1. South Africa was of the co-sponsors of a resolution of the General Assembly of the United Nations which was passed on 11 November 1997 approving the Model Law.

2. The resolution highlights significant aspects of the Model Law in relation to the need for a set of fair 'internationally harmonised legislation on cross-border insolvency that respects the national procedural and judicial systems and is acceptable to States with different legal, social and economic systems' which would contribute to the development of international trade and investment.

3. I was privileged to be a member of a committee of the United Nations concerned with the drafting of the Model Law.

4. In a report dated 22 May 1998 that I made to a Project Committee of the South African Law Commission which I headed and which was concerned with...
the reform of South Africa’s Insolvency Laws I recommended the adoption, suitably modified for South African use, of the Model Law. The Project Committee circulated the Model Law for general comment. Amongst the comments received which supported the introduction of the measure, were two which raised the question of reciprocity. Concerns were expressed to the effect that South Africa, as a small country in a sea of globalization should not allow representatives of a foreign state easy access to South Africa’s cross-border procedures, while South Africans may find it very difficult and expensive to obtain similar recognition in the state in question.

6. In the light of these concerns and those of the parliamentary Justice Portfolio Committee, I considered it prudent to put the matter to three insolvency experts. The experts were directly concerned with the drafting of the Model Law and are highly regarded in the field. The three persons were Professor Jay Westbrook of the University of Texas, Mr Dan Glossband, an insolvency practitioner based in Boston and Mr Jerney Secolec of the United Nations. All three of them unequivocally expressed the opinion that vague reciprocity provisions were undesirable in principle.
7. Despite these opinions and my own urgings the Portfolio Committee agreed to a Bill which was assented to by the South African Parliament on 8 December 2000 resulting in the Cross-Border Insolvency Act, 42 of 2000.

8. Regrettably the Act is not yet in force. It will only come into operation on a date to be fixed by the State President. This has not yet taken place.

9. The Act applies to states designated by the Minister of Justice. The Minister may only designate a state if he is satisfied that the recognition accorded by the law of that state justifies the application of the Act to foreign proceedings in such state. The Act will have no practical effect until states have been so designated. This too has not yet taken pace. This requirement introduces the principle of reciprocity which is a significant departure from the Model Law. In my respectful view it is a retrograde step. It introduces unnecessary uncertainty into the whole question of cross-border recognition. It is also not in keeping with present day notions particularly, for example, in regard to the recognition and enforcement of foreign judgments.

10. A copy of the Act is available on the internet at http://www.polity.org.za/govdocs/legisla
tion/200/act42.pdf.

11. I also refer to a brief note which I wrote entitled UNCITRAL Model Law and the South African Cross-Border Insolvency Act 42 of 200 which was published in the International Bar Association’s Committee J Newsletter of February, 2002 pages 4/5.

Justice R H Zulman

Dated at Johannesburg this the 24th day of August 2003