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Disclaiming Onerous Property in Insolvency: A Comparative Study

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Contents

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Acknowledgement

In many countries, the insolvency legislation allows for insolvency officers to repudiate unprofitable contracts, and any other obligations in respect of property of the debtor company which is unsaleable or is not readily saleable, or where liabilities to pay money or to perform any other onerous acts may arise. The types of obligations that may be repudiated are usually the ones that would be of little or no value to the estate and may further diminish the pool of assets available for the unsecured creditors.

Environmental obligations, especially those arising from hazardous, toxic or harmful activities may also be disclaimed. Unlike traditional property that may be disclaimed, the long-term effect of environmental harms results in claims on the State long beyond the end of insolvency proceedings.

This paper explores the reasons for this option existing, how it is used in a number of different jurisdictions, what limitations there are on its use or impact, whether there is any common rationale for its use or maintenance and, finally, whether separate legislative provision is desirable to deal with environmental property disclaimers.

Our sincere thanks to Paul Omar, Gray's Inn Barrister, Advocate and Solicitor of the High Court of Malaya, and Senior Lecturer, University of Sussex for writing this interesting and thought provoking paper.

Disclaiming Onerous Property in Insolvency: A Comparative Study

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Introduction[1]

An option is provided in the insolvency legislation of a number of jurisdictions to disclaim property of the estate whose maintenance is deemed to constitute an onerous obligation. The intention is to allow the insolvency practitioner administering the estate to disclaim an ongoing obligation in circumstances where requiring the debtor to remain bound under the terms of a contract would constitute an impediment to the efficient administration and conclusion of proceedings involving that debtor. Other property may be disclaimed where its maintenance may be unprofitable and result in further obligations being acquired, which ultimately are of little or no value to the estate and may, in fact, harm the general mass of creditors by further diminishing the pool available for distribution. In a number of jurisdictions, seeking the permission of the court is a necessary pre-condition to exercising the power, in others not so. Notice to third parties may also be a requirement, permitting them, in limited circumstances, to raise a challenge to the proposed divestiture of the obligation. There may also be a specified timeframe, at the end of which, a disclaimer takes effect, determines the extent of any unexpired obligation and binds parties to the transaction as well as any third parties whose claims are derived from original title-holders.

In the past, assets subject to disclaimers tended to fall into one of two groups: (i) property leases, either of the "wasting" type, where the imminent or short-term end of the lease or the inclusion of onerous covenants in the agreement, minimises its value to the estate, or commercial leases, where an uplift clause or one prohibiting assignment renders the lease of little benefit to the estate; or (ii) executory contracts, where medium- or long-term obligations for example in the case of manufacturing goods or supplying services have a potentially disproportionate effect on the insolvency practitioner's ability to dispose of viable assets or the debtor's business as a whole. More recently, environmental obligations, especially those arising from hazardous, toxic or harmful activities, for example cleanup costs and/or particularly onerous control requirements for carrying out activities, have been the object of disclaimers. While an economic argument can be made by weighing up the harms (the negative externalities) before activity is licensed and/or commenced against the benefits to society of industrial progress, the rationale behind the option to disclaim onerous property appears to fail as the responsibility for containing the harm entirely devolves on the State and will generally require public subsidy to resolve. Unlike traditional property that may be disclaimed, where the disclaimer results in quantified or quantifiable claims in insolvency that can be dealt with within proceedings, the generally long-term effect of environmental harms results in claims on the State long beyond the end of insolvency proceedings. This paper intends to explore the history and reasons behind the disclaimer option existing, how it is used in a number of different jurisdictions, what limitations there are on its use or impact, whether there is any common rationale for its use or maintenance and, finally, whether the extension to the possibility of environmental property being the subject of disclaimers is a natural development of this option in insolvency or whether separate legislative provision is desirable that takes into account the very specific nature and threat of environmental harms.

[1] The author would like to acknowledge the honour extended by INSOL International in nominating the author INSOL Scholar for the Europe, Africa and Middle Eastern Region for 2008-2009, in fulfilment of which this scholarship paper is written.

I - The United Kingdom: Sections 178 et seq. of the Insolvency Act 1986

The onerous property provisions have a long history in the United Kingdom.[2] The 1869 bankruptcy framework allowed the trustee-in-bankruptcy to disclaim onerous property by including a provision within the section dealing with the trustee's dominion over property to that effect.[3] Property of various types could be disclaimed, a list that is very reminiscent of those present in the provisions of legislation derived from this model, including unprofitable contracts. No leave of the court was required for disclaimer to take effect, nor was the court able to make any orders imposing terms or conditions. In relation to leases, this apparently caused difficulties, since disclaimer was deemed analogous to a surrender of the lease, thus preventing the application of provisions that would ordinarily apply on the expiry of the lease, such as the retrieval of tenant's fixtures.[4] To alleviate this problem, the 1883 successor legislation included a further clause into section 55 which provided that leave would be required for disclaimers of leases, except in accordance with general rules of law or practice, with the court being able to require the issue of notices and compliance with terms as a precondition for authorising the disclaimer. The provision also permitted the court to make special provision for fixtures, tenant's improvements and any other tenancy matters as the court thought just.[5] The section saw an early use in the case of *Re Moser*,[6] where leave to disclaim was made subject to payment for occupation of the premises from the commencement of proceedings and a choice for the lessor of whether to pay for the fixtures at valuation within a defined period, in default of which the trustee could remove them.[7] The provisions were re-adopted in section 54 of the Bankruptcy Act 1914 and subsequently translated into corporate legislation via section 267 of the Companies Act 1929 and its legislative successors.[8]

The present framework is contained in sections 178 and following of the Insolvency Act 1986, which consolidates bankruptcy and corporate insolvency.[9] However, one notable difference with earlier legislative models is the removal of the need to seek the court's approval for disclaimers taking place.[10] The insolvency practitioner may by giving notice disclaim property not withstanding that he has taken possession, attempted to sell or exercised any rights of ownership over the property.[11] Property is defined for the purposes of these sections as being any unprofitable contract or any other property that is not saleable or not readily saleable because of an obligation to pay money or perform an act which is potentially onerous for the debtor.[12] In bankruptcy, an exception arises for certain property that has been claimed for the estate under sections 307-308A of the Insolvency Act 1986, for which a disclaimer may not operate.[13] The effect of a disclaimer is to determine the rights, interests and liabilities of the debtor from the date the disclaimer is made in the property or in respect of the property. It does not, however, affect the rights or liabilities of any person except insofar as may be necessary to release the debtor from liability.[14] According to Goode, the power to disclaim may not disturb rights or liabilities already accrued, nor can it be used to disclaim executed contracts.[15] In the case of executory contracts, disclaimer has no effect on rights and liabilities from the already performed portion of the contract. If the operation of a disclaimer results in any person sustaining loss or damage, this person is automatically deemed to be a creditor of the estate and may prove for the debt in insolvency proceedings affecting the debtor.[16] Goode suggests the calculation of loss under a disclaimed "unprofitable contract" should be made on the basis of an accepted repudiation.[17] In the case of a disclaimed lease, Rajak suggests that the loss is limited to the loss of the right to future rent, which must be discounted for accelerated payment.[18] Case law supports

[2] Although the law was chiefly developed in England and Wales in the context of bankruptcy (personal insolvency), the application of the corporate insolvency provisions of the Insolvency Act 1986 to all of the jurisdictions that comprise the United Kingdom now means its vocation is universal. Nonetheless, it should be noted that bankruptcy remains jurisdiction-specific and, although many provisions are similarly aligned, the frameworks in the component parts of the United Kingdom are very different.
[3] Section 23, Bankruptcy Act 1869, noted in *Enron Australia v TXU Electricity* [2003] NSWSC 1169, at paragraph 62.
[4] Ibid., at paragraph 63, citing *Ex parte Stephens* (1877) 7 Ch D 127 and *Ex parte Brook* (1878) 10 Ch D 100.
[5] Ibid., at paragraph 65, noting section 55(3).
[6] *Re Moser* (1884) 13 QBD 738.
[7] *Enron Australia v TXU Electricity* [2003] NSWSC 1169, at paragraph 67.
[8] Section 323, Companies Act 1948; section 617, Companies Act 1985. See also H. Rajak, Company Liquidations (Sweet and Maxwell, London, 2006) at paragraph 9-0211.
[9] Sections 315 and following, Insolvency Act 1986 are the analogous provisions applicable in bankruptcy.
[10] See R. Goode, Principles of Corporate Insolvency Law (Sweet and Maxwell, London, 1997) at 127.
[11] Sections 178(2) and 315(1), Insolvency Act 1986.
[12] Ibid., sections 178(3) and 315(2). This much-expanded definition of property was introduced into the Act following recommendations of the Cork Committee in its Report on Insolvency Law and Practice (Cmnd 8558) at paragraphs 1191-1193 inspired by the Australian developments noted below.
[13] Ibid., section 315(4). This affects after-acquired property, personal property exceeding its reasonable replacement value and claims under the Housing Act 2004.
[14] Ibid., sections 178(4) and 315(3). The latter section also discharges the trustee from all personal liability in respect of the property dating back to the commencement of the trusteeship.
[15] Goode, op. cit., at 128, gives the example of the expired lease. He also states that contracts to sell land, where the buyer has already acquired equitable title, are similarly immune from the operation of a disclaimer.
[16] Sections 178(6) and 315(5), Insolvency Act 1986.
[17] Goode, op. cit., at 130.
[18] Rajak, op. cit., at paragraph 9-021.

the contention that the element of advancement must be taken into account.[19] One exception to liability arises in that, in the case of land subject to a rentcharge, if the operation of a disclaimer results in land vesting either in the Crown or another person, no personal liability accrues in respect of any sums due under the rentcharge until or unless entry into possession or occupation is taken or control exercised over the land by or on behalf of the Crown or that person.[20]

Notice is a key feature of the disclaimer provisions. In principle, no time limit applies to the making of a disclaimer. However, where a person interested in the property has applied in writing to the insolvency practitioner requiring a decision on whether the insolvency practitioner will disclaim, if a reply is not forthcoming within a period of 28 days, or any longer period that a court may allow, then the entitlement to disclaim is lost and notice of disclaimer may not in fact be given in relation to any property or contract.[21] In fact, in bankruptcy, the trustee is deemed to have adopted any contract where the right to disclaim has been lost.[22] Special regimes apply in respect of certain types of property. For leasehold property, notice must be served (insofar as the insolvency practitioner is aware of any person with a claim) on underlessees or mortgagees. The disclaimer then does not take effect until the expiry of a 14-day period following the service of the last such notice under this provision, with no application being made to court challenging the disclaimer or, where there has been an application, the court in fact directs that the disclaimer is to have effect.[23] In the latter case, replicating a concern in the earliest amendments to these provisions, the court may make one or more orders in respect of fixtures, tenant's improvements or other lease matters as it thinks fit.[24] In bankruptcy, similar notice must be served on any person who may be occupying or have a claim to occupation in respect of a dwelling house.[25] For disclaimers in respect of leases, case law has qualified how disclaimers operate where there is a chain of (under-)lessees and (under-)lessors and the transaction between the debtor and its immediate hierarchical superior forms only part of this chain.[26] The effect is to preserve entitlements unchanged as far as possible in the case of a subtenant claiming through the debtor, while future obligations, such as those of a guarantor or surety, would not necessarily end unless the landlord entered possession and brought the lease to an end.

Vesting orders may also be made in relation to property. An application may, in this context, be made by persons who may have an interest in the disclaimed property or who are subject to a liability that remains undischarged by the disclaimer.[27] The court may, in consequence, make an order on terms as it thinks fit to vest the property in any person with an entitlement to the property or who is subject to a liability in relation to that property or to any trustee for that person.[28] In relation to a person claiming by virtue of being subject to a liability, the court is bound not to make the order unless it would be just to do so for the purposes of compensating that person.[29] Where a vesting order takes place, it is taken into account as a factor in assessing the amount that may be proved by that individual in proceedings involving the debtor.[30] Finally, the vesting order has effect without there being any need for a subsequent conveyance, assignment or transfer.[31] A slightly different regime applies in the case of leaseholds. There is a presumption here against making an order unless the person in whom the property (or part of it) is to be vested is made subject to the same liabilities and obligations in respect of that property that were applicable on the day proceedings were commenced or, if the court thinks fit, any liabilities or obligations that would have applied had the lease in fact been transferred to him on that day.[32] If no person within the scope of this section is willing to accept the consequences of a vesting order, the court may, as an alternative, vest the property in a person liable to perform the lessee's covenants, whether personally or in a representative capacity and whether solely or jointly liable with the debtor.[33] However, should any

[19] *Christopher Moran Holdings Ltd v Bairstow and Another; Re Park Air Services plc* [1999] UKHL 2.
[20] Sections 180 and 319, Insolvency Act 1986.
[21] Ibid., sections 178(5) and 316(1).
[22] Ibid., section 316(2).
[23] Ibid., sections 179(1) and 317(1). Goode, op. cit., at 128, suggests that the court will not readily interfere in the insolvency practitioner's decision unless it was in "bad faith or perverse", citing *Re Hans Place Ltd* [1993] BCLC 768.
[24] Ibid., sections 179(2) and 317(2).
[25] Ibid., section 318.
[26] *Hindcastle Limited v Barbara Attenborough Associates Limited and Others* [1996] UKHL 19.
[27] Sections 181(2) and 320(2), Insolvency Act 1986. The latter section also provides an entitlement to apply for persons with an occupation right in a dwelling house.
[28] Ibid., sections 181(3) and 320(3). The latter section also concedes the possibility of vesting in a person with an occupation right in a dwelling house.
[29] Ibid., sections 181(4) and 320(4).
[30] Ibid., sections 181(5) and 320(5).
[31] Ibid., sections 181(6) and 320(6).
[32] Ibid., sections 182(1)-(2) and 321(1)-(2). The corporate provisions limit application to underlessees and mortgagees, while the bankruptcy ones are wider in that they apply to any person. Rajak, op. cit., at paragraph 9-023, suggests that the first option is used where the landlord's permission would have been required for assignment, the second where not.
[33] Ibid., sections 182(3) and 321(3).

person within the contemplation of this section not be willing to accept an order, that person will be excluded from having any interest in the property concerned.[34]

Other remedies also exist alongside disclaimer. In corporate insolvency, the court could also make an order for rescission of a contract with the company on such terms as the court might think just, with applications authorised under this section from persons claiming the benefit or liable to a burden under that contract. Terms may be imposed as to payment by or to the company of damages for non-performance and any damages payable by the company may be proved as a debt by the contracting party in the relevant insolvency proceedings.[35] In bankruptcy, without prejudice to the disclaimer provisions, the trustee may effect a distribution *in specie* to the creditors, subject to the approval of the creditors' committee, of property that cannot be readily or advantageously sold by reason of its peculiar nature or other special circumstances.[36] The permission can only apply to a specific disposal, although ratification subsequently of a disposal undertaken without permission can occur, if the disposal was carried out due to the urgency of the situation.[37]

In its potential application to environmental issues, the disclaimer provisions have received some attention in a series of cases dating from the late 1990s. In *Re Mineral Resources*,[38] the insolvent debtor held a waste management licence for a landfill site,[39] a necessary consequence of urban living. The liquidator, deciding that the licence was effectively unsaleable, gave notice to the Environment Agency of his intention to disclaim the licence, as a species of property, under the onerous property provisions of the Insolvency Act 1986. The Environment Agency applied to court for a declaration that the licence was not property or, if the licence was in fact property, that the later statute dealing with the environment had necessarily abrogated the Insolvency Act 1986 as far as such licences were concerned. At first instance, Mr Justice Neuberger felt able to hold that the licences were, in light of a transfer market for them being available, property, but that they could not be disclaimed for a variety of reasons. These were, notably, that in the conflict between the statutes, the later in time should prevail, as the concerns reflected in the later statute, especially the public interest reflected in the "polluter pays principle"[40] were more wide-ranging and important than the policy inherent in insolvency legislation and, furthermore, the Environment Agency would be unable to prove for the loss or damage it would undoubtedly suffer in the debtor's insolvency. The Court of Appeal proceedings in *Celtic Extraction*[41] were concerned with two appeals from decisions of Mr Justice Neuberger to similar fact situations in which the ruling in *Re Mineral Resources* was applied. The Court of Appeal was able to agree with the judge at first instance that the licence was capable of being property under the definition in *Ainsworth*[42] and other cases, especially given that the right it conferred was sufficiently certain and had potential value to a transferee.[43] As to whether it was property capable of being disclaimed, the court was faced with two possible interpretations of the environmental legislation, the wider, championed by the Environment Agency, being one in which section 35 effectively prevented termination except by the Environment Agency or in those limited circumstances where the lease was surrendered.[44] The narrower, favoured by the Official Receiver, was to limit the reading to prevent unilateral termination by the parties, but not to curtail the impact of external statutes.[45] In preferring the latter, narrower, approach,[46] the court was of the view that nothing in the European directives which the Environmental Protection Act 1990 is intended to implement suggests that the polluter pays principle requires that the unsecured creditors pay the cost to the extent of the assets available to them.[47] Subsequent cases, such as *Hillridge*,[48] have consistently upheld this interpretation.

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[34] Ibid., sections 182(4) and 321(4).
[35] Ibid., section 186.
[36] Ibid., section 326(1). It may be possible for the liquidator to use the general discretion to manage the company's assets and effect a distribution amongst creditors contained in section 168(4) to achieve a similar outcome.
[37] Ibid., section 326(2)-(3).
[38] *Re Mineral Resources Ltd (in liquidation), Environment Agency v Stout* [1999] 2 BCLC 516.
[39] Under firstly section 5, Control of Pollution Act 1974 and, later, section 35, Environmental Protection Act 1990.
[40] At 528 d-e.
[41] *Official Receiver as liquidator of Celtic Extraction Ltd and Bluestone Chemicals Ltd v Environmental Agency* [1999] EWCA Civ 1835.
[42] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.
[43] At paragraphs 27-34.
[44] Under sections 38-39, Environmental Protection Act 1990.
[45] At paragraph 37.
[46] At paragraph 46.
[47] At paragraph 39.
[48] *Environment Agency v Hillridge Ltd and others* [2004] 2 BCLC 358. In *Hillridge*, the effectiveness of the disclaimer also had the (perhaps unintended) effect of disclaiming any interest in a trust fund set up by the company to carry out remedial work at the landfill site when tipping had ceased, vesting the proceeds of the fund in the Crown as *bona vacantia*. See C. Shelbourn, Waste Management Sites, Insolvency and Long Term Financial Problems – The Story Continues… (2004) JPL 697 and M. Edwards, Case Comment (2004) JPL 1258.

Commentary on the line of cases has emitted some criticism of the approach of the courts. An early case note on *Celtic Extraction* suggested it was a *non sequitur* for the courts to hold that insolvency legislation implicitly included waste management licences, but that the later environmental legislation did not trump insolvency law because it did not expressly mention the issue. The comment prefers the views at first instance, that allowing disclaimers would offer debtors perverse incentives to use liquidation to shed clean-up obligations, with the argument following that consensual creditors could take environmental risks into account when deciding how to price contracts and the cost of credit, resulting in other (more palatable) incentives to debtors to conduct environmental audits to show how they have minimised exposure in order to obtain better credit.[49] Although some clean-up costs will rank as unsecured claims, if disclaimer continues to be allowed, the burden will mostly fall on public authorities. As a result, courts ill-equipped to resolve complex policy issues may have inadvertently given the wrong guidance to debtors, a situation that legislation should remedy at the earliest.[50] The policy inherent in the decisions, which appear to prefer creditors over environmental concerns, is also an object of criticism.[51] The last word may be left to an early comment in the wake of the *Celtic Extraction* case, which suggested that, as the polluter pays principle gives way in the environmental context to that of sustainable development, the conflict inherent in these cases may find itself, in the absence of legislation, being revisited before the courts.[52]

II - Australia: Sections 568 et seq. of the Corporations Act 2001

The Australian legislative framework, set out in Division 7A of the Corporations Act 2001,[53] contains one of the most complex sets of provisions amongst common law countries. According to the law, a disclaimer may be made at any time in writing and signed on behalf of the company by a liquidator.[54] The types of property are defined widely to include, in language reminiscent of statutes with a common ancestry, land burdened with onerous covenants,[55] shares, unsaleable or not readily saleable property, property giving rise to a liability to an onerous obligation or a requirement to pay money, property whose realisation costs (including charges and expenses) would exceed, in all reasonable expectation, the proceeds of sale as well as any contract.[56] The facility to disclaim is available for all types of property (excepting contracts) irrespective of whether the liquidator has tried to sell the property, has taken possession of it or has exercised an act of ownership over the property.[57] As far as contracts are concerned, the facility remains available even though the liquidator may have exercised rights or attempted to assign the contract or any property it covers.[58] The disclaimer provisions do not apply, however, to an agreement under which the company has contracted to buy its own shares back.[59] All disclaimers, with two exceptions, relating to unprofitable contracts and leases of land, must be made with leave of the court.[60] Leave will generally be granted by the court subject to conditions and the making of any orders in connection with the contract as the court considers just and equitable.[61] Loss of the right to disclaim may occur where a person with a property interest makes an application in writing to the liquidator for the determination of the liquidator's decision in relation to property or a contract.[62] In this case, the liquidator has a period of 28 days, or such extended period as the court permits, to disclaim, in default of which the liquidator is no longer entitled to

[49] See J. Armour, Case Comment: Who pays when Polluters go bust? (2000) 116 LQR 200 at 203.
[50] Ibid., at 204.
[51] See C. Shelbourn, Waste Management and the Insolvent Company (2000) JPL 134 at 139-140, who makes the point that administration/receivership may not carry the same protection, with the factor that the debtor continues to trade meaning that the administrator/administrative receiver will have to ensure continuing respect for pre-existing obligations. Additionally, there is the possibility of personal liability for default occurring during his tenure. See also D. Case and P. de Prez, Case Comment: The Power of Disclaimer and Environmental Licences (2000) Insolv L 87.
[52] See P. De Prez and A. Keay, Insolvency and Environmental Principles: A Case Study in a Conflict of Public Interests (2001) 3 Env L Rev 90 at 110.
[53] See A. Keay and M. Murray, Insolvency: Personal and Corporate Law and Practice (4th ed) (Lawbook Co, Sydney, 2002) at 340, who state that, following changes to the former, the rules in corporate insolvency are now similar to those for bankruptcy contained in section 133, Bankruptcy Act 1966.
[54] Section 568(1), Corporations Law 2001.
[55] Onerous covenants mean not just covenants in the traditional sense, but also other obligations that weigh on the land, for example mortgages and rates. See J. Duns, Insolvency Law and Practice (OUP, Sydney, 2002) at 238, citing *Re Tulloch Ltd (in liq) and the Companies Act* (1978) 3 ACLR 808 and *Re Middle Harbour Investments (in liq)* (1975-76) CLC 40-629.
[56] Section 568(1)(a)-(f), Corporations Law 2001.
[57] Ibid., section 568(1)(g).
[58] Ibid., section 568(1)(h).
[59] Ibid., section 568(1AA).
[60] Ibid., section 568(1A). Keay and Murray, op. cit., at 339, point to the definition of what may be unprofitable contracts, citing *Transmetro Corporation Ltd v Real Investments Pty Ltd* (1999) 17 ACLC 1314 and *Global Television Pty Ltd v Sportvision Australia Pty Ltd* (2000) 35 ACSR 484. Duns, op. cit., at 239, suggests that unprofitable does not necessarily mean financial loss from performing the contract, but could include a substantial financial outlay necessary to continuing performance, citing *Dekala Pty Ltd (in liq) v Perth Land and Leisure Ltd* (1989) 17 NSWLR 664. Nonetheless, also citing *Transmetro*, Duns suggests that comparative financial advantage from a disclaimer, where the liquidator could continue to perform the contract without prejudicing his duty to realise assets for the benefit of creditors, would not be sufficient reason to authorise the disclaimer.
[61] Ibid., section 568(1B).
[62] Ibid., section 568(8)(a). Duns, op. cit., at 237, suggests that a property interest necessarily means a legal or equitable interest and would thus exclude a mortgagee of Torrens title land as well as the holder of a lien, citing the authority of *Re Williams; Ex parte Perpetual Trustees, Executors and Agency Co of Tasmania* (1931) 26 Tas LR 82 and *Re Hensbergen and Aikman; Ex parte Cleland* (1950) 15 ABC 238.

disclaim and, in fact in the case of a contract, is taken to have adopted it.[63] In relation to contracts, the court also has the power, on application of an interested person, to either discharge the contracts on terms as to payment by one or other party of damages for non-performance to the other as the court thinks proper or the rescission of the contract followed by restitution of property in the same manner.[64] Any sums payable by virtue of an order the court makes may be proved in the insolvency.[65]

Notice requirements are a strong feature of this framework. As part of the disclaimer process, the liquidator may require a person on whom notice is served to make a statement of interest in relation to property for the purposes of determining whether the property is of an onerous nature. Compliance within 14 days following service is required.[66] Notice of the disclaimer itself is also required. Once property has been disclaimed, the liquidator must give a number of notices to actually or potentially interested parties and more widely to the regulatory authorities. Notice in written form must be lodged with the Australian Securities and Investments Commission and provided to any person who has or claims to have an interest in property.[67] Notice must also be given to a regulatory authority whose function is to note or register property transfers under the laws of the Commonwealth of Australia or of one of the states.[68] Where the liquidator has cause to suspect that some third party has or may have an interest, but they are not immediately locatable, the liquidator must advertise his proposal in a newspaper circulating in the state or territory where either the property is situated or the company has carried on business in the 6 months preceding the opening of proceedings.[69]

The function of notice generally is to permit challenges by interested parties to disclaimers, which may take place either before or after the disclaimer takes effect. In the case of prior challenges, the law provides that an applicant having or claiming to have an interest must apply within 14 days of receipt of personal notice from the liquidator or, where publication in a newspaper has taken place, within 14 days from the final publication occurring. The same grace period also applies where the liquidator has lodged notice with one of the regulatory authorities.[70] On application, the court may set aside the disclaimer and/or make such further order as it thinks appropriate.[71] The court must not, however, make an order unless it is satisfied that the claimant would suffer prejudice that is grossly disproportionate when compares to the prejudice that would result to the company's creditors by setting aside the disclaimer.[72] In the case of post-event challenges, an applicant must apply for leave to set aside the disclaimer,[73] which will only be granted, with or without conditions, if the court is satisfied it would not have been reasonable in all the circumstances for the applicant to have taken steps prior to the disclaimer becoming effective.[74] Again, in this situation, a court may set aside the disclaimer, but may also make a further appropriate order to restore the company, the liquidator or any other person in the position they would have been in had the disclaimer not taken effect.[75] However, there is a presumption against the making of such an order with the court having to be satisfied not only that the prejudice to the applicant is grossly disproportionate to that caused to the company's creditors by reversing the effect of the disclaimer, but must also consider the interests of other parties who may have relied n the disclaimer taking effect.[76]

Where a disclaimer is not challenged or no challenge is successful, the law also sets out its effect and when this takes place. A disclaimer is taken to terminate the company's rights, interests and liabilities in the property concerned, but has no effect on any other person, except insofar as necessary to give effect to the release to the company.[77] Any person who suffers a loss as a result of the disclaimer having effect may prove the debt in the course of the winding up.[78] The date on which the disclaimer is deemed to take

[63] Ibid., section 568(8)(b).
[64] Ibid., section 568(9).
[65] Ibid., section 568(10).
[66] Ibid., section 568(13).
[67] Ibid., section 568A(1)(a)-(b).
[68] Ibid., section 568A(1)(d).
[69] Ibid., section 568A(1)(c), applying the publication requirements in section 568A(2).
[70] Ibid., section 568B(1).
[71] Ibid., section 568B(2).
[72] Ibid., section 568B(3).
[73] Ibid., section 568E(1).
[74] Ibid., section 568E(2)-(3).
[75] Ibid., section 568E(4).
[76] Ibid., section 568E(5).
[77] Ibid., section 568D(1). Keay and Murray, op. cit., at 340, state that, in particular, covenants in a disclaimed lease are not themselves determined and a guarantor will remain liable, albeit with a debt provable in the winding up, citing the authority of *Sandtara Pty Ltd v Abigroup Ltd* (1996) 19 ACSR 578.
[78] Ibid., section 568D(2). Duns, op. cit., at 241, states that a creditor whose lease contract was disclaimed could prove future rent less an amount for acceleration of the claim, citing *Re Richardsons Meat Industries Ltd* (1989) 15 ACLR 343.

effect is that when an application to set aside is unsuccessful or the period for challenge expires without an application being brought.[79] In these cases, the date of effect is backdated to the day after the expiry of the notice periods the liquidator is required to comply with under section 568A.[80] Only where an application is successful is the disclaimer deemed not to have had any effect.[81] Determining the effect of a disclaimer may be problematic. Duns cites the example of *Re Tulloch*,[82] in which the sole asset was land subject to a mortgage in excess of its value, which the liquidator wished to disclaim after an unsuccessful receivership in which there was an attempt to sell the property. Regulatory authorities owed land tax and rates desired a compulsory sale in which their claims would trump the mortgagee's or, as an alternative, that the land vest in the mortgagee, an order resisted by the latter. The mortgagee also resisted the disclaimer, the effect of which would have been to vest the property in the Crown and the claimants would lose their rights. The court was not prepared to override the mortgagee's objections to vesting in it and also considered the effect of the property vesting in the Crown and, accordingly, refused the disclaimer.[83]

As an alternative to simple disclaimer, the court may make an order vesting the property in or delivering it to a third party, where that person is entitled to the property or where the court deems it appropriate to deliver it to that person as well as any trustee for entitled or appropriate persons.[84] The court may do so on the application of a person who claims an interest or who is under an obligation in respect of that property and after hearing any person it deems appropriate.[85] The effect of the vesting order is generally to transfer property without any subsequent conveyance, transfer or assignment being required,[86] although state and Commonwealth statutes may still impose an obligation to effect registration, pending which the property transfer has only effect in equity.[87] In summary, these quite extensive provisions appear to constitute quite a comprehensive framework for dealing with insolvency issues, although the comparative paucity of case-law with a specifically environmental flavour would suggest that this issue is dealt with by a combination of elements in practice and adherence to environmental standards prior to the undertaking of harmful activities, a situation that would lessen the need for determination within the insolvency context of the impact of a disclaimer in relation to environmentally harmful property.

III - France: Articles L.622-13 to 622-16, Commercial Code

The insolvency model introduced in the 1980s, which was codified in the Commercial Code in 2000, included two distinct components, the Law of 1984,[88] which dealt with diagnosis and prevention of insolvency and contained a pre-insolvency intervention system called amicable settlement (*règlement amiable*), and the Law of 1985,[89] which set up a twin-track approach focusing on being able to distinguish between rescuable businesses and those that had to be liquidated, with the priority being given to judicial rescue (*redressement judiciaire*) over judicial liquidation (*liquidation judiciaire*). Given concerns over the availability of rescue in a worsening economic climate, the Law of 2005[90] accentuated the importance of rescue further by introducing a further procedure called preservation (*sauvegarde*) as a hybrid between the American Chapter 11 model and judicial rescue.[91] It is in the context of rescue that we first find the provisions on the termination of contracts and leases in Articles L.622-13 to 622-16.[92] A preliminary observation may be made in that the word "onerous" does not appear in these articles, but instead in a provision in judicial rescue dealing with the prohibition of payments for debts falling due after the date of cessation of payments and of contracts with an attached burden (*à titre onéreux*) entered into after this date subject to knowledge of the cessation of payments by those dealing with the debtor.[93]

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79 Ibid., section 568C(1).
80 Ibid., section 568C(3).
81 Ibid., section 568C(2).
82 *Re Tulloch Ltd (in liq) and the Companies Act* (1978) 3 ACLR 808.
83 Duns, op. cit., at 241-242.
84 Section 568F(1), Corporations Act 2001.
85 Ibid., section 568F(2).
86 Ibid., section 568F(3).
87 Ibid., section 568F(4).
88 Law no. 84-148 of 1 March 1984.
89 Law no. 85-98 of 25 January 1985.
90 Law no. 2005-845 of 26 July 2005. The Commercial Code was again extensively amended by means of Ordinance no. 2008-1345 of 18 December 2008 (with effect from 15 February 2009).
91 For a summary of the 2005 and 2008 reforms, see, by this author, French Insolvency Law and the 2005 Reforms [2005] 12 ICCLR 490 and French Insolvency Law: Remodelling the Reforms of 2005 [2009] 6 ICCLR 225 respectively.
92 Applicable also to judicial rescue by virtue of Article L.631-14, Commercial Code.
93 Ibid., Article L.632-2. The cessation of payments (*cessation de paiements*) is one of the pre-conditions for entry into both judicial rescue and judicial liquidation and is the *terminus ad quem* preservation proceedings, as a form of anticipatory rescue procedure, are available.

Under the law, notwithstanding any legal rule or contractual term to the contrary, no aggregation, termination or voiding of the contract may result solely by virtue of the opening of preservation proceedings. Furthermore, the other party must perform its obligations despite any default in performance by the debtor as to promises prior to the opening judgment. The default in performing these obligations does not create any right for creditors except for the purposes of a proof of debt.[94] The administrator alone has the capacity to require the execution of current contracts by providing the promised consideration to the other party. Where the consideration is formed by the payment of a sum of money, it must be paid when due, except if the administrator obtains the acceptance by the other party of any payment delays. In light of the provisional documentation in his possession, the administrator has to be assured, at the time he asks for performance, that he has the necessary funds at his disposal for that purpose. If the contract concerned is to be performed or payment made in stages over time, the administrator brings it to an end if it appears to him that he does not have the necessary funds at his disposal to complete the obligations for the next stages of the contract.[95] This requirement is taken to mean funds available immediately or in the foreseeable future.[96]

Otherwise, the contract is terminated as of right after notice addressed to the administrator remains without reply for more than one month.[97] Although there is no particular requirement as to form, the notice must be unequivocal in nature.[98] Before this time limit expires, the supervising judge may give the administrator a shorter time or give him an extension, which may not exceed two months, to take a position and, presumably, for a view at to whether to continue the contract. If payment is not made under the conditions as defined above or, in the absence of agreement by the other party to continue the contractual relationship, the contract is terminated as of right and the court may be petitioned to bring the observation period, the stage in proceedings during which the health of the company is monitored, to an end.[99] An interesting amendment brought in by the 2008 reforms is to also permit the administrator to ask the supervising judge to terminate the contract if it is necessary for preservation proceedings and its termination does not disproportionately affect the interests of the contracting party.[100] If the administrator does not make use of the facility to continue the contract or brings it to an end under the conditions set out above, the failure to execute the contract may give rise to damages and interest which may be declared as a debt for the benefit of the other party. The other party may nevertheless postpone the restitution of sums paid over in excess by the debtor in performance of the contract until an order has been made about the damages and interest.[101]

In relation to leases, the law provides that the termination of leases over immoveable property given in lease to the debtor and used for business purposes is noted or ordered where the administrator decides not to continue with the lease and asks for its termination. In this case, the termination takes effect at the date of the request. The administrator remains liable for any rents between the date of proceedings being opened and that of termination.[102] Termination may also be noted or ordered where the lessor requests the termination or notes the termination of the lease because of a default in the payment of the rent or charges relating to occupation after the opening judgment, the lessor not being able to act except at the expiry of a period of three months from the date of that judgment. If the payment of sums due occurs before the expiry of this period, there is no cause for termination. Furthermore, notwithstanding any contractual term to the contrary, the failure to carry on business during the observation period in one or more premises leased by the business does not cause the termination of the lease.[103]

[94] Ibid., Article L.622-13, paragraph I. In the case of judicial liquidation, nearly identical provisions are contained in Article L.641-11-1.

[95] Ibid., Article L.622-13, paragraph II. An exception exists where the contracting party had already petitioned, prior to the opening of proceedings, for termination of a contract on grounds of a defect in performance (but not a failure to pay moneys due): *Cassation commerciale, 28 May 1996*, Bull. civ. IV no. 149.

[96] *CA Versailles, 18 March 1999*, RJDA 1999 no. 802.

[97] In theory, a contracting party may also ask the administrator/liquidator whether he intends performing the contract, albeit the request must be rejected if the administrator/liquidator does not have sufficient funds available to pursue performance: *Cassation commerciale, 16 November 1993*, Rev. proc. coll. 1994.45.

[98] *CA Paris, 26 February 1993*, Rev. proc. coll. 1993.531.

[99] Article L.622-13, paragraph III, Commercial Code. A third reason is provided in judicial liquidation where the debtor's obligation is the payment of a sum of money, in which case the liquidator may simply address notice to the contracting party of his intention not to proceed with the contract. It should also be noted here that an observation period does not exist in judicial liquidation.

[100] Ibid., paragraph IV. In judicial liquidation, this facility is only available in the case of contracts, where the debtor's obligation is any performance except the payment of a sum of money.

[101] Ibid., paragraph V. Paragraph VI goes on to make an exception for employment contracts, whose termination is governed by the stricter procedure in the Employment Code, as well as trust (*fiducie*) agreements.

[102] *Cassation commerciale, 2 February 1993*, Bull. civ. IV no. 35.

[103] Article L.622-14, Commercial Code.

Of interest here, in terms of liability is the provision that stipulates, in case where the lease is assigned, any clause imposing on the transferor joint liability with the transferee is deemed void.[104] Nonetheless, in case of preservation proceedings, the lessor has a priority for rent for the two years preceding the judgment opening proceedings. If the lease is terminated, the lessor has, in addition, a priority for the current year for all that concerns the performance of the lease and for damages and interest that may be awarded by the Courts. Furthermore, the courts have held that a penalty clause agreed prior to proceedings being opened and to be effective in the case of insolvency proceedings affecting the debtor did not violate the principle of the equal treatment of creditors.[105] If the lease is not terminated, the lessor may not demand the payment of rent yet to fall due where the security given him at the time of the contract are maintained or where those that have been supplied after the opening judgment are sufficient. The supervising judge may authorise the debtor or the administrator, it being the case, to sell moveable assets furnishing the rented property subject to quick perishing or imminent depreciation or wasteful to preserve, or whose sale does not put at risk the existence of funds or the maintenance of guarantees sufficient for the lessor.[106]

There is a slightly different treatment for leases in judicial liquidation. Where the liquidator decides not to continue with the lease, the termination takes effect by a simple notice to the lessor and is effective at the date of the request. In turn, the lessor may request termination by the court or note the termination of the lease as of right for a reason arising prior to the judgment opening judicial liquidation or, where judicial liquidation has been ordered following preservation or judicial rescue proceedings, arising prior to the judgment opening previous proceedings. The lessor should, if he has not done so already, initiate a request within three months of the publication of the judgment opening judicial liquidation. The lessor may also request termination by the court or note the termination of the lease because of a default in the payment of the rent or charges relating to occupation after the judgment opening judicial liquidation under the conditions set out in Article L. 622-14. The liquidator may also assign the lease under the conditions set out in the contract agreed with the lessor with all the rights and obligations attached therein. In this case, any provision that stipulates, in case where the lease is assigned, any clause imposing on the transferor joint liability with the transferee is deemed void.[107]

In France, the provisions in insolvency are a rich progenitor of case-law, some of which has been noted here. They do not, however, address the issue of the disclaimer in the same context as the common law countries analysed elsewhere in this paper, nor does the issue of the potential environmental impact arise in the insolvency context in relation to the repudiate of contracts and leases of property that the provisions here are solely concerned with. Environmental obligations are, of course, dealt with in a very comprehensive Environmental Code, which in common with many of its European counterparts, deals with obligations and liabilities in relation to harmful activities. What is interesting is that this code mentions insolvency in only one provision, dealing with liability for water supply and sewage, where payment delays may be given by the appropriate authority to debtors submitted to any one of the insolvency procedures mentioned.[108] Although this does not of itself indicate that insolvency is not a problem in the context of environmental liability, it may be quite surprising that the liability provisions in the code do not appear to note the possibility of insolvency as a concern.

IV - Malaysia: Section 296, Companies Act 1965 (Cap. 125) and Singapore: Section 332, Companies Act 1967 (Cap. 50)

In these two jurisdictions, a shared legal and political history explains the influences behind the corporate legislation in these two states. The Malaysian Companies Act 1965[109] is primarily based on the United Kingdom Companies Act 1948, with influences from the Australian Uniform Companies Act 1961 and the Ghanaian Companies Code drafted by Professor Gower in 1963.[110] Although Singapore, a former British Crown Colony, joined the Malaysian Federation between 1963 and 1965, it had left by the time the

[104] Ibid., Article L.622-15.
[105] *Cassation commerciale, 11 May 1993*, Bull. civ. IV no. 181.
[106] Article L.622-16, Commercial Code.
[107] Ibid., Article L.641-12.
[108] Article L.213-11-11, Environmental Code.
[109] Act 125 of the Federal Statute Series ("CAM").
[110] See Companies Commission of Malaysia "Strategic Framework for the Corporate Law Reform Programme" at 13, copy available through Companies Commission of Malaysia website at: <www.ssm.com.my/clrc/cd1.pdf> (last viewed 26 July 2009).

Malaysian Act came into force. Nonetheless, the Singapore Companies Act 1967, although much amended since, remains identical in many respects to the Malaysian legislation.[111] Thus, the conjoint treatment of the position in these two states may be undertaken. Similarly, the common origins of the onerous property provisions with British and Australian legislation are quite evident. Nonetheless, one preliminary limitation may be noted, in that, given the absence of formal rescue provisions in Malaysian law,[112] the disclaimer provisions work uniquely in the context of liquidation, or winding up, proceedings.[113]

According to the provisions, the liquidator may with the leave of the court or of the committee of inspection appointed to oversee his work in winding up, disclaim any property within a period of 12 months from the commencement of proceedings unless this period has been extended by the court. Where knowledge of the existence of the property does not come to the liquidator's attention within the first month of proceedings being afoot, the 12 month-period is deemed to run, unless again extended by the court, from the moment the liquidator becomes aware of its existence. The liquidator must make the disclaimer in writing and the facility to disclaim remains available, even though the liquidator may have taken possession of the property, endeavoured to sell it or exercised any right of ownership over the property. For the purposes of the section, property that may be disclaimed may consist of any land or estate in land burdened by onerous covenants, any shares in companies, any unprofitable contracts as well as any property that is unsaleable or not readily saleable because its possession may bind the holder to the performance of an onerous act or to the payment of a sum of money.[114] Although the object of the provision is clearly to facilitate the winding up process by bringing to an end the company's continuing obligations, especially to contracts that might be deemed onerous,[115] the power is not available merely because the liquidator may think it better not to perform a particular contract and to allow the company to get out of its obligations.[116] The procedure in fact requires the court to have regard to other interests at stake before deciding whether to authorise the disclaimer to proceed and to have effect.

In particular, although the disclaimer normally operates to determine from the date on which it is made the interests and liabilities of the company as well as any proprietorial rights in the property being disclaimed, the disclaimer cannot affect the rights or liabilities of any other person except insofar as absolutely necessary to ensure that the company and its property is released from liability.[117] In this regard, notification to interested parties is deemed to be a necessary ingredient of the process. Leave by the court or committee of inspection to disclaim may be made subject to notice being given to any interested person and any leave may be granted subject to conditions or terms, while any order may be made giving an instruction to the liquidator on how to proceed as the court or committee think just.[118] Conversely, where notice has been given by an applicant to the liquidator requiring the liquidator to determine whether a disclaimer may issue, the liquidator may not disclaim unless he has served counter-notice on the applicant within a period of 28 days or longer (as allowed by the court or committee) that the liquidator intends to apply for leave to disclaim. In the case of a contract, if in fact the liquidator has not made an application for leave to disclaim within that period or a longer period as may be allowed, the liquidator is deemed to have adopted the contract and the company will remain liable to perform it.[119]

As far as affected parties are concerned, in substance there are two forms of remedy under the section: allowing the party to prove in the insolvency for the loss they have suffered or the court making a vesting order of property in favour of an affected person. For example, where a party is bound to a contract with the company and is either entitled to a benefit or subject to a burden, which will be the case with more commutative contracts, the court may make, on the application of this person, an order rescinding the contract subject to the payment of damages for non-performance by one or other party to the other or indeed on any terms the court may think just. Where damages are due by the company to a contractual

[111] Cap. 50 of the Statutes of Singapore (2006 Revised Edition) ("CAS"). In fact, revisions to corporate legislation in both Malaysia and Singapore continue to be inspired by British and Australian models.
[112] A United Kingdom-style administration was introduced into Singapore in Part VIIIA of the Companies Act, albeit retitled "judicial management".
[113] Analogous provisions are known in bankruptcy, for which see section 59, Bankruptcy Act 1967 (Act 360) (Malaysia); section 110, Bankruptcy Act 1995 (2000 Revised Edition) (Cap. 20) (Singapore).
[114] Section 296(1), CAM; section 332(1), CAS.
[115] See W. Woon, Company Law (3rd ed) (Sweet and Maxwell Asia, Singapore, 2005) at paragraph 17.153, citing *Hindcastle Ltd v Barbara Attenborough Associates* [1997] AC 70 at 86 [HL]. Note that Australian and United Kingdom cases continue to have the force of persuasive precedent in both Malaysia and Singapore, especially on provisions *in pari materia*.
[116] Ibid., at paragraph 17.154.
[117] Section 296(2), CAM; section 332(2), CAS.
[118] Section 296(3), CAM; section 332(3), CAS.
[119] Section 296(4), CAM; section 332(4), CAS.

partner, those damages are provable in the winding up.[120] In fact, extending the principle of compensation further, any person harmed by the operation of a disclaimer is deemed to be a creditor of the company and may accordingly prove in the winding up for the debt represented by the damage or loss he has suffered by occasion of that injury.[121] This principle, according to Woon, gives rise to a "statutory right" to compensation with the loss being assessable in the same way as damages in the winding up.[122]

The impact on a party affected by a disclaimer is a material consideration for the court or committee in choosing whether or not to give the liquidator leave to disclaim.[123] Furthermore, whether the unsecured creditors obtain any benefit from the disclaimer, which is after all designed to reduce company liabilities and, in theory, swell the estate available to meet claims, is a material consideration to be weighed against the harm occasioned to a person interested in the property being disclaimed.[124] Woon, in fact, makes the point that, because the power to disclaim is given to "facilitate the discharge of all the company's debts", a disclaimer should not operate to the detriment of a third party where the unsecured creditors will be paid off without the disclaimer being necessary. The increase of the amount of overall dividends to claimants is not in itself, according to Woon, a sufficient reason for the court to permit the disclaimer to operate.[125]

The second form of remedy is that of making a vesting order in relation to property and contains a number of supplementary conditions. The court may make an order vesting property in a person or delivering that property to a person who may be entitled to it or, alternatively, to a trustee for that person. Nonetheless, before doing so, an application must be made by a person claiming an interest in any property to be disclaimed or who has an outstanding liability remaining after a disclaimer purports to operate. On hearing such a person, a court may make the order as noted above. Furthermore, vesting in and delivery to a person may also take place where the court deems it just that compensation should be payable for any post-disclaimer liability remaining undischarged. The order may also be made subject to any terms the court sees fit and to the lodging of an office copy of the order with the Registrar of Companies and/or Official Receiver, as the case may be. Where the order involved land or an interest in land, although a copy will also be required for the appropriate authority dealing with land registration and recording of land transactions, the making of the order is effective to vest the property without any further conveyance being required.[126]

Nonetheless, one further caveat exists in relation to leasehold interests in that a vesting order cannot be made in favour of an under-lessee or mortgagee unless that person is made subject to the same liabilities and performance obligations applicable to the company at the commencement of proceedings, although, if the court sees fit, it may limit those liabilities and obligations to only those subsisting as if the property had been assigned at the time. In either case, any person accepting the vesting order may not claim any other interest (i.e. whether as an under-lessee or mortgagee) and will lose the benefit of that claim, having effectively acquired new rights in the property. If no person is willing to undertake this, the court may vest the property nonetheless in that person, either personally or in a representative character, and whether solely or jointly with the company to perform the company's obligations under the lease, without however being bound by any encumbrances or interest created by the company in that lease.[127]

In both Malaysia and Singapore, the relative paucity of case-law with respect to these provisions suggests that they are little applied or are not an especial issue in liquidations. Certainly, despite the industrial sectors dependent on natural resources (such as tin mining, manufacturing and petroleum refining), especially in Malaysia, many of which are potential sources of pollution, little in the jurisprudence would suggest that insolvency has created a special source of concern over outstanding clean-up costs or liabilities devolving upon the state. What is evident here, however, is that a regime will need to be developed, particularly as more potentially polluting industries struggle in the current economic climate and legacy costs may yet arise that would require the state to legislate the balance between the

[120] Section 296(5), CAM; section 332(5), CAS.
[121] Section 296(8), CAM; section 332(8), CAS.
[122] See Woon, op. cit., at paragraph 17.155, citing *Re Park Air Services plc* [2000] 2 AC 172.
[123] Ibid., at paragraph 17.154, citing *Re Middle Harbour Investments Ltd* [1977] 2 NSWLR 652.
[124] Idem., citing *Re Tulloch Ltd* (1977) 3 ACLR 808.
[125] Idem., noting that the same principle would probably apply to the deliberations of any committee of inspection.
[126] Section 296(6), CAM; section 332(6), CAS.
[127] Section 296(7), CAM; section 332(7), CAS.

legitimate aspirations of company creditors to a fair dividend and the rights of society to enforce the polluter pays principle.

V - South Africa: Provision yet to be made

The position in South Africa appears to rely on general principles of common law, supplemented by the views of commentators. This is despite the fact that its corporate legislation was until recently derived from an early British model.[128] In this regard, the opinion of Stander is interesting,[129] especially because a general principle of abandonment or disclaimer of property appears not to be known in South African insolvency law. Dealing directly with the issue of environmental claims, Stander states that claims from before the period of insolvency are not privileged in any way and are therefore provable against the debtor's estate, especially that portion, in particular immoveable property, that has been used to occasion the harm.[130] Similarly, Stander would permit the creation of security against such property as well as any other immoveable property related to the harmful activity so as to secure these claims.[131] The same is true whether the harm occurs prior to the insolvency or its effects are felt after commencement of proceedings. Indeed, Stander goes so far as to state that an insolvency practitioner (trustee) acting in the insolvent debtor's shoes has no special exemption from any duty imposed by environmental law. Nonetheless, because insolvency law does deal with the issue of executory (or unexecuted) contracts, Stander makes the point that, until such time as the insolvency practitioner elects to continue or repudiate the contract, which facility is given to him by law,[132] nothing in theory exempts the insolvency practitioner from any liability arising from the moment proceedings are initiated and appointment is accepted.[133]

The only grace the insolvency practitioner may have is that the contracting partner may not compel performance of the contract pending the trustee's decision being made, although it is unclear whether this period is open-ended or subject to the direction of the court. Nonetheless, Stander is clear that pre-appointment liability does not arise in the same way that the general debts of the estate pre-insolvency are not the insolvency practitioner's personal concern.[134] Exceptionally though, Stander suggests that insolvency practitioners should be permitted, in line with the general principle set out in the UNCITRAL Legislative Guide to Insolvency Law 2004,[135] a facility to abandon property subject to the authority of the estate's creditors, which disclaimer should take place within a reasonable period after appointment. In this way, property which, in Stander's view, is not saleable economically or profitably because of the heavy burden to remedy environmental damage will become bona vacantia and accrue to the state.[136] As a result, environmental costs for remedying the damage will not rank necessarily as costs of the insolvency administration. Nonetheless, because of the public interest involved and especially the consequences of any decision being to transfer remedial costs to the state, Stander would subject the decision to disclaim to approval by the court and to any conditions the court thinks fit to apply.[137]

VI - The Development of an international consensus

The United Nations Commission on International Trade Law ("UNCITRAL") was established by the General Assembly in 1966 to act as the conduit by which the United Nations would play a more active role in reducing the disparities caused by domestic rules governing international trade in particular by reducing obstacles to international commerce,[138] its general mandate being to harmonise and unify the law relating to international trade. UNCITRAL has had a long interest in insolvency matters, dating from a Colloquium in Vienna in April 1994, co-sponsored by INSOL, which saw work commencing in 1995 and eventually culminating in the creation of the Model Law on Cross-Border Insolvency 1997, which has now been adopted by a number of influential commercial states. This work has been followed up by

[128] Insolvency law in South Africa is, however, a completely autochthonous development.
[129] See L. Stander, The Claim against an Insolvent for Environmental Damage, Chapter 13 in P. Omar (ed.), International Insolvency Law: Themes and Perspectives (Ashgate, Aldershot, 2008) at 335-366.
[130] Ibid., at 350.
[131] Ibid., at 351-352.
[132] Ibid., at 350, citing *Smith & Another v Parton NO* 1980 (3) SA 724 (D).
[133] Idem, citing *Porteous v Strydom NO* 1984 (2) SA 489 (D).
[134] Ibid., at 352. Alternatively, if the assertion Stander makes is incorrect, the facility of applying to court for an order limiting environmental liability, perhaps to the maximum value of the assets being administered within the estate, including any secured assets, should be made available.
[135] See section immediately below.
[136] Stander, op. cit., at 352.
[137] Idem.
[138] Outline Introduction at <www.uncitral.org> (last viewed 26 July 2009).

development of model legislative principles, aimed at encouraging the adoption of an ideal corporate insolvency law and which have been set out in an extensive document titled the UNCITRAL Legislative Guide to Insolvency Law 2004.[139] The object of this document, endorsed by the International Bar Association, is its use as a reference by bodies tasked with reviewing the adequacy of domestic insolvency laws. It does this through advice whose purpose is principally to balance the need to address financially embarrassed debtors with the interests of other participants in the process, while examining the issues that are "central to an effective and efficient insolvency law", albeit with possible choices dependent on national or local concerns. Unsurprisingly, this exhaustive document deals with the topic of onerous property, taking on board some of the methodologies for dealing with this species of property as seen in domestic law.[140]

In relation to onerous property, the Guide states that consistency with the objectives of maximising value in proceedings and reducing incidental costs is achieved by permitting disclaimers. The idea is that the insolvency practitioner determines when divesting the property may be in the interests of the debtor's estate. A further possibility is where a secured creditor obtains relief from a stay imposed by the moratorium often found in proceedings, thus enabling access to the secured asset, a phenomenon that is incidentally known as the separation doctrine in a number of civilian jurisdictions. A wide range of potentially onerous property is listed in the Guide, including land, shares, assets subject to a validly created and/or perfected security interest, contracts and miscellaneous property, a list that is very reminiscent of the statutory lists often seen in domestic legislation. Additionally, the Guide stipulates that the disclaimer may be made subject to court approval and further conditions, in order to avoid any violation of a "compelling public interest", the example being used, interestingly enough, of an asset that is dangerous environmentally or hazardous to public health or safety. The Guide also provides that domestic law will need to address the issue of who might be able to claim the asset to be relinquished, with the disclaimer process overall stated as being particularly useful where the property is of no or little value to the estate when, for example, the value of the security is in excess of the stipulated value of the assets that are secured.

Similarly, where the burden on the asset would require expenditure that is disproportionate to the price that might be obtained for the asset or would give rise to an onerous obligation or other liability, for example to pay a sum of money, all of these scenarios would, according to the Guide, justify the availability of a disclaimer. So too would a situation in which the asset is unsaleable or not readily saleable by virtue of its unique nature or where a market or market value does not exist or is not readily apparent. Echoing many domestic law provisions, the Guide also states that vesting of an encumbered asset in the hands of a secured creditor will reduce the value of the claim by the value of the asset, while the notice effect is also adverted to by a requirement that creditors generally have notice of the insolvency practitioner's proposal for disclaiming assets in order to be able to object if necessary. Nonetheless, the recommendation that results, although it reiterates the principles of disclaimer and notice as well as the need to provide an opportunity for creditors to object, provides an exception where the asset transfer is to a secured creditor of an encumbered asset whose value is below that of the security, when the insolvency practitioner may relinquish the asset and agree to a vesting in the secured creditor without notice to other creditors who may be participating in proceedings.[141]

What is interesting about the Guide is that it only addresses the issue of the environment in a discrete number of places. Thus, apart from in relation to burdensome assets, we find environmental creditors being discussed as a possible exception to the equitable treatment principle,[142] the possible inapplicability of a stay to regulatory claims, such as those on behalf of environmental clean-up operations, where the justification for the exception is the clear public interest element,[143] the desirability of avoiding insolvency practitioner liability for acts of environmental damage occurring prior to assumption of office,[144] the ranking of environmental claims generally[145] as well as whether environmental liability should be an

[139] UNCITRAL Legislative Guide to Insolvency Law 2004 ("Guide"), copy available via the UNCITRAL website at the address noted above.
[140] Ibid., paragraph 88, Part 2.2.
[141] Ibid., recommendation 62.
[142] Ibid., paragraph 7, Part 1.1.
[143] Ibid., paragraph 34, Part 2.2.
[144] Ibid., paragraph 64, Part 2.3. Note this is also an issue of concern in South Africa.
[145] Ibid., paragraph 63, Part 2.5.

exception to the availability of discharge of debtors.[146] While it might have been useful for the Guide to do so, the discussion, while interesting, does not of itself furnish a comprehensive treatment of environmental issues in the context of insolvency and, for that reason, does not necessarily address what the concerns of a court might be in applying insolvency law in the context of environmental harmful debtors. As a result, the onerous or burdensome asset provisions seem to stand isolated and little guidance is provided as to any concerted approach domestic courts should take. An international consensus appears to be still far from being reached on this issue.

Summary

The history of the provisions in common law countries reveals a common origin and reasonably close adherence to the contents of the ancestral model, albeit with some developments consonant with the changes in corporate legislation in these countries over the intervening years. What is evident is that the disclaimer in insolvency is thought of as a measure to hasten procedural administration and to relieve the insolvency practitioner of the need to deal with a burdensome asset, whose abandonment would produce a benefit for the estate and for the creditors that derived their claims through it. Interestingly, the French regime, as the sole representative of the civilian systems in this study, reveals a number of parallels in its operations with many similar concerns and issues being set out in its provisions, such as the impact on the parties themselves, the effect on third parties, the need for notice as well as the intervention of the court in many instances, while claims arising from disclaimer or termination are, for the most part, accommodated in insolvency proceedings. One notable difference is, however, in the context. In France, disclaimer operates in the context of all types of insolvency proceedings, whether rescue or liquidation, where rationalising the company's contractual obligations is seen as the way to ensure the exit of the company from its financial difficulties, while in the common law countries studied here, disclaimers tend to operate during the end phase of corporate life, where the function of the liquidator appears to be to distribute dividends to those entitled as early as possible with disclaimers operating so as to curtail possible burdens on the estate. The approaches appear very dissimilar, but may be partly explained by the fact that termination or repudiation of contracts is treated differently to disclaimers in the common law systems and a strict comparison between systems may be difficult.[147]

Nonetheless, it is in their application to environmental issues that we find the defect in all the regimes. Although much debated in the United Kingdom, the courts there have appeared to favour the interests of the creditors over those of environmental obligations, leading many commentators to view the policy inherent in preferring insolvency legislation to be unrealistic given these wider concerns. In France, despite the similar obligations to which that country is subject, insolvency does not appear to be an especial question for the Environmental Code to deal with. Australia, while it may have a very fully-developed framework for disclaimers of onerous property, appears to evidence little by way of case law illustrating potential conflicts between insolvency and environmental issues, while Malaysia and Singapore, both belonging to the category of countries whose economies are in transition, the problem even of disclaimers does not appear to feature in the reported case law. Finally, South Africa, also a country in the developing world, has a relatively undeveloped framework in which, although environmental issues are of constitutional concern, these are not reflected even minimally in the insolvency context. While the framers of the UNCITRAL Legislative Guide to Insolvency Law are to be commended for their exhaustive treatment of the issues applicable in insolvency law, environmental concerns merit infrequent mention and the recommendations on onerous property, while acknowledging the possibility of such concerns, do not address them directly. It may thus be concluded that the development of an international understanding, let alone a framework for the treatment of environmental issues in the context of burdensome obligations in insolvency, is far from being achieved. Hopefully, the future may well provide an opportunity for the very necessary and long-delayed treatment of this issue.

[146] Ibid., paragraph 6, Part 2.6.

[147] See, for example, in the United Kingdom, the rule at common law allowing the administrative receiver to adopt or break existing contracts where it is advantageous to do so (except where to do so would harm the company's goodwill or a difficulty in realising the company's assets subsequently results: *Airline Airspares Ltd v Handley Page* [1970] 1 Ch 193) with the contracting party's remedy limited to a suit for damages, a rule subsumed into the general power in administration/receivership (Paragraph 9, Schedule 1, Insolvency Act 1986) and liquidation (Paragraph 7, Schedule 1, Insolvency Act 1986). Similar rules are known in Australia, Malaysia and Singapore.