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Cross-border insolvencies as a global economic problem

Summary

As a result of the continuing expansion of international trade and investment, there has been an increase in the occurrence of cross-border insolvencies. National insolvency laws have not kept pace with the trend, and there is a need to develop an efficient and fair system for the administration of cross-border insolvencies. The lack of predictability in the handling of cross-border insolvency cases impedes capital flow and constitutes a disincentive to cross-border investment. The object of the *Cross-Border Insolvency Act* is to create provisions for a fair framework to address instances of cross-border insolvency effectively. It is based on UNCITRAL's *Model Law on Cross-Border Insolvency*. The practitioner-inspired solutions that the South African legislation offers are satisfactory and definitely an improvement on the common law position. The only contradiction is that the South African approach towards solving the complicated problems of cross-border insolvencies improves the position of foreign creditors, foreign representatives and foreign courts, while it is still doubtful how foreign courts will treat South African creditors. From this point of view the lack of predictability in the handling of cross-border insolvencies is still subject to criticism as a disincentive to cross-border investment.

Insolvensies oor landsgrense as 'n probleem vir 'n gesonder wêreldekonomie

Insolvensies oor landsgrense skep 'n probleem vir 'n gesonde wêreldekonomie. As gevolg van die toenemende uitbreiding van internasionale handel en belegging is daar 'n onmiskenbare toename van insolvensies oor landsgrense. Dit is 'n feit dat nasionale insolvensieregstelsels nie tred gehou het met hierdie internasionalisering nie met die gevolg dat daar 'n intense behoefte bestaan vir die ontwikkeling van 'n effektiewe en billike stelsel vir die administrasie van insolvensies oor landsgrense. Die afwesigheid van voorspelbaarheid in die hantering van insolvensies oor landsgrense belemmer kapitaalvloei en is 'n hindernis vir transnasionale belegging. Die *Wet op Insolvensie oor Landsgrense* 42 van 2000 se oogmerk is om bepalings daar te stel vir 'n beter hantering van insolvensies oor landsgrense. Dit is gebaseer op UNCITRAL se *Model Law on Cross-Border Insolvency* en is praktyksgeoriënteerd. Hierdie wetgewing is 'n voorbeeld van die wyse waarop insolvensies oor landsgrense, as 'n probleem in wêreldekonomie, opgelos kan word. Die enigste teenstrydigheid is dat die Suid-Afrikaanse benadering om die ingewikkelde aspekte van transnasionale insolvensies op te los, die posisie van buitelandse skuldeisers, buitelandse verteenwoordigers en buitelandse howe verbeter het, terwyl dit steeds onseker is hoe buitelandse howe Suid-Afrikaanse skuldeisers, Suid-Afrikaanse verteenwoordigers en Suid-Afrikaanse howe sal behandel. Uit hierdie oogpunt is die afwesigheid van voorspelbaarheid in die hantering van insolvensies oor landsgrense steeds aan kritiek onderworpe en steeds 'n belemmering vir transnasionale belegging.

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1. Introduction

Cross-border insolvencies are a global economic problem. As a result of the continuing expansion of international trade and investment there is an unmistakable increase in cross-border insolvencies. It is, however, a fact that national insolvency laws have not kept pace with the trend, and consequently there is a need to develop an efficient and fair system for the administration of cross-border insolvencies. Cases where the insolvent debtor has assets in more than one state or where some of the creditors of the debtor are not from the state where the insolvency proceeding is taking place frequently occur. Because there is a lack of communication and co-ordination between courts and administrators from concerned jurisdictions, it is more likely that assets would be dissipated or fraudulently concealed, or possibly liquidated without recourse to other more advantageous solutions. As a result the likelihood of creditors receiving payment is diminished.

The UNCITRAL *Model Law on Cross-Border Insolvency* is designed to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address instances of cross-border insolvency more effectively. An adaptation of the model law was enacted in South Africa. This legislation, the *Cross-Border Insolvency Act*, 42 of 2000,[1] offers certain additions and improvements in the national insolvency regime designed to resolve problems arising in cross-border insolvency cases. As few changes as possible were made in order to strive for a satisfactory degree of harmonisation and certainty.

The absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment.[2] Therefore, the CBA is practitioner-inspired. It attempts to respond to what is felt to be the key minimum requirements that will enable skilled professionals to accomplish their objectives in an efficient and cost-effective manner, with the active assistance of the courts of the enacting states. The aim of this paper is to discuss the viability of UNCITRAL's *Model Law on Cross-Border Insolvency*, as adapted in the CBA, as a solution for global economic problems.

2. The scope of application of the CBA

In terms of section 2 of the CBA the model law applies in the following circumstances: (1) Where there is an inward-bound request[3] by a foreign court or representative in connection with foreign proceedings; (2) Where there is an outward-bound request[4] in connection with insolvency proceedings in South Africa; (3) In the case of co-ordination of concurrent insolvency proceedings in

1 Hereafter called "the CBA". This Act was assented to on 8 December 2000, the date of commencement is still to be proclaimed.

2 UNCITRAL *Model Law on Cross-Border Insolvencies with Guide to Enactment* (New York United Nations 1999) par 13 p23.

3 Assistance is sought in the Republic.

4 Assistance is sought in a foreign State.

South Africa and one or more other States; and (4) in the case of foreign creditors participating in insolvency proceedings taking place in South Africa.

"Foreign court" means[5] a judicial or other authority competent to control or supervise foreign proceedings. "Foreign proceedings" means collective proceedings in a foreign State under the insolvency laws of the foreign State — this even includes (despite previous reluctance to view it as such) interim proceedings — for the purpose of reorganisation or liquidation. "Foreign representative" means a person or body, including one appointed on an interim basis, authorised in foreign proceedings to administer the reorganisation or the liquidation of a debtor's assets or affairs or to act as a representative of the foreign proceedings.

3. Designation

The CBA contains detailed rules and principles for regulating and co-ordinating instances of cross-border insolvencies. There is, however, one problem. Recognition by and co-ordination between different States regarding cross-border insolvencies is usually based on the principle of comity.

> The Court having jurisdiction at the place where such landed property is situated is fully entitled to deal with that property according to the *lex rei sitae*, and to refuse in any way to recognise the order of the Judge of the debtor's domicile. But, on the other hand, the same Court, acting from motives of comity or convenience, is equally justified in allowing the order of the Judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of such order. The matter is entirely one for its own discretion.[6]

The principle of comity involves courteousness between nations. It is based on international politeness. With the creation of this new system with regard to cross-border insolvencies, a drastic movement away from this principle is evident from section 2(2) to (4) of the CBA. These subsections provide that the legislation discussed below applies to any state designated by the Minister by notice in the Government Gazette. In terms of subsection 2(b) the Minister may only designate a state if he is satisfied that the recognition accorded by the law of such a state to proceedings under the local insolvency laws,[7] justifies the application of the CBA to foreign proceedings in such state. In terms of subsection (3) the Minister may at any time by subsequent notice in the Gazette withdraw any notice under subsection 2(b). Thereupon any state referred to in such withdrawal, ceases to be a foreign State for the purposes of this Act. All notices must be approved by Parliament prior to this publication.

Section 1 of the CBA contains definitions of the terms "Minister" and "foreign State". "Minister" is defined as the Cabinet member responsible for the administration of justice. "Foreign State" means a state designated

5 See the definitions in s 1 of the CBA.

6 *Ex parte Palmer NO*: *In re Hahn* 1993 3 SA 359 (C) 363.

7 With this is meant the insolvency laws of the Republic of South Africa.

under section 2(2). The question is whether this implies that "foreign proceedings", as defined above, only applies to proceedings in a designated state. A positive answer, which accords with my view, has the inevitable consequence that the definitions of "foreign representative", "foreign main proceedings", "foreign non-main proceedings" and "foreign court" also apply only to proceedings in a designated State.

The effect is that the entire CBA is only applicable in the case of designated States. The *Cross-Border Insolvency Act* is not in operation yet. While it may "come into operation on a date fixed by the President by proclamation in the *Gazette*", its so coming into operation will not cause the CBA to take effect until States have been designated by the Minister. A further motivation for this view is found in section 2(1)(d) of the CBA where its scope of application is limited to creditors or other interested persons[8] in a foreign State, for instance a state designated.

It is not at this stage clear how the designation process will work. Important considerations are obviously reciprocity[9] and the practical need for the designation of a particular State. According to the narrow interpretation[10] of the reciprocity issue, the important consideration is whether a particular state has enacted a version of the Model Law that does not differ substantially from the Model Law, as, for example, was done in Mexico and Eritrea. Reciprocity in this sense is, however, too inflexible. A more liberal interpretation[11] would not require enactment of a version of the Model Law before designation. This applies to the situation where the ease of recognition of the South African insolvency proceedings in the state in question, is comparable to the ease of recognition of that State's insolvency proceedings accorded by the *Cross-Border Insolvency Act*. Examples are Botswana and Namibia that have substantially the same insolvency law principles as South Africa. According to a broad interpretation[12] of reciprocity, designation should follow almost as a matter of course, such as in the case of the United Kingdom affording South Africa special recognition in terms of section 428 of the UK *Insolvency Act*.[13]

It is very important that the designation of foreign States is encouraged[14] because if South Africa wants to attract foreign investment, foreign investors

8 Who have an interest in requesting the commencement of, or participating in local proceedings.

9 In view of subsection 2(b).

10 Cronje: 31 May & 1 June 2001.

11 Cronje: 31 May & 1 June 2001.

12 Cronje: 31 May & 1 June 2001.

13 As did Australia, New Zealand and Ireland.

14 Why designation has not yet taken place is not clear. It may be that the application of subsection 2(b) (the Minister may only designate a state if he is satisfied that the recognition accorded by the law of such a state to proceedings under the local insolvency laws, justifies the application of this Act to foreign proceedings in such state) causes the delay in designation.

must have adequate assurance that they need not fear the local situation.[15] The *Cross-Border Insolvency Act* can achieve that. Until designation takes place there is still an absence of predictability in the handling of cross-border insolvency cases. This impedes capital flow which is in turn a disincentive to cross-border investment. Designation under the CBA will strengthen the economic ties between South Africa and such designated States. The Model Law consequently guarantees easy recognition. If States are designated and a specific conduct is made applicable under their insolvency proceedings, the reciprocity requirement will, in my view, be satisfied. Insistence on reciprocity will on the other hand take up too much time.

Despite the absence of designation, it is nevertheless important to discuss the rules and principles set out in the CBA in order to determine whether these are sufficient to eliminate global economic problems of a cross-border nature.

4. The CBA and international obligations of the Republic

According to section 3 of the CBA, the requirements of any treaty or other form of agreement to which the Republic is a party with one or more other states, prevail. But this is the case only if the treaty or agreement has been enacted into law in terms of section 231(4) of the *Constitution of the Republic of South Africa*.[16] This concerns the situation where, and to the extent that, this Act conflicts with an obligation of the Republic arising out of such treaty or agreement.

5. Access of foreign representatives and creditors to courts

With the enactment of the CBA letters rogatory or other forms of diplomatic or consular communications became unnecessary.[17] The CBA provides for direct access[18] for foreign representatives to the courts of South Africa. The functions referred to in this Act relating to recognition of foreign proceedings[19] and co-operation with foreign courts must be performed by a High Court.[20] The CBA contains no provisions regarding the particular High Court within the Republic that has jurisdiction. It is thus left to the laws of the Republic to decide the question of jurisdiction. The only reference to jurisdiction is found in section 33 which removes the provision in the *Insolvency Act* [21] that the

15 A foreign investor will want to know what will happen if his business in South Africa goes sour.

16 Act 108/1996.

17 Which usually took 3 to 4 months, while the foreign State decided whether or not it thought that the country from where the relevant application had been made, was competent. See section 14(2)(b).

18 Section 9 of the CBA.

19 Section 17(1)(d) read with section 1 and section 4.

20 Section 4 of the CBA.

21 24/1936.

court may refuse a sequestration order when it appears equitable or convenient that the estate of a person not domiciled in the Republic should be sequestrated elsewhere. The reason for this change is not quite clear.

However, with regard to jurisdiction relating to cross-border issues, section 9(1) of the *Supreme Court Act* [22] will still be applicable. It provides that if

> any civil cause, proceeding or matter has been instituted in any provincial or local division, and it is made to appear to the court concerned that the same may be more conveniently or more fitly heard or determined in another division, that court may, upon application by any party thereto and after hearing all other parties thereto, order such cause, proceeding or matter to be removed to that other division.

Procedures are not prescribed in the CBA[23] and again it is left to the laws of the Republic to decide the issues regarding procedure. Except in the case of the granting of urgent interim relief,[24] the CBA does not provide for a notice of recognition. This, to my view, is a *lacuna* in the CBA. Recognition materially effects the position of the insolvent as well as that of his local creditors. It is only fair that they should be enlightened as to the prospective application. Meskin[25] submits that the court should not issue a recognition order without affording the insolvent an opportunity of being heard unless it is satisfied that the insolvent is aware of the proceedings and does not intend opposing them.[26] I agree. If this view is not acceptable, it is important that this matter should be dealt with in the court order if a rule *nisi* was not granted.

6. Application by foreign representatives and creditors

Application may be for relief,[27] for recognition of foreign proceedings[28] and to commence proceedings under the South African insolvency law.[29] Upon recognition of the foreign proceedings, the foreign representative may participate in proceedings regarding the debtor under the South African insolvency law.[30] But the sole fact that an application is made to a court in the Republic by a foreign representative does not for any purpose other than the application subject the foreign representative or the foreign assets and

22 59/1959.
23 For instance whether the application should be *ex parte*, whether there should be notice of the application for recognition, whether a rule *nisi* should be issued, etc.
24 In such case the CBA does provide for the giving of notice.
25 Meskin & Kunst 2002:4-66.
26 Furthermore, he submits that in all cases where there are local creditors the courts should initially issue a rule *nisi* with directions as to the publication of the application for recognition.
27 In terms of sections 19-21.
28 See section 15.
29 See section 11.
30 Section 12.

affairs of the particular debtor to the jurisdiction of the courts in the Republic.[31]

Nothing in the CBA, however, prevents the court from refusing to take any steps governed by this Act if such steps would be manifestly contrary to the public policy of the Republic.[32]

7. Position of creditors

Foreign creditors have access to proceedings under the local insolvency laws. Section 13(1) provides that foreign creditors have the same rights as local creditors regarding the commencement of, and participation in, proceedings under the local insolvency laws. This, however, does not affect the ranking of claims in proceedings under the local insolvency laws, except that the claims of foreign creditors may not be ranked lower than concurrent claims.[33]

In addition, and without derogating from the application of the law and practice of the Republic generally, it is stressed in subsection (3) that the law and practice of the Republic regulates the ranking of claims in respect of assets in the Republic. This, in my view, is an indication of the legislature's intention that for a single proceeding the local creditors should be paid the dividend that they are entitled to in gross before any amount of money is paid over to the foreign representative.

8. Main or non-main proceedings

The relief provided for in the CBA clearly states that foreign proceedings must be recognised as either main or non-main proceedings. The proceedings will be recognised as foreign main proceedings if they are taking place in the state of the debtor's centre of main interests.[34] Foreign non-main proceedings will be recognised as such if the debtor has an establishment,[35] such establishment being any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.[36]

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31 Section 10.

32 Section 6.

33 Section 13(2).

34 Section 17(2)(a). In the absence of proof to the contrary, the debtor's registered office or habitual residence is presumed to be the centre of the debtor's main interests (section 16(3)). In the South African company law reference is usually made to a company's principle place of business, that is its administrative centre. This test may help to determine the centre of a company's main interests. "Habitual residence" may, in my view, be the place where the debtor is domiciled, or where such person ordinarily resided, as understood in the law of insolvency.

35 Section 17(2)(b).

36 Section 1 of the CBA.

9. Recognition of foreign proceedings

According to section 17(3) the court must at the earliest possible time recognise the proceedings if the following conditions apply: The application must be made to the appropriate court.[37] The foreign proceedings must be proceedings as described in section 1 of the CBA.[38] The applicant must be a person or body as defined in section 1.[39] A certified copy of the decision commencing the foreign proceedings and appointing the foreign representative must accompany the application.[40] In the alternative, a certificate from the foreign court affirming the existence of the foreign proceedings and appointment of the foreign representative may accompany the application.[41] In the absence of such evidence, any other evidence of the existence of the foreign proceedings and the appointment of the foreign representative acceptable to the court, will suffice.[42]

If the decision or certificate indicates that the foreign proceedings are proceedings as defined and the foreign representative is a person or body as defined, the court may so presume.[43] The court may also presume that documents submitted in support of the application are authentic, whether they are legalised or not.[44]

10. Relief upon application of recognition

10.1 Urgent interim relief

From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, grant relief of a provisional nature where relief is urgently needed to protect the interests of creditors.[45] This includes staying execution against the debtor's assets and entrusting the administration or realisation of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court (in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy). The court may also grant any of the discretionary relief that will be discussed below.

Unless the relief is extended as discretionary relief, the relief terminates when the application for recognition is decided upon.[46]

37 Section 17(1)(d).
38 Section 17(1)(a). See paragraph 2 above.
39 Section 17(1)(b). See paragraph 2 above.
40 Section 15(2)(a).
41 Section 15(2)(b).
42 Section 15(2)(c).
43 Section 16(1).
44 Section 16(2).
45 Section 19.
46 Section 19(3). In terms of subsection (4) the court may refuse to grant relief under this section if such relief would interfere with the administration of foreign main

Only in the case of urgent interim relief does the CBA provide that notice of temporary relief must be given. Such an order should be dealt with as contemplated in section 17 of the *Insolvency Act* [47]or section 357(1) and (4) of the *Companies Act*,[48] as the case may be.[49] Whenever notification is given to creditors under the South African law of insolvency notice must also be given to the known foreign creditors.[50]

10.2 Automatic stay

Upon recognition of foreign proceedings that are foreign main proceedings[51] commencement or continuation of individual legal actions or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed. Execution against the debtor's assets is stayed. The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. Section 21 of the *Insolvency Act* [52] applies with regard to assets situated in the Republic to the same extent, as it would have if a South African court had sequestrated the debtor.[53] This is an important addition to the principles of the Model Law. Section 21 provides for the vesting of the assets of the "solvent spouse"[54] in the trustee of the insolvent estate until that spouse has proved that he or she has a valid title to the assets.

The scope, and the modification or termination of the stay and suspension referred to above are subject to sections 20, 23 and 75 of the *Insolvency Act* [55] and sections 341 and 359 of the *Companies Act*.[56] The court may, at the request of the foreign representative or a person affected

proceedings. This is one advantage of recognition as a main proceeding that must be kept in mind. Another advantage found in section 30 is that relief in non-main proceedings must be consistent with the main proceeding and in section 31 another advantage is found in the presumption of insolvency which will be discussed below.

47 24/1936.

48 61/1973.

49 Section 19(2). These sections concern the steps that should be taken to bring the sequestration of a debtor's estate or the winding-up of a company under the attention of certain officials and the public. Section 357 of the *Companies Act* also apply to a close corporation. See section 66(1) of the *Close Corporations Act* 69/1984.

50 Section 14.

51 Recognition as a main proceeding has a definite advantage in this connection, which should be kept in mind by the practitioner.

52 Act 24/1936.

53 Section 20(1).

54 The solvent spouse has a separate estate.

55 These sections concern the divesting of the debtor's estate and the effect of sequestration on the debtor's ability to act, his assets and on pending civil legal proceedings.

56 These sections concern the effect of liquidation on the transfer of a company's shares, alteration in the status of its members, disposition, attachment or execution of its property after liquidation and on civil proceedings by or against the company. These provisions are, in terms of section 66(1) of the *Close Corporations Act,* also applicable to close corporations in liquidation.

by these provisions, modify or terminate the scope of the stay and suspension.[57] This means that the South African courts have no general discretion to modify or terminate the automatic stay and suspensions.[58]

Individual actions or proceedings may still be commenced to the extent necessary to preserve a claim against the debtor.[59] The automatic stay does not affect the right to request the commencement of proceedings under the laws of the Republic relating to insolvency or the right to file claims in such proceedings.[60]

Section 29(a)(ii) provides, however, that there is no automatic stay if insolvency proceedings are taking place in the Republic at a time when application for recognition as foreign main proceedings is filed. When proceedings in the Republic commence, after recognition or filing of an application for recognition of foreign main proceedings, the automatic stay and suspension must be modified or terminated if inconsistent with the proceedings in the Republic.[61] This discussion refers to concurrent proceedings, and this provision is an attempt to co-ordinate these proceedings.

10.3 Discretionary relief

Upon recognition of foreign proceedings, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief. This includes:

(a) staying the commencement or continuation of individual legal actions or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent that they have not been stayed under section 20(1)(a);

(b) staying execution against the debtor's assets to the extent that it has not been stayed under section 20(1)(b);

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent that this right has not been suspended under section 20(1)(c);

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration or realisation of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court. This is the case, provided

57 Section 20(2).
58 Take note that in the case of sections 19 and 21 the court does have such a discretion.
59 Section 20(3) (for instance to interrupt prescription).
60 Section 20(4).
61 Section 29(b)(ii).

that the court is satisfied that the interests of creditors in the Republic are adequately protected;[62]

(f) extending relief granted under section 19(1);

(g) granting any additional relief that may be available to a trustee, liquidator, judicial manager, curator of an institution, or receiver under the laws of the Republic.[63]

In granting discretionary relief to a representative of foreign non-main proceedings, the court must be satisfied that the relief relates to assets that, under the law of the Republic, should be administered in the foreign non-main proceedings or concerns information required in those proceedings.[64]

Without derogating from the application of the laws of the Republic generally,[65] in granting relief under this section the court must indicate the laws of the Republic relating to the administration, realisation or distribution of a debtor's estate in the Republic that will apply.[66] With regard to the Master, a creditor and an insolvent[67] this relates especially to their rights regarding meetings of creditors, sale of assets, admission and rejection of claims, the rights and duties of a trustee[68] in regard to those matters and the plans of distribution of proceeds. The foreign representative will therefore be able to hold an inquiry into the affairs of the insolvent in terms of South African law even if the insolvent did not have any assets in South Africa.

Although nothing is said in the CBA, the rule is that the applicant should provide security for the proper performance of his administration and that the order of recognition is subject to amendment by the court. Further, that the applicant should comply with the provisions for the opening and operation of banking accounts and that the funds may be transferred out of South Africa with the written permission of the Master.

10.4 Protection of creditors and other interested persons

As said before, in granting or denying relief under sections 19 or 21, or in modifying or terminating relief, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.[69]

62 Section 21(2).
63 Section 21(1).
64 Section 21(3). For example information required by the representative with regard to the disposition, alienation or removal of those assets.
65 In these terms, even if the court did not give an indication as set out in this section, the South African law will still be applicable.
66 Section 21(4). See for eg *Moolman v Builders & Developers (Pty) Ltd* 1990 1 SA 954 (A).
67 Or a company being wound up.
68 Or a liquidator.
69 Section 22(1).

The court may subject relief granted under sections 19 or 21 to conditions that it considers appropriate. The court may, at the request of the foreign representative or a person affected by relief granted under sections 19 or 21, or of its own motion,[70] modify or terminate such relief.[71] (It must be borne in mind that in the case of non-main proceedings such relief may in the first instance only be granted in respect of assets that must under the South African law be administered in the non-main proceedings, or concerns information required in those proceedings.)[72]

11. Actions to avoid acts detrimental to creditors

Upon recognition of foreign proceedings, the foreign representative has standing to initiate any legal action to set aside a disposition that is available to a trustee or liquidator under the insolvency law of the Republic. When the foreign proceedings are foreign non-main proceedings, the court must again be satisfied that this legal action relates to assets that, under the law of the Republic, should be administered in the foreign non-main proceedings.[73]

Upon recognition of foreign proceedings, the foreign representative may, provided the requirements of the law of the Republic are met, intervene in any proceedings in which the debtor is a party.[74]

From the time of the filing of the application for recognition of the foreign proceedings, the foreign representative must inform the court promptly of any change in the status of the recognised foreign proceedings or the status of the foreign representative's appointment and any other foreign proceedings regarding the same debtor.[75]

In the absence of proof to the contrary, recognition of foreign main proceedings is, for the purpose of commencing proceedings under the laws of the Republic relating to insolvency, proof that the debtor is insolvent.[76]

12. Co-operation with foreign courts and foreign representatives

In terms of section 25 the South African court must co-operate to the maximum extent possible with foreign courts or foreign representatives,[77] either directly or through the South African appointed trustee, liquidator, judicial manager, curator of an institution, or receiver. The South African court may communicate directly with, or request information or assistance

70 But not in terms of section 20.
71 Section 22(2) and (3).
72 Section 21(3). See also sections 23(2) and 29(c).
73 Section 23. See also sections 21(3) and 29(c).
74 Section 24.
75 Section 18. This differs from the Model Law in terms of which "substantial change" (article 18 UNCITRAL Model Law) should be reported.
76 Section 31.
77 The prerequisite is designation of the foreign state.

directly from, foreign courts or foreign representatives.[78] This is, of course, where there has been an inward bound request for recognition. When, however, it involves an outward bound request, the application of section 25 is subject to the foreign state's benevolence and courtesy — that country's principle of comity.

The South African trustee, liquidator, judicial manager, curator of an institution, or receiver must, in the performance of his or her or its functions and subject to the supervision of the court, co-operate to the maximum extent possible and communicate directly with foreign courts or foreign representatives.[79] The position is the same also in this case. If the initiative comes from the South African representative,[80] he will have to depend upon the comity and view of the foreign State regarding cross-border insolvencies.

Co-operation referred to in sections 25 and 26 may be implemented by any appropriate means, including-

(a) appointment of a person or body to act at the direction of the court;

(b) communication of information by any means considered appropriate by the court;

(c) co-ordination of the administration and supervision of the debtor's assets and affairs;

(d) approval or implementation by courts of agreements concerning the co-ordination of proceedings;

(e) co-ordination of concurrent proceedings regarding the same debtor.[81]

13. Co-ordination of concurrent proceedings

It is a fact that there may be more than one proceeding with regard to the same debtor. Through sections 28-30 the CBA recognises that these proceedings should be co-ordinated with the foreign main proceedings. Where foreign proceedings and proceedings under the local insolvency laws are taking place concurrently regarding the same debtor, the court must seek co-operation and co-ordination under sections 25, 26 and 27.

In section 28 it is provided that, after recognition of foreign main proceedings, proceedings under the local insolvency laws may be commenced only if the debtor has assets in the Republic. These proceedings in the Republic will then be regarded as the non-main proceedings. The effects of such proceedings are restricted to the assets of the debtor that are located in the Republic and, to the extent necessary to implement co-operation and co-

78 Section 25.
79 Section 26.
80 An outward bound request.
81 Section 27.

ordination under sections 25, 26 and 27, to other assets of the debtor that, under the law of the Republic, should be administered in those proceedings.[82]

When the proceedings in the Republic are taking place at the time that the application for recognition of the foreign proceedings is filed-

(i) any relief granted under section 19 or 21 must be consistent with the proceedings in the Republic; and

(ii) if the foreign proceedings are recognised in the Republic as foreign main proceedings, section 20 does not apply.[83]

When the proceedings in the Republic commence after recognition, or after the filing of the application for recognition of the foreign proceedings-

(i) any relief in effect under section 19 or 21 must be reviewed by the court and must be modified or terminated if inconsistent with the proceedings in the Republic; and

(ii) if the foreign proceedings are foreign main proceedings, the stay and suspension referred to in section 20(1) must be modified or terminated pursuant to section 20(2) if inconsistent with the proceedings in the Republic.[84]

Thus, all local proceedings take preference over all foreign proceedings, even after the recognition of foreign proceedings by a local court. It also means that the recognition of foreign proceedings does not obstruct the commencement of local insolvency proceedings. On the other hand, the existence of local proceedings does not prevent the recognition of foreign proceedings from taking place. In granting relief or in extending or modifying such relief granted to a representative of foreign non-main proceedings, the court must be satisfied that the relief relates to assets that, under the South African law, should be administered in the foreign non-main proceedings or concerns information required in those proceedings.[85]

In terms of section 30, in respect of more than one set of foreign proceedings regarding the same debtor, the court must seek co-operation and co-ordination under sections 25, 26 and 27, and-

(a) any relief granted under section 19 or 21 to a representative of foreign non-main proceedings after recognition of foreign main proceedings must be consistent with the foreign main proceedings. In this case the foreign main proceeding is given preference over the foreign non-main proceedings.

(b) If foreign main proceedings are recognised after recognition, or after the filing of an application for recognition of foreign non-main proceedings, any relief in effect under section 19 or 21 must be

82 Section 28. Take note of this important advantage of recognition as a foreign main proceeding in that commencement of local proceedings in the Republic is restricted to assets in the Republic.

83 Section 29(a).

84 Section 29(b).

85 Section 29(c).

reviewed by the court and must be modified or terminated if inconsistent with the foreign main proceedings. Again the foreign main proceeding is given preference over the foreign non-main proceedings.

(c) If, after recognition of foreign non-main proceedings, other foreign non-main proceedings are recognised, the court must grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

14. Payment in concurrent proceedings

With regard to payment in concurrent proceedings, section 32 provides that, without prejudice to secured claims, a creditor who has received part payment in foreign insolvency proceedings may not receive a payment for the same claim in concurrent proceedings under the local insolvency laws regarding the same debtor. This applies 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.[86]

15. Conclusion

The solutions that the South African legislation offer include, *inter alia*, access for the person administering the foreign insolvency proceedings to the courts of South Africa; determining when a foreign insolvency proceeding should be accorded recognition and what the consequences of recognition should be; providing a regime for the right of creditors to commence or participate in insolvency proceedings in South Africa; permitting courts in South Africa to co-operate more effectively with foreign courts and foreign representatives involved in an insolvency matter; authorising courts in South Africa and persons administering insolvency proceedings in South Africa to seek assistance abroad; providing for court jurisdiction and establishing rules for co-ordination where insolvency proceedings in South Africa are taking place concurrently with insolvency proceedings in a foreign state; and establishing rules for co-ordination of relief granted in South Africa in favour of two or more insolvency proceedings that may take place in foreign states regarding the same debtor. It is submitted that the South African legislation can serve as an example of the manner in which cross-border insolvencies, as a global economic problem, can be solved. The only inconsistency is that the South African approach of solving the intricacies of cross-border insolvencies has improved the position of foreign creditors, foreign representatives and foreign courts while it is uncertain how the foreign State will treat South African creditors, representatives and courts. From this point of view the absence of predictability in the handling of cross-border insolvency cases can still be criticized as a disincentive to cross-border investment.

86 Section 32. This section only applies in the case of concurrent proceedings and not if there is just one proceeding pending. It does not matter if this one proceeding is also recognised somewhere else.

Bibliography

CRONJE T

2001. *Clarifying recent legislative developments*. Unpubl paper. Johannesburg: Insolvency Law Symposium.

MESKIN PM AND KUNST JA

2002. *Insolvency and its operation in winding-up*. Butterworths: Durban.