New Zealand

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1. Background

The New Zealand government agreed to adopt the UNCITRAL Model Law[1] in August 2001.[2] The pertinent legislation, the Insolvency (Cross-border) Act 2006, was enacted on November 7 2006.[3] There was no controversy in this respect and no substantive debate about the matter in Parliament.[4]

The government had determined that it would not bring the Insolvency (Cross-border) Act into force until the Model Law was enacted by Australia, given its status as New Zealand's largest and closest trading partner.[5] Due to some delay in Australia's legislative process in that respect, the act was not brought into force until July 24 2008.[6] Save in this respect, New Zealand imposed no requirement of reciprocity in its enactment of the Model Law.[7]

The government had given only limited consideration to the enhancement of cross-border insolvency laws prior to the availability of the Model Law. In 1988, in the context of a general assessment of insolvency law reform requirements, the Department of Justice had limited its observations on cross-border matters to acknowledgment of an Australian recommendation that "multilateral investment treaties for the purpose of adopting common basic elements of insolvency law and the recognition of insolvency" be promoted, and reference to the possibility that "Australia and New Zealand could come closer together on a common insolvency law that would enable greater cross-recognition of each other's insolvency administrators".[8]

Nevertheless, law reform authorities were quick to act following the United Nations' adoption of the Model Law in December 1997. In February 1999 the New

1 The Model Law on Cross-Border Insolvency, promulgated by the United National Commission on International Trade Law in May 1997 and adopted by the General Assembly of the United Nations on 15 December 1997.

2 Referenced in cabinet paper dated December 1 2003 authored by the minister of commerce and submitted to the Cabinet Economic Development Committee.

3 Public Act 2006 No 57.

4 The Insolvency (Cross-border) Bill formed part of a package of insolvency law reforms which included amendments to New Zealand's personal bankruptcy regime and the enactment of a voluntary administration regime based on the Australian model. Such debate as there was focused mainly on aspects of the voluntary administration regime: see *Hansard*, Vol 634; p 6171 (October 26 2006).

5 Speech of the Hon Lianne Dalziel, minister of commerce, October 26 2006 (*Hansard,* Vol 634, p 6171).

6 Insolvency (Cross-border) Act Commencement Order 2008 (2008/171).

7 Originally it was contemplated that reciprocity would be required, but the requirement was subsequently dropped: see paper dated December 12003 submitted by the minister of commerce to the Cabinet Economic Development Committee.

8 Department of Justice: "Insolvency Law Reform – A Discussion Paper", December 1988.

Zealand Law Commission published a report on the question of whether New Zealand should adopt the Model Law.[9] The Law Commission report recommended that New Zealand adopt the Model Law and proposed draft legislation in that respect.

In recommending adoption, the report placed particular weight on the following factors:[10]

- increasing globalisation;
- New Zealand's heavy reliance on both foreign investment and income from exports;
- the perceived disadvantages of a purely 'territorial' approach to cross-border insolvency issues, such as piecemeal realisation of assets, unequal treatment of creditors and impracticality of reorganisation;
- New Zealand's recognition of the common law tradition of comity in cross-border insolvency matters;
- the limitations of existing statutory mechanics in New Zealand law;
- the likelihood that significant trading partners would adopt the Model Law;[11] and
- the perceived advantages of the Model Law in promoting fairness, efficiency and predictability of outcome in cross-border insolvency matters.

Prior to the adoption of the Model Law, New Zealand's cross-border insolvency legislation had been limited to:

- a provision relating to personal bankruptcy enabling the High Court of New Zealand to act in aid of and be auxiliary to any court having jurisdiction in bankruptcy, and to exercise such powers in that respect as it might exercise within its own jurisdiction;[12] and
- a provision relating to corporate insolvency enabling the High Court to exercise powers of liquidation over assets of overseas companies located in New Zealand.[13]

The latter provision was the subject of case law that recognised, in summary, the following principles of comity derived from English common law:[14]

- A New Zealand liquidation of the assets of an overseas company should, in the event of a primary liquidation proceeding elsewhere, be ancillary to the

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9 Law Commission Report No 52: "Cross-Border Insolvency – Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency?", February 1999. The report was substantially authored by Paul Heath QC (now Mr Justice Heath).

10 Law Commission report, Chapter 3.

11 The expectation was that Asian trading partners would be likely to adopt the Model Law in order to satisfy International Monetary Fund funding requirements (Law Commission report, para 98). At present, none of the relevant nations has adopted the Model Law.

12 Insolvency Act 1967, Section 135 (repealed). The provision had two limbs, the first of which appeared to require the High Court to act in aid of any court in a Commonwealth country having jurisdiction (but which was nevertheless interpreted to be directory rather than mandatory), and the second of which gave the High Court discretion to do so in relation to a court of any other country having jurisdiction.

13 Companies Act 1993, Section 342.

14 See in particular *Gavigan v Australasian Memory Pty Ltd (in liq)* (1997) 8 NZCLC 261,449 and *Turners & Growers Exporters Ltd v The ship "Cornelis Verolme"* [1997] 2 NZLR 110.

foreign proceeding.

- In principle, the liquidators in the primary overseas proceeding should be recognised as having the right to administer the assets of the debtor in New Zealand and the New Zealand courts should actively assist the foreign liquidators in carrying out their duties in that respect.
- New Zealand assets should be made available for distribution to creditors universally on a *pari passu* basis, subject to the retention for New Zealand creditors of any preferential status recognised by New Zealand law.
- Although an overseas liquidator could apply to be a liquidator in a New Zealand liquidation, it was generally preferable to appoint a New Zealand liquidator to act in an ancillary capacity (unless the New Zealand court could be satisfied that an overseas liquidator could give undertakings to protect all creditors entitled to protection under New Zealand law).

Similar common law principles had been applied to personal bankruptcy.[15]

Thus, New Zealand's pre-existing cross-border insolvency law represented a form of modified universalism under which foreign primary proceedings were to be recognised, subject to local preferential rights.

2. Schedule 1 to the Insolvency (Cross-border) Act 2006

The Model Law as enacted in New Zealand is set out in Schedule 1 to the Insolvency (Cross-border) Act 2006. Section 7 of that act provides that the Model Law Schedule "applies in the circumstances set out in article 1 of that schedule" – namely, where any of the paragraphs of Article 1(1) of the Model Law applies.

The Model Law has been enacted in New Zealand with so few variations that it is unnecessary to provide commentary on each article. Instead, it is sufficient to identify the distinct features of New Zealand's implementation of the Model Law with reference to relevant articles.

Article 1

New Zealand has specified only one exception to the application of the Model Law. Article 1(2) of the Model Law Schedule states that it is not to apply to any registered bank within the meaning of Section 2(1) of the Reserve Bank of New Zealand Act 1989 that is subject to statutory management under that act.

The Reserve Bank of New Zealand Act provides for a system of prudential supervision of registered banks by the Reserve Bank, with the twin objectives of promoting the maintenance of a sound and efficient financial system and avoiding significant damage to the system that could result from the failure of a registered bank. In aid of the latter objective, the act incorporates a 'statutory management' regime that can be invoked by the Reserve Bank and the minister of finance on grounds that include the insolvency or likely insolvency of a registered bank.[16] The appointment of a statutory manager triggers a moratorium that prevents a range of

15 See, for example, *Re Grose* (HC Christchurch, September 1 1992, B404/92).
16 Reserve Bank of New Zealand Act 1989, Section 113.

enforcement steps from being taken against the relevant bank.[17]

A statutory manager appointed pursuant to the regime can exercise all the powers of shareholders and directors of the bank in question, as well as the powers that a liquidator would have if the bank were in liquidation. In addition, the statutory manager is given a range of ancillary powers (including powers to undertake investigations, suspend payments, transfer undertakings and sell assets subject to security).[18] All such powers must be exercised in accordance with any directions given by the Reserve Bank, save where the High Court directs otherwise.[19]

The Law Commission report recommended that registered banks under statutory management be excluded from the application of the Model Law in New Zealand, reasoning that "if there is a bank insolvency in New Zealand which is likely to cause systemic financial failure it is necessary for New Zealand regulators to retain control of assets in New Zealand so that systemic difficulties can be minimised."[20]

The Reserve Bank's supervisory jurisdiction has recently been extended to non-bank deposit-taking institutions.[21] It is likely that the statutory management regime under the act will also in due course be extended to such institutions, and that they will be excluded from the application of the Model Law Schedule accordingly.

At present, New Zealand has not exempted insurance companies from the application of the Model Law. The only specific insolvency regime for insurance companies that exists under New Zealand law (judicial management for life insurance companies) is expressly brought within the application of the Model Law.[22] The Law Commission's view was that life insurance companies did not of themselves pose a sufficient threat to the financial system to warrant exclusion.[23]

There are currently legislative proposals to extend the Reserve Bank of New Zealand's powers of prudential supervision to insurance companies. The proposals include the introduction of a statutory management regime for insurance companies under the supervision of the Reserve Bank.[24] It is not yet determined whether the extension of these powers will result in the exclusion of insurance companies under statutory management from the application of the Model Law Schedule.

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17 Reserve Bank of New Zealand Act 1989, Section 122. Where a registered bank or an associated person of a registered bank that is declared to be subject to statutory management or a subsidiary of a registered bank that becomes subject to statutory management is incorporated outside New Zealand or is an unincorporated body having its head office or principal place of business outside New Zealand, the statutory management regime applies to the property, rights, assets and liabilities relating to its New Zealand business: see Section 117(3) of the act.

18 Reserve Bank of New Zealand Act 1989, Sections 123-139.

19 Reserve Bank of New Zealand Act 1989, Sections 120 and 142.

20 Law Commission report, paras 213-218.

21 Reserve Bank Amendment Bill (No 3) 2008.

22 The Law Commission noted that "it may be doubted whether … a separate insolvency regime for life insurance companies can be justified": Law Commission report, para 139.

23 Law Commission report, paras 138-141.

24 Cabinet paper dated August 22 2008 authored by the minister of finance entitled "Review of Financial Products and Providers: Prudential Regulation of Insurance". Insurance companies can be placed under statutory management at present, but on the recommendation of the Securities Commission rather than the Reserve Bank.