

Model Law Adapted for Enactment in South Africa: Annexure B
UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY
ADAPTED FOR ENACTMENT IN SOUTH AFRICA

GENERAL EXPLANATORY NOTE:

~~Crossed words in bold indicate omissions from provisions in the UNCITRAL Model Law~~

Words underlined and in bold with a grey background indicate insertions in the provisions recommended in the UNCITRAL Model Law

Some style and formatting changes have not been indicated. The footnotes are for information only and are not intended for inclusion in the Act

ACT

~~To~~ **Preamble**¹ ~~The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of—~~

- (a) cooperation between the courts and other competent authorities of ~~this State~~ **the Republic** and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximization of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

¹It is not customary to include a preamble in ordinary South African legislation. For ease of reference the "preamble" is reflected as a long title although it will probably be reflected in a memorandum on the objects of the Bill.

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CHAPTER I GENERAL PROVISIONS

Scope of application

1. (1) This ~~Law~~ **Act** applies where—

- (a) assistance is sought in ~~this State~~ **the Republic** by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) assistance is sought in a foreign State in connection with a proceeding under ~~identify laws of the enacting State relating to insolvency~~ **the laws of the Republic relating to insolvency**; or
- (c) a foreign proceeding and a proceeding under ~~identify laws of the enacting State relating to insolvency~~ **the laws of the Republic relating to insolvency** in respect of the same debtor are taking place concurrently; or
- (d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under ~~identify laws of the enacting State relating to insolvency~~ **the laws of the Republic relating to insolvency**.

~~(2) This Law does not apply to a proceeding concerning [designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law].²~~

²Comment is invited on the question whether special insolvency regimes in the Republic, such as banks or insurance companies should be excluded from the Act. It is submitted that this is not necessary.

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Definitions

2. For the purposes of this ~~Law~~ Act—

- (a) "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of ~~sub~~paragraph (f) of this ~~article~~ section;
- (d) "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
- (e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;
- (f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.
- (g) "curator" means a curator appointed in terms of section 6 of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984), or section 69 of the Banks Act, 1990 (Act No. 94 of 1990), or section 81 of the Mutual Banks Act, 1993 (Act No. 124 of 1993);**
- (h) "receiver" means a receiver or other person appointed by the High Court to administer a compromise or arrangement under section 311 of the Companies Act, 1973 (Act No. 61 of 1973).**

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International obligations of ~~this State~~ the Republic

3. To the extent that this ~~Law~~ Act conflicts with an obligation of ~~this State~~ the Republic arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Competent court ~~or authority~~³

4. The functions referred to in this ~~Law~~ Act relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by ~~[specify the court, courts, authority or authorities competent to perform those functions in the enacting State]~~ the High Court.

Authorization of ~~[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]~~ trustee, liquidator, judicial manager, curator, or receiver to act in a foreign State

5. A ~~[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]~~ trustee, liquidator, judicial manager, curator, or receiver is authorized to act in a foreign State on behalf of a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ the laws of the Republic relating to insolvency, as permitted by the applicable foreign law.

Public policy exception

6. Nothing in this ~~Law~~ Act prevents the court from refusing to take an action governed by this ~~Law~~ Act if the action would be manifestly contrary to the public policy of ~~this State~~ the Republic.

Additional assistance under other laws

7. Nothing in this ~~Law~~ Act limits the power of a court or a ~~[insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State]~~

³It is submitted that it is not necessary or advisable to refer to the Master of the High Court or any other authority because the functions contemplated in the Act should be performed by the High Court.

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trustee, liquidator, judicial manager, curator, or receiver to provide additional assistance to a foreign representative under other laws of ~~this State~~ **the Republic**.

Interpretation

8. In the interpretation of this ~~Law~~ **Act**, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

CHAPTER 2

ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN ~~THIS STATE~~ **THE REPUBLIC**

Right of direct access

9. A foreign representative is entitled to apply directly to a court in ~~this State~~ **the Republic**.

Limited jurisdiction

10. The sole fact that an application pursuant to this ~~Law~~ **Act** is made to a court in ~~this State~~ **the Republic** by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of ~~this State~~ **the Republic** for any purpose other than the application.

Application by a foreign representative to commence a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency**

11. A foreign representative is entitled to apply to commence a proceeding under ~~*[identify laws of the enacting State relating to insolvency]*~~ **the laws of the Republic relating to insolvency** if the conditions for commencing such a proceeding are otherwise met.

Participation of a foreign representative in a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency**

12. Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under ~~*[identify laws of the enacting State relating to insolvency]*~~ **the laws of the Republic relating to insolvency**.

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Access of foreign creditors to a proceeding under ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency**

13. (1) Subject to paragraph (2) of this **article section**, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency** as creditors in ~~*this State*~~ **the Republic**.

(2) Paragraph (1) of this **article section** does not affect the ranking of claims in a proceeding under ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency**, except that the claims of foreign creditors⁴ shall not be ranked lower than ~~*identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims*~~ **non-preferent claims**.⁵

Notification to foreign creditors of a proceeding under ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency**

14. (1) Whenever under ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency** notification is to be given to creditors in ~~*this State*~~ **the Republic**, such notification shall also be given to the known creditors that do not have addresses in ~~*this State*~~ **the Republic**. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

⁴An alternative provision refuses to recognise foreign tax and social security claims. Notwithstanding the rule that the courts of the Republic has no jurisdiction to entertain legal proceedings involving the enforcement of the revenue laws of another State (*Priestley v Clegg* 1985 (3) SA 955 (T)), it is submitted that the payment of foreign revenue claims as concurrent claims should be permitted.

⁵According to the definition of "preference" in section 2 of the Insolvency Act 24 of 1936 a preferent claim is a claim with a statutory preferences or a secured claim.

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(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall—

- (a) indicate a reasonable time period for filing claims and specify the place for their filing;
- (b) indicate whether secured creditors need to file their secured claims; and
- (c) contain any other information required to be included in such a notification to creditors pursuant to the law of ~~this State~~ **the Republic** and the orders of the court.

CHAPTER 3 RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Application for recognition of a foreign proceeding

15. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

(2) An application for recognition shall be accompanied by—

- (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

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- (c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The court may require a translation of documents supplied in support of the application for recognition into an official language of ~~this State~~ **the Republic**.

Presumptions concerning recognition

16. (1) If the decision or certificate referred to in **article section** 15(2) indicates that the foreign proceeding is a proceeding within the meaning of **article section** 2(a) and that the foreign representative is a person or body within the meaning of **article section** 2(d), the court is entitled to so presume.

(2) The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

(3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

Decision to recognize a foreign proceeding

17. (1) Subject to **article section** 6, a foreign proceeding shall be recognized if—

- (a) the foreign proceeding is a proceeding within the meaning of **article section** 2(a);
- (b) the foreign representative applying for recognition is a person or body within the meaning of **article section** 2(d);

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- (c) the application meets the requirements of **article section** 15(2); and
 - (d) the application has been submitted to the court referred to in **article section** 4.
- (2) The foreign proceeding shall be recognized—
- (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of **article section** 2(f) in the foreign State.

(3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

(4) The provisions of **articles sections** 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Subsequent information

18. From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of—

- (a) any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Relief that may be granted upon application for recognition of a foreign proceeding

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19. (1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—

- (a) staying execution against the debtor's assets;
- (b) entrusting the administration or realization of all or part of the debtor's assets located in ~~this State~~ **the Republic** to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;
- (c) any relief mentioned in **article section** 21(1)(c), (d) and (g).

(2) ~~[Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]~~ **An order issued in terms of subsection (1) shall be dealt with as contemplated in section 17 of the Insolvency Act, 1936 (Act No. 24 of 1936), or subsections 357(1) and 357(4) of the Companies Act, 1973 (Act No. 61 of 1973).**

(3) Unless extended under **article section** 21(1)(f), the relief granted under this **article section** terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this **article section** if such relief would interfere with the administration of a foreign main proceeding.

Effects of recognition of a foreign main proceeding

20. (1) Upon recognition of a foreign proceeding that is a foreign main proceeding—

- (a) commencement or continuation of individual **legal** actions or individual **legal**

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proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

- (b) execution against the debtor's assets is stayed; and
- (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

(2) The scope, and the modification or termination, of the stay and suspension referred to in **paragraph subsection** (1) of this **article section** are subject to ~~*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph (1) of this article*~~ **the provisions of sections 20, 23 and 75 of the Insolvency Act, 1936 (Act No. 24 of 1936), and sections 341 and 359 of the Companies Act, 1973 (Act No. 61 of 1973).**

(3) **Paragraph Subsection** (1)(a) ~~of this article~~ does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

(4) **Paragraph Subsection** (1) ~~of this article~~ does not affect the right to request the commencement of a proceeding under ~~*identify laws of the enacting State relating to insolvency*~~ **the laws of the Republic relating to insolvency** or the right to file claims in such a proceeding.

Relief that may be granted upon recognition of a foreign proceeding

21. (1) Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

- (a) staying the commencement or continuation of individual **legal** actions or individual

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legal proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under **article section** 20(1)(a);

- (b) staying execution against the debtor's assets to the extent it has not been stayed under **article section** 20(1)(b);
- (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under **article section** 20(1)(c);
- (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- (e) entrusting the administration or realization of all or part of the debtor's assets located in ~~this State~~ **the Republic** to the foreign representative or another person designated by the court;
- (f) extending relief granted under **article section** 19(1);
- (g) granting any additional relief that may be available to ~~*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*~~ **a trustee, liquidator, judicial manager, curator, or receiver** under the laws of ~~this State~~ **the Republic**.

(2) Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in ~~this State~~ **the Republic** to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in ~~this State~~ **the Republic** are adequately protected.

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(3) In granting relief under this **article section** to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of ~~this State~~ **the Republic**, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Protection of creditors and other interested persons

22. (1) In granting or denying relief under **article section** 19 or 21, or in modifying or terminating relief under **paragraph subsection** (3) ~~of this article~~, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

(2) The court may subject relief granted under **article section** 19 or 21 to conditions it considers appropriate.

(3) The court may, at the request of the foreign representative or a person affected by relief granted under **article section** 19 or 21, or at its own motion, modify or terminate such relief.

Actions to avoid acts detrimental to creditors

23. (1) Upon recognition of a foreign proceeding, the foreign representative has standing to initiate ~~refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation]~~ **any legal action to set aside a disposition that is available to a trustee or liquidator under the laws of the Republic relating to insolvency.**

(2) When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the **legal** action relates to assets that, under the law of ~~this State~~ **the Republic**, should be administered in the foreign non-main proceeding.

Intervention by a foreign representative in proceedings in ~~this State~~ **the Republic**

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24. Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of ~~this State~~ the Republic are met, intervene in any proceedings in which the debtor is a party.

CHAPTER 4

COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

Cooperation and direct communication between a court of ~~this State~~ the Republic and foreign courts or foreign representatives

25. (1) In matters referred to in **article section** 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a ~~*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*~~ trustee, liquidator, judicial manager, curator, or receiver.

(2) The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Cooperation and direct communication between the ~~*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*~~ trustee, liquidator, judicial manager, curator, or receiver and foreign courts or foreign representatives

26. (1) In matters referred to in **article section** 1, a ~~*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*~~ trustee, liquidator, judicial manager, curator, or receiver shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

(2) The ~~*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*~~ trustee, liquidator, judicial manager, curator, or receiver is entitled, in the exercise of its functions and subject to the supervision of

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the court, to communicate directly with foreign courts or foreign representatives.

Forms of cooperation

27. Cooperation referred to in **articles sections** 25 and 26 may be implemented by any appropriate means, including—

- (a) appointment of a person or body to act at the direction of the court;
- (b) communication of information by any means considered appropriate by the court;
- (c) coordination of the administration and supervision of the debtor's assets and affairs;
- (d) approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) coordination of concurrent proceedings regarding the same debtor.
- (f) ~~[the enacting State may wish to list additional forms or examples of cooperation].~~

CHAPTER 5

CONCURRENT PROCEEDINGS

Commencement of a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency** after recognition of a foreign main proceeding

28. After recognition of a foreign main proceeding, a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency** may be commenced only if the debtor has assets in ~~this State~~ **the Republic**; the effects of that proceeding

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shall be restricted to the assets of the debtor that are located in ~~this State~~ **the Republic** and, to the extent necessary to implement cooperation and coordination under ~~articles sections~~ **articles sections** 25, 26 and 27, to other assets of the debtor that, under the law of ~~this State~~ **the Republic**, should be administered in that proceeding.

Coordination of a proceeding under ~~identify laws of the enacting State relating to insolvency~~ **the laws of the Republic relating to insolvency** and a foreign proceeding

29. Where a foreign proceeding and a proceeding under ~~identify laws of the enacting State relating to insolvency~~ **the laws of the Republic relating to insolvency** are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under ~~articles sections~~ **articles sections** 25, 26 and 27, and the following shall apply—

- (a) when the proceeding in ~~this State~~ **the Republic** is taking place at the time the application for recognition of the foreign proceeding is filed,
 - (i) any relief granted under ~~article section~~ **article section** 19 or 21 must be consistent with the proceeding in ~~this State~~ **the Republic**; and
 - (ii) if the foreign proceeding is recognized in ~~this State~~ **the Republic** as a foreign main proceeding, ~~article section~~ **article section** 20 does not apply;
- (b) when the proceeding in ~~this State~~ **the Republic** commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
 - (i) any relief in effect under ~~article section~~ **article section** 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in ~~this State~~ **the Republic**; and
 - (ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in ~~article section~~ **article section** 20(1) shall be modified or

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terminated pursuant to **article section** 20(2) if inconsistent with the proceeding in ~~this State~~ **the Republic**;

- (c) in granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of ~~this State~~ **the Republic**, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Coordination of more than one foreign proceeding

30. In matters referred to in **article section** 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under **articles sections** 25, 26 and 27, and the following shall apply—

- (a) any relief granted under **article section** 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- (b) if a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under **article section** 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;
- (c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Presumption of insolvency based on recognition of a foreign main proceeding

31. In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under ~~[identify laws of the enacting State relating to insolvency]~~ **the laws of the Republic relating to insolvency**, proof that the debtor is insolvent.

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Rule of payment in concurrent proceedings

32. Without prejudice to secured claims or rights *in rem*⁶, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under ~~*identify laws of the enacting State relating to insolvency*~~ the laws of the Republic relating to insolvency regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

Short title and commencement

33. This Act shall be called the Cross-Border Insolvency Act, 199?.⁷

⁶Consideration can be given to using "real right" or something similar, but the term rights *in rem* is probably more familiar to foreigners who may be affected by the legislation and the South Africans who will deal with the legislation probably know what a right *in rem* is.

⁷It is submitted that the Act can come into operation when published and that it is not necessary to delay commencement to a date fixed by proclamation or to enact transitional provisions.