Fellow of INSOL International

International Association of Restructuring, Insolvency & Bankruptcy Professionals

Cross-Border Insolvency Proceeding.

The Devil is in the Details: Legal Requirements for Incorporating Documents in Latin America

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In the matter of cross-border insolvency proceedings involving Latin America jurisdictions, in which the assets and affairs of the debtor are subject to control and supervision by a foreign court for the purpose of reorganization or liquidation, foreign representatives and their counsel face the challenge of two or more different converging legal systems, which in turn involve two or more different legal cultures as well.

Providing quality service to our international clients in the area of insolvency and asset recovery in the region of Latin America has involved channeling letters rogatory between judicial authorities, authorizing and registering Powers of Attorney, and enforcing judgments such as requests for collaboration or recognition of foreign proceedings. In certain cases, certain evidentiary means such as expert reports on foreign law, witness testimony, and accounting certifications have also been gathered in compliance with strict legal requirements that vary among jurisdictions.

Despite the fact that many local and international efforts have been made in order to improve the efficiency of proceedings involving two or more jurisdictions, achieve standardization and efforts to create consistent case law and legislation, there are still situations, that may seem minor to practitioners, that create legal barriers and obstacles to Administrators/Receivers and Liquidators in the performance of their duties.

In Latin America, one difficulty arises from the need to comply with certain formalities in order to give effect to and incorporate legal documents from certain jurisdictions. It is a general rule applicable to civil law jurisdictions that documents originating abroad, especially in cases where these are produced in different languages, have to be "legally" incorporated if they need to be registered locally or used by local counsel. In the case of Guatemala for example, for documents originating abroad that are intended to have effects in the country, the Foreign Affairs Ministry must legalize them. If the documents are in a foreign language, these must be translated into Spanish by a qualified translator in the country; in cases where a translator is not available for a certain language, these will be translated under a sworn declaration by two persons that speak and write both the foreign language and Spanish, and whose signature will be legalized by a notary. In addition to these requirements, powers of attorney and documents intended to be publicly registered must be inserted to a notarial protocol, and the corresponding authorities will act upon copy of such deeds.

Additionally, Guatemala law states that when Guatemalan tribunals are to apply foreign law, the party invoking such law, or the party objecting to their application, must justify its text, date of enforcement and nature, by means of a certification from two qualified attorneys in the country of the foreign law and legislation in question, certification that must be legalized in order to be filed. Without prejudice to this, a national tribunal may question these facts, on its own initiative or by means of a request, by diplomatic means or others recognized by international law.

Guatemalan civil procedural law also states that documents issued abroad may produce effects in Guatemala, only if: 1) all local requirements are met, or the documents have been issued before diplomatic or consular authorities; and 2) the acts or contracts are not contrary to Guatemalan law. In fact, one of the specific criteria for enforcing a foreign judgment in Guatemala is that it meets all necessary requirements for it to be considered authentic.

As will thus be clear, from the Latin America perspective, notaries or public notaries as they are also known, may assume an important role, critical to the incorporation of documents pertaining to a cross-border proceeding, such as commonly required powers of attorney, accounting certifications, and foreign judgments. This shows a contrast between civil-law tradition and common-law tradition.

By comparing their roles, we see that notaries in common law jurisdictions main role is to authenticate signatures, affidavits and the preparation of wills. Civil law notaries, many also qualified as attorneys, are however empowered

to witness acts and circumstances in their presence, and authorize contracts, locally and abroad, which are required to create effects locally. Common actions include acting as witnesses, authorizing deeds, and authenticating signatures and copies of original documents.

Complementary to the involvement of notaries in legalizing documents the Convention Abolishing the Requirement of Legalization for Foreign Documents was concluded on 5 October 1961. The Convention applies to public documents executed in one territory that have to be produced in another. States party to the Convention are required only to comply with the formality of a certificate (commonly referred to as the "apostille") placed on the document in the form of a model there provided, and issued at the request of the person who has signed the document or of any bearer. The Convention seeks to accelerate the incorporation of foreign public documents by establishing an international certification comparable to a notarization or legalization in domestic law. According to the Hague Conference on Private International Law as of September 2015, there are 108 contracting states who are parties to this Convention[1]. In the case of Guatemala, a non-signatory party, the incorporation of a foreign document may take up to 10-15 business days, depending on the origin of the document, which increases the expense involved and creates delays.

In addition to the role of notaries and the process of legalization of documents through the various routes that may be applicable, one last hurdle is to be met prior to authenticating documents locally, namely legal translation to local language. This process also involves time and costs to consider, as well as confidentiality assurances on the procedure and sharing of documents to a third-party.

Experience has shown our team that our international clients require a clear step-by-step guide when coming to Latin American jurisdictions as regards the completion and preparation of necessary documents to achieve their goals. Once documents comply with said "international" requirements, a local handling and follow up with institutions on the final steps for authentication are needed. Most public offices have specialized departments handling international matters, we have had experience dealing with the Ministry of Foreign Affairs, the Registry of Powers, the General Mercantile Registry, the Supreme Court of Justice and the Public Ministry.

Foreign representatives and their counsel are required to be aware of these details. Even if they appear to be only administrative details they can cause significant time considerations and expenses to foreign proceedings. These are just a few examples that show how apparently minor legal barriers can have a legal, economic and operational effect on the enforcement of legal proceedings in Latin America. The conclusion is that foreign representatives and their counsel need to be aware of these compliance issues, and on a macro level, more efforts need to be made both in the local and international arena in order to simply the processes involved and reduce costs.

[1] http://www.hcch.net/index_en.php

RICHARD TURTON AWARD, 2015

Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, The Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals in the UK. In recognition of his achievements the four organisations jointly created an award in his memory. The Richard Turton Award is an annual award providing an educational opportunity for a qualifying participant to attend the annual INSOL Europe Conference and have a technical paper published.

In recognition of those aspects in which Richard had a special interest, the award for 2015 was open to applicants who fulfilled all of the following:

- Work in and are a national of a developing or emerging nation;
- Work in or be actively studying insolvency law & practice;
- Be under 35 years of age at the date of the application;
- Have sufficient command of spoken English to benefit from the conference technical programme.

Applications for the award were invited to write a statement detailing why they should be chosen in less than 200 words. A panel representing the four associations adjudicated the applications. The panel members are as follows: Stephen Adamson – INSOL Europe, Neil Cooper – INSOL International, Patricia Godfrey – R3 and Maurice Moses – IPA. The committee received outstanding applications for this year's award and it was a very close run decision. We are delighted that the award has attracted such enthusiasm and response from the younger members of the profession and know that Richard would also be extremely pleased that there had been such interest.

The Committee is delighted to announce that the winner is Waiswa Abudu Sallam from Uganda. Waiswa works for the Uganda Revenue Authority in the Debt Collection Department. He is currently studying for a Master of Laws in Corporate and Insolvency Law at Nottingham Trent University, UK (by distance learning). This is the first time we have had a winner from Uganda. Previous winners have come from Belaruse, India, Latvia, Lithuania, Poland, PRC, Romania, Russia and Serbia.

As part of the award, Waiswa was invited to attend the INSOL Europe Conference which was held on the 1-4 October in Berlin, Germany. He will be writing a paper that will be published in summary in one or more of the Member Associations' journals and in full on their websites. We would like to congratulate Waiswa for his excellent application and also thank all the candidates who applied for the award this year. There were many excellent submissions and the judges task was very difficult this year.

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Primeo v Herald – More Certainty for Unpaid Redeemers

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The recent decision of the Grand Court of the Cayman Islands in the case of *Primeo Fund (in Official Liquidation) v Michael Pearson as an Additional Liquidator of Herald Fund SPC (in Official Liquidation)* has brought some welcome clarity as to how liquidators will treat the claims of redeemed, but unpaid former shareholders of Cayman companies (Unpaid Redeemers).

Until now, it had not been clear whether Unpaid Redeemers would rank as creditors and therefore be paid in full before any monies are distributed to unredeemed shareholders, or whether, in certain circumstances, they would fall to be paid *pari passu* with unredeemed shareholders.

Other offshore jurisdictions have grappled with the same question in the relatively recent past. For example, in the 2013 BVI case of *Somers v Monarch Pointe*, the BVI High Court analysed the operative sections of the Insolvency Act 2003 and held that the claims of Unpaid Redeemers should rank alongside the claims of unredeemed shareholders. The Eastern Caribbean Court of Appeal disagreed, holding that Unpaid Redeemers were, in fact, deferred creditors and as such entitled to have their claims against the company satisfied in priority to any claims by unredeemed shareholders.

In the Cayman Islands, the question is also governed by statue, namely section 37(7) of the Companies Law. The operative parts of this statute (which are very different from their BVI counterparts) are:

- section 37(7)(a), which states:

  where a company is being wound up and, at the commencement of the winding up, any of its shares which are or are liable to be redeemed have not been redeemed… the terms of redemption… may be enforced against the company.; and

- subjections (i) and (ii) which contain carve-outs from this enforceable right, including if the company was insolvent between the period on which the redemption was to have taken place and the date of winding up; and

These sections were first enacted in 1987 and have not changed materially since then. They were based on (now repealed) equivalent sections of the English Companies Acts 1981 and 1985. As a consequence, they were drafted well before the Privy Council clarified precisely at what stage a redemption would be completed, which it did in the 2010 case of *Culross v Strategic Turnaround*.

In *Strategic Turnaround*, both the Cayman Grand Court and Court of Appeal had held that a redeeming shareholder remains a member of a company until he has received payment for his shares and his name has been removed from the company's register of members.

The Privy Council disagreed, concluding that the issue depended entirely upon the construction of the individual company's Articles, and that it was *not to be approached on the basis of any a priori view that, until payment of the redemption proceeds, a shareholder must or should necessarily remain a member of a company…* For the company in question, the Privy Council determined that the redemption had taken place on the Redemption Date, with the remittance of redemption proceeds being treated as a matter of supplementary procedure.

Similarly, in *Herald* it was common ground between the parties that the relevant redemptions had taken place before the commencement of the company's winding up. On that basis, the Grand Court held that because the shares in question had been redeemed, the claims fell outside section 37(7), which only applied to shares *which have not been redeemed*.

As a result of this decision, it is now clear that the claims of Unpaid Redeemers fall outside section 37(7). Therefore, they will always be paid in priority to any claims by unredeemed shareholders, even if the company was insolvent when the redemptions took place and, therefore, the claims could not have lawfully been paid prior to the company's liquidation.

Unredeemed shareholders may well feel that such an approach is harsh and that it unfairly relegates their interest behind that of any Unpaid Redeemers. However, the rationale for the approach is investor certainty, and the benefit all investors have from knowing in advance that their contractual bargain will be given effect by the Courts. In that respect, the decision in *Herald* builds on the previous decisions of the Privy Council in *Strategic Turnaround and Fairfield*, which have stressed the desirability of certainty and giving effect to a fund's constitutional documentations.

The decision also considered the circumstances in which liquidators can rectify a company's register of members in the event of fraud. This is an issue that the Grand Court will consider in more detail on a subsequent occasion. However, one noteworthy part of this decision was that the Grand Court stated that the power to rectify would only apply to *those recorded as shareholders as at the commencement of the liquidation*. Therefore, unless they still held other shares, the power would not affect Unpaid Redeemers, as by the commencement of the liquidation they had already become creditors and were no longer shareholders.

This decision is subject to appeal.