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Cross-border insolvency and the recognition of foreign liquidators in South Africa

BY LEONARD KATZ

Cross-border insolvency deals with bankruptcy proceedings initiated in one jurisdiction in relation to an insolvent who has assets in a jurisdiction other than the one in which the relevant bankruptcy order is granted. Reference must therefore be paid to both the law of insolvency and conflict of laws (private international law).

If assets are situated in a foreign jurisdiction, the insolvency representative who has been appointed by the relevant authorities must take steps to take possession of those assets for the benefit of creditors. Unless the situation is governed by an applicable treaty or specific legislation, an application by the insolvency representative to the court of the foreign jurisdiction to be recognised as such by that foreign jurisdiction is usually necessary, alternatively, application may be made for the institution of concurrent bankruptcy proceedings in the foreign jurisdiction.

In general, cross-border insolvency matters are approached by utilising either a universality model or a territoriality model. The universality model approaches a cross-border insolvency as a single matter. It seeks to ensure that all the insolvent's assets are dealt with in one proceeding, to which the courts of other countries would give their assistance, and treats creditors in the different jurisdictions equally. The territoriality approach confines the effects of the insolvency to the jurisdictional limits of each country where assets and liabilities are situated and protects the interests of local creditors before allowing local assets to be utilised for the benefit of foreign creditors. Most legal systems blend the two models. South Africa essentially follows a blend of the two in that it allows local courts to assist foreign insolvency representatives, but leans strongly towards the territoriality model in that the South African court protects local creditors.

South Africa has no cross-border insolvency treaties with any other country. The Cross-Border Insolvency Act 42 of 2000 came in to force in November 2003 and follows the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL). The Act seeks to regulate cross-border insolvency issues. It includes chapters on access of foreign representatives and creditors to South African courts, recognition of foreign proceedings, cooperation with foreign courts and foreign representatives and concurrent proceedings. In terms of section 2(2)(a) thereof, the Act only applies in respect of states designated by the Minister of Justice. Designation is accorded on the basis of reciprocity. No state has yet been designated and thus the Act cannot yet be applied. In the circumstances, at present the common law in regard to international private law and precedent still regulates this area of South African law and is based on considerations of comity, convenience and equity. Once states are designated by the Minister of Justice, South African law will follow a dual approach to the recognition of foreign bankruptcy orders in that insolvency representatives (e.g., trustees or liquidators, hereinafter referred to using the term 'trustees') from designated states will follow the procedure envisaged by the Act, while those from non-designated states will still be required to follow the procedure based on the common law and precedent as set out below.

In accordance with South African law, a foreign trustee is automatically vested with the insolvent's movable property, in whatever jurisdiction it may be situated, if, at the date of the bankruptcy order, the insolvent was domiciled in the area of jurisdiction of the court that granted the order. This is not the case in relation to immovable property. This does not mean that the foreign trustee is entitled to deal with movable property situated in South Africa. He is required to seek recognition by the South African High Court before being able to do so. Recognition is also required to enable him to deal with immovable property situated in South Africa.

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The High Court of South Africa has a discretion to recognise a foreign trustee appointed pursuant to bankruptcy proceedings instituted in the country of the company's domicile. This discretion is subject to the court affording protection to local creditors. Usually such recognition is afforded to foreign trustees for the purpose of enabling them to deal with South African assets belonging to the foreign insolvent. However, the South African High Court may also recognise a foreign trustee to allow the trustee to perform other functions, such as convening an enquiry into the affairs of the foreign insolvent utilising the laws applicable in South Africa. In order to protect the interests of local creditors they must be notified of the intention of the foreign trustee to deal with the local assets. The South African court may order that local assets or the proceeds of the sale thereof may be removed to the foreign jurisdiction only once administration costs and costs of the court application as well as the debts of all local creditors have been satisfied in full.

The procedure employed by a foreign trustee may be illustrated using the example of a liquidator appointed in England in respect of an insolvent company domiciled in England, which insolvent company also owns property located in South Africa. A two-fold process must be followed:

Firstly, the duly appointed English liquidator applies to the High Court of Justice, Chancery Division, Companies Court for 'letters of request'. If this application is successful, the High Court of Justice will instruct the Registrar of Bankruptcy to issue such letters of request. The letters of request are addressed to the appropriate division of the High Court of South Africa and requests that the court recognises the appointment of the English liquidators as liquidators of the English company and recognises such rights and powers as may be set out in the relevant bankruptcy order. Additional powers may be requested, for example the power to institute legal proceedings in South Africa.

Secondly, upon the issuing of the letters of request, an application must be brought before the High Court of South African. In this application the English liquidator must petition the court to give effect to the letters of request and recognise his appointment as liquidator and entitle him to deal with the South African assets of the English company which are situated in South Africa. The South African court may impose conditions on the foreign liquidator in order to protect local creditors.

Conversely, where a South African liquidator or trustee wishes to deal with assets belonging to a South African debtor which are situated in a foreign jurisdiction, he must comply with the laws and procedures of that foreign jurisdiction. In England, for example, South Africa qualifies as a 'relevant country' for the purposes of recognition in terms of the Insolvency Act 1986. Accordingly, the liquidator or trustee must petition the South African High Court to direct the Registrar of the High Court to issue letters of request to the High Court of Justice, Chancery Division, Companies Court. Once the letters of request have been issued, the South African liquidator must make application to such court to be recognised in that jurisdiction. ■

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