

The Kenyan Insolvency Bill 2010: a cross-border insolvency analysis

*Benhaji S.Masoud**

Abstract

Kenyan insolvency Bill has been in the Kenyan government website since 2010. The analysis of the Bill reveals that if it were to be passed into law will have significant implications for the Kenyan insolvency legal regime. The regime which is currently in use is based on the law that was inherited from the colonial administration. This review article focuses on the potential implication that the Bill is, if it were to be passed into law, likely to have for cross-border insolvency reform and proceedings. The analysis is informed by the international insolvency benchmarks, particularly the UNCITRAL Model Law on Cross-Border Insolvency and the emerging trends of its adoption in various countries including sub-Saharan Africa.

Key words: *Kenya, Insolvency Bill, cross-border insolvency.*

Introduction

The Kenyan insolvency Bill was first published in 2010. It is understood that the Bill is yet to be passed into law. Essentially the Bill seeks to overhaul the existing insolvency legal regime which has been operational for many years. As is the case for almost all African countries, Kenya inherited its legislation that contained provisions on how to deal with insolvencies from the British colonial power.¹ The provisions which are still applicable to date were and are mainly found in Kenya's Companies Act² and the Bankruptcy Act.³ As far as the administration of corporate insolvency is concerned, there is glaringly a lack of appropriate provisions institutionalising a regime for dealing with cross-border insolvency problems.

* Lecturer, Faculty of Law, Open University of Tanzania. Email: benhaji.masoud@out.ac.tz. The author is grateful to Professor Rebecca Parry and Professor David Burdette of Nottingham Law School, Nottingham Trent University and Professor Adrian Walters of IIT Chicago-Kent College of Law for their most helpful comments and inspiration in earlier drafts.

¹ See generally, Wabwile, M.N., 'The Place of English Common Law in Kenya', The Oxford University Commonwealth Law Journal, 2003, Vol.3, No.1, pp.51-80; Macneil, I.R Bankruptcy Law in East Africa, University College, Dar es salaam, 1966.

² Chapter 486 of Laws of Kenya.

³ Chapter 53 of Laws of Kenya.

Indeed, the only provisions that could be linked with cross-border insolvencies are those which provide for the winding up of a foreign company, by the court in Kenya, as an unregistered company.⁴ For such winding up to be effected the company must have ceased to carry on business in Kenya and must have been dissolved or ceased to exist in its place of domicile.

Such limited situations where the legislation could be regarded as acknowledging some international effect of insolvency cannot however mean that the law caters and indeed provides for cross-border insolvency.⁵ This means that Kenya is still largely dependent on the English common law in dealing with cross-border insolvency cases, though the extent and manner into which the relevant common law will be invoked in an appropriate case remains uncertain and unpredictable.⁶

The statutory provisions on persons entitled to commence insolvency proceedings, as well as those entitled to claim, prove and receive dividends from the distribution of proceeds of realisation of the assets of the insolvent debtor are silent on national treatment of foreign personalities and institutions involved in the local proceedings.⁷ Indeed, the entire law is silent about giving non-discriminatory treatment to foreign creditors.⁸ While such treatment might always be assumed to be the case as there is no express provision to the contrary, it is important to stress that in most legal systems local priorities are not always available to foreign creditors.⁹

Apparently, there is a scope and merit in favour of the extension and application of the rules of law of personal bankruptcy to govern cross-border co-operation in the winding up of an insolvent company having an international dimension.¹⁰ In fact, the provision under Kenya's company law which extends the rules of bankruptcy law to the winding up of an insolvent company is the same as the one that is found in Tanzania.¹¹ This is also true for the co-operation procedure in cross-border

⁴ Companies Act, s. 359.

⁵ Sandoval, R., 'Chilean Legislation and Cross-Border Insolvency', *Texas International Law Journal*, 1998, Vol.33, No.3, p. 578.

⁶ *Obongo v Municipal Council of Kisumu* [1971] EA 91, 94; and *Judicature Act 1967 (Kenya)*, s. 3(1) which provides common law as among the sources of law in Kenya.

⁷ *Companies Act (Kenya)*, ss. 221 and 311; and Westbrook, J.L., 'Universal Priorities', *Texas International Law Journal*, 1998, Vol.33, No.1, p. 31.

⁸ *JL Westbrook*, *ibid* 31.

⁹ *Ibid* 30 and 31.

¹⁰ *Companies Act (Kenya)*, s.310.

¹¹ The marginal note to the repealed *Companies Ordinance (Tanzania)* s 258 read: 'Application of bankruptcy rules in winding up of insolvent company.' Notably, this provision has now been re-enacted as *Companies Act 2002 (Tanzania)* s 366. It is the same as the provision found in *Companies Act (Chapter 486 of Laws of Kenya)* s 310. *Insolvency Bill 2010 (Kenya)* clause 420(2) seeks to re-enact the same provision.

insolvencies under the respective countries' bankruptcy legislation.¹² To be sure, the scope for the application of such co-operation procedures to cross-border corporate insolvency is a subject that merits extensive discussion and cannot therefore be exhaustively covered in this commentary. This article is set to examine and comment on cross-border insolvency aspects of the Kenyan Insolvency Bill 2010 and assess its overall implication to the cross-border insolvency reform. The analysis is informed by international insolvency benchmarks, particularly, the UNITRAL Model Law on Cross-Border Insolvency and the emerging trends as to the adoption of the Model Law.

Legislative reform initiative

The law relating to insolvency which is operative in Kenya has remained in force without any substantive reform for about five decades. The changing economic climate coupled with the drive by multilateral institutions for institutionalisation of the rule of law and good governance in developing countries have created a pressing need for amelioration of insolvency law and cross-border insolvency law in Kenya.¹³ The initiative is undertaken within the broad context of facilitating growth of trade and investment and foreign direct investment in particular with a view to reducing poverty.¹⁴ While this work was being prepared, the Kenyan government had since 2010 approved and published the Insolvency Bill 2010.¹⁵ One source is to the effect

¹² Bankruptcy Act (Kenya) ss. 115, 151-164 and Bankruptcy (Reciprocity) Rules (LN 143/1962) (Kenya). See also, Bankruptcy Act (Tanzania) ss. 150-163; and Bankruptcy (Reciprocity) Rules G.N. No. 38 of 1932 (Tanzania).

¹³ Agimba, C., 'Global Trends in the Four Doing Business Indicators-Closing a Business: Kenya's Reform Experiences' (Paper given at doing business 2011 in Africa: Sharing Reform Experiences 2011)

<https://www.wbginvestmentclimate.org/loader.cfm?csModule=security/getfile&pageid=16716> < accessed 24 May 2013. It is reported that there has also been "[c]ontinuous pressure for reform of business laws from business community and proactive response to [the] need for reform from highest political leadership, key government ministries and agencies. Close collaboration and synergies between government ministries and agencies (State Law Office, Kenya Law Reform Commission, Ministry of Finance) and private sector and other stakeholders.'

¹⁴ Whitehead, M., 'A New Insolvency Act is Coming.....So Lenders, Borrowers and Insolvency Practitioners Get Ready' [2009] Financial Focus 1, 8 < http://www.pwc.com/en_KE/ke/pdf/pwc-financial-focus.pdf > accessed 24 May 2013; and Agimba (n 13).

¹⁵ Insolvency Bill 2010 (Kenya) http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2010/Insolvency_Bill_2010.pdf accessed 24 May 2013; Kimani, O., 'Cabinet Hailed for Approving Bills', Kenya Broadcasting Corporation (Kenya 12 November 2010) < <http://www.kbc.co.ke/news.asp?nid=67544> > accessed 6 September 2011; and Whitehead (n 14) p.8.

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that the Bill was drafted with the assistance of a German academic,¹⁶ and technical assistance from multilateral institutions such as the World Bank.¹⁷

As stated earlier, the Bill is designed to replace the Bankruptcy Act, streamline procedures in bankruptcy and insolvency law and effectively remove insolvency related provisions from the companies' legislation. The Bill is set also to provide for the rehabilitation of the insolvent debtor, unlike the present situation where insolvency almost always results in liquidation.¹⁸ The reform has been justified as crucially relevant to Kenya's "vision twenty thirty"¹⁹ which seeks to transform Kenya into a competitive and prosperous middle income economy.²⁰ The Bill is thus intended to add to the efforts towards creating an enabling environment for making Kenya more competitive for business and investment. It is thus implicit that the proposed law has as its inherent object the reinforcement of the poverty reduction strategies through a rehabilitation and rescue procedure whose effective implementation would save jobs and revenue in the long term.²¹ The Kenyan poverty reduction strategy seeks among other things to ensure that Kenya domesticates international Standards and Conventions which it is party to.²² One view given in relation to the potential areas for reform of Kenyan insolvency law, which also reflects domestic concerns on local creditors interests, is to the effect that: -

There should ... be a policy review of the issue of preferential debtors especially in favour of the government. Many bona fide creditors of insolvent companies do lose the opportunity to recover their money because of the consideration of the government as a preferential creditor. This policy is detrimental to the growth of other businesses that are not classified as secured creditors. Where they are unable to recover the money owed to them, they may also experience financial difficulties and eventually suffer liquidation as well with the effect that a series of receiverships occur and the momentum continues to

¹⁶ USAID, 'Kenya's Agenda for Action: Commercial Legal and Institutional Reform- Diagnostic of Kenya's Business Environment' (Business Climate Legal and Institutional Reform June 2009) < <http://egateg.usaid.gov/sites/default/files/Kenya.pdf> > accessed 25 May 2013.

¹⁷ Kimani (n 15)

¹⁸ See the long title to Insolvency Bill 2010 (Kenya) which in part reads. '...to provide for corporate and individual insolvency, to provide for the rehabilitation of the insolvent debtor and for connected purposes.'; and Part X (clauses 315 - 443) which provides for administration orders; and Owino, K., 'Shifting Receivership Process to Business Recovery', *The Point: Bulletin of Institute of Economic Affairs*, 2001, 1.

¹⁹ Kenya, Kenya Vision 2030 (Government of United Republic of Kenya, Kenya 2007).

²⁰ HE Hon President M Kibaki, 'Speech During the Official Opening of Parliament' (the Fourth Session of the Tenth Kenyan Parliament 23rd February 2010) < www.parliament.go.ke/index.php?option=com_docman&task > accessed 12 April 2010

²¹ Kenya, 'Investment Programme for the Economic Recovery Strategy for Wealth and Employment Creation 2003-2007' (Poverty Reduction Papers IMF Country Report No. 05/11, 2005) < <http://www.imf.org/external/pubs/ft/scr/2005/cr0511.pdf> > accessed 25 May 2013

²² Ibid

build for more business failures. Government loss in the short term will certainly be compensated when the businesses have recovered and begin to pay taxes.²³

The Bill is, at least in theory, set to establish a key framework for cross-border insolvency regulation.²⁴ Arguably, the proposed radical reforms establish key features that are critical in regulation of and co-operation in cross-border insolvencies. Firstly, the reforms seek to introduce two new legal procedures, namely, Company Voluntary Arrangements (“CVAs”) and Administration. And secondly, the reforms propose to introduce a requirement for any “insolvency practitioner” to be qualified. This proposed requirement closely, as is the case for most parts of the Bill, follows the UK Model. The Bill provides for the law to adopt the two tests of insolvency, namely cash flow test and the balance sheet test, either of which may be invoked to establish insolvency.²⁵

Commentators are of the view that if this Bill ‘ends up as legislation substantially unaltered it could result in some radical changes to the existing insolvency regime.’²⁶ Nevertheless, implementation concerns have also been raised.²⁷ The USAID report has it that:-

Major legislation for a complete revamping of the bankruptcy process, including the adoption of a reorganization statute [which] has been pending for several years.....would be a complete revision of bankruptcy law in Kenya.....*although a less ambitious revision (with a simple provision for the rehabilitation of a business) would be very likely to be easier for the overworked Kenyan court system to implement.*²⁸

Notably, concerns on the need for simplified form of insolvency legislation for developing countries such as those in SSA were also raised in connection with the overhaul of Tanzania’s insolvency legal framework in 2002 which became operational in 2005.²⁹ It was contended that:-

²³ Owino (n 18), pp. 1, 7-8.

²⁴ Insolvency Bill 2010 (Kenya) Part XIII (clauses 462-466) contains general provisions. It provides *inter alia* for the power of the Minister to make regulations and domesticates the UNCITRAL Model Law on Insolvency under a schedule to the Bill. Indeed, this method parallels the approach taken by the Great Britain in adopting the Model Law on Cross-Border Insolvency as a regulation made under the Insolvency Act 1986.

²⁵ Masoud, B.S., ‘Theoretical Aspects of the Cross-Border Insolvency Landscape: Issues and Perspectives for Sub-Saharan Africa’, Norton Annual Review of International Insolvency, 2011, p.340.

²⁶ Whitehead (n 14), p. 8.

²⁷ Ibid, p. 9 and USAID (n 16), p. 70.

²⁸ USAID (n 27).

²⁹ See Editorial Note entitled ‘The Band Wagon of Insolvency Law Reform Globally Rolls on’, Corporate Insolvency Law & Practice, 2006, Vol. 22, p. 97.

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Perhaps a word of warning will not be out of place here. In their zeal to continually improve their business rescue and insolvency regimes, [they] should *avoid the pitfall of making them so over-regulated and complex* as to become unwieldy and prohibitively costly. Any trend in this direction must be quickly identified and nipped in its bud.³⁰

Cross-border insolvency features in the Kenyan reform initiative

Adoption of the UNCITRAL model law on cross-border insolvency

Although cross-border insolvency regulation is not explicitly singled out as one of the primary objectives of the Bill, as is for rehabilitation of an insolvent debtor, reading through the Bill reveals that cross-border insolvency regulation is indeed one of the major and significant reforms and updates that the Bill seeks to achieve for Kenya.³¹ Apart from the traditional procedure of winding up of a foreign company as an unregistered company, which the Bill has incorporated, it seeks also to give effect to the adoption of the UNCITRAL Model Law on Cross-border Insolvency as a schedule to the proposed Insolvency Act 2010.³² One of the relevant clauses under the Kenyan Insolvency Bill 2010 reads thus:-

The United Nations Commission on International Trade Law (Model Law on Cross-Border Insolvency) shall have the force of law in Kenya in the form set out in the Fifth Schedule.³³

It is of interest to consider this development in Kenya in light of some of the prevailing features characterising adoption of the Model law as a domestic legislation. Firstly, it is common knowledge that the Model Law has been adopted differently in different countries which suggests the potential influence of local policies, priorities and culture, to mention but a few. Secondly, the test of reciprocity has proved to be one of the more common features of the adoption of the Model Law, and it is increasingly becoming also true for SSA countries that have to date adopted the Model Law.³⁴ And thirdly, despite some variations as to how the Model

³⁰ Ibid.

³¹ This is particularly so given the express commitment to adopt the UNCITRAL Model Law on Cross-Border Insolvency.

³² This method of giving effect to the adoption of the UNCITRAL Model Law on Cross-border Insolvency parallels the approach taken by the Great Britain whereby the Model Law was adopted as a regulation made under the Insolvency Act 1986.

³³ Insolvency Bill 2010 (Kenya) clause 463.

³⁴ Ho, L.C., 'Overview', in LC Ho (ed) *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law*, Globe Business, London, 2006, p. 12; and Westbrook, J.L. *et al.*, *A Global View of Business Insolvency Systems*, World Bank, Washington, 2010, p. 231. See in particular, Insolvency Act 1986 (UK) s. 426 designating specific countries to which the co-operation under such provision should be extended; Dawson, K., 'Assistance under Section 426 of the Insolvency Act 1986', *International Insolvency Review*, 1999, Vol.8, No.2, 117, explaining that a court requesting assistance must be on the list of countries or territories designated by the Secretary of State. See also Cross-Border Insolvency Act 2000 (South Africa) s. 2 requiring the

Law has been adopted thus far, a public policy element is a prominent feature that has hardly been omitted in the adopted versions of the Model Law. The question is whether or not the proposed law to be adopted in Kenya is going to fit within this trend.

Key aspects of the proposed Kenyan law on cross-border insolvency

The Kenyan Insolvency Bill 2010 that has been published thus far incorporates a proposed set of Cross-Border Insolvency Regulations as the 5th schedule to the Bill (herein after referred as the Bill). Clearly, the Bill is significantly in line with the UNCITRAL Model Law on Cross-Border Insolvency. The following are some highlights of the fundamental aspects of the Bill as it proposes to address cross-border insolvency.

Application of the proposed law to foreign jurisdictions and proceedings

The Insolvency Bill 2010 does not restrict its application to foreign jurisdiction and proceedings on a basis of a requirement for reciprocity.³⁵ It appears that the intention is to welcome any application from any jurisdiction whether or not it is from a jurisdiction that has adopted the Model Law or one that has any reciprocal cooperation with Kenya. This is a point of significant contrast to the adoption of the UNCITRAL Model Law on Cross-Border Insolvency in other SSA countries.³⁶ Assistance may be refused on grounds of contravention of Kenyan public policy. The Bill proposes that if a refusal on grounds of public policy is sought, the court must consider appearance of the Kenyan Attorney General to be heard in relation to the public policy issue raised.³⁷ This requirement is a positive development which is non-existent in the UNCITRAL Model Law.³⁸ More importantly, the extent of

Minister for Justice to designate countries to which the Act will apply. The minister must be satisfied that recognition accorded by a country to South African proceedings justifies application of the Act to such a country. For recent developments in this regard, see Insolvency Act 2009 (Mauritius) ss. 366 and 368(2) requiring sufficient reciprocity before the law is brought into force “in dealing with insolvencies with jurisdictions that have trading or financial connections with Mauritius, or that it is otherwise in the public interest to bring it into operation.” In this connection, there must be an agreement between Mauritius and a foreign country for mutual recognition of insolvency proceedings and appropriate protection for the interests of debtors and creditors in Mauritius.

³⁵ Insolvency Bill 2010 (Kenya) 5th Schedule para 8.

³⁶ n 34.

³⁷ Insolvency Bill 2010 (Kenya) 5th Schedule para 8(1) & (2); and Guide to Enactment of UNCITRAL Model Law para 124 and 125.

³⁸ UNCITRAL Model Law art 2; see also Law Commission of New Zealand, Report 52: Cross-Border Insolvency: Should New Zealand Adopt the UNCITRAL Model Law on Cross-Border Insolvency? Report/Law Commission, Wellington 1999, xiii and xiv, from which such development in relation to public policy seem to have originated; and Mason, R., ‘Implications of

application of the proposed law may also be constrained by the existence of international obligations arising from international treaties to which Kenya is a party.³⁹ It might be argued that this may include specific effects of bilateral investment treaties and such other treaties like the UNIDROIT Cape Town Convention where there is sufficient linkage with issues governed by the provision of the relevant national insolvency or cross-border insolvency law.⁴⁰ This brings in such aspects as requirements for extending national treatment, most favoured national treatment, fair and equitable treatment and the right of a foreign investor to repatriate capital and funds from a host country as well as super-priority treatment to some of the claimants.⁴¹

Treatment of foreign creditors and foreign representatives

As a general rule, the Bill seeks to require ‘national treatment’ of foreign creditors in addition to providing direct access for foreign representatives to the court in Kenya. It is to the effect that foreign creditors are to be treated in the same way that local creditors are treated, including the right to commence and participate in a local insolvency proceeding.⁴² While the proposed law seeks to provide for exception to the application of non-discrimination principle in relation to application of priorities in distribution, it is silent on the establishment of a minimum level of fair treatment.⁴³ The minimum requirement recommended in the Model Law is one that may provide that a foreign creditor must be treated in a distribution at least as well as a general, unsecured creditor, if a similarly situated local creditor would receive at least that treatment.⁴⁴ Rather, the Bill only provides that access of foreign creditors to a proceeding relating to insolvency ‘...does not affect the ranking of claims in a proceeding under [the proposed law] or the exclusion of foreign tax and social security claims from such a proceeding.’⁴⁵ The rule governing ranking of claims proposed under the Bill is such that the priority of payment is first granted to a specified category of unsecured creditors, which includes administration claims,

the UNCITRAL Model Law for Australian Cross-Border Insolvencies’, International Insolvency Review, 1999, Vol.8, No.2, p.88.

³⁹ Insolvency Bill 2010 (Kenya) 5th Schedule para 5; UNCITRAL Model Law art 3; and Guide to Enactment of UNCITRAL Model Law para 76 and 77

⁴⁰ Ibid.

⁴¹ Ibid. Based on the stipulations of the Guide to Enactment of UNCITRAL Model Law, it is important to note that there is nothing in the Bill that suggests that “...in order for article [5] to displace a provision of the national law, a *sufficient link* must exist between the international treaty concerned and the issue governed by the provision of the national law in question.”

⁴² Insolvency Bill 2010 (Kenya) para 15.

⁴³ UNCITRAL Model Law art 13(2).

⁴⁴ UNCITRAL Model Law art 13 (2); and Westbrook, J.L., ‘Multinational Enterprises in General Default: Chapter 15, the ALI Principles and the EU Insolvency Regulations’, American Bankruptcy Law Journal, 2002, Vol.76, Winter, p.16.

⁴⁵ UNCITRAL Model Law, art 13(2).

employment related claims, and tax claims, before it applies to other creditors starting with the secured ones.⁴⁶

The equality of treatment is reflected in the proposed requirement of having foreign creditors notified whenever notification to local creditors is required.⁴⁷ This is on an individual basis to known foreign creditors unless otherwise ordered by the court. The proposed law, as is the case for the Model Law, prescribes the specific information to be included in the notice. This includes information about the time and place for filing of claims and whether secured creditors need file claims as well as any other information required for local creditors or by order of the court.⁴⁸ Such prescription as to notification is ideally intended to facilitate the participation of foreign creditors in the local proceedings.⁴⁹

Recognition

The Insolvency Bill adopts the procedure for recognition of foreign proceedings provided in the UNCITRAL Model Law.⁵⁰ This procedure entails an application for obtaining local recognition filed locally by a foreign representative with relevant supporting documentation as a proof for existence of such a proceeding and appointment of the representative. The proposed presumption is that such documentation, if submitted in accordance with the law, must be deemed to be authentic. Of particular importance is that the application must identify all proceedings in respect of a debtor that are known to the foreign representative. Consistent with the Model Law, the proposed law seeks to make it mandatory for an application for recognition to be determined expeditiously.⁵¹ This is crucially critical in enabling 'effective protection of the debtor's local assets from dissipation and concealment.'⁵² The recognition and assistance that follow depend upon whether the foreign proceeding is the main proceeding, if it has commenced in the state where the debtor has its 'centre of main interests', or a foreign non-main proceeding, if it is based on the place where the debtor has an establishment.⁵³ It is noteworthy that the proposed law seeks to allow and mandate international co-operation between courts

⁴⁶ Insolvency Bill clause 421,1st Schedule para 1.

⁴⁷ UNCITRAL Model Law, art 14; and Insolvency Bill 2010, Schedule 5 para 16.

⁴⁸ Insolvency Bill 2010 (Kenya), Schedule 5, para 16(4); and UNCITRAL Model Law art 14.

⁴⁹ UNCITRAL Model Law art 14; and Insolvency Bill 2010 (Kenya) 5th Schedule para 16(4); and see also Clift, J., 'The UNCITRAL Model Law on Cross-Border Insolvency- A Legislative Framework to facilitate Coordination and Cooperation in Cross-Border Insolvency', Tulane Journal of International and Comparative Law, 2004, Vol.12, Spring, pp.322-223.

⁵⁰ Insolvency Bill 2010 (Kenya) Schedule 5 para 17; and UNCITRAL Model Law art 19.

⁵¹ Insolvency Bill 2010 5th Schedule para 19(3); UNCITRAL Model Law art 17(3).

⁵² See Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency para 125.

⁵³ Insolvency Bill 2010 5th Schedule, paras 4 & 19(2); UNCITRAL Model Law arts 2(f), 17(2), and 20(1)(a) (b) & (c) and (2); and Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency paras 31, 72, 73 and 126.

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to the maximum extent possible in cases involving proceedings based on the presence of assets.⁵⁴ According to the Bill such proceedings may still be commenced in Kenya after the recognition of foreign main proceedings if the debtor has assets in such jurisdiction.⁵⁵ It should be noted, however, that the effects of an insolvency proceeding commenced on the basis of the presence of assets only are normally restricted to the assets located in Kenya.⁵⁶

The basic principle that characterises the Bill with regard to relief (which is consistent with the Model Law) is that the recognition of foreign proceedings by the Kenyan court grants effects that are considered necessary for the conduct of cross-border insolvency subject to protection of interests of local creditors and other interested parties and conformity to public policy.

Protection of creditors

The Bill explicitly provides for protection of creditors in a manner that is consistent with the provisions of the Model Law.⁵⁷ As such, the court is required to satisfy itself that the interests of creditors, among others, are adequately protected, when granting or denying relief under the proposed law or modifying or terminating it.⁵⁸ It has been contended that such provisions leave it to the discretion of the court whether to grant temporary relief upon an application for recognition or upon a decision to recognise a foreign proceeding.⁵⁹

Indeed, the protection of the creditors focuses, though not exclusively, on the local creditors.⁶⁰ Local creditors concerns that may arise in cross-border insolvency cases, such as on issues related to turnover of assets to foreign representatives or other designated persons, may be addressed to the court which is required to be assured that the creditors' interests as well as those of debtors and other stakeholders are adequately protected. For example, as is the case for the Model Law, the proposed law in Kenya is such that the court is entitled to ensure that interests of creditors in Kenya are protected when deciding whether or not to entrust the distribution of all or part of the debtor's assets located in Kenya to the foreign representative or another

⁵⁴Insolvency Bill 2010 (Kenya), 5th Schedule, paras 27-29; and UNCITRAL Model Law art 25-27; J Clift (n 49) 323-324.

⁵⁵Insolvency Bill 2010 5th Schedule para 30; and UNCITRAL Model Law art 28; and Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency para 73.

⁵⁶ Ibid

⁵⁷Insolvency Bill 2010 (Kenya)5th Schedule para 22; and UNCITRAL Model Law on Cross-Border Insolvency art 22.

⁵⁸ Insolvency Bill 2010 (Kenya) 5th Schedule paras 21, 23 and 24.

⁵⁹ Clift (n 49),p. 326.

⁶⁰ Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency para 35.

person designated by the Court.⁶¹ Generally speaking, the proposed law seeks to empower the court to subject relief granted to conditions that it considers appropriate.⁶²

Communication, co-ordination and co-operation

The Bill seeks to authorise and in fact make co-operation by any appropriate means and direct communication between the Kenyan court and foreign courts or foreign representatives mandatory. Such a requirement also applies at various levels between local insolvency administrators and foreign courts or foreign representatives.⁶³ Of particular importance is the adoption of the express provision that the Kenyan court ‘...is entitled to communicate directly with, or to request information or assistance directly from, foreign Courts or foreign representatives.’⁶⁴ This is seemingly a core element of the Bill with the object of enabling courts and insolvency administrators from Kenya and foreign jurisdictions to be efficient and achieve optimal results. The Bill suggests ways to co-operate which include communication of information; approval of agreements concerning the co-ordination of proceedings; and co-ordination of concurrent proceedings with respect to the same debtor.⁶⁵

Application of other relevant laws

The Bill seeks to permit application of other laws in facilitating co-ordination and co-operation in cross-border insolvencies.⁶⁶ Arguably, this provision will have the effect of enabling the Kenyan court to look beyond the Kenyan Model Law in the pursuit of providing assistance to foreign proceedings in respect of an insolvent company. The approaches to cross-border insolvency at common law may be applied to complement the proposed law as long as such application aims ‘...to provide additional assistance to a foreign representative...’⁶⁷ or a ‘...different... type of assistance’⁶⁸ and not otherwise.

Although the adoption of the Model Law is intended not to displace the laws that were already in place, it seems that the refusal of assistance or provision of any

⁶¹ Insolvency Bill 2010 (Kenya) 5th Schedule para 23(2); UNCITRAL Model Law art 21(2) and Guide to enactment of the UNCITRAL Model Law para 157.

⁶² Insolvency Bill 2010 (Kenya) 5th Schedule para 24(2); UNCITRAL Model Law 21(2), 22(1), and 22(2); and Guide to enactment of the UNCITRAL Model Law para 157.

⁶³ Insolvency Bill 2010 5th Schedule Para 28; UNCITRAL Model Law arts 25-27; Guide to Enactment paras 173-177.

⁶⁴ Insolvency Bill 2010 (Kenya) 5th Schedule Para 28(1).

⁶⁵ Insolvency Bill 2010(Kenya) 5th Schedule para 29; and UNCITRAL Model Law art 27.

⁶⁶ Insolvency Bill 2010 (Kenya) 5th Schedule para 9; and UNCITRAL Model Law art 7.

⁶⁷ Ibid; and Guide to Enactment of UNCITRAL Model Law para 90.

⁶⁸ Guide to Enactment of UNCITRA Model Law para 90.

limited form of assistance might not be justified under this provision but perhaps other grounds that may be permitted by different provisions under the proposed law. As discussed below, it is this very provision that the application of relevant personal bankruptcy laws on cross-border insolvency co-operation could be based on.

Future of cross-border insolvency regulation

It is notable that although the Insolvency Bill 2010 seeks to repeal and replace Kenya's Bankruptcy Act and insolvency provisions under the current Kenyan Companies Act (which is also in the process for repeal), it provides that any regulation or other instrument made or issued and given effect under such laws will continue to have effect as if such regulation or other instrument were made or issued under the proposed insolvency law.⁶⁹ This means that the old Bankruptcy reciprocity rules, made under the Bankruptcy Act (proposed for repeal by the Insolvency Bill 2010), which regulates the reciprocal cross-border co-operation in matters of insolvency would under transition provisions continue to be operational notwithstanding the repeal of the principal legislation.⁷⁰ Indeed, this seems to be the position unless the rules are repealed.

The phrase 'other instrument' used in the draft Bill is seemingly intended to accommodate things like declarations and forms.⁷¹ It is doubtful if such 'rules and other instrument' can be applied as such without inconsistencies and tensions given that the basis, namely the Bankruptcy Act, upon which they were founded would no longer be in existence.⁷² It would have, perhaps, been appropriate for the Bill to provide that such regulations and instrument would apply in so far as is practical and in so far as they are not inconsistent with the Insolvency Bill 2010. There is room for arguing that the adoption of the Model Law would have the effect of rendering the reciprocal arrangement reflected under the Bankruptcy reciprocity rules as an exception to the adopted Model Law.⁷³ This would mean that the adopted version of the Model Law may apply to the countries that are parties to the arrangement (which include Tanzania and Uganda) only to the extent that does not affect the additional assistance available under the reciprocal co-operation arrangement if such other countries still recognise such arrangement.

⁶⁹ Insolvency Bill 2010 (Kenya) clause 466(1).

⁷⁰ n 12. The author is not aware if the rules have effectively been repealed.

⁷¹ The Bankruptcy legislation in Tanzania, Kenya and Uganda was and perhaps is still arguably rich in statutory documents designed for use in facilitating reciprocal co-operation among contracting member states consisting of Tanzania, Kenya and Uganda.

⁷² Notably, the Insolvency Bill 2010(Kenya) does not seek to re-enact the provisions of Bankruptcy Act (Kenya) ss. 115,151-164) on the basis of which the Bankruptcy reciprocity rules were made. However the Insolvency Bill 2010 (Kenya) clause 420(2) seeks to re-enact the provisions that apply relevant rules of personal bankruptcy to corporate insolvency.

⁷³ The Insolvency Bill 2010, Clause 421, 1st Schedule, Para 1.

Conclusion

The Bill is a testimony of the growing awareness of the importance of effective insolvency regimes incorporating cross-border insolvency aspects in SSA countries. Hitherto insolvency related laws recorded not only low awareness among the various stakeholders and general public but also remained largely in disuse. This emerging trend seems to have been significantly influenced by the desire and thrust of competing in attracting trade and capital inflows into SSA countries as host countries of foreign direct investments in the international economic co-operation.

The analysis of the Bill and the manner into which it will seemingly apply if it were to be enacted into law reveals the influence the international insolvency benchmarks has had on the cross-border insolvency reform process. The Kenyan position is indeed an indicative of what is happening or likely to happen in other jurisdictions in sub-Saharan Africa. However, it remains to be seen whether the current reform initiative will bear any fruit. And indeed, whether the Bill will eventually be enacted into law as it is or in a different version and if so whether the implementation of the resulting law will eliminate the uncertainties and unpredictability that are in place as to the manner in which relevant authorities, courts in particular, in Kenya may approach and deal with various issues that relate to cross-border insolvency in appropriate cases. The Bill also suggests that the common law approach to cross-border insolvency could still be relevant and indeed applicable to supplement the international character of the law by filling up what might be seen to be lacking in the enacted law.