



REPUBLIC OF VANUATU

INSOLVENCY (CROSS - BORDER) ACT NO. 4 OF 2013

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REPUBLIC OF VANUATU

Assent: 14/10/2013

Commencement: 31/08/2015

INSOLVENCY (CROSS - BORDER) ACT NO. 4 OF 2013

An Act to implement the Model Law on Cross-Border Insolvency in Vanuatu and for related purposes.

Be it enacted by the President and Parliament as follows:

1 Purpose

The purpose of this Act is to:

- (a) implement the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 1997, and approved by the General Assembly of the United Nations on 15 December 1997; and
- (b) provide a framework for facilitating insolvency proceedings when:
 - (i) a person is subject to insolvency administration (whether personal or corporate) in 1 country, but has assets or debts in another country; or
 - (ii) more than 1 insolvency administration has commenced in more than 1 country in relation to a person.

2 Interpretation

- (1) In this Act:

insolvency proceeding means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency (whether personal or corporate) in which the assets and affairs of a debtor are subject to control or supervision by a judicial or other competent authority to control or supervise that proceeding, for the purpose of reorganisation or liquidation;

Minister means the Minister responsible for Finance and Economic Management;

- (2) In interpreting this Act, reference may be made to:

- (a) the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 1997, and approved by the General Assembly of the United Nations on 15 December 1997; and
 - (b) any document that relates to the Model Law on Cross-Border Insolvency that originates from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law on Cross-Border Insolvency.
- (3) To avoid doubt, subsection (1) does not limit article 8 of the Schedule.
- (4) This Act applies in conjunction with the Companies (Insolvency and Receivership) Act No. 2 of 2013.
- (5) In the event of any conflict, overlap, or inconsistency, between this Act and any other Act, each Act is to be read and applied so as to extend and apply in addition to, rather than to the exclusion of, the other Act.

3 Application of Model Law on Cross-Border Insolvency in Vanuatu

The Schedule applies to circumstances set out in clause 1 of the Schedule.

4 Supreme Court to act in aid of overseas Courts

- (1) This section applies to a person referred to in subclause 1(1) of the Schedule.
- (2) If a Court of a country other than Vanuatu has jurisdiction in an insolvency proceeding and makes an order requesting the assistance of the Supreme Court in relation to the insolvency proceeding of a person to whom this section applies, the Supreme Court may, if it thinks fit, act in aid of and be auxiliary to that Court in relation to that insolvency proceeding.
- (3) In acting in aid of and being auxiliary to a Court in accordance with subsection (2), the Supreme Court may exercise the powers that it could exercise in respect of the matter if it had arisen within its own jurisdiction.

5 Manner of making rules or regulations

The Minister may by Order make Regulations:

- (a) for the procedures of the Supreme Court under this Act; and

- (b) for the manner in which an application under Schedule 1 is to be made to the Supreme Court.

6 Regulations may prescribe specified insolvency proceedings

- (1) In this section;

designated country means a country that is specified by the Minister as a designated country for the purpose of this Act;

foreign country means a designated country other than Vanuatu.

- (2) The Minister may by Order designate a class of insolvency proceeding as a specified insolvency proceeding, in a designated country.
- (3) The Minister must not make an Order under subsection (2) unless the Minister is satisfied that:
 - (a) Vanuatu and the foreign country are both parties to an agreement for the mutual recognition of insolvency proceedings; and
 - (b) the level of recognition given to the interests of Vanuatu debtors and creditors in an insolvency proceeding in the foreign country and the terms of the agreement referred to in paragraph (a) provide appropriate protection for the interests of Vanuatu debtors and creditors.
- (4) An Order made under subsection (2) may specifically modify or vary Schedule 1 in its application to a specified insolvency proceeding.
- (5) To avoid doubt, if there is any inconsistency between subsection (3) and subsection (4), subsection (4) prevails.

7 Power to make Regulations

- (1) The Minister may, by Order in writing, make regulations:
 - (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

8 Transitional provisions for this Act

- (1) If an insolvency proceeding has started before the commencement of this Act, the law governing that insolvency proceeding is the law that would have applied if this Act had not been passed.

- (2) For the purposes of subsection (1), an insolvency proceeding is taken to have started on the date upon which the Judicial Manager, Official Assignee, Statutory Manager, Receiver, Liquidator, or Administrator was appointed.

9 Commencement

This Act commences on the day on which it is published in the *Gazette*.

SCHEDULE

RULES APPLYING TO CROSS-BORDER INSOLVENCY PROCEEDINGS

S6

The provisions of this Schedule correspond, for the most part, to the provisions of the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 1997, and approved by the General Assembly of the United Nations on 15 December 1997 (General Assembly Resolution 52/158). Certain changes have been made to amend or supplement the provisions of the Model Law in its application to Vanuatu.

OBJECTIVES OF THE SCHEDULE

The purpose of this Schedule is to provide effective mechanisms for dealing with cases of cross-border insolvency and to promote the objectives of:

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

CHAPTER I - GENERAL PROVISIONS

1 Scope of application

- (1) Except as provided in subclause (2), this Schedule applies if:
 - (a) assistance is sought in Vanuatu by a foreign Court or a foreign representative in connection with a foreign insolvency proceeding; or
 - (b) assistance is sought in a foreign State in connection with a Vanuatu insolvency proceeding; or

- (c) a foreign proceeding and a Vanuatu insolvency proceeding 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 participation in, a Vanuatu insolvency proceeding.
- (2) This Schedule does not apply to a bank carrying on business in Vanuatu that is subject to statutory management under sections 46 or 47 of the Financial Institutions Act [CAP 254].

2 Definitions

For the purposes of this Schedule:

Court means the Supreme Court of the Republic of Vanuatu;

foreign proceeding means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign Court, for the purpose of reorganisation or liquidation;

foreign main proceeding means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of this clause;

foreign representative means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

foreign Court means a judicial or other authority competent to control or supervise a foreign proceeding;

establishment means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;

insolvency administrator means:

- (i) a person, other than an employee or officer of the company concerned, authorised by the laws of Vanuatu to administer the affairs of a company that is or appears to be insolvent, and includes a receiver; and
- (ii) the Assignee, or any other person authorised to administer the affairs of an individual who is or appears to be insolvent;

Vanuatu insolvency proceeding means a collective judicial or administrative proceeding pursuant to the law in Vanuatu relating to:

- (a) the bankruptcy, liquidation, receivership, judicial management, or statutory management of a debtor; or
- (b) the reorganisation of the debtor's affairs, under which the assets and affairs of the debtor are administered, or the assets of the debtor are or will be realised, for the benefit of secured or unsecured creditors.

3 International obligations of Vanuatu

No action may be taken under this Schedule that is in conflict with an obligation of Vanuatu arising out of any treaty or other form of agreement to which Vanuatu is a party with 1 or more other States.

4 Supreme Court to have jurisdiction

The functions referred to in this Schedule relating to recognition of foreign proceedings and co-operation with a foreign Court is to be performed by the Supreme Court of Vanuatu.

5 Authorisation of insolvency administrator to act in a foreign State

An insolvency administrator is authorised to act in a foreign State on behalf of a Vanuatu insolvency proceeding, as permitted by the applicable foreign law.

6 Public policy exception

- (1) This Schedule does not prevent the Court from refusing to take an action governed by this Schedule if the action would be clearly contrary to the public policy of Vanuatu.
- (2) Before the Court refuses to take an action under paragraph (1), the Court is to consider whether it is necessary for the Attorney General to appear and be heard on the question of the public policy of Vanuatu.

7 Additional assistance under other laws

This Schedule does not limit the power of the Court or an insolvency administrator to provide additional assistance to a foreign representative under any other laws of Vanuatu.

8 Interpretation

In interpreting this Schedule, 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 II - ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN VANUATU

9 Right of direct access

A foreign representative is entitled to apply directly to the Court.

10 Limited jurisdiction

To avoid doubt, an application made under this Schedule to the Court by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the Court for any purpose other than the application.

11 Application by a foreign representative to commence a Vanuatu insolvency proceeding

A foreign representative may apply to commence a Vanuatu insolvency proceeding if the conditions for commencing such a proceeding are complied with.

12 Participation of a foreign representative in a Vanuatu insolvency proceeding

Upon recognition by the Court of a foreign proceeding, the foreign representative is entitled to participate in a Vanuatu insolvency proceeding regarding the debtor.

13 Access of foreign creditors to a Vanuatu insolvency proceeding

(1) Subject to subclause (2), a foreign creditor has the same rights regarding the commencement of, and participation in, a Vanuatu insolvency proceeding as a creditor in Vanuatu.

- (2) Subclause (1) does not affect the ranking of claims in a Vanuatu insolvency proceeding or the exclusion of foreign tax and social security claims from such a proceeding.

14 Notification to foreign creditors of a Vanuatu insolvency proceeding

- (1) In a Vanuatu insolvency proceeding, notification is to be given to creditors in Vanuatu, and notification shall also be given to the known creditors that do not have addresses in Vanuatu.
- (2) The Court may order for appropriate steps in notifying any creditor whose address is not yet known.
- (3) Each individual creditor is to be notified, unless the Court considers that, under the circumstances, some other form of notification would be more appropriate.
- (4) No letters seeking information or evidence, especially from a foreign country or other such form, as only similar formality are required.
- (5) When a notification of commencement of a proceeding is to be given to a foreign creditor, the notification is to:
 - (a) indicate a reasonable time period for filing claims and specify the place for their filing; and
 - (b) indicate whether secured creditors need to file their secured claims; and
 - (c) contain any other information required to be included by the Court.

CHAPTER III - RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

15 Application for recognition of a foreign proceeding

- (1) A foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed.
- (2) An application for recognition is to be accompanied by:
 - (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

- (b) a certificate from the foreign Court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - (c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.
- (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.
 - (4) The Court may require a translation of documents supplied in support of the application for recognition into each official language of Vanuatu.

16 Presumptions concerning recognition

- (1) If the decision or certificate referred to in subclause 15(2) indicates that the foreign proceeding is a proceeding as defined under clause 2 and that the foreign representative is a person or body as defined under clause 2, then the Court is entitled to so presume.
- (2) The Court is entitled to 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, a 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.

17 Decision to recognise a foreign proceeding

- (1) Subject to clause 16, a foreign proceeding may be recognised if:
 - (a) the foreign proceeding is a proceeding as defined under clause 2;
 - (b) the foreign representative applying for recognition is a person or body as defined under clause 2;
 - (c) the application meets the requirements of subclause 15(2); and
 - (d) the application has been submitted to the Court.
- (2) The foreign proceeding is to be recognised:

- (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) as a foreign non-main proceeding if the debtor has an establishment as defined under clause 2, in the foreign State.
- (3) An application for recognition of a foreign proceeding must be decided upon at the earliest possible time.
- (4) As soon as practicable, after the Court recognises the foreign proceeding under subclause (1), the foreign representative is to notify the debtor, in the prescribed form, that the application has been recognised.
- (5) The provisions of clauses 15, 16, 17, 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.

18 Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative is to inform the Court promptly of:

- (a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and
- (b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

19 Relief that may be granted upon application for recognition of a foreign proceeding

- (1) Upon filing an application for recognition and until the application is decided, the Court may, at the request of the foreign representative, if 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; and
 - (b) entrusting the administration or realisation of all or part of the debtor's assets located in Vanuatu 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; and

- (c) any relief mentioned in paragraph 21(1)(c) and (d).
- (2) As soon as practicable, after the Court grants relief under subclause (1), the foreign representative is to notify the debtor, in the prescribed form, of the relief that has been granted.
- (3) Unless extended under paragraph 21(1)(f), the relief granted under this clause expires when the application for recognition is decided upon.
- (4) The Court may refuse to grant relief under this clause if such relief would interfere with the administration of a foreign main proceeding.

20 Effects of recognition of a foreign main proceeding

- (1) Upon recognition by the Court of a foreign proceeding that is a foreign main proceeding,
 - (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities is stayed; and
 - (b) execution against the debtor's assets is stayed; and
 - (c) the right to transfer, encumber, or otherwise dispose of any assets of the debtor is suspended.
- (2) Subclause (1) does not prevent the Court, on the application of any creditor or interested person, from making an order, subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets.
- (3) Paragraph (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) Subclause (1) does not affect the right to request the commencement of a Vanuatu insolvency proceeding or the right to file claims in such a proceeding.

21 Relief that may be granted upon recognition of a foreign proceeding

- (1) Upon recognition by the Court of a foreign proceeding, whether main or non-main, 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 actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities, to the extent they have not been stayed under paragraph 20(1)(a); and
 - (b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 20(1)(b); and
 - (c) suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 20(1)(c); and
 - (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; and
 - (e) entrusting the administration or realisation of all or part of the debtor's assets located in Vanuatu to the foreign representative or another person designated by the Supreme Court; and
 - (f) extending relief granted under subclause 19(1).
- (2) Upon recognition by the Court of a foreign proceeding, 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 Vanuatu to the foreign representative or another person designated by the Court, provided that the Court is satisfied that the interests of creditors in Vanuatu are adequately protected.
 - (3) In granting relief under this clause to a representative of a foreign non-main proceeding, the Court must be satisfied that the relief relates to assets that, under the law of Vanuatu, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

22 Protection of creditors and other interested persons

- (1) In granting or denying relief under clause 19 or 21, or in modifying or terminating relief under subclause (3), the Court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

- (2) The Court may subject relief granted under clause 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 clause 19 or 21, or at its own motion, modify or terminate such relief.
- (4) The Court must, on application of the statutory manager, terminate the relief granted under clause 19 or 21 if:
 - (a) an application for recognition has been made in respect of a debtor that is a bank carrying on business in Vanuatu; and
 - (b) the Court has granted that application or has granted relief under clause 19; and
 - (c) the debtor is placed in statutory management or any similar procedure after that application or relief has been granted.

23 Actions to avoid acts detrimental to creditors

- (1) Upon recognition by the Supreme Court of a foreign proceeding, the foreign representative has standing to initiate any action that an insolvency administrator may take in respect of a Vanuatu insolvency proceeding relating to:
 - (a) any transaction (including any gifts or improvement of property or otherwise); or
 - (b) security or charge that is voidable or may be set aside or altered.
- (2) If a foreign proceeding is a foreign non-main proceeding, the Court must be satisfied that the action relates to assets that under the law of Vanuatu, should be administered in the foreign non-main proceeding.
- (3) To avoid any doubt, subclause (1) does not affect the doctrine of relation back as it is applied in Vanuatu.

24 Intervention by a foreign representative in Vanuatu insolvency proceeding

Upon recognition by the Supreme Court of a foreign proceeding, the foreign representative may intervene in any proceeding in which the debtor is a party to, provided the requirements of the law of Vanuatu are met.

CHAPTER IV - CO-OPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

25 Co-operation and direct communication between the Supreme Court and foreign Courts or foreign representatives

- (1) In matters referred to in subclause 1(1), the Court is to co-operate to the maximum extent possible with foreign Courts or foreign representatives, either directly or through an insolvency administrator.
- (2) The Court may communicate directly with, or to request information or assistance directly from, foreign Courts or foreign representatives.

26 Co-operation and direct communication between the insolvency administrator and foreign Courts or foreign representatives

- (1) In matters referred to in subclause 1(1), an insolvency administrator must, in the exercise of its functions and subject to the supervision of the Supreme Court, co-operate to the maximum extent possible with foreign Courts or foreign representatives.
- (2) The insolvency administrator may, in the exercise of its functions and subject to the supervision of the Court, communicate directly with a foreign Court or foreign representatives.

27 Forms of co-operation

Co-operation referred to in clauses 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; or
- (b) communication of information by any means considered appropriate by the Court; or
- (c) co-ordination of the administration and supervision of the debtor's assets and affairs; or
- (d) approval or implementation by Courts of agreements concerning the co-ordination of proceedings; or
- (e) co-ordination of concurrent proceedings regarding the same debtor.

CHAPTER V - CONCURRENT PROCEEDINGS

28 Commencement of a Vanuatu insolvency proceeding after recognition of a foreign main proceeding

Upon recognition by the Court of a foreign main proceeding, an insolvency proceeding may commence if the debtor has assets in Vanuatu with the effect that the proceeding are to be restricted to the assets of the debtor located in Vanuatu and, to implement co-operation and co-ordination under clauses 25, 26 and 27, to other assets of the debtor that should be administered in the proceeding.

29 Co-ordination of a Vanuatu insolvency proceeding and a foreign proceeding

If a foreign proceeding and Vanuatu insolvency proceeding are taking place concurrently regarding the same debtor, the Court is to seek co-operation and co-ordination under clauses 25, 26, and 27, and the following is to apply:

- (a) when the Vanuatu insolvency proceeding is taking place at the time the application for recognition of the foreign proceeding is filed:
 - (i) any relief granted under clause 19 or 21 must be consistent with the Vanuatu insolvency proceeding;
 - (ii) if the foreign proceeding is recognised in Vanuatu as a foreign main proceeding, clause 20 does not apply;
- (b) when the Vanuatu insolvency proceeding commences after recognition, or after the filing of the application for recognition of the foreign proceeding,
 - (i) any relief in effect under clause 19 or 21 is to be reviewed by the Court and may be modified or terminated if inconsistent with the Vanuatu insolvency proceeding; and
 - (ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in subclause 20(1) is to be modified or terminated pursuant to subclause 20(2) if inconsistent with the Vanuatu insolvency proceeding;
- (c) in granting, extending, or modifying relief granted to a representative of a foreign non-main proceeding, the Court must be satisfied that the relief relates to assets that, under the laws of Vanuatu, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

30 Co-ordination of more than one foreign proceeding

In matters referred to in subclause 1(1), in respect of more than one foreign proceeding regarding the same debtor, the Court is to seek co-operation and co-ordination under clauses 25, 26, and 27, and the following is to apply:

- (a) any relief granted under clause 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding; and
- (b) if a foreign main proceeding is recognised after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under clause 19 or 21 is to be reviewed by the Court and may be modified or terminated if inconsistent with the foreign main proceeding; and
- (c) if, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognised, the Court may grant, modify, or terminate relief for the purpose of facilitating co-ordination of the proceedings.

31 Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a Vanuatu insolvency proceeding, proof that the debtor is insolvent.

32 Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights against any person, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a Vanuatu insolvency proceeding 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.