pay the amount of any court judgment obtained against him or her, or to meet his or her financial obligations, and has no sufficient assets capable of attachment to satisfy

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<sup>174</sup> Section 1 of the Deeds Registries Act, 1937. Although a new deeds Bill has been proposed, the registration of deeds in the former Rehoboth Gebiet is provided for under the Registration of Deeds in Rehoboth, 1976 (Act No. 93 of 1976). It is envisaged that the new Deeds Bill will, once promulgated, implement regional and subregional offices in an attempt to decentralize the powers and functions of the Registrar under the Deeds Registries Act, 1937.

<sup>175</sup> Section 63(1) of the Deeds Registries Act, 1937.

such judgment or obligations.<sup>176</sup> The requirements for granting of an administration order are set out in section 74(1) of the Magistrates' Courts Act, 1944 as follows:

**74 Granting of administration orders**

(1) Where a debtor-

(a) is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations, and has not sufficient assets capable of attachment to satisfy such judgment or obligations; and

(b) states that the total amount of all his or her debts due does not exceed N\$50 000, such court or the court of the district in which the debtor resides or carries on business or is employed may, upon application by the debtor or under section 651, subject to such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realization of movables subject to hypothec (except movables referred to in section 34*bis* of the Land Bank Act, 1944 (Act 13 of 1944), or otherwise, make an order (in this Act called an administration order) providing for the administration of his estate and for the payment of his debts in instalments or otherwise.

6.5.3 The court hearing the application has a discretion to grant or reject the administration order. Once granted, it assists the debtor by appointing an administrator to take control of the debtor's financial affairs and to manage the payment of debts due to creditors.<sup>177</sup> Subject to the court order, the debtor will then have the option of paying off his/her debts in instalments or otherwise.<sup>178</sup> It suffices to say that granting of an administration order does not amount to a discharge, and the debtor is required to repay all his/her debts in full. As soon as the costs of administration and the list of creditors have been paid, the administration order automatically lapses.<sup>179</sup> This means however, that the debtors who cannot raise funds

<sup>176</sup> Sections 74 and 74A to 74W of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) govern and regulate administration orders in the Magistrates Court.

<sup>177</sup> Section 74E of the Magistrates' Court Act, 1944 (Act No. 32 of 1944).

<sup>178</sup> Section 74(1) (b) of the Magistrates' Courts Act, 1944.

<sup>179</sup> Section 74U of the Magistrates' Courts Act, 1944.

to discharge all their financial obligations may stay on the administration for the duration of their lives until all creditors have been paid.

6.5.4 According to Dlodlo AJ, in *Fortuin v Various Creditors*, the aim of an administration order is to “assist a debtor over a period of financial embarrassment without the need for sequestration.”<sup>180</sup>

6.5.5 Nevertheless, the administration orders experience many challenges and criticisms. The South African Law Commission (SALC) for example, found some of the following constraints when it undertook the review of the administration orders under the Magistrates’ Courts Act, 1944:<sup>181</sup>

The fact that section 74 of the Magistrates’ Courts Act, 1944 does not contain a discharge or time period for the repayment of debts is tantamount to keeping debtors in bondage for life.

Unsuitable persons are appointed as administrators.

Administrators overcharge for remuneration and expenses.

Administrators do not distribute funds regularly and do not account to creditors properly.

6.5.6 In response to some of the problems identified above, SALC proposed some of the following amendments to the Magistrates’ Courts Act, 1944:

administration orders ought to lapse after the expiry of a specified period;<sup>182</sup>

**74U: Lapsing of administration order**

(1) An administration order granted—

(a) eight years or more prior to the coming into operation of this provision, lapses within one year from the date on which this provision comes into operation; or

<sup>180</sup> 2004 (2) SA 570 (C).

<sup>181</sup> The review of the administration orders by the SALC can be found at the website of the South African Law Reform Commission, *Administration Orders: Proposed Amendments to section 74 – 74 W of the Magistrate’s Court Act, 1944 (Act No. 32 of 1944): Background Document for Stakeholder’s Workshop to be held on 31 May 2011 (Project 127 [web document], (2011). Available at: <<http://salawreform.justice.gov.za> > last accessed on 30 March 2014.*

<sup>182</sup> *ibid*, p. 32.

(b) after the date on which this provision comes into operation, lapses after a period of eight years from that date.

Provided that the debtor has not received a discharge from debts in terms of the Insolvency Act, 1936 (Act No. 24 of 1936) within four years before the date on which the order would have lapsed.

(2) All outstanding debts subject to an administration order referred to in subsection (1) shall be discharged unless the court orders for good cause shown upon application by a creditor before the lapsing of the order that the debtor should not obtain a discharge for some or all of the outstanding debts.

(3) Where an administration order has lapsed, the administrator shall lodge a certificate to that effect with the clerk of the court and send a copy thereof to the debtor and each creditor (who shall also be informed therein of the debtor's last known address).

(4) The debtor may, in the prescribed manner and form, file a copy of the certificate referred to in subsection (3) with the national register established in terms of section 69 of the National Credit Act, 2005 (Act No. 34 of 2005) or any credit bureau who upon receiving the certificate must expunge from its records-

(a) the fact that the consumer was subject to administration;

(b) any information relating to any default by the consumer that relates to a debt which was subject to administration unless the court has ordered that the debtor should not receive a discharge in respect of the debt.

the appointments of administrators ought to be limited to practising attorneys. This view is substantiated by the fact that the trust accounts of attorneys are audited annually, they are subject to the oversight of law societies with strict disciplinary procedures with the threat of removal from the roll of attorneys, and they have Fidelity Fund cover;<sup>183</sup> and

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<sup>183</sup> *ibid*, p. 16.

#### **74E: Appointment of administrator**

(1) When an administration order has been granted under section 74 (1), the court shall

appoint a person who practices within its area of jurisdiction as an administrator, which appointment shall become effective only –

(a) after a copy of the administration order has been handed or sent to him by registered post;

(b) in the event of his being required as administrator to give security, after he has given such security;

(c) after he has provided the clerk of the court with a certified copy of his certificate proving his membership of the Council for ... / regulatory body referred to in section ...; and

(d) in the event of his being an attorney, after he has provided the clerk of the court with a letter signed by the secretary of the law society of which he is a member, to the effect that he is a practicing attorney and that—

(i) no proceedings to strike his name off the roll of attorneys or to suspend him from practice as an attorney have been instituted by that law society; and

(ii) he has not been found guilty of unprofessional, dishonourable or unworthy conduct relating to the management of his trust account that he keeps in terms of section 33 of the Attorneys, Notaries and Conveyancers Admission Act, 1934 (Act 23 of 1934) or any other conduct which in view of the secretary will render him unfit to be appointed as an administrator.

(2) An administrator may on good cause shown be relieved of his appointment by the court, and the court may appoint any other person in his place.

(3) An administrator who is not an officer of the court or a practitioner shall, before a copy of the administration order is handed or sent to him by registered post, give security to the satisfaction of the court and thereafter as required by the court for the due and prompt payment by him to the parties entitled thereto of all moneys which come into his possession by virtue of his appointment as an administrator.

(4) An administrator shall not be obliged to give security in respect of his appointments as administrator of the estate of any particular debtor if he has given or gives security to the satisfaction of the court for the due and prompt payment by him to the parties entitled thereto of all moneys which may come into his possession by virtue of his appointment as administrator of the estate of any debtor, irrespective of whether such appointment was made before or after the date on which the said security was given.

(5) An administrator shall within 30 days after complying with the provisions of subsection (1) provide the debtor over whose estate he has been appointed as an administrator with a prescribed letter informing the debtor of his rights and obligations, the administrator's rights and obligations and the remedies provided for in this Act should the administrator fail to carry out his duties in terms of this Act.

(6) An administrator who contravenes the provisions of subsection (5) is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment.

(7) A person who acts as an administrator for the estate of and for the payments of the debts of a debtor in instalments or otherwise without being appointed as an administrator as contemplated in subsection (1) is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment; and

(8) A person who on the date of commencement of this Act acts as an administrator for the estate of and for the payments of the debts of a debtor in instalments or otherwise without being appointed as an administrator as contemplated in subsection (1) must within six months after the date of commencement of this Act apply to be appointed as an administrator.

(c) measures aimed at ensuring that proper charges are levied.<sup>184</sup>

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<sup>184</sup> *ibid*, p. 27.

**74L: Remuneration and expenses of administrator**

(3) An administrator who contravenes the provisions of subsection (2) is guilty of an offence and on conviction liable to –

(a) a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment; and

(b) payment of the amount that exceeded the percentage referred to in subsection (2) to the debtor's estate.

6.5.7 The current wording of the Magistrates' Courts Act, 1944 in Namibia leaves in places some of the constraints identified by the SALC above. In this respect, the ROSC states that "the operation of the administration orders in terms of section 74 of the Magistrates' Courts Act of 1944, and its alignment with sequestration which causes a liquidation of assets, should be subject to a careful review, in conjunction with other matters like the regulation of credit bureaus and the revision of consumer credit agreements."<sup>185</sup> To this end, the LRDC is convinced by the need to effectuate the efficacy of options available for consumers who are unable to meet their financial obligations. However, the review of these options should go hand in hand with the review of consumer oriented legislation such as the regulation of credit bureaus which, notwithstanding the commendable measures taken in the banking sector, may require revisiting and fortification.

## **6.6 The need to regulate credit information systems in Namibia**

6.6.1 Credit information systems, or credit bureaus as they are commonly known in Namibia, play an important role in determining the availability of and access to credit.<sup>186</sup> They keep credit registries containing information on the credit worthiness of both consumers and legal entities. This information allows financial and banking institutions to extend credit at more favourable interest rates and helps consumers and legal entities alike to accumulate assets, exploit economic opportunities and establish

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<sup>185</sup> ROSC, p. 6.

<sup>186</sup> ROSC, p. 7 states that "Credit information systems play a major role in ensuring the soundness of lending practices and allowing access to finance for creditworthy businesses and individuals."

businesses. For the enjoyment of those benefits however, the industry needs to be regulated, simply to ensure that consumer abuses are minimised. The Governor of the Bank of Namibia confirms this view when he stated as follows:<sup>187</sup>

“Research has shown that there is a positive correlation between the credit information system through the presence of credit registries/bureaus in an economy and access to finance. This is because credit information sharing plays a critical role in the financial sector in facilitating access to finance to people who are in need of funding. This is achieved by availing information on borrowers’ credit worthiness to lenders. This helps lenders with credit assessment, meaning that well behaved borrowers may easily have access to credit.

A good credit information system also enables well behaved borrowers to get cheaper credit in terms of low interest. This is because if the lender is satisfied with the credit record of a customer it will be willing to charge the customer reasonable interest rates. At the same time, it contributes to financial discipline at an individual level because those who are not disciplined to pay back borrowed money will have difficulties getting credit and if they get it, they will pay a high price.

A good credit information system contributes to financial stability. Armed with consolidated records in the credit information system, regulators are better equipped to assess the indebtedness of all individuals in the country. This enables regulators to be in a position to determine whether or not the financial stability of the country is under threat and whether or not necessary action needs to be undertaken to contain the situation.

6.6.2 The Bank of Namibia (BoN) has commenced the process of drafting Credit Bureau Regulations with the view to regulate how credit information will be shared in Namibia.<sup>188</sup> These draft regulations come at a time when there is no existing regulatory framework for credit bureaus in the country.

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<sup>187</sup> A speech delivered by Mr. Ipumbu Shiimi, the Governor of the Bank of Namibia at the Credit Information Workshop, Windhoek, 19 August 2013. The speech is available for download on the Bank of Namibia’s website at <http://www.bis.org/review/r130822c.pdf> , last accessed on 30 March 2014.

<sup>188</sup> The draft Credit Bureau Regulations are in the process of being finalized and can be obtained from the Bank of Namibia directly upon request.



6.6.3 Currently, credit providers are under no obligation to supply information to credit bureaus. The draft regulations seek to establish the rights and obligations of credit bureaus and requires that all credit providers are to supply information to all credit bureaus.<sup>189</sup> The draft Credit Bureau Regulations contain a proposed arrangement of the following sections:<sup>190</sup>

1. Definitions
2. Application of regulations
3. Registration of credit bureaus
4. Application for a license
5. Issuance of a license
6. Refusal to issue a license
7. Annual license fee
8. Validity of a license
9. Notice to revoke a license
10. Application for review
11. Surrender of license
12. Transfer of a license
13. Sources of credit performance information
14. Search inquiries
15. Nature of information to be shared
16. Prohibited information
17. Collected information
18. Credit reports
19. Restrictions on the use of credit performance information
20. Data management and quality control
21. Credit performance information providers' obligations
22. The right to information and data
23. The right to challenge incorrect information
24. Record of challenges

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<sup>189</sup> The obligations of credit providers are outlined in clause 21 of the draft Credit Bureau Regulations.

<sup>190</sup> The sections are listed here to garner a synopsis of the structure of the new regulatory framework.

25. Suspension to access
26. Fee charged by a credit bureau
27. Powers of the Bank
28. Inspection by the Bank
29. Sale of credit information
30. Retention period of data subject's information on the credit bureau database
31. Disposal of information
32. Indemnification
33. Non-compliance Notice

6.6.4 Providing a framework to regulate credit bureaus means bringing Namibia in line with international best practices in financial risk management by allowing transparent credit history information to be available for decision making and facilitating cheaper access to funding.

## **6.7 The need to address the problems in the protection of consumer rights in the regulation of credit information systems**

6.7.1 Privacy in relation to the data collected by credit bureaus has been identified as a major concern where credit information systems are concerned. Although different countries have different legal and regulatory frameworks overseeing credit information systems, privacy issues must be addressed. The OECD makes this point clearly as follows:<sup>191</sup>

“Data protection and the right to privacy are fundamental to the establishment of a private credit bureau. Without these rights, borrowers will be reluctant to allow lenders to access their credit information and lenders will be reluctant to share their information for fear of unknown reprisal stemming from the uncertain legal environment.”

6.7.2 The right to privacy dictates that subjects of information in credit information systems should be made aware of the existence of such systems and, in particular, should be notified when information from such systems is used or intended to be used

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<sup>191</sup> Organization for Economic Co-operation and Development (OECD), *Facilitating access to finance. Discussion Paper on Credit Information Sharing* [web document] (2012) Available at: <[www.oecd.org/investment/psd/45370071.pdf](http://www.oecd.org/investment/psd/45370071.pdf)>, last accessed on 21 February 2014.

to made adverse decisions about them.<sup>192</sup> Therefore there is a need to allow consumers to access such information to correct any erroneous information.

6.7.3 The draft Credit Bureau Regulations of the Bank of Namibia (BoN) confer the right of consumers to access the information and data collected by credit bureaus and the right to challenge incorrect information.<sup>193</sup> Furthermore, it imposes a duty on credit bureaus to protect the confidentiality of consumer information.<sup>194</sup> However, the draft Credit Bureau Regulations do not aim to address the rights of consumers in credit agreements or transactions entered into.

6.7.4 Across our borders, South Africa has promulgated the National Credit Act, 2005.<sup>195</sup> The National Credit Act, 2005 aims to regulate credit bureaus and the information they keep about consumers.<sup>196</sup> The regulation of credit bureaus in South Africa is justified by the need to tightly regulate the flow of credit bureau information, to improve its accuracy and reduce the scope for discrimination in decisions about credit.

6.7.5 Besides the regulating credit bureaus and the information they keep about consumers, the National Credit Act, 2005 has a broad application scope sets out what the law is when consumers take loans or buy goods on credit, majorly impacting the rights of consumers who have entered into credit agreements and the over-indebtedness of consumers.

6.7.7 Namibia still uses the Credit Agreements Act, to regulate certain transactions in terms of which movable goods are purchased or leased on credit or certain services that are rendered on credit. The limited scope of the rights of consumers in the Credit Agreements Act, 1980 (Act No. 75 of 1980) are provided for under the following sections:

<b>4</b>	<b>Furnishing of information to prospective credit receivers</b>
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<sup>192</sup> *ibid.*

<sup>193</sup> Part VI of the draft Credit Bureau Regulations issued by the BoN.

<sup>194</sup> See clause 18 & 19 of the draft Credit Bureau Regulations.

<sup>195</sup> (Act No. 34 of 2005).

<sup>196</sup> Section 3 of the National Credit Act, 2005.

Any prospective credit grantor or his manager, agent or employee shall, before entering into a credit agreement at a place not being his business premises, in writing draw the attention of a prospective credit receiver to the provisions of section 13.

**14 Rights of credit receiver upon non-compliance with credit agreement**

If a credit receiver fails to comply with any obligation in terms of any credit agreement or if any other contingency occurs which in terms of such credit agreement entitles the credit grantor to take action against the credit receiver, and such credit agreement is not terminated or rescinded, such credit receiver shall, subject to the provisions of the Limitation and Disclosure of Finance Charges Act, 1968 (Act 73 of 1968), not be bound to make any payment or to the performance of any other act whereby the credit grantor would be placed in a better financial position than that in which he would have been if the credit receiver had carried out the obligation in question or if such contingency had not occurred.

**28 Secrecy**

No person shall in respect of any business undertaking disclose any information which came to his knowledge in the performance of his duties or functions under this Act, except-

(a) for the purpose of performing his duties or functions in terms of this Act; or

(b) when required in respect of criminal proceedings by order of any competent court or in terms of any law.

6.7.9 The point here is that despite the commendable effort of putting measures in place to regulate credit information systems in Namibia, there appears to be no compulsory rules providing for consumer protection in credit agreements. As a result, Namibia needs to consider the emerging themes that are surfacing across the globe on the protection of consumer rights and undertake a careful comparative analysis of

some of the issues addressed across her borders, and especially those issues addressed by South Africa in the astute protection of consumer rights.

## **6.8 The need for Namibia to have a modern insolvency system regulating the treatment of financial contracts**

6.8.1 Financial contracts have become an important component of international capital markets. The regulation of financial contracts which permit close-out netting have created a buzz in the international financial markets community in the last few decades. In its findings, the ROSC reports the following in respect of how financial contracts operate in Namibia:

“At present, there is significant legal uncertainty about the treatment of executory contracts, and, specifically, about the treatment of financial contracts. The lack of predictability in the treatment of executor contracts and of financial contracts is generally seen to be preventing access to the international financial markets and arresting the development of a modern domestic financial market, and may have other important repercussions in other areas, such as the design of regimes for the resolution of financial institutions”.<sup>197</sup>

6.8.2 The UNCITRAL Guidelines on Insolvency Law define a “financial contract” as follows:

“any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above”.<sup>198</sup>

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<sup>197</sup> ROSC, p. 9.

<sup>198</sup> The United Nations Commission on International Trade Law, UNCITRAL *Legislative Guide on Insolvency Law* [web document] (2004). Available at: <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html)>, last accessed on 21 April 2014, p. 5.

6.8.3 Typically, financial contracts contain provisions for close-out netting upon the default or insolvency of one party.<sup>199</sup> Close-out is a mechanism employed by financial institutions and other financial market participants in their daily operations to reduce their risk exposure and to provide each other with security or collateral.<sup>200</sup> Broadly speaking, close-out netting is often understood as resembling the common law concept of set-off applied upon the insolvency of one of the parties.<sup>201</sup>

6.8.4 As discussed in Chapter One of this Discussion Paper, financial institutions and other financial market participants agree and provide for close-out netting to apply in financial contracts into which they enter with each other. A widely used standardized financial contract amongst financial institutions and other market participants is the International Swaps and Derivatives Association (ISDA) Master Agreement.<sup>202</sup> The

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<sup>199</sup> According to Clinton Van Loggerenberg and Shawn Barnett, South Africa: Post-Insolvency Set-Off: South Africa Moves Towards International Best Practice [web document] (2003), Available at: <<http://www.mondaq.com/x/23497/Insolvency+Bankruptcy/PostInsolvency+SetOff+South+Africa+Move+s+Towards+International+Best+Practice>>, last accessed on 25 June 2014, what is notable about international netting legislation is that the validity of post-insolvency set-off often only applies to certain specified types of transactions.

<sup>200</sup> The International Institute for the Unification of Private Law (UNIDROIT), Principles on the Operation of Close-Out Netting Provisions [web document] (2013). Available at: <<http://www.unidroit.org/en/instruments/capital-markets/netting>>, last accessed on 25 June 2014. Principle 2 of these Principles follows a functional understanding of the term 'close-out netting provision', the main elements of which are as follows: a close-out netting mechanism comes into operation either by means of a declaration by one of the parties when a pre-defined event occurs, in particular default or insolvency of its counterparty, or it is triggered automatically when such an event occurs. Once the close-out netting mechanism is triggered, whether automatically or by means of a declaration by one party, generally all transactions that are covered by the close-out netting provision are terminated and a value is determined for each under a pre-defined valuation mechanism. The sum value of all such transactions is then aggregated, resulting in a single net payment obligation. The net obligation remains the only obligation to be settled and is generally due immediately after being determined even though no debts may have been due and payable under the transactions covered by the close-out netting provision prior to the operation of the close-out netting mechanism.

<sup>201</sup> Set-off has been discussed in Chapter One of this Discussion Paper as a common law method by which contractual and other debts may be extinguished. Although they are similar, close-out netting is different from common law set-off as the latter traditionally applies only to obligations of the same kind which are already due, whereas the former is designed to aggregate the values of a multitude of still open contracts with variable content.

<sup>202</sup> The International Swaps and Derivative Association (ISDA) is a trade organization of participants in the market for over-the-counter derivatives (a financial contract which derives its value from the performance of another entity such as an asset, index, or interest rate called the underlying value). It has created a standardized contract, the ISDA Master Agreement to regulate derivatives transactions. The ISDA Master Agreement can be found at the ISDA website. Available at: <<http://www.isda.org/publications/isdamasteragrmnt.aspx>> last accessed on 25 June 2014.

ISDA Master Agreement provides for the close-out netting of debts.<sup>203</sup> In the event of default or insolvency, the ISDA Master Agreement provides that the solvent or non-defaulting party can terminate all outstanding contracts between the parties, calculate the losses and gains on each contract and then set them off so that only a 'net' balance is owing.<sup>204</sup>

6.8.5 The effect of permitting close-out netting is to allow a financial institution which may even constitute a non-preferent creditor to realise the payment of a debt and thus be in a better position than the unsecured creditors of the insolvent estate.<sup>205</sup> Member States of the UNCITRAL Working Group V (Insolvency Law) agree that it is desirable to permit close-out netting after the commencement of insolvency proceedings as it is as an important factor to mitigate systemic risks that could threaten the stability of financial markets.<sup>206</sup>

6.8.6 Furthermore, the UNCITRAL Legislative Guide on Insolvency Law recognizes the importance of close-out netting provisions as follows:<sup>207</sup>

“Without the ability to close out, net and set off obligations in respect of defaulted contracts promptly after commencement of insolvency proceedings as described above, a debtor’s failure to perform its contract (or its decision to perform profitable contracts and not perform unprofitable ones) could lead the counterparty to be unable to perform its related financial contracts with other market participants. The insolvency of a significant market participant could result in a series of defaults in back-to-back transactions, potentially causing financial distress to other market participants and, in the worst case, resulting in the financial collapse of other counterparties, including regulated financial institutions. This domino effect is often referred to as systemic risk, and is cited as a significant policy reason for permitting

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<sup>203</sup> The International Swaps and Derivative Association (ISDA), ISDA Master Agreement [web document] (2002) Available at: < <http://www.isda.org/publications/isdamasteragmmt.aspx> >, last accessed on 25 June 2014, Section 6(e).

<sup>204</sup> *ibid.*

<sup>205</sup> This is contrary to the long established principle of *pari passu* principle, which holds that all creditors receive a proportionate share of those assets available for distribution in the insolvent estate.

<sup>206</sup> The United Nations Commission on International Trade, *Legislative Guide on Insolvency Law* [web document] (2005). Available at: < [http://www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf)> last accessed on 07 August 2013, p. 5.

<sup>207</sup> *ibid.*, p. 157.

participants to close out, net and set off obligations in a way that normally would not be permitted by insolvency law.”

6.8.7 Despite the benefits of having enforceable close-out netting provisions under financial contracts, Namibian law does not permit post-insolvency set-off or netting. In particular, section 46 of the Insolvency Act, 1936 empowers the trustee of an insolvent estate with the discretion to ‘cherry-pick’ which set-off arrangements to abide by and which disregard by considering which set-off arrangements were effected in the ordinary course of business.<sup>208</sup> The same discretion is noted in section 35 of the Insolvency Act, 1936 which empowers the trustee to enforce or abandon an uncompleted contract for the purchase of immovable property, without considering the possibility of setting-off the parties liquidated claims.<sup>209</sup>

6.8.8 The prohibition of post-insolvency set-off or netting is based on the premise that the preferential treatment of financial institutions by allowing them to ‘net’ off amounts owed by the insolvent debtor during insolvency will amount to the unequal treatment of creditors as is required by the *pari passu* principle. At the core of the issue that needs to be determined is the question of how Namibia can protect financial institutions and other market participants and still ensure that the object of the Insolvency Act, 1936 is adhered to?

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<sup>208</sup> Section 46 of the Insolvency Act, 1936 also provides for situation where there has been a cession between a person who had a claim against another (the "debtor") and a third person against which third person the debtor had a claim at the time of the cession and the debtor's estate is sequestrated within a year after the cession took place. If the set-off was not in the ordinary course of business the trustee of the sequestrated estate has an election of either abiding by, or disregarding the set-off.

<sup>209</sup> Section 35 of the Insolvency Act, 1936 states that “If an insolvent, before the sequestration of his estate, entered into a contract for the acquisition of immovable property which was not transferred to him, the trustee of his insolvent estate may enforce or abandon the contract. The other party to the contract may call upon the trustee by notice in writing to elect whether he will enforce or abandon the contract, and if the trustee has after the expiration of six weeks as from the receipt of the notice, failed to make his election as aforesaid and inform the other party thereof, the other party may apply to the court by motion for cancellation of the contract and for an order directing the trustee to restore to the applicant the possession of any immovable property under the control of the trustee, of which the insolvent or the trustee gained possession or control by virtue of the contract, and the court may make such order on the application as it thinks fit: Provided that this section shall not affect any right which the other party may have to establish against the insolvent estate, a non-preferent claim for compensation for any loss suffered by him as a result of the non-fulfilment of the contract.”



6.8.9 In order to protect participants in the South African financial markets in the event of insolvency, South Africa promulgated the Insolvency Amendment Act, 1995 with a view to make provision for the close-out netting of certain transactions.<sup>210</sup> In this regard, the amendments of sections 35 and 46 in South Africa now provide as follows:

**Transactions on an Exchange**

35A. (1) In this section –

'**exchange**' means a licensed stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or a financial exchange or clearing house as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989);

'**market participant**' means a stockbroker as defined in section 1 of the Stock Exchanges Control Act, 1985, or a financial instrument principal or a financial instrument trader as defined in section 1 of the Financial Markets Control Act, 1989, or a client of such a stockbroker or financial instrument trader or any other party to a transaction; 'rules of an exchange' means rules made pursuant to either section 12 of the Stock Exchanges Control Act, 1985, or section 17 of the Financial Markets Control Act, 1989; and

'**transaction**' means any transaction to which the rules of an exchange apply.

(2) If upon the sequestration of the estate of a market participant the obligations of such market participant in respect of any transaction entered into prior to sequestration have not been fulfilled, the exchange in question in respect of any obligation owed to it, or any other market participant in respect of obligations owed to such market participant, shall in accordance with the rules of that exchange applicable to any such transaction be entitled to terminate all such transactions and the trustee of the insolvent estate of the market participant shall be bound by such termination.

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<sup>210</sup> Act No 32 of 1995.

(3) No claim as a result of the termination of any transaction as contemplated in subsection (2) shall exceed the amount due upon termination in terms of the rules of the exchange in question.

(4) Any rules of an exchange and the practices thereunder which provide for the netting of a market participant's position or for set-off in respect of transactions concluded by the market participant or for the opening or closing of a market participant's position shall upon sequestration of the estate of the market participant be binding on the trustee in respect of any transaction or contract concluded by the market participant prior to such sequestration, but which is, in terms of such rules and practices, to be settled on a date occurring after the sequestration, or settlement of which was overdue on the date of sequestration,

(5) Section 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 26, 29 and 30 of this Act shall not apply to property disposed of in accordance with the rules of an exchange.

### **Agreements on Informal Markets**

35B. (1) In this section '**agreement**' means any agreement, other than a transaction as defined in section 35A, providing primarily for delivery, exchange, settlement or payment, as the case may be, on a future date, of, or in connection with, or based on, or based on the price of, currency of a country other than the Republic, interest rates, exchange rates, indices, gold, precious or base metals, financial instruments as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989), whether or not it is a standardised contract as defined therein, securities as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or such other commodity or corporeal or incorporeal thing or agreement as may be specified by the Minister, after consultation with the Minister of Finance, by notice in the Gazette, or any combination of, or option on, any of the foregoing agreements.

(2) If upon sequestration of the estate of a party to an agreement, any obligation,

whether then immediately claimable or not, arising out of such agreement has not been fulfilled, the right of a party to claim specific performance in terms of such agreement shall be replaced by a claim for payment of damages as at the date of sequestration, which damages shall be deemed to constitute a liquidated claim for purposes of netting or set-off.

(3) Any provision in an agreement for the netting or set-off of the parties' claims under one or more agreements shall, upon sequestration of the estate of any party, be binding on the trustee in respect of any agreement concluded prior to such sequestration but which is, in terms of such agreement, to be settled on a date occurring after the sequestration, or settlement of which was overdue on the date of sequestration.

(4) Section 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 26, 29 and 30 of this Act shall not apply to property disposed of in terms of an agreement.

#### **Amendment of section 46 of Act 24 of 1936**

2. Section 46 of the principal Act is hereby amended by the addition of the following proviso:

“Provided that any set-off shall be effective and binding on the trustee of the insolvent estate if it takes place between an exchange or a market participant as defined in section 35A and any other party in accordance with the rules of such an exchange, or if it takes place under an agreement defined in section 35B”.

6.8.10 In order to make provision for the technical changes of the Insolvency Amendment Act, 1995, South Africa further passed the Judicial Matters Second Amendment Act, 2003 (Act No. 55 of 2013) and the Banks Amendment Act, 1996 (Act

No. 55 of 1996).<sup>211</sup> If the same amendments are to be adopted in Namibia, it would mean that creditors, particularly creditors from financial institutions, will be able to apply set-off and the close-out netting of debt. In this manner, it is endeavoured that the amendment of sections 35 and 46 will prevent trustees appointed under the Insolvency Act, 1936 from electing to abide by some transactions and from refusing to abide by others.

6.8.11 Indeed, the promulgation of South Africa's Insolvency Amendment Act, 1995 constitutes a significant amendment to South African insolvency law. Reform across the world since 1989, shows many jurisdictions, including Belgium, Canada, the Cayman Islands, Denmark, France, Germany, Ireland, Luxembourg, Sweden and Switzerland enacting laws that expressly protect the enforceability of set-off for privately negotiated derivative transactions in local insolvency proceedings.<sup>212</sup> With Namibia increasingly becoming part of a larger global community and attempting to attract international trade, it is vital for our insolvency laws to adhere to international best practices. It is for this reason that the LRDC urges Namibia to take a further step towards such international best practice with the development of appropriate thresholds to protect participants in financial markets.

6.8.12 It must be remembered that Namibia's membership with the Common Monetary Area (CMA)<sup>213</sup> may force it to accept the changes obtaining in the dominant market of

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<sup>211</sup> The Second Judicial Matters Act, 2003 substitutes the definition of "agreements" provided for by section 35B of the Insolvency Amendment Act, 1995 with a view to widen the type of transactions capable of post-insolvency set-off. The Banks Amendment Act, 1996 on the other hand, abrogates the suspension of the operation of set-off in respect of any amount owing by a creditor to a bank under curatorship and makes the provisions of sections 35A, 35B and 46 of the Insolvency Act, 1936, applicable in relation to a bank under curatorship.

<sup>212</sup> Clinton Van Loggerenberg and Shawn Barnett, South Africa: Post-Insolvency Set-Off: South Africa Moves Towards International Best Practice [web document] (2003), <<http://www.mondaq.com/x/23497/Insolvency+Bankruptcy/PostInsolvency+SetOff+South+Africa+Moves+Towards+International+Best+Practice>>, last accessed on 25 June 2014.

<sup>213</sup> The Common Monetary Area (CMA) links South Africa, Lesotho and Swaziland into a monetary union. It is allied to the Southern African Customs Union (SACU). Namibia automatically became a member upon independence, but withdrew with the introduction of the Namibia dollar in 1993.

South Africa, which is the natural home of many of the corporate players in Namibia, especially in the financial services arena.<sup>214</sup>

## **6.9 The need to consider the UNCITRAL Model Law on Cross-Border Insolvency as there is no law in Namibia regulating cross-border insolvencies or the insolvency of enterprise groups**

6.9.1 Olivier and Boraine introduce this topic effectively by stating the following:<sup>215</sup>

“Globalisation has made insolvencies with an international character where debtors have assets in more than one state, a common phenomenon. This calls for formal cooperation between the different jurisdictions involved and legal rules to govern practical matters flowing from cross-border insolvencies.”

6.9.2 Generally, cross-border insolvency law primarily deals with the situation where an insolvency procedure is initiated in one jurisdiction, in relation to the property of a debtor who is situated in another jurisdiction.<sup>216</sup> The liquidator then has to consider which procedures to follow and which system of law would apply in the administration of the debtor's property, wherever situated, for the benefit of local and foreign creditors.<sup>217</sup>

6.9.3 The Namibian High Court has jurisdiction over every debtor and with regard to the estate of every debtor who, on the date on which a petition for the acceptance of the surrender or for the sequestration of his estate is lodged with the registrar of the court, is domiciled, owns or is entitled to property situated within the jurisdiction of the court, or who at any time within the twelve months preceding the lodging of the petition

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<sup>214</sup> Banks such as First National Bank (FNB), Standard Bank and Nedbank, and insurance companies such as Old Mutual, Sanlam etc. are all South African companies with locally registered companies trading in their names. All their products are designed in South Africa, modelled on South African law.

<sup>215</sup> Andre Boraine and Michele Olivier ‘Some Aspects of International Law in South African Cross-Border Insolvency Law’, *The Comparative and International Law Journal of Southern Africa*, 38/3 (2005), pp. 373-395.

<sup>216</sup> The United Nations Commission on International Trade Law, *Practice Guide on Cross-Border Insolvency Cooperation* [web document] (2010), Available at: <[http://www.uncitral.org/pdf/english/texts/insolven/Practice\\_Guide\\_Ebook\\_eng.pdf](http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf)> last accessed on 28 March 2014.

<sup>217</sup> *ibid*, p. 1.

has ordinarily resided or carried on business within the jurisdiction of the court.<sup>218</sup> It is noteworthy that the definition of “property” as defined in the Insolvency Act, 1936 includes all types of property, both movable and immovable, situated in Namibia.<sup>219</sup>

6.9.4 Namibia is not a party to any international treaty regarding cross-border insolvencies and in the absence of legislation on cross-border insolvency, Namibia applies the principles of international private law with regard to property of a debtor situated in a foreign jurisdiction.

6.9.5 A liquidation or sequestration order has no effect *per se* on the immovable property owned by an insolvent that is situated in a foreign country. Such property remains vested in the insolvent, but with regard to movables, the position is different. A sequestration or liquidation order granted by the court where the debtor was domiciled, *ipso facto*, divests the insolvent of all movable property wherever situated, even in a foreign country.

6.9.6 As in South Africa, foreign insolvent estate representatives thus have to apply to the Namibian High Court to be recognised as such before they will be allowed to attach property situated Namibia in favour of foreign creditors whom they represent.<sup>220</sup> The High Court of Namibia in ***Oliver NO v Insolvent Estate D Lidchi*** held that although it is not strictly necessary for trustees laying a claim to movable assets in a country other than the country of the insolvent’s domicile where the sequestration was obtained, to apply for recognition, such an application is invariably made and the need to apply for formal recognition has now been elevated into a principle.<sup>221</sup>

6.9.7 The granting of recognition is no mere formality. Namibian courts have the absolute discretion to grant or refuse an application for recognition. The discretion is

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<sup>218</sup> Section 149 (1)(a)(b) of the Insolvency Act, 1936.

<sup>219</sup> Section 2 of the Insolvency Act, 1936.

<sup>220</sup> Andre Boraine, ‘Notes’, *Some Notable Divergences in the Development of South African and Namibian Insolvency Law*, [web document] (2010), Available at: < <http://hdl.handle.net/2263/15695> >, last accessed on 14 October 2013.

<sup>221</sup> 1998 NR 31 at 38.

usually exercised on the basis of comity or convenience.<sup>222</sup> Innes JP, in *Ex parte BZ Stegmann*, while accepting the absolute discretion of the Namibian Courts, went on to state as follows.<sup>223</sup>

“But on the other hand, in the same court, acting from motives of comity or convenience, is equally justified in allowing the order of the judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of such order. The matter is entirely one for its own discretion.”

6.9.8 The effect of recognition is to grant the foreign representative the *locus standi* to take part in local proceedings to which the debtor is a party or to initiate legal action to set aside any disposition that is available to a Namibian representative.<sup>224</sup>

6.9.9 In the process of reviewing, reforming and developing Namibia’s insolvency framework, the LRDC acknowledges that Namibia’s private international legal rules have not been successful in dealing with the intricacies of transnational insolvencies and the economic logic of investors because they are only based on rules to regulate national insolvencies. As a result, Namibia’s national insolvency laws are not capable of providing efficient solutions in cross border proceedings.

6.9.10 UNCITRAL has adopted a Model Law on Cross-Border Insolvency in Vienna on 30 May 1997.<sup>225</sup> The Model Law is designed to assist Member States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where

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<sup>222</sup> Bowman Gilfillan, *Getting the Deal Through – Restructuring and Insolvency* [web document] (2009), Available at: <<http://www.bowman.co.za/FileBrowser/ArticleDocuments/GettingtheDealThrough-Insolvency&Restructuring.pdf>>, last accessed on 25 April 2014, p. 422.

<sup>223</sup> 1902 TS 40.

<sup>224</sup> Although after recognition has been obtained the foreign representative may deal with the local assets of an insolvent debtor, a Namibia court may impose conditions on the foreign representative in order to safeguard the rights and interests of local creditors.

<sup>225</sup> The United Nations General Assembly, *Guide to Enactment of the UNCITRAL Model Law: Annexure A* [web document] (1997). Available at: <[http://www.justice.gov.za/salrc/media/1998\\_crossbannexa.pdf](http://www.justice.gov.za/salrc/media/1998_crossbannexa.pdf)>, last accessed on 25 April 2014. The Model Law on Cross Border Insolvency is herewith attached as Annexure D.

the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.

6.9.11 The Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Thus, the States enacting the Model Law would be introducing useful additions and improvements into national insolvency regimes designed to resolve problems arising in cross-border insolvency cases. The Model Law offers solutions to assist States in the following:<sup>226</sup>

Providing access for the person administering a foreign insolvency proceeding ("foreign representative") to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;

Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

Permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

Authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;

Providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State; and

Establishing rules for coordination of relief granted in the enacting State in favour of two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

6.9.12 Following the Model Law, South Africa adopted the Cross Border Insolvency Act, 2000.<sup>227</sup> Despite its commencement, the Cross Border Insolvency Act, 2000 in 2003, the legislation is not yet in operation as the Minister of Justice and Constitutional

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<sup>226</sup> *ibid.*

<sup>227</sup> (Act No. 42 of 2000).



Development is required to designate countries which would reciprocate South Africa in cross border insolvency proceedings. No such State has been designated yet. Until such countries are designated, the courts in South Africa would be unable to invoke the provisions of the Cross Border Insolvency Act, 2000 to recognise orders of a foreign bankruptcy court, to apply a debt standstill or automatic stay worldwide.

6.9.13 Drawing from the above exposition of the legal position in Namibia, it is critical that Namibia harmonizes its insolvency legal framework with that of the Model Law on Cross Border Insolvency so as to strengthen cooperation between our courts and foreign courts in cross-border insolvency matters and to improve legal certainty for trade and investment. This is even more necessary against the background of regional integration of the economies of the Southern African Development Community (SADC) Member States in order to encourage the facilitation of trade in Africa.

6.9.14 In the same manner, the development of an effective cross-border legislation in Namibia is necessitated by circumstances where an insolvent debtor has assets and/or creditors in more than one country. This is especially true for Namibian businesses that have interests stretching beyond their home jurisdiction such as Shoprite, Game, Wimpy, Edgars, Truworths, Standard Bank, First National Bank, Nedbank, Pick 'n Pay, Mugg and Bean, At Home, Sanlam, Tiger Wheel and Tyre, Hifi Corporation, Old Mutual, Metropolitan, Nando's, Steers – to mention but a few, who are all South African entities doing business in Namibia with assets in Namibia. A very large chunk of corporate Namibia is therefore an extension of corporate South Africa. For this reason alone, Namibia needs to ensure that its citizens are capable of enforcing their rights across the Orange River should any entity operating in Namibia become involved in insolvency proceedings in South Africa. Issues of *locus standi* come to the fore, and hence, activities on the UNCITRAL scene will be closely followed by the LRDC.

**Quare:** As a matter of fact, for all CMA countries, or for that matter SACU<sup>228</sup> economies, may it not be ripe that discussion commences (or even from a SADC perspective) for a regional protocol on cross border insolvency matters?<sup>229</sup>

## **6.10 The need to amend key provisions and aspects that will make judicial management a functional and effective procedure for distressed companies and also the need to introduce processes that could be used to rescue/restructure the debt of legal entities**

6.10.1 The use of judicial management as a form of business rescue is introduced in Chapter Two of this Discussion Paper. The aim of judicial management under the Companies Act, 2004 is to assist companies which suffer a temporary financial setback to overcome those financial problems and eventually go back to “business as normal.”

6.10.2 The procedure of judicial management exists as an alternative to liquidation, and places a moratorium on the debt payments of the company.<sup>230</sup> However, even if judicial management exists as an alternative to the liquidation or winding-up of a company, stringent requirements must be met before a court will grant an order for the judicial management of a company.

6.10.3 This is evident from the case of *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* where the court found that a judicial management order cannot be easily granted, as judicial management is an extraordinary remedy that had to be treated by the courts as such.<sup>231</sup> In this event, an applicant seeking an order for the judicial management of a company has to demonstrate that a reasonable probability

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<sup>228</sup> The Southern African Customs Union (SACU) consists of Botswana, Lesotho, Namibia, South Africa, and Swaziland. The SACU Secretariat is located in Windhoek, Namibia. The Member States form a single customs territory in which tariffs and other barriers are eliminated on, substantially, all the trade between the Member States for products originating in these countries; and there is a common external tariff that applies to non-members of SACU.

<sup>229</sup> The absence of the SADC Tribunal to create community law in the area of Insolvency, inter alia, may very well justify this thinking.

<sup>230</sup> George Mutsa Museta, *The Development of Business Rescue in South African Law*, [web document] (2011). Available at: < <http://upetd.up.ac.za/thesis/available/etd-09102012-141143/unrestricted/dissertation.pdf> >, last accessed on 10 June 2014.

<sup>231</sup> 2001 (2) SA 727 (C).

exists that, if given the protection of judicial management, the company would be able to pay its debts and be restored to a successful concern. Often, proving this requirement is not an easy task and many companies eventually find themselves under liquidation in any event.<sup>232</sup>

6.10.4 If Namibia agrees that judicial management has not proved to be a useful business rescue tool in practice, then the question remains as to what can be done to keep financially troubled companies afloat so as to stave off liquidations and winding-up procedures that result in the dissolution of companies?

6.10.5 The ROSC narrates the application of judicial management in Namibia as follows:<sup>233</sup>

**The system does not include a formal procedure specifically designed for the reorganization of enterprises.**

Judicial management, as the only available formal procedure to reorganize distressed companies, is not being used in Namibia. Judicial management is at present a practically dead letter and it does not qualify as a reorganization proceeding under international standards because it lacks certain crucial features relating to the promotion of a formal restructuring plan. The lack of a rescue culture is a major shortcoming, and there are also a number of key provisions and aspects that necessitate close attention, including the following:

- (1) The threshold for placing a financially distressed company into judicial management may be too high therefore discouraging the use of the procedure;
- (2) The cost to run the procedure seems to be prohibitive;

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<sup>232</sup> See David Burdette, The University of Pretoria, Faculty of Law, Centre for advanced Corporate and Insolvency Law, *Final Report Containing Proposals on a Unified Insolvency Act: Part 1 Final Report and Explanatory Memorandum [web document] (January 2000)*. Available at: <[http://www.justice.gov.za/master/m\\_docs/insolve-unified-insolvency-report-up.pdf](http://www.justice.gov.za/master/m_docs/insolve-unified-insolvency-report-up.pdf)> last accessed on 07 August 2013. This particular publication addresses the reasons for the failure of judicial management as a viable business rescue mechanism, and the lessons to be learnt from its failure.

<sup>233</sup> ROSC, p.9.

(3) There is some uncertainty regarding the moratorium or automatic stay following the initiation of the process; and

(4) The relationship between judicial management and other insolvency procedures is not always correctly delineated.

6.10.6 South Africa introduced a new Companies Act, 2008.<sup>234</sup> This Companies Act, 2008 replaces judicial management and introduces a new “business rescue” provision the purpose of which is “to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”.<sup>235</sup> In defining the term “business rescue,” section 128(b) of the Companies Act, 2008 reads as follows:

**128 Application and definitions applicable only to Chapter**

“b. Business rescue – means proceedings to facilitate the rehabilitation of a company that is “financially distressed” by providing for –

1. temporary supervision of the company and of the management of its affairs, business and property;
2. a temporary moratorium on the rights of claimants against the company or in respect of property in its possession (not for property not in its possession per Section 133(1); and
3. the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company.”

<sup>234</sup> (Act 71 of 2008).

<sup>235</sup> Section 7(k) of the Companies Act, 2008.

6.10.7 In summary, the important aspects of business rescue in terms of the Companies Act, 2008 are the following:

- (a) it applies to companies and close corporations that are “financially distressed”;
- (b) it applies to companies that are unable to pay their debt and to those that are factually insolvent;
- (c) it allows such companies and their assets to be placed under temporary supervision by a business rescue practitioner;
- (d) has the benefit of a temporary moratorium of rights of claimants against the company or in respect of property in its possession;
- (e) allows for the development and implementation of a plan to rescue the company by restructuring its affairs, business, property, debts and other liabilities and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or if that is not possible will result in the business rescue practitioner giving a better return to creditors or shareholders (if applicable) than on liquidation of the company; and
- (f) As a final point, business rescue allows all stakeholders of that company to participate in the business rescue under the supervision of a neutral practitioner and ensures that all affected parties have a say in the business rescue.

6.10.8 According to the UNCITRAL Legislative Guide on Insolvency Law, there is far-reaching agreement that an effective and efficient insolvency law should aim to achieve certain key objectives. Although it does not use the term ‘business rescue’, the UNCITRAL Legislative Guide on Insolvency Law states unequivocally that facilitating the provision of the reorganization of businesses is a key objective of insolvency law.<sup>236</sup> The UNCITRAL Legislative Guide on Insolvency Law defines ‘reorganization’ as the process by which the financial well-being and viability of a debtor’s business can be restored and the business continues to operate, using

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<sup>236</sup> The United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law* [web document] (2004). Available at: <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html)>, last accessed on 21 April 2014.

various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern.<sup>237</sup>

6.10.9 Given that the judicial management procedure is considered very costly, not very effective and almost entirely untested in practice, the LRDC concurs that business rescue options may have to be accommodated by Namibia as the primary option to rehabilitate legal entities who are unable to pay their debts or meet their obligations. Nevertheless, the development of business rescue provisions in Namibia's insolvency regime needs to reflect both an awareness of modern international principles, as well as an innovative application of these principles to its own unique needs and socio-economic realities.

## **6.11 The need to regulate the insolvency profession in Namibia**

6.11.1 The Master of the High Court is a creature of statute that is established by section 2 of the Administration of Estates Act, 1965.<sup>238</sup> Besides the Administration of Estates Act, 1965 there are various statutes which regulate the duties and powers of the Master of the High Court. The most important of these are the Insolvency Act, 1936, the Companies Act, 2004, and the Close Corporations Act, 1988.

6.11.2 The Master of the High Court controls the entire process for the administration and sequestration of insolvent estates.<sup>239</sup> The effect of a sequestration order is to divest the insolvent of his estate and vest it in the Master.<sup>240</sup> It is from this that the necessity for the appointment of a trustee arises. The Master of the High Court is vested with the power to appoint a trustee pending the failure of creditors to elect one or two trustees at their first meeting under the Insolvency Act, 1936, an

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<sup>237</sup> *ibid*, p. 7. The UNCITRAL Legislative Guide on Insolvency Law cautions nevertheless, that adopting a reorganization-friendly approach should not result in establishing a safe haven for moribund enterprises: enterprises that are beyond rescue should be liquidated as quickly and efficiently as possible.

<sup>238</sup> (Act No. 66 of 1965).

<sup>239</sup> The provisions of the Insolvency Act, 1936 also apply in considerable measure, *mutatis mutandis*, to the winding-up of insolvent companies and to the appointment of, and control over, liquidators and provisional liquidators.

<sup>240</sup> Section 20(1) of the Insolvency Act, 1936.

important part of which consists of the oversight she exercises over the trustees in the performance of their functions as mandated by the insolvency Act, 1936.<sup>241</sup> The Insolvency Act, 1936 guides the Master of the High Court in the appointment of such a trustee by stating which persons cannot be appointed as trustees.<sup>242</sup>

## **55 Persons disqualified from being trustees**

Any of the following persons shall be disqualified from being elected or appointed a trustee-

- (a) any insolvent;
- (b) any person related to the insolvent concerned by consanguinity or affinity within the third degree;
- (c) a minor or any other person under legal disability;
- (d) any person who does not reside in the Republic;
- (e) any person who has an interest opposed to the general interest of the creditors of the insolvent estate;
- (f) a former trustee disqualified under section seventy-two;
- (g) any person declared under section fifty-nine to be incapacitated for election as trustee, while any such incapacity lasts, or any person removed by the court, on account of misconduct, from an office of trust:
- (h) a corporate body;
- (i) any person who has at any time been convicted (whether in the Republic or

<sup>241</sup> Section 54(5) of the Insolvency Act, 1936 states that "If at any meeting of creditors convened for the purpose of electing a trustee, no trustee is elected and the estate is not vested at the time of that meeting in a provisional trustee, the Master may appoint a trustee and if he does not so appoint a trustee, the Master or the insolvent with the Master's consent, may apply, at the cost of the estate, to the court by petition to set aside the sequestration and the court may make such order thereon as it thinks fit". Section 374 of the Companies Act, 2004 operates in a similar fashion regarding the appointment of a liquidator in the liquidation of companies. Bertelsmann J, in the matter of ***Ex parte: The Master of the High Court (North Gauteng) (2011 (5) SA 311 (GNP)) [2011] ZAGPPHC 105; 28042/11 (27 June 2011)*** defined clearly the scope of the Master's functions. In this regard, Bertelsmann declared that the Master of the High Court of South Africa is the only official authorised to appoint (1) trustees and provisional trustees of sequestrated and provisionally sequestrated estates, (2) liquidators and provisional liquidators of companies and close corporations in liquidation or provisional liquidation, (3) judicial managers and provisional judicial managers of companies in judicial management and provisional judicial management, and that no Judge of the High Court of South Africa has authority or jurisdiction to effect any appointment of any person to any of the positions referred to above, nor to make any recommendations to the Master in respect of any appointment to any of these positions".

<sup>242</sup> Section 55 of the Insolvency Act, 1936.

elsewhere) of theft, fraud, forgery or uttering a forged document, or perjury and has been sentenced therefor to serve a term of imprisonment without the option of a fine, or to a fine exceeding ten pounds;

(j) any person who was, at any time, a party to an agreement or arrangement with any debtor or creditor whereby he undertook that he would, when performing the functions of a trustee or assignee, grant or endeavour to grant to, or obtain or endeavour to obtain for any debtor or creditor any benefit not provided for by law;

(k) any person who has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for him as trustee or to effect or assist in effecting his election as trustee of any insolvent estate.

(l) any person who at any time during a period of twelve months immediately preceding the date of sequestration acted as the bookkeeper, accountant or auditor of the insolvent;

(m) any agent authorized specially or under a general power of attorney to vote for or on behalf of a creditor at a meeting of creditors of the estate concerned and acting or purporting to act under such special authority or general power of attorney.

6.11.3 Although the Insolvency Act, 1936 distinguishes between the persons who are disqualified from acting as a trustee, it omits to state the criteria for making such an appointment. This effectively confers on the Master of the High Court a discretion as to the method and the identity of the person appointed as a trustee of an insolvent estate.<sup>243</sup>

6.11.4 In order to circumvent the lack in statutory guidelines, the Master of the High Court implemented the following criteria in the determination of suitable candidates for appointment as trustees:<sup>244</sup>

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<sup>243</sup> The discretion of the Master of the High Court was an issue considered by the court in the matter between *Krumm v The Master 1989 3 SA 944 (D)*. In this matter, the court stated that the exercise of a discretion by the Master of the High Court to appoint a provisional liquidator could only be attacked on review on the basis that the Master of the High Court failed to exercise his/her discretion at all, that he/she acted *mala fide*, or was motivated by improper considerations.

<sup>244</sup> These guidelines can be obtained from the Ministry of Justice, Directorate: Master of High Court of Namibia. [web document] (2012). Available at: <<file:///P:/MOJsite250806/Requirements.htm>>, last accessed on 1 March 2014.



- (a) An application form requesting his/her name to be entered into the Register. Such application form is to contain an official letterhead and be personally signed by the candidate seeking appointment as trustee;
- (b) If the candidate is not self-employed, but employed at a firm, an application should be made by the management or a member of the organization;
- (c) Such application is to be supported by a comprehensive Curriculum Vitae of the candidate containing therein his/her relevant qualifications and testimonials signed personally by the candidate;
- (d) If the candidate was or is at present employed by a principal whose name appears on the Register, such application must be accompanied by –
- (i) A report on each on the matters to which candidate administered on behalf of principal;
  - (ii) A summary of aspects of administration which candidate is/was responsible; and
  - (iii) Candidate must be supported by that principal.
- (e) If the candidate is a practicing attorney/accountant practicing in partnership or a corporation, his/her partners or co-members should agree to the application in writing and confirm that membership is not against any agreement between parties;
- (f) The candidate should declare all his/her business/occupational activities and affirm that such activities will not put a strain on his/her duties as appointee in insolvency and liquidation matters especially when urgent attention is required;
- (g) All candidates are required to prove that they have the necessary infrastructure at their disposal to properly attend to all duties attached to the said offices;
- (h) All candidates are to provide proof of their position to lodge security to the

Masters satisfaction for proper performance of his/her duties in office;

- (i) All candidates are to have the necessary applicable knowledge and experience to execute their duties specialized in knowledge and qualifications act as strong recommendation;
- (j) All candidates should refer to an experienced practitioner with his/her written confirmation that is prepared to act jointly with him/her; and
- (l) All candidates should submit proof of his/her residency in Namibia

6.11.5 Many of the trustees appointed under the Insolvency Act, 1936 who meet the requirements outlined above are legal practitioners, accountants and auditors. These professions are subject to discipline by their statutory professional bodies and regulatory or administrative bodies or societies, and besides insolvency practitioners are not regulated in Namibia.<sup>245</sup>

6.11.6 Like Namibia, the South African insolvency practice was virtually unregulated, with wide variances in qualifications of insolvency practitioners, judicial managers and liquidators. As mentioned previously in this Discussion Paper, the SALC has published a Discussion Paper on the review of South Africa's insolvency law.<sup>246</sup> The Discussion Paper outlines some of the measures to address persistent complaints that some liquidators are incompetent and even dishonest and proposed the following substantive changes to South Africa's insolvency profession:<sup>247</sup>

#### **Measures against dishonest or incompetent liquidators**

<sup>245</sup> Legal practitioners are regulated by the Legal Practitioners Act, 1995 (Act No. 15 of 1995) and accountants and auditors are regulated by the Public Accountants' and Auditors' Act, 1951 (Act No. 51 of 1951).

<sup>246</sup> South Africa Law Commission, *Review of the Law on Insolvency*, Discussion Paper 86 (Vol 1), [web document] (1999). Available at: <<http://www.justice.gov.za/salrc/dpapers.htm.#sthash.OhZxkqN0.dpuf>>, last accessed on 21 June 2013.

<sup>247</sup> *ibid*, p. 11.

Only a person who is a member of a professional body recognized by the Minister may be appointed as liquidator.

The discretion of the Master of the High Court to appoint a liquidator of his or her choice has been limited in cases where creditors nominate or vote for a liquidator. Liquidators may preside at meetings unless questioning is to take place at the meeting or an interested party requests that the Master or a magistrate should preside.

Resolutions can be adopted at the first meeting which is now convened by the initial liquidator as soon as possible after his or her appointment and not by the Master.

A creditor under a financial lease agreement is treated as a secured creditor and must prove a claim.

Many of the preferent claims (for instance for taxes) are abolished.

In respect of dispositions before liquidation that may be set aside, wider provisions apply to associates of the insolvent than to other persons, and it is presumed for all dispositions, until the contrary has been proved, that a debtor's liabilities exceeded his or her assets at any time within three years before the liquidation of the estate.

A cap of R200 000 (approximately US\$ 17,000 at the current rate of exchange when the LRDC went to publication of this Discussion Paper) has been placed on the exclusion of pension benefits from the insolvent estate (clause 15(4)) and certain extraordinary contributions to pension funds may be recovered for the benefit of creditors.

Provision is made for a binding composition between a debtor and a majority of creditors without an application to declare a debtor's estate insolvent.

6.11.7 Although the South African Government is yet to implement the proposals of SALC's Discussion Paper, it has passed a policy on the appointment of insolvency practitioners.<sup>248</sup> The stated objective of this policy on the appointment of insolvency practitioners is to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.<sup>249</sup> Accordingly,

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<sup>248</sup> This policy can be accessed from the Government of the Republic of South Africa, Department of Justice and Constitutional Development, *Policy on the Appointment of Insolvency Practitioners* [web document] (2014). Available at: < <http://www.justice.gov.za/master/liqui/Policy-AppointmentOfInsolvencyPractitioners.pdf> >, last accessed on 23 June 2014.

<sup>249</sup> *ibid*, section 2.

all masters offices in South Africa are expected to divide insolvency practitioners into four categories:<sup>250</sup>

- Category A: African, Coloured, Indian and Chinese females;
- Category B: African, Coloured, Indian and Chinese males;
- Category C: White females; and
- Category D: White males.

6.11.8 The policy will only apply to appointments made in terms of the Insolvency Act, 1936, the Companies Act, 2008 and the Close Corporations Act, 1984 and will not apply to the appointment of an insolvency practitioner tasked with the voluntary winding up of a solvent company.<sup>251</sup> Although the policy is an attempt to establish uniform procedures for the appointment of insolvency practitioners, several arguments have been raised by the South Africa Restructuring and Insolvency Practitioners Association (SARIPA) against the implementation of the policy.<sup>252</sup>

6.11.9 SARIPA issued a court application in terms of which it applied for an interdict to restrain the Minister of Justice and Constitutional Development and the Chief Master from implementing the new policy and further applying for the court to review and set aside the policy.<sup>253</sup> SARIPA argues that the policy unlawfully fetters the discretion of the Master, infringes the right to equality under section 9 of the South African Constitution and is irrational and *ultra vires* of the Insolvency Act, 1936.<sup>254</sup>

6.11.10 Pending the determination of SARIPA's application, the Minister of Justice and Constitutional Development and the Chief Master have been interdicted and restrained from implementing the policy.<sup>255</sup>

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<sup>250</sup> *ibid*, section 6.1.

<sup>251</sup> *ibid*, section 3.

<sup>252</sup> Hogan Lovells & Ashton Crommelin, *New policy on the appointment of insolvency practitioners – could this be a turning point in the South African insolvency industry?* [web document] (2014). Available at: < <http://www.lexology.com/library/detail.aspx?g=9a47716d-bc0f-47ed-b746-80997987e09a> >, last accessed on 23 June 2014.

<sup>253</sup> *ibid*.

<sup>254</sup> *ibid*.

<sup>255</sup> *ibid*.

6.11.11 The UNCITRAL Legislative Guide on Insolvency Law confirms the important role the insolvency practitioner plays in insolvency proceedings by stating as follows:<sup>256</sup>

However appointed, the insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially. Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.

6.11.12 The lack of a formal set of criteria for determining the qualification, accreditation and supervision of insolvency practitioners in Namibia poses risks for the development of the system.<sup>257</sup> The LRDC shares the view that the insolvency profession in Namibia has reached a stage in its development that demands heightened attention to strong, international standards of professionalism.

6.11.13 To this end, Namibia can learn from the examples of South Africa and determine the best way to develop and standardise rules to ensure competency, integrity and independence of insolvency representatives in the country.

## **6.12 The need to regulate the insolvency of trusts**

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<sup>256</sup> The United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law* [web document] (2004) <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html)>, last accessed on 21 April 2014, p. 174.

<sup>257</sup> ROSC, p. 10.

6.12.1 The position of law regulating the insolvency of trusts was summarised in the case of *Melville v Busane and Another*<sup>258</sup> as follows:

“The common law does not recognise a trust as a juristic person, except where a particular statute so provides. The previous Act did not define “juristic person” or “body corporate”. In the Act, “juristic person” is defined to include a trust, irrespective of whether or not it was established within or outside the Republic. There is no definition of “body corporate”. [.....]

6.12.2 In the event of a trust’s insolvency, while the previous Act was in operation, the appropriate remedy was to sequestrate a trust. The reason for this is apparent in the judgment of *Magnum Financial Holdings v Summerly NO*<sup>259</sup> where it was found that a trust fell within the definition of a “debtor” as set out in Section 2 of the Insolvency Act, 24 of 1936. In the Insolvency Act “debtor” is defined as follows:

"'debtor', in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or a partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies".

6.12.3 It was found that a trust was "a debtor in the usual sense of the word". Furthermore, it was not a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies.”

6.12.4 In light of the above, in the absence of specific legislation, insolvent trusts are treated as debtors and sequestered as natural persons or partnerships. It may be feasible that the law takes into account the business nature or business utility of trusts and seeks to encompass their regulation in similar fashion with other enterprises.

6.12.5 This much the Namibia Stock Exchange has requested time and again, and it may be time to structure the nature of trusts in business in such a way that they may

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<sup>258</sup> (2067/2011) [2011] ZAECPEHC 45; 2012 (1) SA 233 (ECP); [2012] 1 All SA 675 (ECP) (18 August 2011)

<sup>259</sup> 1984 (1) SA 160 (WLD)

continue to be used for business without much difficulty in winding up. The treatment of bonds and their netting (where required) would be largely facilitated.

## 7. CONCLUSION

7.1 It is manifest that the law of insolvency concerns not only the regulation of sequestration, liquidation and winding-up procedures of individuals and legal entities who are unable to pay their debts or meet their obligations, but it covers and affects a broader scope and multiplicity of other laws that fortify a country's economic development and reinforces economic relations between States.

7.2 In the last twenty-four years Namibia's economy and its legislative framework have undergone a massive programme of reform, as would be expected of a developing economy. Similarly, as the global pace of international trade amongst nations changes, it becomes crucial to undertake a holistic review of and modernise all aspects of Namibia's insolvency law so as to respond to the needs of individuals and legal entities alike. This is what Calitz meant when she stated the following:<sup>260</sup>

“Lawmakers will have to negotiate a satisfactory resolution between global norms and standards which would be acceptable on an international level, while also anticipating the difficulties that could arise out of the political and economic realities of a developing country with unique commercial and legal issues.”

7.3 The modernisation and review of Namibia's insolvency laws can be achieved either by taking international instruments as an example, adapting their rules according to the needs of our domestic law and legal tradition, or looking at other comparative jurisdictions and taking examples from their experiences. This is obviously not something that can be done overnight. It can only be achieved with a clear remit and the inclusion of or consideration of the views of all interested parties.

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<sup>260</sup> Juanita Calitz, Some thoughts on State Regulation of South African Insolvency Law, *De Jure*, 2/44 (2011), pp. 290 – 318.

7.4 This Discussion Paper outlines key issues and challenges to implementing a strong and effective insolvency regime. It further sets out the framework for detailed consultation to ensure that law reform proposals are not only compatible and harmonious with international best practice, but incorporate the legal, economic and social context of a contemporary Namibia.

7.5 Namibia will benefit from the work done by UNCITRAL's Working Group V (Insolvency), and in particular the UNCITRAL Legislative Guide on Insolvency: Parts 1, 2, 3 and 4, as evidence of thinking on the subject at the international level in globalized world. Cross-border insolvency is not a far-away phenomena in globalized world.

7.6 The Discussion Paper calls upon the views and informed input of interested parties on the way forward in terms of law reform. As stated earlier in this Discussion Paper, the LRDC envisages that the publication and circulation of this Discussion Paper to the relevant stakeholders to culminate into a workshop for final contributions to a draft Bill and/or amendments to the Insolvency Act, 1936 and ancillary legislation where applicable.

7.7 As a final point, it must be noted that whilst the Insolvency Act, 1936 and the Companies Act, 2004 have undergone various revisions over the years, such reviews have essentially been piecemeal. It is the LRDC's view that a holistic review and update is thus timely, especially given Namibia's growth in the financial and economic sectors. If Namibia's insolvency laws responds to the needs of individuals and businesses, this will be significant for economic growth and contribute towards the economic vision of Namibia under Vision 2030.

7.8 Such a holistic view should answer the policy questions that have surfaced: Should the entire Insolvency Act, 1936 be reformed or only specific provisions of the said legislation?

**End.**



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## ANNEXURE A

### REPORT ON THE OBSERVANCE OF STANDARDS AND CODES INSOLVENCY AND CREDITOR/DEBTOR REGIMES

# NAMIBIA

FINAL

OCTOBER 2014

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## REPORT ON OBSERVANCE OF STANDARDS & CODES

### NAMIBIA

### INSOLVENCY AND CREDITOR/DEBTOR REGIMES

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Prepared by a staff team<sup>1</sup> from the World Bank on the basis of information provided by the Namibian authorities

FINAL

OCTOBER 2014

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## EXECUTIVE SUMMARY

After its independence in 1990, Namibia has achieved political and economic stability and a moderate rate of economic growth. Access to credit, however, is uneven, and there are special problems in access to finance for small and medium enterprises. It can be argued that there are legal factors that contribute to the restrictions many businesses experience in accessing the credit market. The legal system of Namibia is based on the Roman-Dutch law inherited from South Africa. There have been important changes to the legal system since independence, but these changes have been marginal in the area of insolvency and creditor/debtor regimes.

The system for the creation of security interests over immovable assets is generally sound. However, the regulation of security interests over movable assets could be significantly improved by means of substantive changes in the law and the introduction of a new system for registration. The enforcement system is regarded as being efficient, although there are symptoms of overload in the High Court.

Credit information systems in Namibia follow the South African model and their coverage of the Namibian population is good, but the industry is unregulated and there are no rules providing for consumer protection. Restructuring of debts is considered as the best approach to the problems of distressed enterprises, but there are no guidelines for the negotiation of workouts, and the main instrument for restructuring debt, the scheme of arrangement, has important shortcomings that could be addressed.

The insolvency regime in Namibia suffers the complexities that characterize the original South African model. The provisions applicable to insolvency proceedings are dispersed across different statutes belonging to very different periods. The system is geared towards liquidation, and the

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<sup>1</sup>The team comprised José M. Garrido (Task Team Leader, Senior Counsel, Legal Vice-Presidency), Look Chan Ho (Senior Counsel, Legal Vice-Presidency) and Andre Boraine (Senior International Consultant). The World Bank team was assisted by the Namibian advocate Adolph Denk.

only alternative to liquidation, the judicial management process, is considered very costly, not very effective and almost entirely untested in practice. There are several issues that would deserve attention in a reevaluation of the insolvency process, such as the criteria for access to insolvency, the treatment of executory contracts, and the classification of creditors. The insolvency system is particularly deficient in some of the most advanced areas, such as the treatment of cross-border insolvencies and of the insolvency of enterprise groups.

The institutional framework of the insolvency and creditor/debtor regime needs to be reinforced. Although insolvency practice has remained at low levels for a long time, it is foreseeable that a larger economy, when faced with economic difficulties, will require higher institutional capacity to deal with insolvency and debt enforcement issues. In this regard, the courts would need to be reinforced, but it is even more important that the Master of the High Court, which performs critical functions in the insolvency system, receives the adequate resources. Finally, the regulatory framework for insolvency representatives is an important part of the architecture of the system and deserves special consideration. There is a great need for the development of a regime for insolvency practitioners, with adequate qualifications, and proper supervision and enforcement.

## I. INTRODUCTION

1. The World Bank reviewed the legal and regulatory frameworks for creditor-debtor rights and corporate insolvency systems in Namibia pursuant to a joint IMF – World Bank initiative to develop *Reports on Observance of Standards and Codes* (“ROSC”). The review was based on the international standard, based on the World Bank *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (“Principles”) adopted by the World Bank Board at its meeting in April 2001, and modified in 2005 and in 2011<sup>2</sup>; and on the recommendations of the UNCITRAL Legislative Guide on Insolvency Law<sup>3</sup>. There are 35 World Bank Principles that are divided into four broad categories:

- a) The legal framework for granting and enforcing security (credit, enforcement and collateral systems);
- b) Credit risk management and the environment for corporate workouts and restructurings;
- c) The legal framework for insolvency (liquidation and rehabilitation); and d) The institutional and regulatory implementation framework.

2. The assessment was performed by a World Bank team following a mission to Namibia in July 2013. The team interviewed a wide cross section of stakeholders to

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<sup>2</sup>World Bank, *Principles for Effective Insolvency and Creditor Rights Systems* (revised version 2011), available at [http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/ICRPrinciples-Jan2011\[FINAL\].pdf](http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/ICRPrinciples-Jan2011[FINAL].pdf).

<sup>3</sup>UNCITRAL, *Legislative Guide on Insolvency Law*, (2004, with part 3 added in 2010, and part 4 added in 2013), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html).

discuss the effectiveness of the legal framework for insolvency and its implementation to support debtor-creditor relationships, commercial insolvency and credit risk management and resolution practices, including among others:

- Senior officials from the Law Reform and Development Commission; the Bank of Namibia, NAMFISA, the Ministry of Trade and Industry, the Ministry of Finance; the Office of the Master of the High Court, and the Deeds Registry and the Registry of Companies;
- The Namibian Stock Exchange; the Chamber of Commerce;
- Representatives from the Development Bank of Namibia, SME Bank, FIDES Bank, and AgriBank;
- Senior bankers from the four key commercial lending banks in Namibia; Representatives from credit information systems;
- Senior lawyers, accountants, and insolvency practitioners.

3. The conclusions in this assessment are based largely on the above interviews, a review of applicable legislation,<sup>4</sup> data and information on the subject of insolvency, creditor rights, investment climate in Namibia and the contributions of the steering committee. In addition, a number of commercial banks provided responses to a questionnaire soliciting data, information and experience of the banks on credit risk management issues, corporate recovery practices and levels and treatment of distressed assets. The team wishes to express its gratitude to all the public and private stakeholders for their cooperation, and especially to the Law Reform and Development Commission, which has provided invaluable support for this process.

## **II. DESCRIPTION OF COUNTRY PRACTICE**

**5. The insolvency and creditor/debtor regime of Namibia has served the economic needs of the country since independence, but further economic growth and development will require targeted reforms and incremental changes in the system.** The legal framework for regulating insolvency and creditor rights in Namibia still largely tracks the South African approach, based on robust creditor rights and on an effective court system, and has procured security and predictability to economic actors. Reforms should be built on the foundations of the existing insolvency and creditor/debtor regime.

**6. The implementation of the strategy of economic development of the Namibian Government contemplates the strengthening of the business enabling environment and broader access to credit.** The National Development Plan (NDP4) would be effectively supported by careful consideration of important aspects of the insolvency and creditor/debtor regime, since a sound insolvency and creditor/debtor regime is both a defensive tool against crises, in that it provides a safety valve for widespread financial distress, and an inducement to investment, as it contributes to flexibility and certainty.

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<sup>4</sup>Among the numerous statutes that have been analyzed for this report it is worth mentioning the Insolvency Act 24 of 1936; the Deeds Registries Act 47 of 1937; the Magistrates' Court Act 32 of 1944; the Close Corporations Act 1988; and the Companies Act 28 of 2004.

**7. The reforms introduced since independence have affected the insolvency and creditor/debtor regime framework only marginally.** The basic pieces of legislation covering the insolvency and creditor/debtor regime remain: the Insolvency Act 24 of 1936, the Close Corporations Act 26 of 1988, and the Companies Act 28 of 2004. These statutes are supplemented by other basic statutes regulating credit relationships, security interests and enforcement of debts, and also by the common law.

**8. The legal framework for regulating insolvency and creditor rights in Namibia is fragmented and an effort should be made to coordinate the different pieces of legislation.** Broadly speaking, the existence of different, often unconnected, legal procedures to regulate various persons and debt-scenarios may work against the effectiveness of the insolvency and creditor/debtor regime.

#### **A. CREDITOR RIGHTS AND ENFORCEMENT PROCEDURES**

**9. While Namibia has maintained stability in its financial system, access to credit still presents constraints for the small-to-medium sized business sector and for sole traders.** Banking practice is based on the analysis of the creditworthiness of businesses, their financial statements and credit history, and the provision of adequate collateral. Many micro-, small and medium enterprises experience constraints in accessing finance for several reasons, including the shortcomings in the legal regime. It must however be noted that there are new Government-led initiatives to foster credit granting to SME's in particular, that may assist in the development of new businesses.

**10. Namibian law provides for a variety of different types of security to be used as collateral in lending, but the regime for security interests over movable assets is less effective than it should be.** The system recognizes the possibility of creating mortgage bonds on land and special bonds and general bonds over movable assets. There is also a role for assignment of debts, hire-purchase agreements, and leasing contracts as functional equivalents of security interests. Generally, lenders appear less comfortable with the use of movable security. One reason may relate to the regime for the creation and perfection of interests in movable property, whereby security is largely perfected by court order or by taking possession by agreement between the parties. In this context, perfection of the security interest over a potentially depreciating asset may be affected by delays in the court process, or by debtors dissipating the secured assets in anticipation of insolvency. As such, broadly, movable security is not regarded as meaningfully limiting the credit risk undertaken by lenders, and thus reducing the costs of credit. A general reform of the law of secured transactions over movables would be required to bring Namibia in line with international best practices on this matter, especially on the issue of perfection of security interests by registration.

**11. The system of Deeds Registries in Namibia is generally effective for the registration of security interests over immovable assets; however, there are some issues such as the indirect cost of registration and delays that derive of processes different from registration; and some logistical and organizational challenges are**

**noted.** The Deeds Registry is responsible, amongst other things, for undertaking registrations of both movable and immovable security. The Deeds Registry, deals mainly with the registration of land and rights thereto, but also serves as the registry for charges over movables in the form of notarial bonds. The costs associated with registration are substantial, and the delays in registration of security interests, due to the different procedural steps involved, have often been cited as a concern by financial institutions. There are also issues in the organization of the registry, which is not yet fully computerized, and it presents problems of accessibility, especially for users located outside the capital. An effective system for the registration of security interests over movables necessitates an organized and consolidated system for the recording and documentation of security interests. Alongside the reform of the law of secured transactions, a modern and accessible registry which records and provides notice of security interests over movables is likely to inject considerable certainty and predictability into the system.

**12. The enforcement of secured and unsecured claims is generally effective in Namibia.** The system for the enforcement of secured and unsecured credit is eminently judicial, with no role for out-of-court enforcement. Although enforcement may be slow in defended cases, most of the debt enforcement actions are undefended and creditors are able to enforce their claims within a reasonable amount of time, when High Court procedures are used.<sup>5</sup>

## **B. CREDIT RISK MANAGEMENT/INFORMAL WORKOUTS**

**13. The legal environment for risk management and restructuring activities presents positive aspects, but also important challenges.** Risk management practices of financial institutions are generally sound, based on the analysis of financial statements, business plans, credit history, repayment capacity and adequate collateral. There is a clear trend towards negotiation and informal restructuring of debts in cases of distress. Restructuring activities are supported by a strong enforcement regime, which acts as a backdrop for negotiation. The quality of financial statements and accounting information is acceptable, although it depends on the size of the enterprise. The tax regime, however, can create obstacles to restructuring activities, especially because concessions to the debtor in the form of reduction of principal and interest payments are considered taxable income, whereas from the lender's perspective, only a reduction of interest may be tax deductible.

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<sup>5</sup> It seems that, in spite of the culture of debt-repayment in Namibia, there are numerous financial consumers subject to dubious debt enforcement practices. The operation of various debt restructuring options like the reform of the administration order in terms of section 74 of the Magistrates' Courts Act of 1944, and its alignment with sequestration which causes a liquidation of assets, should be subject to a careful review, in conjunction with other matters like the regulation of credit bureaus and the revision of consumer credit agreements. These matters should be considered within the broader context of the analysis of the financial consumer protection regime and the revision of the personal insolvency system.



**14. Credit information systems in Namibia require regulation.** Credit information systems play a major role in ensuring the soundness of lending practices and allowing access to finance for creditworthy businesses and individuals. There are at present two credit information providers, offering a good coverage of the market. However, the credit bureaus are unregulated, and there are issues both in the nature of the information provided and the reliability of the system. Comprehensive draft regulations have already been prepared by the Bank of Namibia to address these issues and the problems in the protection of consumer rights.

**15. The definition –and especially, the enforcement- of the duties of directors and officers in connection with the insolvency of companies could be improved.** There is no effective mechanism to establish accountability and liability of those persons who control distressed enterprises. Indeed, persons controlling distressed enterprises characteristically suffer perverse incentives to risk the enterprise's assets in negative net present value projects in the unrealistic hope of trading out of difficulties. They may also have an incentive to strip the enterprise of assets or to benefit connected creditors at the expense of others. The insolvency regime should counter such perverse incentives through effective mechanisms of accountability and liability. In this connection, the Companies Act 28 of 2004 contains a number of provisions dealing with directors' duties and liabilities in distressed scenarios. However, these provisions do not seem effective because they are hardly invoked by insolvency practitioners to hold directors to account and the insolvency practitioners' decision in this regard is practically not subject to any review.

**16. A number of aspects relating to the legal framework for restructuring practice may need to be strengthened.** There is some practice in the negotiation of multilateral workouts, but without a set of guidelines accepted by the financial sector. In practical terms financial institutions do informal debt restructurings, and it seems that schemes of arrangement under the Companies Act 28 of 2004 (sometimes used in conjunction with provisional liquidation) are the preferred formal procedures where informal resolution is not practicable. A robust restructuring framework may encourage/guide informal restructurings where negotiations are conducted against the background of formal restructuring measure. Among other things, consideration may be given to providing for a moratorium or automatic stay following the initiation of a scheme of arrangement process. An important issue in relation to restructuring is the practical difficulty in transforming informal workouts into rescue plans or other form of binding arrangements on dissenting creditors. In general, all changes must be undertaken in the context of a shift towards a business rescue culture.

### **C. LEGAL FRAMEWORK FOR BUSINESS INSOLVENCY**

**17. The insolvency system of Namibia is contained in a number of different statutes and the use of insolvency procedures is limited.** The current regime is divided across a

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number of regimes, notably, the Insolvency Act 24 of 1936 (regulating personal and partnership insolvency largely, and providing rules of general application within the insolvency system); the Close Corporations Act 26 of 1988 (insolvency of close corporations); the Companies Act 28 of 2004 (corporate liquidation, and rescue procedures in the form of judicial management and schemes of arrangements and compromises). The Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968 also influence the insolvency regime. The insolvency system is used sparingly, especially by individuals and by partnerships. The analysis of the absolute data must take into account the size of the Namibian economy and its growth potential.

**COMPANY LIQUIDATION CASES**

	2009	2010	2011	2012	As of July 2013
No. of companies liquidated	21	16	7	16	6
No. of close corporations liquidated	6	8	3	10	7
<b>Total</b>	<b>27</b>	<b>24</b>	<b>10</b>	<b>26</b>	<b>13</b>

Source: Master of the High Court, Namibia

**PERSONAL INSOLVENCY CASES (SEQUESTRATIONS)<sup>6</sup>**

	2009	2010	2011	2012	As of July 2013
No. of cases registered	11	13	7	4	2

Source: Master of the High Court, Namibia

**18. The current liquidation regime is antiquated and does not serve the needs of a modern economy.** At present, the current framework for insolvency, as codified under the Insolvency Act 24 of 1936; the Close Corporations Act 26 of 1988; and the Companies Act 28 of 2004. The regime is almost exclusively focused on liquidation of

<sup>6</sup> Sequestrations may refer to merchants or to individuals not engaging in business activities.

the insolvent estate, often by way of sale of the assets on a piecemeal basis. Liquidation is considered by all participants as a measure of last resort and only fulfills a residual role in the protection of economic enterprise value.

**19. There are specific technical issues in the liquidation framework that reveal issues that need to be addressed.** Various sections of the Insolvency Act 24 of 1936 as well as sections from the Companies Act 28 of 2004 relating to insolvency are not adapted to the demands of a modern insolvency process. Some of these provisions include the notification procedures and the communications among the competent authorities; the provisions regulating the sale of assets –where the sale of the business as a going concern presents serious challenges; and a hierarchy of claims that no longer corresponds to the Namibian economy and society.

**20. At present, there is significant legal uncertainty about the treatment of executory contracts, and, specifically, about the treatment of financial contracts.** The lack of predictability in the treatment of executor contracts and of financial contracts is generally seen to be preventing access to the international financial markets and arresting the development of a modern domestic financial market, and may have other important repercussions in other areas, such as the design of regimes for the resolution of financial institutions.

**21. The system does not include a formal procedure specifically designed for the reorganization of enterprises.** Judicial management, as the only available formal procedure to reorganize distressed companies<sup>7</sup>, is not being used in Namibia. Judicial management is at present practically dead letter and it does not qualify as a reorganization proceeding under international standards because it lacks certain crucial features relating to the promotion of a formal restructuring plan. The lack of a rescue culture is a major shortcoming, and there are also a number of key provisions and aspects that necessitate close attention, including the following: -The threshold for placing a financially distressed company into judicial management may be too high therefore discouraging the use of the procedure; -The cost to run the procedure seems to be prohibitive; -There is some uncertainty regarding the moratorium or automatic stay following the initiation of the process; and the relationship between judicial management and other insolvency procedures is not always correctly delineated.

**22. The Namibian system does not have a regime for handling cross-border insolvencies or the insolvency of enterprise groups.** These may be regarded as advanced issues for which there is not a present and urgent need. However, the future may bring an increase in cross-border insolvency cases in Namibia, particularly in light of globalization of trade and investment in general, and economic development will inevitably bring about a wider use of complex corporate structures. In a world of cross-border economic activities legal disputes are bound to arise and a proper regime for the recognition and enforcement of foreign insolvency proceedings and judgments are

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<sup>7</sup>It must be noted that the Close Corporations Act of 1988 has a procedure for compositions that may be used for the purposes of rescue but it appears hardly ever used in practice. Partnerships seem not to have a practical composition to their avail in order to restructure debt and there is no such formal procedure for SOE's. So it seems that the introduction of a process that could be used to rescue/restructure the debt of such entities should also be considered.

therefore important for any system. Although Namibia has some legal rules and precedents regarding the enforcement of foreign judgments, it lacks a comprehensive regime for recognition and cooperation in cross-border insolvency cases, as well as provisions for the treatment of the insolvency of domestic and international enterprise groups.

#### **D. REGULATORY FRAMEWORK FOR CREDITOR RIGHTS AND INSOLVENCY**

**23. There are positive aspects in the Namibian institutional framework, especially in the judiciary.** The judiciary in Namibia has a strong reputation of independence and integrity and users of the system appreciate the quality of the judges. The effective operation of the insolvency and creditor rights framework relies, to a large extent, on the intervention of the courts. However, the judicial framework to support the operation of an efficient credit environment may be rendered less effective by a challenging workload. Since there is a tendency to take all enforcement matters to the High Court, this may lead to an overburdening of this court, being the only civil court at this level in the country. The introduction of case management and the newly proposed e-filing system may ease the burden in time to come. The Magistrates Courts seem to be struggling with a number of issues like weak administrative support in many instances, and a backlog of cases that have resulted in the court process becoming subject to lengthy delays – hence the preference to take matters rather to the High Court. Namibia does not have a specialized commercial court and the amount of cases may not warrant the introduction of such a court. A limited *de facto* specialization by judges and the allocation of the more complex matters to those with particular interest and knowledge of such matters may however assist in this regard.

**24. The Master of the High Court should play a key role in the effective administration and oversight of the insolvency framework.** To fulfill its functions, the Master's office requires adequate human and material resources. At present, the Master's office lacks the essential means to ensure the swift processing of urgent insolvency matters and the adequate supervision of the work of insolvency practitioners. In addition, the communications among the various offices like the Master's office, The Registrar of the High Court and the Registrar of Companies, are not being efficient.

**25. The insolvency profession, in Namibia, albeit small, remains largely unregulated and this poses risks for the development of the system.** To begin with, there is no formal set of criteria for determining the qualification, accreditation and supervision of insolvency practitioners. In addition, there is no formal system for developing training for the profession, such that there is no mechanism for entrants to gain experience as part of a robust training program.

### **III. SUMMARY OF ASSESSMENT FINDINGS AND CONCLUSIONS**

**26. The regulation of secured credit and the functioning of enforcement procedures present positive aspects, as well as some points that could be improved.** The key areas of attention are the following:

○ **The creation of security interests over immovable property is generally efficient, but the regime for the creation of security interests over movable assets presents some defects.** The substantive law for the creation of security interests over movable assets, and the system of the Deeds Registries is not adapted to the needs of a modern framework for the creation and registration of security interests over movable assets.

○ **The enforcement of individual secured and unsecured claims is not entirely satisfactory.** Although the situation in Namibia is much more favorable than in the other countries of the region, the enforcement could be improved, and could be further decentralized. The inefficiencies are attributable more to the problems of the institutional framework than to the procedural regime applicable to enforcement actions.

**27. Credit risk management is well developed, and informal restructurings represent a more attractive alternative than the formal insolvency system.** However, some aspects in this area deserve special attention:

○ **The activity of credit information systems is unregulated, although draft credit bureau regulations are in the process of being approved.**

○ **Although there are some provisions establishing the liability of directors in insolvency, their scope is incomplete and their enforcement is insufficient.**

○ **Financial institutions tend to follow standard practices in the negotiation of workouts, but the instruments for multilateral debt restructuring present shortcomings.** Debt restructurings are the best option in the system, despite some obstacles such as the tax treatment of restructuring activities. Formal schemes of arrangement have been used by Namibian institutions, but the lack of a stay of actions, the high costs and other legal rules have prevented a more efficient use of the schemes. The law does not provide a special regime for the conversion of informal workouts into a scheme or into a composition.

**28. The regulation of commercial insolvency is fragmentary, contained in legislation that is not coordinated and that is antiquated.** The regulation of business insolvency is presently comprised in a number of different statutes belonging to different periods. It is sometimes difficult to discern the appropriate rule applicable to a certain distress situation, or for a specific debtor. Some of the more relevant issues that this insolvency framework raises are the following:

○ **The regime for personal and partnership insolvency is regarded as being outdated and the number of cases is low.** Individual merchants and partnership tend to avoid the insolvency process and normally liquidate operations outside the scope of the insolvency process.

○ **The liquidation process focuses on the sale of the debtor's assets, but even that limited goal is difficult to achieve in the most efficient way.** The liquidation procedure does not ensure that the company's assets are sold as a

going concern despite the fact that this is more beneficial for creditors in most cases. In addition, there are other important issues with the regulation of the liquidation proceedings, namely:

- Deficient communications among the competent authorities;
- The sale of the business as a going concern presents serious difficulties;
- The treatment of executory contracts is fragmentary and does not offer solutions that are generally applicable;
- The outdated regime of priorities reduces the possibilities of recovery for unsecured creditors;
- The mechanisms for the publicity of decisions affecting creditor rights are insufficient.

○ **Judicial management has not been successful as an alternative to liquidation.**

Judicial management lacks many of the distinctive features of a reorganization process. The lack of use of the process reveals an absence of reorganization practice in Namibia.

- **There are no provisions for cross-border insolvency, or for the treatment of the insolvency of domestic and international enterprise groups.**

**29. The institutional framework for the enforcement of claims and for commercial insolvency has rendered a good service to Namibia since its independence, but is already experiencing problems.** Some important points on the institutional framework include the following:

- **The judiciary is not specialized in commercial matters or in insolvency, but the quality of the judges is generally high.** The Magistrates' Courts experience numerous and more severe problems in their operation.
- **The Master of the High Court is the insolvency regulator.** As such, the Master's office is responsible for maintaining the lists of qualified insolvency representatives, and for the supervision of the activity of these professionals. The means at the disposal of the Master are insufficient.
- **The regime of insolvency representatives has not been developed.** There are no objective and adequate requirements to become an insolvency representative, and the regime for insolvency representatives has not been updated to the needs of a modern economy. There are no standards of professional conduct applicable to insolvency representatives and many other aspects of the regime have not been developed or have developed through de facto practices that supersede the legal regime.

#### IV. POLICY RECOMMENDATIONS

**30. The introduction of several changes on the insolvency and creditor/debtor regime would allow the preservation of the positive qualities of the system.** The analysis contained in the report provides a comprehensive analysis of the credit and insolvency system, and solutions that are based on international best practices and comparative experiences. The questions that are highlighted should be regarded as opportunities for the improvement of a system that already possesses many positive features. A summarized list of the key recommendations is included below.

**31. Namibia could benefit from the creation of a modern secured transactions regime, which could improve access to credit for small and medium enterprises.** The lines of that regime are described in the relevant sections of Annex 1. Basically, a substantive law on secured transactions over movable assets should allow the creation of security interests over all types of movable assets used in entrepreneurial activities, in the most flexible way, and without high costs or complex formalities. The security interests would be perfected by registration in a notice-based registry, organized nationally, according to the criterion of the name of the grantor, and easily accessible through the Internet. *–High priority.*

**31. Some enforcement procedures should be streamlined.** Enforcement of secured credit over movable assets requires a summary enforcement process that allows for recovery of the claim before the asset is depreciated, as out-of-court procedures do not seem acceptable in the Namibian legal system. Institutional issues, such as the reinforcement of the administrative resources of the courts, may play a fundamental role in the reduction of the delays experienced in enforcement procedures. *–High priority.*

**32. Credit information systems should be adequately regulated.** There is a need for credit information systems operating under clear regulations and full respect of consumer protection rules. The draft regulations prepared by the bank of Namibia address the issues and should be adopted. *–High priority.*

**33. Informal restructuring can increase its importance in the system if certain reforms are adopted.** In this regard, modifications in the tax treatment of debt forgiveness and debt restructuring would promote the uptake of corporate workouts. *–Medium priority.*

**34. The restructuring regime can be reinforced through the reform of the scheme of arrangement.** Informal and semi-formal restructurings play a crucial role in preserving business, thanks to their increased speed and flexibility, and reduced costs. The scheme of arrangement can be enhanced with some reforms, especially with the addition of a stay of creditors' actions. It would also be necessary to introduce a special and simplified regime for the transformation of an informal workout into a formal insolvency plan. *–High priority.*

**35. An effective regime of directors' liability requires the development of more detailed provisions and their effective enforcement.** This can change the dynamics or debt restructuring, and will affect the use of the formal insolvency processes. *–Medium priority.*

**34. The insolvency regulation can be modernized and better coordinated, to meet the needs of a modern and developing economy.** A new regime could provide for the regulation of insolvency of different types of persons and debt-scenarios/procedures, i.e. liquidation and reorganization or debt restructuring. This will likely provide considerable coherence, streamlining and internal unity to an otherwise fairly fragmented framework and will allow for proper and timely treatment of indebtedness in the corporate context as well as for natural persons. The likely increase in predictability and ease of use and access to the insolvency system may benefit both debtors and creditors alike. Various sections of the Insolvency Act 24 of 1936 as well as sections from the Close Corporations Act 26 of 1988 and Companies Act 28 of 2004 relating to insolvency should be revised in order to ensure that they reflect and are in line with modern practices, such as the following:

- The introduction of effective communications among authorities;
- The modification of the rules for the sale of assets, to increase the possibilities of selling the business as a going concern;
- A unified and coherent treatment of executory contracts, allowing the insolvent enterprise to maximize its value;
- The introduction of special rules for the treatment of financial contracts;
- The modification of the priority regime, which should provide for a better balance of interests between different classes of creditors;
- The regulation of notifications to creditors, to provide for effective and individual notifications to the parties most directly affected by the insolvency process;

These changes would preserve the positive qualities of the current system, but would enhance its effectiveness. –*High priority.*

**36. The introduction of an effective reorganization process would require substantive reforms.** Judicial management may potentially serve as a useful restructuring tool as the economy develops, but it would require substantive changes to transform it into a full formal reorganization process following the international standard. It is possible for the judicial management regime to be transformed to include elements regarding the promulgation of a formal restructuring plan, and such elements should track the scheme of arrangement procedure in order to avoid inconsistencies. It is important to ensure the availability of a reorganization procedure that is trusted and one that forms a seamless legislative cohesion between rescue and liquidation provisions, to provide that companies that cannot sustain a rescue can move easily and quickly into liquidation. These reforms should be introduced in the context of a change of culture, favoring the rescue of distressed businesses. A reformed scheme of arrangement may contribute to fill the gap of the lack of a formal reorganization process, at least momentarily. –*Medium priority.*



**37. The system should consider the incorporation of regimes for cross-border insolvency and the insolvency of enterprise groups.** The consideration of the UNCITRAL Model Law on Cross-Border Insolvency would be useful, as well as some provision for the regulation of the insolvency of domestic and international enterprise groups. However, these are not top priorities in the current stage of development of the Namibian economy. - *Medium priority.*

**38. The qualities of the institutional framework can be reinforced with several targeted reforms.** Several measures would improve the present situation of the insolvency and creditor/debtor regime in Namibia:

- More resources need to be assigned to the courts, especially the Magistrates Courts. -*High priority.*
- The Master's office needs to be sufficiently staffed and resourced to fulfill the important functions assigned to it in the insolvency system. -*High priority.*
- It is crucial to introduce a new regime for the qualification of insolvency representatives. A comprehensive reform is needed in order to introduce rules for licensing, regulation, ethical and professional standards, remuneration and disciplinary proceedings for insolvency professionals, and also an apprenticeship system to guarantee knowledge and skills transfer. -*High priority.*

**39. Benefits of the proposed reforms.** The recommendations in this report are extensive and will take time and considerable resources to complete but the benefits of the reforms listed above can reasonably be expected to out-weight the costs. Among the benefits that may reasonably be expected to follow from implementation of these reforms it is possible to list the following:

- ✓ **General benefits to economic activity.** The quality of the credit and insolvency regulation directly impacts on the levels of economic activity in all sectors and on the growth of the economy as a whole;
- ✓ **Increased access to credit by Namibian businesses at all levels,** especially for micro-enterprises and small and medium enterprises, as improved legal infrastructures allow for greater ability to take and register security, and also allow for the effective and timely enforcement of claims against debtors;
- ✓ **Increased confidence in the rule of law in general and the judiciary, legal and regulatory systems of Namibia in particular,** as matters are dealt with reliably, cost-effectively and on a timely basis;
- ✓ **Increased confidence in the commercial banks** – the current framework does not assist them fully in aiding financially troubled customers and in providing financial support to small and medium enterprises;

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- ✓ **The ability to preserve businesses** that are suffering financial distress by developing an advanced insolvency practice that will permit them to reorganize their affairs in ways that will benefit creditors, workers, suppliers, and investors;
- ✓ **Confidence in the institutional framework**, comprising judges, regulators and insolvency administrators subject to adequate regimes of licensing and supervision.

## NAMIBIA

## Annex 1: Principle by Principle Assessment

**PRINCIPLES AND GUIDELINES FOR  
EFFECTIVE INSOLVENCY AND CREDITOR RIGHTS SYSTEMS**

No.	PART A. LEGAL FRAMEWORK FOR CREDITOR RIGHTS	
A1	Key Elements	
A2	Security (Real Property)	
A3	Security (Movable Property)	
A4	Registry Systems	
A5	Commercial Enforcement Systems	
	<b>PART B. RISK MANAGEMENT AND CORPORATE WORKOUT</b>	
B1	Credit Information Systems	
B2	Director & Officer Accountability	
B3	Enabling Legislative Framework	
B4	Corporate Workout – Restructuring Procedures	
B5	Regulation of Workout and Risk Management	
	<b>PART C. LEGAL FRAMEWORK FOR INSOLVENCY</b>	
C1	Key Objectives and Policies	
C2	<i>Due Process</i> : Notification and Information	
	<i>Commencement</i>	
C3	Eligibility	
C4	Applicability and Accessibility	
C5	Provisional Measures and Effects of Commencement	
	<i>Governance</i>	
C6	Management	
C7	Creditors and the Creditors Committee	
	<i>Administration</i>	
C8	Collection, Preservation, Administration and Disposition of Assets	
C9	Stabilizing and Sustaining Business Operations	
C10	Treatment of Contractual Obligations	
C11	Avoidable Transactions	
	<i>Claims and Claims Resolution</i>	
C12	Treatment of Stakeholder Rights & Priorities	
C13	Claims Filing and Resolution	
	<i>Reorganization Proceedings</i>	
C14	Plan Formulation and Consideration Voting and Approval of Plan Implementation and Amendment Discharge and Binding Effects Plan Revocation and Case Closure	
C15	International Considerations	
	<i>Insolvency of Enterprise Groups</i>	
C16	<i>Insolvency of Domestic Enterprise Groups</i> Procedural Coordination Post-commencement Finance Substantive Consolidation Avoidance actions Insolvency Representative Reorganization Plans	

C17	<b><i>Insolvency of International Enterprise Groups</i></b> Access to court and Recognition of Proceedings Cooperation involving courts Cooperation involving insolvency representatives Appointment of the insolvency representative Cross-border insolvency agreements	
<b>PART D. IMPLEMENTATION: INSTITUTIONAL &amp; REGULATORY FRAMEWORKS</b>		
	<b><i>Institutional considerations</i></b>	
D1	Role of Courts	
D2	Judicial Selection, Qualification, Training and Performance	
D3	Court Organization	
D4	Transparency and Accountability	
D5	Judicial Decision Making and Enforcement	
D6	Integrity of the System (Courts and Participants)	
	<b><i>Regulatory considerations</i></b>	
D7	Role of Regulatory or Supervisory Bodies	
D8	Competence and Integrity of Insolvency Representatives	

	<b>PART A. LEGAL FRAMEWORK FOR CREDITOR RIGHTS</b>
<b>Principle A1</b>	<p><b>Key Elements</b></p> <p>A modern credit-based economy should facilitate broad access to credit at affordable rates through the widest possible range of credit products (secured and unsecured) inspired by a complete, integrated and harmonized commercial law system designed to promote:</p> <ul style="list-style-type: none"> <li>▪ reliable and affordable means for protecting credit and minimizing the risks of non-performance and default;</li> <li>▪ reliable procedures that enable credit providers and investors to more effectively assess, manage and resolve default risks and to promptly respond to a state of financial distress of an enterprise borrower;</li> <li>▪ affordable, transparent and reasonably predictable mechanisms to enforce unsecured and secured credit claims by means of individual action (e.g., enforcement and execution) or through collective action and proceedings (e.g., insolvency);</li> <li>▪ a unified policy vision governing credit access, credit protection, credit risk management and recovery, and insolvency through laws and regulations that are compatible procedurally and substantively.</li> </ul>
<b>Description</b>	<p><b><u><i>The Namibian economy, in general</i></u></b></p> <p>Namibia is a middle income country that has enjoyed considerable successes since it gained independence from South Africa in 1990 resulting from sound economic management, good governance, basic civic freedoms, and respect for human rights<sup>8</sup>. Namibia inherited a well-functioning physical infrastructure, a market economy, rich natural resources, and a relatively strong public administration. The country also inherited extreme social and economic inequities, however, which have left Namibia with a highly dualistic society. In addition, the country is vulnerable to short- and long-term environmental shocks as all major sources of growth depend heavily on Namibia’s fragile ecosystem. Namibia has a relative small economy and until it gained independence in 1990 it was under administration of its neighboring country, South Africa, from whom it also inherited its legal system.</p> <p>The country’s relatively well developed formal economy is largely built on capital intensive industries including mining operations and farming. Essential sources of revenue are derived from its exports in commodities, including minerals, metals, as well as agro-</p>

<sup>8</sup> <http://www.worldbank.org/en/country/namibia/overview>.

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business and tourism. Reflecting the state of the economy, the flow of credit is unevenly distributed within the economy. There is a sophisticated and concentrated banking sector, catering to the needs of medium and large businesses and wealthy individuals. For the major banks in Namibia, the percentage of its loan portfolio tends to be two-thirds individual loans, one-third corporate loans (or half individuals and small businesses, half corporate, depending on the banks). Although the market is concentrated, participants report that it is also competitive.

In the banking sector, the rate of non-performing loans is very low (at 1-2% levels). The banks tend to base their loan decisions on an analysis of the debtor's financial situation, based on audited financial statements, where available (see Principles B3 and B5)<sup>9</sup>, the available information in the credit bureaus, other sources of credit history, and they also use security but, as opposed to other African countries, providing security is not a decisive factor in the evaluation of a loan application<sup>10</sup>. In fact, the loan-to-value ratios, between 60-100%, are also lower than in most Africa countries. In any case, most of the lending is secured lending, estimated at around 75% of the portfolio of credit institutions, and the preferred security is mortgages over commercial and residential property. Security interests over movable assets are not very popular with banks, as they find them expensive and unreliable. The only exceptions are vehicles and financial assets. Leasing, and hire purchase, is also used in Namibia as a technique to finance the acquisition of vehicles and equipment.

Much of the population has little or no access to credit, and smaller to medium sized businesses have very limited access to finance. It must be pointed out that there are government initiatives underway to assist small-medium sized industries in this regard, based mainly on the work of FIDES and SME Bank. Many consumers seem to depend on loans from micro-financing businesses and their enforcement measures seem to be questionable in some respects. Micro-loans have also been exempt from the Usury Act 73 of 1968. Namibia can therefore be said to comprise a complex economy with reference to the disparate levels of access to credit.

**The Namibian legal system**

The Namibian legal system is characterized by legal pluralism. It is an amalgamation of Roman-Dutch common law, Westminster-style constitutional law, customary law and international law. The main source of Namibian Law is the Namibian Constitution, which entered into force on 21 March 1990.

Namibia became a German Imperial protectorate in 1884 and remained a German colony until the end of World War I. The period of German colonial rule did not leave significant traces in the legal system.

After the First World War, the League of Nations by virtue of article 22 of the Covenant of the League of Nations mandated South Africa to administer Namibia (then known as South-West Africa).

An important feature of the South African administration is the Administration of Justice Proclamation (SWA) 21 of 1919. It made Roman Dutch law, as existing and applied in the Cape Province as at 1 January 1920, the common law of South-West Africa. This is still applicable to date as decisions of the Cape Provincial Division (CPD) and the Appellate Court of South Africa before 1990 are binding upon Namibian Courts due to adherence to

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<sup>9</sup>For small businesses, the practice is to analyze their books of orders, business plans, and projections, as they do not normally have audited accounts.

<sup>10</sup>Only certain banks, such as the Development bank, have special rules that state that a certain percentage of the loan portfolio has to be secured (in this case 60%). For the Agricultural Bank, 100% of the portfolio needs to be secured.

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the *stare decisis* principle. Decisions of other South African Divisions were persuasive authority. To date, due to the shared heritage of Roman Dutch common law, South African Court decisions are persuasive authority in Namibian Courts.

(See: *S v Redondo* 1992 NR 133 (SC) at 143-148)

In addition, the South African administration was the legislative authority of South-West Africa. Certain laws passed by the South African Parliament were explicitly made applicable to South-West Africa. South African procedural law was also extended to South West Africa. English law to some extent took hold in the Cape Province and was also transferred to South-West Africa. Insolvency and company law, for example, are strongly influenced by English law.

Following World War II, the League of Nations was dissolved in April 1946 and its successor, the United Nations, instituted a Trusteeship system to bring all of the former German colonies in Africa under UN control. South Africa objected.

Legal argument ensued over the course of the next twenty years until, in October 1966, the UN General Assembly decided to end the mandate, declaring an end to South Africa's right to administer the territory and placing South-West Africa under the direct responsibility of the UN by virtue of Resolution 2145 XXI of 27 October 1966. A national liberation struggle spearheaded by the South West African People's Organization (SWAPO) commenced with that entity's establishment on 19 April 1960.

Namibia, however, remained under South African administration as South-West Africa. Following internal violence, South Africa installed an Interim Administration in Namibia in 1985. Namibia obtained full independence from South Africa in 1990, with the exception of Walvis Bay and the Penguin Islands, which remained under South African control until 1994<sup>11</sup>.

Article 140(1) of the Namibian Constitution provides:

*“Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.”*

All statutory laws which were enacted by the South African administration prior to 1990 and which were explicitly made applicable to Namibia as well as all laws enacted by the Interim Administration thus remained in force after Namibia's Independence on 21 March 1990.

Article 66(1) of the Constitution contains a similar provision, providing that both the ***“customary law and the common law of Namibia in force on the date of independence, shall remain valid to the extent to which it does not conflict with the Constitution or any other statutory law”***.

Consequently many of the laws relevant to Namibia's insolvency and creditor rights regime were identical to their South African counterparts as at 21 March 1990. Decisions pertaining to insolvency and creditor rights of the South African Appellate Division and the CPD prior to 1990 are still binding authority for Namibian Courts, unless overruled. Decisions of all Courts in South Africa and Zimbabwe (also a Roman Dutch common law jurisdiction) insofar as they are compatible with Namibian law are persuasive authority.

***The Namibian system for the protection of creditor rights and regulation of credit***

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<sup>11</sup>See *Geraldine Mwanza Geraldo and Isabella Skeffers* “Researching Namibian Law and the Namibian Legal System”, GlobaLex, available at [http://www.nyulawglobal.org/globalex/namibia.htm#\\_The\\_Judiciary](http://www.nyulawglobal.org/globalex/namibia.htm#_The_Judiciary)

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The Usury Act 73 of 1968 provides for the limitation and disclosure of finance charges levied in respect of money lending transactions, credit transactions and leasing transactions<sup>12</sup>. The regulation forbids loans that exceed 1.6 times the prime rate, except for microfinance loans.

In terms of Section 15A of the Usury Act 73 of 1968, the Minister responsible for finance may from time to time by notice in the *Gazette* exempt the categories of money lending transactions, credit transactions or leasing transactions which the Minister may deem fit, from any of or all the provisions of this Act on such conditions and to such extent as he may deem fit, and may at any time in like manner revoke or amend any such exemption. The Minister has published such exemption notices from time to time, only in respect of money lending transactions. The most current one is Exemption Notice No. 189 of 25

August 2004 in terms of which micro loan transactions are exempt from the provisions of the Usury Act 73 of 1968<sup>13</sup>.

No collateral registry, unified geographically and/or by asset type, with an electronic database indexed by debtors' names is in operation.

**The Namibian insolvency regime**

The primary feature of Namibia's insolvency regime is the principle of *concursum creditorum* - the position as at the date of sequestration/liquidation is preserved and safeguarded for transmission to creditors according to their ranking. On the general characteristics of the insolvency regime, see also Principle C1.

Namibia's insolvency regime is focused more on liquidating insolvent debtors than rescuing debtors in distress.

The insolvency regime is governed primarily by-

1. The Insolvency Act 24 of 1936, which primarily governs the insolvency of individual estates, trusts, and partnerships<sup>14</sup>;

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<sup>12</sup>Section 15 of the Usury Act 73 of 1968 provides for exemptions from act itself and stipulates under subsection 15(g) that:

*"The provisions of this Act, as amended by the Limitation and Disclosure of Finance Charges Amendment Act, 1980, shall not apply to ... a money lending transaction or a credit transaction or a leasing transaction in terms of which the principal debt exceeds, on the date on which such transaction is entered into, R100 000 or any such other amount, whether greater or smaller, as may be prescribed by regulation for the purposes of this paragraph, or in terms of which the principal debt, on the date on which such transaction is entered into, together with the aggregate amount of the principal debt owing on that date by the same borrower or credit receiver or lessee to the same moneylender or credit grantor or lessor in respect of another transaction or other transactions of the same kind, exceeds R100 000 or the amount so prescribed"*.

Consequently a money lending transaction or a credit transaction or a leasing transaction exceeding the threshold amount of N\$100,000.00 (this amount has not been changed since the inception of the Usury Act 73 of 1968) is not caught by the provisions of the Usury Act and is regulated by private contractual arrangements.

<sup>13</sup> In terms of paragraph 1 of the Exemption Notice a "micro loan transaction" means a money lending transaction in respect of which the loan amount -

(a) does not exceed N\$50 000;

(b) together with the finance charges which is owing by the borrower must be paid to the microlender, whether in instalments or otherwise, within a period of 60 months after the date on which the sum of money has been advanced to the borrower; and

(c) is not paid in terms of a credit card scheme or withdrawn from a cheque account with a bank so as to leave that cheque account with a debit balance;

<sup>14</sup> The Insolvency Act, although in the nature of a code, is not a complete statement of the law of insolvency and does not interfere with the common law of insolvency, where the latter is not inconsistent with the provisions of the Act. The sources of the common law are Roman, Roman-Dutch law and the judgments of the courts.

	<p>2. The Companies Act 28 of 2004, which, together with the provisions of the Insolvency Act 24 of 1936 incorporated by reference, governs the reorganization and liquidation of most businesses<sup>15</sup>;</p> <p>3. The Close Corporations Act 26 of 1988, which governs the insolvency of smaller close corporations. This Act incorporates by reference the provisions of the Companies Act 28 of 2004 and, accordingly, the Insolvency Act 24 of 1936. A close corporation is a simple form of juristic person akin to a partnership with limited liability, with members taking the role of both shareholders and directors.</p> <p>The High Court of Namibia has exclusive jurisdiction pertaining to insolvency matters including the sequestration of individuals and partnerships and the liquidation of companies and close corporations (see Principle D1).</p> <p>The Magistrates’ Court Act 32 of 1944 contains provisions governing procedures for administration orders for the rehabilitation of an individual’s debt using the pro-creditor administration order procedure, which establishes relatively low total debt thresholds and required full repayment. Once under administration a moratorium is granted to individuals who cannot pay their debts, although it does not involve a sequestration of their estate. The granting of an administration order in a magistrate’s court does not amount to a discharge, and the debtor is required to repay all his or her debts in full. However, the granting of an administration order does bring about a stay for the debtor, in that the creditors that are affected by the order cannot take execution proceedings against such a debtor in respect of debts covered by the administration order<sup>16</sup>.</p> <p>In a liquidation of a company or close corporation, a liquidator is appointed, while in a sequestration of an individual, trust or partnership, a trustee is appointed.</p> <p>Reorganizations of companies are dealt with under Section 317 of the Companies Act 28 of 2004. Judicial management of companies is dealt with in terms of Sections 433 to 447 of the Companies Act 28 of 2004.</p>
<p><b>Assessment</b></p>	<p>The legal framework for regulating insolvency and creditor rights in Namibia still largely tracks the South African approach, based on robust creditor rights and on an effective court system in general – especially the High Court, and has procured a high degree of security and predictability to economic actors. There are however issues regarding the functioning of magistrates’ courts in some respects, such as monetary jurisdictional limit is too low, not strong confidence in the level of expertise of some magistrates to deal with rather complex commercial matters and administrative problems experienced by some magistrate courts. Formal communications between various role-players like the office of the Master of the High Court, the Registrar of the Court, the Registrar of Companies and the Deeds Registry seems to be inefficient in certain respects.</p> <p>The supreme law of the land is contained in the Constitution of Namibia of and its enacted Bill of Rights. Namibian law is not codified and many legal principles are still to be found in its common law, which is based on the Roman-Dutch law. Some areas, especially mercantile law and procedure, were influenced by English law, and in other areas there is an important influence of African customary law, hence a mixed legal system<sup>17</sup>. South</p>

<sup>15</sup> The Insolvency Act applies in respect of any matter not specially provided for in the Companies Act as far as it concerns the winding-up of a company unable to pay its debts. Where the Companies Act specially provides for winding-up, the provisions often differ from the provisions of the Insolvency Act in form only and not in respect of substance or principle. Substantial differences between the provisions that apply to insolvency and those that apply to the winding-up of companies can usually be explained in terms of material differences between individuals and companies.

<sup>16</sup> See Sections 74, 74A-74W of the Magistrates’ Court Act 32 of 1944.

<sup>17</sup> However, customary law plays virtually no role in business insolvency.



African precedents and general law developments are still relevant for interpreting Namibian law.

The credit industry, comprising mainly banks as well as other credit providers, is largely regulated by means of legislation and subordinate legislation promulgated by various regulators such as the Registrar of Banks (appointed by the Bank of Namibia). Various other aspects of the financial system are also regulated by the Namibian Financial Institutions Supervisory Authority (Namfisa), that supervises and enforces compliance with laws relating to different types of financial institutions such as pension funds; friendly associations, collective investments schemes and insurance companies.

In terms of Namibian law, creditors have common law rights and statutory measures to protect and enforce their rights. Credit may be extended on a secured or unsecured basis and credit may be secured both over immovable as well as movable property, as discussed further with respect to Principles A2 and A3 below. Broadly, security arrangements normally consist of special mortgage bonds granted over immovable property. With respect to movable property, a variety of different instruments are available. Special notarial bonds over movable property and pledges over movable property are available. In addition, the so-called general notarial bond, covering all the movable assets of a debtor may also be granted. Although this type of instrument offers some preference with regard to the proceeds arising from this interest, the creditor is not deemed to be a secured creditor, and the perfection of the security interest requires that the creditor takes possession of the assets in case of default in order to establish real security. It is to be noted that Namibian law also acknowledges security that can come about by operation of law, i.e. hypothecs and liens. Both mortgage bonds and notarial bonds must be registered in the Namibian Deeds Registry before they will provide security (see Principle A4). There is however not a national registry for the purposes of recording all types of securities in movable assets. Enforcement of security interests is effected by means of a court order, and out-of-court enforcement is not in principle allowed (see Principle A5).

The regulation of insolvency is governed by the operation of a number of different legislative instruments (see Principle C1). By way of brief summary, the Insolvency Act 24 of 1936 sets out the rules and processes to govern the insolvency of natural persons, partnerships and voluntary organizations, and rules applicable to all insolvency processes. The compulsory winding of companies is regulated by the Companies Act 28 of 2004, but the insolvency of close corporations is regulated by the Close Corporations Act 26 of 1988. The Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968 for instance seek to provide for some regulation of consumer credit. The Companies Act 28 2004 has replaced the former South African Companies Act 61 of 1973. It provides for both voluntary and winding-up by court for solvent and companies and companies unable to pay their debts. It must be noted that the Companies Act 28 of 2004 is still largely based on the South African Companies Act 61 of 1973.

Broadly speaking, the existence of different, often unconnected, legal procedures to regulate various persons and debt-scenarios, and enforcement may work against the effectiveness of debt enforcement within insolvency and creditor rights area.

Credit is usually limited to larger and more experienced borrowers who have existing relationships with the main lenders in Namibia who can provide security for their loans. The system allows for credit on the basis of both movable and immovable security, but credit tends to be secured by immovable property and there is also ample use of personal guarantees. There are no regulatory requirements that influence the decision of the banks to lend with or without security.

The lack of a centralized registry for secured transactions over movable assets creates difficulties and makes movable assets in general a less attractive form of security. Unsecured credit is available mainly for consumer credit, on the one hand, and for the financing of large companies, on the other. Small and medium sized businesses, including start-ups, are thus unlikely to have access to a deep asset base with which to offer by way of security for credit. In addition, smaller companies may not have the requisite credit

	<p>history and longstanding record of financial statements to overcome the “experience” gap that may persuade lenders to grant security over security that is less than the quality of immovable security. Government led initiatives are underway to assist such businesses to obtain credit.</p>
<p><b>Comment</b></p>	<p>As time progresses Namibia is slowly introducing its own legislation to replace former South African legislation or to amend same. Reforms should be built on the foundations of the existing insolvency and creditor/debtor regime but by providing for the Namibian environment and at the same time by considering international best practice.</p> <p>The National Development Plan (NDP4) would be effectively supported by careful consideration of important aspects of the insolvency and creditor/debtor regime, since a sound insolvency and creditor/debtor regime is both a defensive tool against crises, in that it provides a safety valve for widespread financial distress, as well as an inducement to investment, as it contributes to flexibility and certainty.</p> <p>The government-led support to foster credit granting to small- medium sized businesses may assist in the development of new business. Improved regulation of the micro loan industry and credit bureaus also seems to be necessary, and, as a matter of fact, the adoption of credit bureau regulations seems imminent (see Principle B1). A national registry for secured debt in relation to movable assets is achievable and could be lined to the Deeds Registry. This would make credit information much more accessible and bring the system in line with international best practice.</p> <p>Some effort will be required to bring all regulatory structures to an efficient level of service delivery, especially when the potential growth and development of the Namibian economy is considered.</p>
<p><b>Principle A2</b></p>	<p><b>Security (Immovable Property)</b></p> <p>One of the pillars of a modern credit economy is the ability to own and freely transfer ownership interests in land and land use rights, and to grant a security interest (such as a mortgage or charge) to credit providers with respect to such interests and rights as a means of gaining access to credit at more affordable prices. The typical hallmarks of a modern mortgage system include the following features:</p> <ul style="list-style-type: none"> <li>▪ Clearly defined rules and procedures for granting, by agreement or operation of law, security interests (mortgages, charges, etc.) in all types of interests in immovable assets;</li> <li>▪ Security interests related to any or all of a debtor’s obligations to a creditor, present or future, and between all types of persons;</li> <li>▪ Clear rules of ownership and priority governing competing claims or interests in the same assets, eliminating or reducing priorities over security interests as much as possible;</li> <li>▪ Methods of notice, including a system of registry, which will sufficiently publicize the existence of security interests to creditors, purchasers, and the public generally at the lowest possible cost.</li> </ul>
<p><b>Description</b></p>	<p>The principal type of security that may be taken over immoveable property is a mortgage bond. A covering mortgage bond is registered over the debtor’s immoveable property to secure all indebtedness of a particular debtor to a particular creditor in the Deeds Registry (which contains a register of all ownership of immoveable property). Ownership in the immoveable property remains vested in the debtor, but the creditor acquires the right, on default by the debtor, to attach and sell in execution the immoveable property and apply the proceeds thereof in discharge of the outstanding indebtedness. During the existence of</p>

	<p>the mortgage bond, the debtor cannot transfer the property without the consent of the mortgage creditor<sup>18</sup>.</p> <p>Surety mortgage bonds are used to secure a suretyship or guarantee that has been provided. Immoveable property can be owned outright or by way of sectional title (in the case of townhouses and apartments)<sup>19</sup>. Mortgage bonds can thus be ordinary mortgage bonds or sectional title mortgage bonds<sup>20</sup>. Long-term leases (that is leases enduring for 10 years or more) must be registered in the Deeds Office. Mortgage bonds can be taken over such leases (Section 81 of the Deeds Registries Act No. 47 of 1937), although this is effectively a mortgage over a right of occupancy rather than over the immoveable property itself.</p> <p>The statutory mortgage is the only way in which valid security is conferred over immovable property.<sup>21</sup> In the event of non-compliance with the formalities, the lender does not have an enforceable real right and is therefore unable to rely on the mortgage bond to prove a secured claim if the debtor is liquidated.</p> <p>Security which foreigners are able to hold requires special mention. In terms of Section 58 of the Agricultural (Commercial) Land Reform Act 6 of 1995, foreign nationals (including a foreign national's nominee) are restricted from owning agricultural land in Namibia, or from acquiring a right to occupation or possession of such property for a period exceeding 10 years, an indefinite period or for a fixed period less than 10 years renewable from time to time, except where the Minister responsible for land affairs gives prior written consent.</p> <p>Any company or close corporation in which a foreign national holds the controlling interest is restricted from owning agricultural land<sup>22</sup>. Consequently, foreign nationals are unable to obtain mortgage bonds in respect of agricultural land in the scenarios set out above. As is clear from the definition of "agricultural land" in Section 1 of the Agricultural (Commercial) Land Reform Act 6 of 1995, no such restriction applies in respect of immovable property situated in (amongst others) local authority areas.</p>
<p><b>Assessment</b></p>	<p>In Namibia, lenders tend to rely on the use of land and immovable assets in general as the basis for their lending. Some important credit institutions have a very high rate of secured</p>

<sup>18</sup>See Section 56(1) of the Deeds Registries Act 47 of 1937.

<sup>19</sup>See Sectional Titles Act 66 of 1971. Curiously, the Sectional Titles Act No. 2 of 2009 (duly signed by the President and promulgated) repealed this Act. However the 2009 Act only enters into force upon a date determined by the Minister responsible for land affairs by notice in the Government Gazette (sec 62). Thus far the 2009 Act, although on the statute book, has not been operationalized.

<sup>20</sup>Section 1 of the Sectional Titles Act 66 of 1971 defines "**sectional mortgage bond**" as "a sectional mortgage bond hypothecating a unit or land held under a sectional title deed or a registered lease or sublease of any such unit or land or any other registered real right in or over any such unit or land".

<sup>21</sup>The Namibian High Court in *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others* (2) 2009 (1) NR 232 (HC) at para. [20] 242 accepted that that an abstract system of land registration is followed in Namibia, similar to South Africa. In *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) para. [16] p 579 (cited with approval in the Namibian Supreme Court case of *Permanent Secretary Of Finance and Another v Shelfco Fifty-One (Pty) Ltd* 2007 (2) NR 774 (SC)) the South African Supreme Court held that:

"A real right is adequately protected by its registration in the Deeds Office (see *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 582A). Once Capex's rights had been registered they were maintainable against the whole world (Frye's case at 583E) (own underlining).

<sup>22</sup>In terms of Section 1 of the Sectional Titles Act 66 of 1971, "**controlling interest**", in relation to- (a) a company, means-

(i) more than 50 percent of the issued share capital of the company;  
(ii) more than half of the voting rights in respect of the issued shares of the company; or  
(iii) the power, either directly or indirectly, to appoint or remove the majority of the directors of the company without the concurrence of any other person; or  
(b) a close corporation, means more than 50 percent of the interest in the close corporation"

credit over immovable assets in their portfolio.

The mortgage bond is the most widely used instrument for the creation of a security interest over immovable property. A mortgage is defined as an accessory right founded upon a contractual agreement between the mortgagor and the mortgagee, in which the mortgagor agrees to offer property as security for a principal debt. The mortgage, therefore, is a very broad concept, and would include security interests over movable, immovable and intangible property. The difference with the pledge is that a mortgagor remains in possession of the secured property.

Various types of mortgage bonds are possible, including the following:

- “Special bond”, which is a bond over immovable property, or any interest in immovable property, where the bond is imbedded in a pledge agreement and then registered;
- “*Kustingsbrief* bond”, which is a bond over immovable property being purchased, in order to secure the balance of the purchase price for the immovable property;
- “Covering bond”, which is a bond over immovable property used to secure future debts, such as bank overdrafts;
- “Statutory participation bond”, which is a bond over immovable property held by a company, but in which the individual holders have their respective claims secured, *pari passu*, by the bond.

The mortgage bond is the most important and widely used instrument to create a security interest over land. By way of a mortgage bond it is possible to secure any or all of a debtor’s current or future obligations as such. Mortgage bonds as a form of security are in principle available to both natural persons and juristic persons.

There are other security interests over immovable assets in the Namibian legal system. A lien over immovable property arises by operation of law in favour of a person who effects improvements to the land and provides such a creditor with a right of real security over such land for as long as the creditor remains in possession of the land.

A mortgage bond must be executed in the presence of the Registrar of Deeds, and such execution must be attested by the Registrar.<sup>23</sup> Although a mortgage bond agreement is valid *per se*, it only gives rise to a personal right to demand that the real security be given, and no real right in property is created until the bond is registered with the Deeds Registry. In case of land mortgaged by more than one mortgage bond, the date of registration will in general determine the priority ranking of the mortgage. The asset may not be alienated by the mortgagor without the cancellation of the mortgage bond registered at the Deeds office. Such cancellation can only occur with the consent of the mortgagee.

The mortgage gives the creditor a first priority over the proceeds of the sale of the immovable asset, both inside and outside insolvency proceedings (see also Principle C12).

All dealings with the land must be done through the Deeds Registries. The Deeds Registry comprises the main Registry situated in Windhoek which serves the whole of Namibia, and a separate one for the Rehoboth area where indigenous rights in land, including mortgage bonds in such rights are being registered. (Walvis Bay used to be part of South Africa even after independence and land situated in that area was registered under a separate registry. It however now forms part of the central registry in Windhoek.) The Deeds Registries are public offices provided by the State but there is no positive guarantee that all the information contained in the registry is correct and there is no liability attaching to the Registry in the event that the information housed may be incomplete or inaccurate. However, the system is based on the intervention of qualified conveyancers and notaries, who are responsible for the preparation and lodgement of documents for registration, and on the analysis of the documents by examiners in the employ of the State before

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<sup>23</sup>Sections 3(1)(e) and 50(1) of the Deeds Registries Act 47 of 1937.

	<p>registration takes place. As a result, a high degree of reliability is maintained.</p> <p>The work of the Deeds Registry is also supported by the Office of the Surveyor General. The Surveyor General is responsible for ensuring that land in Namibia is surveyed, documented and mapped to accurately represent land boundaries. It has been noted that almost all land in Namibia is surveyed and mapped, thus making it easier for persons to effect registration of land. There are also some communication problems between the office of the Master of the High Court, the courts and the Registry offices.</p> <p>See a more detailed description of the registry under Principle A4 and of enforcement of security interests over immovable assets under Principle A5.</p>
<p><b>Comment</b></p>	<p>It would be useful to reduce the time and expense on processes and authorizations that are not the direct responsibility of the Deeds Registry (see also Principle A4).</p> <p>In addition, there is a property valuation bill, which, if enacted, would provide better foundations for transactions over land (especially, sales and mortgages).</p>
<p><b>Principle A3</b></p>	<p><b>Security (Movable Property)</b></p> <p>A modern credit economy should broadly support all manner of modern forms of lending and credit transactions and structures, with respect to utilizing movable assets as a means of providing credit protection to reduce the costs of credit. A mature secured transactions system enables parties to grant a security interest in movable property, with the primary features that include:</p> <ul style="list-style-type: none"> <li>▪ Clearly defined rules and procedures to create, recognize, and enforce security interests over movable assets, arising by agreement or operation of law;</li> <li>▪ Allowance of security interests in all types of movable assets, whether tangible or intangible (e.g., equipment, inventory, bank accounts, securities, accounts receivables, goods in transit; intellectual property, and their proceeds, offspring and mutations); including present, after-acquired or future assets (including goods to be manufactured or acquired); wherever located and on a global basis; and based on both possessory and non-possessory interests;</li> <li>▪ Security interests related to any or all of a debtor’s obligations to a creditor, present or future, and between all types of persons;</li> <li>▪ Methods of notice (including a system of registration) that will sufficiently publicize the existence of security interests to creditors, purchasers, and the public generally at the lowest possible cost; and</li> <li>▪ Clear rules of priority governing competing claims or interests in the same assets, eliminating or reducing priorities over security interests as much as possible.</li> </ul>
<p><b>Description</b></p>	<p>The principal types of security over movable property are notarial bonds, cessions, pledges, suretyship, guarantees and liens. A creditor may have a further form of security by means of a reservation of title or ownership. Certain statutes may also impose protection to creditors.</p> <p>A creditor may register a notarial bond<sup>24</sup> in the Deeds Registry over a debtor’s corporeal or incorporeal movable property.<sup>25</sup> While ownership and possession in the movables remains vested in the debtor, the creditor has the right, on default by the debtor, to apply to court to</p>

<sup>24</sup>A notarial bond is defined in Section 102 of the Deeds Registries Act 47 of 1937 as “a bond attested by a notary public hypothecating movable property generally or specially”.

<sup>25</sup>See Sections 61-62 of Deeds Registries Act 47 of 1937.

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take possession of the movables and to sell them and discharge the indebtedness with the proceeds. Notarial bonds can be "special" (where assets secured are specifically listed)<sup>26</sup> or "general" (where the assets aren't specifically listed). Special notarial bonds constitute a form of real security (a statutory pledge) over assets specially described and identified in the bond. The security under a general notarial bond is relatively weak because it's lower in priority than other secured debts<sup>27</sup>.

A general notarial bond gives a creditor a preference over unsecured claims in respect of the free residue of the insolvent estate<sup>28</sup>. A creditor must apply to the court to perfect its security in terms of a general notarial bond, except if the bond provides otherwise. On perfection the creditor becomes a secured creditor and may take possession of the assets in question. A notarial bond not registered gives no preference against other creditors.

There is no central register of cessions. Cessions are typically regulated by contractual arrangements *inter partes*<sup>29</sup>. A debtor may cede, for example, his or her book debts (receivables) to a creditor *in securitatem debiti* for a loan or other obligation. No specific formalities are required to perfect cessions of book debts. Cessions usually convey a right to the creditor, if there is a default by the debtor, to advise the debtors so ceded of the existence of the cession and to require them to pay the creditor the amount of the debt (receivable) direct to the creditor. In the event of a liquidation the assets subject to a cession continue to vest in the liquidated company and in practice the liquidator will realize the security and pay the proceeds to the creditor.

A pledge need not be registered in the Deeds Registry and is created contractually by the creditor taking possession of corporeal and incorporeal movables. The debtor retains ownership but the creditor has the right to possess the movables until the debt has been paid in full. On default by the debtor, the creditor has the right to sell the movables and discharge the indebtedness with the proceeds. In general, in the event of liquidation the assets subject to a pledge continue to vest in the liquidated company and in practice the liquidator will realize the security and pay the proceeds to the creditor.

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<sup>26</sup>In *Cooper NO v Die Meester* 1992 (3) SA 60 (A) the Appellate Court of South Africa held that: "Sections 96-102 inclusive of the Insolvency Act 24 of 1936 contains an exhaustive list of priorities of statutory preferences on insolvency. A special notarial bond over specified movable property, which property has remained in the possession of the mortgagor until the sequestration of his estate, is not included in that list and accordingly does not confer a statutory preference in favour of the mortgagee. It follows, therefore, that the aforementioned mortgagee has no preference above other concurrent creditors in respect of the free residue".

<sup>27</sup> In *Commercial Bank of Namibia Ltd v Rossing Stone Crushers Ltd* 1997 NR 11 (HC) the Namibian High Court held (at 14A) that: "A [general notarial bond] is a combination of 'business-bond' and a 'general covering' bond." And at 14D-E- "Bondholders taking into account their legal position are therefore much better off if they can take possession of the bonded properties so as to realise their security as pledgees rather than bondholders. They can however only take possession of such property if this is specifically provided for in the bond. (See *Boland Bank Bpk v Spies en 'n Ander* 1993 (1) SA 402 (T).)"

<sup>28</sup> In *Rössing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia* 1993 NR 274 (HC) at 275-276 the Court noted that: "First respondent is the holder of a registered general notarial covering bond executed by the applicant in favour of first respondent which covers the applicant's 'movable property of every description whatsoever . . .', up to an amount of R900 000. The reason for the previous litigation between the parties was the first respondent's fear that the applicant's business might collapse as a result of serious financial problems. The first respondent consequently approached this Court on an urgent basis for an order to secure first respondent's claim in the event of applicant being liquidated. As the first respondent was not a secured creditor in the event of insolvency of the applicant the first respondent was only entitled to preference over concurrent creditors of the applicant with respect to the proceeds of assets subject to the bond insofar as they would fall into the free residue of the estate. The purpose of that application was consequently to obtain an order to enable first respondent to take possession of the bonded property prior to any insolvency of the applicant so that it could have a secure claim and then hold the property subject to the pledge

<sup>29</sup> It was held in *Bank of Lisbon and South Africa Ltd v the Master* 1987(1) SA 276 (A) 294 that a cession of rights is regarded as a "pledge".

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Suretyships and guarantees do not constitute real security in that the creditor who holds the suretyship or guarantee will merely have a concurrent claim against such surety or guarantor.

A supplier of goods may protect him or herself by inserting a clause in the supply agreement to the effect that ownership or title in the goods so supplied will not pass to the purchaser until the supplier has been paid in full. If a reservation of ownership clause is validly incorporated in the agreement between the trade creditor and the debtor, the trade creditor is treated as a secured creditor for the property over which ownership has been reserved. The property is sold in the liquidation and proceeds are allocated to the trade creditor. Any surplus remaining after the trade creditor has been paid in full is distributed to concurrent creditors.

There are no specific formalities for the above forms of security other than properly drawn up and executed contracts. As a general rule though, for a party to have a lien or pledge the party must be in possession of the debtor's property.

Liens arise by operation of law out of certain contractual relationships and are not required to be registered<sup>30</sup>. A builder, for example, has a lien over a building for payment of the work done. The debtor retains ownership while the creditor has the right to possess the movables until the debt has been paid in full. On default by the debtor, the creditor has the right to sell the movables and discharge the indebtedness with the proceeds.

Landlords also enjoy a common law lien (termed a hypothec) over the possessions of a tenant as security for arrear rental. In insolvency, the security under the hypothec is limited to three months' arrear rental.

Section 124 of the Customs and Excise Act 20 of 1998 provides extraordinary protection for the State at the expense of creditors<sup>31</sup>. The lien is established, not only in respect of goods belonging to the debtor, but also in respect of other goods in the possession or under the control of the debtor. An asset may be subject to the lien although it is not used illegally or although duty is not evaded and although the owner is unaware that duty has not been paid.

Section 14 of the Sale of Land on Instalments Act 72 of 1971 relates to contracts for the sale of land, used or intended to be used mainly for residential purposes, under which the purchase price is payable in more than two instalments over a period of one year or longer (see Section 1, *sv* "contract" and "land"). Section 14 safeguards the rights of the purchaser in the event of the insolvency of the owner of the land, or the attachment thereof at the instance of a judgment creditor of the owner. In terms of subsection (2) of Section 14, read with subsections (3) and (4) thereof, the purchaser has the right, in the event of the insolvency of the registered owner of the land, or the attachment thereof, to obtain transfer

<sup>30</sup> ~~In the case of *Glaser, D. & Sons (Pty) Ltd v The Master NO 1979 (4) SA 780 (C)* at 792F-H the Court (after an exhaustive analysis of authorities pertaining to order of preference between lienholders, mortgage bondholders and debtor/creditor liens) held that:~~

~~"In the result I am of opinion that as between a builder who has a lien over the property and a bondholder who has a bond over the same property the order of preference is as follows:~~

~~First: the builder's lien, in so far as it amounts to an enrichment lien and therefore a real right, to the extent whereby he has enhanced the value of the property;~~

~~Second: the mortgage bond; and if there be more than one such the various bonds in time-sequence of registration; and~~

~~Third: a debtor-creditor lien which is for expenses which are neither useful nor necessary and which have not enhanced the value of the property; such a lien being a mere personal right against the debtor and persons claiming through him [or her] for the balance of the contract price not accounted for under the first head."~~

<sup>31</sup> Section 124(1)(e) of the Customs and Excise Act 20 of 1998 provides the following: "Any claim by the State against any person in respect of a debt due as contemplated in paragraph (a) shall, notwithstanding any provision in any other law, have preference to the claim of any other person in respect of any goods or other item subject to a lien as contemplated in paragraph (a) or (b), and the State may proceed to recover the amount outstanding in respect of such claim if the debt is not paid within a period of three months after the date on which such debt became due."

	<p>of the land upon compliance with the requirements of ss (3), where there is no mortgage bond over the land, or ss (4) where the land is encumbered by a mortgage bond. Provided he complies with the requirements of either of these subsections, as the case may be, the purchaser is entitled to insist upon registration of the land in his name, regardless of the wishes or views of any other interested parties, such as the judgment creditor, in the case of an attachment in execution, or the trustee, or the liquidator, or the <i>concursum creditorum</i>, in the case of insolvency. Section 14 has created in favor of the purchaser a legal preference in respect of such land and has provided for a particular way of realizing it in insolvency or execution.</p> <p>On the other hand, if the purchaser decides not to avail him/herself of the right to take transfer, and the land is then sold by the trustee or liquidator, or in execution, he/she has a preferential claim for the portion of the purchase price which he/she has paid under the agreement, plus 5 per cent interest thereon in respect of the period from the date of the agreement to the date upon which the land is sold. This claim is met from the proceeds of the sale of the land, and it ranks in preference directly after a claim which is secured by a mortgage bond over the land<sup>32</sup>.</p> <p>There is also provision in the Merchant Shipping Act 57 of 1951 to pass mortgage bonds over ships<sup>33</sup>.</p>
<p><b>Assessment</b></p>	<p>Namibian law allows for the use of different techniques for the creation of security interests over movable assets. However, the array of security interests offered by the law does not cover adequately the needs of modern businesses.</p> <p>The pledge requires that the debtor relinquishes possession of the asset, so that it can only be used with assets that are not needed in the operation of the business activities (for instance, a pledge of listed shares or securities is an interesting option). The pledge cannot be considered as a realistic option for the use as collateral of the productive assets of an enterprise.</p> <p>The cession of rights in security can achieve a high degree of protection of the lender, and it is suitable for assets whose possession is not necessary for the continuing operation of the grantor's business, at least temporarily, such as receivables, or documents of title. However, like the pledge, the cession of rights creates a "secret" security interest, created without any publicity measures despite affecting the interests of third parties and prospective creditors. The lack of publicity mechanisms for reservation of ownership arrangements and leasing contracts also places these functional equivalents of security interests within the category of "secret" security interests (see also Principle A4).</p> <p>Leasing contracts can perform a useful function as a mechanism that facilitates the financed acquisition of industrial equipment. However, under Namibian law there is no substantial regulation of the parties' obligations under leasing contracts, and, there is also a certain lack of coordination of the accounting legal frameworks, which do not seem to offer a harmonized treatment of finance leasing contracts.</p> <p>The financial sector also uses hire purchase agreements and reservation of title. Normally assets are registered in the name of the party financing the asset.</p> <p>The instruments that allow a better use of the enterprise assets as collateral are the special and the general notarial bonds. However, there is a lack of a proper publicity system for</p>

<sup>32</sup> The provisions of Section 14 of the Sale of Land on Instalments Act 72 of 1971 were authoritatively discussed and applied in *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corp Ltd (in Liq.)* 1981 (1) SA 171 (A), at 183-185.

<sup>33</sup> Section 46 of the Merchant Shipping Act 57 of 1951 provides: (1) *Notwithstanding anything contained in the Deeds Registries Act, 1937 (Act 47 of 1937), or in any other law, but subject to the provisions of subsection (2), a Namibian ship or a share in a Namibian ship shall not after the coming into operation of this section be mortgaged by bond registered in a deeds registry, and no bond so registered-*

(a) *before such coming into operation shall after the expiration of sixty days from such coming into operation; or*  
 (b) *after such coming into operation shall after its registration, confer upon the mortgagee any preference as against other creditors".*



	<p>the creation of security interests (see Principle A4). The problems of the regulation of the special and notarial bonds, however, are not restricted to the registration regime, but also extend to the substantive regime of these security interests. The special notarial bond requires that the asset be capable of identification, and this makes its use difficult for the creation of security interests over inventory, raw materials, or receivables, as the compliance with the identification requirements would render the creation and modification of the security interest a cumbersome process. The general notarial bond, on the other hand, may assist in the creation of a general security interest over all the movable assets of an enterprise, but the fact that the security interest is perfected only after the lender enters into the possession of the assets of the debtor once the debtor has defaulted on the loan, and usually after a court order. This greatly affects the effectiveness of the general notarial bond as a security interest, and adds substantial costs and time delays.<sup>34</sup></p> <p>The overall assessment of the regime for the creation of security interests over movable assets in Namibia shows some shortcomings that are typical of traditional regimes, which can be compounded in the lack of flexibility and adaptation to the needs of modern business, especially in relation to the creation of security interests over broad categories of circulating assets. This is reflected in the high degree of discomfort of lenders with the use of movable security. Lenders appear reluctant to lend on the basis of movable security, which is problematic for potentially restricting access to finance to start-up businesses or to other small and medium sized businesses. The lack of confidence in lending on this basis may lead to over-collateralization in some cases, and the reasons for the lack of confidence may be viewed as relating to the system for the creation of movable security.</p> <p>Leasing contracts are used in Namibia especially to finance the acquisition and/or use of equipment and vehicles. The tax regime allows lease, rentals and operating costs to be deductible for income tax purposes. However, there is less clarity in the accounting regime, and the recovery of the possession of the leased asset in case of default may present challenges (see Principle A5).</p>
<p><b>Comment</b></p>	<p>A reform of the law of security interests over movable assets would be very beneficial for Namibia, and especially, for the financing needs of small and medium enterprises. The reform should be aligned with international best practices, exemplified by the UNCITRAL Legislative Guide on Secured Transactions, and would need, as a basic element of the reform, the creation of a new, notice-based registry for security interests over movable assets, operating with a centralized national database of grantors (see Principle A4). The reform of the substantive law of security interests over movable assets would require the introduction of a unified general security interest, which could substitute most of the existing security interests, and would allow enterprises to use most of their assets as collateral, without losing possession of those assets and with adequate publicity, and perfection by registration. The new security interest could be tailored to meet the specific needs of businesses, and it would allow the creation of a security interest over all of the movable assets of the grantor, but also the creation of security interests over different categories of assets (e. g. inventory, or receivables), and over specific assets such as machinery or any other tangible or intangible assets. Some of the security interests that work efficiently in the present system should be preserved, such as pledges of listed shares, or leasing contracts.</p> <p>Leasing contracts, as a functional equivalent to security interests, would benefit from the introduction of substantive regulation that would define the rights and duties of the parties to a leasing contract, and the enforcement remedies in case of default. The involvement of the Ministry of Finance in this context would be useful towards providing for the elaboration of a coherent and detailed framework to determine the tax consequences and treatment of leasing. Leasing can provide an important avenue for small businesses and in this regard gaining better legal clarity for prospective participants in the market is essential if this market is to develop its full potential in Namibia.</p>

<sup>34</sup> The issue has important implications for the dynamics of the insolvency system (see Principles C12 and C14).

<p><b>Principle A4</b></p>	<p><b>Registry Systems</b></p> <p>There should be an efficient, transparent, and cost-effective registration system with regard to property rights and security interests in the borrower’s immovable assets. There should be an efficient, transparent and cost-effective means of providing notice of the possible existence of security interests in regard to the borrower’s movable assets, with registration in most cases being the principal and strongly preferred method, with some exceptions. The registration system should be reasonably integrated, easily accessible and inexpensive with respect to recording requirements and searches of the registry, and should be secure.</p> <p><b>A4.1</b> <i>Land and mortgage registries.</i> Registries pertaining to land (or land use rights) and mortgages are typically established solely for recording of interests of this nature, although permanent fixtures and attachments to the land may be treated as being subject to recordation in the place of the underlying real property. Land and mortgage registries are typically established by jurisdiction, region or locale where the property is situated, and ideally should provide for integrated, computerized search features.</p> <p><b>A4.2</b> <i>Charge registries.</i> Registries pertaining to movable assets of enterprises should be integrated and established nationally with filings made on the basis of the enterprise or business name, ideally in a centralized, computerized registry situated in the jurisdiction or location where the enterprise or business entity has been incorporated or has its main place of registration.</p> <p><b>A4.3</b> <i>Specialized registries.</i> Special registries are beneficial in the case of certain kinds of assets, such as aircraft, vessels, vehicles, and certain types of intellectual property (e.g., trademarks, copyrights, etc.).</p>
<p><b>Description</b></p>	<p>The process of registering urban land in Namibia can be divided into two components:</p> <p>1. Township establishment in terms of the Townships and Division of Land Ordinance, 11 of 1963: the process to bring vacant, serviced sites onto the property market for transfer. Township establishment pre-supposes the development of local authority area or portions thereof in terms of town planning schemes in terms of the Town Planning Ordinance 18 of 1954.</p> <p><u>Township establishment (also referred to as township proclamation):</u></p> <ul style="list-style-type: none"> <li>• Layout plan prepared by town planner and approved by local authority.</li> <li>• Plan indicates proposed land use (zoning) and circulation.</li> <li>• Land surveyed and cadaster established in line with the Land Survey Act 33 of 1993</li> <li>• Usually indicates the main boundaries and a land description</li> <li>• Survey plan must be approved by the Surveyor General.</li> <li>• Survey plan once approved by the Surveyor General becomes the General Plan.</li> <li>• Land constituting the township must be consolidated into a single piece of land and underlying restrictions on the land must be cancelled/removed in the Deeds Registry.</li> <li>• Township Register is opened in the Deeds Registry in terms of which each of the individual sites is shown on the General Plan.</li> <li>• Freehold title is then granted through the registration of individual sites in the names of their owners in the Deeds Registry.</li> <li>• Ownership of all public places vests in the local authority concerned</li> </ul> <p>2. Purchasing and transferring land: the process of buying and selling sites/properties that are already registered and developed</p> <p>The Deeds Registries Act, 1937 (Act 47 of 1937), creates the "deeds registry" which contains a register of all the real estate ownerships and any associated encumbrances. A</p>

register is also maintained for notarial bond in the Deeds Office in a similar manner as with a mortgage bond over real estate assets. The Deeds Office also maintains township registers in terms of which township zoning and circulation are reflected.

The responsible functionary is the Registrar of Deeds assisted by one or more deputy registrar(s). The registry of deeds is part of the Ministry of Lands and Resettlement.

In terms of the Flexible Land Tenure Act 4 of 2012<sup>35</sup>, the Registrar of Deeds must establish a land hold title register<sup>36</sup> and a starter title register<sup>37</sup> (Section 6(1)).

The Act also establishes a Land Rights Office with a pre-determined area of jurisdiction (Section 4) and a Land Rights Registrar (Section 5)<sup>38</sup>

It seems that only the holder of a land hold title may cause the creation or cancelling of a mortgage or another form of security for a debt executable on the plot concerned (Section 10(5)(b) of the Flexible Land Tenure Act 4 of 2012).

The Merchant Shipping Act 57 of 1951 makes provision for a registry kept by a proper officer at a port of registry in which a record of ships and mortgages in respect of ships or shares in ships are recorded.

Section 2 of the Merchant Shipping Act 57 of 1951 defines a "port of registry", in relation to a ship, as the port at which she is registered or is to be registered;

Two ports of registry have been recognized by the Minister of Works, Transport and Communication, namely the ports of Lüderitz and Walvis Bay.

Section 13 of the Merchant Shipping Act 57 of 1951 provides for an obligation to apply for

<sup>35</sup> The Flexible Land Tenure Act 4 of 2012 Act has been promulgated (signed by the President and published in the Government Gazette) but has not yet been operationalized by the Minister responsible for the registration of immovable property (Section 20).

<sup>36</sup> In terms of Section 10(1) of the Flexible Land Tenure Act 4 of 2012, the holder of land hold title rights-  
“(a) has, subject to the provisions of this Act, all the rights in the plot concerned that an owner has in respect of his or her erf under the common law;  
(b) may subject to the provisions of this Act, perform all the juristic acts in respect of the plot concerned that an owner may perform in respect of his or her erf under the common law;  
(c) has an undivided share in the common property;  
(d) is a member of the association of the scheme concerned.”  
In South Africa and Namibia, the term “erf” designates a plot of land, usually urban.

<sup>37</sup> Section 9(1) of the Flexible Land Tenure Act 4 of 2012 determines that the holder of a starter title right has the right–  
“(a) to erect a dwelling on the block erf at the specified location of the specified size and nature; (b) to occupy the dwelling referred to in paragraph (a) in perpetuity;  
(c) on his or her death to bequeath the dwelling to his or her heirs and to lease to another person;  
(d) subject to subsection (3), to utilise such services as may be provided to the scheme as a whole by a local authority or any other person;  
(e) to transfer his or her rights to any other person, (whether that person is the heir of the holder of that rights [sic] or whether the transfer is another transaction recognised by law);  
(f) to be a member of the association of the scheme concerned.”  
According to the Act, a “block erf” means a piece of land on which a starter title scheme or a land hold title scheme is established.

<sup>38</sup> The functions of the Land Rights Registrar are set out in Section 7(1) of the Flexible Land Tenure Act 4 of 2012 as follows:  
“(a) to ensure that all information that is required to be recorded in the registers referred to in section 6 and which relates to starter title schemes or land hold title schemes situated in the area of jurisdiction of the land title office of which he or she is the Registrar, is recorded in the required register;  
(b) to ensure that regular inspections of land hold title and starter title schemes situated in the area of jurisdiction of the office for which he or she has been appointed as the Registrar, are conducted to determine whether the information recorded in the registers referred to in section 6 has been recorded accurately;  
(c) to ensure that assistance is rendered to persons who intend to transfer land hold title or starter title rights or who desire to create land hold title schemes or starter title schemes.”

	<p>registry of a ship to the proper officer at one of the ports of registry. The proper officer must enter all ships registered by him or her in a special book referred to as the register. Section 47 stipulates that a Namibian ship or share therein may be mortgaged as security for a loan or other debt by means of a deed of mortgage. On the production of such instrument the proper officer at the ship's port of registry shall record the mortgage in the register in the order in which the deeds creating them are produced to him or her, and he or she must endorse on each deed that it has been so recorded, stating the date and time of that record</p>
<p><b>Assessment</b></p>	<p>The current system of Deeds Registries appears to be effective and professional in the completion of its duties, and it conforms to good international practices as regards registration of land and of security interests over land. (A separate registry that deals with indigenous land rights and securities in such land is still maintained for the Rehoboth area). Market Participants do not complain about the costs and times of registration <i>per se</i>. The main issue for registration of security interests arises with the need to obtain compliance or clearance certificates from the municipalities, which can have an obstructive effect on the process. There are many authorities involved in the process (local authorities, planning, and ministry of housing), and as a result, the process may not be as fluid and efficient as it should be. A number of additional points about the registries can be made:</p> <ul style="list-style-type: none"> <li>• There is a lack of titles in some areas of the country. Some persons use informal certificates in areas where land that has not been surveyed. There is land in Namibia that has not been surveyed. 90% of the country, though, has been surveyed, and there are initiatives in progress to cover the whole territory.</li> <li>• The registry is entirely centralized, so access to the registry from distant areas may be a problem and an effort should be made in investing in new technologies for the registry. This may yield better results than a decentralization of the registry services, considering costs and benefits. There is a computerization process being implemented at the registry.</li> <li>• It is possible to perform searches using the criterion of the immovable asset or the criterion of the grantor of rights. Access to the public for the purpose of searching the registry is economical, charged at 6 Namibian dollars per search.</li> <li>• Registration fees are low (300 Namibian dollars). Stamp duty is levied on mortgages. Recent reforms of stamp duty have been introduced by virtue of the Stamp Duty Amendment Act no 5 of 2013, and numerous low-value transactions have been exempt from stamp duty.</li> <li>• There are other costs associated with the creation of security interests: namely, valuation fees and lawyers' fees. Fees for lawyers and notaries are subsidized for low income citizens.</li> <li>• Restrictions in the ownership of land and tax implications of transactions over land are sometimes avoided by economic actors by creating close corporations and transferring the shares in those corporations, instead of transferring the land directly.</li> <li>• There is a requirement for double registration for mortgages created by companies (these mortgages have to be registered both at companies' registry and at the mortgage registry). The notaries are charged with the task of sending the documents to both registries -there is no formal communication between the two registries.</li> <li>• Regarding communication with the insolvency process, it is worth mentioning that the Master of the High Court sends regularly notices of liquidation or sequestration (see Principle C4).</li> <li>• Avoidance actions of land transfers are rare (see Principle C11).</li> </ul> <p>The main problems highlighted in this assessment, however, refer to the regime of registration of security interests over movable assets.</p>

	<p>There are very few registrations of special bonds over movable property. There is a new bill eliminating the intervention of notaries (reform of the Deeds Act 1937). The intervention of the notary is voluntary, but in practice it is normally used.</p> <p>An effective system for the registration of security interests over movables necessitates an organized and consolidated system for the recording and documentation of security interests. The Deeds Registry, which currently also functions as the registry for notarial bonds over movables, is structured to operate throughout Namibia except for the Rehoboth area, as was mentioned before, which has its own registry for indigenous land rights (see Principle A2). Namibia is a vast country and it is essential that the records be easily accessible from every outpost of the country.</p> <p>There is no centralized registry for all movables serving as security by holding a database organized and searchable according to the criterion of the debtor name. As noted with respect to principle A3, lenders have appeared uncomfortable with respect to the use of movable security, owing, in part to the regime for perfecting general security interests on default rather than by registration, but also to other problems with the registration of security interests over movable assets. The lack of a central registry of security interests over movable assets – except in the case of notarial bonds- creates serious problems in regards to pledges/cessions over intangible assets such as receivables. The creditor is forced to rely upon a warranty from the debtor/pledgor that the intangible assets have not been pledged/ceded before – a warranty that will give rise to a concurrent claim for damages but is of scant assurance to a creditor who is already owed money by the debtor/pledgor.</p>
<p><b>Comment</b></p>	<p>The ongoing project to implement electronic filing for all registrations should be continued, as it can address the issue of the distance between the registry and the citizens located in distant parts of the country. The project includes also the possibility of accessing the registry on-line.</p> <p>With respect to the other challenges noted above, it would be timely to consider the establishment of a centralized notice-based register of security interests over movable assets that would allow searches by the identifier of the name of the debtor, and would permit a lender to see the complete record of charges against a specific debtor. For high - value assets, such as machinery or vehicles, the debtor identifier can be complemented by an identifier based on the asset itself, such as the serial number or the number of the license plates.</p> <p>This registry should utilize modern technology, and could be easily accessible through the Internet. The registry should be able to operate at a very low cost, thus increasing opportunities for accessing finance for micro- and small and medium-sized enterprises. The new registry should be linked to a reform of the substantive law of security interests over movable assets (see Principle A3) and according to that law, registration would be the only requirement for perfection of the security interest, and registration would be the criterion for ranking of security interests over the same assets. The requirement of notarial intervention could be dispensed with in the new regime, since the registry would be based on the filing of notices, and not of loan documentation and security agreements.</p> <p>The establishment of a national registry for interests in all movables and electronic searching would indeed improve the ability of debtors to raise credit and reduce the risks faced by creditors in regard to competing claims.</p>
<p><b>Principle A5</b></p>	<p><b>Commercial Enforcement Systems</b></p> <p><b>A5.1</b> <i>Enforcement of unsecured debt.</i> A functional credit system should be supported by mechanisms and procedures that provide for efficient, transparent, and reliable methods for satisfying creditors’ rights by means of court proceedings or non- judicial dispute resolution procedures. To the extent possible, a country’s legal</p>

	<p>system should provide for executive or abbreviated procedures for debt collection.<sup>39</sup></p> <p><b>A5.2 Enforcement of secured debt.</b> Enforcement systems should provide efficient, cost-effective, transparent and reliable methods (including both non-judicial and judicial) for enforcing a security interest over assets. Enforcement proceedings should provide for prompt realization of the rights obtained in secured assets, designed to enable maximum recovery according to market-based asset values.</p>
<p><b>Description</b></p>	<p>In general the debt enforcement system in Namibia requires judicial intervention, for both unsecured and secured debt, unless the debtor (in case of natural person or partnership) is sequestrated or (in case of companies and close corporations) is liquidated.</p> <p>The typical scenario is that the creditor issues summons against the debtor claiming payment of the amount outstanding. If the debtor does file a notice of intention to defend the action, or a plea judgment can be granted by default without the need to lead evidence, usually within two weeks after the due date for the notice to defend lapsed (Rule 31(2) of the High Court Rules of Namibia). However, a debtor still has the right to deliver a notice to defend even after expiration of the period applicable, but before default judgment has been granted. The debtor will be liable for the costs though (Rule 19(5)).</p> <p>Where application for default judgment has been made, the court may, where the claim is for a debt or liquidated demand, without hearing evidence, and in the case of any other claim, after hearing evidence, grant judgment against the defendant (Rule 31(2)) If a defendant is in default of delivery of notice of intention to defend an action where each of the claims is for a debt or liquidated demand, the plaintiff, if he or she wishes to obtain judgment by default, may file with the Registrar of Court a written application for judgment against such defendant, instead of following the procedure prescribed by Rule 31(2).</p> <p>In terms of Rule 32(1) a creditor may apply for summary judgment where a claim is-</p> <ul style="list-style-type: none"> <li>• on a liquid document;</li> <li>• for a liquidated amount in money;</li> <li>• for delivery of specified movable property;</li> <li>• for ejection.</li> </ul> <p>A creditor may also apply for provisional sentence, a remedy which is available to the plaintiff who wants to sue a defendant on a claim based on a liquid document.</p> <p>An application for summary judgment or provisional sentence can take anything between one week to 2 months to obtain if opposed and can be done in both the Magistrates' Court and the High Court (depending on whether the Magistrate's Court has jurisdiction). Once judgment has been obtained, the creditor may seek to enforce the judgment. This can be done by directing the deputy-sheriff of the Court to attach and sell the debtor's assets or to attach a credit balance in a debtor's bank account, or to attach (by way of garnishee order) a debt or income owing to the debtor. Debtors can apply for rescission of or appeal against a judgment, which slows down the execution process.</p> <p>In special circumstances, if a creditor who is awaiting judgment can demonstrate that the debtor is dissipating assets to frustrate the claim, the creditor can apply to court for an order that assets to the value of the amount claimed can be attached or frozen pending judgment (a Mareva-type injunction). Where a creditor believes that a debtor is about to abscond, the creditor may apply for the debtor's arrest (arrest <i>tanquam suspectus de fuga</i>). This practice</p>

<sup>39</sup>Enforcement in this principle aims primarily at the treatment with respect to proceedings to recover against corporate debtors. Where enforcement proceedings involve individuals or persons, reasonable exemptions may need to be adopted to allow individuals or persons to retain those assets indispensable to the subsistence of the debtor and his/her family. Any such exemptions should be clearly defined and narrowly tailored.

	<p>has however been declared unconstitutional in South African Courts based on their Bill of Rights. It is anticipated that Namibian Courts will similarly, once a constitutional challenge is mounted, declare the arrest of a debtor to be unconstitutional. However a Creditor will, in appropriate circumstances, still be able to attach property (if available) in order to found or confirm jurisdiction, if the debtor has fled the country.</p> <p>A creditor may also apply for the sequestration/liquidation of the debtor.</p> <p>There are no special rules for foreign creditors, except that if a claim is disputed, the debtor may obtain a court order in terms of Rule 47, requiring the foreign creditor to provide security for the debtor’s legal costs by way of a payment into court (which is repaid to the creditor if it was successful, or used to cover the debtor’s costs if he/she/it is not).</p> <p>Namibian courts also enforce foreign civil final judgments or orders for the payment of money in terms of the Enforcement of Foreign Civil Judgments Act 28 of 1994. Foreign judgments, which are sought to be enforced, must emanate from a designated country, i.e. a country declared as such by the Minister responsible for justice by notice in the Government Gazette.</p> <p>The length of time to obtain a judgment and the cost of obtaining the judgment will depend upon the amount of the debt and the particular court in which proceedings are taken for enforcement and much will depend upon whether the claim is disputed or not.</p> <p>The High Court has with effect from May 2011 embarked upon structured judicial case management which has seen a significant turn-around in the number of cases finalized per year. This aspect will be dealt with in Part D hereunder.</p> <p>Lastly, the High Court Amendment Act 2013 has given the Judge President the power to make rules on a number of aspects that are relevant to this report. The Judge President will be able to regulate the conduct of the proceedings of the High Court, including the proceedings of the sheriff and the court fees. In particular, the Judge President will be able to regulate <i>“the execution of judgments sounding in money against the property, salary, earnings or emoluments of a judgment debtor and in particular to provide for -</i></p> <ul style="list-style-type: none"> <li><i>(i) the setting out of circumstances in which the process of execution of judgment debts in the High Court shall not be issued against the property of the judgment debtor;</i></li> <li><i>(ii) the procedure to be followed in the execution of orders for the payment of judgment debts by way of installments;</i></li> <li><i>(iii) the transfer of execution of certain judgments to a magistrate’s court established in terms of the Magistrates’ Court Act, 1944 (Act 32 of 1944), the circumstances in which such execution is transferred to a magistrate’s court, and the procedure to be followed to effect such transfer;</i></li> <li><i>(iv) any other procedure to be followed to effect the transfer of the execution of certain judgments to a magistrate’s court, having regard to the jurisdiction of the magistrate’s court, the function of the magistrate’s court as a debt collecting forum and its prescribed procedures for debt collection, so as to ensure that the High Court remains efficient for the purpose of its functions, being the delivery of justice in complex matters and matters which are excluded from the jurisdiction of magistrates’ courts”</i> (Section 39(1)( b) of the High Court Act 16 of 1990, as amended).</li> </ul> <p>There are also other important regulatory powers regarding the use of alternative dispute mechanisms and different measures to speed up litigation (see Principles D3 and D5).</p>
<p><b>Assessment</b></p>	<p>In the Namibian system, individual collection can be effected through High Court or Magistrate’s Court procedures but due to the limiting monetary jurisdiction of the magistrates’ courts and some systemic problems experienced in the lower court system,</p>

	<p>creditors prefer to do collections through the High Court (see Principle D1). For civil matters this court just has one division based in Namibia that serves the whole of Namibia. From a logistical point of view this creates practical problems for creditors as well as debtors who may want to oppose the cases against them. There are, however, clear procedures in place to deal with the enforcement of both unsecured and secured debt. The deficiencies are found, mainly, in the regime for the enforcement of security interests over movable assets, and in the problems that do not originate in the enforcement procedures as such, but in the institutional framework (see Principles D1-D6).</p> <p>Enforcement procedures are in some instances less effective and expeditious than required, however, the general perception is that the system is generally effective, security interests, such as mortgages, can be enforced in less than six months, according to estimations of the Bank of Namibia. The fastest processes are these relative to default judgments of secured credit. The enforcement of judgments can take a long time in some instances. The court system is said to be burdened by a high number of cases and parties can find it difficult to obtain a prompt date for their claims to be heard. Some creditors have voiced concern regarding the inefficiencies of the court system that can add to the costs and risks of lending, especially to the smaller borrowers who may already be considered risky by creditors but they seem to have more faith in the High Court in general. Secondly, in the absence of a dedicated commercial division, claims can often be heard by judges who may not necessarily have a specialized knowledge of commercial cases (see Principle D1). In the case of the enforcement of mortgages, the impact of the delays is not as dramatic as it is for other enforcement actions, where depreciation may mean that the creditor’s claim is in practice deprived of the possibilities of being satisfied with the proceeds of the sale of the movable assets. Lengthy delays in the process can indeed be very problematic where creditors may seek to recoup their interest in a timely manner to avoid concerns of asset depreciation, asset-stripping and to encourage the efficient allocation of their capital.</p> <p>It is helpful to indicate that most of the judgments are default judgments, and one of the reasons is that sometimes is very difficult for the debtor to defend the case in Windhoek, and also that it is very expensive and the losing party pays the costs of litigation. There was some reference to an “Aggrieved Homeowners Association” protesting the current regime.</p> <p>There are factoring companies specialized in debt collection. This is small unregulated industry, and some abuses have been reported in their collection practices.</p> <p>The operation of the auction system evidences some degree of inefficiency. There are signs of abuses in the system like allegations of organized rings of people pushing up prices, and other conducts that affect the orderly functioning of the auction system. After a reform in 2007, the enforcing creditor has to be present at the auction, but is unclear whether this requirement actually performs a useful function.</p> <p>Another important issue is valuation. Valuations are supposed to be good for 3 years. It is difficult to have a fresh valuation after default, as it may be impossible to access the property because of lack of cooperation of the debtor. As noted before (see Principle A2), there is a valuation bill being considered by the Namibian authorities.</p> <p>Valuation is also an issue in the enforcement of claims over movable assets. Experts are used to conduct valuations of special equipment.</p>
<p><b>Comment</b></p>	<p>In general the creditors expressed faith in the functioning of especially the High Court. There appears to be a need to undertake reforms in the enforcement systems in Namibia, particularly regarding the enforcement of secured claims over movable assets –especially in the magistrates’ courts. As discussed below (see Principle D1) an important step would be the notion of at least specialized judges since the introduction of specialized courts may not be warranted by the legal needs of the country. Namibia is in process of introducing e-filing and case management in the office of the Registrar of the High Court. This may speed up the process and make it more accessible on a national basis. An increase in the monetary jurisdiction limits of the magistrates courts linked with an improvement on the administration side of these courts will also assist in convincing more creditors to do</p>



	<p>enforcement through these courts. Some additional training in commercial matters for some magistrates may be required though.</p> <p>The development of small claims court may render a good service to consumers and to their credit providers, and may also free valuable judicial resources for their use in complex commercial cases.</p>
	<p><b>PART B. RISK MANAGEMENT AND CORPORATE WORKOUT</b></p>
<p><b>Principle B1</b></p>	<p><b>Credit Information Systems</b></p> <p>A modern credit-based economy requires access to complete, accurate and reliable information concerning borrowers’ payment histories. Key features of a credit information system should address the following:</p> <p><b>B1.1 Legal framework.</b> The legal environment should not impede and, ideally should provide the framework for, the creation and operation of effective credit information systems. Libel and similar laws have the potential of constraining good faith reporting by credit information systems. While the accuracy of information reported is an important value, credit information systems should be afforded legal protection sufficient to encourage their activities without eliminating incentives to maintain high levels of accuracy.</p> <p><b>B1.2 Operations.</b> Permissible uses of information from credit information systems should be clearly circumscribed, especially regarding information about individuals. Measures should be employed to safeguard information contained in the credit information system. Incentives should exist to maintain the integrity of the database. The legal system should create incentives for credit information services to collect and maintain a broad range of information on a significant part of the population.</p> <p><b>B1.3 Public policy.</b> Legal controls on the type of information collected and distributed by credit information systems can be used to advance public policies. Legal controls on the type of information collected and distributed by credit information systems may be used to combat certain types of societal discrimination, such as discrimination based on race, gender, national origin, marital status, political affiliation, or union membership. There may be public policy reasons to restrict the ability of credit information services to report negative information beyond a certain period of time, e.g., five or seven years.</p> <p><b>B1.4 Privacy.</b> Subjects of information in credit information systems should be made aware of the existence of such systems and, in particular, should be notified when information from such systems is used to make adverse decisions about them. Subjects of information in credit information systems should be able to access information maintained in the credit information service about them. Subjects of information in credit information systems should be able to dispute inaccurate or incomplete information and mechanisms should exist to have such disputes investigated and have errors corrected.</p> <p><b>B1.5 Enforcement/Supervision.</b> One benefit of the establishment of a credit information system is to permit regulators to assess an institution’s risk exposure, thus giving the institution the tools and incentives to do it itself. Enforcement systems should provide efficient, inexpensive, transparent and predictable methods for resolving disputes concerning the operation of credit information systems. Both non-judicial and judicial enforcement methods should be considered. Sanctions for violations of laws regulating credit information systems should be sufficiently stringent to encourage compliance but not so stringent as to discourage operations of such systems.</p>
<p><b>Description</b></p>	<p>Credit bureaus are not regulated in terms of a specific legal framework apart from the general laws that may apply to their establishment (such as the Companies Act 28 of 2004 or the Close Corporations Act 26 of 1988). Currently there is no legislation applicable to their registration and the type of and manner in which they provide consumer and commercial credit information. Generally entities desirous of using their services enter into contractual arrangements, regulating those aspects. Historically the two operational credit bureaus (<i>Transunion ITC</i> and <i>Compuscan</i>, both private companies incorporated under the Companies Act 28 of 2004) operating in Namibia recorded only negative debt history of</p>

	<p>credit-active consumers.</p> <p>However, with the advent of the National Credit Act 2005 in South Africa, these bureaus (since their holding companies are in South Africa) are now maintaining databases of the entire credit history of credit-active consumers in Namibia, both positive and negative. The Bank of Namibia has already prepared draft credit bureau regulations addressing the regulatory concerns expressed by consumers and users of credit information services.</p> <p>The Namibian Financial Institutions Supervisory Authority (Namfisa) is in the process of finalizing a draft bill, the Financial Institutions and Markets Bill,<sup>40</sup> which requires credit bureaus to be registered in terms of clause 402. It is envisaged that the requirements that an applicant must meet before registration will eventually be stipulated in market conduct standards issued by Namfisa (clause 402(3)).</p> <p>Part V deals with consumer credit information in detail, in particular the creation of a national credit register (a single national register of outstanding credit agreements, informed <i>inter alia</i> by information provided by credit bureau) in terms of clause 416, the consumer credit information that a credit bureau is obliged to keep (clause 417) and rights of debtors to challenge credit records and information kept in the national credit register or by a credit bureau (clause 419).</p> <p>The banks routinely check the information provided by credit bureaus as part of their processes to evaluate loan applications. The credit bureaus have a good coverage of the Namibian population. According to reports, credit bureaus cover 880.000 adults (which is estimated to be two thirds of the potential borrowers), and 15.500 firms<sup>41</sup>.</p> <p>Banks are required to report defaults to the credit bureaus. Other information sources are the registry of deeds, the courts (money judgments and insolvency processes). According to the credit bureaus, they are also collecting positive information, although the quality of information is disputed.</p> <p>Also according to the credit bureaus, negative information is being purged after 1 or 2 years (for defaults and arrears); 5 years (for judgments), and not purged at all for liquidations. For sequestrations, the practice is to remove the negative information after 10 years or until rehabilitation (which is obtainable after 5 years).</p> <p>Consumers have the right to obtain a copy of their credit report, at the cost of 60 Namibian dollars, and they can do repeat checks of their status every 3 months.</p>
<p><b>Assessment</b></p>	<p>Namibia provides a good but basic framework for the dissemination of credit information on borrowers. The work of the main credit bureaus evidences some regulation and professionalism and lenders are able to rely on their services. There are, however, issues with the protection of the rights of debtors and the initiative by the Namibian Financial Institutions Supervisory Authority (Namfisa) to put an official regulatory framework in place should be supported. Such reform should compel credit bureaus to purging negative information after a specified period.</p> <p>The credit information systems seem to concentrate their efforts in the collection and provision of negative information on data subjects, although representatives from the systems have affirmed that they are also currently collecting positive information. Users of the systems have argued that the positive information is less reliable than negative information. The explanation might be found in the fact that the banks do not have a problem in sharing the negative data, but they prefer not to disclose some of the positive data. In addition, users of the system also complain about the cost of credit bureaus, especially the small institutions.</p>

<sup>40</sup> <http://www.namfisa.com.na/legislation.html>

<sup>41</sup> See *Doing Business* 2014 (World Bank Group).

	<p>The credit bureaus obtain data from official authorities, such as the Deeds registry (notices of default), but the quality of data is disputed, and the quality of the interface is not optimal. The process to collect information from the courts is cumbersome, and it is sometimes unreliable. Normally, there is information about sequestration, but not information about rehabilitation.</p> <p>There have been complaints on the functioning of the credit bureaus, and the Banking Workers' Union, specifically, has been very active on this matter.</p>
<p><b>Comment</b></p>	<p>The work to improve the regulatory framework for credit bureaus is already underway: there are drafts that contemplate the full regulation of the credit information industry and the activity of the credit information providers.</p> <p>The regime should also be anchored on broader data protection legislation.</p> <p>The ICR standard provides basic guidance on the characteristics of a credit information system, and more specific guidance can be found in other documents that are based on best international practices<sup>42</sup>.</p> <p>The current draft credit bureau regulations that are being considered by the Namibian authorities include responses for the main issues affecting the current situation of credit information services in Namibia. This team has had access to the draft regulations (document titled "Draft credit bureau regulations: Bank of Namibia Act 1997) and has found them generally compliant with international best practices.</p> <p>The draft regulations include rules for the registration and licensing of credit bureaus (Part II, Sections 5-14). The rules specify the contents and procedure for applications, and the remedies in case of refusal of a license or a revocation of a license. In this regard, although the system foresees appeals, those are of an administrative nature, and it is not clear whether aggrieved parties have access to the courts for the revisions of the decisions taken by the authorities in the appeal. This may be clarified by referring to the generally applicable provisions under Namibian administrative law. A similar issue arises in the context of the right of data subjects to challenge incorrect information (Section 25(5)).</p> <p>Part III of the regulations (Sections 15-18) covers the collection of consumer information by the credit bureaus. There is an obligation to provide information to the credit bureaus, and the system places an emphasis on credit information on SMEs. The rules specify the information to be kept in the system as well as the information prohibited.</p> <p>The obligations of credit bureaus are described under Part IV of the regulations (Sections 19-22). These obligations relate to the collection of information, the measures to be adopted in relation with credit reports, the restrictions on the use of consumer information and the obligations in terms of data management and quality control. Overall, these obligations create a coherent and comprehensive framework for the correct development of the activities of credit bureaus.</p> <p>Part V includes the obligations of consumer information providers (Section 23). The providers must establish contractual relationship with the bureaus, and observe procedures to guarantee that information is accurate, complete and timely, and to correct mistakes, in the event that the information is found to be inaccurate. Consumer information providers bear the responsibility for damages derived from posting incorrect information in credit information systems (see also Section 34(2)).</p> <p>Part VI is devoted to data subject rights and protection (Sections 24-28). The range of rights recognized to data subjects is ample, with the right to access credit reports, including a free copy every twelve months, and the right to challenge the information included in the credit information systems.</p> <p>Part VII deals with the supervisory and regulatory powers of the Bank of Namibia (Sections 29-30). The Bank of Namibia will have the power of conducting inspections, and can suggest measures to correct the observed deficiencies.</p>

<sup>42</sup>See World Bank, *General principles for Credit Reporting*, available at [http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Credit\\_Reporting\\_text.pdf](http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Credit_Reporting_text.pdf)

	<p>Finally, there are some general provisions in Part VIII of the regulations (Sections 31-36). Some of these provisions are extremely important, especially the one that refers to the retention periods of negative information (Section 32). The observation that can be made regarding the retention periods for negative information is that these periods seem generally moderate (3 years for most defaults), and perhaps the long period of ten years for administration orders and sequestrations is less justifiable, but the problem is found more in the personal insolvency regime than in the credit information systems (ideally, a personal insolvency regime should rehabilitate individuals within a shorter period of time). What could be revised, though, is the rule whereby the information on a rehabilitation order is kept in the system for five years – keeping this information in the system amounts to extending the duration and the stigma of the negative information associated with personal bankruptcy, and defeats the purpose of the rehabilitation order. Ideally, a rehabilitation order should remove all negative information from the credit information systems.</p>
<p><b>Principle B2</b></p>	<p><b>Director and Officer Accountability</b></p> <p>Laws governing director and officer liability for decisions detrimental to creditors made when an enterprise is in financial distress or insolvent should promote responsible corporate behavior while fostering reasonable risk taking. At a minimum, standards should hold management accountable for harm to creditors resulting from willful, reckless or grossly negligent conduct.<sup>43</sup></p>
<p><b>Description</b></p>	<p>The main rules regulating liability of directors and officers in the case of the insolvency of the company are the following:</p> <p>-Section 423(1) of the Companies Act 28 of 2004 provides that:  <i>“In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before the Master or the Court any director or officer of the company or person known or suspected to have in his or her possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.”</i></p> <p>-Section 423(3) of the Companies Act 28 of 2004<sup>44</sup> states that: “  <i>The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his or her answers to writing and require him or her to sign them and that person must, unless he or she has a lawful excuse for not doing so, answer any question put to him or her at the examination.</i>”<sup>45</sup></p>

<sup>43</sup>This principle addresses only accountabilities of directors and officers in the period when a company is facing an imminent risk of insolvency. General principles for corporate governance and officer and director liability to its shareholders are dealt with under the OECD Principles for Corporate Governance.

<sup>44</sup> The predecessor of current Section 423(3) of the Companies Act 28 of 2004 -Section 417(2)(b) of the Companies Act 61 of 1973- provided that a person, such as a director or officer of a company could not at the enquiry refuse to answer any question put to him or her, notwithstanding that the answer might tend to incriminate him or her, and any answer given to any such question may thereafter be used in evidence against him or her. The last part of Section 417 (only insofar it meant that any answer given to any such question may thereafter be used in evidence against him or her if applied to the use of any such answer against the person who gave it, in criminal proceedings against that person) was declared unconstitutional in *Ferreira v Levin; Vryenhoek and Others v Powell NO and Others (supra, note 43)* but the Court stated that requiring a person to answer, even in circumstances where he may incriminate him- or herself (in the circumstances of an insolvency enquiry), was rationally connected to a legitimate purpose. However Section 423(3) has lost much of its sting as a director questioned may refuse to answer a question if the director “*has a lawful excuse for ... doing so*”. That lawful excuse may well include the right against self-incrimination, which has not been specifically limited by Section 423(3).

<sup>45</sup>In *Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) paragraph [123], the South African Constitutional Court held that-

Part 11 (Sections 429-432) of the Companies Act 28 of 2004 deals with personal liability of delinquent directors and officers. Section 429(1)<sup>46</sup> provides the following:

*“If in the course of the winding-up or judicial management of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the Court may, on the application of the Master or of the liquidator or of any creditor or member or contributory of the company, enquire into the conduct of the promoter, director or officer concerned and may order him or her to repay or restore the money or property or any part of it, with interest at a rate which the Court considers just, or to contribute any sum of money to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust.”<sup>47</sup>*

Furthermore, Sections 430(1) and (2)<sup>48</sup> provide that:

*“(1) If it appears, whether it be in a winding-up, judicial management or otherwise, that*

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*“The purpose of the enquiry under ss 417 and 418 is undoubtedly to assist liquidators in discharging these duties- 'so that they may determine the most advantageous course to adopt in regard to the liquidation of the company'<sup>45</sup>; and 'to achieve his primary object, namely the ascertainment of the assets and liabilities of the company, the recovery of the one and the payment of the other, according to law and in a way which will best serve the interests of the company's creditors”*

This case was quoted with approval in the Namibian case *Gases and others v The Social Security Commission and others* 2005 NR 325 (HC)

<sup>46</sup> The predecessor of Section 429 of the Companies Act 28 of 2004 is Section 423 of the now repealed Companies Act 61 of 1973.

<sup>47</sup> In *Timmers v Spansteel (Pty) Ltd* 1979 (3) SA 242 (T) the Court held at 246H-247D (regarding the predecessor provisions of Section 423) that

*“The position is therefore that under s 423 an application may be made to the Court for an examination into certain conduct. ...*

*In Lipschitz and Another NNO v Wolpert and Abrahams* 1977 (2) SA 732 (A) an order under the predecessor of the present section (s 184 (1) of the Companies Act 46 of 1926) that the auditors of a company in liquidation contribute a certain sum to its assets had been claimed but refused. On appeal before the Appellate Division, *HOLMES JA* (at 744) said the following:

*“A further reason why 'officer', in s 184 (1), should not be given an extensive meaning (wide enough to include an unmentioned auditor) is that the sub-section makes drastic inroads upon the normal procedure of enforcement of claims. It cuts across and dispenses with pleadings, discovery, and the right of a defendant not to testify. The Court may summarily require the alleged delinquent to give viva voce evidence and to be cross-examined. Such an order was made by RAMSBOTTOM J (as he then was) in respect of two directors; see *Waisbrod v Potgieter and Others* 1953 (4) SA 502 (W) at 510. I would add that it is not only the liquidator who may apply for such an order. The Master or any creditor or contributory may also apply. The procedure may be robust and wholesome but it is rough and ready; and the provision should not be construed widely.”*

*This passage clearly illustrates the uniqueness of this special remedy to which an applicant is not entitled as of right. This examination into the conduct of another person is a departure from the basic principles of our adversary system of litigation. It has indeed inquisitorial elements and can only take place after the Court has so ordered upon application for this definite and distinct relief.”*

In *Rennie NO v Holzman* 1989 (3) SA 706 (A) the Appeal Court held that Section 423 must be restrictively applied due to the extraordinary nature of the remedy with reference to the *Lipschitz* case (*supra*) and decided that the Section did not apply to a judicial manager.

<sup>48</sup> The predecessor of Section 430 of the Companies Act 28 of 2004 is Section 424 of the now repealed Companies Act 61 of 1973. Section 424 was the subject of many cases concerned with the personal liability of directors, such as *Fisheries Dev Corp of SA Ltd v Jorgensen* 1980 (4) SA 156 (W); *Fisheries Dev Corp of SA Ltd v AWJ Inv (Pty) Ltd and Others* 1980 (4) SA 156 (W); and *Philotex (Pty) Ltd v Snyman; Braitex (Pty) Ltd v Snyman* (*infra*, note 48).

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any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in that manner, is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

(2) Where the Court makes the declaration contemplated in subsection (1), it may give any further directions for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him or her, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or her or any company or person on his or her behalf or any person claiming as assignee from or through the person liable or any company or person acting on his or her behalf, and may from time to time make any further orders which may be necessary for the purpose of enforcing any charge imposed under this subsection."

Section 429(4) provides that, without prejudice to any other criminal liability incurred, where the business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in Section 429(1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, commits an offence.

As to the meaning of "recklessly" in Section 430(1), the Court in *Fisheries Dev Corp of SA Ltd v Jorgensen; Fisheries Dev Corp of SA Ltd v AWJ Inv (Pty) Ltd* 1980 (4) SA 156 (W) at 169-170 held that:

"*Henochsberg (op cit at 741) submits that, in the context of the section, the carrying on of any business of a company "recklessly" means "carrying it on by actions which evince a lack of any genuine concern for its prosperity"*.

*Hyman, in his article on "Directors' Liability for Company's Debts" in 1980 SA Company Law Journal E - 1, points out that, had the Legislature intended mere negligence to be sufficient for liability under s 424 (1) or 424 (3), it would have used the term "negligently" and not "recklessly". Hyman's view is that recklessness is a concept to be placed somewhere between mere carelessness and dishonesty. That really brings the definition back to "gross negligence", without necessarily appreciating or being aware of the consequences. Hyman says at E - 7:*

"... if 'gross negligence' is required as an element of recklessness (as it almost certainly is) the tests will vary greatly from case to case. The criteria will be in the scope of operations of the company... the role, functions and powers of the director, the amount of the debt, the extent of the company's financial difficulties and the prospects, if any, of recovery and many other factors particular to the claim involved and the extent to which the director has departed from the standards of a reasonable man in regard thereto. No attempt at a closer definition of gross negligence is feasible or advisable."

*I would, with respect, agree with those views. "Negligence" as a general concept embraces everything from culpa levissima to culpa latissima, but "recklessness", in the ordinary sense, connotes at the least culpa lata, and "recklessly" has a corresponding meaning.*"<sup>49</sup>

<sup>49</sup> These views were endorsed in *Philotex (Pty) Ltd v Snyman; Braitex (Pty) Ltd v Snyman* 1998 (2) SA 138 (SCA) where the Supreme Court of South Africa held that:

"In the application of the recklessness test to the evidence before it in proceedings in terms of s 424(1) of the Companies Act a Court should have regard, inter alia, to the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery." (At 144A/B--B/C.):

"Ha vin g a pp li ed th e a fo r ementioned criteria to the facts and circumstances before it, a Court dealing with a s 424

	<p>Section 64(1) of the Close Corporations Act 26 of 1988 stipulates:  <i>“If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.”</i></p> <p>The provision is virtually identical to the personal liability of directors under section 430 of the Companies Act 28 of 2004.</p> <p>The Close Corporations Act 26 of 1988 also provides for repayments that may need to be made by the members of a close corporation within two years before liquidation. These provisions are contained in sections 70 and 71 of the Close Corporations Act 26 of 1988.</p> <p>If the company is wound up on the basis that it cannot pay its debts, then the directors and corporate officers can also be charged criminally for certain actions prior to liquidation such as: the falsifying of business records; the disposition of the company’s assets other than in the ordinary course of business; the obtaining of credit based on false representations as to ownership of assets or amount of liabilities; the failure to maintain proper business records; and the incurral of credit without the reasonable expectation of being able to repay the debt.</p>
<p><b>Assessment</b></p>	<p>There are a number of cases in which the liability of directors in connection with corporate insolvency has been discussed – these cases have largely been gleaned from South African case law. The corporate law includes duties for directors in connection with insolvency that contemplate not only fraudulent conduct but also wrongful or reckless behavior on the</p>

*claim based on alleged recklessness will have cleared the way to the question whether reckless trading has been shown. The following approach by means of which to answer that question was stated in Ozinsky NO v Lloyd and Others 1992 (3) SA 396 (C) at 414G--H:*

*‘If a company continues to carry on business and to incur debts when, in the opinion of reasonable businessmen, standing in the shoes of the directors, there would be no reasonable prospect of the creditors receiving payment when due, it will in general be a proper inference that the business is being carried on recklessly.’*

*The approach suggested in Ozinsky's case ... does accord recognition to the difference between negligence, on the one hand, and recklessness, at least in the form of gross negligence, on the other. Participation in business necessarily involves taking entrepreneurial risks but s 424 only penalises the subjection of third parties to risk where (apart from the case of fraudulent trading) it is grossly unreasonable. It is not possible to attempt to draw the line between negligence and recklessness more exactly. Each case must turn on its own facts and involve a value judgment on those facts. From what has been said above regarding the meaning of recklessness and the objective nature of the enquiry as to its proof, it will be plain that a director's honest belief as to the prospects of payment when due, while critical in a case of alleged fraudulent trading, is not in itself the determinant of whether he was reckless. It will be irrelevant if a reasonable person of business in the same circumstances would not have held that belief.” (At 145H--J, 146G--H/I and 147C/D--E.).*

*Although the standard by which a director's conduct must be measured is an objective one, the subjective consideration referred to above requires that regard should also be had to any additional knowledge, experience or qualification that the evidence reveals that director to possess and which is relevant to the question whether recklessness has been proved. The enquiry will therefore be: what would the reasonable businessman having that additional knowledge, or having ready access to that knowledge, have done in the circumstances? That is the question that must ordinarily be answered in the case of every individual defendant against whom recklessness is alleged under s 424 but where the crucial decisions in a given case were made by unanimous decision of the board of directors and it is those directors, or some of them, who are the defendants, the question referred to can simply be posed in respect of the board's decision. Naturally, opinions, even among notional reasonable people, may differ, but in the case of a unanimous board decision it is that decision which must be subjected to the necessary objective test.” (At 148E/F--F and H--J.)*

	<p>directors’ part. However, enforcement of the duties of directors has shown clear shortcomings in practice, and it is safe to state that the provisions establishing directors’ liability in connection with corporate insolvency are hardly used in practice in Namibia. One of the main problems is the lack of funding for these actions – and if the liquidator undertakes them, it has to show that there is a potential advantage to creditors. And, on the other hand, conducts reported to public prosecutors have failed to attract the attention of them, and have not resulted in actual prosecution of directors.</p>
<p><b>Comment</b></p>	<p>There is no effective mechanism for the accountability and liability of those controlling distressed enterprises. Those controlling distressed enterprises characteristically suffer perverse incentives to risk the enterprise’s assets in negative net present value projects in the unrealistic hope of trading out of difficulties. They may also have an incentive to strip the enterprise of assets or to benefit connected creditors at the expense of others. The insolvency regime should counter such perverse incentives through effective mechanisms of accountability and liability. In this connection, the Companies Act 28 of 2004 contains a number of provisions dealing with directors’ duties and liabilities in distressed scenarios. However, these provisions do not seem effective because they are hardly invoked by insolvency practitioners to hold directors to account and the insolvency practitioners’ decision in this regard is practically not subject to any review.</p>
<p><b>Principle B3</b></p>	<p><b>Enabling Legislative Framework</b></p> <p>Corporate workouts and restructurings should be supported by an enabling environment that encourages participants to engage in consensual arrangements designed to restore an enterprise to financial viability. An environment that enables debt and enterprise restructuring includes laws and procedures that:</p> <p><b>B3.1</b> Require disclosure of or ensure access to timely, reliable and accurate financial information on the distressed enterprise;</p> <p><b>B3.2</b> Encourage lending to, investment in or recapitalization of viable financially distressed enterprises;</p> <p><b>B3.3</b> Flexibly accommodate a broad range of restructuring activities, involving asset sales, discounted debt sales, debt write-offs, debt reschedulings, debt and enterprise restructurings, and exchange offerings (debt-to-debt and debt-to-equity exchanges);</p> <p><b>B3.4</b> Provide favorable or neutral tax treatment with respect to losses or write-offs that are necessary to achieve a debt restructuring based on the real market value of the assets subject to the transaction;</p> <p><b>B3.5</b> Address regulatory impediments that may affect enterprise reorganizations.</p> <p><b>B3.6</b> Give creditors reliable recourse to enforcement as outlined in Section A and to liquidation and/or reorganization proceedings as outlined in Section C of these Principles.</p>
<p><b>Description</b></p>	<p>The Namibian legal system offers possibilities for the implementation of restructuring solutions for businesses in financial distress. As described before (see Principle A1), Namibia had, at the time of independence, the legal system of South Africa. Changes to the received legal system have been incremental in the area of private law. An enabling legal system for debt restructuring activities comprises a series of aspects of different areas of private law, and even some aspects of public law, such as the tax treatment of debt restructuring activities. The aspects of the Namibian legal framework that influence restructuring practices are described in the following paragraphs.</p> <p><b><u>Financial information</u></b></p> <p>Although there is no statutory accounting or auditing standard-setting body in Namibia, it is generally recognized that the Institute of Chartered Accountants of Namibia (“<b>ICAN</b>”) determines what constitute Generally Accepted Accounting Practice in Namibia and Namibian Generally Accepted Auditing Standards to be complied with by any ICAN</p>



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members who carry out an audit function.

Compliance with the International Financial Reporting Standard (IFRS) is required by the Namibian Stock Exchange for all entities listed on the exchange. Unlisted Namibian companies are permitted to follow IFRS.

Limited companies (private and public) are required to produce annual financial statements audited by an independent auditor<sup>50</sup> and public companies must also file a copy of the audited financial statements with the Registrar of Companies.<sup>51</sup> Close corporations formed in accordance with the Close Corporations Act 26 of 1988 are required to produce annual financial statements, though they need not be audited.<sup>52</sup>

The law is silent on whether creditors may require debtors to submit audited financial statements. However, in practice, this is subject to negotiation and often taken into account by credit institutions as part of their risk management exercise.

**Financing of distressed enterprises**

There are no special inducements for lending to distressed enterprises. As a matter of fact, the rules on prudential lending may discourage lending to businesses that are facing illiquidity or solvency problems (see Principle B5).

Absent a formal insolvency procedure (such as liquidation), unsecured loans made to distressed enterprises do not carry an automatic priority right to repayment. (For more details, see Principle C9). Advantages given to creditors could be subject to avoidance actions, in the event of a subsequent liquidation (see Principle C13).

A security interest may be granted over assets that are already subject to existing security. Priority generally follows the order of registration (see Principles A2-A4).

It is possible for new shares to be issued as a method to support the enterprise overcoming its financial difficulty (see for example Section 81 of the Companies Act 28 of 2004).

**Restructuring tools and techniques**

Credit institutions may consider rescheduling or extending payment terms for their clients based on their financial capacity and debt payment capacity. Further, taking account of the debt classification requirements applicable to credit institutions and the reserve funds for each type of debt, a credit institution may consider writing off certain debts.

For State-owned enterprises, under the State-Owned Enterprises Governance Act 2 of 2006 (SOEGA 2006), the State-owned Enterprises Governance Council may formulate a restructuring plan for approval by the cabinet. The restructuring plan may include the conversion of the State-owned company into a public company, the privatization of the State-owned company, the transfer of the State-owned enterprise's undertaking and assets and liabilities to another State-owned enterprise, the sale of the State-owned enterprise's undertaking and assets to members of the public, liquidation of the State-owned enterprise, any other method through which the restructuring of the State-owned enterprise should be effected, and any measures, including any legislation or legislative changes, which may be required to achieve the restructuring of the State-owned enterprise as proposed (see also Principle C3).

Companies may use a variety of corporate law techniques to restructure their finances. Companies may issue convertible instruments or debentures, and may issue shares in

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<sup>50</sup>See Section 283 of the Companies Act 28 of 2004.

<sup>51</sup>See Chapter 11 of the Companies Act 28 of 2004.

<sup>52</sup>See Part VII of the Close Corporations Act 26 of 1988.

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exchange of debt (see, generally, Companies Act 28 of 2004).

The acquisition of share capital by banking institutions in exchange for debt is not impossible, although it is regarded as an exceptional development, as it represents an exception to the prohibition that banks become involved, directly or indirectly, in business activities unrelated to the financial sector (see Section 39 of the Banking Institutions Act 2 of 1998). Section 48 of the Banking Institutions Bill 2013 maintains this regime and extends it also to microfinance lenders.

The law also permits a compromise and arrangement between a company, its members and creditors, the reconstruction of a company, and the amalgamation of two or more companies (Chapter 12 of the Companies Act 28 of 2004; for more details, see Principles B4 and C14).

**Tax treatment of restructuring activities**

There is no favourable tax treatment relating to sales of distressed assets, debt write-offs or debt rescheduling. An enterprise has to pay corporate income tax based on the income the enterprise gains from its activities. The written-down amount of a loan or interest constitutes taxable income for the debtor under the Namibian tax regime. On the other hand, only the written-down amount of interest (as opposed to principal) may constitute a

'loss' and thus be tax deductible from the lender's perspective. See the Income Tax Act 24 of 1981<sup>53</sup>.

The treatment of losses, and especially of carrying forward of losses in the context of mergers and acquisitions, appears uncertain.

**The enforcement regime**

As the enforcement mechanisms for secured and unsecured debts are generally sound (see Principle A5), the enforcement regime often serves as a useful backdrop against which restructuring deals are concluded, by providing a solid negotiating position for creditors and a credible threat in case of default on the part of the debtor.

In supervisory and tax practice, financial institutions are not required to provide evidence of having resorted to all legal enforcement mechanisms before they can consider that a loan has resulted in a loss.

**Other regulatory treatment of restructuring activities**

Stakeholders have not voiced major regulatory obstacles to restructuring.

Although the regulatory approach of the banking supervision presents some challenges for transactions such as debt/equity swaps, there are possibilities to implement these transactions in a restructuring situation, provided safeguards are adopted –such as the sale of the participation in the restructured company within a reasonable period of time.

The supervisory framework allows the reclassification of restructured loans. According to the Bank of Namibia's Determination No. BID-2 on Asset Classification, Suspension of Interest and Provisioning (13 October 2003), a non-accrual loan may only be reclassified to accrual status when no amount of principal or interest is overdue and the bank expects repayment of all remaining contractual principal and interest. For this purpose, the bank must have received repayment in cash of all delinquent principal and interest unless the loan has been formally restructured and qualifies for accrual status. In addition, if a restructured loan deteriorates and qualifies again for non-accrual status, then the loan must be returned to non-accrual status and treated accordingly.

Therefore, the supervisory regime for credit institutions does not present major obstacles to restructuring activities.

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<sup>53</sup>The Income Tax Act 24 of 1981 is a statute previous to independence, and it reflects the approach to tax of the South African administration. Although the act has been reformed several times, the issue of debt restructuring has not been addressed yet.

<p><b>Assessment</b></p>	<p>The Namibian legal framework provides for informal workouts (including multi-creditor workouts) to be concluded in accordance with general contractual principles. Such arrangements may be attractive, in some cases, more than by the wish to reorganize the affairs of a company, by the poor prospect of repayment that formal procedures may yield. There are no specific legal constraints on agreements between a company and its creditors for financial rehabilitation, so long as the agreement is reached before the company becomes insolvent and does not prefer one class of creditors over another. However, the scope for informal workouts is, in practice, restricted to larger firms with a predominance of bank debt. For small to medium-sized firms, or for firms with large numbers of non-bank creditors, informal workouts are difficult, for a variety of legal and business reasons, including (i) the lack of a standstill mechanism connected to informal restructuring (see Principle B4); (ii) secured creditors’ general tendency to enforce security which would then lead to the borrowers’ liquidation; and (iii) the scarcity of workout skills, in part resulting from an excessive focus on liquidation.</p> <p>Corporate informal workouts are usually negotiated against an effective backdrop of what parties may expect in formal enforcement procedures. The potential delays in and costs associated to individual enforcement actions reduce the negotiating power of the creditors vis-à-vis the debtor, which is one of the most important factors in the initiation of a n informal restructuring.</p> <p>However, the tax framework is not conducive to informal workouts. It deters non-court workouts, treating the written-down element of a loan (including the interest component) as ‘income’ for the borrower’s tax purposes, while the lender may write it off as a ‘loss’ for its tax purposes only in respect of the written-down interest (as opposed to principal). This unfavorable tax treatment of relief obtained by a debtor in the context of a workout may make rehabilitation potentially unattractive and thus work to reduce the number of debtors willing to enter into a workout. The treatment of carrying forward of losses in the context of mergers and acquisitions also appears to pose challenges.</p> <p>The company legislation permits the issue of new shares, and appropriately, there is no prohibition on doing so when the company is in distress.</p>
<p><b>Comment</b></p>	<p>Informal restructurings could give distressed but viable enterprises the opportunity of trading out of their difficulties, thus preserving wealth and employment. They should be supported, via legislative and regulatory amendments, to create tools to facilitate investments in and lending to distressed enterprises, the sale of distressed debt to stimulate the creation of a specialized market, and specifically tailored provisions for debt/equity and debt/debt swaps.</p> <p>A commendable approach would be to provide supportive treatment of workout more generally in the tax legislation. It would be important to ensure that businesses that are insolvent, at least, are not assigned a taxable income for the reason of having obtained an advantage in a workout with creditors, even if the advantage represents a reduction in debt or an improvement in the conditions of the outstanding debt. Other issues requiring consideration include enabling deduction of losses in a debt for equity swap, the carrying forward of losses in the context of mergers and acquisitions, and removing any liability to value added tax or stamp duties upon asset transfers or other steps in the restructuring process.</p> <p>Restructuring practice will tend to increase naturally with its own development and the increase in the number and quality of specialists in restructuring, and with a general improvement of individual and collective enforcement procedures.</p>

<p><b>Principle B4</b></p>	<p><b>Informal Workout Procedures</b></p> <p><b>B4.1</b> An informal workout process may work better if it enables creditors and debtors to use informal techniques, such as voluntary negotiation or mediation or informal dispute resolution. While a reliable method for timely resolution of inter-creditor differences is important, the financial supervisor should play a facilitating role consistent with its regulatory duties as opposed to actively participating in the resolution of inter-creditor differences.</p> <p><b>B4.2</b> Where the informal procedure relies on a formal reorganization, the formal proceeding should be able to quickly process the informal, pre-negotiated agreement.</p> <p><b>B4.3</b> In the context of a systemic crisis, or where levels of corporate insolvency have reached systemic levels, informal rules and procedures may need to be supplemented by interim framework enhancement measures to address the special needs and circumstances encountered with a view to encouraging restructuring. Such measures are typically of an interim nature designed to cover the crisis and resolution period, without undermining the conventional proceedings and systems.</p>
<p><b>Description</b></p>	<p><b><u>Informal dispute resolution</u></b></p> <p>Namibian law recognises dispute resolution through settlement, arbitration, and the courts. While Namibia is not party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Namibian law recognises and enforces a domestic arbitral award through the High Court. The position regarding a foreign arbitral award may be the same.</p> <p>As noted at Principle B3 above, Namibian law acknowledges informal restructuring, for instance through mergers, acquisitions and consolidations. In principle nothing prevents a debtor to seek to implement an informal reorganization by approaching creditors to compromise their debts, or grant a moratorium, or both. The terms and effect of such reorganization will depend on the terms negotiated with the creditors, and, to achieve the desired result, all creditors have to agree.</p> <p>Multi-creditor informal workouts and restructurings rarely occur in Namibia. Perceived draw-backs in informal workouts militating against their wider application in insolvency scenarios include the following:</p> <ul style="list-style-type: none"> <li>• They require the approval of all affected creditors, which approval must be reduced to contractual arrangements containing the proposed restructuring.</li> <li>• Creditors not agreeing to the proposal would not be bound, since in the informal, out-of-court process there is no statutory rule for making the decision of the majority binding on the dissenting or minority creditors.</li> <li>• Other useful features of a formal proceeding are unavailable, such as a moratorium to stay enforcement actions by creditors.</li> <li>• Informal workout transactions are not protected by a court order approving the workout and thus they may be vulnerable to challenge in a subsequent insolvency proceeding under the insolvency legislation as constituting a preference or fraudulent transfer.</li> </ul> <p>In terms of the common law, a natural person as debtor may offer composition outside the Insolvency Act 24 of 1936 to his creditors. However, this option is risky as a mere offer of composition amounts to an act of insolvency in terms of which the debtor may be sequestrated.<sup>54</sup> In addition, the offer of composition is ineffective unless it has been accepted by all the creditors of the debtor. If there are dissenting creditors, the composition</p>

<sup>54</sup>See Section 8(e) of the Insolvency Act 24 of 1936.

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cannot be forced on them and this leaves the agreement flawed in regard to the debtor.

**Approval of pre-negotiated restructuring agreements**

At common law, a composition or compromise<sup>55</sup> of rights that creditors and members have against a company must be accepted by each and every person to whom it is proposed.<sup>56</sup>

The creditors and members of a company are often numerous, with the result that it may be difficult, indeed impossible if they cannot all be traced, for the company to negotiate with them individually.

There is no express mechanism for the approval of pre-negotiated restructuring agreements. However, a scheme of arrangement under the Companies Act 28 of 2004 may conceivably to some extent perform this function. Specifically, Sections 317–318 of the Companies Act

28 of 2004 provide procedures whereby the company can negotiate with its creditors and members collectively, and for machinery to enable the company to bind them to the bargain agreed and decided upon by the majority of them. Section 319 provides a procedure for implementing a reconstruction of one or more companies, or an amalgamation of two or more companies, by means of the procedure provided for in Section 317 (for more details on Section 319 of the Companies Act 28 of 2004, see Principle C14.)

Section 317(1) of the Companies Act 28 of 2004 creates the machinery whereby a compromise or arrangement may be made between (a) a company and its creditors, or any class of them, or (b) a company and its members, or any class of them, or (c) a company and any combination of its creditors and or members, or any class of them. Not only may such a compromise or arrangement be made with only a class of creditors or members, but it may also be made with only certain creditors or members, or with only certain creditors or members of a particular class.<sup>57</sup> A scheme of arrangement may be proposed outside or within formal insolvency proceedings (e.g. liquidation and judicial management).

In summary, a scheme of arrangement involves three main procedural steps which in some cases may be completed within about eight weeks:

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<sup>55</sup> See generally *Law of South Africa (LAWSA), Volume 4(3) - First Reissue Volume*, para. 56. See also *LAWSA* para. 59A: a compromise (*transactio*) is an agreement to settle a dispute over rights or to modify undisputed rights where a difficulty exists over their enforcement. Each party must give ground, but there must be a *quid pro quo*, not a gratuitous giving up of rights.

<sup>56</sup> See *De Wit v Boathavens CC (King intervening)* 1989 1 SA 606 (C) 611–612.

<sup>57</sup> See *Kleena Industries (Pty) Ltd v Senator Insurance Co Ltd* 1982 2 SA 458 (W) 463–464. At 464, the Court held the following:

*"I see nothing in the Act or in any authorities . . . which would, all other things being equal, preclude an offeror from making an offer to acquire only some of the claims which lie against a company or perhaps only one of them, or from directing his offer to only some of the members of a class of creditors and not to others. No doubt, if such an offer is calculated to provide inequity, sanction would be withheld. Equally, I have little doubt that a creditor, or, for that matter, a member to whom the offer is not directed, would have locus standi either when it is sought to obtain leave to convene meetings or at the later stage when approval of the Court is asked, to make his complaint known."*

In *Ex parte Satbel (Edms) Bpk: in re Meyer v Satbel (Edms) Bpk* 1984 4 SA 347 (W) the Court raised the question whether, when [Section 317] speaks of an arrangement between the company and a "class of members", it must be understood to mean an arrangement between the company and all the members of a class.

In *Ex parte Suiderland Development Corporation, Ex parte Kaap-Kunene Beleggings Bpk* 1986 2 SA 442 (C) 446 the Court accepted the argument that the "non-scheme members" had "adopted the attitude that they do not wish to take part in the meeting and are therefore willing to allow the affected shareholders to hold their own meeting and to be treated as a separate class, whose wishes based on similarity of interests would weigh with the Court in the ultimate adjudication whether or not to approve the scheme; even had a meeting been called of the entire class (based on similarity of rights against the company)."

	<ul style="list-style-type: none"> <li>• First, where a compromise or arrangement is proposed, a person with <i>locus standi</i> (namely, the company, any creditor or member, liquidator or judicial manager) brings an application to obtain the authority and directions of the court for the summoning of meetings of the creditors or members concerned.<sup>58</sup></li> <li>• Second, if the court grants the order, the meetings are summoned and held in order to obtain the agreement of the required majority of the creditors or members present and voting either in person or by proxy at the meeting (i. e. at least (i) a majority in number representing three-fourths in value of the creditors or class of creditors, or (ii) a majority representing three-fourths of the votes exercisable by the members or class of members). Together with every notice summoning the meeting which is sent to a creditor or member, there must also be a statement (a) explaining the effect of the compromise or arrangement, (b) stating all relevant information material to the value of the shares and debentures concerned in any arrangement, and (iii) in particular, stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons.</li> <li>• Third, if the proposal is agreed to by the required majority or majorities, the sanction of the court must be sought. If sanctioned, the proposal, on registration by the Registrar of Companies of a copy of the court’s order, becomes binding on all the creditors or members concerned (whether or not they have all agreed to it) and on the company itself or, if it is being wound up or is under judicial management, on the liquidator or judicial manager.<sup>59</sup> Under a compromise a ‘receiver’ is usually appointed whose function it is to implement the compromise.</li> </ul> <p>As a general principle, the court will regard the creditors of the company as being the best judges of what is in their commercial interests. Where the majority has, on the basis of sufficient information at their disposal, reached their conclusion in favor of the arrangement honestly and without reference to irrelevant considerations, the court will usually respect the wishes of the majority and not overly concern itself with the commercial wisdom of the arrangement. Implicit in the exercise of the court’s statutory discretion to sanction an arrangement is the power to impose suitable conditions to secure effective implementation of its terms. No arrangement affects the liability of any person who is a surety for the company. Debts arising after the arrangement are not covered by it unless expressly provided.</p> <p>There is not a similar workout procedure for close corporations, unincorporated partnerships or individual traders prior to the commencement of formal insolvency proceedings.</p>
<b>Assessment</b>	<p>Informal workouts can provide very useful mechanisms for allowing the survival of viable enterprises in financial distress, and preserve the enterprise’s economic value. In particular, informal workouts may save costs entailed in formal proceedings and moreover provide a negotiated solution that empowers each of the parties involved in the workout. The Namibian framework presents several mechanisms that can be useful for the treatment of corporate indebtedness outside of formal insolvency processes. However, there are several deficiencies that prevent the system from reaching its full potential in</p>

<sup>58</sup>See Section 317(2) of the Companies Act 28 of 2004.

<sup>59</sup>See Section 317(3) of the Companies Act 28 of 2004.

terms of offering creditors and debtors an alternative to formal insolvency procedures.

While arbitration can provide a means to effect a workout, market participants report that its effectiveness may be undermined by the costs attached to arbitration which can be higher than that of liquidation.

The scheme of arrangement process has not been tested properly. One of the main reasons for the relatively low use of schemes of arrangement is found in the high costs associated with the use of schemes of arrangement. Market participants report that all the schemes of arrangement promoted by debtors received unanimous approval from creditors. Accordingly, there was no issue of a scheme of arrangement binding on dissenting creditors. Without dissent or objection, the court would appear not to have the opportunity of working out the boundaries of the scheme of arrangement regime. As a result, there is considerable uncertainty surrounding the court's approach to a contested scheme and there is as yet insufficient practice to assess the effectiveness of the scheme of arrangement process.

There are a number of limitations on scheme of arrangement as follows:<sup>60</sup>

- A scheme cannot be used to effect something which the parties could not have done by agreement. The court cannot sanction a scheme which involves the company in an *ultra vires* act. Nor can a creditor be made a party to a compromise if it would be *ultra vires* for it to submit to the scheme.
- The scheme of arrangement must not be contrary to the general law or *in fraudem legis*. A scheme which is in truth an arrangement between a third party and the company's creditors or members would be *in fraudem legis* if it were made to appear to be an arrangement between the company and its creditors or members.
- Where the Companies Act 28 of 2004 indicates a specific and detailed procedure, such as the procedures to be complied with when it is sought to reduce the company's capital, it is necessary to comply with that specific procedure, if necessary for the workout.
- The purpose of Section 317 of the Companies Act 28 of 2004 is to provide a solution to the problem of attaining an agreement in the case of a large number of widely distributed individuals who must be contacted with a view to negotiating the same agreement with each one, and to provide a mechanism for binding dissenting minorities. The section cannot be applied to adorn, with the status afforded by a court order, ordinary business transactions which already exist, or which can be brought about by the usual or customary means.
- Another limitation of scope is that the scheme of arrangement cannot be used to bind preferential creditors.

Finally, the scheme of arrangement process can only be used by companies, and it is not accessible to other forms of business enterprises.

The scheme of arrangement represents a "hybrid" restructuring mechanism, which incorporates aspects of a purely informal restructuring, and aspects of a formal procedure, although the judicial intervention is limited. The scheme of arrangement is not a fully functional equivalent, however, of an expedited reorganization procedure, as the one recommended under Principle B4.2. The standard recommends that informal restructurings may be easily converted into full reorganization plans, without the need to

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<sup>60</sup>See *Law of South Africa (LAWSA), Volume 4(3) - First Reissue Volume*, para. 64.

	<p>comply with all the procedural requirements of a formal reorganization procedure (see Principle C14).</p>
<p><b>Comment</b></p>	<p>he recommendations included in this report for the reinforcement of the scheme of arrangement must be contemplated in conjunction with those referred to the reorganization mechanisms (see Principle C14).</p> <p>Arbitration could perform a more important role in the Namibian restructuring framework<sup>61</sup>. A wider use of arbitration could increase the options available to national and international financial institutions and investors for the resolution of the financial distress of companies.</p> <p>Consideration should also be given to strengthening the scheme of arrangement process, whereby the initiation of the process could trigger a moratorium on enforcement mechanisms against the borrower. This could then allow a restructuring plan to be agreed out-of-court and then confirmed speedily in court. This ‘pre-packaged’ plan to restructure the business and/or debt restructuring agreement would be binding on all relevant creditors, including those who had voted against the plan. Such pre-packaged agreements would preserve the advantages of informal workouts, reducing to a minimum delays and costs and, in addition, bind dissentients and so avoid the possible failure of a plan reached through wholly voluntary negotiations.</p> <p>Further, consideration may be given to reducing formal court intervention in respect of scheme of arrangement. For instance, it may be possible to dispense with the need to obtain a court order to summon meetings of creditors/shareholders, provided the scheme legislation contains sufficient guidance on the summoning of meetings and the information to be provided to stakeholders in order to compensate for the lack of initial judicial oversight. At this juncture, it may be helpful to refer to the South African regime by way of comparative analysis. Under Section 155 of the South African Companies Act 71 of 2008, a less informal compromise procedure has been introduced because one does not need a court order to initiate it, and court intervention is required only at the stage of sanction/finalisation of the compromise. In all other respects, the procedure is similar to the current scheme procedure in Namibia. It permits a company to propose an arrangement or compromise of the financial obligations of a company to all of its creditors or to a class of creditors. The main features of the compromise procedure and its effects in this recently reformed system can be summarised as follows:</p> <ul style="list-style-type: none"> <li>• The board or the liquidator of a company may propose an arrangement or compromise of the company’s financial affairs to all the creditors or creditors of the relevant class.</li> <li>• A copy of the proposal together with the notice of meeting to consider the proposal is then sent to all relevant creditors and the Companies and Intellectual Property Commission.</li> <li>• The proposal must contain all information reasonably required to assist creditors in their decision whether to accept or reject the proposal.<sup>62</sup> The information that must be included is extensive and requires details of all the assets and creditors of the company, the nature and extent of any proposed moratorium on claims, the</li> </ul>

<sup>61</sup> Consideration could be given to the improvement of the Namibian arbitration law following best international practice, namely the UNCITRAL Model Law on International Commercial Arbitration (see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html)).

<sup>62</sup> See Section 155(2) and (3) of the Companies Act 71 of 2008.



treatment of ongoing contracts to which the company is a party, the order of priority in which the proceeds of the property of the company will be applied to pay creditors, any conditions precedent that must be satisfied for the proposal to come into operation and be implemented, the number of employees of the company and their terms and conditions of employment, and a projected balance sheet and statement of income and expenses for the ensuing three years. The proposal must be concluded with a certificate by an authorized director or officer of the company stating that the factual information is accurate, complete and up to date and that the projections provided are estimates made in good faith.

- A compromise must be approved by a majority in number, representing at least 75% in value of the creditors or class of creditors present and voting in person or by proxy at the meeting.
- Upon obtaining the required majority approval, the company may apply to court for the sanctioning of the compromise and the court will sanction the compromise only if it appears just and equitable.
- Upon sanctioning by the court the compromise binds all the creditors or creditors of the relevant class from the date of its filing.

This description of the South African regime of the compromise procedure is given for reference purposes only. The Namibian authorities should evaluate the different techniques available with a view to properly reinforce the regime of debt restructuring.

An important element that should be introduced in the legal framework consists of the possibility that an informal restructuring agreement can be converted into a fully binding composition or reorganization plan. This can be done by introducing an expedited reorganization procedure, which would allow for a rapid conversion of an informal restructuring agreement into a fully binding reorganization plan.

The UNCITRAL Legislative Guide on Insolvency Law (recommendations 160-168) delineates the characteristics of expedited reorganization proceedings. Such procedures combine voluntary restructuring negotiations and the acceptance of a plan with an expedited procedure for plan confirmation before the court. The law should make these procedures available for debtors that are or are likely to be generally unable to pay its debts as they mature; that have negotiated a reorganization plan and the plan has been accepted by each class of creditors; and that satisfy the general requirements for commencement of full reorganization proceedings (recommendation 160).

The application should be accompanied by the reorganization plan, a disclosure statement, a description of the voluntary restructuring negotiations; a certification that unaffected creditors are being paid regularly and that the plan does not adversely impact the rights of unaffected creditors without their agreement; a report of the votes of the affected classes of creditors demonstrating that those classes have accepted the plan; a financial analysis or other evidence that the plan satisfies all applicable requirements to a full reorganization; and a list of the members of any creditor committee formed during the course of the voluntary restructuring negotiations (recommendation 162).

The application must either automatically commence the proceedings or be promptly decided by the court (recommendation 163). Notice of commencement should be given to affected creditors and affected equity holders (see recommendation 165).

The regime of the procedure would be as follows (recommendation 164):

- Rules generally applicable to a reorganization procedure should also be applicable to an expedited reorganization, unless there is a specific rule to the contrary;
- The effects of commencement are normally limited to the debtor and the creditors affected by the plan;
- A creditor committee appointed during the voluntary restructuring negotiations will continue as a creditor committee appointed under the insolvency law;
- A hearing for the confirmation of the plan should be held as soon as possible.

	<p>The law must specify the requirements for confirmation of the plan (recommendation 166).  A confirmed plan has binding effects only on the debtor and the affected creditors (recommendation 167). If the debtor substantially defaults under the confirmed plan, the court may close the proceedings and creditors will be free to pursue any applicable remedies under general law (recommendation 168).  Naturally, the introduction of expedited reorganization proceedings also requires a broad reform of the full reorganization procedure. See the related recommendations in Principle C14.</p>
<p><b>Principle B5</b></p>	<p><b>Regulation of Workout and Risk Management Practices</b></p> <p><b>B5.1</b> A country’s financial sector (possibly with the informal endorsement and assistance of the central bank, finance ministry or bankers’ association) should promote the development of a code of conduct on a voluntary, consensual procedure for dealing with cases of corporate financial difficulty in which banks and other financial institutions have a significant exposure, especially in markets where corporate insolvency has reached systemic levels.</p> <p><b>B5.2</b> In addition, good risk management practices should be encouraged by regulators of financial institutions and supported by norms that facilitate effective internal procedures and practices that support prompt and efficient recovery and resolution of non-performing loans and distressed assets.</p>
<p><b>Description</b></p>	<p><u><b>Code of conduct for workouts</b></u></p> <p>There is no code of conduct for a voluntary, consensual procedure for dealing with cases of enterprise financial difficulty. The Bankers Association and the Bank of Namibia issued a Code of Banking Practice in January 2013 but workouts and informal restructuring are not addressed in the Code, which deal mostly with consumer issues.</p> <p>However, on an ad hoc basis, credit institutions exposed to a common borrower may enter into a standstill agreement with a view to achieving an informal workout.</p> <p><u><b>Credit risk management</b></u></p> <p>Risk management practices in Namibia are fairly developed. The Bank of Namibia has issued several prudential and risk management guidelines, such as Determination No. BID-2 on Asset Classification, Suspension of Interest and Provisioning (13 October 2003), Determination No. BID-4 on Limits on Exposures to Single Borrowers (13 October 2003), Determination No. BID-5 on Capital Adequacy (13 October 2003), Determination No. BID-6 on Minimum Liquid Assets (13 October 2003), Determination No. BID-15 on Limits on Inter-Bank Placements (13 October 2003), and Determination No. BID-16 on Foreign Currency Exposure Limits (13 October 2003). In general, the approach followed by Namibian institutions can be classified under the “risk-based approaches” that have been defined in banking supervision practices.</p> <p>Credit institutions must apply the following capital adequacy ratios during their operation:</p> <p>(a) Leverage Capital: the minimum leverage ratio shall be 6.0%.</p> <p>(b) Tier 1 Risk-Based Capital: the minimum Tier 1 ratio shall be 7.0%.</p> <p>(c) Total Risk-Based Capital: the minimum total ratio shall be 10.0%.</p> <p>A higher minimum may be required if a bank is pursuing or experiencing significant growth, has inadequate risk management systems, an inordinate level of risk, or less than satisfactory asset quality, management, earnings or liquidity.</p>

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There are 5 categories of debt classification, listed below together with the respective minimum provisioning percentages:

- Grade 1 (pass or acceptable): 1%
- Grade 2 (watch or special mention): 2%
- Grade 3 (substandard): 10%
- Grade 4 (doubtful): 50%
- Grade 5 (loss): 100%.

Loans are classified based on the following criteria:

(a) 'Pass or acceptable' loans are fully protected by the current sound worth and paying capacity of the obligor or the collateral pledged, and performing in accordance with contractual terms, and are expected to continue doing so.

(b) 'Watch or special mention' loans are currently protected, but exhibit potential weaknesses which, if not corrected, may weaken the asset or the bank's position at some future date. Examples of such weaknesses include: inability to properly supervise due to an inadequate loan agreement; deteriorating condition or control of collateral; deteriorating economic conditions or adverse trends in the obligor's financial position which may, if not checked, jeopardize repayment capacity. Any loan which is overdue 60 days or more but less than 90 days shall be classified as 'special mention' at a minimum.

(c) 'Substandard' loans are not adequately protected by the current sound worth and paying capacity of the obligor. Any loan which is overdue 90 days or more but less than 180 days shall be classified as 'substandard' at a minimum. Renegotiated loans shall continue to be classified substandard unless (i) all overdue interest is paid in cash at the time of re-negotiation, and (ii) a sustained record of performance under a realistic repayment programme has been maintained. A sustained record of performance means that all principal and interest payments are made according to the modified repayment schedule for at least six months from the re-negotiation date.

(d) 'Doubtful' loans have all the weaknesses inherent in a substandard asset plus the added characteristic that the asset is not well-secured. Any loan which is overdue 180 days or more but less than 360 days shall be classified as doubtful at a minimum unless (i) the loan is well-secured, (ii) legal action has actually commenced, and (iii) the time needed to realize collateral does not exceed one year after judgment.

(e) 'Loss' loans are considered uncollectible or of such little value that their continuance as a bankable asset is not warranted.

The approach taken is based on the need for credit institutions to know their clients, and to properly analyze their finances, their credit history, and their repayment capacity. For companies, lenders tend to rely on the companies' financial statements and on their own lending experience with those companies. Limited companies are required under the law to produce annual audited financial statements, whereas close corporations' annual financial statements need not be audited. In respect of entities that apply for credit, financial institutions do not have an automatic right to conduct inspections but may clearly ask for all relevant financial information before granting credit, and agree with the debtor to receive regular statements and other information etc. An important source of information is the credit bureaus (see Principle B1) and searches in Deeds Registry (see Principle A4) may also reveal the debtor's financial position.

<p><b>Assessment</b></p>	<p>The system lacks guidelines for out-of-court workouts, although it seems that the financial sector has developed practices that are similar to those accepted internationally for the negotiation of workouts.</p> <p>The development of risk management practices is generally healthy. The level of Non-Performing Loans (NPLs) has been kept very low (see Principle A1). The financial sector is encouraged to lend on the basis of the analysis of financial statements, credit history and repayment capacity. While the regulators do not demand that banks always take security, the analytical tools used to assess risk may sometimes have the result of discriminating against entities that are unable to provide collateral. For instance, some SMEs (e.g. those in the form of close corporations) may find it difficult to obtain finance as it is difficult for them to produce reliable financial records. Further, their credit history may be short or even not documented by the credit bureaus (see Principle B1); and thus it may be difficult for banks to assess their repayment capacity. At any rate, the SME sector faces a problem of lack of access to credit.</p>
<p><b>Comment</b></p>	<p>The system is in need of an effective, transparent and even-handed framework for non-court workouts. Particularly given the tendency towards the enforcement of security and liquidation, a non-court mechanism for the resolution of distress is highly desirable.</p> <p>The authorities should adopt a non-court workout framework that would encourage a standstill, require the parties to act in good faith, obtain disclosure of relevant information while ensuring due confidentiality, deter private deal-making between the borrower and favored/aggressive syndicated members, enable the provision of new funding, and thus facilitate a fair, even-handed, confidence-enhancing restructuring. It seems that in practice the Namibian financial institutions operate in accordance with these broad principles, and therefore their introduction would be easily accepted and internalized. The framework would best be issued by the Bank of Namibia and capitalize upon its regulatory suasion. This recommendation is independent from the recommendations to develop further hybrid restructuring mechanisms (see Principles B4 and C14).</p> <p>A future FSAP (Financial Sector Assessment Program), conducted by the IMF and the World Bank, can provide a systematic and detailed analysis of credit risk management practices as well as recommendations for reform.</p>
<p><b>PART C. LEGAL FRAMEWORK FOR INSOLVENCY</b></p>	
<p><b>Principle C1</b></p>	<p><b>Key Objectives and Policies</b></p> <p>Though country approaches vary, effective insolvency systems should aim to:</p> <ul style="list-style-type: none"> <li>(i) Integrate with a country’s broader legal and commercial systems.</li> <li>(ii) Maximize the value of a firm’s assets and recoveries by creditors.</li> <li>(iii) Provide for both the efficient liquidation of nonviable businesses and those where liquidation is likely to produce a greater return to creditors, and the reorganization of viable businesses.</li> <li>(iv) Strike a careful balance between liquidation and reorganization, allowing for easy conversion of proceedings from one procedure to another.</li> <li>(v) Provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors.</li> <li>(vi) Provide for timely, efficient and impartial resolution of insolvencies.</li> <li>(vii) Prevent the improper use of the insolvency system.</li> <li>(viii) Prevent the premature dismemberment of a debtor’s assets by individual creditors seeking quick judgments.</li> </ul>

	<p>(ix) Provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information.</p> <p>(x) Recognize existing creditor rights and respect the priority of claims with a predictable and established process.</p> <p>(xi) Establish a framework for cross-border insolvencies, with recognition of foreign proceedings.</p>
<p><b>Description</b></p>	<p><b><u>The insolvency regime</u></b></p> <p>The High Court issues sequestration orders in respect of individuals and partnerships and liquidation (winding-up) orders relating to corporations. The overall supervision and regulation of insolvency issues is in the hands of a Government official known as the Master of the High Court (the Master), who is responsible to appoint liquidators of corporations and trustees of individual insolvent estates.</p> <p><b><u>A. Liquidation under the Companies Act 28 of 2004.</u></b></p> <ul style="list-style-type: none"> <li>• Although this Act has been passed in 2004 and assented to by the President of the Republic of Namibia on 19 December 2004, its date of commencement was only on 1 November 2010 by virtue of Government Notice No. 172 of 10 August 2010. Apparently the delay was occasioned by the preparation of the regulations, notices and other secondary legislation necessary to implement the Act.</li> <li>• Practically this has caused the Act to be passed at a time when major reforms in company laws took place in the region, particularly in South Africa where the Companies Act 71 of 2008 became effective.</li> <li>• The 2004 Act is based on substantial amendments made to the South African Companies Act 61 of 1973 between 1990 and 2004 but does not incorporate the reform of the South African company law as manifest in the Companies Act 71 of 2008, in particular in the areas of business rescue. It is anticipated that eventually Namibia's Company Act will incorporate appropriate changes in the South African Act.</li> <li>• In terms of Section 343 the provisions of the 2004 Act relating to the winding-up of a company do not apply to any company whose winding-up was commenced before the coming into operation of that Act, and the winding-up of such a company must be continued under the relevant provisions of the 1973 Act.</li> <li>• Section 344 stipulates that in the winding-up of a company unable to pay its debts the law relating to insolvency must, in so far as it is applicable, with the necessary changes, be applied in respect of any matter not specially provided for by the 2004 Act.</li> <li>• Structurally, the Companies Act 28 of 2004 governs company activities where the company is solvent, while the Insolvency Act 24 of 1936 governs procedures involving liquidations of insolvent entities.</li> <li>• As soon after a Court order issues to liquidate a company or a special resolution for voluntary liquidation is registered, the Master must appoint a liquidator to realize and distribute the estate. Liquidators may be guided by creditors in how to realize the estate but not with respect to distributions, which are governed by strict priorities.</li> <li>• In terms of Section 348, a company may be wound up by the High Court or may be wound up voluntarily.</li> </ul> <p><b><u>1. Winding-up by the Court</u></b></p> <p>In terms of Section 349 of the Companies Act 28 of 2004, a company can be wound up by the High Court if any of the following apply:</p> <ul style="list-style-type: none"> <li>• the company is unable to pay its debts;</li> <li>• it appears to the court that it is just and equitable;</li> </ul>

- the company itself has resolved, by special resolution, to be wound up;
- the company commences business before the Registrar of Companies certified that it was entitled to do so;
- the company does not commence business within a year from incorporation or has suspended its business for a year;
- in the case of a public company, the number of shareholders has been reduced to below seven;
- 75% of the issued share capital of the company has been lost or useless for the business of the company;
- in the case of an external company, the company is dissolved in the country in which it was incorporated.
- Most commonly, creditors will seek to wind up a company involuntarily on the basis that the company cannot pay its debts or that it is just and equitable to do so.

In terms of Section 350 of the Companies Act 28 of 2004 a company is deemed to be unable to pay its debts if-

- any court official charged to satisfy a judgment cannot find sufficient disposable property to satisfy the judgment,
- a creditor, to whom the company is indebted in a sum of not less than the prescribed amount has served a letter on the registered office of the company demanding payment of the debt and the company has not paid the debt or has not secured or compounded for it to the reasonable satisfaction of the creditor within a period of 15 days.
- it is proved to the satisfaction of the Court that the company is unable to pay its debts
- The Court must also take into account the contingent and prospective liabilities of the company.

In assessing just and equitable grounds the Court has wide discretion and must take into account all the relevant circumstances. An applicant that seeks to rely on just and equitable grounds, must come to court with “clean hands”, that is, the applicant cannot be wrongfully responsible for the circumstances leading to the application.

The five broad categories of just and equitable grounds for the winding up of a company are:

- the disappearance of the company’s substratum (that is, where it has become impossible for the company to continue to operate its business);
- illegality of the objects of the company and fraud committed in connection with this;
- deadlock (between members or directors);
- grounds analogous to those that allow the dissolution of partnerships (erosion of trust, breach of good faith etc.);
- oppression, which involves the unjust and inequitable treatment of minority shareholders.

The following persons may apply to Court for the winding-up of a company (Section 351 of the Companies Act 28 of 2004):

- the company
- one or more of its creditors, including contingent or prospective creditors
- one or more of its members
- bearer of a share warrant, if the articles of the company so provide (Section 110(3) of the Companies Act 28 of 2004)
- jointly by any or all of the parties mentioned in paragraphs (a), (b) and (c)
- in the case of any company being wound up voluntarily, by the Master or any creditor or member of that company
- in the case of the discharge of a provisional judicial management order, by the provisional judicial manager of the company

## 2. Voluntary winding-up

- A company (except an external company), may be wound up voluntarily if the company has by special resolution resolved that it be so wound up. Such a resolution must state whether or not the winding-up is a voluntary winding-up by members or by creditors<sup>63</sup>

- The main distinction between the two lies in the fact that in the case of a voluntary winding-up by members the company (or corporation) is wound up voluntarily due to reasons other than insolvency, while in the case of a voluntary winding-up by creditors the company (or corporation) is being wound up due to the fact that it is unable to pay its debts<sup>64</sup>.

- *Members' voluntary winding-up* (Section 355 of the Companies Act 28 of 2004)  
The shareholders of a company<sup>65</sup> must pass a special resolution (75 per cent majority) to wind up the company in circumstances where a company can pay its debt or has no debt. The directors must sign an affidavit and the auditor must also sign a certificate, to this effect; otherwise the company must put up security for the debts of the company to be incurred in the year from the date of liquidation. A liquidator is appointed, who winds up the company according to the directives of the shareholders. Voluntary liquidations remain largely outside the control of the authorities responsible for enforcing the insolvency legislation.

- *Creditors' voluntary winding-up of* (Section 356 of the Companies Act 28 of 2004).<sup>66</sup>

Despite the misleading name, the shareholders of a company must pass a special resolution (75 per cent majority) to wind up the company, in circumstances where the company cannot pay its debt. One of the unique aspects of this mode of voluntary winding-up is that there is no application to court, and hence no court order placing the company or close corporation in liquidation. It is a much faster and economical method of achieving the same result as an application to court by the company itself. The administration process is very similar to a winding-up by the court.

- Another unique aspect of a voluntary winding-up by creditors (as opposed to a winding-up by the court) is that the members remain involved in the administration process. For example, meetings of creditors and members are held<sup>67</sup> and the members may appoint their own liquidator<sup>68</sup>.

- In the case of a close corporation, no distinction between types of resolution is made and the members must unanimously pass a resolution agreeing to wind up the close corporation, whether insolvent or not<sup>69</sup>.

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<sup>63</sup>See Section 354 of the Companies Act 28 of 2004 and Section 67(1) of the Close Corporations Act 26 of 1988.

<sup>64</sup>See D. Burdette, *Framework for Corporate Insolvency law reform in South Africa* (LLD thesis UP 2002) Part 4, at 389.

<sup>65</sup> In the case of a close corporation it must be a written resolution signed by all the members of the corporation (Section 67(1) of the Close Corporations Act 26 of 1988).

<sup>66</sup>Note that the reference to creditors in this mode of winding-up is actually an indication that the administration process is creditor- driven.

<sup>67</sup>See Section 370(1) of the Companies Act 28 of 2004 and Section 78 of the Close Corporations Act 26 of 1988.

<sup>68</sup>See Section 376(2) of the Companies Act 28 of 2004 and Section 74 of the Close Corporations Act 26 of 1988.

<sup>69</sup>See Section 67(1) of the Close Corporations Act 26 of 1988.

- Section 354(1) of the Companies Act 28 of 2004 provides that the Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.

- The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence (Section 354(2) of the Companies Act 28 of 2004).

**B.** There are similar provisions relating to close corporations in terms of the Close Corporation Act 26 of 1988<sup>70</sup>.

**C. Sequestration: Insolvency Act 24 of 1936**

- In terms of the definition of “debtor” in Section 2 of the Insolvency Act 24 of 1936, only the estates of natural persons and partnerships may be sequestered.

- Under current insolvency law a debtor may be sequestered in two possible ways, a voluntary surrender and compulsory sequestration.

- The main difference between these two forms of sequestration lies in the burden of proof. In the case of a voluntary surrender the debtor has to prove that the granting of a sequestration order will in fact be to the benefit of the creditors<sup>71</sup>, while in the case of a compulsory sequestration the applicant creditor need merely prove that there is reason to believe that the sequestration will be to the benefit of the creditors<sup>72</sup>.

**1. Voluntary sequestration**

- In the case of a voluntary surrender the debtor him- or herself brings the application.

- The debtor may realize that his or her chances of surmounting financial difficulties are remote and, accordingly, apply to court voluntarily for the acceptance of the surrender of his estate.

- Although the procedure of voluntary surrender was primarily designed for the benefit of creditors and not for the relief of harassed debtors, insolvency proceedings protect the debtor from being unduly importuned by his creditors.<sup>73</sup>

**2. Compulsory sequestration**

- A creditor may bring sequestration proceedings against a debtor if such creditor has a liquidated claim, sounding in money, for not less than fifty pounds, which is equal to N\$100-00<sup>74</sup>. Two or more creditors, who in the aggregate have liquidated

<sup>70</sup>See Part IX, Close Corporations Act 26 of 1988 (Sections 66-81).

<sup>71</sup>See Section 6(1) of the Insolvency Act 24 of 1936.

<sup>72</sup>See Section 10(c) of the Insolvency Act 24 of 1936.

<sup>73</sup>See *Ex parte Pillay, Mayet v Pillay* 1955 2 SA 309 (N) 311.

<sup>74</sup>See Section 9(1) of the Insolvency Act 24 of 1936. This Section was inserted in 1943. It has not been amended and dates to the time when South African pound was legal tender in South Africa. The South African pound was replaced by the rand on 14 February 1961 at a rate of 2 rand = 1 pound. See: <http://www.resbank.co.za/Publications/Speeches/Detail-Item-View/Pages/default.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblist=a01d874c-c3f6-4b93-a9dc-c984cf8652cf&sarbitem=200>. The Namibian dollar is pegged to the South African rand at N\$1=R1.



claims against the debtor for not less than N \$200, may also apply for the sequestration of the debtor's estate<sup>75</sup>.

- A liquidated claim, for these purposes, is one sounding in money, the amount of which is fixed and determined either by agreement, judgment, or otherwise.

- The creditor's application for the sequestration of the debtor's estate can only be brought on two grounds, namely that the debtor has committed an act of insolvency as set out in Section 8 of the Insolvency Act 24 of 1936 or that such debtor is insolvent.

Actual insolvency means that the debtor's liabilities exceed his assets on a balance sheet test.<sup>76</sup>

The current regime is divided across a number of regimes, notably, the Insolvency Act 24 of 1936 (regulating personal and partnership insolvency largely, and providing rules of general application within the insolvency system); the Close Corporations Act 26 of 1988 (insolvency of close corporations); the Companies Act 28 of 2004 (corporate liquidation, and rescue procedures in the form of judicial management and schemes of arrangements and compromises). The Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968 also influence the insolvency regime. The insolvency system is used sparingly, but the analysis of the absolute data must take into account the size of the Namibian economy and its growth potential.

**A. COMPANY LIQUIDATION CASES**

	2009	2010	2011	2012	As of July 2013
No. of companies liquidated	21	16	7	16	6
No. of close corporations liquidated	6	8	3	10	7
<b>Total</b>	<b>27</b>	<b>24</b>	<b>10</b>	<b>26</b>	<b>13</b>

Source: Master of the High Court, Namibia

**B. PERSONAL INSOLVENCY CASES (SEQUESTRATIONS)<sup>77</sup>**

	2009	2010	2011	2012	As of July 2013
No. of cases registered	11	13	7	4	2

<sup>75</sup>See Section 9(1) of the Insolvency Act 24 of 1936.

<sup>76</sup>See *Ohlsson's Cape Breweries Ltd v Totten* 1911 TPD 48 at 50. The generally accepted legal test of insolvency is whether the debtor's liabilities, fairly estimated, exceed his or her assets, fairly valued. See: *Venter v Volkscas Ltd* 1973 3 SA 175 (T) 179.

<sup>77</sup>It is important to note that sequestrations may refer to merchants or to individuals not engaging in business activities.

	<p><b>Source: Master of the High Court, Namibia</b></p>
<p><b>Assessment</b></p>	<p>Albeit relatively speaking a small economy, Namibia has the basic infrastructure in place and its systems for supporting an insolvency regime are rather sophisticated. That being said, the current framework for insolvency appears to be dated and in need of a revision in view of international best practice (see Comment section below). As a first point, the insolvency law is fragmented across a number of different acts, without a cohesive, universal framework to govern insolvency in general. The insolvency laws of Namibia are interrelated, but are also fragmented and not contained in one single piece of legislation. The lack of consistency between the different regimes derives from the fact that the statutes regulating insolvency processes belong to different historic periods, support different policies and regulatory philosophies.</p> <p>The perception in the market is that insolvency is an expensive and slow process, and credit institutions generally try to avoid it.</p> <p>There is a general perception that the insolvency process only liquidates businesses, and that the insolvency cases are initiated too late, when it is already impossible to reorganize a distressed business.</p> <p>The procedure of voluntary liquidation is easily accessible for shareholders, and remains outside the control and supervision of the authorities. This may offer a partial explanation for the lack of insolvency cases in Namibia.</p> <p>The confusing patchwork of legislation can act as a disincentive for the use of framework – and arguably, add to legal costs for those that may be seeking to use the system. In addition, in light of this fragmentation, stakeholders may come to view the insolvency system in a compartmentalized manner – for example focusing either on liquidation or on rehabilitation – without necessarily noting the continuum in between as well as the overall cohesiveness of the insolvency framework, allowing movement between different processes. In addition, the distinction between different insolvency processes accentuates the so-called “boundary problems” and therefore the mistakes and costs in the opening of insolvency processes, where the parties do not choose the appropriate option for the debtor or the indebtedness situation of the debtor.</p> <p>In any case, and notwithstanding the number of pieces of legislation governing insolvency in Namibia, the system is currently heavily weighted towards the liquidation of corporate debtors – although and due to the size of the economy there are not many liquidation cases. The current focus and culture in Namibian insolvency law is geared towards the liquidation of companies, and does not currently strike a balance between rehabilitation of viable enterprises, and dissolution of businesses. This can lead to an inefficient allocation of capital, creating a terminal situation for a business that may be experiencing only temporary distress. Within the market, liquidation tends to be regarded as matter of last resort, and not as a mechanism for a meaningful recovery of creditor interests. Judicial management has proven to be an ineffective vehicle for the preservation of viable enterprises, and does not represent a real alternative to liquidation (this will be analyzed further with respect to Principle C14). Delays in the process, the variability of technical commercial expertise on the bench, as well as some of the technical issues addressed in Principles C2-C15 may lead to a negative perception attaching to the liquidation process. The institutional backdrop is significant, in terms of shaping the implementation of the framework. Insufficient resources, especially at the Master of the High Court’s office, lack of training and the high workload of the courts in terms of commercial litigation –may slow down the administration of cases. This aspect of the framework is discussed more fully with respect to the Principles in section D below (see Principles D1-D8).</p> <p>Although there was not a formal insolvency law review process underway yet, the Namibian company law has been reviewed by the replacement of the South African Companies Act 61 of 1973, with the Namibian Companies Act 28 of 2004. In so far as it relates to insolvency, i.e. liquidation and rescue, it however tracks the 1973 South African</p>

	<p>Act. For instance, the Act has not introduced a modern rescue process and kept the rather antiquated and under-used judicial management procedure.</p>
<p><b>Comment</b></p>	<p>The current picture concerning insolvency laws in Namibia is that it takes quite some effort to find and to understand the interplay between the various pieces of legislation dealing with insolvency in the broad sense of the word. In general a more consolidated framework for insolvency may make the rules more accessible and to ensure that there is seamless interaction between the various insolvency tools and processes in Namibian law. A comprehensive and coherent vision of the insolvency system, and of its connection with the broader regulation of credit and credit protection in Namibia, seems a logical step in the circumstances.</p> <p>In this regard, the introduction of duties to communicate the initiation of voluntary liquidations to the authorities (Companies’ Registrar, Master of the High Court) would avoid that true insolvencies are treated as private liquidations. This would result in a tighter control of the situation of distressed companies and a more efficient use of the insolvency system.</p> <p>There are a number of important technical questions that should be considered in a revision of the insolvency framework (see for instance the comments to Principles C2-C15). In addressing those technical questions, Namibia could take the opportunity of further improving insolvency legislation and achieve a greater degree of alignment with best international practices, and, above all, a more efficient system that would allow viable businesses to be reorganized, non-viable businesses to be liquidated in a fast and efficient way, and, in both cases, increasing the returns for creditors.</p> <p>As detailed further in section D, institutional reforms are also needed to ensure that courts, the Master’s Office and all insolvency practitioners have the time, skills and resources to be able to efficiently handle liquidation claims as well as tackle questions arising in the insolvency context.</p>
<p><b>Principle C2</b></p>	<p><b>Due Process: Notification and Information</b></p> <p>Effectively protecting the rights of parties in interest in a proceeding requires that such parties have a right to be heard on and receive proper notice of matters that affect their rights, and that such parties be afforded access to information relevant to protecting their rights or interests and to efficiently resolving disputes. To achieve these objectives, the insolvency system should:</p> <p><b>C2.1</b> Afford timely and proper notice to interested parties in a proceeding concerning matters that affect their rights. In insolvency proceedings there should be procedures for appellate review that support timely, efficient and impartial resolution of disputed matters. As a general rule, appeals do not stay insolvency proceedings, although the court may have power to do so in specific cases.</p> <p><b>C2.2</b> Require the debtor to disclose relevant information pertaining to its business and financial affairs in detail sufficient to enable the court, creditors and affected parties to reasonably evaluate the prospects for reorganization. It should also provide for independent comment on and analysis of that information. Provision should be made for the possible examination of directors, officers and other persons with knowledge of the debtor’s financial position and business affairs, who may be compelled to give information to the court and insolvency representative and creditors’ committee.</p> <p><b>C2.3</b> Provide for the retention of professional experts to investigate, evaluate or develop information that is essential to key decision-making. Professional experts should act with integrity, impartiality and independence.</p>
<p><b>Description</b></p>	<p>The relevant provisions in Namibian law, for the different procedures, are the following:</p> <p><b><u>A. Liquidation</u></b></p>

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1. By members

- Within 28 days of the resolution having been registered by the Registrar, the company must lodge a certified copy of the resolution with the Master.<sup>78</sup>
- The company must also give notice of the voluntary winding-up in the Government Gazette<sup>79</sup>. Section 362 of the Companies Act 28 of 2004 also requires a copy of the resolution to be sent by the company to certain officers and registrars within 14 days of the registration of the resolution.

2. By Court

- The application for the winding-up of a company consists of a notice of motion and supporting affidavits.

- Before an application for the winding-up of a company is presented to the Court, a copy of the application and of every affidavit confirming the facts stated therein must be lodged with the Master. The Master may report to the Court any facts ascertained by him or her which appear to him or her to justify the Court in postponing the hearing or dismissing the application and must transmit a copy of that report to the applicant or the agent of the applicant and to the company<sup>80</sup>.

- The application itself must mention the main business and nature of the company, as well as the company's registered office. The *locus standi* of the applicant and the ground of liquidation relied upon for the application, must also be specified. At the hearing the court may grant the application, dismiss it, or adjourn proceedings conditionally or unconditionally. If the applicant has shown a prima facie case the court will normally issue a provisional winding-up order with a rule *nisi*.

- Where the Court grants an application for the liquidation of a company under section 351, the Court must, unless there is good reason not to do so-

- (a) grant a rule *nisi* calling on the company and all interested persons to show cause on the return day why the company should not be finally wound up; and

- (b) direct that the rule be published in the Government Gazette and, if the Court deems it necessary, in a newspaper circulating in Namibia<sup>81</sup>.

- On the return date the company can advance reasons why it should not be placed under final liquidation.

- The Registrar of the High Court must immediately send a copy of every winding-up order, whether provisional or final and of any order staying, amending or setting that order aside, made by the Court to-

- (a) the sheriff of the Court;

- (b) every registrar or other officer charged with the maintenance of any register under any Act in respect of any property within Namibia which appears to be an asset of that company;

- (c) the messenger of every magistrate's court by the order where it appears that property of that company is under attachment<sup>82</sup>.

- On receipt of a copy of any winding-up order of any company lodged with him or her, the Master must give notice of that winding-up in the Government Gazette<sup>83</sup>.

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<sup>78</sup>See Section 361(2) of the Companies Act 28 of 2004. Note, however, that a copy of the resolution will already be in the possession of the Master, since the Registrar of Companies has to transmit a copy of the resolution to him or her in terms of Section 357(2).

<sup>79</sup>See Section 361(2)(b) of the Companies Act 28 of 2004.

<sup>80</sup>See Section 351(4) and (5) of the Companies Act 28 of 2004.

<sup>81</sup>See Section 352(2) of the Companies Act 28 of 2004.

<sup>82</sup>See Section 362(1) of the Companies Act 28 of 2004.

<sup>83</sup>See Section 361(1) of the Companies Act 28 of 2004.

	<p><b><u>B. Sequestration</u></b></p> <ul style="list-style-type: none"> <li>• The Insolvency Act 24 of 1936 itself does not make provision for notice of the application to be given to the debtor prior to the hearing of the application by the court. However, with the advent of the Constitution and in particular the fair trial rights enshrined by Article 12 the Courts frown upon <i>ex parte</i> applications and unless good cause is shown, may require notice to be given to the debtor.</li> <li>• The court has no authority to grant a final order of sequestration immediately, but is obliged to issue a provisional order of sequestration.<sup>84</sup></li> <li>• Where the court grants an order of provisional sequestration, it must simultaneously issue a rule <i>nisi</i> in terms of which the debtor is called upon to show cause on the return date why his or her estate should not be placed under final sequestration<sup>85</sup>.</li> </ul> <p>Section 11 of the Insolvency Act 24 of 1936 requires that the provisional sequestration order must be served upon the debtor. The debtor, on good cause shown, may anticipate the return date of the rule nisi, but must give at least twenty-four hours' notice of such application to the applicant. If upon the return date of the rule nisi the court is satisfied that the applicant has proved the three essential elements<sup>86</sup> of his or her case, the court has the discretion to finally sequester the debtor's estate</p>
<p><b>Assessment</b></p>	<p>There appears to be a strong framework in place to provide for the publicity of insolvency processes, as well as to encourage access information regarding the debtor's finances. One of the problems is the lack of individual notification to creditors when insolvency processes regulated by the Insolvency Act 24 of 1936 are opened.<sup>87</sup> Moreover, the effectiveness of the publicity measures is dependent on the diligence and efficiency of the liquidators and the board of the company.</p> <p>Formal interrogation procedures are in principle available to the liquidator and judicial manager.</p> <p>There are problems in the communication of notifications of insolvency between the Office of the Registrar of the High Court, the Registrar of Companies and the Master of the High Court with notifications not always being communicated, or being transmitted with delays.</p> <p>The current law does not provide extensive detail regarding the power of the insolvency representative to get advice from third party experts like specialized lawyers and accountants – and how this might be paid for. Critically, there is little mention of what the duties that cannot be delegated by the practitioner.</p>
<p><b>Comment</b></p>	<p>In all insolvency procedures, creditors should receive an individual notification for all procedures relating to an insolvency matter. The system should not rely entirely on the publication of announcements in the Gazette. Individual notifications are more effective</p>

<sup>84</sup>See Section 10 of the Insolvency Act 24 of 1936. See also *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 3 SA 1 (A) 9-10. Moch's case was approved in a different context in a number of Supreme Court judgments, one of which is *Shetu Trading CC v Chair, Tender Board of Namibia* 2012 (1) NR 162 (SC) par [26] and [27]

<sup>85</sup>See Section 11(1) of the Insolvency Act 24 of 1936.

<sup>86</sup> In terms of Section 12 of the Insolvency Act 24 of 1936 these "essential elements" are: i) the applicant creditor has established a claim against the debtor; ii) the debtor has committed an act of insolvency or is insolvent; and iii) there is reason to believe that the sequestration of the debtor's estate will be to the advantage of the creditors.

<sup>87</sup>The exception is the notification for the application of voluntary surrender and the second meeting: see Section 81(1) bis(a) of the Insolvency Act 24 of 1936.

	<p>and more protective of creditor interests, especially for those creditors who have less access to official publications or who have their domiciles abroad. E-notification could also be considered especially since e-filing at the high court is now being implemented.</p> <p>It may also be helpful to provide legislative clarity on the delegation powers of insolvency practitioners and also of judicial management experts. This can facilitate understanding and expectations as to what advice may be sought – and how this advice may be paid for.</p> <p>Finally, the connection between the insolvency processes and the Deeds Registry should be reinforced, as the publicity of the insolvency process through the registries is an important tool for the protection of creditors’ interests.</p>
	<p><b><i>Commencement</i></b></p>
<p><b>Principle C3</b></p>	<p><b>Eligibility</b>          The insolvency proceeding should apply to all enterprises or corporate entities, including state-owned enterprises.<sup>88</sup> Exceptions should be limited, clearly defined, and should be dealt with through a separate law or through special provisions in the insolvency law.</p>
<p><b>Description</b></p>	<p>In principle the insolvency process applies to all forms of enterprises or corporate entities.</p> <p><b><u>Special rules and exceptions</u></b></p> <p>The provisions of the Companies Act 28 of 2004 and by extension the Insolvency Act govern the liquidation or winding-up of banks, insurance companies, pension fund organizations, friendly societies, unit trust schemes, participation bond schemes, stock exchanges and medical aid funds; however special rules relating to the liquidation or winding-up of these entities also appear in the Banking Institutions Act 2 of 1998, the Long-term Insurance Act 5 of 1998, the Short-term Insurance Act 4 of 1998, the Pension Funds Act 24 of 1956, the Unit Trusts Control Act 54 of 1981, the Friendly Societies Act 25 of 1956, the Participation Bonds Act 55 of 1981, the Stock Exchanges Control Act 1 of 1985 and the Medical Aid Funds Act 23 of 1995. The aforesaid entities are prudentially regulated and contain additional requirements for liquidation.</p> <p>These latter Acts are “connected” to the Insolvency Act 24 of 1936, the central piece of legislation, by means of “connecting provisions” that make insolvency law applicable also to these types of entities.</p> <p>State-owned enterprises that have not been formed as companies under the Companies Act 28 of 2004 are not subject to the insolvency framework and their enabling Acts contain their peculiar winding up procedures. In general such enterprises must be wound up by an Act of Parliament. In general, state-owned enterprises are subject to the State-Owned Enterprises Governance Act 2 of 2006 (“SOEGA 2006”). Under this statute, the State-owned Enterprises Governance Council may formulate a restructuring plan for approval by the cabinet. The restructuring plan may include the conversion of the State-owned company into a public company, the privatization of the State-owned company, the transfer of the State-owned enterprise’s undertaking and assets and liabilities to another State-owned enterprise, the sale of the State-owned enterprise’s undertaking and assets to members of the public, liquidation of the State-owned enterprise, any other method through which the restructuring of the State-owned enterprise should be effected, and any measures, including any legislation or legislative changes, which may be required to achieve the restructuring of the State-owned enterprise as proposed (see also Principle B3 above).</p> <p>The Co-operatives Act 23 of 1996 (Part XII, Sections 77-83) contains its own framework for the liquidation of co-operatives, without reference to the Companies Act 28 of 2004. The Registrar of Co-operatives appoints the liquidator.</p>

<sup>88</sup>Ideally, the insolvency process should apply to SOEs, or alternatively, exceptions of SOEs should be clearly defined and based upon compelling state policy.

<p><b>Assessment</b></p>	<p>In principle the insolvency process applies to all debtors, but as noted above, there are separate legal regimes that apply to different types of debtors:</p> <ul style="list-style-type: none"> <li>• Individuals, partnerships and other non-corporate entities, such as trusts and voluntary associations where the Insolvency Act 24 of 1936 applies;</li> <li>• Companies where the Companies Act 28 of 2004 (involuntary winding up) applies. In addition, the Insolvency Act 24 of 1936 can also apply, in cases where the 2004 Companies does not provide coverage in relation to insolvency; and</li> <li>• Close corporations where the Close Corporations Act 26 of 1988 applies.</li> <li>• A variety of other pieces of legislation that establish regimes for special types of debtors like banks, cooperatives and insurance companies.</li> </ul>
<p><b>Comment</b></p>	<p>The enactment of a new Insolvency Act, generally applicable to all debtors would simplify the regime greatly. It would be important to make insolvency procedures generally applicable to all companies, including state-owned companies. Schemes of arrangement should also be available to all enterprises, including close corporations and unincorporated partnerships (see Principle C14)<sup>89</sup>.</p> <p>Where exceptions are introduced, they need to be justified on objective circumstances, such as the special regimes for financial institutions.</p>
<p><b>Principle C4</b></p>	<p><b>Applicability and accessibility</b></p> <p><b>C4.1</b> Access to the system should be efficient and cost-effective. Both debtors and creditors should be entitled to apply for insolvency proceedings.</p> <p><b>C4.2</b> Commencement criteria and presumptions about insolvency should be clearly defined in the law. The preferred test to commence an insolvency proceeding should be the debtor’s inability to pay debts as they mature, although insolvency may also exist where the debtor’s liabilities exceed the value of its assets, provided that the value of assets and liabilities are measured on the basis of fair market values.<sup>90</sup></p> <p><b>C4.3</b> Debtors should have easy access to the insolvency system upon showing proof of basic criteria (insolvency or financial difficulty).</p> <p><b>C4.4</b> Where the application for commencement of a proceeding is made by a creditor, the debtor should be entitled to prompt notice of the application, an opportunity to defend against the application, and a prompt decision by the court on the commencement of the case or the dismissal of the creditor’s application.</p>
<p><b>Description</b></p>	<p><b><u>Accessibility</u></b></p> <p>1. <b><u>Companies Act 28 of 2004</u></b></p> <p>This aspect has been dealt with above: see Principle C1 under para. 1, “Winding-up by Court”.</p> <p>2. <b><u>Insolvency Act 24 of 1936</u></b></p>

<sup>89</sup> There are precedents in common law countries where the issue of the lack of a proper regulation of the insolvency of partnerships (situated in a no man’s land between corporate insolvency and personal insolvency) has been addressed by simple, delegated legislation: the most noticeable example is England (Insolvent Partnerships Order 1994, SI 1994/2421).

<sup>90</sup> A single or dual approach may be adopted, although where only a single test is adopted it should be based on the liquidity approach for determining insolvency – that is, the debtor’s inability to pay due debts.

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The sequestration of an individual's estate does bring about discharge of the debt once the debtor has been rehabilitated<sup>91</sup> and for this reason many debtors make use of sequestration proceedings in practice.

In order to assist creditors that apply for the sequestration of a debtor's estate certain presumptions, that are indicative of insolvency, have been provided in the form of "acts of insolvency". A debtor commits an act of insolvency if:

- (a) He or she leaves the Republic or otherwise absents himself or herself with the intention of evading or delaying the payment of his or her debts.<sup>92</sup>
- (b) He or she fails to satisfy a judgment by the court, or fails to point out sufficient disposable property to satisfy it, or where a *nulla bona* return has been made by the officer responsible for the execution of the judgment.<sup>93</sup>
- (c) The debtor makes or attempts to make a disposition of his or her property which has or would have the effect of prejudicing his or her creditors or of preferring one creditor above another.<sup>94</sup>
- (d) He or she removes or attempts to remove any of his or her property with the intent of prejudicing his or her creditors or of preferring one creditor above another.<sup>95</sup>
- (e) He or she makes or offers to make an arrangement with any of his or her creditors for releasing him or her wholly or in part from his debts.<sup>96</sup>
- (f) After having published a notice of his intent to bring an application for voluntary surrender, he or she fails to comply with the formal requirements or to bring such application, or where he or she lodges an incorrect statement of affairs.<sup>97</sup>
- (g) He or she gives notice in writing to any one of his or her creditors that he is unable to pay any of his or her debts.<sup>98</sup>
- (h) Being a trader, he or she places a notice in the Government Gazette in terms of section 34 of the Insolvency Act 24 of 1936 (alienation of business) and is thereafter unable to pay his or her debts.<sup>99</sup>

**Commencement criteria**

Due to the fact that sequestration and / or winding-up have the effect of bringing about a *concursum creditorum*<sup>100</sup>, the date upon which the sequestration or liquidation commences

<sup>91</sup>See Section 129(1)(b) of the Insolvency Act 24 of 1936.

<sup>92</sup>See Section 8(a) of the Insolvency Act 24 of 1936.

<sup>93</sup>See Section 8(b) of the Insolvency Act 24 of 1936.

<sup>94</sup>See Section 8(c) of the Insolvency Act 24 of 1936.

<sup>95</sup>See Section 8(d) of the Insolvency Act 24 of 1936.

<sup>96</sup>See Section 8(e) of the Insolvency Act 24 of 1936.

<sup>97</sup>See Section 8(f) of the Insolvency Act 24 of 1936.

<sup>98</sup>See Section 8(g) of the Insolvency Act 24 of 1936.

<sup>99</sup>See Section 8(h) of the Insolvency Act 24 of 1936.

<sup>100</sup> The position is neatly summed up in *Walker v Syfret* 1911 AD 141 at 166:

*"The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon*



	<p>is of paramount importance. The date of commencement of sequestration and/or liquidation also has an important impact on the execution of judgments and the rights of the parties to transactions entered into prior to sequestration or liquidation.</p> <p>1. <u>Winding-up by Court</u></p> <ul style="list-style-type: none"> <li>• A winding-up of a company by the Court is deemed to commence at the time of the presentation to the Court of the application for the winding-up (Section 353 of the Companies Act 28 of 2004).<sup>101</sup></li> <li>• The commencement of liquidation is therefore not determined by reference to the date on which the order is granted, or even the date on which the application is heard by the court, although there can be no commencement of liquidation without a winding-up order having been granted. It must also be noted that the mere presentation of an application to court does not have the effect of creating a moratorium in respect of the payment of a company's debts.<sup>102</sup></li> </ul> <p>2. <u>Voluntary liquidation</u></p> <ul style="list-style-type: none"> <li>• A voluntary winding-up of a company commences at the time of the registration of the special resolution authorizing the winding-up (Section 357 of the Companies Act 28 of 2004).</li> </ul> <p>3. The same rules apply with the necessary changes to a close corporation in liquidation (See Section 66 of the Close Corporations Act 26 of 1988).</p> <p>4. <u>Sequestration</u></p> <ul style="list-style-type: none"> <li>• Where the application is for voluntary surrender, the date of sequestration is the date upon which the court grants the sequestration order.<sup>103</sup></li> <li>• Where the application is an application for compulsory sequestration, the date of sequestration is the date on which the provisional sequestration order (rule <i>nisi</i>) is granted by the court, provided the provisional order has not been set aside or, stated differently, provided the provisional order has been made final.<sup>104</sup></li> </ul>
<p><b>Assessment</b></p>	<p>Access to the insolvency system in Namibia is complicated by the existence of numerous procedures with different requirements. The Insolvency Act 24 of 1936 still includes a</p>

*the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.”*

<sup>101</sup>In *Lief v Western Credit (Africa) (Pty) Ltd* 1966 3 SA 344 (W) at 347 it was held that the reason behind the deeming provisions is to negate any attempt by a dishonest company, or directors, or creditors or others, to gain an unfair advantage during the period between then presentation of the application for a winding-up order and the granting of an order by the court.

<sup>102</sup>In *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 4 SA 75 (W) at 83A-B the Court held that Section 348 of the Companies Act 61 of 1973 (the predecessor of Section 353 of the 2004 Act), did not mean that the launching of winding-up proceedings had the effect of granting the company concerned a moratorium in the payment of its debts.

<sup>103</sup>Section 2 of the Insolvency Act 24 of 1936 defines a “sequestration order” as any order of court whereby an estate is sequestrated and includes a provisional order which has not been set aside. Section 353 of the Companies Act 28 of 2004 provides for the commencement of liquidation as the time of the presentation to the Court of the application for the winding-up. The Insolvency Act 24 of 1936 does not contain a similar provision to Section 353 of the Companies Act 28 of 2004. See D. Burdette, *Framework for Corporate Insolvency Law Reform in South Africa*, cit., Part 4, p. 278, footnote 5.

<sup>104</sup>See D. Burdette, *Framework for Corporate Insolvency Law Reform in South Africa*, cit., Part 4, p. 279.

	<p>system based on “acts of bankruptcy”, whereas the Companies Act 28 of 2004 seems to use a basic cash-flow test, accompanied by some statutory grounds for winding-up and presumptions. In some cases, it seems that the courts have required proof of balance-sheet insolvency. This may create confusion. In addition, the impact of the “advantage of creditors’ test” in case of sequestration, in particular, should be regarded as negative.</p> <p>In practice, the system of access to insolvency procedures seems cost-effective, especially because most applications are unopposed. However, for close corporations, the costs of the court application may imply a deterrent in some cases.</p> <p>The questions connected with the functioning of the courts are discussed under Principles D1-D6. The organization of the courts has a direct impact on the difficult question of assessing whether a debtor is insolvent and whether the creditors or the debtor itself should be granted access to the insolvency process under the circumstances.</p>
<b>Comment</b>	<p>A future reform of the insolvency law should perhaps include a unified insolvency test. It would appear appropriate and effective to unify the regimes and to include one insolvency test for the purposes of the opening of the insolvency process, based on the inability to pay debts as they fall due, potentially supplemented by a balance-sheet test. It is possible to use a broader concept, such as “financial distress” for the purposes of a new reorganization procedure (see Principle C14). Alternative definitions of “solvency” or “insolvency” may play different roles in the system, but it is crucial to establish the effects and the specific consequences attached to each of these definitions.</p> <p>The law should establish mechanisms to deal with “no-asset” cases, but restricting access to the process on the basis of this test could imply that there is no possibility of seeking redress in numerous situations, including situations in which the estate can be increased by way of the use of avoidance actions or liability actions against directors.</p>
<b>Principle C5</b>	<p><b>Provisional Measures and Effects of Commencement</b></p> <p><b>C5.1</b> When an application has been filed, but before the court has rendered a decision, provisional relief or measures should be granted when necessary to protect the debtor’s assets and the interests of stakeholders, subject to affording appropriate notice to affected parties.</p> <p><b>C5.2</b> The commencement of insolvency proceedings should prohibit the unauthorized disposition of the debtor’s assets and suspend actions by creditors to enforce their rights or remedies against the debtor or the debtor’s assets. The injunctive relief (stay) should be as wide and all-encompassing as possible, extending to an interest in assets used, occupied or in the possession of the debtor.</p> <p><b>C5.3</b> A stay of actions by secured creditors should be imposed in liquidation proceedings to enable higher recovery of assets by sale of the entire business or its productive units, and in reorganization proceedings where the collateral is needed for the reorganization. The stay should be of limited, specified duration, strike a proper balance between creditor protection and insolvency proceeding objectives, and provide for relief from the stay by application to the court based on clearly established grounds when the insolvency proceeding objectives or the protection of the secured creditor’s interests in its collateral are not achieved. Exceptions to the general rule on a stay of enforcement actions should be limited and clearly defined.</p>
<b>Description</b>	<p>The relevant provisions in Namibian law are the following:</p> <p><b>1. <u>Liquidation in terms of the Companies Act 28 of 2004</u></b></p> <ul style="list-style-type: none"> <li>• The effect of a voluntary winding-up is that the company remains a corporate body and retains all its powers as such, but, must, from the commencement of the winding-up, cease to carry on its business except in so far as may be required for</li> </ul>

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the beneficial winding-up of the company (Section 358(1) of the Companies Act 28 of 2004).

- As from the commencement of a voluntary winding-up all the powers of the directors of the company concerned cease except in so far as their continuance is sanctioned -by the liquidator or the company in general meeting in a members' voluntary winding-up; or -by the liquidator or the creditors in a creditors' voluntary winding-up (Section 358(2) of the Companies Act 28 of 2004).

*Stay of legal proceedings before winding-up order is granted (Section 363 of the Companies Act 28 of 2004)*

- After the presentation of an application for winding-up but before a winding-up order has been made, the company concerned or any creditor or member may-
  - (a) if an action or proceeding by or against the company is pending in any court in Namibia, apply to that court for a stay of the proceedings; and
  - (b) if any other action or proceeding is being or about to be instituted against the company, apply to the Court to which the application for winding-up has been presented, for an order restraining further proceedings in the action or proceeding.

*Stay of legal proceedings after winding-up order is granted (Section 364 of the Companies Act 28 of 2004)*

- When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered -
  - (a) all civil proceedings by or against the company concerned are suspended until the appointment of a liquidator; and
  - (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up are void<sup>105</sup>.

**2. Sequestration in terms of the Insolvency Act 24 of 1936**

- Section 20(1) of the Insolvency Act 24 of 1936 stipulates:

*“The effect of the sequestration of the estate of an insolvent shall be-*

- (a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;*
- (b) to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent save such proceedings as may, in terms of section twenty-three, be instituted by the insolvent for his own benefit or be instituted against the insolvent: Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of section forty-four or seventy-eight, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate;*
- (c) as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration*

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<sup>105</sup>According to D. Burdette, *Framework for Corporate Insolvency Law Reform in South Africa*, cit., Part 4, p. 282, the purpose of Section 359 of the Companies Act 61 of 1973, (the predecessor of current Section 364) is to protect the creditors in the estate, preventing other (judgment) creditors from obtaining an unfair advantage where liquidation of the company is eminent.

	<p><i>of the insolvent's estate, to stay that execution, unless the court otherwise directs;</i></p> <p><i>(d) to empower the insolvent, if in prison for debt, to apply to the court for his release, after notice to the creditor at whose suit he is so imprisoned, and to empower the court to order his release, on such conditions as it may think fit to impose.</i></p>
<p><b>Assessment</b></p>	<p>The current framework allows for the imposition of provisional measures in the case of a formal insolvency proceeding being commenced -liquidation or business rescue-, although the legal framework does not specify all the measures available to creditors and the requirements for them. This matter, therefore, depends on case-law. Although the law, generally, contains instruments that would allow for the treatment of the problems typically posed at the time of the opening of insolvency proceedings, in practice the problem is that, because of the delays in the appointment of liquidators by the Master of the High Court (see Principle D7), there are opportunities for unscrupulous debtors to deal in their own assets and thus prejudice the interests of creditors (see also Principle C6).</p> <p>Concerns have been raised regarding the co-ordination of the Registry office with other branches of the institutional framework governing insolvency and enforcement (see Principle C2). In this regard, it has been noted that there have been cases where the Deeds Registry does not always receive prompt notifications regarding liquidations and sequestrations from the office of the Master of the High Court. This can result in the Deeds Registry failing to place an interdict against the relevant name and to thus permit continuing transactions to be undertaken by the person or entity subject to the liquidation and sequestration. This may add to the problem of the delay in the appointment of the liquidator, described above.</p> <p>One of the main problems with the Namibian regulation lies with the regulation of the stay and its application to secured creditors. The system leaves options for secured creditors to enforce their claims in a liquidation – but the stay in judicial management is only effected with court approval. Also, in the liquidation procedure, the factors that are taken into account in order to allow the creditor to enforce its security interest seem to bear no relation with those that are the object of consideration in the laws that conform to best international practice.</p> <p>It seems that the provisional liquidation is sometimes used in order to effect a stay and to provide an opportunity to work out a compromise that may assist in rescuing the business.</p>
<p><b>Comment</b></p>	<p>More specificity of the provisional measures available to creditors could be useful, although if the case law developed is consistent, there might be less need for a statutory list of possible measures to be adopted by the courts. In any case, this is a matter that can be given serious consideration in the drafting of a new Insolvency Act. Typically, one of the most efficient provisional measures is the appointment of an interim insolvency representative, who may manage the estate or control the management of the estate by the debtor. In order for this measure to be effective, the delay in appointing the interim insolvency representative should be minimal. In any case, the sheriff of the court should be able to take possession of the assets before the interim representative is appointed.</p> <p>The question of the communications between the organs of the insolvency process and the Deeds registry should be addressed in order to protect effectively the interests of creditors (see Principle C2).</p> <p>Finally, the stay of secured creditors’ actions could be usefully revised: the stay should be linked to the possibility of liquidating the estate in a more efficient manner (for instance,</p>

	<p>where the going concern value is higher than the value of the assets separately sold) or the possibilities of reorganizing the debtor’s business. In this case, the collateral should be necessary for the reorganization efforts. Where a stay is imposed on creditors for a substantial period of time, as in a reorganization, there must be mechanisms that protect the secured creditor in an effective way, especially against the risk of loss or depreciation of the assets covered by the security interest. If the creditor is not satisfied with the protection measures, the creditor should be able to apply to the court for relief from the stay, as the law recognizes, but the law should also establish the grounds and the criteria that the secured creditor needs to meet in order to obtain relief from the stay (see also Principle C14).</p>
	<p><b>Governance</b></p>
<p><b>Principle C6</b></p>	<p><b>Management</b></p> <p><b>C6.1</b> In liquidation proceedings, management should be replaced by an insolvency representative with authority to administer the estate in the interest of creditors. Control of the estate should be surrendered immediately to the insolvency representative. In creditor-initiated filings, where circumstances warrant, an interim administrator with limited functions should be appointed to monitor the business to ensure that creditor interests are protected.</p> <p><b>C6.2</b> There are typically three preferred approaches in reorganization proceedings: (i) exclusive control of the proceeding is entrusted to an independent insolvency representative; or (ii) governance responsibilities remain invested in management; or (iii) supervision of management is undertaken by an impartial and independent insolvency representative or supervisor. Under the second and third approaches, complete administration power should be shifted to the insolvency representative if management proves incompetent, negligent or has engaged in fraud or other misbehavior.</p>
<p><b>Description</b></p>	<p>In the case of a debtor who is a natural person, the debtor is divested of his or her estate and the assets vest in the Master and then in the trustee once appointed.<sup>106</sup></p> <p>However, in the case of a company being wound up by the court, the assets fall under the custody and control of the Master and then the liquidator, once appointed<sup>107</sup>.</p> <p>It was held in <i>Secretary for Customs and Excise v Millman</i><sup>108</sup> at 552 that the assets of a company never vest in the liquidator. This is subject of course to cases where the court has made an order in terms of section 366(3)<sup>109</sup></p> <p><u>Appointment of liquidator</u></p> <ul style="list-style-type: none"> <li>• Liquidation proceedings involve the replacement of existing management with a liquidator appointed by the Master of the High Court.</li> <li>• In <i>AMS Marketing Co (Pty) Ltd v Holzman and Another</i><sup>110</sup>, the Court observed that “the essential point to notice is that as the directors are divested of their</li> </ul>

<sup>106</sup>See Section 20(1)(a) of the Insolvency Act 24 of 1986.

<sup>107</sup>See Section 366(1) of the Companies Act 28 of 2004.

<sup>108</sup>See *Secretary for Customs and Excise v Millman* 1975 3 SA 544 (A).

<sup>109</sup>In fact, Section 366(3) of the Companies Act 28 of 2004 provides:

“If, for any reason it appears expedient, the Court may, by the winding-up order or by any subsequent order, direct that all or any part of the property, immovable and movable belonging to the company, or to trustees on its behalf, vest in the liquidator in his or her official capacity, and the property or the part of it specified in the order vests accordingly, and the liquidator may, after giving any indemnity, if any, which the Court may direct, bring or defend in his or her official capacity any action or other legal proceedings relating to that property, or necessary to be brought or defended for the purpose of effectually winding-up the company and recovering its property.”

<sup>110</sup>See *AMS Marketing Co (Pty) Ltd v Holzman and Another* 1983 (3) SA 263 (W) at 269.

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*powers upon compulsory liquidation so, in a broad sense, is the liquidator invested with similar powers upon his appointment. Remembering that a company is an artificial entity, not being capable of performing acts itself, its functions are performed by its officers. In the case of a solvent company there is a division of powers between the board of directors and the general meeting of members. It seems to me, therefore, in the case of a company in liquidation, that there is a similar division of powers between the liquidator on the one hand and the meeting of creditors or contributories on the other. Furthermore, in the same way as the board of directors constitutes a primary organ of the company in the sense in which that expression is used by Gower [Principles of Modern Company Law, 4th edition, at 152], it seems to me that the liquidator who takes its place upon compulsory liquidation should enjoy the same classification. That means that where the liquidator performs the functions of the former board, his acts are the acts of the company itself. Thus I am of opinion that the liquidator is not merely an agent of the company in whom special duties are vested by the Act”*

- The liquidator stands in a fiduciary relationship to the company and to the body of members as a whole and to the body of creditors as a whole. His duties, in this context, include a duty of impartiality towards all persons whose interests are involved in the winding-up. This duty, however, is not breached merely because the discharge of his other duties requires that he oppose such a person, e.g. where he is constrained to challenge an alleged creditor’s claim against the company.<sup>111</sup>

- The powers in general of a liquidator are contained in section 392(1) and (6) of the Companies Act 28 of 2004. The liquidator has *inter alia*, the power “to perform any act or exercise any power” provided it is not one for the performance or the exercise of which the Companies Act requires him or her to obtain the leave of the Court. This is a wide power which, subject to the stated proviso, enables him or her to do anything which cannot be done within the scope of any of the powers contained in Section 392(1) and Section 392(6)(a)–(h) of the Companies Act 28 of 2004. The liquidator may seek directions from the Court in the form of its leave to do anything which he or she is able to satisfy the Court is necessary for the winding-up of the company and in some circumstances he may seek other directions from the Court.

Voluntary liquidation by members

- Once the resolution has been registered, the Master will normally appoint the person nominated as liquidator in the resolution,<sup>112</sup> although he or she may refuse to appoint a specific person if such person is disqualified from being appointed<sup>113</sup>

- As it has been stated, summarizing the case law:  
*“The liquidator does not convene meetings of creditors, no claims by creditors are proved against the company, there is no need to submit a report to creditors and no statement of the affairs of the company needs to be completed. Subject to the consent of the members, the liquidator realises the assets of the company or corporation and lodges the account of his administration with the Master in the prescribed form. It is not necessary for the liquidator to realise all the assets if it is possible for him or her to distribute the assets to the members in specie, as long as the distribution of the assets is strictly in proportion to the shareholding of every member of the company”<sup>114</sup>.*

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<sup>111</sup>See Meskin, *Insolvency Law*, LexisNexis, *Service Issue 34*, para. 4.54, on the legal position of the liquidator of a company.

<sup>112</sup>See Section 376(1) of the Companies Act 28 of 2004.

<sup>113</sup>See Section 377 of the Companies Act 28 of 2004. See also Section 74(3) of the Close Corporations Act 26 of 1988.

<sup>114</sup>See D. Burdette, *Framework for Corporate Insolvency Law Reform in South Africa*, cit., Part 4, at 392-393.

	<p><u>Voluntary liquidation by creditors</u></p> <ul style="list-style-type: none"> <li>• In the case of a creditors' voluntary winding-up and a winding-up by the Court of a company, the Master must appoint the person or persons nominated by the first meetings of creditors and members referred to in section 370 as liquidator or liquidators of the company concerned, if the same person or persons have been nominated by those meetings<sup>115</sup>.</li> <li>• If the meetings referred to in Section 370 of the Companies Act 28 of 2004 have nominated different persons, the Master must, subject to the Master's right to decline an appointment under Section 377 of the Companies Act 28 of 2004, decide the difference and appoint all or any of the persons so nominated, as liquidator or liquidators of the company concerned<sup>116</sup>.</li> </ul> <p><u>In all cases</u></p> <ul style="list-style-type: none"> <li>• The Master appoints the liquidator by virtue of a certificate of appointment in terms of Section 382(1) of the Companies Act 28 of 2004.</li> <li>• On receipt of the certificate of appointment the liquidator must within seven days after receipt of the certificate, send a copy thereof to the Registrar of Companies<sup>117</sup>. The liquidator must also give notice of his or her appointment in the Government Gazette<sup>118</sup>.</li> <li>• The acts of a liquidator are valid notwithstanding any defects that may afterwards be discovered in his or her appointment or qualification<sup>119</sup></li> <li>• Liquidators must realize the assets of the company and distribute the proceeds to creditors. Creditors are dependent on the liquidator to maximize their dividends by ensuring that assets are sold for the highest possible purchase price and by pursuing claims against delinquent directors and other parties who may be liable to the company. Liquidators act on the directions of creditors, which are given at formal meetings. Urgent directions can be obtained from the court.</li> <li>• The winding up of a company is complete when the liquidator has realized all the assets and completed his investigations (including any action that has arisen through this) into the affairs of the company. A first liquidation and distribution account can be prepared within six months of the liquidation order. Before this stage, a creditor that holds security can ask the liquidator to pay an advance dividend subject to confirmation of the liquidation account. Subsequent accounts are prepared until all the proceeds of the asset realizations have been distributed.</li> <li>• The liquidator produces a final liquidation and distribution account and makes the final dividend payment to creditors (if any). The Registrar of Companies then de-registers the company. Alternatively, the Court where creditors enter into a compromise or arrangement with the company may discharge a company from liquidation.</li> </ul>
<p><b>Assessment</b></p>	<p>The legal framework governing the scope of liquidator powers and responsibilities are largely compliant with the tenor of this Principle. In a liquidation framework, all management powers are transferred to the liquidator; and in a business rescue, the business rescue specialist (judicial manager) assumes the management of the debtor's business, which is one of the options explicitly contemplated in the World Bank Principles. However, some concerns have been noted in the practice and implementation of the part of</p>

<sup>115</sup>See Section 376(2) of the Companies Act 28 of 2004.

<sup>116</sup>See Section 376(3) of the Companies Act 28 of 2004.

<sup>117</sup>See Section 382(5)(a) of the Companies Act 28 of 2004.

<sup>118</sup>See Section 382(5)(b) of the Companies Act 28 of 2004.

<sup>119</sup>See Section 382(4) of the Companies Act 28 of 2004.

	<p>the insolvency regime that is covered by this Principle.</p> <p>First and foremost, the appointments process for liquidators can be subject to delays where the court orders are not promptly transferred to the office of the Master of the High Court. This problem aspect is also analyzed under Principles D7 and D8. The delays in the appointment of the liquidator, at a critical juncture of the process, are very risky for the integrity of the insolvency estate<sup>120</sup>.</p> <p>It has been noted that several liquidators can potentially be appointed for the management of one debtor company. Section 382 of the 1973 Act provides for multiple liquidators to be appointed, and for disputes between liquidators to be referred to be the Office of the Master. In theory this can present several issues in the running of the company. Where several liquidators may be appointed, the effective management of the company may be compromised on account of the competing views of the liquidators concerned. There is a danger also that tasks may be divided across a number of practitioners, whereby information may be compartmented, such that no one liquidator is able to have all of the information and have the right to act on that information with respect to a proceeding. As noted, when disputes do arise, it seems likely that delays may arise at the level of the Master’s Office in hearing and adjudicating on such disputes, given workload pressures and resource constraints. Due to the relative small number of liquidations, this problem is however not substantial within the Namibian system.</p> <p>At present, it appears that judicial management is hardly ever used. As noted elsewhere (see, for instance, Principle C1), the current practice in Namibia is heavily weighted towards liquidation. There is little practice of rehabilitation – with the lack of uptake of the compromise and judicial management procedures.</p> <p>It would seem appropriate to emphasize the importance of providing the office of the Master of the High Court with adequate resources in order to make the appointments of liquidators and provisional liquidators with utmost urgency and efficiency. Business rescue expertise should also be developed within the jurisdiction.</p>
<p><b>Comment</b></p>	<p>It would seem appropriate to emphasize the importance of providing the office of the Master of the High Court with adequate resources in order to make the appointments of liquidators and provisional liquidators with urgency and efficiency. It is equally necessary to insist on the need of the introduction of a system that provides for business rescue specialists, who should have the necessary abilities to effectively manage the distressed company (see Principles D7 and D8).</p>
<p><b>Principle C7</b></p>	<p><b>Creditors and the Creditors' Committee</b></p> <p><b>C7.1</b> The role, rights and governance of creditors in proceedings should be clearly defined. Creditor interests should be safeguarded by appropriate means that enable creditors to effectively monitor and participate in insolvency proceedings to ensure fairness and integrity, including by creation of a creditors’ committee as a preferred mechanism, especially in cases involving numerous creditors.</p> <p><b>C7.2</b> Where a committee is established, its duties and functions, and the rules for the committee’s membership, quorum and voting, and the conduct of meetings should be specified by the law. It should be consulted on non-routine matters in the case and have the ability to be heard on key decisions in the proceeding. The committee should have the right to request relevant and necessary information from the debtor. It should serve as a conduit for processing and distributing that information to other creditors and for organizing creditors to decide on critical issues. In reorganization proceedings, creditors</p>

<sup>120</sup> According to anecdotal evidence, an appointment of the liquidator two or three days after the court order is the best possible outcome in the Namibian practice.



	<p>should be entitled to participate in the selection of the insolvency representative.</p>
<p><b>Description</b></p>	<p>The following relevant provisions apply:</p> <p><b><u>1. Mem b ers' vo lunt a ry wind i ng -up</u></b></p> <p>In the case of a voluntary winding-up by members there are no creditors who suffer any loss, and therefore creditors have no say in the winding-up process. The initiative remains with the members throughout and the process is an inexpensive and simple one which allows for the efficient and speedy winding-up of the entity concerned Due to the fact that no creditor suffers any loss, no creditors meetings are held.</p> <p><b><u>2. Cred ito rs' liq uid ation and liquidation by the Court</u></b></p> <p>In terms of Section 370 of the Companies Act 28 of 2004, after the Court has made a final winding-up order or a special resolution for a creditors' voluntary winding-up, the Master must forthwith summon-</p> <ul style="list-style-type: none"> <li>• a meeting of the creditors of the company to-             <ul style="list-style-type: none"> <li>(i) consider the statement as to the affairs of the company; (ii) consider the proof of claims against the company; and</li> <li>(iii) nominate a person or persons for appointment as liquidator or liquidators; and</li> </ul> </li> <li>• a meeting of the members of the company or, in the case where the winding-up concerns a company limited by guarantee, a meeting of the contributories in respect of that company, to-             <ul style="list-style-type: none"> <li>(i) consider the statement as to the affairs of the company; and</li> <li>(ii) nominate a person or persons for appointment as liquidator or liquidators.</li> </ul> </li> </ul> <p>Currently the law does not provide for creditor's committees. Creditors have the right to vote on the administration of liquidation or reorganization proceedings at meetings.</p> <p>Votes by creditors play an important role when the insolvency administrators are appointed.</p> <p>However, nothing prohibits informal committees and major creditors to sometimes form a</p>
<p><b>Assessment</b></p>	<p>There is a high level of creditor passivity, attributed by some to the small size of creditor claims and the lack of expectation of a significant recovery. This is evident in the fact that normally no creditor attends the creditor meeting. This results in an imbalanced system in which the liquidator is free to take decisions without an effective supervision of the creditors of the Master of the High Court (see Principles C6 and D7).</p> <p>Creditors have an important role in the Namibian insolvency system, and their interests are safeguarded by the provision of information and by the opportunity to take decision through the creditors' meeting. It is noted, however that in the liquidation of larger companies, where the number of creditors involved can be high, the creditors' meeting may not be really effective. Therefore, the representation of the interests of creditors is somewhat undermined by the absence of provisions allowing for the creation of a creditors' committee, although informal consultation with creditors plays an important role, especially before formal resolutions are adopted at meetings.</p> <p>In practice, and in some cases, creditors' committees have been created, and they have performed a useful function.</p>

<p><b>Comment</b></p>	<p>It would be important that a new Insolvency Act extend the possibility of creating creditor committees to all insolvency proceedings, including reorganization proceedings. The law should specify the duties and functions of the committee, its role in the process, especially in a consultative role for key decisions within the process and as a conduit for the distribution of information to all creditors. Clear rules on membership, presidency, quorum and voting should also be introduced. Given the workload of the Master’s Office, it should not be absolutely necessary that the Master, or a delegate, preside over such creditor meetings –this is a function that could be performed by the insolvency representative.<sup>121</sup></p>
	<p><b>Administration</b></p>
<p><b>Principle C8</b></p>	<p><b>Collection, Preservation, Administration and Disposition of Assets</b></p> <p><b>C8.1</b> The insolvency estate should include all the debtor’s assets, including encumbered assets and assets obtained after the commencement of the case. Assets excluded from the insolvency estate should be strictly limited and clearly defined by the law.</p> <p><b>C8.2</b> After the commencement of the insolvency proceedings, the court or the insolvency representative should be allowed to take prompt measures to preserve and protect the insolvency estate and the debtor’s business. The system for administering the insolvency estate should be flexible and transparent and enable disposal of assets efficiently and at the maximum values reasonably attainable. Where necessary, the system should allow assets to be sold free and clear of security interests, charges or other encumbrances, subject to preserving the priority of interests in the proceeds from the assets disposed.</p> <p><b>C8.3</b> The rights and interests of a third party owner of assets should be protected where its assets are used during the insolvency proceedings by the insolvency representative and/or the debtor in possession.</p>
<p><b>Description</b></p>	<p>There are rules for the different procedures that are relevant in this context:</p> <p><b><u>I. Companies Act 28 of 2004</u></b></p> <p>The law relating to insolvency of individuals applies to the winding-up of companies in so far as it is applicable (Section 344 of the Companies Act 28 of 2004), in particular the application of assets to pay creditors and costs of winding-up (Section 347 of the Companies Act 28 of 2004), the proving of claims, the position of secured creditors (Section 373 of the Companies Act 28 of 2004) and the setting aside of voidable dispositions and undue preferences (Section 345 of the Companies Act 28 of 2004).</p> <p>The functions of a liquidator are essentially to control and administer the property and affairs of the company and to liquidate it. He or she is appointed for “the purpose of conducting the proceedings” in the winding-up<sup>122</sup> and Section 397 of the Companies Act 28 of 2004 thus describes his or her general duties, i.e.:</p> <ul style="list-style-type: none"> <li>• to proceed to recover and reduce into possession all the assets and property of the company, movable and immovable;</li> <li>• to apply the assets and property in satisfaction of the costs of the winding-up and the claims of creditors; and</li> <li>• to distribute the balance among those who are entitled to it.</li> </ul>

<sup>121</sup>See USAID report “*Insolvency Systems in South Africa*” at <http://www.fsp.org.za/blog/wp-content/uploads/SOUTH-AFRICA-INSOLVENCY-SYSTEMS1.pdf>, at 10.

<sup>122</sup>See Section 374 of the Companies Act 28 of 2004.

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Meetings of creditors (and members) are held, creditors are required to prove claims, the liquidator must lodge a report and the directors (or in the case of a close corporation the members) must lodge a statement of the affairs of the company (or close corporation) in the prescribed form.

The liquidator must, not later than six months after his appointment, frame and lodge with the Master an account of his receipts and payments and a plan of distribution or, if there is a liability among creditors and contributories to contribute towards the costs of the winding-up, a plan of contribution apportioning their liability.<sup>123</sup>

If this account is not a final account, the liquidator must from time to time and as the Master may direct, but (unless he receives an extension of time) at least once every period of six months, frame and lodge with the master a further account and plan of distribution. In addition, the Master may at any time and in any case where the liquidator has funds in hand which ought in the master's opinion to be distributed, or applied towards the payment of the debts, direct the liquidator in writing to frame and lodge with him or her an account and plan of distribution in respect of such funds within a specified period<sup>124</sup>.

Where the company being wound up is unable to pay its debts, the provisions of the law relating to insolvency apply, and thus the liquidator or his/her spouse, partner, employer, employee or agent may not acquire any property of the company unless the acquisition is confirmed by an order of the court.<sup>125</sup>

**2. Insolvency Act 24 of 1936**

A sequestration order divests the insolvent of his estate and vests it in the Master of the High Court until a trustee is appointed. The estate then vests in the trustee whose function it is to satisfy the creditors' claims as far as possible. Subject to certain exceptions, the insolvent estate includes all property situated in Namibia. Once the *concursum creditorum* is instituted upon insolvency, the insolvent estate is, so to speak, frozen and it is no longer possible for any one creditor to do anything which would have the effect of altering or prejudicing the rights of other creditors. Except for what is permissible in terms of the Act, nothing can be done which would reduce the insolvent's assets or disturb the preferent claims of creditors<sup>126</sup>. The trustee must take the estate as he finds it at the time of sequestration, liquidate it and distribute it amongst the creditors in accordance with the provisions of the Insolvency Act 24 of 1936.

Immediately after his appointment as such, the trustee (including a provisional trustee) must cause a book or books to be kept in which particulars of "all moneys, goods, books, accounts and other documents received by him or her on behalf of the estate" are properly recorded<sup>127</sup>. The book (or books) must at any point of time during the administration accurately contain (contain) the requisite information.

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<sup>123</sup>See Section 409(1) of the Companies Act 28 of 2004.

<sup>124</sup>See Section 409(2) of the Companies Act 28 of 2004.

<sup>125</sup>See Section 82(7) of the Insolvency Act 24 of 1936.

<sup>126</sup>See *Administrator, Natal v Magill, Grant & Nell (Pty) Ltd (in liquidation)* 1969 1 All SA 367 (A).

<sup>127</sup>See Section 71(1) of the Insolvency Act 24 of 1936, read with the provisions of Section 19(1)(d) and Section 69(1) of the same Act.

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The trustee's book (or books) may be inspected at any time by a proved creditor or, if the Master orders accordingly, by one who claims to be a creditor or by a surety for the trustee<sup>128</sup>

The trustee must open a banking account in the name of the estate with a banking institution in Namibia<sup>129</sup>. All moneys received by the trustee on behalf of the estate must be deposited into the banking account.<sup>130</sup>

The trustee may use property of the estate only for its benefit, i.e., for the purposes only of the due administration thereof. Use of such property for any other purpose, if without lawful cause, renders the trustee liable, in addition to any other, to a penalty in the form of an obligation to pay into the estate an amount equal to double the value of the property so used.<sup>131</sup>

The Master exercises general control of the administration through the numerous specific powers assigned to him or her by the Insolvency Act 24 of 1936, either expressly or by necessary implication. Such powers are the only ones which, in this context, are available to him or her.

A creditor who wishes to share in the distribution of the assets in an insolvent estate, or to have a say in the administration of the estate must, as a rule, prove a claim against the estate at a meeting of creditors (that is to say, at the first, the second or a special meeting). The Insolvency Act 24 of 1936 provides that any person who has a liquidated claim against the estate, the cause of which arose before sequestration of the estate, may prove that claim in the prescribed manner.<sup>132</sup>

After the sale of the property of the insolvent estate, the trustee must distribute the proceeds amongst the creditors in the order of preference set out in the Insolvency Act. The trustee's principal duty is to liquidate and distribute the assets of the estate. The vesting of the assets in the trustee, the sale of those assets and the distribution of the proceeds amongst the creditors constitute the kernel of the Insolvency Act.<sup>133</sup>

The sale of assets, especially the sale of encumbered assets, presents some problems. The approval of the secured creditor is required for the sale of the encumbered assets by the liquidator, and the secured creditor will preserve its priority, subject to the impact of the costs directly related to the sale. If a secured creditor proves for the secured debt in the insolvency of the debtor and also for the potentially unsecured balance of the debt, then the secured creditor may be liable for contribution towards the cost of the insolvency process. The sale of businesses as a going concern seems to be difficult and is seldom done in practice.

Finally, the law recognizes the possibility of abandoning assets, in cases where possession of assets may be against the interests of the insolvent estate (Section 83 of the Insolvency Act 24 of 1936).

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<sup>128</sup>See Section 71(2) of the Insolvency Act 24 of 1936.

<sup>129</sup>See Section 70(1)(a) of the Insolvency Act 24 of 1936.

<sup>130</sup>See Section 70(1)(a) of the Insolvency Act 24 of 1936.

<sup>131</sup>See Section 72(1) of the Insolvency Act 24 of 1936.

<sup>132</sup>See Section 44(1) of the Insolvency Act 24 of 1936.

<sup>133</sup>See *Collison Ltd v Castle Wine & Brandy Co* 1907 TS 587, where the vesting and sale of assets is described as being "the very pivot of the statute".

**Assets excluded from the insolvent estate:**

The insolvent estate includes all rights, including rights obtained after the commencement of the case and subject to exclusions with respect to bedding and necessary clothing, insurance, pension rights, etc., in the case of individual debtors. The estate vests in the trustee or comes under the control of the liquidator after appointment. The trustee or liquidator must take immediate steps to preserve, protect, and collect assets of value and may abandon assets without value.

However the following are excluded from the insolvent estate:

- Moneys due by way of benefit in terms of the rules of a friendly society (within the meaning of that expression as defined in Section 1(1) of the Friendly Societies Act 25 of 1956) on the retirement of a member of the society who was such for a period of at least three years, do not form part of such member's insolvent estate.<sup>134</sup>
- Sections 43-47 of the Long-term Insurance Act 5 of 1998 affords limited protection to the benefits provided or to be provided by certain long-term insurance policies. The policy benefits which are protected are those which are payable to the protected person in terms of a protected policy under which the protected person or his or her spouse is the life insured; (2) the protected policy must have been in force for at least three years; (3) the protection is limited (in the case of such policy benefits and such assets) to an aggregate amount of 50000 Namibian dollars.
- If at the date of sequestration the insolvent has a liability to a third party, and an insurer is obliged to indemnify the insolvent in respect of such liability, the third party, upon such sequestration, is entitled to recover the amount of the indemnity directly from the insurer in terms of Section 156 of the Insolvency Act 24 of 1936 without there being any contractual nexus between the third party and the insurer, provided that the third party is able to show that he has a good claim in law against the insolvent person. The section requires only that the insurer is contractually obliged to indemnify the insolvent against the relevant claim by the third party irrespective of whether it was the insolvent or another that incurred the liability.
- Section 37B of the Pension Funds Act 24 of 1956 provides that benefits payable in terms of the rules of a registered pension fund (including an annuity purchased by the said fund from an insurer for that person) is sequestrated or surrendered, such benefit or any part thereof is deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by the trustee in his insolvent estate or by his creditors, notwithstanding anything to the contrary in any law relating to insolvency.
- Section 27 of the Legal Practitioners Act 15 of 1995 provides that an amount standing to the credit of a legal practitioner's trust account does not form part of the assets of the legal practitioner and may not be attached at the instance of or on behalf of a creditor of that legal practitioner<sup>135</sup>.
- The amount which as at the date of sequestration is standing to the credit of an insolvent estate agent's trust account, or of any savings or other interest-bearing account to which trust moneys have been deposited, does not form part of his insolvent estate.<sup>136</sup>
- Compensation for loss or damage suffered by the insolvent as at or after the date of

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<sup>134</sup>See Section 48A(1) of the Friendly Societies Act, 25 of 1956.

<sup>135</sup>See in this regard also *JCL Civils Namibia (Pty) Ltd v Steenkamp 2007 (1) NR 1 (SC)* where the Court inter alia held that as far as trust accounts were concerned, the relationship was one of debtor and creditor with exclusion of any and all other creditors of the attorney except insofar as there might be a free residue in the trust account after payment of all trust creditors. In regard to the trust account it could be said that the position of trust creditors was analogous to a preferent claim.

<sup>136</sup>See Section 32(8) of the Estate Agents Act, 112 of 1976.

	<p>sequestration by reason of defamation or personal injury may be recovered by him or her for his or her own benefit<sup>137</sup>. In this context, by “personal injury” is meant not only physical injury but also <i>injuriae</i> such as adultery or insult<sup>138</sup>. The compensation envisaged is that recoverable in respect of loss or damage suffered by reason of personal injury and this includes, in the case of bodily injuries, special damages such as loss of earnings and medical expenses<sup>139</sup></p> <ul style="list-style-type: none"> <li>• An insolvent’s essential means of subsistence (wearing apparel, bedding, household furniture, tools and other essential means of subsistence) may not be sold by the trustee<sup>140</sup> and it effectively excludes these from the insolvent’s estate.</li> <li>• Section 102(3) of the Employees' Compensation Act 30 of 1941 expressly provides that compensation payable to or received by any person in terms of that Act, in the event of the sequestration of his or her estate, does not form part of the assets of his or her insolvent estate.</li> <li>• Section 40(3) of the Social Security Act 34 of 1994 similarly stipulates that no benefits payable to any person in terms of this Act form part of the assets of his or her insolvent estate.</li> </ul> <p>Finally, it is to be noted that the Namibian system contemplates the <i>rei vindicatio</i>, i.e., the possibility for third party owners to recover their assets that are in possession of the debtor or the liquidator.</p>
<p><b>Assessment</b></p>	<p>Namibian law makes provision for liquidators and trustees of a debtor’s estate to take control of assets with a view to their realization and the release of value contained in the debtor’s business. The estate comprises all the debtor’s assets –except for limited exemptions applicable to individuals-, and the law protects the rights of third-party owners.</p> <p>A number of challenges may be noted, some of which are considered throughout this report:</p> <p>-Further to the discussion set out under Principles C5 and C7, the Master’s Office may sometimes experience delays in the appointment of liquidator that may impact on the value of assets sold when a debtor is deep in distress. This problems are however not extensive due to the relative few insolvency cases in Namibia. In addition, concerns have been raised regarding the level of strict scrutiny that may be feasibly exercised by the Master’s office, due to insufficient capacity in some areas (see Principle D7).</p> <p>-There are serious difficulties in selling assets as a going concern. This is only possible, in practice, where there is a scheme of arrangement. Once a business stops functioning in a liquidation (see Principle C9) it is basically impossible to sell it as a going concern. Problems in the definition of the treatment of encumbered assets.</p> <p>-The functioning of auctions is directly related with the scope of this Principle. The problems in the practice that has developed around auctions in the insolvency process places limitations to the possibilities of recovery of the creditors’ claims, but it seems that liquidators are able to obtain better values than judicial auctions in individual</p>

<sup>137</sup>See Section 23(8) of the Insolvency Act 24 of 1936.

<sup>138</sup>See *De Wet NO v Jurgens* 1970 (3) SA 38 (AD) at 49-53; in this case it was held that personal injury included the mental injury caused to an innocent spouse by the other’s adultery; it was held also that, the marriage being in community of property, the innocent spouse (the wife) was an insolvent, for the purposes of Section 23(8) of the Insolvency Act 24 of 1936.

<sup>139</sup>See *Santam Versekeringsmaatskappy Bpk v Kruger* 1978 (3) SA 656 (AD).

<sup>140</sup>See Section 82(6) of the Insolvency Act 24 of 1936.

	enforcement actions.
<b>Comment</b>	<p>Notwithstanding the legal framework that is in place, a reform appears important to address system-wide concerns regarding the control and sale of a debtor’s assets.</p> <p>The system should include rules that allow a sale of the estate as a going concern (or of business units). A proper balance of the rights of all parties, including secured creditors, is necessary to achieve this goal.</p> <p>While the need for greater resourcing of the Master’s Office has been noted (see Principle D7) and may be reiterated here, scrutiny may also helpfully fall on the work of more ancillary players, such as auctioneers, whose conduct can impact on the outcome of liquidation, affecting the work of liquidators, as well as the returns eventually accruing to creditors. In this regard, it may be worthwhile considering how abuses in the auction system may be controlled and checked. For example, it may be worth considering whether the burden of scrutinizing their conduct could be within the duties for insolvency practitioners – whereby they are the first port of call for informing on auctioneer conduct, and where abuses are known but not reported, potentially facing liability as a result. For example, under section 406 of the Companies Act 28 of 2004, the liquidator is under an obligation to report any misconduct by directors as part of his/her report to the Office of the Master. It may be timely to consider whether the scope for enquiry for misconduct may also be extended to cover other actors in the process, such as auctioneers.</p>
<b>Principle C9</b>	<p><b>Stabilizing and Sustaining Business Operations.</b></p> <p><b>C9.1</b> The business should be permitted to operate in the ordinary course. Transactions that are not part of the debtor’s ordinary business activities should be subject to court review.</p> <p><b>C9.2</b> Subject to appropriate safeguards, the business should have access to commercially sound forms of financing, including on terms that afford a repayment priority under exceptional circumstances, to enable the debtor to meet its ongoing business needs.</p>
<b>Description</b>	<p>The following provisions are relevant to the issues analyzed under this Principle:</p> <p><b><u>Continuation of business</u></b></p> <p><b><u>1. Companies Act 28 of 2004</u></b></p> <p>The primary goal of liquidation is to distribute the proceeds of sale of the debtor’s assets amongst the creditors, with a view to winding up the company. This is crystallized in Section 397 of the Companies Act 28 of 2004 that stipulates the general duty of the liquidator as being one focused on recovering and reducing into possession all the assets and property of the company, movable and immovable, in satisfaction of the costs of the winding-up and the claims of creditors, and distributing the balance among those who are entitled to it. Continuation of business under the liquidation process, therefore, is regarded as possible, but it remains ancillary to the main objective of the process, which is to liquidate the debtor’s business in the most efficient way. The mandatory stay on claims has historically worked to provide some breathing space for the liquidator to stabilize the company (see Principle C5).</p> <p>Accordingly, Section 392(6)(f) of the Companies Act 28 of 2004 provides that a liquidator has the power “to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up of the company, but, if he or she considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he or she has obtained the leave of the Court or the</p>

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*authority referred to in subsection (5), but, is not, in that event, entitled, as between himself or herself and the creditors or contributories of the company, to include the cost of any goods purchased by him or her in the costs of the winding-up of the company unless those goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of those goods after providing for the costs of winding-up”.*

This power may only be exercised with the authority granted by meetings of creditors and members or contributories or on the directions of the Master.<sup>141</sup> Further, the power to continue the business may be exercised only “in so far as may be necessary for the beneficial winding-up” of the company.<sup>142</sup> In reaching his decision whether or not to continue the business, the liquidator must not overlook that, as in the case of an insolvent estate, it is not part of the ordinary process of the administration of the winding-up that there should be speculation with any business or property of the company; rather there should be a speedy realization thereof.

Where a company is subject to judicial management which is to enable the company to become a successful concern, the judicial manager will assume the management of the company and run the company’s business. The judicial manager must conduct the management of the company in a manner which he considers most economic and most advantageous of the interests of the members and creditors of the company.<sup>143</sup>

In the case of close corporations, the position regarding liquidation is similar to that of limited companies. Judicial management is not applicable to close corporations.

**2. Insolvency Act 24 of 1936**

A provisional trustee has power to continue the business of the insolvent, or any part of such business, with the authority of creditors of the estate or, in the absence of their instructions, of the Master.<sup>144</sup>

The authority of creditors here envisaged is one given at a meeting of creditors duly convened under the Insolvency Act 24 of 1936, given by all or some of the creditors of the estate.<sup>145</sup>

Where the business is continued with authority, the provisional trustee may purchase goods for it only for cash and “*only out of the takings of [the] business*” unless creditors otherwise direct.<sup>146</sup>

An authorization to a provisional trustee to continue the business impliedly authorizes him to employ another or others (including the insolvent) to operate it on his behalf and to incur all other day-to-day expenses which the conduct of such business in the ordinary course entails.

In deciding whether to seek authority to continue the business the provisional trustee should have regard to the prime consideration that ordinarily it is not part of the process of

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<sup>141</sup>See Section 392(5) of the Companies Act 28 of 2004.

<sup>142</sup>See Section 392(5) of the Companies Act 28 of 2004.

<sup>143</sup>See Section 439 of the Companies Act 28 of 2004.

<sup>144</sup>See Section 80(1) read with Section 18(3) of the Insolvency Act 24 of 1936.

<sup>145</sup>See *Thorne v The Master* 1964 (3) SA 38 (N) at 50-51.

<sup>146</sup>See Section 80(2) of the Insolvency Act 24 of 1936.



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administration of an insolvent estate to speculate with the property thereof but that, on the contrary, there should be a speedy realization of such property.<sup>147</sup> Nevertheless, in practice it is often the case that the interests of creditors are better served by a continuation of the business: e.g., its preservation as a going concern may render it more readily saleable or saleable for a price larger than otherwise would be achieved or may facilitate the establishment of an advantageous composition.<sup>148</sup>

**Post-petition financing**

The provision of finance may be absolutely necessary for restructuring and the continuation of the debtor's business, even on a temporary or provisional basis.

Section 392(7) of the Companies Act 28 of 2004 provides that in a winding-up by the court, the court may grant leave to a liquidator to raise money on the security of the assets of the company or to do any other thing which the court may consider necessary for winding up the affairs of the company and distributing its assets. The repayment obligation ranks as an expense of the liquidation. Although there is no express legislative provision or case-law regulating the priority ranking of such post-liquidation security vis-à-vis existing security, one view is that priority follows the order of registration.

There is no provision for voluntary liquidation which is equivalent to Section 392(7) of the Companies Act 28 of 2004 in respect of post-liquidation financing. However, section 394(1) of the Companies Act 28 of 2004 provides the following: Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may apply to the court to determine any question arising in the winding-up or to exercise any of the powers which the court might exercise if the company were being wound up by the court. Conceivably, such question could involve whether a liquidator could be enabled by the court to raise money on security of the assets of the company.

In the case of judicial management, Section 438(3) of the Companies Act 28 of 2004 provides that the final judicial management order may confer on the final judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders. Section 440(3) of the Companies Act 28 of 2004 provides that the costs of the judicial management and the claims of creditors of the company must be paid in accordance with the law relating to insolvency as if those costs were costs of the sequestration of an estate and those claims were claims against an insolvent estate. It is not clear if a loan repayment obligation incurred by a judicial manager would be treated as the cost of judicial management. In any event, Section 442(1) of the Companies Act 28 of 2004 provides that the creditors of a company whose claims arose before the granting of a judicial management order in respect of that company may, at a meeting convened by the judicial manager or provisional judicial manager, resolve that all liabilities incurred or to be incurred by the judicial manager or provisional judicial manager in the conduct of the company's business be paid in preference to all other liabilities not already discharged exclusive of the costs of the judicial management. The liabilities referred to in Section 442(1) of the Companies Act 28 of 2004 include both liabilities incurred by the judicial manager in the course of borrowing monies or acquiring goods or services on credit in the course of conducting the company's business, and liabilities incurred by him in seeking to strengthen the financial position of the company.<sup>149</sup>

The law does not clearly provide for the grant of security for financing during judicial management and the priority ranking of such security vis-à-vis existing security. However, where the creditors of the company whose claims arose before the granting of the judicial

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<sup>147</sup>See *Thorne v The Master* 1964 (3) SA 38 (N) at 50-51.

<sup>148</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 5.25.

<sup>149</sup>See *General Leasing Corporation Ltd v Thorne* 1975 4 SA 157 (C) 162-163.

	<p>management order resolve that all liabilities incurred or to be incurred by the judicial manager or provisional judicial manager in the conduct of the company’s business will be paid in preference to all other liabilities not already discharged exclusive of the costs of judicial management, the judicial manager may not pay a pre-judicial management creditor until all post-judicial management creditors have been paid. However, existing security interests are not affected unless the secured creditors in question accept to be subordinated to the post-judicial management liabilities incurred by the judicial manager.</p>
<p><b>Assessment</b></p>	<p>The law and practice in Namibia has historically been geared towards liquidation and thus the continuation of business after the commencement of formal insolvency proceedings is regarded as a temporary measure. Where business continuation is warranted, post-liquidation financing is not hard to obtain. In this regard, Namibian practice benefits from the confidence and familiarity that characterizes insolvency practice: the small number of insolvency practitioners (see Principles D7 and D8) has allowed these practitioners to develop longstanding relationships with financial institutions that support the financing needs of insolvency procedures.</p> <p>With respect to judicial management, there is currently no practice regarding its effectiveness in stabilizing the going concern value and working to turn a business around. Judicial management is extremely rare and market participants report that precedents of judicial management only show failure, in particular due to the costs of judicial management. Accordingly, there is no practice regarding post-judicial management financing.</p> <p>Secured creditors are protected against the impact of the expenses of the liquidation and the loans incurred to sustain the insolvent business’s operations, but there is some uncertainty as to the priority ranking of post-insolvency security vis-à-vis existing security interests. It does not appear possible for a later security interest to ‘prime’ or take priority over an earlier one so long as both interests were registered timeously, except with the consent of the senior creditor.</p>
<p><b>Comment</b></p>	<p>Consideration should be given to having express provisions for (i) post-insolvency financing (including its priority ranking) in respect of voluntary liquidation and judicial management; and (ii) the treatment of security for such post-insolvency financing.</p> <p>According to recommendation 67 of the UNCITRAL Legislative Guide, “<i>the insolvency law should specify that, where the existing secured creditor does not agree, the court may authorize the creation of a security interest having priority over pre-existing security interests provided specified conditions are satisfied, including:</i></p> <p>(a) <i>The existing secured creditor was given the opportunity to be heard by the court;</i></p> <p>(b) <i>The debtor can prove that it cannot obtain the finance in any other way; and</i></p> <p>(c) <i>The interests of the existing secured creditor will be protected”</i></p> <p>The need for post-petition finance will increase when the reorganization practice develops, after appropriate reforms of the legal framework.</p>
<p><b>Principle C10</b></p>	<p><b>Treatment of Contractual Obligations</b><sup>150</sup></p> <p><b>C10.1</b> To achieve the objectives of insolvency proceedings, the system should allow interference with the performance of contracts where both parties have not fully performed</p>

<sup>150</sup> Treatment of contracts typically also includes leases.

	<p>their obligations. Interference may imply continuation, rejection or assignment of contracts.</p> <p><b>C10.2</b> To gain the benefit of contracts that have value, the insolvency representative should have the option of performing and assuming the obligations under those contracts. Contract provisions that provide for termination of a contract upon either an application for commencement, or the commencement of insolvency proceedings, should be unenforceable subject to special exceptions.</p> <p><b>C10.3</b> Where the contract constitutes a net burden to the estate, the insolvency representative should be entitled to reject or cancel the contract, subject to any consequences that may arise from rejection.</p> <p><b>C10.4</b> Exceptions to the general rule of contract treatment in insolvency proceedings should be limited, clearly defined and allowed only for compelling commercial, public or social interests, such as in the following cases: (i) upholding general setoff rights, subject to rules on avoidance; (ii) upholding automatic termination, netting and close out provisions contained in financial contracts; (iii) preventing continuation and assignment of contracts for irreplaceable and personal services where the law would not require acceptance of performance by another party; and (iv) establishing special rules for treating employment contracts and collective bargaining agreements.</p>
<p><b>Description</b></p>	<p>The position as to the effect in general of sequestration or liquidation on certain contracts subsisting at the commencement of the <i>concursum creditorum</i> (i.e., a contract in relation to which, as at the date of the <i>concursum</i>, there are obligations, the performance of which still is wanting) is regulated specifically (but not exclusively) by the Insolvency Act 24 of 1936 and, in relation to companies, by that Act read with Chapter 14 of the Companies Act 28 of 2004 and, in relation to close corporations, by both such Acts read with the Close Corporations Act 26 of 1988. These contracts are executory contracts for the acquisition by the insolvent debtor of immovable property, executory contracts for the purchase by the insolvent debtor of movable property for cash and for which payment has not been made or has not been made in full, executory contracts of lease under which the insolvent debtor is the lessor/lessee, executory contracts of service under which the insolvent debtor is the employer, executory contracts which are instalment agreements within the meaning of that expression as defined in Section 1 of the Credit Agreements Act 75 of 1980 under which the insolvent debtor is the purchaser, executory contracts to which the rules made pursuant to the Stock Exchange Control Act 1 of 1985 apply.<sup>151</sup> The detailed rules are set out below.</p> <p>In relation to all other contracts, the position is regulated by the common law and, in some cases, also by other statutes.<sup>152</sup></p> <p>Under common law sequestration or liquidation automatically terminates certain contracts. Thus, for example, sequestration or liquidation of the principal terminates the agent's authority and a partnership terminates on the sequestration or liquidation of a partner.</p> <p>Other contracts executory at the date of the institution of the <i>concursum creditorum</i> are not terminated by the insolvency or liquidation of any party thereto; the contract continues, the trustee or liquidator having to take it as he finds it, the effect of the institution of the <i>concursum</i> being that the other party to the contract cannot compel the trustee or liquidator specifically to perform it. If, therefore, in terms of the contract, the other party thereto has an accrued right to cancel it as at the institution of the <i>concursum</i>, the trustee or liquidator is unable effectively to resist the exercise of such right<sup>153</sup>. But in all other cases the trustee or liquidator has an election as to whether to enforce or to repudiate the contract. The election referred to above operates only in relation to contracts which as at the date of the commencement of the <i>concursum</i> are executory, i.e. partly performed, in that one or other</p>

<sup>151</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 5.21.

<sup>152</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 5.21.

<sup>153</sup>It is unclear if an ipso facto provision for termination upon the insolvency or liquidation of one party is enforceable (see also assessment and comments section below).

of the obligations imposed by the relevant contract require to be fulfilled by any of the parties thereto.

Where the trustee or liquidator elects to enforce the contract, payments by him for the purposes of the performance of the debtor's obligations thereunder ensue in such trustee's or liquidator's administration and form part of the costs thereof: the other party's claims to these payments accordingly are considered administrative expenses and therefore have an absolute preferential treatment. Where the trustee or liquidator elects to repudiate the contract, the counterparty's claim for damages is concurrent once it becomes a liquidated claim (Section 44 of the Insolvency Act 24 of 1936).

*Acquisition of immovable property*

In the event of a contract of sale of immovable property where the insolvent debtor is the purchaser concluded prior to the date of the commencement of the sequestration or winding-up, as the case may be, where at such date the immovable property has not been transferred to the purchaser, Section 35 of the Insolvency Act 24 of 1936 applies. It accords to the trustee an election, i.e., to enforce or abandon the contract. The other party to the contract may call upon the trustee by notice in writing to elect whether he will enforce or abandon the contract, and if the trustee has after the expiration of six weeks as from the receipt of the notice, failed to make his election as aforesaid and inform the other party thereof, the other party may apply to the court for cancellation of the contract and for an order directing the trustee to restore to the applicant the possession of any immovable property under the control of the trustee, of which the insolvent or the trustee gained possession or control by virtue of the contract. The option given to the trustee under this section does not affect any right which the other party may have to establish against the insolvent estate, a non-preferent claim for compensation for any loss suffered by him as a result of the non-fulfilment of the contract.

*Acquisition of movable property*

In the event of a contract of sale of movable property for cash where the insolvent debtor is the purchaser, Section 36 of the Insolvency Act 24 of 1936 accords to the seller a right to reclaim the property if within ten days after the delivery thereof the seller has given written notice that he reclaims the property to the purchaser or to the trustee of the latter's insolvent estate or to the Master. Delivery, in this context, means delivery for the purpose of passing ownership against payment. If the trustee disputes it, the seller's right to reclaim the property is lost unless it is sought to be enforced by legal proceedings instituted by the seller within 14 days after his receipt of notice of such dispute.

*Leases*

In the case of a contract of lease (a contract of lease of immovable property or movable property, or any other agreement having the effect of such a contract) where the insolvent debtor is the lessee, Section 37 of the Insolvency Act 24 of 1936 holds that the sequestration of the lessee's estate does not result in the automatic termination of the lease. This is so even if in terms of the lease itself such termination is intended or a right is purportedly accorded to the lessor to cancel by virtue of such sequestration. But a term of the lease which restricts or prohibits the transfer, i.e. cession, of any right thereunder binds the trustee of the lessee's estate (Section 37(5) of the Insolvency Act 24 of 1936).

Section 37 of the Insolvency Act 24 of 1936 accords an election to the trustee as to whether or not to continue the lease on behalf of the estate. The election must be made within three months of the appointment of the trustee; if the trustee does not within such period notify the lessor that he, the trustee, desires to continue the lease on behalf of the estate, he is deemed to have elected to terminate the lease at the expiry of such period. The election once made is incapable of unilateral alteration by the trustee.

The lessor may claim from the estate compensation for any loss which he may have sustained by reason of the non-performance of the terms of such lease. The rent due under any such lease, from the date of the sequestration of the estate of the lessee to the determination or the cession thereof by the trustee, is included in the costs of sequestration.

Contracts of lease where the insolvent debtor is the lessor are regulated by Section 37(5) of the Insolvency Act 24 of 1936. The sequestration of the lessor's estate does not result in the automatic termination of the lease: the institution of the *concursum* has the result that the trustee of the lessor's insolvent estate has an election at common law to decide whether or not to continue with the lease provided, of course, that no right to cancel the lease already has already accrued to the lessee. A term of the lease that upon the sequestration of the estate of the lessor it is to terminate automatically, or that the lessee is to be entitled to cancel it, is of no force or effect.

#### Employment contracts

Section 32 of the Labour Act 11 of 2007 provides that:

*“(1) [A] contract of employment terminates automatically- (a) one month*

*after-*

- (i) the death or sequestration of the employer, if the employer is an individual;*
- (ii) the date on which the employer is wound up, if the employer is a juristic person;*  
*or*
- (iii) the date on which the partnership is dissolved, if the employer is a partnership; or*

*(b) at the end of a longer period-*

- (i) provided for in the contract of employment or a collective agreement; or*
- (ii) during which the employer continues to carry on business.*

*(2) At any time during the period contemplated in subsection (1), an executor, administrator, liquidator or a partner may give notice to terminate an employee's contract of employment in accordance with this Part, or of a collective agreement.*

*(3) Despite the provisions of any law to the contrary, an employee whose contract is terminated in the circumstances referred to in subsection (1) is a preferent creditor in respect of any remuneration due or monies payable to the employee in terms of this Act.”*

#### Instalment agreements

Section 84 of the Insolvency Act 24 of 1936 prescribes that if any property was delivered to the insolvent debtor under a transaction that is an instalment agreement contemplated in paragraph (a), (b), and (c)(i) of the definition of “instalment agreement” set out in the Credit Agreements Act 75 of 1980, such transaction shall be regarded on the sequestration of the debtor's estate as creating in favor of the creditor a hypothec over that property whereby the amount still due to him under the transaction is secured. The trustee of the debtor's insolvent estate shall, if required by the creditor, deliver the property to him, and thereupon the creditor shall be deemed to be holding that property as security for his claim.

#### Post-insolvency contracts

Contractual obligations entered into by a trustee or liquidator ensue in such trustee's or liquidator's administration and form part of the costs thereof. A trustee or liquidator can be found personally liable in case of default on these contractual obligations.

#### Financial contracts

	<p>The insolvency regime does not expressly deal with financial contracts, such as derivatives agreements, repurchase agreements and stock-lending agreements. When one of the parties to a financial contract is subject to insolvency proceedings, the impact on the financial contract is governed by the general law. Typically, financial contracts contain provisions for close-out netting upon the default or insolvency of one party. But there is significant uncertainty as to the enforceability of close-out netting upon the default or insolvency of one party. It is generally accepted that contractual set-off provisions are not enforceable after the commencement of insolvency proceedings. In addition, Section 46 of the Insolvency Act 24 of 1936 renders voidable certain set-off effected six months prior to the commencement of insolvency proceedings if the set-off was not effected in the ordinary course of business.</p> <p>As a result, stakeholders in the financial sector report that the unfavorable insolvency regime has been hindering the proper development of Namibia’s domestic financial market and preventing their participation in the international financial markets.</p> <p><b><u>Judicial management</u></b></p> <p>There is no legislative provision in the judicial management regime dealing with financial contracts or executory contracts generally, though some guidance may be derived from the South African case-law on judicial management which was generated in that country while judicial management was in force.</p> <p>It was held in <i>Goodricke &amp; Son v Auto Protection Insurance Co Ltd (in liq.)</i> 1968 1 SA 717 (A) that judicial management brings about such a change in the status of the company as to have the effect of automatically terminating any mandate the company may have granted. Thus a provisional management order terminates the mandate of the company’s attorneys and they become entitled to be paid for the services they have rendered up to the date of the order. The judicial manager therefore has no election to abide by the contract, but he may renew it. This case is therefore authority for the proposition that all contracts of mandate automatically terminate upon the granting of a judicial management order.</p> <p>With regard to other contracts apart from mandate, it must be remembered that a judicial management order does not have the effect of creating a <i>concursum creditorum</i>.<sup>154</sup></p> <p>In <i>Ruskin, N.O. v Amalgamated Minerals, Ltd.</i> 1951 (1) P.H. E15 the court held that placing a company under judicial management was not much more than substituting a new manager in place of the directors and settling the order in which creditors must be paid, the court could not infer that such an order had the effect of preventing ordinary set-off taking place, in the absence more particularly of an appropriate resolution of creditors to give preference to post-judicial management contracts.</p> <p>There is no practice to confirm the position regarding close-out netting in judicial management.</p>
<p><b>Assessment</b></p>	<p>The law makes provision for the liquidator to have the tools to work with the contracts that a debtor is subject to, to set these aside as well as to confirm them. This provides the liquidator with a sound foundation to be flexible and creative in relation to the winding-up of the debtor’s estate.</p> <p>However, several issues remain. First, the liquidation framework does not contain a rule generally applicable to all contractual relationships. Instead, the regulatory approach is based on specific and piecemeal solutions for certain contractual relationships, and</p>

<sup>154</sup>See *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966(3) SA 345 (W) at 348.

	<p>therefore this leaves many questions unresolved when dealing with other types of contract and contractual terms, e.g. the validity of ipso facto clauses and the time-frame for the assumption or rejection of contracts. Second, there is no provision applicable to judicial management that enables the relevant officeholder to fashion a rehabilitative solution in respect of existing contracts with a view to turning the debtor around. Further, the judicial management regime is completely untested.</p> <p>Legal uncertainty regarding the treatment of financial contracts has an acute impact on the development of the financial markets and financial transactions may be prohibitively priced to compensate for the risks of unenforceability of certain fundamental provisions, such as post-insolvency termination and close-out netting.</p>
<p><b>Comment</b></p>	<p>A general regime for executory contracts should be an important part of the insolvency framework. This general regime should include a general provision for the unenforceability of ipso facto clauses, a clear and defined time-frame for the insolvency representative’s decision on the assumption or rejection of executory contracts, the treatment of claims for damages as a consequence of the rejection of contracts as concurrent claims, the liability of the estate and/or the insolvency representative regarding the performance of contracts assumed by the insolvency representative, and the possibility to offer guarantees to third parties for the performance of contractual obligations by the insolvent estate.</p> <p>This general regime should also apply to a reorganization procedure.</p> <p>Special rules may be provided for specific contracts where the circumstances and policy justifications warrant, as it is the case with employment contracts.</p> <p>There is also justification for a special treatment of financial contracts. The scope of any such special treatment (e.g. the width of the concept of ‘financial contracts’) is dependent on policy choices and the developmental needs of the financial market. The following are some of the factors to be taken into account<sup>155</sup>:</p> <ul style="list-style-type: none"> <li>• As financial transactions often involve the outright transfer of title to cash, securities and other intangible assets, it is important that such title transfer is not recharacterised as a grant of security interest even though the purpose of the outright title transfer is to perform the functional equivalent of a security interest.</li> <li>• The law should allow the exercise of close-out netting promptly after the commencement of insolvency proceedings.</li> <li>• Close attention should be paid to the issue of systemic risk and the emerging international consensus on the financial institutions insolvency regime which may curtail the enforceability of close-out netting in certain circumstances.</li> </ul>
<p><b>Principle C11</b></p>	<p><b>Avoidable Transactions</b></p> <p><b>C11.1</b> After the commencement of an insolvency proceeding, transactions by the debtor that are not consistent with the debtor’s ordinary course of business or engaged in as part of an approved administration should be avoided (cancelled), with narrow exceptions protecting parties who lacked notice.</p>

<sup>155</sup>For a comparative guidance on the issues listed, e.g. the scope of close-out netting, the type of applicable financial transactions, and systemic risk concerns, see the UNIDROIT *Principles on the Operation of Close-out Netting Provisions* (May 2013), available at <http://www.unidroit.org/english/governments/councildocuments/2013session/cd92-06a-e.pdf>.

	<p><b>C11.2</b> Certain transactions prior to the application for or the date of commencement of the insolvency proceeding should be avoidable (cancelable), including fraudulent and preferential transfers made when the enterprise was insolvent or that rendered the enterprise insolvent.</p> <p><b>C11.3</b> The suspect period, during which payments are presumed to be preferential and may be set aside, should be reasonably short in respect to general creditors to avoid disrupting normal commercial and credit relations, but may be longer in the case of gifts or where the person receiving the transfer is closely related to the debtor or its owners.</p>
<p><b>Description</b></p>	<p>The general principle of Namibian insolvency law is that the debtor cannot undertake any action that falls outside the ordinary course of business after the opening of the process, and such actions would be null and void.</p> <p>The law includes a detailed regulation of avoidable transactions. These apply not only to liquidations, but also to judicial management.</p> <p><u>Categories of impeachable transactions</u></p> <p>Transactions which may be impeachable are (a) dispositions without value, (b) voidable preferences, (c) undue preferences, (d) collusive dealings, (e) voidable sales of a business or of property forming part thereof<sup>156</sup>, (f) dispositions of a company's or corporation's property after commencement of the winding-up thereof<sup>157</sup>, (g) unlawful dealings with a company's property prior to the winding-up thereof,<sup>158</sup> and (h) unlawful dealings with a corporation's property prior to the winding-up thereof,<sup>159</sup> including payments to its members.<sup>160</sup></p> <p>The basic principles applying in the case of the transactions mentioned in categories (a) to (e) above are contained in the Insolvency Act 24 of 1936. Those principles, in turn, are made applicable <i>mutatis mutandis</i> in the winding-up of a company where, of course, it is unable to pay its debts and, for the purposes of such application, the date of the presentation to the Court of the application to wind up the company is to be deemed to correspond with the date of sequestration. Such principles are, again in turn, made applicable <i>mutatis mutandis</i> in the winding-up of a corporation which is unable to pay its debts, subject <i>mutatis mutandis</i> to the same deeming. In relation to the proceedings which may be instituted in relation to the setting aside of such transactions, and the onus to be discharged in such proceedings.</p> <p>Transactions which constitute dispositions without value, voidable preferences, undue preferences and collusive dealings are voidable at the instance of the trustee or liquidator, as the case may be, and until set aside at his instance by the Court, or by agreement between him- and herself and the other party concerned, stand.<sup>161</sup></p> <p>A transaction may be impeachable also at common law under the <i>actio Pauliana</i>. The Insolvency Act 24 of 1936 does not deprive the creditors or the trustee of an insolvent estate from exercising any right that any of them may have at common law to set aside a disposition of the insolvent's property prior to sequestration where such right is not</p>

<sup>156</sup>See Section 26 of the Insolvency Act 24 of 1936; Section 345 of the Companies Act 61 of 1973, sec 345; Section 66(1) of the Close Corporations Act 26 of 1988, read with Section 345 of the Companies Act 61 of 1973.

<sup>157</sup>See Section 346(2) of the Companies Act 28 of 2004; Section 66(1) of the Close Corporations Act 26 of 1988, read with Section 346(2) of the Companies Act 61 of 1973.

<sup>158</sup>See Section 429 of the Companies Act 28 of 2004.

<sup>159</sup>See Section 73 of the Close Corporations Act 26 of 1988.

<sup>160</sup>See Section 70 of the Close Corporations Act 26 of 1988.

<sup>161</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 5.31.



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inconsistent with the Act.

Meaning of disposition

In any case seeking to impeach a transaction as a disposition without value, a voidable preference, an undue preference, or a collusive dealing, it is fundamental that the transaction should have involved a disposition by the insolvent of his or, in the case of a company or of a corporation, of its property, bearing in mind, of course, the meaning of “property” in this context. By “disposition”, in this context, is meant a disposition within the meaning of that expression as defined in Section 2 of the Insolvency Act 24 of 1936, which definition reads: “any transfer or abandonment of rights to property [including] a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but [excluding] a disposition in compliance with an order of the court”. The language is such that it covers any conceivable means of disposing of property.

A payment made by an insolvent to another to settle the debt of a third party amounts to a disposition. The right of a borrower to claim payment from the lender of an amount which the latter has agreed to lend to the former is “property” within the meaning of Section 29(1) of the Insolvency Act 24 of 1936 and an instruction by the borrower to the lender to pay the amount of such loan to another constitutes a disposition of property by the borrower as envisaged by such section.<sup>162</sup>

- Disposition without value: insolvent estate

Where the trustee proves that at any time *more than* two years before the sequestration of his estate the insolvent made a disposition of his property and that immediately after such disposition his liabilities exceeded his assets, the disposition may be set aside by the Court if the trustee also proves that it was not made for value<sup>163</sup>.

The undertaking by the company of a suretyship for, or the mortgage or pledge by the company of its property to secure the liabilities of, another company or other companies in the group, may be a disposition for which the former has received value in the form of the continued financial stability of all the companies in the group, i.e., some ascertainable commercial advantage for itself.

A donation (ordinarily) is a disposition without value. A payment in discharge of a lawful obligation to pay is a disposition for value, within the meaning of the Insolvency Act 24 of 1936: such value consists in the discharge of the obligation to pay<sup>164</sup>

- Disposition without value: company/close corporation in liquidation

A disposition by a company/close corporation of its property may be set aside in the winding-up of the corporation if, had the corporation been a natural person, such disposition could have been set aside as a disposition without value in the event of insolvency.

- Voidable preference: insolvent estate

A disposition of his property by an insolvent prior to the sequestration of his estate may have the effect of preferring one of his creditors above another. If the disposition had such effect and was made within six months before the date of sequestration, and immediately

<sup>162</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 5.31.

<sup>163</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 5.31.3.

<sup>164</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 5.31.3.

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after it was made the liabilities of the insolvent exceeded the value of his assets, the Court may set aside the disposition unless “*the person in whose favour the disposition was made proves that [it] was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another*”.<sup>165</sup>

- *Disposition having the effect of preferring one creditor above another*

The test to be applied in a determination as to whether a disposition had the effect of preferring one creditor above another is an objective one. Ordinarily a disposition which has the effect of preferring a creditor exists if, prior to sequestration, the creditor is paid the whole or part of his claim while another creditor, or other creditors, receive no payment or proportionately less, or the creditor is paid in advance of other creditors; but “*a creditor could in fact be preferred, not only when his claim against the insolvent debtor is paid or reduced, but also when the debtor arranges a disposition of his property to a third party in such a way that from the disposition some other proprietary benefit will accrue to the creditor, to the disadvantage of other creditors*”. A disposition which otherwise is one having the effect of preferring a creditor does not cease to be such merely because it was made in consideration of some benefit to be given to the insolvent by the creditor.<sup>166</sup>

A disposition made to a surety for the insolvent, or to a person who is “in a position by law analogous to that of a surety”, is deemed to be a disposition to his, the insolvent’s, creditor<sup>167</sup>

- *Voidable preference: company/close corporation in liquidation*

A disposition by a corporation of its property may be set aside in the winding-up of the corporation unable to pay its debts if, had the corporation been a natural person, such disposition could have been set aside as a voidable preference in the event of insolvency. The onus is on the plaintiff to prove that the corporation is unable to pay its debts at the time when the proceedings to set aside the disposition are instituted.

- *Undue preference: insolvent estate/company/close corporation*

A disposition by a debtor of his property at a time when his liabilities exceeded his assets may be set aside by the Court as an undue preference if it was made with the intention of preferring one of the debtor’s creditor’s and the debtor’s estate thereafter is sequestrated.<sup>168</sup>

The essence of the trustee’s (or liquidator’s) onus in proceedings under Section 30(1) of the Insolvency Act 24 of 1936 is proof that the debtor disposed of his/her property with the intention of preferring one of his/her creditors above another.

- *Collusive dealings: insolvent estate/company/close corporation*

Where prior to the sequestration of his/her estate the insolvent disposed of property belonging to him/her in a manner “which had the effect of prejudicing his/her creditors or

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<sup>165</sup>See Section 29(1) of the Insolvency Act 24 of 1936.

<sup>166</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 5.31.6.1.

<sup>167</sup>See Section 30(2) of the Insolvency Act 24 of 1936.

<sup>168</sup>See Section 30(1) of the Insolvency Act 24 of 1936.

	<p>of preferring one of his creditors above another”, the Court may set aside the disposition if it was effected by the insolvent in collusion with another.<sup>169</sup> By “collusion”, in this context, is meant an agreement between the insolvent and another pursuant to which the disposition ensued where the contracting parties’ intention actually was to defraud the insolvent’s creditors; if such agreement was concluded without such intention, the disposition cannot be set aside as a collusive dealing notwithstanding that in fact it prejudiced creditors or resulted in one being preferred above another or others<sup>170</sup>.</p> <ul style="list-style-type: none"> <li>• <u>Voidable sale of business</u></li> </ul> <p>The policy of the law is to afford protection to a trader’s creditors against his dispossessing him- or herself of his/her property without paying his/her debts before the disposition or from the proceeds thereof. The provisions of section 34 of the Insolvency Act 24 of 1936 are intended to give effect to such policy. Section 34 applies only in relation to a “trader” as defined in Section 2 of the Insolvency Act 24 of 1936.</p> <p>Section 34(1) of the Insolvency Act 24 of 1936 provides that:</p> <p><i>“If a trader alienates any business belonging to him or her, or the goodwill of such business or any goods or property forming part thereof (except in the ordinary course of that business) and such trader does not publish a notice of such intended alienation in the Gazette, and in two issues of an Afrikaans and two issues of an English newspaper circulating in the district in which that business is carried on, within a period not less than thirty days and not more than sixty days before the date of such alienation, the said alienation shall be void as against his creditors for a period of six months after such alienation, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period.”</i></p> <p>The onus of proving that the transfer [disposition] was not in the ordinary course of the particular business is on the trustee (or the creditor) seeking to avoid the transaction.</p> <p>Finally, regarding expenses of avoidance actions, it is worth noting that the second meeting of creditors takes a decision on the funding of avoidance actions. In any case, where a creditor successfully challenges a transaction, they will obtain a court order against the losing party for the expenses, and in any event the law will give the creditor a preference against the return for their claim as well as their cost<sup>171</sup>.</p>
<p><b>Assessment</b></p>	<p>Namibian law avoids the acts performed by the debtor after the opening the insolvency process, and provides rules for the setting aside of suspect transactions when a business is in liquidation. As such, the insolvency practitioner can rely on statute to claim against transactions at an undervalue, preferences and fraudulent or collusive actions. The presumptions in favor of setting aside such transactions can save time and legal costs in recovering value, with a simpler evidentiary hurdle needed to make such claims. The regime lacks different suspect periods for connected and unconnected parties to the debtor.</p>
<p><b>Comment</b></p>	<p>The regime of avoidance actions could be completed with the establishment of different periods for the avoidance of transactions with connected and unconnected persons. Rules</p>

<sup>169</sup>See Section 31(1) of the Insolvency Act 24 of 1936.

<sup>170</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 5.31.12.

<sup>171</sup>See Section 104(3) of the Insolvency Act 24 of 1936.

	that place the onus of proof on the connected party may be very useful for the effectiveness of the avoidance regime.
	<b><i>Claims and Claims Resolution Procedures</i></b>
<b>Principle C12</b>	<p><b>Treatment of Stakeholder Rights and Priorities</b></p> <p><b>C12.1</b> The rights of creditors and priorities of claims established prior to insolvency proceeding under commercial or other applicable laws should be upheld in an insolvency proceeding to preserve the legitimate expectations of creditors and encourage greater predictability in commercial relationships. Deviations from this general rule should occur only where necessary to promote other compelling policies, such as the policy supporting reorganization or to maximize the insolvency estate’s value. Rules of priority should enable creditors to manage credit efficiently consistent with the following additional principles:</p> <p><b>C12.2</b> The priority of secured creditors in their collateral should be upheld and, absent the secured creditor’s consent, its interest in the collateral should not be subordinated to other priorities granted in the course of the insolvency proceeding. Distributions to secured creditors should be made as promptly as possible.</p> <p><b>C12.3</b> Following distributions to secured creditors from their collateral and payment of claims related to costs and expenses of administration, proceeds available for distribution should be distributed pari passu to the remaining general unsecured creditors,<sup>172</sup> unless there are compelling reasons to justify giving priority status to a particular class of claims. Public interests generally should not be given precedence over private rights. The number of priority classes should be kept to a minimum.</p> <p><b>C12.4</b> Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors.</p> <p><b>C12.5</b> In liquidation, equity interests or the owners of the business are not entitled to a distribution of the proceeds of assets until the creditors have been fully repaid. The same rule should apply in reorganization, although limited exceptions may be made under carefully stated circumstances that respect rules of fairness that entitle equity interests to retain a stake in the enterprise.</p>
<b>Description</b>	<p>The following provisions are relevant for the analysis of this Principle:</p> <p><b><u>Enforcement of debt in sequestration/liquidation of the debtor</u></b></p> <p>Claims are enforced in liquidation by the creditor submitting his claim to the insolvency administrator who will thereafter proceed to realize the property and pay over the net proceeds to the creditor according to rank. When a company/close corporation is liquidated or a natural person or partnership is sequestrated the order of preference is:</p> <ul style="list-style-type: none"> <li>• Liquidation costs</li> <li>• Secured creditors: Payment is made from the proceeds of the sale of the secured asset.</li> </ul> <p>Where a secured creditor's claim is not satisfied in full, the unpaid balance gives rise to a concurrent claim. In this context, a preferent right to payment, i.e., a preference, means a right to payment “out of” property of the estate in preference to other claims. In the case of a secured claim, the creditor has a right to payment “out of” the particular property by which his claim is secured which ranks before the right to payment of any other creditor of the estate<sup>173</sup>.</p> <ul style="list-style-type: none"> <li>• Preferent creditors. These are creditors who do not hold security for their claims, but are ranked above concurrent creditors. Where a creditor has a right to payment “out of” the property of the estate which is enforceable before other creditors’ rights, a creditor’s claim is preferent. It also may be secured. If it is not secured, it ranks for payment out</li> </ul>

<sup>172</sup>Subject to any intercreditor agreements and contractual subordination provisions or where equitable subordination of a creditors claim may be appropriate.

<sup>173</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 9-3.

	<p>of the free residue <i>before</i> the claims of non-preferent, that is concurrent, creditors, and are paid from the proceeds of unencumbered assets in a pre-determined order as set out in the Insolvency Act 24 of 1936<sup>174</sup>. Preferent creditors include employees where a contract of employment terminates automatically because the employer was sequestrated/liquidated (Section 32(3) of the Labour Act 15 of 2004) and the Directorate Inland Revenue in the Ministry of Finance. Both the tax priority and the labor claims priority are unlimited in amount (and in time)<sup>175</sup>.</p> <p>The holder of a general notarial bond who has not perfected its security by obtaining possession of the asset is the lowest ranked preferent creditor. In the Namibian system, all preferent creditors belong to the same class and receive the same treatment, without a hierarchy among them (Section 99 of the Insolvency Act 24 of 1936).</p> <ul style="list-style-type: none"> <li>• Concurrent creditors. These creditors are paid from any proceeds of unencumbered assets (the free residue of the estate) that remain after preferent creditors have been paid in full. They are paid in proportion to the amounts owing to them.</li> </ul> <p>A claim which as at the date of sequestration has prescribed is incapable of being proved against the estate. The Prescription Act 68 of 1969 provides in Section 10(1) that a <i>debt</i> (a word to which the law gives a wide interpretation, not confined to money debts, and essentially meaning any legal claim) is <i>extinguished by prescription</i> after the expiration of the prescriptive period of time laid down in that Act. Aside from some special prescriptive periods for debts secured by mortgages, judgments, and tax debts, the general prescriptive period is three years from the date that the debt became legally due.</p> <p>The Act also provides in Section 15(1) that prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt</p> <p>In the context of an insolvency proceeding, the proof of the claim has the result, <i>inter alia</i>, that prescription of the related debt is interrupted. The interruption of prescription commences when the creditor's claim is filed, and ceases only once the Master confirms the final liquidation and distribution account.<sup>176</sup></p> <p>Any monies that are left over after all claims have been paid in full must be used to satisfy the interest on concurrent claims from the date of liquidation to the date of payment, in proportion to the amount of each concurrent claim.</p> <p>If all creditors and costs in the case of the liquidation of a company/close corporation are paid in full, any amounts remaining must be distributed among the shareholders according to their rights and interests in the company. Where shareholders are creditors by means of loan accounts, they are treated like any other creditor. In this regard, shareholders may hold security for their loan account claims and in doing so are treated as other secured creditors, failing which they are treated as concurrent creditors.</p>
<b>Assessment</b>	

<sup>174</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 9-6(1) By way of example the learned authors state: “The bondholder under a general notarial bond, who is not in possession of any of the debtor’s movable property, is entitled (although not a secured creditor) to payment “out of” such property before any concurrent creditor. The bondholder under a special notarial bond, ... a bond hypothecating particular movable property only ... who is not in possession of such property, also has a preference over concurrent creditors in respect of payment “out of” such property and, indeed, “out of” the entire free residue. ... Where there is a plurality of notarial bonds enjoying this preference, and no bondholder has possession of any of the movable property of the debtor, priority as to payment “out of” such property is regulated by the date of registration i.e., the principle *qui prior est tempore potior est jure* applies. If one such bondholder takes possession of the movable property prior to the commencement of the *concursum creditorum* then his rights become that of a pledgee and he falls to be treated as a secured creditor in respect of such property”. The same legal position would apply in Namibia, it is submitted.

<sup>175</sup>In addition, payment of VAT and other retention payments are considered to be excluded from the insolvency estate.

<sup>176</sup>See Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, cit., para. 9-7.

	<p>Namibian law provides broadly clear and predictable provisions for priorities in insolvency and for the distribution of proceeds among the different classes of creditors. However, the ranking of creditors is complex, and the treatment of secured creditors is unequal: creditors with general notarial bonds will only have a priority over unsecured creditors, and will suffer the impact of all the preferential creditors that are ranked higher. In addition, general notarial bonds need to be perfected before the initiation of the insolvency process, and the lack of perfection means that the creditor loses any possibility of receiving a secured priority payment in the liquidation. The category of secured creditors is very broad in itself, as it includes not only consensual security interests, but also a series of liens and hypothecs.</p> <p>In this respect, Namibian law protects the interests of numerous and diverse categories of creditors. The protection of workers' claims is strongly ingrained in the Namibian legal system, and is consistent with international best practices: it may be considered, nonetheless, that alternative measures of protection, such as an employee guarantee fund, financed by contributions from employers and employees, may provide a far better protection mechanism for the protection of workers of distressed enterprises. The priority accorded to tax claims should be reassessed: in the ranking of claims, tax claims receive priority over claims secured by a general notarial bond, and, naturally, over unsecured creditors. The World Bank Principles indicate, in this regard, that "<i>public interests generally should not be given precedence over private rights</i>". The priority of tax claims may be difficult to justify where it is taken into account that the tax authorities are better prepared, in terms of information and financial power than almost any other creditor. It may even more difficult to justify where the priority covers tax penalties that effectively punish creditors for the past behavior of the debtor.</p> <p>In case of judicial management the creditors may in terms of Section 442 of the Companies Act 28 of 2004 agree to a preference regarding post-commencement claims above pre-commencement claims, i.e. effectively a statutory subordination.</p>
<b>Comment</b>	<p>It may be timely to review the ranking of claims in the insolvency process. The category of security interests should be reviewed. A reform of the law of security interests (see Principle A3) should include the principle of perfection by registration for virtually all security interests. The list of liens and hypothecs should be revised, as there are many of them that are at odds with present economic realities.</p> <p>A reassessment of the ranking of claims in insolvency should provide a uniform treatment for the security interests contemplated in a new regime, and should also include a revision of the priority of tax claims, the potential introduction of alternative or supplementary mechanisms for the protection of workers' claims.</p>
<b>Principle C13</b>	<p><b>Claims Resolution Procedures</b></p> <p>Procedures for notifying creditors and permitting them to file claims should be cost effective, efficient and timely. While there must be a rigorous system of examining claims to ensure validity and resolve disputes, the delays inherent in resolving disputed claims should not be permitted to delay insolvency proceedings.</p>
<b>Description</b>	<p>The provisions set out below describe the system for admission of claims in the Namibian system:<sup>177</sup></p>

<sup>177</sup>See generally *Law of South Africa, Volume 11 – 2<sup>nd</sup> ed., vol. Insolvency*, para. 313: "Procedure for proof of claims".

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**Insolvency Act 24 of 1936**

Lodging of claim

A claim is proved by means of an affidavit corresponding substantially with form C or D in the first Schedule to the Insolvency Act 24 of 1936. Form C is used for the proof of claims other than those based on a bill of exchange, and form D is used for the proof of claims based on a bill of exchange. The affidavit is an important document and should be meticulously prepared. It is a formal document which the law requires to be clear and precise (see Section 44 of the Insolvency Act 24 of 1936).

The affidavit may be made by the creditor or any person fully cognizant of the claim.<sup>178</sup>

The affidavit must contain, *inter alia*, the facts upon which the deponent's knowledge of the claim is based, the amount, nature and particulars of the claim, and the manner in and the time at which it arose. Where there is more than one ground of indebtedness, each should be dealt with separately and full particulars of each given. Such particularity is required in order to render effective the right accorded to creditors, the trustee or the insolvent, to inspect affidavits in proof of claim. Failing such particularity it would be impossible for them to decide whether or not to contest the claim. The affidavit must further set out whether the claim was acquired by cession after the institution of the sequestration proceedings, the nature and particulars of any security which the creditor

holds for his claim and the value of that security.<sup>179</sup> If a claim is based on a document such as a mortgage bond or credit agreement, the original document or a certified copy should be attached to the affidavit in proof of claim. If the claim is based on a judgment debt it is sufficient to attach the order of court to the affidavit and there is no need to attach a statement of account. If an original document is not attached to the affidavit, a satisfactory explanation should be given of why it is not available. Where the claim is for the purchase price of goods sold and delivered to the insolvent on an open account, a supporting statement must be submitted, setting out the monthly total and a brief description of the purchases and payments for the full period of trading or for a period of 12 months immediately before the date of sequestration, whichever is the lesser<sup>180</sup>.

The affidavit in proof of claim must be attested by a commissioner of oaths. A legal practitioner who prepares the affidavit and represents the deponent at the meeting of creditors is disqualified from attesting the affidavit and an affidavit so attested is invalid.

Claims in foreign currency are converted in national currency according to the rate of the date of the liquidation.

A secured creditor, when proving his claim, should consider the position of the estate carefully and decide whether or not he relies entirely on the proceeds of the property constituting his security for the satisfaction of his claim. If he decides to do this, he should state as much in his affidavit. By making this statement, he ensures that he will not be liable to contribute towards the costs of sequestration other than the costs of maintaining, conserving and realizing that property and the costs for which he will be liable if there is no free residue<sup>181</sup>. On the other hand, if the proceeds of that property are insufficient to meet

<sup>178</sup>See Section 44(4) of the Insolvency Act 24 of 1936.

<sup>179</sup>See Section 44(4) of the Insolvency Act 24 of 1936.

<sup>180</sup>See Section 44(6) of the Insolvency Act 24 of 1936.

<sup>181</sup>See Section 89(2) of the Insolvency Act 24 of 1936.

his claim, he cannot share on a secured basis in the free residue<sup>182</sup>. If a creditor has proved an incorrect claim he may with the consent of, and on conditions imposed by, the Master correct his claim or submit a fresh one<sup>183</sup>.

*Time and place for lodging claim documents*

The affidavit and supporting documents must be delivered at the office of the presiding officer not later than 24 hours before the advertised time of the meeting at which the creditor concerned intends to prove the claim. If the creditor fails to deliver the affidavit timeously the claim will not be admitted to proof at that meeting, unless the presiding

officer is of the opinion that the failure was not occasioned by the creditor's fault<sup>184</sup>. The presiding officer has no discretion unless it can be shown that the delay occurred through no fault of the creditor. The discretion vested in the presiding officer must be exercised judicially. If the affidavit in proof of claim and the supporting documents have been delivered by the creditor at the required time before the meeting but are not in order, the presiding officer may, it seems, adjourn the meeting to enable the creditor concerned to prove his debt in proper form. However, if a claim has not been delivered timeously or at all, it may not be admitted to proof at an adjourned meeting. That this must be so is apparent from the fact that the affidavit and supporting documents must be lodged not later than 24 hours before the *advertised* time of the meeting, and an adjourned meeting is not advertised.

*Inspection of claim documents by interested parties*

Creditors, the trustee, the insolvent, and their representatives, are entitled to inspect affidavits in proof of claims and supporting documents at the office of the presiding officer during office hours, free of charge<sup>185</sup>.

*Attendance by creditor*

It is customary for creditors to appear at the meeting (in person or through representatives) in order to prove their claims; although the Act does not specifically require such attendance. It is obviously advisable for creditors or their representatives to be present in order to meet any objections to the admission of the claim taken by other creditors, the trustee, or presiding officer.

*Interrogation of creditor*

To help him or her adjudicate on a claim, the presiding officer may call upon a person present at the meeting who wishes to prove, or who has already proved a claim to submit to interrogation under oath in regard to the claim<sup>186</sup>. If such a person is not present at a

meeting, the presiding officer has the power to summon him or her to appear and submit to interrogation<sup>187</sup>. The presiding officer, the trustee, or a creditor whose claim has been proved, is entitled to interrogate the person wishing to prove<sup>188</sup>.

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<sup>182</sup>A secured creditor whose right to interest is not fully met from the proceeds of the property in question has a concurrent claim for the balance against the free residue: see *Bezuidenhout v Sackstein* 1986 1 All SA 65 (O).

<sup>183</sup>See Section 44(4) of the Insolvency Act 24 of 1936.

<sup>184</sup>See Section 44(4) of the Insolvency Act 24 of 1936.

<sup>185</sup>See Section 44(5) of the Insolvency Act 24 of 1936.

<sup>186</sup>See Section 44(7) of the Insolvency Act 24 of 1936.

<sup>187</sup>See Section 44(8) of the Insolvency Act 24 of 1936.



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There is no hard and fast rule on when a presiding officer should have recourse to interrogation. He should not, however, reject a claim without hearing the claimant's evidence unless the claim is on the face of it bad. It would appear that the right of the presiding officer to hold an interrogation to determine the validity of a claim is restricted to this section and he may not call for evidence from other persons as envisaged by Section 65 of the Insolvency Act 24 of 1936.

If any person wishing to prove or having proved a claim fails to attend a meeting when summoned, or refuses to submit to interrogation, his claim, if not yet proved, may be rejected and, if proved, may be expunged by the Master<sup>189</sup>. A presiding officer other than the Master has no power to expunge a claim.

***Adjudication on claims by presiding officer***

A claim must be proved to the satisfaction of the presiding officer, who must either admit or reject it<sup>190</sup>. What test the presiding officer must apply in this regard is not altogether a simple question. Each case must be decided on its own merits and there is no definite formula to determine when a presiding officer should be satisfied with the proof of claim. In reaching his decision, the presiding officer performs a limited judicial function; as such he must exercise an independent judgment. He should not examine the claim too critically with a view to detecting purely technical defects. All that is required is that *prima facie* proof of the claim should be produced. In this regard, it must be remembered that the decision of the presiding officer is not final: if he rejects the claim the claimant may either prove it at a subsequent meeting or establish it by an action of law; and if the presiding officer admits the claim the admission is provisional only, since the trustee is entitled to dispute the claim. On the other hand, it is not sufficient for the presiding officer to examine the claim cursorily and without careful attention to detail. If the claim is, on the face of it, bad, the presiding officer should reject it. The same applies if the presiding officer suspects, on reasonable grounds, that the claim is not genuine.

***Liquidation of corporations***<sup>191</sup>

In the winding-up of a company by the court and by a creditors' voluntary winding-up, claims against the company must be proved at a meeting of creditors *mutatis mutandis* in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency<sup>192</sup>. This provision does not merely provide for the procedure that must be followed when claims are proved at meetings of creditors; it also renders applicable the substantive law in relation to the proof of claims against an insolvent estate. A secured creditor is under the same obligation to set a value upon his security as if he were proving his claim against an insolvent estate under the law relating to insolvency<sup>193</sup>. Where the company is unable to pay its debts, a secured creditor and the

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<sup>188</sup>See Section 44(57) of the Insolvency Act 24 of 1936.

<sup>189</sup>See Section 44(9) of the Insolvency Act 24 of 1936.

<sup>190</sup>See Section 44(3) of the Insolvency Act 24 of 1936.

<sup>191</sup>See generally *Law of South Africa*, vol. 4(3), 1<sup>st</sup> reissue vol., para. 287 and authorities there collected.

<sup>192</sup>See Section 373(1)(a) of the Companies Act 28 of 2004, read with sections 44–51 of the Insolvency Act 24 of 1936. Also see Section 78(3) of the Insolvency Act 24 of 1936: a claim, whether liquidated or unliquidated, which the liquidator has compromised or admitted or settled, is deemed to have been proved and admitted against the estate in the manner set forth in sec 44: see *Barlows Tractor Co (Pty) Ltd v Townsend* 1996 2 SA 869 (A) 881. The Companies Act does not itself prescribe the procedure according to which such claims have to be proved; it simply provides in Section 373 that the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency will apply.

<sup>193</sup>See Section 373(1)(b) of the Companies Act 28 of 2004.

	<p>liquidator have the same right respectively to take over the security as a secured creditor and a trustee would have under the law relating to insolvency<sup>194</sup>.</p> <p>The rejection of a claim does not debar the claimant from proving his claim at a subsequent meeting of creditors or from establishing his claim by action at law.<sup>195</sup> Where a creditor thus seeks to prove his claim by action at law, Section 364(2)(a) of the Companies Act 28 of 2004 does not apply, which means that the creditor does not have to serve notice on the liquidator in terms of that subsection. The right of the creditors to bring legal proceedings is however subject to Section 75(2) of the Insolvency Act 24 of 1936<sup>196</sup>. These actions do not stop distributions, unless they involve a fundamental claim whose admission would radically change the distribution to creditors.</p>
<b>Assessment</b>	<p>The regime for the proof of claims seems to be effective and has been tested over a long period of time. One observation in this respect is that the lack of a personal notification may affect the effectiveness of the protection of creditor rights in a liquidation (see Principle C2). In addition the proof of claims seems to have created a bottleneck in the process. Some proofs of claim do not have proper accounting support, or correspondence with the debtor's accounts, and there are numerous late filings, delaying the process considerably.</p> <p>Challenges to the decisions of the Master on the admission of claims are extremely rare.</p> <p>The liquidator or trustee is in the position of using all the information available on the business, and may also use investigative powers, or the assistance of experts, to the effect of clarifying the situation of claims. The law does not explicitly state the powers of the court when the admission of a claim –or the refusal to admit a claim– is challenged by interested parties. The law does not address expressly the question of the suspension of the procedure, or the effects of the lack of recognition over the interests of the creditor who is affected by it.</p>
<b>Comment</b>	<p>It would be appropriate to include a personal notification for all liquidation procedures, following the precedent of the business rescue procedure (see also Principle C2).</p> <p>A cut-off date for the submission of claims should be effective, and the law should specify clearly the consequences of submitting a late claim.</p> <p>The regime could be completed with the express affirmation that the challenge of the decisions on the admission of claims does not suspend the process, which continues its course and is unaffected by the review of the actions of the Master.</p>
<b>Principle C14</b>	<p><b>Reorganization Proceedings</b></p> <p><b>C14.1</b> The system should promote quick and easy access to the proceeding, assure timely</p>

<sup>194</sup>See Section 373(1)(b) of the Companies Act 28 of 2004 read with Section 83 of the Insolvency Act 24 of 1936. See also *Mercatrust Bpk v Keepers Hosiery Suid-Afrika (Edms) Bpk* 1980 3 SA 411 (W), where it was held that Section 83 of the Insolvency Act 24 of 1936 is not applicable to the realization of claims which have been ceded to a creditor *in securitatem debiti*.

<sup>195</sup>See Section 44(3) of the Insolvency Act 24 of 1936.

<sup>196</sup>See Section 75(2) of the Insolvency Act 24 of 1936 provides that after confirmation by the Master of the liquidator's account, no person may institute any legal proceedings against the estate in respect of any liability which arose before liquidation except with the permission of the Court, which permission it may grant if it finds that there was a reasonable excuse for the delay in instituting those proceedings. Section 44(3) of the Insolvency Act 24 of 1936 contains, *inter alia*, the proviso that the rejection of a claim "*shall not debar the claimant from proving the claim at a subsequent meeting of creditors or from establishing his claim by an action at law, but subject to the provisions of [Section 75(2)]*".

	<p>and efficient administration of the proceeding, afford sufficient protection for all those involved in the proceeding, provide a structure that encourages fair negotiation of a commercial plan, and provide for approval of the plan by an appropriate majority of creditors. Key features and principles of a modern reorganization proceeding include the following:</p> <p><b>C14.2</b> Plan Formulation and Consideration. A flexible approach for developing a plan consistent with fundamental requirements designed to promote fairness and prevent commercial abuse.</p> <p><b>C14.3</b> Plan Voting and Approval. For voting purposes, classes of creditors may be provided with voting rights weighted according to the amount of a creditor’s claim. Claims and voting rights of insiders should be subject to special scrutiny and treated in a manner that will ensure fairness. Plan approval should be based on clear criteria aimed at achieving fairness among similar creditors, recognition of relative priorities and majority acceptance, while offering opposing creditors or classes a dividend equal to or greater than they would likely receive in a liquidation proceeding. Where court confirmation is required, the court should normally defer to the decision of the creditors based on a majority vote. Failure to approve a plan within the stated time period, or any extended periods, is typically grounds for placing the debtor into a liquidation proceeding.</p> <p><b>C14.4</b> Plan Implementation and Amendment. Effective implementation of the plan should be independently supervised. A plan should be capable of amendment (by vote of the creditors) if it is in the interests of the creditors. Where a debtor fails or is incapable of implementing the plan, this should be grounds for terminating the plan and liquidating the insolvency estate.</p> <p><b>C14.5</b> Discharge and Binding Effects. The system should provide for plan effects to be binding with respect to forgiveness, cancellation or alteration of debts. The effect of approval of the plan by a majority vote should bind all creditors, including dissenting minorities.</p> <p><b>C14.6</b> Plan Revocation and Closure. Where approval of the plan has been procured by fraud, the plan should be reconsidered or set aside. Upon consummation and completion of the plan, provision should be made to swiftly close the proceedings and enable the enterprise to carry on its business under normal conditions and governance.</p>
<p><b>Description</b></p>	<p>The Namibian system does not have a formal reorganization process, but offers different alternatives that may be used for reorganizing a business. Some of the procedures that may be used for business restructuring, such as the scheme of arrangement, have already been analyzed as an informal procedure with limited court intervention (see Principle B4). Other reorganization measures typically involve a greater degree of court intervention, such as judicial management and composition, as explained below.</p> <p><b><u>Judicial Management (Chapter 15, Sections 433-447 of the Companies Act 28 of 2004)</u></b></p> <p>Judicial management is an extraordinary procedure, the purpose of which is to obviate a company being placed in liquidation. It is aimed at obtaining a moratorium and preventing a company from being placed in liquidation in a situation where, by proper management or proper conservation of its resources, the company would be able to meet its obligations and become a successful concern. Judicial management takes place pursuant to an order of the court and upon the application of the company itself, one or more of its creditors, or one or more of its shareholders, or jointly by any one or all of these parties. The overriding consideration, which will influence the court in deciding whether or not to grant a judicial management order, is whether the applicant can demonstrate that the company has a reasonable probability of being able to surmount its present financial difficulties and thrive. To enable the court to decide this question, the company is first placed under provisional judicial management and a provisional judicial manager is appointed. Judicial management is not, and may not be used, as an alternative method of winding-up or as an experiment to determine whether the company can extricate itself from its difficulties. It is a special</p>

privilege given at the discretion of the court in favor of the company, radically affecting the rights of creditors, which will be authorized only where the court is satisfied that it will be just and equitable and will achieve the rehabilitation of the company.

The court may, if it appears just and equitable, grant a judicial management order in respect of a company:

(a) when the company by reason of mismanagement or for any other cause (i) is unable to pay its debts or is probably unable to meet its obligations and (ii) has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern; or

(b) when an application for the winding-up of a company is made to the court under CA 2004 and it appears to the court that if the company is placed under judicial management the grounds for its winding-up may be removed, and that it will become a successful concern.

When a company is placed under provisional judicial management, its directors are divested of their powers and a provisional judicial manager is appointed. The provisional judicial manager acts under the direction of the court. His job is to run the company's business in the manner he deems most economic and beneficial to the interests of the shareholders and creditors of the company. The provisional judicial management order usually provides for a moratorium so as to give the company a breathing space. Any funds received by the provisional judicial manager must be applied in payment of the costs of the judicial management and the claims of post-judicial-management creditors. Only then, insofar as circumstances permit, can payment be made toward the claims of *pre-judicial-* management creditors.

On the return day of a provisional judicial management order the court must, before making its order, consider:

(a) the opinion and wishes of the creditors and members of the company; (b) the report of the

provisional judicial manager;

(c) the number of creditors who did not prove claims at the first meeting of creditors and the amounts and nature of their claims;

(d) the report of the Master; and

(e) the report of the Registrar of Companies.

If the judicial management is successful, the judicial manager must apply to court for the cancellation of the judicial management order and for directions concerning resumption of the management and affairs of the company. Conversely, if it appears to the judicial manager that the judicial management is unsuccessful, he must apply to court for the cancellation of the judicial management order and for an order to wind up the company.

Judicial management is not available to close corporations.

In practice, judicial management is extremely rare and a successful judicial management is almost unheard of. As a result, the judicial management regime is completely untested.

**Scheme of Arrangement**<sup>197</sup>

The scheme of arrangement procedure is discussed in detail in Principle B4.

Section 395 of the Companies Act 28 of 2004 authorizes a company which is able to pay its debts and is or is about to be wound up, to enter into an arrangement with its creditors. That arrangement is binding on the company, if sanctioned by a resolution of its members, and if acceded to by three-fourths in number and value of the creditors of the company, on the creditors. Any creditor or member of the company may, within 21 days of its completion, bring the arrangement under review by the court, which may amend, vary, set aside or confirm the arrangement as it thinks fit.

In the case of a close corporation which is being wound up and unable to pay its debts, Section 72 of the Close Corporations Act 26 of 1988 provides that the members of the corporation may at any time after the first meeting of creditors submit to the liquidator a written offer of composition, signed by the members holding more than fifty per cent of members' interests in the corporation. The operation of such composition is modelled on the composition procedure under Insolvency Act 24 of 1936 (explained in more detail below).

The use of the scheme of arrangement under Section 395 of the Companies Act 28 of 2004 or the composition under Section 72 of the Close Corporations Act 26 of 1988 is extremely rare.

**Reconstruction and amalgamation**<sup>198</sup>

Section 319 of the Companies Act 28 of 2004 provides machinery for facilitating the implementation of a compromise or arrangement proposed in terms of Section 317 of the Companies Act 28 of 2004 for purposes of or in connection with a scheme for the reconstruction of one or several companies or the amalgamation of two or more companies where, under the scheme, the whole or part of the undertaking or property of the company involved in the scheme is to be transferred to another company.<sup>199</sup> The court is empowered, if application is made to it under Section 317 the Companies Act 28 of 2004 to sanction the scheme, to make provision for all (or any) of the following matters:

- (a) the transfer of the whole or any part of the undertaking, property and liabilities of the transferor company to the transferee company;<sup>200</sup>
- (b) the allotment or appropriation by the transferee company of shares or debentures or other like interests in that company which under the scheme are to be allotted or appropriated by that company to or for any person;<sup>201</sup>

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<sup>197</sup>See *Law of South Africa (LAWSA), Volume 4(3) - First Reissue Volume*, para. 86. See also para. 59: An "arrangement" is a much wider class of agreement not involving any dispute or difficulty in enforcement which may be compromised; the only difficulty being getting the parties to agree. In this context the term "arrangement" extends to arrangements of the widest character. Despite the context in which the word is used, its meaning is not limited to something analogous to "compromise". Thus, for example, use may be made of an arrangement to provide for a special or alternative method of liquidating a company when the company is already in liquidation; or as a means of effecting a takeover. Indeed, "*so wide a meaning does the word bear that an arrangement need not, when initially mooted, be legally binding in the sense of formally amounting to a contract or agreement*".

<sup>198</sup>See *Law of South Africa (LAWSA), Volume 4(3) - First Reissue Volume*, para. 87.

<sup>199</sup>See Section 319(1) of the Companies Act 28 of 2004.

<sup>200</sup>See Section 319(1)(a) of the Companies Act 28 of 2004.

(c) the continuation by or against the transferee company of any legal proceedings pending by or against the transferor company;<sup>202</sup>

(d) the dissolution, without winding-up, of the transferor company,<sup>203</sup> but not until after transfer in due form of all its property and liabilities;<sup>204</sup>

(e) the provision to be made for dissenters who signify their dissent within such time and in such manner as the court may direct;<sup>205</sup> and

(f) such incidental, consequential and supplemental matters as may be necessary to ensure the full and effective carrying out of the reconstruction or amalgamation.<sup>206</sup>

Both the transferor company and the transferee company must be companies within the meaning of the Act.<sup>207</sup>

**Composition under the Insolvency Act 24 of 1936**

It must be pointed out that the provisions of the Insolvency Act 24 of 1936 in regard to a compromise under that Act are not applicable to compromises under Section 317 of the Companies Act 28 of 2004 in the case of a company being wound up and unable to pay its debts.<sup>208</sup>

A debtor whose estate has been sequestrated may avoid the process of liquidation and distribution and curtail the period of his insolvency by making a composition with his creditors in terms of the Insolvency Act 24 of 1936.

**Submission of offer to trustee and creditors**

At any time after the first meeting of creditors of an insolvent estate,<sup>209</sup> the insolvent may submit to the trustee of his estate a written offer of composition.<sup>210</sup> If the trustee considers

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<sup>201</sup>See Section 319(1)(b) of the Companies Act 28 of 2004.

<sup>202</sup>See Section 319(1)(c) of the Companies Act 28 of 2004.

<sup>203</sup>See Section 319(1)(d) of the Companies Act 28 of 2004.

<sup>204</sup>See Section 319(2) of the Companies Act 28 of 2004.

<sup>205</sup>See Section 319(1)(e) of the Companies Act 28 of 2004.

<sup>206</sup>See Section 319(1)(f) of the Companies Act 28 of 2004.

<sup>207</sup>See Section 319(1) of the Companies Act 28 of 2004.

<sup>208</sup>See *Law of South Africa (LAWSA), Volume 4(3) - First Reissue Volume*, para. 86, foot note 11: “*Smith v Mann* 1984 1 SA 791 (W), where it was held that sec 339 of the Companies Act ... does not render applicable to a compromise under sec 311 (predecessor to sec 317) the provisions in sec 141 of the Insolvency Act... in regard to the buying off of opposition to an offer of composition under ss 119–120 of that Act. In *Ilic v Parginos* ... 801–802 it was pointed out that, notwithstanding a similarity in substance between s 311 of the Companies Act ... and ss 119 and 120 of the Insolvency Act ... there are fundamental differences between an offer of compromise under s 311 of the Companies Act ... and an offer of composition under s 119 of the Insolvency Act ... S 311 of the Companies Act ... applies to both solvent companies and to companies in liquidation; an offer under s 311 can be directed to a wide spectrum of creditors or members or any class of either; and there is scope for the inclusion of certain creditors and members and the exclusion of others. By contrast, ss 119 and 120 of the Insolvency Act ... apply only on insolvency, and an offer of composition includes all concurrent creditors without exceptions and binds all creditors”.

<sup>209</sup>The holding of the first meeting of creditors with its concomitant election and appointment of a trustee is a condition precedent to the submission of an offer of composition by an insolvent.

<sup>210</sup>See Section 119(1) of the Insolvency Act 24 of 1936.

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that the offer will probably be acceptable to the creditors, he must immediately post in a registered letter or deliver to every proved creditor a copy of the offer with his report on it.<sup>211</sup> If he considers that there is no likelihood that creditors will accept the offer, he must inform the insolvent that the offer is not acceptable and that he does not propose to send it to creditors. The insolvent has a right of appeal to the Master<sup>212</sup> who, after considering a report from the trustee, may direct the trustee to send a copy of the offer to every proved creditor.<sup>213</sup>

On sending a copy of the offer to creditors, the trustee must simultaneously convene and give notice of a meeting of creditors for the purpose of considering the offer and any other matter mentioned in the notice.<sup>214</sup>

The date of the meeting must be not earlier than 14 days, and not later than 28 days, after posting or delivery of the notice.<sup>215</sup> A meeting so convened is a general meeting as contemplated by the Act<sup>216</sup> and, hence, must be convened in the manner prescribed, namely, by publication of notice in the *Government Gazette* and one or more newspapers circulating in the district in which the insolvent resides.<sup>217</sup> The notice must include a specific reference to the offer of composition as a matter to be dealt with at the meeting.

*Terms of the composition*

The composition normally provides that, on acceptance, the insolvent will be re-invested with his assets and released from further liability in respect of his debts. The Act controls the terms of the composition to some extent:

(a) If security is to be given, its nature must be fully specified and, if it is to consist of a surety bond or guarantee, every surety must be named.<sup>218</sup> It is not the function of the trustee to investigate whether the security is adequate.

(b) The offer may not be accepted if it contains a condition under which any creditor may obtain, as against another creditor, any benefit to which he would not have been entitled upon the distribution of the estate in the ordinary way.<sup>219</sup> “Creditor”, in this context, includes a creditor who has not proved a claim.<sup>220</sup>

(c) A condition which makes the offer of composition subject to the insolvent’s rehabilitation is of no effect.<sup>221</sup> The question of rehabilitation must be judged on its merits and cannot flow directly from the composition.

*Acceptance of offer*

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<sup>211</sup>See Section 119(2) of the Insolvency Act 24 of 1936.

<sup>212</sup>See Section 119(3) of the Insolvency Act 24 of 1936.

<sup>213</sup>See Section 119(4) of the Insolvency Act 24 of 1936.

<sup>214</sup>See Section 119(5) of the Insolvency Act 24 of 1936.

<sup>215</sup>See Section 119(6) of the Insolvency Act 24 of 1936.

<sup>216</sup>See Section 41 of the Insolvency Act 24 of 1936.

<sup>217</sup>See Section 40 of the Insolvency Act 24 of 1936.

<sup>218</sup>See Section 119(7) of the Insolvency Act 24 of 1936.

<sup>219</sup>See Section 119(7) of the Insolvency Act 24 of 1936.

<sup>220</sup>See Section 119(8) of the Insolvency Act 24 of 1936.

<sup>221</sup>See Section 119(7) of the Insolvency Act 24 of 1936.

	<p>To give rise to a binding composition, the offer must be accepted by not less than three-fourths in value and three-fourths in number of the votes of all proved creditors.<sup>222</sup> A composition that does not comply with this provision is void.<sup>223</sup> Since a composition may, in effect, amount to a compulsory novation inflicted on a dissenting minority by majority creditors, the provisions of this section<sup>224</sup> are restrictively construed and must be strictly complied with. A creditor who has lodged his claim must be permitted to prove it before the offer of composition is considered and to vote for or against the acceptance of the offer. There is nothing in the Act to prohibit the adjournment of the meeting in order to afford creditors an opportunity of considering the offer.</p> <p>The motive prompting creditors to accept the offer of composition is important since the court may set aside an acceptance induced by an improper motive. The spirit permeating the whole concept of a statutory composition with creditors is that the composition should be for the benefit of creditors generally and in the interest of the estate. The position of the majority of creditors is a very strong one; that of the minority is weak. The legislature has given great power to the majority, but this power must be exercised <i>bona fide</i> in the interests of the creditors and not from motives of kindness to the debtor. It would appear from the authorities that an acceptance induced by motives of pity or benevolence towards the insolvent is void. A resolution passed under such circumstances is, to use the apt phrase of James LJ, “<i>a mere sham resolution</i>”.<sup>225</sup> Where an offer of composition has been accepted by such a resolution it has, in fact, not been accepted at all and the provisions of the statute on the effect of the acceptance do not become operative.</p> <p>As all of the above procedures are rarely used, there is no practice to confirm the length of time needed to complete each procedure.</p>
<p><b>Assessment</b></p>	<p>It is widely recognized that the law and practice of reorganization of distressed businesses in Namibia has not developed as an effective alternative to liquidation. Informal or semi-formal restructurings via schemes of arrangement under the Companies Act 28 of 2004 may take place from time to time. But formal restructuring via the judicial management procedure under the Companies Act 28 of 2004 is almost unheard of. In fact the judicial management regime does not qualify as a reorganization proceeding under international standards because it lacks certain crucial features relating to the promotion of a formal restructuring plan, although a judicial manager has power to seek to promote a formal restructuring plan.</p> <p>In practice, liquidation becomes the natural ‘solution’ to distressed businesses, regardless of their viability. Another important issue is that judicial management tends to be considered too late, when the financial and economic situation of the company has deteriorated to a point where liquidation may be inevitable. The lack of proper incentives for debtors may be one of the explanations for the lack of timely use of judicial management.</p> <p>However, some fundamental issues have prevented the reorganization regime from achieving its full potential. First of all, it does not appear to exist enough coordination among the different restructuring mechanisms available to distressed companies. The scheme of arrangement, judicial management, and composition are disconnected mechanisms under the current insolvency and restructuring regime. The result of this patchwork of procedures is that a true formal reorganization procedure is missing in the Namibian framework.</p> <p>The scheme of arrangement has found to be lacking in some of the elements that would</p>

<sup>222</sup>See Section 119(7) of the Insolvency Act 24 of 1936.

<sup>223</sup>See *Prinsloo v Van Zyl* 1967 2 All SA 118 (T).

<sup>224</sup>See *Blou v Lampert & Chipkin* 1970 2 All SA 156 (T).

<sup>225</sup>See *Re Terrell* 1876 4 Ch 293, 296.



	<p>make it a more effective restructuring tool (see Principle B4), but it is fair to say that the scheme also possesses some of the basic features of a sound reorganization procedure. The scheme of arrangement requires the production of disclosure or explanatory statement to accompany a reorganization plan to enable creditors to make an informed decision about the plan; creditors are separated into classes voting purposes; and a scheme, once approved, binds all creditors and/or shareholders whether or not they voted for it. However, a scheme of arrangement does not possess the characteristics of a full formal reorganization procedure, and is better understood and classified as a hybrid restructuring procedure.</p> <p>There are a number of additional technical issues that are worth noting:</p> <ul style="list-style-type: none"> <li>-The scheme of arrangement procedure is not available to close corporations which are the dominant form of business entity.</li> <li>-The initiation of a scheme of arrangement as such does not trigger any moratorium on proceedings against the debtor (see Principle C5).</li> <li>-The provisions regulating the scheme of arrangement are skeletal and many issues remain to be decided by the court. For instance, it is not clear if the position is that where the rights of a creditor are not modified by a scheme, that creditor is not entitled to vote on the scheme. It is also not clear if a scheme may bind all creditors who are “out of the money” or ‘under water’ (despite their collective opposition) on the basis that they have no economic interest. As the scheme procedure is untested, the court’s approach to contested schemes is hard to predict and this in turn creates significant legal uncertainty.</li> <li>-Although it is true that a scheme of arrangement may be used in conjunction with judicial management which is a restructuring tool and may trigger a moratorium on proceedings against the debtor, judicial management has fallen into desuetude.</li> </ul> <p>Indeed, judicial management would be the procedure that would have to perform the function of a full formal reorganization procedure under Namibian law, but there is consensus among financial and legal operators that judicial management has failed to perform such function in the Namibian insolvency system. The reasons for the failure of the procedure can be found in the inadequacy of the procedure itself –which is basically a judicially controlled administration of the company, without the conclusion of a plan that would ensure the continuity of the business after having been restructured-; and in the high costs associated with the use of judicial management. Stakeholders report that the costs of judicial management are too high relative to the size of typical business entities in Namibia. In these circumstances, invoking judicial management may paradoxically quicken the route to liquidation.</p> <p>Finally, the composition procedure, which can be invoked only within a formal liquidation proceeding, is unlikely to perform a real reorganization function. As liquidation is usually already the last resort, businesses being wound up are unlikely to be viable enough to be successfully restructured via a composition.</p>
<p><b>Comment</b></p>	<p>Having an insolvency regime that promotes reorganization in a fair manner produces an environment conducive to rescuing distressed but viable businesses, with positive results for the protection of jobs and investments. The current Namibian regime calls for reform to reflect international best practice. Particular consideration may be given to the following aspects:</p> <ul style="list-style-type: none"> <li>-Reinforcing the scheme of arrangement will provide debtors and creditors with a hybrid restructuring mechanism with elements of formal reorganization and elements of informal debt restructuring. The following changes could be introduced to the scheme of</li> </ul>

arrangement (see also Principle B4):

-providing for an automatic moratorium on proceedings against the company upon the formal initiation of a scheme of arrangement (e.g. an application to the court for an order for the summoning of meetings in respect of a scheme of arrangement) and an application to the court for a judicial arrangement order (see Principle C5);

-strengthening the scheme of arrangement regime by clarifying the position of creditors whose claims would not be impaired by the scheme and clarifying the constitution of classes of creditors (see also Principle B4 and Principle C12);

-making the scheme of arrangement procedure available to close corporations;

-adapting the scheme of arrangement procedure with a view to making it available to unincorporated partnerships. This would, inter alia, require treating unincorporated partnerships as legal entities for the purposes of schemes of arrangement.

The reforms of the scheme of arrangement and the introduction of an expedited reorganization procedure would represent important tools for the restructuring of distressed enterprises in Namibia (see Principle B4).

-Judicial management should be revisited to transform it into a formal reorganization procedure in compliance with the international insolvency standard and in particular with this Principle C14. It is possible for the judicial management regime to be transformed to include elements regarding the promulgation of a formal restructuring plan, and such elements should track the scheme of arrangement procedure in order to avoid inconsistencies. This requires attention to a number of aspects in the regulation of the procedure, if it is to be retained as the main formal procedure to reorganize businesses.

-A reorganization procedure should possess the following characteristics:

-Access to the process should be quick and easy (see also Principle C4), and the process should provide a negotiation framework where all parties and interests are dealt fairly (see World Bank Principle C14.1).

-The reorganization plan is at the center of the reorganization proceedings. The law should include rules for the presentation and contents of a reorganization plan (see recommendations 139, 140 and 144 of the UNCITRAL Legislative Guide on Insolvency Law); the plan must be accompanied by a disclosure statement, and both the plan and the disclosure statements should be accessible to creditors and equity holders (recommendations 140, 141 and 142 of the UNCITRAL Legislative Guide on Insolvency Law). The procedure should establish voting mechanisms, and classification of creditors in classes, with the important proviso that creditors unaffected by the plan will not be entitled to vote, and, symmetrically, that all creditors affected by the plan will have the opportunity of voting (see recommendations 145-149 of the UNCITRAL Legislative Guide on Insolvency Law). There are different systems for the approval of the plan, but the common denominator must be the existence of safeguards and protections for creditors who are in the minority – the system should ensure that creditors will receive at least what they would have received in a liquidation of the company, and must also guarantee that the hierarchy of claims is respected in the distribution of payments corresponding to the reorganization plan. For voting purposes, classes of creditors may be provided with voting rights weighted according to the amount of a creditor's claim. Claims and voting rights of insiders should be subject to special scrutiny and treated in a manner that will ensure fairness. Plan approval should be based on clear criteria aimed at achieving fairness among similar creditors, recognition of relative priorities and majority acceptance, while offering opposing creditors or classes a dividend equal to or greater than they would likely receive in a liquidation proceeding (World Bank Principle C14.3).

-The plan may or may not be subject to confirmation by the court, but in any case

	<p>creditors should be able to challenge a confirmed or approved plan, especially on the grounds of fraud (see recommendations 152-154 of the UNCITRAL Legislative Guide on Insolvency Law; World Bank Principle C14.6). The law should permit the amendment of a plan following the established approval procedures (recommendations 155-156 of the UNCITRAL Legislative Guide on Insolvency Law; World Bank Principle C14.4). The plan may also include supervision mechanisms (recommendation 157 of the UNCITRAL Legislative Guide on Insolvency Law). The law should include rules that govern the conversion of a reorganization into a liquidation and the consequences of the failure to implement the reorganization plan (recommendations 158-159 of the UNCITRAL Legislative Guide on Insolvency Law; World Bank Principle C14.4). On the other hand, completion of a reorganization plan should result in the discharge of the debt and the continuation of the enterprise’s business under normal conditions (World Bank Principle C14.5).</p> <p>Apart from these observations there are several technical issues in particular that can be addressed with the following suggestions:</p> <ul style="list-style-type: none"> <li>-reducing the entry threshold for judicial management from “reasonable probability” to “reasonable prospect” that judicial management would enable the debtor to become a successful concern (see Principle C4);</li> <li>-reducing a judicial manager’s costs in order to reduce the overall cost of judicial management, perhaps by aligning the scale of a judicial manager’s remuneration to that of a liquidator (see Principle D8);</li> <li>-eliminating the phase of provisional judicial management, which may also serve to reduce the overall costs;</li> <li>-clarifying and strengthening the executory contract regime in judicial management (see Principle C10);</li> </ul> <p>-Finally, the composition presents itself as a solution available in liquidation procedures, and its scope and structure may be expanded to extend its advantages to all potential debtors. This could be achieved by adapting the current composition procedure under the Insolvency Act 24 of 1936 with a view to making it available to individuals prior to the commencement of formal insolvency proceedings and at the same time strengthening the composition procedure by providing for an automatic moratorium on proceedings against the debtor upon the formal initiation of a composition.</p>
<p><b>Principle C15</b></p>	<p><b>International Considerations</b></p> <p>Insolvency proceedings may have international aspects, and a country’s legal system should establish clear rules pertaining to jurisdiction, recognition of foreign judgments, cooperation among courts in different countries and choice of law. Key factors to effective handling of cross-border matters typically include:</p> <ul style="list-style-type: none"> <li>(i) A clear and speedy process for obtaining recognition of foreign insolvency proceedings;</li> <li>(ii) Relief to be granted upon recognition of foreign insolvency proceedings;</li> <li>(iii) Foreign insolvency representatives to have access to courts and other relevant authorities;</li> <li>(iv) Courts and insolvency representatives to cooperate in international insolvency proceedings;</li> <li>(v) Nondiscrimination between foreign and domestic creditors.</li> </ul>

## **Description**

Cross-border insolvencies are currently still dealt with in terms of private international law.<sup>226</sup>

Under Namibian law,<sup>227</sup> a sequestration order issued by a court in the country in which the insolvent is domiciled has the effect that the trustee of the insolvent estate becomes vested with all the latter's movable property, wherever situated, and accordingly when the estate of a debtor who is domiciled in Namibia is sequestrated by a court in the Republic, the insolvent's movable property situate both in the Republic and in a foreign country will vest in the trustee of his insolvent estate.

Likewise, in terms of Namibian law, where an estate of a debtor domiciled in a foreign country is sequestrated by a Court in that country, movable property of the insolvent estate situate in Namibia will vest in the foreign trustee of his estate.

The position is different, however, in relation to immovable property, where the *lex rei sitae* principle applies, and recognition must be obtained in the foreign jurisdiction if the immovable property is not situated in Namibia. If the local representative fails to obtain this recognition, the immovable property remains vested in the insolvent.

The position was summarized by Innes JP, in *Ex Parte Stegmann*,<sup>228</sup> as follows: “Regarding, then, a decree of insolvency, not as an ordinary judgment, but as an order *sui generis*, we find two rules of private international law clearly applicable. The one is that an order of insolvency duly made at the domicile of a debtor places in the hands of his trustees for administration all the movable property of the insolvent wherever situated. This rule is recognised by almost every civilised nation . . . and it is often justified or explained as being an instance of the effect of the maxim, *mobilia personam sequuntur*. But it seems, to say the least of it, doubtful whether the ex-territorial recognition of a bankruptcy order, as affecting movables, sprang simply from an application of the above maxim. A thorough investigation of the history of the practice would probably show that the fiction which the maxim embodies originated, among other causes, from a desire to justify that placing of foreign movables under the jurisdiction of the judge of an insolvent's domicile which comity and convenience demanded. The second of the rules referred to is that immovable property is governed by the *lex rei sitae*, and that an order of sequestration made by the judge of an insolvent's domicile does not vest in his trustee the right to administer any immovable property located outside the jurisdiction. Such property can only be dealt with by invoking, in some form or other, the authority of the Courts of the territory where it is situated. This rule is approved by the tribunals of the great majority of countries; more particularly, it has the sanction of the laws both of England and of Holland.”

However, the fact that an order of sequestration in the jurisdiction of the debtor's domicile vests in his trustee all movable property wherever situate must be distinguished from his right to deal with such property, and does not eliminate the necessity for him or her to obtain assistance from a foreign court where such property is situate for the purposes of the administration of such property. Whereas in the case of movable property recognition is regarded as a mere formality, recognition in the case of immovable property is a necessity

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<sup>226</sup>See generally Meskin, *Insolvency Law, LexisNexis, Service Issue 34*, Chapter 17, para. 17.2 and the authorities there collected.

<sup>227</sup>As in South African law, due to the convergence of the two legal systems and their continued geometry as explained in Principle A1 above.

<sup>228</sup>See *Ex Parte Stegmann*, 1902 TS 40.

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and the courts are accorded discretion to reject or approve an application for recognition.

Where the order of sequestration is made by a court other than one in the country of the debtor's domicile, at common law, neither immovable nor movable property owned by the insolvent at the date of sequestration of his estate, or acquired by him at a date thereafter, which is situated in a foreign jurisdiction, vests in the trustee of his estate. In order to administer any such property, whether vested in him or not, a local trustee ordinarily would require recognition as such under the relevant foreign law. The same principle applies in relation to property situate in the Republic belonging to a foreign insolvent, i.e., in order effectively to administer such property, his (foreign) trustee must apply for recognition to a court in the Republic.

With regard to property situated in a foreign jurisdiction, the principles of private international law apply. These rules apply where a local representative applies for recognition in a foreign jurisdiction to enable him or her to deal with property of the insolvent estate situated outside the borders of Namibia (an "outward-bound" situation), and also where a foreign representative applies for recognition in Namibia (an "inward-bound" situation) to deal with property situate in Namibia.

In *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd*<sup>229</sup>, the Court held (dealing with the South African position, which is similar to the Namibian one) that it is imperative for the foreign representative of a *juristic person* to apply for recognition where he has to deal with either immovable property or movable property within South Africa.

After recognition has been obtained, a foreign representative may, in principle and in terms of the court order, deal with local assets and related matters such as interrogations. A Namibian court may impose conditions on the foreign representative in order to safeguard the rights and interests of local creditors.<sup>230</sup> If recognition is refused by a Namibian court, or if the foreign representative does not apply for recognition, a foreign creditor may apply for the sequestration or winding-up (as the case may be) of the estate of the debtor in Namibia.

In the case of a Namibian sequestration order, the local representative may seek to recover assets situated in a foreign jurisdiction. In this respect, the laws and procedures of the foreign jurisdiction must be complied with.

In order to be recognized as such in Namibia, a foreign representative must apply to the High Court for recognition and assistance. When the rights of a third party (for example a local creditor) may be affected by the application, such person must be notified of that application. In appropriate circumstances, a rule *nisi* may also be issued before the order becomes final.

However, it seems the Namibian Court retains an unfettered discretion to recognize foreign orders and appointments. In *Ex parte Stegmann*<sup>231</sup>, Innes JP, while accepting this principle, stated: "*But on the other hand, the same court, acting from motives of comity or convenience, is equally justified in allowing the order of the judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of such order. The matter is entirely one for its own discretion.*"

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<sup>229</sup>See *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd* 1998 (3) SA 175 (SCA).

<sup>230</sup>See *Ex parte Steyn* 1979 (2) SA 309 (O) at 312 F.

<sup>231</sup>See *Ex Parte Stegmann*, 1902 TS 40.

	<p>It must be noted however that foreign bankruptcy orders cannot be treated on exactly the same footing as the enforcement of foreign judgments in terms of the Enforcement of Foreign Civil Judgments Act 28 of 1994, since a foreign bankruptcy order does not merely settle a dispute between litigants but also affects the rights of third parties who were not parties before the foreign court. Furthermore, foreign proceedings may have been based on court orders or alternative procedures to initiate a bankruptcy procedure. It may well be that a foreign representative will not be allowed to act in Namibia in such a capacity before his or her appointment has been recognized by the High Court.</p>
<p><b>Assessment</b></p>	<p>Although under the common law it is possible for recognition to be granted to foreign insolvency representatives and proceedings, the common law regime is entirely discretionary and the lack of precedents entails significant legal uncertainty. For example, it is not clear what relief would be available to the foreign insolvency representatives once the foreign insolvency proceedings are recognized.</p>
<p><b>Comment</b></p>	<p>The increasing interrelationship between Namibia and other economies, as well as the constantly growing mutual trade regionally and globally, increases the likelihood and expected frequency of insolvency cases with foreign elements. To promote coordination between jurisdictions and facilitate the provision of assistance in the administration of insolvency proceedings originating in Namibia or in a foreign country, the insolvency law should contain modern rules on cross-border insolvency.</p> <p>Consideration should be given to the adoption of the Model Law on Cross-Border Insolvency Proceedings prepared by UNCITRAL. The Model Law, which constitutes international best practice, would increase co-operation between Namibian courts and others where the debtor's assets were located; would grant access to Namibian courts to representatives of foreign insolvency proceedings and creditors; would accord recognition in Namibia to certain orders issued by foreign courts; and would grant relief to assist foreign insolvency proceedings.</p>
<p><b>Principle C16</b></p>	<p><b>Insolvency of Domestic Enterprise Groups</b></p> <p><b>C. 16. 1.</b> Procedural Coordination. The system should specify that the administration of insolvency proceedings with respect to two or more enterprise group members may be coordinated for procedural purposes. The scope and extent of the procedural coordination should be specified by the court.</p> <p><b>C. 16. 2.</b> Post-commencement Finance. The system should permit an enterprise group member subject to insolvency proceedings to provide or facilitate post-commencement finance or other kind of financial assistance to other enterprises in the group which are also subject to insolvency proceedings. The system should specify the priority accorded to such post-commencement finance.</p> <p><b>C. 16. 3.</b> Substantive Consolidation. The insolvency system should respect the separate legal identity of each of the enterprise group members. When substantive consolidation is contemplated, it should be restricted to circumstances where: (i) assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or (ii) the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose. The court should be able to exclude specific claims and assets from an order of consolidation. In the event of substantive consolidation, the system should contemplate an adequate treatment of secured transactions,</p>

	<p>priorities, creditor meetings, and avoidance actions. The system should specify that a substantive consolidation order would cause the assets and liabilities of the consolidated enterprises to be treated as if they were part of a single estate; extinguish debts and claims as amongst the relevant enterprises; and cause claims against the relevant enterprises to be treated as if they were against a single insolvency estate.</p> <p><b>C. 16. 4.</b> Avoidance actions<sup>232</sup>. The system should authorise the court considering whether to set aside a transaction that took place among enterprise group members, or between any of them and a related person, to take into account the specific circumstances of the transaction.</p> <p><b>C. 16. 5.</b> Insolvency Representative. The system should permit a single or the same insolvency representative to be appointed with respect to two or more enterprise group members, and should include provisions addressing situations involving conflicts of interest. Where there are different insolvency representatives for different enterprise group members, the system should allow insolvency representatives to communicate directly and to cooperate to the maximum extent possible.</p> <p><b>C. 16. 6.</b> Reorganization Plans. The system should permit coordinated reorganization plans to be proposed in insolvency proceedings with respect to two or more enterprise group members. The system should allow enterprise group members not subject to insolvency proceedings to voluntarily participate in a reorganization plan of other group members subject to insolvency proceedings.</p>
<p><b>Description</b></p>	<p>Namibian law is silent on whether an enterprise group may conduct coordinated insolvency proceedings. In particular, it is silent on the following issues: (i) the possibility of procedural coordination of insolvency proceedings with respect to two or more enterprise group members; (ii) the provision of financing by an entity subject to insolvency proceedings to another group entity subject to insolvency proceedings; (iii) substantive consolidation; (iv) the appointment of a common insolvency representative with respect to two or more enterprise group members; and (v) the coordination of reorganization plans with respect to two or more enterprise group members. There is also no special provision dealing with the avoidance of intra-group transactions.</p> <p>Nevertheless, there are some provisions in legislation regulating financial institutions services, pertaining to prudentially regulated institutions, which deal with associates and affiliates of such institutions in the context of insolvency proceedings, although these provisions fall outside the scope of the analysis of this report.<sup>233</sup></p>
<p><b>Assessment</b></p>	<p>There is no provision on enterprise group insolvency. However, given the small number of insolvency practitioners in Namibia, coordination of insolvency proceedings with respect to group members might happen through the happenstance of appointment of a common insolvency representative with respect to two or more enterprise group members. Namibian corporate structures have not reached a high level of sophistication yet, in any case.</p>
<p><b>Comment</b></p>	<p>As businesses expand, they are likely to generate corporate groups with different members being responsible for different business lines. Where insolvency proceedings are needed in</p>

<sup>232</sup>See Principle C11.

<sup>233</sup>See for example, Section 56 of the Banking Institutions Act 2 of 1998, which is concerned with the powers of the Bank if a banking institution, affiliate or associate is insolvent or likely to become insolvent. Moreover, in terms of section 12E, no restructuring of companies within a group, of which a banking institution or a controlling company or a subsidiary of banking institution is a member, may be effected without the prior written approval of the Bank.

respect of more than one group entity, it could be more efficient and in the interests of all creditors for there to be procedural coordination of insolvency proceedings while respecting each entity's separate legal personality. Procedural coordination may not only facilitate the obtaining of comprehensive information on the business operations of the group members subject to insolvency proceedings, but also assist in the valuation of assets, in the identification of creditors and other parties in interest, and in avoiding duplication of effort.

Procedural coordination could start with a joint application for commencement of insolvency proceedings and include the following matters:

- combination of court hearings and meetings;
- preparation of a single list of creditors and other parties in interest for the provision of notice and coordination of the provision of notice;
- establishment of joint deadlines;
- agreement on a joint claims procedure and coordinated realization and sale of assets;
- coordination of avoidance proceedings; and
- the holding of joint creditor meetings or coordination among creditor committees.

International experience suggests that procedural coordination of insolvency proceedings is most efficient if the insolvency proceedings are managed by the same insolvency representatives subject to the same court supervision.

Similarly, having coordinated reorganization plans may help the fruition of all the reorganization plans.

While it may generally be expected that a group member subject to insolvency proceedings would not have the ability to provide post-insolvency financial assistance to another member, there may be circumstances where it would be both possible, and desirable, particularly when the interests of the enterprise group are considered as a whole. The provision of post-insolvency finance to other insolvent group members may facilitate the continued operation or survival of all the entities concerned, drawing on the synergy of the group. Further, the availability of post-commencement finance may be even more important in the group context than it is in the context of single-debtor insolvency proceedings. If there are no ongoing funds there is very little prospect of reorganizing an insolvent enterprise group or selling all or parts of it as a going concern. The economic impact of that failure is likely to be much greater, especially in large groups, than it would be in the case of a single debtor.

Avoidance provisions applicable to intra-group transactions ought to take account of two principles. First, they could seek to protect intra-group transactions in the interests of the group as a whole, on the basis that they are normal 'ordinary course' business transactions. Secondly, they could seek to subject intra-group transactions to particular scrutiny and a greater likelihood of avoidance because of the relationship between transacting parties as group members and the provisions of the insolvency law applicable to related person transactions. In some cases, a stricter regime may be justified on the basis that related persons are more likely to be favored and, because they tend to have the earliest knowledge of when a particular group member is in fact in financial difficulty, they also have a greater opportunity to take advantage of that situation.

Substantive consolidation permits the court, in insolvency proceedings involving two or more enterprise group members, to disregard the separate identity of each group member in appropriate circumstances and consolidate their assets and liabilities, treating them as though held and incurred by a single entity. The assets are thus treated as if they were part of a single estate for the general benefit of all creditors of the consolidated group members. With appropriate safeguards, substantive consolidation should be permitted in



	<p>some limited circumstances to achieve efficiency and fairness among all creditors, such as where the assets and liabilities of the group members are so intermingled that they cannot be separated without disproportionate expense, and where the group members are engaged in a fraudulent scheme without legitimate business purpose and hence substantive consolidation may perform the function of rectifying the scheme.</p>
<p><b>Principle C17</b></p>	<p><b>Insolvency of International Enterprise Groups</b></p> <p><b>C. 17. 1.</b> Access to court and Recognition of Proceedings. In the context of the insolvency of enterprise group members, the system should provide foreign representatives and creditors with access to the court, and for the recognition of foreign insolvency proceedings, if necessary.</p> <p><b>C. 17. 2.</b> Cooperation involving courts. The system should allow the national court to cooperate to the maximum possible extent with foreign courts or foreign representatives, either directly or through the local insolvency representative. The system should permit the national court to communicate directly with, or to request information or assistance directly from, foreign courts or representatives.</p> <p><b>C. 17. 3.</b> Cooperation involving insolvency representatives. The system should allow insolvency representatives appointed to administer proceedings with respect to an enterprise group member to communicate directly and to cooperate to the maximum extent possible with foreign courts and with foreign insolvency representatives in order to facilitate coordination of the proceedings.</p> <p><b>C. 17. 4.</b> Appointment of the insolvency representative. The system should allow, in specific circumstances, for the appointment of a single or the same insolvency representative for enterprise group members in different States. In such cases, the system should include measures addressing situations involving conflicts of interest.</p> <p><b>C. 17. 5.</b> Cross-border insolvency agreements. The system should permit insolvency representatives and other parties in interest to enter into cross-border insolvency agreements involving two or more enterprise group members in different States in order to facilitate coordination of the proceedings. The system should allow the courts to approve or implement such agreements.</p>
<p><b>Description</b></p>	<p>There is no general law dealing specifically with the insolvency of international enterprise groups. The law is silent on cross-border insolvency agreements and the coordination of proceedings in relation to corporate groups.</p>
<p><b>Assessment</b></p>	<p>There is a complete absence of law and practice in respect of the cross-border treatment of insolvent international corporate groups.</p> <p>Based on general principles of common law, the courts could cooperate with foreign courts and foreign representatives based on general principles and comity, but the lack of any statutory basis and the lack of precedent would make that cooperation unpredictable and riddled with practical difficulties.</p>
<p><b>Comment</b></p>	<p>While it may be possible in some instances to treat each group member entirely separately, for many enterprise groups the best result for the different members may be achieved through a more widely based and potentially global solution that reflects the manner in which the group conducted its business before the onset of insolvency and addresses either distinct business units or the enterprise group as a whole, particularly where the business is closely integrated. It is thus desirable that Namibian insolvency law recognize the existence</p>

	<p>of enterprise groups and the need, with respect to cross-border cooperation, for courts to cooperate with other courts and with insolvency representatives, not just with respect to insolvency proceedings concerning the same debtor, but also with respect to different members of an enterprise group. The rules for the treatment of international enterprise groups should be integrated and developed in harmony with the rules dedicated to the treatment of cross-border insolvency in general (see Principle C15).</p>
	<p><b>PART D. IMPLEMENTATION: INSTITUTIONAL &amp; REGULATORY FRAMEWORKS</b></p>
<p><b>Principle D1</b></p>	<p><b>Role of Courts</b></p> <p><b>D1.1</b> Independence, Impartiality and Effectiveness. The system should guarantee the independence of the judiciary. Judicial decisions should be impartial. Courts should act in a competent manner and effectively.</p> <p><b>D1.2</b> Role of Courts in Insolvency Proceedings. Insolvency proceedings should be overseen and impartially disposed of by an independent court and assigned, where practical, to judges with specialized insolvency expertise. Non-judicial institutions playing judicial roles in insolvency proceedings should be subject to the same principles and standards applied to the judiciary.</p> <p><b>D1.3</b> Jurisdiction of the Insolvency Court. The court’s jurisdiction should be defined and clear with respect to insolvency proceedings and matters arising in the conduct of these proceedings.</p> <p><b>D1.4</b> Exercise of Judgment by the Court in Insolvency Proceedings. The court should have sufficient supervisory powers to efficiently render decisions in proceedings in line with the legislation without inappropriately assuming a governance or business administration role for the debtor, which would typically be assigned to the management or the insolvency representative.</p> <p><b>D1.5</b> Role of Courts in Commercial Enforcement Proceedings. The general court system must include components that effectively enforce the rights of both secured and unsecured creditors outside of insolvency proceedings. If possible, these components should be staffed by specialists in commercial matters. Alternatively, specialized administrative agencies with that expertise may be established.</p>
<p><b>Description</b></p>	<p>The main characteristics of the Namibian judiciary are defined by the Constitution. Article 78 of the Namibian Constitution stipulates:</p> <p><i>“(1) The judicial power shall be vested in the Courts of Namibia, which shall consist of:</i>  <i>(a) a Supreme Court of Namibia;</i>  <i>(b) a High Court of Namibia; (c)</i>  <i>Lower Courts of Namibia.</i></p> <p><i>(2) The Courts shall be independent and subject only to this Constitution and the law.</i></p> <p><i>(3) No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require protecting their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.</i></p> <p>In <i>Minister of Justice v Magistrates’ Commission and Another</i> 2012 (2) NR 743 (SC) at para. [22], the Namibian Supreme Court stated:</p> <p><i>“Namibia is a constitutional democracy that upholds the doctrine of separation of powers the rule of law and the independence of the judiciary. These principles presuppose a culture of mutual respect between the executive, the legislature and the judiciary. Given the relationship between the judiciary and the minister, [the minister] would be especially expected to accord such assistance as the judiciary might require to protect its independence, dignity and effectiveness.”</i></p>

	<p>In <i>Mostert v The Minister of Justice</i> 2003 NR 11 (SC) the Supreme Court noted that the principle of the independence of the judiciary that is enshrined in Article 78 of the Namibian Constitution provides ample protection to ensure such independence.</p> <p>Regarding the competence of the courts on insolvency and creditor/debtor litigation, the High Court has competence over all insolvency and commercial enforcement proceedings. The Magistrates Courts have competence only on cases for amounts between 25.000 to 100.000 Namibian Dollars.</p>
<p><b>Assessment</b></p>	<p>The Namibian legal system comprises judges of high quality, largely elected from the members of the bar but the system can perhaps be improved by providing special training for judges – especially in highly specialized commercial matters. As a first point, it may be worth considering whether judges could benefit from the establishment of a cadre of professional clerks, potentially comprising high-achieving law students, who work actively in helping with legal research and writing. This arrangement may be of benefit to both judges and student clerks, who will likely benefit from their experiences with judges. In addition, it would be helpful to allow for greater training for judicial administrative staff. Additional resources in training will increase the qualifications and competencies of those charged with administration – as well as allow for ambitious prospective staff to apply, who might be attracted by the prospect of legal training – as a first step to a career in the law.</p> <p>While judges might be able to hear all types of cases, more difficult, more complex or higher value matters may be better handled by the specialized judges in the absence of specialized courts for instance. The system would benefit from a <i>de facto</i> specialization in commercial law and insolvency and restructuring law, without the need of introducing broad changes in the legislation or the need of creating new courts and classes of judges.</p> <p>There are several important positive aspects in the Namibian institutional framework. The judiciary in Namibia has a strong reputation of independence and integrity and users of the system appreciate the quality of the judges. The effective operation of the insolvency and creditor rights framework relies, to a large extent, on the intervention of the courts. However, the judicial framework to support the operation of an efficient credit environment may be rendered less effective by a challenging workload. Since there is a tendency to take all enforcement matters to the High Court, this may lead to an overburdening of this court, being the only civil court at this level in the country. The introduction of case management and the newly proposed e-filing system may ease the burden in time to come.</p> <p>The Magistrates Courts seem to be struggling with a number of issues like weak administrative support in many instances, and a backlog of cases that have resulted in the court process becoming subject to lengthy delays – hence the preference to take matters rather to the High Court. Namibia does not have a specialized commercial court and the amount of cases may not warrant the introduction of such a court. <i>De facto</i> specialization by judges and the allocation of the more complex matters to those with particular interest and knowledge of such matters may however assist in this regard</p>
<p><b>Comment</b></p>	<p>A firmer structure of specialization in the High Court may strengthen its ability to deal even more effectively with commercial matters but the size of the economy may not warrant the introduction of a separate specialized court in this regard although it may be desirable. The fact that the High Court is based in Windhoek may make it rather</p>

	<p>inaccessible to many parties who may reside far from the court.</p> <p>It seems procedures are underway to make the administration of the High Court more efficient but various problems in the Magistrates' Courts would also need to be addressed.</p>
<p><b>Principle D2</b></p>	<p><b>Judicial Selection, Qualification, Training and Performance</b></p> <p><b>D2.1</b> Judicial Selection and Appointment. Adequate and objective criteria should govern the process for selection and appointment of judges.</p> <p><b>D2.2</b> Judicial Training. Judicial education and training should be provided to judges.</p> <p><b>D2.3</b> Judicial Performance. Procedures should be adopted to ensure the competence of the judiciary and efficiency in the performance of court proceedings. These procedures serve as a basis for evaluating court efficiency and for improving the administration of the process.</p>
<p><b>Description</b></p>	<p>Article 79(1) of the Constitution provides that the Supreme Court consists of a Chief Justice and such additional judges as the President, acting on the recommendation of the Judicial Service Commission, may determine. The Supreme Court is the highest national forum of appeal. It adjudicates, according to Article 79 of the Constitution, appeals emanating from the High Court, including appeals, which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed therein. It also hears matters referred to it by the Attorney General or authorized by an Act of Parliament.</p> <p>Article 80 (1) provides that the High Court consists of a Judge-President and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine. The High Court has original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court also has jurisdiction to hear and adjudicate upon appeals from Lower Courts.</p> <p>All Judges so appointed are to hold office until the age of 65, but the President is entitled to extend the retiring age of any judge until 70<sup>234</sup>. Judges may only be removed from office on the ground of mental incapacity or for gross misconduct and after investigation by the Judicial Service Commission, and then only by the President acting on the recommendation of the Judicial Service Commission. Judges are not specialized and, as a matter of fact, there is a rotation policy in place.</p> <p>Lower Courts are presided over by magistrates or other judicial officers appointed in accordance with procedures prescribed by Act of Parliament.</p> <p>The requirements to become a judge or a magistrate are the following:          -A magistrate needs to have an LLB and undergo six months' training.          -A High Court Judge needs to be an advocate with 5-10 years of experience.</p> <p>The pool of judges in the High Court includes legal specialists of high prestige and long experience, although the number of judges is limited.</p>
<p><b>Assessment</b></p>	<p>Judges in Namibia are seen as having a high level of legal education and practice, showcasing a wide spectrum of interests. However, judges often face a very challenging environment for their work in which a heavy workload and limited administrative support which may discourage professionals for accepting a judgeship. At present, it appears that training remained ad hoc and variable across the bench.</p>

<sup>234</sup>See Article 82(4) of the Constitution.

	<p>Furthermore, there is no specialized division for commercial matters in Namibia (see Principle D1). This may be difficult to introduce but a system whereby complex matters of a commercial nature be reserved for judges with experience in the field may assist in this regard.</p> <p>In case of magistrates' courts it seems that more training in commercial type cases in particular is needed. There also seems to be a need for properly trained administrative staff.</p>
<p><b>Comment</b></p>	<p>Namibia comprises a small and skilled judiciary. Training and resourcing remain critical components of ensuring continuing performance and that court delays are kept to a minimum. In this regard, it may be helpful to introduce compulsory training for judges, or at least make sufficient provision from a resource perspective to help judges attend the training that may be on offer. Training may be more effective if it is targeted also towards judges developing expertise in special areas of the law, such as insolvency and creditor rights.</p> <p>In addition, it may be helpful to consider whether to establish a specialized cadre of commercial judges (see Principle D1). Focused expertise may facilitate the quicker and more trained evaluation of cases, potentially helping to shorten the delays seen in the system.</p>
<p><b>Principle D3</b></p>	<p><b>Court Organization</b></p> <p>The court should be organized so that all interested parties—including the attorneys, insolvency representative, debtor, creditors, public and media—are dealt with fairly, timely, objectively and as part of an efficient, transparent system. Implicit in that structure are firm and recognized lines of authority, clear allocation of tasks and responsibilities, and orderly operations in the courtroom and case management.</p>
<p><b>Description</b></p>	<p>The effective operation of the insolvency and creditor rights framework relies, to a large extent, on the intervention of the courts.</p> <p>Since May 2011, the High Court has introduced judicial case management by virtue of Government Notice No 57 of 13 May 2011.<sup>235</sup> In terms of the rules, a case is assigned to a specific Judge as soon as the pleadings have closed. Invariable cases are assigned as far as possible to Judges with the most expertise in the subject-matter. In any case, there are no Judges specializing in insolvency matters.</p> <p>The impact on the turnover of cases and the quality of jurisprudence in the High Court as a result of implementation of these rules has been significant. Prior to case management implementation, cases took on average between one to four years to complete. Now, however, cases can be determined within a year of having been instituted. More judges have been employed by the High Court and the Judge-President in consultation with the</p>

<sup>235</sup>The objectives of the case management system included *inter alia* in terms of Rule 1A, to ensure the speedy disposal of any action or application, to provide for a court-controlled process in litigation to promote the prompt and economic disposal of any action or application, to curtail proceedings, to identify as soon as practicable firm dates for particular steps as well as for the trial of an action or hearing of an opposed motion.

	<p>Judicial Service Committee has imposed deadlines for the delivery of judgments. It is envisaged that the case management process will speed up the pronouncement of judgments even further in the future. New rules have been drafted in terms of which Judges take control of cases from the moment the founding process is delivered at Court.</p> <p>The Registrar of the High Court is the highest administrative official, responsible for the smooth running of the Court. She prepares daily Court rolls and unopposed motion court rolls. These are circulated in advance to practitioners.</p> <p>The recent reform of the High Court Act by way of the High Court Amendment Act (Act No. 12 of 2013) has included the possibility that the Judge-President of the High Court approves regulations with the goal of speeding up the resolution of processes (Section 39 (1) (e)). The Judge-President has the power <i>“to regulate the control of the litigation process by judges so as to speed up litigation in a fair, just and cost-effective manner, and may prescribe therein the power of a judge -</i></p> <ul style="list-style-type: none"> <li><i>(i) to require the filing of witness statement and the manner of reception of such statement, and may prescribe therein that such witness statement constitutes evidence-in-chief which is in lieu of oral evidence, subject to a party’s right to cross-examine the maker of the statement;</i></li> <li><i>(ii) to appoint court experts;</i></li> <li><i>(iii) to require the electronic filing of process and documents with the court in all proceedings;</i></li> <li><i>(iv) to impose any appropriate sanction for failure by a party to comply with the rules of the court or orders made by the court;</i></li> <li><i>(v) to do all that is necessary or expedient to speed up the litigation process in the court in order to reduce costs of litigation as much as is reasonably practicable”.</i></li> </ul>
<p><b>Assessment</b></p>	<p>While the Namibian legal system places a high constitutional premium on access to the court and in ensuring that legal proceedings are made public quickly and efficiently, access to justice can still be a problem for smaller players, especially those with limited funds to expend on legal costs. This problem is exacerbated by the fact that many creditors prefer to enforce their rights in the High Courts rather than the magistrates’ courts. This is due to the perception amongst many that the magistrates’ courts are less effective and limitations regarding the monetary jurisdiction of these courts. However, affordability remains a concern – especially where cases may take a long time to conclusion.</p> <p>The judicial framework to support the operation of an efficient credit environment may be rendered less effective by a challenging workload. Since there is a tendency to take all enforcement matters to the High Court, this may lead to an overburdening of this court, being the only civil court at this level in the country. The introduction of case management and the newly proposed e-filing system may ease the burden in time to come. The Magistrates Courts seem to be struggling with a number of issues like weak administrative support in many instances, and a backlog of cases that have resulted in the court process becoming subject to lengthy delays – hence the preference to take matters rather to the High Court. Namibia does not have a specialized commercial court and the amount of cases may not warrant the introduction of such a court. <i>De facto</i> specialization by judges and the allocation of the more complex matters to those with particular interest and knowledge of such matters may however assist in this regard.</p> <p>The lack of administrative support is a concern for the future growth of the activity of the judiciary.</p>
<p><b>Comment</b></p>	<p>It would be helpful to determine how access to justice may be ameliorated for the smaller players, particularly those that may not be able to afford the cost of lengthy proceedings. In this case, it would be most helpful to focus on reducing court time which may follow on the introduction of case management and e-filing, reducing the delays seen in the court cases,</p>

	<p>and to ensuring proper allocation of court time to the right court, so that smaller value claims might be heard at the Magistrates’ Courts. The introduction of electronic case management coupled with proper training of judges, magistrates and their staff gain will assist in this regard. (See also Principles D4 and D5). The regulatory powers that the reform of the High Court Act has given to the Judge-President of the High Court may, if properly exercised, provide responses for most of the issues faced by the judiciary.</p> <p>Providing more qualified administrative support to the courts would result in a more effective and efficient judicial system, and in turn, it would increase the confidence in the system by enterprises and financial institutions, both national and foreign.</p>
<b>Principle D4</b>	<p><b>Transparency and Accountability</b></p> <p>An insolvency and creditor rights system should be based upon transparency and accountability. Rules should ensure ready access to relevant court records, court hearings, debtor and financial data and other public information.</p>
<b>Description</b>	<p>All Court documents are public documents, except those where the Court directed the proceedings should be held <i>in camera</i>. As a general rule, all court proceedings take place in open court and in exceptional circumstances, usually upon application by a party; a Judge may order that proceedings must be conducted <i>in camera</i>, normally where minors are involved.</p> <p>Important Court decisions are reported (see Principle D5) and all judgments pronounced are circulated by way of email on or shortly after the day they are delivered.</p>
<b>Assessment</b>	<p>The rights of parties to access the court records and other data are recognized by legislation. The main problem is a practical one: given the centralization of the High Court in Windhoek, and the vast extension of the country, it may be difficult for persons residing in other parts of the country to exercise their rights of access.</p>
<b>Comment</b>	<p>It would be helpful to determine how access to court records and data, generally speaking, can be ameliorated for the smaller players, and this will probably require the development of modern information technology and communication systems. This is part of the broader question of how to improve access to justice for those that may not be able to afford the cost of lengthy proceedings – especially in the High Court. In this case, it would be most helpful to focus on reducing court time, reducing the delays seen in the court cases, and to ensuring proper allocation of court time to the right court, so that smaller value claims might be heard at the Magistrates’ Courts. The new electronic case management system coupled with training of court staff will be beneficial to the system (see also Principles D4 and D5).</p>
<b>Principle D5</b>	<p><b>Judicial Decision Making and Enforcement of Orders</b></p> <p><b>D5.1</b> Judicial Decision Making. Judicial decision making should encourage consensual resolution among parties where possible and otherwise undertake timely adjudication of issues with a view to reinforcing predictability in the system through consistent application of the law.</p> <p><b>D5.2</b> Enforcement of Orders. The court must have clear authority and effective methods of enforcing its judgments.</p> <p><b>D5.3</b> Creating a Body of Jurisprudence. A body of jurisprudence should be developed by means of consistent publication of important and novel judicial decisions, especially by higher courts, using publication methods that are conventional and electronic (where possible).</p>

<p><b>Description</b></p>	<p>The court system encourages ADR solutions as a mechanism to prevent unnecessary litigation. The recent reform of the High Court Act (by means of the High Court Amendment Act 12 of 2013) has introduced the possibility of enacting regulation on the matter, whereby the Judge-President of the High Court may regulate “<i>compulsory alternative dispute resolution mechanisms in certain causes and matters that are before the court, and prescribe therein that –</i></p> <p><i>(i) a judge may order the parties to refer their dispute to any of the prescribed alternative dispute resolution mechanisms; and</i></p> <p><i>(ii) it is only when the alternative dispute resolution is unsuccessful and a certificate in that behalf is issued, that the parties or one of them may set the matter down for hearing or trial”</i> (Section 39 91) (d).</p> <p>Since Namibia is a Constitutional democracy, the rule of law is a fundamental pillar of her democratic practice. All decisions made by Namibian Courts may be enforced through law enforcement agencies. Failure to adhere to decisions will invoke contempt of court proceedings<sup>236</sup>.</p> <p>Cases are regularly published in Namibia. There are published collections of reported cases and also services that provide for on-line access to cases.</p> <p>Statutes are also easily accessible, in printed form or on-line.</p>
<p><b>Assessment</b></p>	<p>By and large, Namibia evidences a sound system in the respect accorded to orders issued by the court and in creating greater certainty for stakeholders through a system for the publication of cases and judgments.</p> <p>There are some challenges in the effective enforcement of court orders, not because of any problem in the definition of the court powers, or the lack of obedience of the court orders, but rather, because of the practical problems that result in delays in the preparation of opinions and in the conclusion of claims (see, especially, Principle A5). The delays in hearing a case, in the speed of administration of the court process, and in mobilizing the enforcement mechanisms available (e.g. sheriffs) in order to give effect to judgments may impact the operation of the whole system. This problem is exacerbated by the fact that Namibia is a vast country and the High Court is based in the capital city, Windhoek. The time taken in the enforcement of a claim has been seen as a discouraging factor in the use of the court, notwithstanding confidence in the quality of the judges on the bench and the availability of judicial precedent. There have been some isolated cases of resistance against</p>

<sup>236</sup> In *Namibia Financial Institutions Supervisory Authority v Christian and Another 2011 (2) NR 537 (HC)* the Court held at para [88] that:

“Civil contempt procedures were recently reviewed by the [South African] Supreme Court of Appeal in the light of the post-constitutional order in that country in *Fakie NO v CCII Systems (Pty) Ltd*. After a thorough survey, Cameron JA (speaking for the majority of that court) succinctly summarized the conclusions reached by the court as follows:

[42] To sum up:

(a) *The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives H constitutional scrutiny in the form of a motion court application adapted to constitutional requirements...*”

And further at para [95]:

“The paramountcy (sic) accorded to the rule of law in the Namibian Constitution underlines the importance to be attached to the obligation on every person to obey a court order unless and until that order is discharged or set aside”.



	orders, in cases of enforcement of mortgages and disputes over customary land. Although statutes are easily accessible, it is often difficult to determine whether a particular provision is in force, due to the lack of official consolidated texts.
<b>Comment</b>	<p>The ability to regulate the use of alternative dispute mechanisms offers the High Court a good possibility of controlling access to the courts and ensuring the most efficient use of judicial resources.</p> <p>The reinforcement of the resources at the disposal of the courts may give effective support to the timely enforcement of court orders. This can have beneficial effects for the whole system of credit protection and insolvency.</p> <p>The publication of consolidated legal texts would increase legal certainty and a better knowledge of the possibilities afforded by the legal system.</p>
<b>Principle D6</b>	<p><b>Integrity of the System</b></p> <p><b>D6.1</b> Integrity of the Court. The system should guarantee security of tenure and adequate remuneration of judges, and personal security for judicial officers and court buildings. Court operations and decisions should be based on firm rules and regulations to avoid corruption and undue influence.</p> <p><b>D6.2</b> Conflict of Interest and Bias. The court must be free of conflicts of interest, bias and lapses in judicial ethics, objectivity and impartiality.</p> <p><b>D6.3</b> Integrity of Participants. Persons involved in a proceeding must be subject to rules and court orders designed to prevent fraud, other illegal activity and abuse of the insolvency and creditor rights system. In addition, the court must be vested with appropriate powers to enforce its orders and address matters of improper or illegal activity by parties or persons appearing before the court with respect to court proceedings.</p>
<b>Description</b>	<p>There are positive aspects in the Namibian institutional framework. The judiciary in Namibia has a strong reputation of independence and integrity and users of the system appreciate the preparation and quality of the judges, especially the judges at the High Court. The conditions of the Magistrates' Courts are variable, and there seems to be a steep difference at all levels between the High Court in Windhoek and the Magistrates' Courts.</p> <p>The Legal Practitioners Act regulates the conduct of lawyers (Legal Practitioners Act 15 of 1995, modified in 1997). The Act punishes unprofessional, dishonorable or unworthy conduct. This includes, for instance, wilfully misleading the court (Section 33(1)(h)). This may result in removal from the roll, after a judicial decision, and a request by the disciplinary committee of the legal profession.</p>
<b>Assessment</b>	<p>The system possesses strong features which should be maintained and reinforced. The judiciary has a high reputation, especially as far as the judges at the High Court are concerned. As the High Court plays a fundamental role in the insolvency and creditor/debtor regime, the reputation and integrity of the High Court judges is of extreme importance.</p> <p>The situation of the Magistrates' Courts does not seem to be so universally good, and part of the explanation may reside in the shortcomings of human and material resources at the courts.</p> <p>There have been incidents –for instance, in administration order procedures- where the ethical conduct of lawyers has been called into question; and the actions of the judiciary and the bodies governing the legal profession have been insufficient to address these issues. It is important to take into consideration that the small number of legal and insolvency practitioners, and the atmosphere of familiarity in which commercial and insolvency</p>

	litigation is conducted, presents some distinct advantages and disadvantages. In a certain sense, the existence of a closed social group implies the development of a self-enforcing discipline in behavior; on the other hand, questionable actions by members of this social group may be condoned by their mere social standing.
<b>Comment</b>	There does not seem to exist any major integrity issues in the functioning of the credit and insolvency system. As the economy grows, however, and the number and complexity of cases will also grow, it is important to have mechanisms in place that will ensure that integrity issues are promptly addressed and resolved. This is even more important in the case of legal practitioners and insolvency practitioners (see also Principle D8).
<b>Principle D7</b>	<p><b>Role of Regulatory or Supervisory Bodies</b></p> <p>The bodies responsible for regulating or supervising insolvency representatives should:</p> <ul style="list-style-type: none"> <li>- Be independent of individual representatives;</li> <li>- Set standards that reflect the requirements of the legislation and public expectations of fairness, impartiality, transparency and accountability; and,</li> <li>- Have appropriate powers and resources to enable them to discharge their functions, duties and responsibilities effectively.</li> </ul>
<b>Description</b>	<p>The Master of the High Court is the supervisory body for insolvency representatives in Namibia. The Master’s office has a number of responsibilities with respect to the oversight of insolvency representatives, notably in relation with the appointment of liquidators (see Principle C6), the conduct of creditors’ meetings and interrogations (see Principle C7) hearing complaints brought against insolvency practitioners and generally overseeing the conduct of the insolvency process. The decisions of the Master are subject to the review of the High Court (see Principle D1).</p> <p>The Master is therefore responsible for the supervision of liquidators and may remove a liquidator for incompetence or fraud on his or her own initiative or on the request of creditors. Where the Master fails to act, any interested person may apply to the court for the removal of a liquidator. Where the legislation prescribes specific duties for the insolvency practitioner, breaches of these duties, where the duty may not have been exercised as stipulated, or where the liquidator may have been liable for misconduct (e.g. inappropriate retention of funds from the estate) may be reported and handled by the office of the Master. There is no formal statutory prescribed complaints procedure but creditors or others affected by improper actions of a liquidator or trustee may submit complaints to the Master of the High Court. However, disciplinary action is extremely rare. The Master of the High Court is responsible for monitoring the performance of trustees and liquidators, basically by revising their statements of accounts.<sup>237</sup></p> <p>The Master has not developed a comprehensive set of standards for the conduct of insolvency administrators in the different insolvency and restructuring procedures.</p>
<b>Assessment</b>	<p>According to legislation, the Master has fundamental function in overseeing the insolvency process and the conduct of insolvency representatives. However, the Master does not have the necessary resources to perform its functions. There is a clear lack of means and staff for the discharge of the functions assigned to the Master by legislation, and this seems to be increasing delays in the conduct of insolvency processes.</p> <p>There are also difficulties facing the administrative apparatus of the office of the Master, evidenced in the communication with other branches of the justice system and the</p>

<sup>237</sup>See Section 60 of the Insolvency Act 24 of 1936.

	<p>government, such as the Deeds Registry and the High Court.</p> <p>The lack of resources also impacts the Master’s ability to supervise and discipline liquidators (see Principle D8). The Master’s Office lacks resources for investigations of the conduct of liquidators, and therefore cannot even determine the facts that could give rise to disciplinary action against insolvency representatives.</p>
<b>Comment</b>	<p>Although the number of cases is still small in Namibia, the Master would need more resources to appropriately discharge its functions in the insolvency system. Better communications with the courts and with other Government agencies, such as the Registry of Deeds and the Companies’ Registry are clearly required to improve the general functioning of the process.</p>
<b>Principle D8</b>	<p><b>Competence and Integrity of Insolvency Representatives</b></p> <p>The system should ensure that:</p> <ul style="list-style-type: none"> <li>- Criteria as to who may be an insolvency representative should be objective, clearly established and publicly available;</li> <li>- Insolvency representatives be competent to undertake the work to which they are appointed and to exercise the powers given to them;</li> <li>- Insolvency representatives act with integrity, impartiality and independence; and</li> <li>- Insolvency representatives, where acting as managers, be held to director and officer standards of accountability, and be subject to removal for incompetence, negligence, fraud or other wrongful conduct.<sup>238</sup></li> </ul>
<b>Description</b>	<p>Namibia has a very small group of insolvency professionals, who are routinely appointed as liquidators in the majority of the cases. It is, at best, an oligopolistic situation. Although the system has worked reasonably well, due to the small number of cases, and the individual qualities of some of these practitioners, the profession is completely unregulated.</p> <p>As a first point, there is no formal set of criteria for determining the qualification, accreditation and supervision of insolvency practitioners. In addition, there is no formal system for developing training for the profession, such that there is no mechanism for entrants to gain experience as part of a robust training program.</p> <p>There are no overarching and standardized rules to ensure competency, integrity and independence of insolvency representatives. If they are members of professional bodies such as law societies or accounting bodies, they must adhere to the codes of ethics of those bodies. However, some practitioners do not even hold membership of bodies with codes of ethics.</p> <p>Actions against insolvency representatives for negligence, fraud or other illegal conduct are virtually unheard of.</p>
<b>Assessment</b>	<p>The lack of a regime for insolvency representatives constitutes a major departure from the international standard. Although the small size of the insolvency practice and the existence of several prestigious professionals may mitigate the situation, the fact is that the insolvency regime is missing a crucial element that would be necessary for its growth and development</p> <p>Although the few practitioners in the jurisdiction have long experience and are very knowledgeable about the insolvency regime, the system does not include the necessary “checks and balances” to avoid the exercise of unfettered discretion by these professionals,</p>

<sup>238</sup>See Principle B2.

	<p>and, in a growing economy, there is no guarantee that persons who join the insolvency profession will preserve the standards that the experienced practitioners have maintained.</p>
<b>Comment</b>	<p>A complete regime for the regulation of insolvency representatives should be introduced, possibly by means of secondary legislation or regulations.</p> <p>The regime should include requirements for qualification, competence and integrity standards for insolvency practitioners, conflict of interest rules, grounds for disqualification of the insolvency practitioners, and procedure for disqualification, specific and detailed rules for the remuneration of insolvency practitioners in their different roles in insolvency proceedings, and the regime of liability to which the insolvency professionals are subject to, and which should be similar to the regime that governs company directors.</p> <p>In particular, the introduction of a process of licensing of insolvency practitioners to ensure basic knowledge of the field will assist in developing a professional cohort of insolvency practitioners in time to come.</p> <p>The supervisory regime should be improved (see Principle D7), and the disciplinary regime should also be developed and effectively enforced. The regime should include a disqualification sanction for the most serious offences.</p> <p>Regarding training, consideration may be given to the development of an “articles” or apprenticeship system to develop practical experience for new practitioners, following completion of a first degree. This may work to allow for knowledge and skills transfer and to lend credibility to the work of new practitioners.</p> <p>A code of conduct for insolvency representatives would be very useful to give precision to the insolvency representative’s duties and the standard of diligence and loyalty to be expected in the conduct of their functions.</p>