

2006 No. 199

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session Amendment
No. 2) (UNCITRAL Model Law on Cross-Border
Insolvency) 2006**

Made - - - - *3rd April 2006*

Coming into force - - *6th April 2006*

The Lords of Council and Session, under and by virtue of the powers conferred upon them by section 5 of the Court of Session Act 1988(a) and of all other powers enabling them in that behalf, do hereby enact and declare:

Citation and commencement

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No. 2) (UNCITRAL Model Law on Cross-Border Insolvency) 2006 and shall come into force on 6th April 2006.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session

2.—(1) The Rules of the Court of Session 1994(b) shall be amended in accordance with the following sub-paragraphs.

(2) In rule 62.1 (disapplication of certain rules to Chapter 62) at the beginning there shall be inserted “Subject to Part XIII,”.

(3) At the end of Chapter 62 (recognition, registration and enforcement of foreign judgments etc.) there shall be inserted the following:—

“PART XIII

UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

Application and interpretation of this Part

62.90.—(1) This Part applies to applications under the Model Law and applications under the Scottish Provisions.

(2) In this Part—

“application for an interim remedy” means an application under article 19 of the Model Law for an interim remedy by a foreign representative;

(a) 1988 c.36; section 5 was amended by the Civil Evidence (Scotland) Act 1988 c.32, section 2(3) and by the Children (Scotland) Act 1995 c.36, Schedule 4, paragraph 45.
(b) S.I. 1994/1443, last amended by S.S.I. 2004/291.

“former representative” means a foreign representative who has died or who for any other reason has ceased to be the foreign representative in the foreign proceeding in relation to the debtor;

“main proceeding” means proceedings opened in accordance with Article 3(1) of the EC Insolvency Regulation and falling within the definition of insolvency proceedings in Article 2(a) of the EC Insolvency Regulation(a);

“the Model Law” means the UNCITRAL Model Law on Cross-Border Insolvency as set out in Schedule 1 to the Cross-Border Insolvency Regulations 2006(b);

“modification or termination order” means an order by the court pursuant to its powers under the Model Law modifying or terminating recognition of a foreign proceeding, the restraint, stay and suspension referred to in article 20(1) of the Model Law or any part of it or any remedy granted under article 19 or 21 of the Model Law;

“recognition application” means an application by a foreign representative in accordance with article 15 of the Model Law for an order recognising the foreign proceeding in which he has been appointed;

“recognition order” means an order by the court recognising a proceeding as a foreign main proceeding or a foreign non-main proceeding, as appropriate;

“review application” means an application to the court for a modification or termination order;

“the Scottish Provisions” are the provisions of Schedule 3 to the Cross-Border Insolvency Regulations 2006; and

words and phrases defined in the Model Law have the same meaning when used in this Part.

(3) References in this Part to a debtor who is of interest to the Financial Services Authority are references to a debtor who—

- (a) is, or has been, an authorised person within the meaning of section 31 of the Financial Services and Markets Act 2000(c) (authorised persons);
- (b) is, or has been, an appointed representative within the meaning of section 39 (exemption of appointed representatives) of that Act; or
- (c) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.

(4) In paragraph (3) “the general prohibition” has the meaning given by section 19 of the Financial Services and Markets Act 2000 and the reference to “regulated activity” shall be construed in accordance with—

- (a) section 22 of that Act (classes of regulated activity and categories of investment);
- (b) any relevant order under that section; and
- (c) Schedule 2 to that Act (regulated activities).

General

62.91.—(1) Rule 62.1 (disapplication of certain rules to Chapter 62) shall not apply to an application to which this Part relates.

(2) Unless otherwise specified in this Part, an application under the Model Law or the Scottish Provisions shall be made by petition.

(3) For the purposes of the application of rule 14.5(1) (first order for intimation, service and advertisement) to a petition under this Part, where necessary, the petitioner shall seek an order for service of the petition on:—

- (a) the foreign representative;

(a) Council Regulation (EC) 1346/2000, O.J. No. L 160, 30.06.00 p.1.

(b) S.I. 2006/1030.

(c) 2000 c.8.

- (b) the debtor;
 - (c) any British insolvency officeholder acting in relation to the debtor;
 - (d) any person appointed an administrative receiver of the debtor or as a receiver or manager of the property of the debtor in Scotland;
 - (e) any member State liquidator who has been appointed in main proceedings in relation to the debtor;
 - (f) any foreign representative who has been appointed in any other foreign proceeding regarding the debtor;
 - (g) if there is pending in Scotland a petition for the winding up or sequestration of the debtor, the petitioner in those proceedings;
 - (h) any person who is or may be entitled to appoint an administrator of the debtor under paragraph 14 of Schedule B1 to the Insolvency Act 1986^(a) (appointment of administrator by holder of qualifying floating charge); and
 - (i) the Financial Services Authority if the debtor is a debtor who is of interest to that Authority.
- (4) On the making of—
- (a) a recognition order;
 - (b) an order granting an interim remedy under article 19 of the Model Law;
 - (c) an order granting a remedy under article 21 of the Model Law;
 - (d) an order confirming the status of a replacement foreign representative; or
 - (e) a modification or termination order,

the Deputy Principal Clerk shall send a certified copy of the interlocutor to the foreign representative.

Recognition application

- 62.92.**—(1) A petition containing a recognition application shall include averments as to—
- (a) the name of the applicant and his address for service in Scotland;
 - (b) the name of the debtor in respect of which the foreign proceeding is taking place;
 - (c) the name or names in which the debtor carries on business in the country where the foreign proceeding is taking place and in this country, if other than the name given under sub-paragraph (b);
 - (d) the principal or last known place of business of the debtor in Great Britain (if any) and, in the case of an individual, his last known place of residence in Great Britain, (if any);
 - (e) any registered number allocated to the debtor under the Companies Act 1985;
 - (f) the foreign proceeding in respect of which recognition is applied for, including the country in which it is taking place and the nature of the proceeding;
 - (g) whether the foreign proceeding is a proceeding within the meaning of article 2(i) of the Model Law;
 - (h) whether the applicant is a foreign representative within the meaning of article 2(j) of the Model Law;
 - (i) the address of the debtor’s centre of main interests and, if different, the address of its registered office or habitual residence as appropriate;
 - (j) if the debtor does not have its centre of main interests in the country where the foreign proceeding is taking place, whether the debtor has an establishment within the meaning of article 2(e) of the Model Law in that country, and if so, its address.

^(a) 1986 c.45.

- (3) There shall be lodged with the petition—
- (a) an affidavit sworn by the foreign representative as to the matters averred under paragraph (2);
 - (b) the evidence and statement required under article 15(2) and (3) respectively of the Model Law;
 - (c) any other evidence which in the opinion of the applicant will assist the court in deciding whether the proceeding in respect of which the application is made is a foreign proceeding within the meaning of article 2(i) of the Model Law and whether the applicant is a foreign representative within the meaning of article 2(j) of the Model Law; and
 - (d) evidence that the debtor has its centre of main interests or an establishment, as the case may be, within the country where the foreign proceeding is taking place.
- (4) The affidavit to be lodged under paragraph (3)(a) shall state whether, in the opinion of the applicant, the EC Insolvency Regulation applies to any of the proceedings identified in accordance with article 15(3) of the Model Law and, if so, whether those proceedings are main proceedings, secondary proceedings or territorial proceedings.
- (5) Any subsequent information required to be given to the court by the foreign representative under article 18 of the Model Law shall be given by amendment of the petition.

Application for interim remedy

- 62.93.**—(1) An application for an interim remedy shall be made by note in process.
- (2) There shall be lodged with the note an affidavit sworn by the foreign representative stating—
- (a) the grounds on which it is proposed that the interim remedy applied for should be granted;
 - (b) the details of any proceeding under British insolvency law taking place in relation to the debtor;
 - (c) whether to the foreign representative’s knowledge, an administrative receiver or receiver or manager of the debtor’s property is acting in relation to the debtor;
 - (d) an estimate of the assets of the debtor in Scotland in respect of which the remedy is applied for;
 - (e) all other matters that would in the opinion of the foreign representative assist the court in deciding whether or not to grant the remedy applied for, including whether, to the best of the knowledge and belief of the foreign representative, the interests of the debtor’s creditors (including any secured creditors or parties to hire-purchase agreements) and any other interested parties, including if appropriate the debtor, are adequately protected; and
 - (f) whether to the best of the foreign representative’s knowledge and belief, the grant of any of the remedy applied for would interfere with the administration of the foreign main proceeding.

Application for remedy

- 62.94.**—(1) An application under article 21 of the Model Law for a remedy shall be made by note in process.
- (2) There shall be lodged with the note an affidavit sworn by the foreign representative stating—
- (a) the grounds on which it is proposed that the remedy applied for should be granted;

- (b) an estimate of the value of the assets of the debtor in Scotland in respect of which the remedy is requested;
- (c) in the case of an application by a foreign representative who is or believes that he is a representative of a foreign non-main proceeding, the reasons why the applicant believes that the remedy relates to assets that, under the law of Great Britain, should be administered in the foreign non-main proceeding or concerns information required in that proceeding; and
- (d) all other matters that would in the opinion of the foreign representative assist the court in deciding whether or not it is appropriate to grant the remedy requested, including whether, to the best of the knowledge and belief of the foreign representative, the interests of the debtor's creditors (including any secured creditors or parties to hire-purchase agreements) and any other interested parties, including if appropriate the debtor, are adequately protected.

Application for confirmation of status of replacement foreign representative

62.95.—(1) An application under paragraph 2(3) of the Scottish Provisions for an order confirming the status of a replacement foreign representative shall be made by note in process.

- (2) The note shall include averments as to—
 - (a) the name of the replacement foreign representative and his address for service within Scotland;
 - (b) the circumstances in which the former foreign representative ceased to be foreign representative in the foreign proceeding in relation to the debtor (including the date on which he ceased to be the foreign representative);
 - (c) his own appointment as replacement foreign representative in the foreign proceeding (including the date of that appointment).
- (3) There shall be lodged with the note—
 - (a) an affidavit sworn by the foreign representative as to the matters averred under paragraph (2);
 - (b) a certificate from the foreign court affirming—
 - (i) the cessation of the appointment of the former foreign representative as foreign representative, and
 - (ii) the appointment of the applicant as the foreign representative in the foreign proceeding, or
 - (c) in the absence of such a certificate, any other evidence acceptable to the court of the matters referred to in sub-paragraph (a).

Review application

62.96.—(1) A review application shall be made by note in process.

- (2) There shall be lodged with the note an affidavit sworn by the applicant as to—
 - (a) the grounds on which it is proposed that the remedy applied for should be granted; and

- (b) all other matters that would in the opinion of the applicant assist the court in deciding whether or not it is appropriate to grant the remedy requested, including whether, to the best of the knowledge and belief of the applicant, the interests of the debtor's creditors (including any secured creditors or parties to hire-purchase agreements) and any other interested parties, including if appropriate the debtor, are adequately protected.”.

BRIAN GILL
Lord Justice Clerk
I.P.D.

Edinburgh
3rd April 2006

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt makes amendments to the Rules of the Court of Session 1994 (S.I. 1994/1443) to make provision in respect of applications under the UNCITRAL Model Law on Cross-Border Insolvency.

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