

REPUBLIC OF SOUTH AFRICA

CROSS-BORDER INSOLVENCY BILL

(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in Government Gazette No. 20862 of 4 February 2000) (The English text is the official text of the Bill)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 4—2000]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP INSOLVENSIE OOR LANDSGRENSE

(Soos ingedien in die Nasionale Vergadering as 'n artikel 75-wetsontwerp; verduidelikende opsomming van Wetsontwerp in Staatskoerant No. 20862 van 4 Februarie 2000 gepubliseer) (Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)

(MINISTER VIR JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

BILL

To provide effective mechanisms for dealing with cases of cross-border insolvency; and to amend the Insolvency Act, 1936, so as to further regulate the jurisdiction of the High Courts; and to provide for matters connected therewith.

PREAMBLE

WHEREAS the General Assembly of the United Nations on 15 December 1997 adopted a resolution, co-sponsored by the Republic of South Africa, recommending that States review their legislation on cross-border insolvency and, in that review, give favourable consideration to the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law;

AND WHEREAS the Republic of South Africa acknowledges the need to create effective mechanisms for dealing with cases of cross-border insolvency in accordance with the provisions of the Model Law, bearing in mind the need for internationally harmonised legislation governing instances of cross-border insolvency;

AND WHEREAS there is a need—

- * to strengthen cooperation between the courts and other competent authorities of the Republic of South Africa and those of foreign states involved in cases of cross-border insolvency;
- * for greater legal certainty for trade and investment;
- * for fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- * for protection and maximisation of the value of the debtor's assets;
- * for the facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1

INTERPRETATION AND FUNDAMENTAL PRINCIPLES

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Definitions

- 1. For the purposes of this Act—
 - (a) “court” means a High Court referred to in section 4;
 - (b) “curator of an institution” means a curator appointed in terms of section 6 of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984), or section 69 of the Banks Act, 1990 (Act No. 94 of 1990), or section 81 of the Mutual Banks Act, 1993 (Act No. 124 of 1993); 20
 - (c) “establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;
 - (d) “foreign court” means a judicial or other authority competent to control or supervise foreign proceedings; 25
 - (e) “foreign main proceedings” means foreign proceedings taking place in the State where the debtor has the centre of his or her or its main interests;
 - (f) “foreign non-main proceedings” means foreign proceedings, other than foreign main proceedings, taking place in a State where the debtor has an establishment within the meaning of paragraph (c) of this section; 30
 - (g) “foreign proceedings” means collective judicial or administrative proceedings in a foreign State, including interim proceedings, pursuant to a law relating to insolvency in which proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation; 35
 - (h) “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 the debtor’s assets or affairs or to act as a representative of the foreign proceedings; 40
 - (i) “receiver” means a receiver or other person appointed by a court to administer a compromise or arrangement under section 311 of the Companies Act, 1973 (Act No. 61 of 1973);
 - (j) “Republic” means the Republic of South Africa.

Scope of application

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- 2. This Act applies where—
 - (a) assistance is sought in the Republic by a foreign court or a foreign representative in connection with foreign proceedings; or
 - (b) assistance is sought in a foreign State in connection with proceedings under the laws of the Republic relating to insolvency; or 50

- (c) foreign proceedings and proceedings under the laws of the Republic relating to insolvency in respect of the same debtor are taking place concurrently; or
- (d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, proceedings under the laws of the Republic relating to insolvency.

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International obligations of Republic

3. To the extent that this Act conflicts with an obligation of the Republic arising out of any treaty or other form of agreement to which it is a party with one or more other states, the requirements of the treaty or agreement prevail.

Competent court

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4. The functions referred to in this Act relating to recognition of foreign proceedings and cooperation with foreign courts must be performed by a High Court referred to in section 166(c) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).

Authorisation of trustee, liquidator, judicial manager, curator of institution, or receiver to act in foreign State

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5. A trustee, liquidator, judicial manager, curator of an institution, or receiver is authorised to act in a foreign State in respect of proceedings under the laws of the Republic relating to insolvency, as permitted by the applicable foreign law.

Public policy exception

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6. Nothing in this Act prevents the court from refusing to take an action governed by this Act if the action would be manifestly contrary to the public policy of the Republic.

Additional assistance under other laws

7. Nothing in this Act limits the power of a court or a trustee, liquidator, judicial manager, curator of an institution, or receiver to provide additional assistance to a foreign representative under other laws of the Republic.

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Interpretation

8. In the interpretation of this Act, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

CHAPTER 2

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ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN REPUBLIC

Right of direct access

9. A foreign representative may apply directly to a court in the Republic for relief.

Limited jurisdiction

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10. The sole fact that an application pursuant to this Act is made to a court in the Republic by a foreign representative does not subject the foreign representative or the

foreign assets and affairs of the debtor to the jurisdiction of the courts of the Republic for any purpose other than the application.

Application by foreign representative to commence proceedings under laws of Republic relating to insolvency

11. A foreign representative may apply to commence proceedings under the laws of the Republic relating to insolvency if the conditions for commencing such proceedings are otherwise met. 5

Participation of foreign representative in proceedings under laws of Republic relating to insolvency

12. Upon recognition of foreign proceedings, the foreign representative may participate in proceedings regarding the debtor under the laws of the Republic relating to insolvency. 10

Access of foreign creditors to proceedings under laws of Republic relating to insolvency

13. (1) Subject to subsection (2), foreign creditors have the same rights regarding the commencement of, and participation in, proceedings under the laws of the Republic relating to insolvency as creditors in the Republic. 15

(2) Subsection (1) does not affect the ranking of claims in proceedings under the laws of the Republic relating to insolvency, except that the claims of foreign creditors may not be ranked lower than non-preferent claims. 20

(3) Without derogating from the application of the law and practice of the Republic generally, the ranking of claims in respect of assets in the Republic is regulated by the law and practice of the Republic on the ranking of claims.

Notification to foreign creditors of proceedings under laws of Republic relating to insolvency 25

14. (1) (a) Whenever under the laws of the Republic relating to insolvency notification is to be given to creditors in the Republic, such notification must also be given to the known creditors that do not have addresses in the Republic.

(b) The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known. 30

(2) (a) Such notification must be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

(b) No letters rogatory or other similar formality is required.

(3) When a notification of commencement of proceedings is to be given to foreign creditors, the notification must— 35

(a) indicate a reasonable time period for filing claims and specify the place for their filing;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in such a notification to creditors pursuant to the law of the Republic and the orders of the court. 40

CHAPTER 3

RECOGNITION OF FOREIGN PROCEEDINGS AND RELIEF

Application for recognition of foreign proceedings

15. (1) A foreign representative may apply to the court for recognition of the foreign proceedings in which the foreign representative has been appointed. 45

(2) An application for recognition must be accompanied by—

- (a) a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; or
 - (b) a certificate from the foreign court affirming the existence of the foreign proceedings and of the appointment of the foreign representative; or
 - (c) in the absence of evidence referred to in paragraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceedings and of the appointment of the foreign representative. 5
- (3) An application for recognition must also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. 10
- (4) The court may require a translation of documents supplied in support of the application for recognition into an official language of the Republic.

Presumptions concerning recognition

16. (1) If the decision or certificate referred to in section 15(2) indicates that the foreign proceedings are proceedings within the meaning of section 1(g) and that the foreign representative is a person or body within the meaning of section 1(h), the court may so presume. 15
- (2) The court may presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalised.
- (3) In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests. 20

Decision to recognise foreign proceedings

17. (1) Subject to section 6, foreign proceedings must be recognised if—
- (a) the foreign proceedings are proceedings within the meaning of section 1(g); 25
 - (b) the foreign representative applying for recognition is a person or body within the meaning of section 1(h);
 - (c) the application meets the requirements of section 15(2); and
 - (d) the application has been submitted to a court.
- (2) The foreign proceedings must be recognised— 30
- (a) as foreign main proceedings if they are taking place in the State where the debtor has the centre of his or her or its main interests; or
 - (b) as foreign non-main proceedings if the debtor has an establishment within the meaning of section 1(c) in the foreign State.
- (3) An application for recognition of foreign proceedings must be decided upon at the earliest possible time. 35
- (4) The provisions of this section and of sections 15, 16 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Subsequent information

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18. From the time of filing the application for recognition of the foreign proceedings, the foreign representative must inform the court promptly of—
- (a) any change in the status of the recognised foreign proceedings or the status of the foreign representative's appointment; and
 - (b) any other foreign proceedings regarding the same debtor that become known to the foreign representative. 45

Relief that may be granted upon application for recognition of foreign proceedings

19. (1) 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, where relief is

urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including—

- (a) staying execution against the debtor's assets;
 - (b) 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;
 - (c) any relief mentioned in section 21(1)(c), (d) and (g).
- (2) An order issued under subsection (1) must be dealt with as contemplated in section 17 of the Insolvency Act, 1936 (Act No. 24 of 1936), or section 357(1) and (4) of the Companies Act, 1973 (Act No. 61 of 1973), as the case may be.
- (3) Unless extended under section 21(1)(f), the relief granted under this section terminates when the application for recognition is decided upon.
- (4) The court may refuse to grant relief under this section if such relief would interfere with the administration of foreign main proceedings.

Effects of recognition of foreign main proceedings

20. (1) Upon recognition of foreign proceedings that are foreign main proceedings—
- (a) commencement or continuation of individual legal actions or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
 - (b) execution against the debtor's assets is stayed;
 - (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended; and
 - (d) section 21 of the Insolvency Act, 1936 (Act No. 24 of 1936), applies with regard to assets situated in the Republic to the same extent as it would have if the insolvent had been sequestered by a court.
- (2) The scope, and the modification or termination, of the stay and suspension referred to in subsection (1) are subject to sections 20, 23 and 75 of the Insolvency Act, 1936, and sections 341 and 359 of the Companies Act, 1973 (Act No. 61 of 1973), and the court may, at the request of the foreign representative or a person affected by subsection (1), modify or terminate the scope of the stay and suspension.
- (3) Subsection (1)(a) does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.
- (4) Subsection (1) 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.

Relief that may be granted upon recognition of foreign proceedings

21. (1) 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, including—
- (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;
 - (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.

(2) Upon recognition of foreign proceedings, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in the Republic are adequately protected. 5

(3) In granting relief under this section 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. 10

(4) Without derogating from the application of the laws of the Republic generally, 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. 15

Protection of creditors and other interested persons

22. (1) In granting or denying relief under section 19 or 21, or in modifying or terminating relief under subsection (3), the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. 20

(2) The court may subject relief granted under section 19 or 21 to conditions it considers appropriate.

(3) The court may, at the request of the foreign representative or a person affected by relief granted under section 19 or 21, or of its own motion, modify or terminate such relief. 25

Actions to avoid acts detrimental to creditors

23. (1) 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 laws of the Republic relating to insolvency.

(2) When the foreign proceedings are foreign non-main proceedings, the court must be satisfied that the legal action relates to assets that, under the law of the Republic, should be administered in the foreign non-main proceedings. 30

Intervention by foreign representative in proceedings in Republic

24. 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. 35

CHAPTER 4

COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

Cooperation and direct communication between court of Republic and foreign courts or foreign representatives 40

25. (1) In matters referred to in section 2, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a trustee, liquidator, judicial manager, curator of an institution, or receiver.

(2) The court may communicate directly with, or request information or assistance directly from, foreign courts or foreign representatives. 45

Cooperation and direct communication between trustee, liquidator, judicial manager, curator of institution, or receiver and foreign courts or foreign representatives

26. (1) In matters referred to in section 2, a 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, cooperate to the maximum extent possible with foreign courts or foreign representatives. 5

(2) The trustee, liquidator, judicial manager, curator of an institution, or receiver may, in the performance of his or her or its functions and subject to the supervision of the court, communicate directly with foreign courts or foreign representatives. 10

Forms of cooperation

27. Cooperation 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; 15
- (c) coordination of the administration and supervision of the debtor's assets and affairs;
- (d) approval or implementation by courts of agreements concerning the coordination of proceedings; 20
- (e) coordination of concurrent proceedings regarding the same debtor.

CHAPTER 5

CONCURRENT PROCEEDINGS

Commencement of proceedings under laws of Republic relating to insolvency after recognition of foreign main proceedings 25

28. (1) After recognition of foreign main proceedings, proceedings under the laws of the Republic relating to insolvency may be commenced only if the debtor has assets in the Republic.

(2) 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 cooperation and coordination 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.

Coordination of proceedings under laws of Republic relating to insolvency and foreign proceedings

29. Where foreign proceedings and proceedings under the laws of the Republic relating to insolvency are taking place concurrently regarding the same debtor, the court must seek cooperation and coordination under sections 25, 26 and 27, and— 35

- (a) when the proceedings in the Republic are taking place at the time that the application for recognition of the foreign proceedings is filed— 40
 - (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;
- (b) when the proceedings in the Republic commence after recognition, or after the filing of the application for recognition, of the foreign proceedings— 45
 - (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 50

pursuant to section 20(2) if inconsistent with the proceedings in the Republic;

- (c) in granting relief or in extending or modifying relief granted 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. 5

Coordination of foreign proceedings

30. In matters referred to in section 2, in respect of more than one set of foreign proceedings regarding the same debtor, the court must seek cooperation and coordination under sections 25, 26 and 27, and— 10

- (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;
- (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 reviewed by the court and must be modified or terminated if inconsistent with the foreign main proceedings; 15
- (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. 20

Presumption of insolvency based on recognition of foreign main proceedings

31. 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. 25

Rule of payment in concurrent proceedings

32. Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of his or her or its claim in proceedings pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in proceedings under the laws of the Republic relating to insolvency regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received. 30

CHAPTER 6

GENERAL PROVISIONS

Amendment of section 149 of Act 24 of 1936 35

33. Section 149 of the Insolvency Act, 1936, is hereby amended by the substitution for the proviso to subsection (1) of the following proviso:

“Provided that when it appears to the court equitable or convenient **[that the estate of a person not domiciled in the Republic be sequestrated elsewhere, or]** that the estate of a person over whom it has jurisdiction be sequestrated by another court within the Republic, the court may refuse or postpone the acceptance of the surrender or the sequestration.”. 40

Short title

34. This Act is called the Cross-Border Insolvency Act, 2000.

MEMORANDUM ON THE OBJECTS OF THE CROSS-BORDER INSOLVENCY BILL, 2000

1. BACKGROUND

1.1 On 15 December 1997 the General Assembly of the United Nations adopted a resolution, co-sponsored by the Republic of South Africa, recommending that States review their legislation on cross-border insolvency and, in that review, give favourable consideration to the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL), bearing in mind the need for internationally harmonised legislation governing instances of cross-border insolvency.

1.2 The enactment of the Model Law was considered by the South African Law Commission as part of its comprehensive review of the law of insolvency. The Bill emanates from the Law Commission's interim report on the Review of the Law of Insolvency: The Enactment in South Africa of UNCITRAL's Model Law on Cross-Border Insolvency (Project 63).

2. OBJECTS OF BILL

In line with the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, as few changes as possible have been made to the Model Law, as contained in the Bill, in order to strive for a satisfactory degree of harmonisation and certainty. However, the Model Law has been adjusted to suit South African law. The principal objects of the Bill are to promote—

- (a) cooperation between the courts and other competent authorities of the Republic of South Africa and foreign States involved in cases of cross-border insolvency;
- (b) greater legal certainty for trade and investment;
- (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) protection and maximisation of the value of the debtor's assets; and
- (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

3. CONSULTATION PROCESS

On 25 May 1998 the Law Commission invited comments from about 130 selected correspondents on the advisability of the enactment in South Africa of an adaptation of the Model Law. The Model Law and the *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* were attached to the invitation for comment. The invitation and the said attachments were also published on the website of the Law Commission on the Internet.

4. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice are of the opinion that this Bill must be dealt with in accordance with section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5. FINANCIAL IMPLICATIONS FOR THE STATE

No additional financial implications arising from this Bill are foreseen.