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Guest editor
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The Development of a Uniform Cross-Border Insolvency Law in SADC: Drawing From the OHADA Experience

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Abstract

With the expansion in cross-border trade and investment within the Southern African Development Community (SADC), a well-crafted law is needed to address issues of CBI effectively since the absence of clear rules in all the jurisdictions fosters uncertainty, amongst others. Various options to introduce a regional approach may be considered. To that end, this article presents the experience of the Organisation for the Harmonisation of Business Law in Africa, or to use the original French title, Organisation pour l'harmonization en Afrique du Droit des Affaires (OHADA), to highlight the lessons that SADC may learn from the OHADA's CBI regime in developing a uniform approach to cross-border insolvency amongst its member states. In considering this structure, some other options will also be mentioned. Such a dispensation would be a welcome addition to the arsenal of laws that lawyers and practitioners could use to deal with CBI matters within the SADC. In developing such a cross-border law,

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the text could draw from a number of models and be tailored to SADC needs.

Keywords: SADC; OHADA; uniform law; cross-border insolvency; foreign representative; foreign bankruptcy procedure; insolvency; territoriality; treaty; universality

1 INTRODUCTION

Over the past century, the growth of international trade and multinational businesses has significantly increased the incidence of international insolvencies, with various insolvency law regimes applying in different jurisdictions.¹ Globalisation, trade and the movement of assets across borders sometimes force creditors to engage with their debtors' insolvent estates in multiple jurisdictions to address transactions and recover debts when insolvency emerges.² Consequently, issues of cross-border law, including those of insolvency law, have become more common, especially when debtors hold assets in more than one country.³ This situation necessitates formal cooperation amongst jurisdictions and the development and/or strengthening of legal rules governing practical issues arising from cross-border insolvencies.⁴ The reason is that the traditional private international law principles or choice of law rules are not in themselves always adequate to deal with complex questions that may arise in cross-border insolvency (CBI) matters. As stated by Omar "[t]he questions of multiplicity or proliferation of laws applicable to the resolution of disputes is a particularly important question to ask in international insolvency law and one to which the branch of private international law applied in insolvency does not always provide an answer."⁵

At its core, cross-border or international insolvency law addresses cases in which an insolvency,⁶ or bankruptcy proceeding is initiated in one jurisdiction (typically the debtor's domicile or place of incorporation) while the debtor holds assets or interests in at least one other jurisdiction as well, and this law may become increasingly complex when multiple jurisdictions are involved.⁷ In such cases, the estate representative — such as a trustee, liquidator, or administrator⁸ — must pursue those foreign assets for the benefit of that representative's local creditors. In so doing, the representative must comply with the legal principles of the jurisdiction where the assets are located. Without a clear set of rules or a treaty between the engaged states, this compliance may be arduous to achieve. It may necessitate the initiation of a concurrent bankruptcy proceeding under the other jurisdiction's local insolvency laws as well, which may increase the complexity

1 In this context, the proceeding in the state or jurisdictions where an insolvency proceeding has been opened will be referred to as the "local proceeding." When the same debtor involved in this proceeding also has assets or dealings in another jurisdiction, which may necessitate action in that foreign jurisdiction as well, that proceeding will then be referred to as a "foreign proceeding." See in general Omar "The landscape of international insolvency law" 2002 *IIR* 173; Wood *Principles of International Insolvency* 2ed (2007) 801; Smith and Ailola "Cross-Border Insolvencies: An Overview of Some Recent Legal Developments" 1999 *SA Merc LJ* 19; Olivier and Boraine "Some Aspects of International Law in South African Cross-Border Insolvency Law" 2005 *CILSA* 373; Chitimira "Aspects of the Regulation of Cross-Border Insolvency in South Africa" 2018 *Obiter* 173 173–174.

2 Olivier and Boraine 2005 *CILSA* 373–375; Chitimira 2018 *Obiter* 173–174.

3 *Ibid.*

4 *Ibid.*

5 Omar 2002 *IIR* 173; Wood 801.

6 The terms "insolvency" and "bankruptcy" are used interchangeably.

7 Wessels *International Insolvency Law: Global Perspectives on Cross-Border Insolvency Law Part I* 4 ed (2015) 1; Olivier and Boraine 2005 *CILSA* 373–374.

8 Because of the variety in titles for the insolvent estate administrators, and within the confines of cross-border insolvency, the more general term "estate representative" may be used instead of the terms "trustee" or "liquidator", whilst the term "local representative" (LR) will denote the representative of a local jurisdiction, and the term "foreign representative" (FR) will denote a representative from a foreign jurisdiction.

of the matter⁹ — for instance, more than one insolvency procedure may be applicable to the same insolvent-debtor. In this regard, it must also be noted that foreign jurisdictions usually provide mechanisms to protect the interests of their local creditors under the principle of territoriality as discussed below.¹⁰

A further insight is that, in the words of Bob Wessels, international insolvency law consists of rules concerning insolvency proceedings or measures that cannot be fully enforced because it is necessary to account for the international aspects of a case.¹¹ This definition acknowledges the limitations imposed by the existence of national legal frameworks, while simultaneously opening the discussion for strengthening such rules. Ian Fletcher¹² stated that international or CBI involves situations that transcend a single legal system, requiring consideration of foreign elements that domestic laws alone cannot adequately address. These references indicate a need for states and regions to strengthen their CBI regimes to support international trade, amongst other things. In transnational trade, predictability of rules that may apply in certain foreseen or even unforeseen circumstances as well as cooperation between foreign courts remain of paramount importance.

From an African perspective, cross-border trade amongst states themselves is important and growing,¹³ but insolvency issues are expected to increase, since an increase in cross-border trade requires credit and insolvency among some participating entities will be encountered along the line. The continent's diverse legal systems — ranging from common law and civil law to mixed systems — generate different approaches to insolvency.¹⁴ Within the field of cross-border or international insolvency, some states have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency Law (the MLCBI)¹⁵ as the basis of a statutory dispensation in their jurisdictions, while others, such as the member states of the OHADA regional structure,¹⁶ have introduced a regional CBI regime. It should be noted that the European Union (EU) is a distinct supra-national structure, with a parliament and member states (except for Denmark) and is bound by the EU insolvency regulation that regulates CBI matters between member states.¹⁷

This context raises the question of whether the Southern African Development Community (SADC), with its sixteen member states, could or should at least establish a regional CBI system based, for instance, on a treaty like the OHADA example to strengthen the available tools in cross-border trade in cases where one of the parties should become insolvent. The idea to introduce such a regional dispensation based on a treaty, first suggested by the late David

9 Omar 2002 *IIR* 174 raises the point that an efficient system will minimise the number of courts involved. See also Wood 802–803.

10 See Omar 2002 *IIR* 176, where this aspect is discussed within the context of discrimination in the treatment of foreign creditors by preferring the local creditors in the absence of a fair system.

11 See Wessels *Part I* 1.

12 Fletcher *Insolvency in Private International Law: National and International Approaches* 2 ed (2005) 15.

13 See for instance the 2024 African Trade Report https://media.afreximbank.com/afrexim/African-Trade-Report_2024.pdf (accessed 10-03-2025).

14 See in general Wood 30 and 801 regarding the differences in approaches towards insolvency and related issues in various jurisdictions.

15 See further discussion below.

16 *Ibid*.

17 This regulation, the Council Regulation on insolvency proceedings (EC) No 1346/2000 dated 29 May 2000 (EU InsReg), came into force on 31 May 2002, OJ L 160 30.06.2000. See further Wessels Part 1 74. This regulation was subsequently amended in 2015 by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) *OJ L 141, 5.6.2015: see EUR-Lex* <https://eur-lex.europa.eu/eli/reg/2015/848/oj> (accessed 13-11-2024).

Ailola in 1999,¹⁸ and further developed by Doris Leno in her 2014 thesis,¹⁹ has not been pursued formally, but some states have adopted the MLCBI. To summarise, these authors argue that in light of the OHADA's success in the development of a regional CBI system, the SADC and its member states could achieve the same by utilising the SADC treaty as the basis. Since a number of SADC member states already adopted the MLCBI, it should not be too problematic to use it as the foundation for such a treaty.

Findings in a recent empirical study of seventeen jurisdictions that adopted the MLCBI provide support for the benefits to be derived from the adoption of a clear and predictable set of CBI rules.²⁰ The researchers Jang, Tak and Wang first found support in their results, which showed that a lack of such rules leads to “[p]oor court coordination across bankruptcy jurisdictions and creates uncertainty in the protection of debtors’ value and creditor recoveries.”²¹ In assessing the benefits of the adoption of the MLCBI in some jurisdictions, in particular, with a focus on the United States of America, where it was ultimately adopted in 2005 as Chapter 15 of the US Bankruptcy Code of 1978 (as amended), Jang, Tak and Wang concluded that “mitigating frictions that arise from global insolvency proceedings can be an important driver of cross-border investments and growth of multinational firms.”²² They also found that “countries that have reformed their insolvency laws to conform to the MLCBI, for instance, have experienced a significant increase (14% above the mean) in inbound cross-border acquisitions and a decrease in outbound investment,”²³ and that “such adoption results in greater debt capacity of foreign firms that would help facilitate their cross-border investments.”²⁴ Their findings conclude that in countries that introduce such insolvency laws “that meet global standards, the costs of possessing foreign assets decrease, thereby promoting active FDI flows.”²⁵ The study also provides evidence that court cooperation at a cross-border level facilitates more predictable outcomes and the maximisation of the value of a debtor’s foreign assets, which has a real impact on cross-border capital flows.²⁶

The purpose of this research is to revisit the earlier discussions, proposing the way forward in honour of Ailola’s initial 1999 suggestions and those of other distinguished authors to consider developments since. The OHADA system will be considered as a possible option, but a few references to the EU Insolvency Regulation will also be made. It must be noted, though, that the detail of the various options will not be discussed extensively, owing to the word length restriction and nature of this article.

18 Ailola “Recognition of Foreign Proceedings, Orders and Officials in Insolvency in Southern Africa: A Call for a Regional Convention” 1999 *CILSA* 71. See also Smith and Ailola “Cross-Border Insolvencies: An Overview of Some Recent Legal Developments” 1999 *SA Merc LJ* 209.

19 Leno *The Development of a Commercial Law Structure in the SADC with Specific Reference to OHADA* (LLD-thesis, University of Pretoria, 2014) 6. See also in general, Masoud *Legal Challenges of Cross-border Insolvencies in Sub-Saharan Africa with Reference to Tanzania and Kenya: A Framework for Legislation and Policies* (PhD-thesis, Nottingham-Trent University, 2012) 279.

20 Jang, Tak and Wang “Global Insolvency and Cross-border Capital Flows” 2024 Harvard Law School Round Table <https://bankruptcyroundtable.law.harvard.edu/2024/11/12/does-global-insolvency-law-affect-cross-border-capital-flows> (accessed 14-11-2024).

21 *Ibid.*

22 *Ibid* 1 34.

23 *Ibid* 1 5.

24 *Ibid* 1 34.

25 *Ibid* 1 35.

26 *Ibid.*

2 VARIOUS ASPECTS PERTINENT TO CROSS-BORDER INSOLVENCY

2.1 Various approaches Towards Cross-border Insolvency

At a doctrinal level, CBI issues are generally addressed through either a universality approach or a territoriality approach.²⁷ The universality approach treats a cross-border or transnational insolvency matter as a single case to be administered from a single jurisdiction to ensure a more efficient administration and equal treatment of creditors across jurisdictions, the idea being that the insolvency law of the state where a (main) insolvency proceeding has been opened (the *lex concursus*) would apply extra-territorially in all those jurisdictions where the insolvent-debtor owns property, or is or was involved in transactions. By contrast, territoriality prioritises the interests of local creditors before allowing local assets to be used for the benefit of foreign creditors,²⁸ and would thus limit the operation of a foreign insolvency proceeding outside the jurisdiction where it was opened.

Most jurisdictions lean towards a more territorial approach, with some incorporating elements of universality, termed modified universality.²⁹ An absolute universalist stance supports a single bankruptcy procedure, but territoriality allows for multiple procedures. Given the jurisdictional limitations of legal systems, territoriality remains the predominant approach.

Legal systems are shaped by distinct legal cultures and traditions, resulting in little uniformity in local insolvency regimes, a disparity that complicates CBI issues. Solutions include the use of treaties or conventions between states, and the utilisation of customary private international law principles or specific precedents or legal rules based on common law notions of comity or legislation.³⁰

To provide guidance amongst the diversity of legal systems and approaches towards CBI, UNCITRAL adopted the MLCBI in 1997, which aims to establish a common framework for CBI matters amongst adopting states to enhance uniformity in the treatment of CBI cases.³¹ However, the MLCBI focuses on procedural aspects rather than substantive principles.³²

Since its acceptance in 1997, the MLCBI has been strengthened by the introduction of further UNCITRAL Model Laws. It is submitted that when states consider implementing the MLCBI, some consideration should be given to integrating these further models as well. The later Model Law on Recognition and Enforcement of Insolvency-Related Judgments of 2018³³ is aimed at assisting states to equip their laws with a framework to deal with the recognition and enforcement of insolvency-related judgments in a CBI proceeding, while the Model Law on Enterprise Group Insolvency of 2019³⁴ is aimed at addressing the domestic and CBI of multiple debtors who are members of the same enterprise group. Any attempt to adopt the MLCBI

27 Smith and Ailola 1999 *SA Merc LJ* 192 193; Omar 2002 *IIR* 176–179; Wood 902; Wessels Part 1 8–20.

28 Smith and Ailola 1999 *SA Merc LJ* 192 19; Omar 2002 *IIR* 173 178, 193–194.

29 Omar 2002 *IIR* 173 179–181; Wessels 25-26.

30 Omar 2002 *IIR* 173 181; Wood 802.

31 Omar 2002 *IIR* 173 195; Wessels Part I 101 ff.

32 *Ibid.*

33 See <https://uncitral.un.org/en/texts/insolvency/modellaw/mlj> (accessed 28-11-2024).

34 See <https://uncitral.un.org/en/MLEGI> (accessed 28-11-2024).

should thus also consider the adoption of these two later model laws.

Apart from a number of CBI treaties entered into between various states in the past,³⁵ some more recent efforts to regulate CBI include more structured regional frameworks such as the OHADA treaty for African states³⁶ and the European Union’s Insolvency Regulation (EIR), which was originally adopted in 2000 (Council Regulation (EC) 1346/2000) as amended,³⁷ and governs cross-border insolvency within the EU (except for Denmark). The OHADA structure is based on a treaty, but the EU structure, also initially established by means of a treaty, is more formalised in that all the member states have subjected themselves to a type of overarching EU parliament. In general, it should be noted that unlike the OHADA dispensation, the EIR does not regulate CBI between EU member states and third states, and that each of its member states also has its own local insolvency law, whereas in the OHADA system is a uniform “local” insolvency law that applies throughout the region.

In Africa, many states, including South Africa, follow different dispensations, but there is a general lack of bilateral or multilateral CBI treaties, with the OHADA model an exception in this regard.³⁸ South Africa’s CBI, for instance, is still regulated by its common law, despite the MLCBI being incorporated into the legal system as the Cross-Border Insolvency Act.³⁹ However, the implementation of the Cross-Border Insolvency Act is hampered by a reciprocity and designation clause introduced in the adopted version.⁴⁰

Of the sixteen SADC member states (Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe), nine have adopted the UNCITRAL Model Law: Angola (in 2021), Comoros (in 2015), Democratic Republic of Congo (in 2015), Lesotho (in 2021), Malawi (in 2015), Mauritius (in 2009), Seychelles (in 2013), South Africa (in 2000, though not yet operational), and Zimbabwe (in 2018).⁴¹ These developments reflect progress since Ailola’s initial proposal for an interstate treaty on CBI within the SADC region. His idea has been further explored, notably by Leno in her 2014 doctoral thesis.⁴² However, a re-evaluation is now needed to move the discussion forward. In discussing the SADC framework, Wessels⁴³ states that the SADC treaty, with its focus on the promotion of sustainable and equitable economic growth and socio-economic development through deeper cooperation and integration

35 See, e.g., the two examples in Latin America, namely, the 1889 and 1940 Montevideo Conventions and the 1928 Bustamante Code, as discussed by Fletcher 221-236, and the 1933 Nordic Bankruptcy Convention between the Nordic countries, i.e., Denmark, Finland, Iceland, Norway and Sweden, that have a strong common legal tradition in at least their respective private law dispensations. See further Svensson “Inter-Nordic Insolvency Convention” 1996 *International Business Lawyer* 226-228.

36 Wessels Part I 69–73.

37 See Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (referred to as the “EIR (recast)”). It must be noted that successive amendments to Regulation (EU) 2015/848 have been incorporated into the basic text. On these matters see further Wessels *International Insolvency Law: European Insolvency Law*, Part II 4 ed (2017) 1 ff; Wessels and Boon *Cross-Border Insolvency Law: Instruments and Commentary* (2015) 86 ff.

38 See Wessels Part I 69–73.

39 41 of 2000.

40 See s 2(2) of the Cross-Border Insolvency Act.

41 See https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (accessed 10-10-2024). Notably, Lesotho has introduced a new Insolvency Act, Act 9 of 2022, which is seemingly not in operation yet, but the MLCBI is integrated in this Act as its Ch 23.

42 Leno (LLD-thesis, University of Pretoria, 2014) 6.

43 Wessels Part I 73.

“forms a cradle for a form of international insolvency regulation.”

It should also be noted that apart from different approaches and rules towards cross-border insolvency law, African states, including the SADC member states, each has its own local insolvency laws that are not identical. This position is the same amongst the EU member states, but in contrast, uniform insolvency legislation also applies to all the member states in the OHADA region.

2.2 Various Models and International Attempts and Initiatives to Establish Cross-border Insolvency Law Regimes

Various models and principles apply to create a more uniform system of cross-border-insolvency rules on the one hand, and to deal with such situations in a particular jurisdiction, on the other hand — the purpose being to make such a dispensation more efficient and to provide predictability. To achieve greater uniformity in CBI rules while addressing jurisdiction-specific situations, various models and principles are applied, including the following:⁴⁴

- Treaties and conventions between states, usually amongst states within particular regions;
- The EU Insolvency Regulation applicable within the EU region and to EU member states;
- Statutory frameworks based on the MLCBI;
- Local statutory provisions;
- Common law principles based on the principle of comity for recognising foreign estate representatives, as seen in countries such as South Africa, Namibia, and Botswana; and
- Principles of private international law which may apply to a CBI matter.

International bodies, such as the International Bar Association (IBA) and INSOL International, have proposed frameworks to harmonise CBI rules.⁴⁵ However, there are significant differences between states and their legal systems and varying insolvency law regimes, related legal principles (for example, securities law) and the still fairly strong adherence to territorial jurisdiction by individual states.⁴⁶

The existing models tend to favour either a territoriality approach or a more universality approach. As noted, many systems are still rooted in territoriality, with some incorporating modified universality principles.⁴⁷ A territorial approach gives rise to multiple insolvency proceedings in different jurisdictions for the same debtor. By contrast, an absolute universality approach would eliminate the need for such multiplicity by allowing a single, unified proceeding to govern an insolvency matter relating to the same debtor, wherever the assets are situated.⁴⁸

When a debtor has assets and liabilities across multiple jurisdictions, it typically resides in one jurisdiction (the home jurisdiction) but have creditors, assets, or interests in assets located elsewhere. This situation has become more common with globalisation, resulting in inter-connected economies worldwide. In this context, CBI raises several challenges, primarily because of the territorial limits of national insolvency laws. Debtors may face diverse bankruptcy procedures across different jurisdictions where they trade and/or where their assets are located,

44 Omar 2002 *IIR* 173 183–196; Wessels Part I 33–38; and Chitimira 2018 *Obiter* 182–189 where the authors also highlight several approaches to cross-border insolvency.

45 See Omar 2002 *IIR* 173 192–196 for a discussion of the various initiatives.

46 Wood 801.

47 Omar 2002 *IIR* 179–180; Wessels Part I 12 and 25.

48 Omar 2002 *IIR* 176.

resulting in inconsistent and sometimes inadequate approaches to CBI matters. Hence it is important to establish clear rules within jurisdictions and/or regions to deal with CBI matters that may arise.⁴⁹

2.3 A Hypothetical Example of a Cross-border Case Amongst SADC States

The complexities of a CBI case, with reference to a SADC-related matter, may be illustrated by the following hypothetical set of facts with some explanatory remarks. For lack of a general set of terminology applicable in this field in the SADC, some terms used in the MLCBI, for instance, will be utilised in this respect.

For instance, a company incorporated in South Africa (call it SA Ltd) may, for instance, conduct business in some or even all sixteen SADC member states with local branch offices in each. To this end, SA Ltd is a party to various business transactions and owns property in each one of these states. Owing to a downswing in the global economy, SA Ltd ends up defaulting on the payment of its loan obligations. Assuming that SA Ltd is managed from South Africa (its jurisdiction of incorporation), it may be accepted that its centre of main interest (COMI)⁵⁰ is in South Africa. Should a South African creditor succeed in placing the company under liquidation in terms of South African insolvency law because of its inability to pay the local creditor, South African (local) insolvency law will apply. A local liquidator (estate representative) will be appointed, and he/she will deal with the local business transactions of SA Ltd and collect the South African-based property of the company with the view to realising this property for the benefit of the South African creditors. Since the COMI is in South Africa, this local insolvency proceeding may be termed the main proceeding (MP) in the global terminology.

If SA Ltd turns out to have property in the other SADC states, the South African estate representative may consider following up on such property and business transactions in those states as well, but it will depend on the local laws of each one of these states, which may differ as regards in how far and under what conditions, if at all, they will allow the South African estate representative to deal with such property and related matters. In this regard, the legal position will vary from state to state, since some of the states have adopted the MLCBI, but others are still based on common law principles. At least one of the SADC states, namely Mozambique, has no CBI dispensation in place.

In any event, where a dispensation is in place, the South African estate representative needs to seek assistance, at least in the form of a recognition order of the court of each one of the states in which he or she plans to follow up on property and transactions, with the ultimate view of attaching and realising such foreign-based assets, and to transfer the allowable proceeds to South Africa to assist in settling the debts of South African creditors. To this end, and based on the notion of territorial jurisdiction, it will depend on each one of the jurisdictions approached on how far they will render assistance for such inward-bound requests from the South African estate representative. In states where such recognition and assistance cannot be granted, the South African estate representative may consider initiating full-scale insolvency proceedings against the same company if the laws of that particular jurisdiction will provide for those

49 *Ibid* 198–200.

50 Article 2 of the MLCBI defines a foreign main proceeding as a foreign proceeding that takes place in the state where the debtor has the centre of its main interests.

proceedings.⁵¹

What may also happen is that creditors in various other states where SA Ltd operates may in terms of their own insolvency laws open local proceedings, to the extent that their laws allow for these local proceedings. Assuming for the purposes of this discussion that it is possible to open these local proceedings, SA Ltd, the same debtor, may face full-scale insolvency proceedings in a number of these states where it has a sufficient presence to warrant such an order.⁵² In each one of these instances, estate representatives will be appointed to deal with the property and transactions of SA Ltd within their respective jurisdictional boundaries. Such a scenario may in principle ensue but it is not desirable. Nevertheless, where it does occur, such proceedings may, according to the MLCBI, be termed “non-main proceedings” (NMP) or “secondary proceedings”⁵³ if the EIR terminology is used. In terms of contemporary CBI matters in such concurrent proceedings, one would expect cooperation between the various jurisdictions. Yet such cross-border cooperation and collaboration remain complex in the absence of clear rules in all instances. In order to support this aspect of cross-border trade, a predictable system is thus most desirable.

It must be understood that where a formal insolvency procedure is initiated in a particular state, and owing to the principle of territoriality, such an insolvency proceeding will as a rule apply to that jurisdiction only, the appointed estate representative will not as a rule have the powers to act outside the local jurisdiction where he or she has been appointed. A foreign state where such a representative wants to collect the property of the insolvent debtor, or investigate transactions that may have taken place in that foreign state relating to the insolvent debtor, may however, assist such a representative to act within its jurisdiction.⁵⁴

It may, however, happen, especially within regional structures such as the OHADA or the EU,⁵⁵ that where a treaty or supra-national governance structure is in place that allows for it, the insolvency proceeding opened in the state where the insolvent debtor’s COMI is situated may apply automatically in other member states too. The *lex concursus*, in other words, the insolvency law of the state or jurisdiction where the MP has been opened, will then also regulate the administration of such insolvency proceeding within the regional structure. To this end, in such an insolvency proceeding, the MP, will be deemed to have a more universal application but still within the confines of the structure as provided for by the treaty or regional regulation. Even in such a regional dispensation that allows for a more universalist approach within its confines, the enabling treaty or legislative framework may also allow for a secondary proceeding (or an NMP) in another member state where the same debtor has an “establishment” and usually on good grounds for such intervention.⁵⁶ It is submitted that there are lessons to be learnt from

51 For a secondary proceeding, art 2(c) of the MLCBI uses the term “foreign non-main proceeding.” which 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 art 2(f).

52 Such further insolvency proceedings in terms of the local insolvency laws of each state could then be effected where the same insolvent-debtor has an “establishment”, defined in art 2(f) of the MLCBI as any place of operations where the debtor carried out a non-transitory economic activity with human means and goods or services. In practical terms, an “establishment” refers to the factor to establish a link to a particular jurisdiction.

53 See the discussion about a non-main proceeding above.

54 This would usually happen by means of a recognition order issued by a competent court of the foreign jurisdiction or state.

55 See the discussion on OHADA below, and for the position in the EU, see the brief mentioned above, and further see Wessels Part I 74; Part II 1 ff; Wessels and Boon 84 ff.

56 Such NMP may be required in the state where the property of the insolvent-debtor is situated on the basis of the *lex fori rei sitae* because the particular property right dispensation may differ in some states, or because of peculiar rights of real security or contractual dispensations closely connected to a particular jurisdiction.

both the OHADA and the EU structures. However, when compared to the EU dispensation, to some extent, the OHADA system is more developed in that it not only provides for a uniform cross-border arrangement between the member states but also has the same local insolvency law applying throughout the region, which is not the case in the EU. It even provides for cross-border insolvency law applying to non-OHADA member states, but the focus of this article will remain on the OHADA structure.

3 THE LACK OF A CROSS-BORDER INSOLVENCY STRUCTURE IN SADC

The lack of a cross-border insolvency law presents a significant problem in an age of growing inter-connectedness. Africa is no exception. Apart from poor court coordination across bankruptcy jurisdictions, it creates uncertainty in the applicable law and protection of debtor's value and creditor recoveries.⁵⁷ With regard to these obstacles, it is necessary for the SADC states to consider and embrace a uniform CBI law to facilitate trade and address issues of CBI within the SADC region effectively; in spite of the variety of legal roots and legal cultures within the region.

If the SADC undertakes to develop a uniform CBI law within its region, it is submitted that there are also lessons which the SADC could learn from the OHADA in this regard, whilst also noting some other possible options. In so doing, Ailola proposed that the SADC states should adopt an interstate treaty on CBI within the SADC region because it offers a better solution. As mentioned, this idea was further explored by Leno in her 2014 doctoral thesis,⁵⁸ who contended that the SADC urgently requires a uniform cross-border insolvency law in the resolution of insolvency disputes. And that there are lessons the SADC may learn from OHADA.

Against this backdrop, the SADC legal framework for a CBI dispensation will be considered in this article. It will highlight the shortcomings of the current legal systems and indicate some advantages of adopting a uniform CBI law. Finally, a possible solution for the development of a uniform CBI law in the SADC structure will be proposed.

Overall, the authors aim to demonstrate that the OHADA provides practical lessons for the development of a uniform CBI law in the SADC. This demonstration follows the OHADA's success in developing a uniform CBI regime regulating all matters relating to insolvency in all seventeen OHADA member states.⁵⁹ This new regime, based largely on the MLCBI, applies directly in the member states and is accorded primacy over existing or future domestic legislation — a pure form of law harmonisation.⁶⁰ The proposals discussed here, may demonstrate that OHADA provides some practical lessons for the development of a uniform CBI law in SADC. Therefore, the authors provide an argument that there is a real need for a well-crafted, uniform regional CBI law in SADC. Such a dispensation would be a welcome addition to some existing laws that courts and practitioners could use to deal with CBI matters within the community.

4 THE GENERAL SADC LEGAL FRAMEWORK AND ITS USE TO ESTABLISH A CROSS-BORDER INSOLVENCY DISPENSATION

The main thrust of this section is to analyse the SADC legal framework with a view to highlighting the shortcomings of the current legal systems and the advantages of adopting a uniform CBI law in the SADC. In this regard, a descriptive approach is adopted to lay the foundation for a

⁵⁷ *Ibid.*

⁵⁸ Leno (LLD-thesis, University of Pretoria, 2014) 6.

⁵⁹ The New Uniform Act Organising Collective Proceedings for Wiping Off Debts dated 10 September 2015 replaces the previous one, which was enacted on 10 April 1998.

⁶⁰ Article 10 of the Organisation for the Harmonisation of Business Law in Africa treaty 17 October 1993, as amended on 17 October 2008 (hereinafter referred to as the "OHADA treaty").

comprehensive analysis of the SADC legal framework. The SADC is described as a “treaty-based organisation,”⁶¹ in the sense that it was established within the framework of an agreement between the Southern African states (that is, the SADC treaty).⁶²

The SADC treaty is not self-executing in that it does not apply directly in the domestic jurisdictions of the member states, and as such does not form part of the internal legal order of the member states. Instead, signatory states are required to take all internal steps necessary to accord the treaty the force of national law and to ensure the uniform application of the treaty.⁶³ The treaty⁶⁴ establishing the SADC constitutes the legal basis and framework for achieving the SADC’s mission. The underlying mission of SADC is to

foster regional development and integration on the basis of balance, equity and mutual benefits⁶⁵ in order to promote sustainable development, economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa⁶⁶

To this end, the SADC states are required to take all measures necessary to promote the achievement of its mission.⁶⁷ In so doing, they may negotiate protocols as may be necessary in each area of cooperation.⁶⁸ It is significant to note that article 21(3) of the SADC treaty does not include the harmonisation of commercial laws in SADC. In general, it seems that little progress has been made in this regard, especially in the important fields towards the harmonisation of labour laws and insolvency laws of the SADC member states.

Incontestably, all the SADC member states lack a common legal tradition,⁶⁹ language,⁷⁰ currency or a uniform CBI law. These are all issues to be considered by investors or economic operators who wish to invest in a region or a community. Without a uniform CBI approach, this set of disparities means that in a cross-border dispute, economic operators will be subject to diverse CBI regimes. The facts and judgment in *Sackstein NO v Proudfoot SA (Pty) Limited*⁷¹ illustrate the difficulties posed by a CBI matter concerning alleged voidable dispositions of a Namibian company, initially liquidated in Namibia, but with a branch through which it operated in South Africa.⁷² In an attempt to set aside payments by the Namibian company to a service provider based in South Africa, the branch was also liquidated in South Africa in terms of South African insolvency law. The then South African appointed liquidator sought to set aside the payments to the Namibian company by means of a South African court order, although the Namibian company had meanwhile been taken out of liquidation by a statutory scheme of arrangement. It is submitted that time and costs would have been saved if a CBI dispensation between South Africa and Namibia had been in place. Instead of opening two concurrent insolvency

61 Sands and Klein *Bowette’s Law of International Institutions* 5 ed (2001) 16. See also Masoud 279.

62 SADC comprises the following states: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe.

63 See art 6(4) and (5) of the Treaty of the Southern African Development Community 1992, as amended.

64 The treaty establishing the Southern African Development Community was signed in Windhoek, Namibia on 17 August 1991 and amended in August 2021 (hereinafter referred to as the “SADC treaty”).

65 *Ibid* art 21(1).

66 *Ibid* art 5.

67 *Ibid* art 21(2).

68 Article 21(1) of the SADC treaty highlights the areas of cooperation, which include the following: land and agriculture, trade, investment, industry, food security, and finance, to name just a few.

69 Mancuso “Legal Integration in the SADC Region: A Methodological Approach” 4 (2010, unpublished note on file with the authors).

70 See Leno (LLD-thesis, University of Pretoria, 2014) 6, 89–90.

71 2003 4 (SCA) 34 348–360.

72 See Smith and Boraine “The Grab Rule Foils the Foreign Liquidator in His Own Jurisdiction” 2004 *SA Merc LJ* 495–524.

proceedings, a single procedure could have sufficed.

The absence of a uniform CBI law thus impedes the easy flow of cross-border commercial activity when insolvency enters the picture.⁷³ This issue may hamper not only individuals and states from entering into and participating in cross-border transactions, because of the risk of unpredictable CBI and the rules they may have to face.

The diversity of systems is uneconomic and may increase transaction costs and uncertainty in the applicable law, the jurisdiction of courts and in the recognition and enforcement of foreign judgments, which, in turn, may drive away investors. The diversity also raises “considerable problems for policy and program coordination.”⁷⁴ Moreover, it opens the debtor to a wider negotiation that may ultimately lead to complexities and inconsistencies in handling such cases.⁷⁵ Yet a further challenge would be to balance the contradictory local insolvency provisions of member states where the insolvent assets are situated and/or to find and secure assets situated in different states.⁷⁶ Such diverse approaches also exert a significantly negative influence on local and foreign investors, the people of the community, and subsequently on economic development, since it cultivates uncertainty and unpredictability as to the rules that will apply.

Given these shortcomings and the large volume of cross-border transactions enabled by the movement of goods and services, persons and capital, the SADC states need to develop a uniform CBI law to facilitate investment and to regulate CBI disputes. This assertion is strengthened by the fact that investors’ decision to invest or do business in any location is influenced by, amongst other things, the attractiveness of the laws and the institutions that promote justice for all players in the market. Legal experts have agreed that uniformity in commercial law and practice by the enactment of similar and unified rules can be a catalyst to the development process.⁷⁷ For instance, Kessedjian⁷⁸ points out that, “a stable legal framework is an absolute pre-condition for the encouragement of investment and the advancement of development.”

Arguably, the development of a uniform CBI in the SADC could assist the SADC to integrate or harmonise its CBI rules. It would also make it easier to identify the applicable law, minimise fraud committed by debtors, expedite the determination of cases, and save time and resources in the resolution of cross-border debt-related disputes.⁷⁹ In addition, it would remove the present uncertainty regarding the scope of existing national legislative provisions, and would support investors’ confidence that might enhance access to credit, which in turn would promote entrepreneurship, preserve jobs, and create new employment opportunities.⁸⁰ Furthermore, it would enable CBI debt-related problems to be conducted more swiftly and efficiently and

73 South Africa has in fact adopted the MLCBI as the Cross-Border Insolvency Act 42 of 2000, which is not yet in force because the Minister of Justice has not yet designated the relevant states to which it would apply. The Namibian and Botswana CBI regimes, like South Africa, apply the common law principles which are outdated and ill-equipped to deal with current issues.

74 Nangela “Harmonisation or Unification of Laws in the Context of SADC Regional Integration: ‘Analysing the SADC’s Initiatives in the Era of E-commerce’” 2013 *SADC Law Journal* 80–103.

75 Rafique and Sadhwanti “Navigating the Labyrinth: Cross-border Insolvency Regime in India” <https://www.barandbench.com> (accessed 14-08-2024).

76 *Ibid.*

77 Muna “Is OHADA ‘Common Law Friendly?’” 2001 *International Law Forum di Droit international* 178.

78 Kessedjian “Introduction” 2001 *International Law Forum di Droit international* 149.

79 See in general Smith and Boraine “Crossing Borders into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law ” *ABI L Rev* 135 172; Masoud 99–100,117, 128,153; Barteld “Cross-border Bankruptcy and the Cooperative Solution” 2013 *Brigham Young University International Law & Management Review* 26 43; Wessels Part I 175–177 regarding the benefits of a uniform model; and Chitimira 2018 *Obiter* 173 181–182 regarding the importance of legal certainty in cross-border insolvency matters etc.

80 Leno “Bankruptcy and Debt Recovery Procedures in Cameroon” Chapter 3 in Van Wyk (ed) *De Serie Legenda Volume IV Insolvency Law* 43.

open the door to a more just and efficient system that would benefit all parties — debtors as well as local and foreign creditors. Ultimately, it would create an environment that would be more predictable and conducive to investment for the member states' international economic engagement.⁸¹

From this background sketch, it is apparent that the SADC should consider the design and implementation of a uniform CBI law. In so doing, it is hoped that the SADC states could learn from the OHADA's experience, a model for many regional economic communities seeking to develop uniform commercial laws in general and CBI in particular.⁸²

All the same, it must be noted that the OHADA structure has been infused by the MLCBI. Since Ailola's article, nine of the sixteen SADC states have adopted the MLCBI. It is submitted that the SADC states should now go further and establish a regional CBI system based, for instance, on a treaty to strengthen the available CBI tools. As in the OHADA structure, so too in the SADC, the regional system should be embedded in the SADC treaty.

5 POSSIBILITES PRESENTED BY THE OHADA EXPERIENCE

5.1 General

Unlike the SADC, the OHADA regional structure provides a detailed law on national (local) and international insolvency in its Insolvency Act.⁸³ This indicates that the international insolvency provisions feature in the OHADA Insolvency Act, whilst the local insolvency laws of the participating states are also the same. What is important to note is the fact that the current international insolvency law provisions are largely based on the MLCBI⁸⁴ and effectively address CBI cases both from outside OHADA states and those states internal to the OHADA.⁸⁵ Although Anglophone Cameroon adopted a common law system, the provisions on insolvency in the respective jurisdictions are *in pari materia* with the provisions in the other contracting states. Hence, the legal basis for the settlement of insolvency disputes in the contracting states *vis-à-vis* non-member states is the OHADA Insolvency Act, and it is largely considered as it stands today. The OHADA structure also allows for wide acceptance of the law by states wishing to join the OHADA. The OHADA Insolvency Act is suited to the increasingly numerous international investors doing business in the OHADA region, and its introduction is therefore welcomed.⁸⁶

A review of the OHADA Insolvency Act, however, reveals that only factually insolvent corporate debtors⁸⁷ are subject to bankruptcy proceedings.⁸⁸ In such cases, the debtor, its

81 Rafique and Sadhwani "Navigating the Labyrinth: Cross-border Insolvency Regime in India" <https://www.barandbench.com/law-firms/view-point/navigating-the-labyrinth-cross-border-insolvency-regime-in-india> (accessed 27-11-2024).

82 See Leno (LLD-thesis, University of Pretoria, 2014) 130.

83 The New Uniform Act Organizing Collective Proceedings for Wiping off Debts dated 10 September 2015 (otherwise called the OHADA Insolvency Act).

84 30 May 1997.

85 OHADA Insolvency Act arts 247–285. See Lemay "OHADA Enacts Legislation Based on UNCITRAL Model Law on Cross-Border Insolvency" <https://unis.unvienna.org/unis/en/pressrels/2015/unisl222.html> (accessed 27-11-2024).

86 See Degos, Green and Akchoti "A New OHADA Uniform Act on Insolvency and Restructuring in Africa" (2015) 1 https://files.klgates.com/files/101953_alert_ohada%20uniform_act.pdf (accessed 27-11-2024).

87 OHADA Insolvency Act arts 1(3) and 25. Balance sheet insolvency is a situation where a debtor is unable to pay its debts because the value of its assets is less than that of its liabilities (balance sheet approach).

88 *Ibid* art 34. Reorganisation and liquidation proceedings are provided for.

creditor(s) and/or the public prosecutor may file for bankruptcy⁸⁹ because it is the only formal measure available in the case of corporate debtors. This means that no out-of-court procedures are available. It is beneficial to file for bankruptcy in that it enables the creditors to determine whether the debtor is insolvent or not, and it saves the creditors the trouble of having to deal with the insolvent individually. As for the debtor, bankruptcy also provides the opportunity to reorganise the debtor's affairs and to make a fresh start.

The bankruptcy process commences with an application before a competent court, which is territorially limited to the place where the debtor has its registered office or principal place of business.⁹⁰ Upon receipt of the application, an expert is appointed by the court to investigate the financial situation of the debtor and to report on the latter's situation.⁹¹ If satisfied from the expert's report that the debtor is indeed insolvent, the court will issue a bankruptcy order⁹² placing the insolvent in re-organisation or liquidation proceedings.⁹³

A bankruptcy order is defined as a collective debt collection mechanism through which the assets of the insolvent are pooled together for the benefit of all creditors involved in the process.⁹⁴ This order is intended to maximise returns to creditors and prevent the inequitable treatment of creditors. It must be acknowledged that the granting of a bankruptcy order depends on the financial position of the debtor.

When a corporate debtor is insolvent and there is no reasonable possibility of recovery, the main thrust of the OHADA Insolvency Act is to liquidate the assets of the insolvent. Liquidation allows for the timely exit of the insolvent through the sale of assets and distribution of proceeds to creditors in accordance with the rules relating to the ranking of claims.⁹⁵ Liquidation may be executed on a break-up basis, where assets of the debtor are sold piecemeal, or on a going-concern basis, where the entire assets of the debtor are sold.⁹⁶

By contrast, if the debtor is insolvent but still operates a viable enterprise, the OHADA Insolvency Act allows for re-organisation — that is, restructuring of the affairs of the insolvent through the application of formal measures such as new financing, debt-equity swaps, transfer of the whole or part of the business, replacement of top executives, time extension not exceeding three years, or debt reduction.⁹⁷ Since the legal basis for the settlement of insolvency disputes in the contracting states *vis-à-vis* non-member states is the OHADA Insolvency Act, restructuring will be available to a foreign debtor doing business within the OHADA region. This availability protects investment and preserves employment.

5 2 Cross-border Insolvency Cases Between OHADA States *Inter se*

As regards CBI matters between OHADA member states, it must be noted that the OHADA Insolvency Act deals with the recognition of bankruptcy proceedings opened in OHADA contracting or member states. The OHADA Insolvency Act provides for two main proceedings that may be initiated in the event of such a CBI matter: a main bankruptcy proceeding (MBP)

89 *Ibid* arts 26–29. These articles provide both the debtor and its creditors with the standing to file for bankruptcy.

90 *Ibid* art 3(1).

91 *Ibid* art 32.

92 *Ibid* art 34.

93 *Ibid* art 33.

94 Leno “Bankruptcy and Debt Recovery Procedures in Cameroon” 1.

95 OHADA Insolvency Act arts 166 and 167.

96 Armour “The Law and Economics of Corporate Insolvency: A Review” ESRC Centre for Business Research, University of Cambridge Working Paper No. 197 (2001) 32.

97 OHADA Insolvency Act art 27. These measures are submitted within sixty days of the date of insolvency.

and a secondary bankruptcy proceeding (SBP).

The MBP is the order issued where the debtor has its registered office or principal place of business, whilst an SBP is restricted to those states where the debtor has an establishment.⁹⁸ In line with article 247 of the OHADA Insolvency Act, a bankruptcy order issued by a competent court of a contracting state is universally recognised by the OHADA contracting states amongst themselves. This recognition is intended to promote unity amongst OHADA contracting states.⁹⁹ Although recognition of a bankruptcy order is automatic, its enforcement is not, and requires the assistance of the courts, lawyers and insolvency practitioners of the states in which enforcement is sought (by *exequatur*).¹⁰⁰ After the opening of a bankruptcy proceeding, a trustee is appointed, known as an “administrator” in the case of business rescue, and a “liquidator” in the case of a company that ceases trading. Such appointee must administer the insolvent estate,¹⁰¹ and in doing so protects the interests of all creditors involved in the bankruptcy procedure.

When an MBP is commenced and a trustee is appointed, the latter administers all assets of the insolvent wherever located in the OHADA region, provided that no other bankruptcy proceeding is opened. A universality approach is thus followed within the region.¹⁰² Article 250 of the OHADA Insolvency Act recognises the principle of equal treatment of creditors. To this end, a creditor is required to account or return to the trustee whatever the creditor has received in a foreign court out of the insolvent’s assets. This requirement ensures the equality of a later distribution of proceeds realised from the insolvent estate, by following the “hotchpot” rule.¹⁰³

When an insolvent has assets or property in contracting states other than the state of its place of incorporation, the competent courts of the other contracting states have jurisdiction to open separate bankruptcy proceedings (secondary bankruptcy proceedings (SBPs)).¹⁰⁴ This possibility suggests that the opening of an MBP does not bar the commencement of SBPs. The effects of these SBPs are limited to the assets of the insolvent located in the contracting states in which such proceedings are opened (under a territorial approach).¹⁰⁵ Article 251 of the OHADA Insolvency Act gives contracting states the opportunity to apply the law, within their jurisdictions, to the assets of the insolvent and to distribute proceeds realised from the sale of the assets to local creditors.

If bankruptcy proceedings are opened in several contracting states in respect of the same debtor (concurrent proceedings), the courts and trustees of the SBPs are required to cooperate with the court and estate administrator of the MBP (thus following a modified universality approach)¹⁰⁶ in the exchange of information, filing and verification of claims, and the distribution of proceeds.¹⁰⁷ Creditors are at liberty to file their claims in any of the proceedings, although a creditor who

98 *Ibid* art 1(3).

99 *Ibid* art 256(7).

100 *Ibid* art 247.

101 *Ibid* art 4(7).

102 *Ibid* art 249.

103 In an attempt to equalise the payment of dividends amongst creditors across borders in a CBI matter, the “hotchpot” rule provides in general that a creditor who has received part payment in respect of its claim in an insolvency proceeding in a foreign state may not receive payment for the same claim under a foreign insolvency proceeding regarding the same debtor, for as long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received. See further Shandro “The Implementation of the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain” 2006 *American Bankruptcy Institute Journal* 31 35.

104 OHADA Insolvency Act art 251.

105 *Ibid*.

106 In the light of the OHADA Insolvency Act art 1(3), a main bankruptcy proceeding is opened by the competent court of the contracting state in which the insolvent has its registered office or place of business.

107 OHADA Insolvency Act art 252.

has received a share of his claim in one proceeding, must wait until creditors of the same rank have received an equivalent.¹⁰⁸ The “hotchpot” principle ensures equality between creditors and hence predictability.

5 3 The OHADA CBI Dispensation Between an OHADA Member State and a Non-member State

Outside the confines of OHADA member states, the OHADA Insolvency Act equally recognises bankruptcy proceedings opened outside the OHADA region in a non-member state. The aim of such recognition is, amongst other things, to promote cooperation between the courts and competent authorities of contracting states and those of foreign states; ensure legal security in trade and investment and efficient administration of bankruptcy proceedings in the interest of all creditors, debtors and other interested parties; and protect the insolvent’s assets and facilitate business rescue of the insolvent estate so as to protect investment and preserve employment.¹⁰⁹ In this regard, the OHADA Insolvency Act was amended in 2015 to largely reflect the MLCBI principles.¹¹⁰

For a foreign representative (FR) to be recognised, the FR is required to apply for recognition to the competent court of a contracting state to enable that court to ascertain whether the representative is a foreign FR.¹¹¹ It should be noted that the application for recognition of the FR does not subject the FR, the debtor’s affairs or assets in the foreign state to the local court of the contracting state concerned.¹¹² If the court is satisfied that the representative is indeed an FR, it recognises the FR. Upon recognition of an FR, four basic rights come into effect for the FR. First is the right to participate in any bankruptcy proceeding opened in respect of the insolvent pursuant to the OHADA Insolvency Act; to communicate directly with the court of the contracting state concerned, to petition for the opening of local bankruptcy proceedings in the contracting state concerned,¹¹³ and to petition for recognition of the foreign bankruptcy proceeding (FBP) under which he/she has been appointed.¹¹⁴

An FR seeking for recognition of an FBP is required to file an application accompanied by all relevant documents before the competent court of the contracting state concerned. This set of documents includes the following: a certified true copy of the decision to open an FBP and appointment of the FR; a certificate of the foreign jurisdiction certifying the opening of the FBP and the appointment of the FR; or other evidence certifying the opening of the FBP and appointment of the FR; and a statement identifying all FBPs concerning the insolvent known to the FR. All these documents must be translated into the official language(s) of the contracting state concerned.¹¹⁵ If the competent court is satisfied that the threshold requirements have been met, it may decide to recognise the FBP if it is an FBP, the FR requesting recognition is an FR, the application meets the requirements of article 256(14) of the OHADA Insolvency Act, and

108 *Ibid* art 255.

109 *Ibid* art 256.

110 See in general <https://unis.unvienna.org/unis/en/pressrels/2015/unisl222.html> (accessed 27-03-2025); and Andriani, Faye and Barry “Overview: OHADA Uniform Act on Insolvency and Restructuring in Africa” <https://globalrestructuringreview.com/review/europe-middle-east-and-africa-restructuring-review/2017/article/overview-ohada-uniform-act-insolvency-and-restructuring-in-africa> (accessed 02-03-2025).

111 *Ibid* art 256(9).

112 *Ibid*.

113 *Ibid* art 256(1), (6), and (10).

114 *Ibid* art 256(14).

115 *Ibid* art 256(14).

the application has been submitted to the competent court.¹¹⁶

Upon recognition, there is a stay of individual actions and proceedings against the debtor's assets, and a stay of the transfer or disposal of the debtor's assets. In this respect, universality prevails over territoriality.¹¹⁷ It must still be emphasised that the provisions of article 256(19) of the OHADA Insolvency Act do not affect the following aspects of the administration of the estate, namely: The rights of foreign creditors and the FR to commence, intervene or participate in any proceedings regarding the debtor;¹¹⁸ the right to lodge their claims or notification of the local bankruptcy proceedings, stating the time limit to file their claims,¹¹⁹ or the filing location and the names of creditors whose claims are subject to some form of security.¹²⁰ Pending recognition of the FBP, the local court may, at the request of the FR and if necessary to protect the assets of the debtor and the creditors, grant relief in a provisional order. This relief may include a stay of execution against the debtor's assets and the right to transfer the debtor's assets as well as the administrator's, entrusting the debtor's assets to the FR, or a designated person, for the purpose of preserving and protecting the value of the assets.¹²¹ Recognition is entirely a matter of discretion of the contracting state. The contracting state concerned may refuse recognition if it is contrary to public policy of the state (that is, an *ordre public* exception),¹²² or if the grounds for recognition were fully or partially lacking or have ceased to exist.¹²³

In the event of concurrent proceedings (local and FB proceedings) against the same debtor, the OHADA Insolvency Act requires maximum cooperation between the local courts, foreign courts and representative.¹²⁴ This cooperation may be through direct communication of information by any means possible,¹²⁵ or through a designated person in the administration of the assets and affairs of the insolvent and coordination of proceedings.¹²⁶ The purpose is to get rid of time-consuming formalities or diplomatic channels and to expedite the bankruptcy process. To underline this cooperative spirit, the OHADA Insolvency Act contains the "hotchpot" rule. Article 256(31) states that a creditor who has received payment in one proceeding shall not receive payment for the same claim in another proceedings regarding the same debtor if the latter payment would mean that the creditor proportionally receives more than other creditors of the same class of preference. Thus, payment received in one proceeding is taken into account in other proceedings to ensure that all creditors receive at least a dividend.

6 LESSONS THE SADC MAY LEARN FROM THE OHADA

Since the lack of a clear set of rules presents a significant problem in an age of growing interconnectedness, it is apparent that the SADC should consider the design and implementation of a uniform CBI law. In so doing, it is hoped that the SADC states could learn from the OHADA's experience, a model for many regional economic communities seeking to develop uniform commercial laws in general and CBI in particular.¹²⁷ Since nine SADC states have

116 *Ibid* art 256(16).

117 *Ibid* art 256(19).

118 *Ibid* art 256(12).

119 *Ibid* art 78. Under this article, foreign creditors have 90 days to file their claims, but local creditors have only 30 days.

120 *Ibid* art 256(13).

121 *Idem* arts 256(18) and 20(3).

122 *Ibid* art 256(5).

123 *Ibid*.

124 *Ibid* art 256(28).

125 *Ibid* art 256(24) and (25).

126 *Ibid* art 256 (24) and (26).

127 See Leno (LLD-thesis, University of Pretoria, 2014) 130.

already adopted the MLCBI, this instrument could be used as a basis for an inter-SADC CBI dispensation, authorised by a specific treaty. In so doing, the following lessons could be learnt. First and foremost, the OHADA Insolvency Act provides clarity on the competent court and certainty about participation and treatment of creditors. Similarly, a SADC CBI framework must first specify the competent court which must be territorially limited to the place where the debtor has its registered office or principal place of business.¹²⁸ The treatment of both local and foreign creditors should embrace an equitable system to ensure the equality of a subsequent distribution of proceeds realised from the insolvent estate amongst all creditors and to prevent the inequitable treatment of creditors.

Secondly, the law must specify the commencement standard because it is instrumental in identifying debtors who can be subjected to insolvency proceedings (for instance, the insolvency criteria of the balance sheet or the cash flow test). It will, however, be a policy consideration whether to follow the OHADA model in which only corporate debtors could be subject to a collective bankruptcy proceeding,¹²⁹ the granting of which should depend on the financial position of the debtor, or whether to expand the dispensation to other types of debtors as well.

Either way, the CBI law must also deal with the recognition of bankruptcy proceedings opened in the SADC region amongst SADC member states. In line with article 247 of the OHADA Insolvency Act, a bankruptcy order issued by a competent court of an SADC state could follow a more universalist approach to be automatically recognised by all the SADC states. This solution is intended to promote unity amongst the SADC states.¹³⁰ It is submitted that such a framework should also provide for two main types of proceedings: an MBP and an SBP. Whilst the MBP should be universal within the region in its scope, the SBP should be more territorial. When both proceedings are commenced concurrently against the same debtor, the trustees of both proceedings should be required to cooperate in the exchange of information and the filing and verification of claims (by a modified universality approach).¹³¹

As for third countries (that is, non-SADC member states) and since the MCBI has already been adopted by a large number of SADC member states, the MCBI can be used as the basis for the recognition of a FR and bankruptcy proceedings opened outside the SADC region. In line with the aims of the MCBI, it could: promote cooperation between the courts and competent authorities of contracting states and those of foreign states outside its ambit; ensure legal security in trade and investment and efficient administration of bankruptcy proceedings in the interest of all creditors, debtors and other interested parties; and protect the insolvent's assets and facilitate the business rescue of the insolvent estate in order to protect investment and preserve employment. The recognition of the FR and FBP should be subject to the fulfilment of certain threshold requirements. As in the OHADA dispensation, the ultimate recognition as such in an individual case should be entirely a matter of discretion of a contracting state.¹³² In fact, the contracting state concerned may refuse recognition if it is contrary to the public policy of the state (that is, an *order publique* exception),¹³³ or if the grounds for recognition were fully or partially lacking or have ceased to exist.¹³⁴

Furthermore, in the event of concurrent proceedings (local and FB proceedings) against the same debtor, the insolvency framework should provide for maximum cooperation between the

128 *Ibid* art 3(1).

129 See para 5 2 above.

130 *Ibid*.

131 *Ibid*.

132 *Ibid*.

133 *Ibid* art 256(5).

134 *Ibid*.

local courts, foreign courts and representatives. As in the OHADA dispensation, the cooperation should take place through direct communication of information or through a designated person in the administration of the assets and affairs of the insolvent and coordination of proceedings with the aim of getting rid of time-consuming formalities. To underline this co-operative spirit, the framework must contain the “hotchpot” rule, which provides for equitable treatment of creditors regardless of where they are situated. Thus, payment received in one proceeding must be taken into account in other proceedings to ensure that all creditors receive at least a dividend.¹³⁵

Finally, in view of the adoption of the MLCBI within the SADC region, it is submitted that the SADC structure already has the makings of a CBI treaty to operate at least amongst the SADC member states. In a CBI matter between a SADC member state and a non-member state, it will depend on whether all the member states will be prepared to regulate that relationship also via a treaty. If not, it is nevertheless submitted that this relationship could be harmonised throughout the region so that a uniform approach should at least be adopted — something that might be fairly easy to achieve because the MLCBI is a familiar concept within the region, and the MLCBI’s content can also be used to establish such a dispensation.

7 CONCLUSION AND RECOMMENDATIONS

This article defines the CBI concept, noting that it is a situation in which an insolvent has assets, property or interest in property across a number of jurisdictions. It examines and explains the SADC’s legal framework and some difficulties in the current legal systems of the SADC member states, noting that some of these lack a common language, currency, legal system and, pertaining to this contribution, a common CBI law. These facts invariably mean that in a cross-border dispute, economic operators will be subject to diverse national laws which, according to the authors, may harm the interests of local and foreign investors, communities and development in general, which could have an impact on the large volume of cross-border transactions enabled by the movement of goods, services and persons. The authors call on the SADC states to develop uniform CBI legislation to facilitate investment and regulate cross-border disputes. It is submitted that a uniform CBI law would remove uncertainty regarding the scope of existing national provisions, and it would strengthen investors’ confidence. The OHADA experience is thus submitted to serve as an example because of its successful development of a detailed insolvency law as well as a national or local insolvency law. In this regard, the OHADA’s experience that highlighted some aspects that may benefit the SADC in developing a uniform CBI law for its region, is assessed. Amongst these is the fact that the OHADA Insolvency Act deals with both the recognition of bankruptcy proceedings initiated in OHADA contracting states and those outside the OHADA space, with respect to the same debtor and with the aim of, amongst other things, promoting cooperation between the courts and competent authorities of contracting states and those of foreign states. Ultimately, the OHADA CBI law is contained in the OHADA Insolvency Act, an initiative welcomed by international investors.

In this age of growing inter-connectedness, it is expedient for the SADC to also develop at least a uniform CBI law to facilitate trade and address CBI issues within its region effectively. In so doing, SADC may draw inspiration from the OHADA experience. Since nine SADC states have already adopted the MLCBI, this instrument could be used as a basis for an inter-SADC CBI dispensation, authorised by a specific treaty. As mentioned above in paragraph 1, David Ailola mooted this option in 1999, and Bob Wessels viewed the SADC structure as a cradle for

135 *Ibid.*

such an initiative.

The OHADA Insolvency Act provides clarity on the competent court and certainty about participation and treatment of creditors. Similarly, a SADC CBI framework must first specify the competent court which must be limited to the territory where the debtor has its registered office or principal place of business.¹³⁶ The treatment of both local and foreign creditors should embrace an equitable system to ensure that the subsequent distribution of proceeds realised from the insolvent estate will be distributed fairly amongst all creditors to prevent any inequitable treatment. Secondly, the law must specify the commencement standard because it is instrumental to identifying debtors who can be subjected to insolvency proceedings (for instance, the insolvency criteria of the balance sheet or the cash flow test). It will, however, be a policy consideration whether to follow the OHADA model in which only corporate debtors could be subject to a collective bankruptcy proceeding,¹³⁷ the granting of which should depend on the financial position of the debtor, or whether to expand the dispensation to other types of debtors as well.

Either way, the CBI law must also deal with the recognition of bankruptcy proceedings opened in the SADC region amongst SADC member states. In line with article 247 of the OHADA Insolvency Act, a bankruptcy order issued by a competent court of a SADC state could follow a more universalist approach to be automatically recognised by all the SADC states. This solution is intended to promote unity amongst the SADC states.¹³⁸ It is submitted that such a framework should also provide for two main types of proceedings: an MBP and an SBP. Whereas the MBP should be universal within the region in its scope, the SBP should be more territorial. When both proceedings are commenced concurrently against the same debtor, the trustees of both proceedings should be required to cooperate in the exchange of information and the filing and verification of claims (by a modified universality approach).¹³⁹

As for third countries (that is, non-SADC member states) and since the MCBI has already been adopted by a large number of SADC member states, the MCBI can be used as the basis for the recognition of a FR and bankruptcy proceedings opened outside the SADC region. In line with the aims of the MCBI, amongst other things, it could promote cooperation between the courts and competent authorities of contracting states and those of foreign states outside its ambit; ensure legal security in trade and investment and efficient administration of bankruptcy proceedings in the interest of all creditors, debtors and other interested parties; and protect the insolvent's assets and facilitate the business rescue of the insolvent estate in order to protect investment and preserve employment. The recognition of the FR and FBP should be subject to the fulfilment of certain threshold requirements. As in the OHADA dispensation, the ultimate recognition as such in an individual case should be entirely a matter of discretion of a contracting state.¹⁴⁰ In fact, the contracting state concerned may refuse recognition if it is contrary to public policy of the state (that is, an *ordre public* exception),¹⁴¹ or if the grounds for recognition were fully or partially lacking or have ceased to exist.¹⁴²

Furthermore, in the event of concurrent proceedings (local and FB proceedings) against the same debtor, the insolvency framework should provide for maximum cooperation between the local courts, foreign courts and representatives. As in the OHADA dispensation, the cooperation

136 *Ibid* art 3(1).

137 See para 5 2 above.

138 *Ibid*.

139 *Ibid*.

140 *Ibid*.

141 *Ibid* art 256(5).

142 *Ibid*.

should take place through direct communication of information or through a designated person in the administration of the assets and affairs of the insolvent and coordination of proceedings with the aim of getting rid of time-consuming formalities. To underline this co-operative spirit, the framework must contain the “hotchpot” rule, which provides for equitable treatment of creditors regardless of where they are situated. Thus, payment received in one proceeding must be taken into account in other proceedings to ensure that all creditors receive at least a dividend.¹⁴³

Finally, in view of the adoption of the MLCBI within the SADC region, it is submitted that the SADC structure already has the makings of a CBI treaty to operate at least amongst the SADC member states. In a CBI matter between a SADC member state and a non-member state, it will depend on whether all the member states will be prepared to regulate that relationship, also via a treaty. If not, it is nevertheless submitted that this relationship could be harmonised throughout the region so that a uniform approach would at least be adopted — something that might be fairly easy to achieve because the MLCBI is a familiar concept within the region, and the MLCBI’s content can also be used to establish such a dispensation.

143 *Ibid.*