Recognition of Foreign Insolvency Proceedings – An Australian Perspective

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Introduction

1 One of the objectives of the *Cross-Border Insolvency Act 2008* (Cth) was to allow Australia to participate in "an internationally harmonised and streamlined approach to cross-border insolvencies".[1] The source of that harmony, of course, was the adoption of the UNCITRAL Model Law on Cross-Border Insolvency (the **"Model Law"**).[2]

2 Earlier this year, and shortly after the 10th anniversary of the adoption of the Model Law, Justice Ward delivered an excellent and comprehensive paper on the practical application of the Model Law in Australia.[3] In that paper, her Honour examined some recent cases which shed light on the topics of recognition of foreign proceedings, the obligation to inform the court of a "substantial change" in foreign proceedings, and the availability of urgent injunctive relief. Her Honour has successfully stolen one topic that this paper may otherwise have addressed.

3 In today's paper, I wish to focus on the issue of recognition of foreign proceedings, and the consequential relief granted by Australian courts.

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[1] Commonwealth, *Parliamentary Debates*, Senate, 13 February 2018, 242 (Senator Ludwig).

[2] The Model Law is given statutory effect through s 6 of the *Cross-Border Insolvency Act 2008* (Cth). By virtue of s 22, the Model Law prevails over the *Corporations Act 2001* (Cth) to the extent of any inconsistency.

[3] Justice Julie Ward, 'Of Singaporean yachts, Chilean Ponzi schemes, and the Italian merchant marine (among others): An update on cross-border insolvency law in Australia' (Paper delivered at the 35th Annual BFSLA Conference, Queenstown, 1-3 September 2018).

Although the latter is often considered the *raison d'être* for the Model Law, it is the former which provides the key to unlock it. This is because it is only once foreign proceedings are recognised that a foreign representative can seek orders to enable it to complete its cross-border liquidation or re-organisation.[4]

4 Thus, in the words of Lord Hoffmann, recognition allows

> … the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.[5]

5 The objective of today's paper is three-fold; it seeks to:

(1) provide some background and context to the importance of mutual cooperation and recognition of proceedings in the world of cross-border insolvency;

(2) examine the provisions of the Model Law relating to recognition and consequential relief; and

(3) consider some Australian authorities which have applied those provisions.

6 The third objective, in particular, is important for two reasons. The first is that it allows one to tease out some aspects of the Model Law as they are applied by Australian courts. The second, and perhaps more important, reason is that Article 8 of the Model Law provides that:

> In the interpretation of this Law, 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.

[4] There being an exception in Art. 19 of the Model Law, which allows a court to grant urgent relief, such as staying execution against the debtor's assets, whilst the application for recognition is being determined. Such relief automatically comes to an end once the application for recognition is determined: Art. 19(3). For a recent discussion and application of such relief, see *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCA 1130, and the appeal in *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCAFC 132.

[5] *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26 at [22].

7 A uniform application of the Model Law is promoted by a greater awareness of the way in which *all* jurisdictions have interpreted its provisions. Whilst authorities from jurisdictions such as the United States (and particularly its Bankruptcy Court) are well-known, those from Australia are less so. It is hoped that this paper can assist in helping change that position.

The need for cooperation in cross-border insolvency proceedings

8 Before diving into the deep and perilous waters of cross-border insolvency, it is helpful to take a step back. As a matter of law, whether a corporation is insolvent can be resolved, in Australia at least, by a simple question: can that corporation pay all its debts, as and when they become due and payable.[6] What consequences should follow that insolvency, however, presents many more difficult questions for the policy-maker or legislator. How should rules of priority work? Are some creditors, such as employees, entitled to priority over other unsecured creditors? When can otherwise lawful transactions preceding insolvency be voided? The list goes on.

9 Whilst different jurisdictions furiously disagree on the answers to those questions, they tend to agree on the general purpose which should be served by insolvency law. These include considerations such as maximising the assets of the insolvent party, efficiently and impartially resolving the insolvency, and treating similar creditors in a similar manner.[7] Those normative objectives are typically advanced by a system of collective action, whereby an independent administrator is appointed who acts in the interests of all creditors. Indeed, as UNCITRAL's Legislative Guide on Insolvency Law notes:[8]

> [i]t is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies…

[6] *Corporations Act 2001* (Cth), s 95A.

[7] See the Preamble to the Model Law, and note that these principles have been embodied in the English tradition (which Australia inherited) since at least 1542: *Statute of Bankrupts*, 34 & 35 Henry VIII, c. 4.

[8] United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (New York, 2005) at [151].

10 In the domestic context, having a system of collective action is simple: it can be achieved through imposing, by force of statute, an insolvency regime that provides for only one set of insolvency proceedings. In Australia, that regime (for corporations) is contained within Chapter 5 ("External Administration") of the *Corporations Act 2001* (Cth). It follows that there is limited need for "cooperation", in the legal sense, for domestic insolvency proceedings.

11 But what about in the international context? As Bob Dylan noted some 58 years ago, "the times they are a-changing", and many corporations now do not exist within a single jurisdiction where they are amenable to a statutorily imposed collective administrator. Whilst collective action may be more economically more efficient, how can a set of nations, each with different views on insolvency procedure, create such a system?

12 The difficulty is best illustrated with by way of example.

13 Many of Australia's largest companies are traded on the Australian Securities Exchange and other exchanges around the globe. They may have thousands of employees worldwide, with current operations in many nations. They may sell billions of dollars of goods or services to multiple overseas markets. Now, consider what would happen if one of those companies became insolvent. Let us accept that collective action is the "more efficient" way to proceed. Where will the administrator be appointed? What if an administrator from Sydney and one from London both purport to try to re-organise and liquidate the global assets of that company? Which rules of insolvency will apply to the administration? How will creditors know, in advance, what those rules are? What if, despite the appointment of a single global administrator, a Brazilian creditor commences proceedings in the Brazilian courts, seeking to secure assets presently located within Brazil to enable it to satisfy its entire claim? Once again, the list goes on.

14 That scenario may be hypothetical, but there are many that are not. The 2016 Federal Court decision in *Tai-Soo Suk v Hanjin Shipping*[9] concerned a

[9] [2016] FCA 1404.

company that, at the relevant time, was the 9th largest container shipping company in the world. It had approximately 3,600 creditors, with total claims exceeding $1 billion. Those creditors, of course, were spread across the globe. Collectively administering, liquidating or restructuring that global entity, for the benefit of all its creditors, could *only* work under a system of mutual and legal cooperation between courts and their appointed external administrators. In this context, cooperation includes assisting to preserve assets, obtaining information, staying proceedings, avoiding parallel insolvency regimes and so on. That cooperation, in turn, necessarily requires some courts to cede jurisdiction which they would otherwise have had over processes within their territorial bounds.

15 That proposition is not a new one. Over 100 years ago, Lord Dunedin in *Galbraith v Grimshaw*[10] wrote that:

> "Now so far as the general principle is concerned… if the court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution.

16 So how is this to be achieved?

Methods of cross-border insolvency cooperation outside the Model Law

17 Initially, external administrators (either directly or through a foreign court) were required to rely on notions of comity in order to request a domestic court to provide cooperation and assistance in their administration of insolvency proceedings. Reliance on principles of comity and private international law, however, is uncertain at best. One limitation is that different jurisdictions accord varying levels of respect to the processes of other jurisdictions.[11] Another is that the common law only recognises the authority of a foreign

[10] [1910] AC 508 at 513.

[11] See, eg, *Official Assignee in Bankruptcy of The Property of Cooksley, Re Cooksley v Cooksley* [2017] FCA 1193 at [12] where Logan J referred to the "commonality of insolvency provision[s]" regarding aid as one factor relevant to granting comity and relief.

administrator or liquidator appointed by the courts of the State in which the corporation was itself incorporated.[12]

Aid and Auxiliary Provisions:

18 In order to overcome some of these difficulties, and to give statutory force to the common law conception of cooperation, many nations have enacted "aid and auxiliary" provisions. The Australian equivalent is found in s 581 of the *Corporations Act*, which relevantly provides that:

> …
>
> (2) In all external administration matters, the Court:
>
> (a) must act in aid of, and be auxiliary to, the courts of:
>
> (i) external Territories; and
>
> (ii) States that are not in this jurisdiction; and
>
> (iii) prescribed countries;
>
> that have jurisdiction in external administration matters; and
>
> (b) may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters.
>
> …

19 Although the section clarifies that Australian courts are bound to assist the courts of prescribed countries,[13] it does not prescribe *what* relief may follow, nor the circumstances in which it will be granted. Despite the focus (and bulk) of this paper being on recognition under the Model Law, it is instructive to briefly consider this section because:[14]

> [s]ection 581 operates independently of the Model Law. It may apply where the Model Law does not. Similarly, given the definition of 'foreign proceeding' in the Model Law differs from the conditions that must be met in order for s 581 to apply, it is possible for the Model Law to apply where s 581 does not.

20 One of the more recent and detailed considerations of the "aid and auxiliary" provisions in Australia can be found in the judgment of the Victorian Court of

[12] *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCA 1130 at [16] (Perram J); *Rubin v Eurofinance SA* [2013] 1 AC 236 at [13] (Lord Collins, Lords Walker and Sumption agreeing).

[13] See *Re Ayres; ex parte Evans* (1981) 34 ALR 582 at 591 (Lockhart J), upheld on appeal in *Ayres v Evans* (1981) 39 ALR 129 at 139 (Northrop J), 144 (McGregor J).

[14] *Legend International Holdings Inc v Indian Farmers Fertiliser Cooperative Ltd* (2016) 52 VR 40 at [130].

Appeal in *Legend International Holdings Inc v Indian Farmers Fertiliser Cooperative Ltd*.[15] In that case, Legend was an entity incorporated in Delaware and registered in Australia. Two of its shareholders commenced an application in the Victorian Supreme Court, under s 583 of the *Corporations Act*, to have Legend wound up. It is important to note that Australian courts have a discretion regarding whether they will make a winding up order, even if the relevant pre-conditions are satisfied.

21 Before the application for winding up was heard, Legend filed proceedings in the United States under Chapter 11 of the Bankruptcy Code, which is typically used to facilitate the re-organisation of a corporation. Legend then applied to the Supreme Court of Victoria for recognition under the Model Law of those Chapter 11 proceedings, with the corollary that the present winding up proceedings would be stayed or dismissed.

22 The Supreme Court refused to recognise the proceedings under the Model Law (I will return to this at [47] below). The question remained whether, in accordance with the court's obligations under s 581(2), it should nevertheless exercise its discretion to refuse to wind up Legend because "making a winding up order would be the antithesis of providing aid … as it would defeat the purpose of the Chapter 11 proceeding".[16]

23 At first instance, Randall AsJ disagreed. His Honour held that:[17]

> In this proceeding, the Court does not know what action is or might be thought to be in aid of or auxiliary to the US court. In order to act in aid of and be auxiliary to the US bankruptcy court, this Court would need an indication from that court of the assistance it needs.

24 His Honour then considered the relationship between the Australian proceedings and the Chapter 11 proceedings and said:[18]

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[15] (2016) 52 VR 40.

[16] *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* (2016) 52 VR 1 at [141].

[17] Ibid at [139].

[18] Ibid at [142].

> I do not consider that Chief Judge Shannon or any court in the United States would find that a winding up order is repugnant in the circumstances. After all, the United States trustee proposed that there be another status conference so that the position in Australia [regarding the winding-up application] could be ascertained, and I infer that Judge Shannon adjourned the further status conference to after this hearing.

25 On appeal, Legend maintained its position regarding the obligations imposed by s 581. It characterised the Chapter 11 proceedings as the rough equivalent of voluntary administration proceedings in Australia, and then noted that as the purpose of voluntary administration is to maximise the chances of an insolvent company continuing in existence, it would be inconsistent for the Victorian court to order the immediate winding up of Legend.

26 The Court of Appeal accepted that there was a live question regarding the inconsistent purposes of the two different insolvency proceedings which requires the Court to consider how it could aid the foreign court. What it did not accept was that s 581 automatically required the Australian court to refuse to wind up Legend. Instead, it held that:

> … the Court was required to consider whether in all the circumstances (including the existence of the US Proceeding which involves a regime that is distinctly different to liquidation) **it would be proper to provide aid, and act in an auxiliary manner,** by not exercising the discretion to wind up Legend.

27 The Court then considered the relevant factors, and concluded that Legend should be wound up because, amongst other considerations:

(1) the pre-requisites for winding up under s 583 were satisfied;

(2) the US proceedings were only in early stages, and there was no plan for reorganisation;

(3) the majority of Legend's interests, creditors, activities and directors were based in Australia; and

(4) the Court had power under the *Corporations Act* to respond to developments in the United States, as they became relevant.

28 As the Court of Appeal made plain, the obligation imposed on courts under s 581 is to "aid"; i.e. to serve the benefits of cross-border insolvency, and not to thwart them. The courts will not allow a party to halt an ongoing insolvency proceeding, simply because an application has been filed, later in time, in a jurisdiction where it does not even have its main economic interests. That would undermine a system of harmonious cross-border insolvency proceedings, not enhance it.

29 Of course, the discretion regarding winding up may well have been exercised differently had the Chapter 11 proceedings been commenced first, or had a United States court requested that the Victorian court adjourn its determination for some time, or if the majority of Legend's creditors and business interests were based in that jurisdiction. In each of those circumstances, it may have been "proper to provide aid" by refusing to deal with the winding up application until the position in the United States was more certain. None of those examples, however, applied to this case.

30 With that brief foray into the world of s 581, it comes time to turn to the provisions of the Model Law (as implemented through the *Cross-Border Insolvency Act 2008* (Cth)). This is because, in the vast majority of cases, the Model Law provides a simpler and more certain way to proceed collectively in a cross-border insolvency issue. That cooperation is brought about through recognising foreign proceedings, and it is to this topic that we now turn.

Introduction to Recognition of Foreign Proceedings under the Model Law

31 For the purposes of the Model Law, "foreign proceeding" is defined broadly (Art. 2(a)), and includes any:

> … 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 reorganization or liquidation;

32 As is evident, the word "proceeding" is broader than a judicial action, and includes, for example, a Trustee appointed under Chapter 7 of the US

Bankruptcy Code to liquidate the assets of a company. Using that as an example, and supposing that the relevant insolvent party has had dealings in Australia, what happens next?

33 Before continuing, it should be noted that, unlike many other international conventions, the Model Law does not operate on a "reciprocity" basis. Instead, Model Law nations such as Australia are required to assist liquidators and administrators appointed by foreign courts, even if those foreign courts would not assist liquidators and administrators appointed by Australian courts. This universal and non-discriminatory operation is contrasted with s 581(2) of the *Corporations Act*, which only mandates cooperation for "prescribed countries".

The Public Policy Exception

34 If a foreign proceeding complies with the requirements for recognition, an Australian court *must* recognise it "unless recognition would be manifestly contrary to the public policy of Australia".[19] That is a reference to Article 6 of the Model Law, which provides that:

> Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

35 The bar to recognition imposed by the "manifestly contrary" test is very high indeed. The Enactment Guide to the Model Law expresses a desire that this exception be limited to those matters "of fundamental importance for the enacting State",[20] and the mere fact that two nations have different "insolvency schemes do[es] not [itself] justify a finding that enforcing one State's laws would violate the public policy of another State".[21]

[19] *Re Edelsten* (2014) 320 ALR 506 at [22] (Beach J).

[20] UNCITRAL Secretariat, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (United Nations, 1997) at [104].

[21] Ibid at [30].

36 Australian case law is, to date, relatively light on this public policy exception. This is likely because of the difficulty that parties seeking to resist recognition perceive in running such an argument. Indeed, it appears that no Australian court has ever declined to recognise a foreign insolvency proceeding on this basis. This judicial caution is one imbued in Australian law, and it aligns with the Australian treatment of foreign arbitral awards under the New York Convention,[22] and of judgments of foreign courts.[23] What the jurisprudence in those areas shows (and I suggest that it is applicable by analogy to our present discussion)[24] is that essential principles of justice or morality generally need to be at stake before an Australian court will refuse recognition on public policy grounds.

37 Thus, the existence of a conflict of interest regarding a common administrator of two different entities was held to be insufficient for an Australian court to not recognise the foreign insolvency proceedings.[25] Nor was the filing of foreign bankruptcy proceedings to circumvent winding up proceedings commenced first in time in Australia in circumstances where the Australian proceedings were brought to the attention of the foreign court.[26]

Recognition of Foreign Proceedings – Main and Non-Main Proceedings

38 Returning to the structure of the Model Law, it (and consequently Australian law) draws a distinction between a "foreign main proceeding" and a "foreign non-main proceeding". The distinction when applied will have an impact on the nature of the relief which follows.

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[22] *International Arbitration Act 1974* (Cth), ss 7, 7A; New York Convention, Art. V(2)(b). See, e.g., *Taxsys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 291 ALR 99 at [105].

[23] See the authorities canvassed by Whelan J in *Jenton Overseas Investment Pty Ltd v Townsing* [2008] VSC 470 at [6]-[22].

[24] I note that this approach was accepted by Randall AsJ in *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* (2016) 52 VR 1 at [53].

[25] *Abate, in the matter of Chang Rajii v Chang Rajii (No 2)* [2018] FCA 241 at [47] (Gleeson J).

[26] *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* (2016) 52 VR 1 at [47]-[49].

Foreign Main Proceedings:

39 A "foreign main proceeding" is a proceeding taking place where the insolvent party has its "centre of main interests" (**"COMI"**) (Art. 17(2)(a)). The relevant time for making this assessment is, in Australia at least, at the time of the court's decision on the recognition application.[27]

40 Article 16(3) provides a presumption that the insolvent party's registered office is presumed to be its centre of main interests. Whilst the presumption can be rebutted by leading evidence regarding where the entity conducts the majority of its business, or the location of its directors,[28] the Model Law gives relatively little guidance as to how, and in what circumstances, the presumption will be rebutted.

41 *Akers (as Joint Foreign Representative) v Saad Investments Co Ltd (in Official Liquidation)*[29] is one of the leading Australian cases considering this question. Saad Investments was a company incorporated in the Cayman Islands. One of its related companies was an entity known as Saad Financial Services SA, a company registered in Switzerland. In addition to sharing directors, Saad Financial Services SA had been engaged in a long-term contract to provide investment advisory and back-office services to Saad Investments. There were also other indications that Saad Investments had commercial activities in and connections to places outside the Cayman Islands; in particular, Switzerland. The issue before the Federal Court was where Saad Investments' COMI was located.

42 Rares J held that the COMI was where Saad Investment's registered office was located: the Cayman Islands. In reaching that conclusion, his Honour noted that it is of critical importance to give effect to considerations of certainty, predictability and efficiency in cross-border insolvency matters.

[27] *Re Edelsten* (2014) 320 ALR 506 at [39] (Beach J); *Abate, in his capacity as Liquidator of Onix Capital SA* [2017] FCA 751 at [71] (Gleeson J).

[28] See, eg, *Moore as Debtore-in-Possession of Australian Equity Investors v Australian Equity Investors* [2012] FCA 1002; *Young, JR, Re Buccaneer Energy Limited v Buccanneer Energy Ltd* [2014] FCA 711.

[29] (2010) 190 FCR 285.

These objectives, and thus the purpose of the Model Law, would not be promoted by allowing debates to rage over the location of the COMI whilst the assets of the insolvent entity remained in a state of non-administration.[30] Consequently, the Article 16(3) presumption has real work to do, and it operates as "a manner of proof, to the point of being prima facie evidence" of the location of the COMI.[31]

43 To rebut the presumption, it is similarly important to have regard to the considerations of certainty and efficiency earlier noted. This requires the COMI to be "identified by reference to criteria that are both objective and ascertainable by third parties".[32] If there were clear and objective evidence that another jurisdiction was the COMI, such as if the place of incorporation was merely a "post-box office", the presumption would be rebutted. But, as Rares J held:[33]

> where the position is left uncertain, the Model Law authorises the court to proceed upon the deemed position, even if a more mature and thorough investigation eventually could determine it to be an erroneous, or indeed, fictitious, position.

44 That approach was recently followed in *Wood v Astra Resources Ltd*.[34] Astra Resources had its registered office in the United Kingdom. There were factors indicating that its COMI was in the UK, including the location of its corporate secretary, its solicitors, and its auditors. Equally, there were factors tending towards a conclusion that its COMI was in Australia, including that Astra was a resident in Australia for tax purposes, that it retained Australian brokers for the issue of its shares, and that it distributed share application forms and made offers of shares to several persons in Australia. White J balanced these matters, and concluded:[35]

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[30] Ibid at [48].
[31] Ibid at [56].
[32] Ibid at [49], quoting *Re Eurofood IFSC Ltd* [2006] Ch 508.
[33] Ibid at [53].
[34] [2016] FCA 1192.
[35] Ibid at [24].

> In my opinion, these factors which indicate that there is some connection of Astra Resources with Australia, and with countries other than Australia, are not sufficient to displace the presumption for which Art 16(3) provides.

Foreign Non-Main Proceedings:

45 A "foreign non-main proceeding" is a proceeding taking place in any other nation where the insolvent party has an "establishment" (Art. 17(2)(b)), which is relevantly defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services" (Art. 2(f)).

46 Ordinarily, if a foreign proceeding is not a "main" proceeding, it will be a "non-main" proceeding. That much follows from the fact that, generally speaking, insolvency proceedings will take place in a jurisdiction where the insolvent party has a presence. But this is not always the case, and it is still necessary for the court to be satisfied that the relevant foreign proceedings meet the criteria to be a "non-main" proceeding.

47 An example where the threshold was not met can be seen in the case of *Legend*,[36] which was discussed earlier in the context of s 581 of the *Corporations Act*. Although Legend was originally incorporated in Delaware, and had raised 90% of its capital from the United States, its entire day-to-day investment activities were conducted in Melbourne, its passive investments were managed from Australia, and its directors all resided in Australia. Randall AsJ then noted that the only evidence of activities which actually took place in the United States were the auditing of its accounts, and complying with United States regulatory supervision. In his Honour's view, the mere conducting of regulatory compliance is insufficient to support an "establishment" within the meaning of the Model Law.[37] Consequently, Randall AsJ refused to recognise the Chapter 11 proceedings altogether.

[36] *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* (2016) 52 VR 1 at [141].
[37] Ibid at [95]-[128].

48 In those circumstances, the foreign representative or administrator will be left to the processes under s 581 and the common law. Let us assume, however, that our United States Trustee has been recognised. What relief will be offered by Australian courts?

Relief Awarded by Australian Courts after Recognition

49 As already noted, the consequences following recognition differ depending on whether the relevant foreign proceeding is a "main" or a "non-main" proceeding. This paper will consider both in turn, but will not consider the relief available under Art. 19 of the Model Law. That provision deals with urgent injunctive relief available *before* an application for recognition is determined and is designed to maintain the status quo.

Automatic Relief (Foreign Main Proceedings)

50 If a foreign proceeding has been recognised as a "main" proceeding, certain automatic consequences follow (Art. 20(1)):

> (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
>
> (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.

51 This is in addition to the extra relief which the court can grant, in its discretion, in accordance with Article 21, and to which we will come to shortly. Further, Article 31 provides that the recognition of a foreign main proceeding is proof that the debtor is actually insolvent, for the purposes of domestic law.

52 Whilst the provisions in Article 20 can appear self-explanatory, there is, as is unfortunately too often the case, more lurking below the surface. In this regard, it is important to note the effect of s 16 of the *Cross-Border Insolvency Act*, which relevantly provides that:

> … the scope and the modification or termination of the stay or suspension referred to in paragraph 1 of [Article 20 of the Model Law], are the same as would apply if the stay or suspension arose under:
>
> (a) The *Bankruptcy Act 1966*; or
>
> (b) Chapter 5 (other than Parts 5.2 and 5.4A) of the *Corporations Act 2001*;
>
> as the case requires.

53 As Rares J noted in *Hur v Samsun Logix Corporation*,[38] the practical operation of Article 20(1) can become "beguilingly ambiguous, since the *Corporations Act* has a variety of different stay provisions that differentially affect the position of secured creditors, sometimes at different points in the same overall process". Indeed, for some forms of external administration, such as schemes of arrangement, there are no stay provisions. Although discussing the different forms of external administration under Australian law is beyond the scope of this paper, it is important to appreciate the methodology by which Australian courts approach this issue.

54 The most recent case which dealt with this issue in depth was *Tai-Soo Suk v Hanjin Shipping Co Ltd*.[39] That case concerned rehabilitation procedures commenced in the Republic of Korea. Jagot J recognised those proceedings as foreign main proceedings for the purposes of the Model Law. Her Honour then turned to the question of which stay provision applies, and commenced by noting that:

> Chapter 5 of the Corporations Act, to the extent relevant, includes the following Parts:
> (1) Part 5.1 (scheme of arrangement) – no stay applies.
> (2) Part 5.3A (voluntary administration) – ss 440A-440JA provide for stays.
> (3) Part 5.4/Part 5.4B (Court-ordered liquidation) – ss 467, 471B and 471C provide for stays.
> (4) Part 5.5 (voluntary liquidation) –s 500 provides for a stay.

55 As s 16 indicates that the relevant stay which should apply is "as the case requires", Jagot J considered that it was incumbent on her first to identify "which of the Parts of the Corporations Act would apply to the foreign

[38] (2015) 238 FCR 483 at [21].

[39] [2016] FCA 1404.

proceedings if they were taking place under that Act".[40] Her Honour commenced the analysis by noting that there were similarities between the rehabilitation proceedings in Korea, and schemes of arrangement in Australia (and, indeed, Brereton J had considered the same in *ML Ubase Holdings Co Ltd v Trigem Computer Inc*[41]). The applicant, however, contended that the rehabilitation proceedings were more akin to voluntary administration proceedings under Part 5.3A of the *Corporations Act*. The distinction was not a moot one – a scheme of arrangement (under Part 5.1 of the *Corporations Act*) does not attract an automatic stay of proceedings, whilst a voluntary administration does. This would have a real impact on various creditors, depending on their status.

56 Ultimately, Jagot J undertook a highly detailed factual and legal analysis of the nature of rehabilitation proceedings in Korea (spanning some 3.5 pages of the judgment), and accepted the plaintiff's submissions.

Discretionary Relief (Main and Non-Main Proceedings)

57 Whilst Article 20 only provides relief for main proceedings, Article 21 governs the position for both sets of proceedings. That Article relevantly provides that:

> 1. Upon recognition of a foreign proceeding, whether main or non main, where necessary 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 1 (a) of article 20;
> >
> > (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
> >
> > (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 1 (c) of article 20;

[40] At [22]-[24], [45].

[41] (2007) 69 NSWLR 577.

(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;

(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) Extending relief granted under paragraph 1 of article 19;

(g) Granting any additional relief that may be available to [the relevant administrator or liquidator appointed under the *Corporations Act*].

2. Upon recognition 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 this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under this article 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 this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

58 It is not instructive in a paper such as this to discuss the precise nature of relief available under Article 21. It is sufficient to say that Article 21 is broad enough in its scope that it effectively mirrors the powers available under domestic insolvency law. Beyond this, a few general points should be noted:

(1) first, unlike Article 20, the relief granted under Article 21 is discretionary (as it is couched in the language of "may");

(2) second, although the relief is dependent on it being "necessary to protect the assets of the debtors or the interests of creditors", the word "necessary" has been construed by Australian courts as not meaning "essential", but rather being "subjected to the touchstone of reasonableness";[42] and

(3) third, the relief granted should, ordinarily, only extend so long as the foreign proceeding is still in progress. This is because it is the

[42] *Abate, in his capacity as Liquidator of Onix Capital SA* [2017] FCA 751 at [78] (Gleeson J)

recognition of the foreign proceeding that provides the jurisdictional basis for the making of the orders.[43]

59 The third point has been considered in a number of decisions in recent times. In *Yakushiji v Daiichi Chuo Kisen Kaisha (No 2)*,[44] the Federal Court had earlier recognised rehabilitation proceedings taking place in Japan. A Japanese court later made a termination order regarding those proceedings, as the debtor's rehabilitation plan had been accepted. Allsop CJ considered that, in those circumstances, the Australian relief should be similarly terminated. The Chief Justice further noted that this was an area where the provisions of Article 18 of the Model Law became important. Article 18 provides that:

> From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:
>
> (a) Any substantial change in the status of the recognized 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

60 It can be accepted, as the Chief Justice noted, that if the foreign proceedings are for liquidation, it is unlikely that an end date to the orders will be relevant. But, if they are for rehabilitation or reconstruction, the position could very well be different. However, whilst this is a general rule, Australian courts have also recognised that there may be exceptions. Indeed, as Allsop CJ noted in the same case:[45]

> It may be that if, for the purpose of commercial efficacy of carrying out some aspect of a rehabilitation plan, it was necessary for the company to maintain protection against creditors in foreign jurisdictions, then it may be appropriate for the relevant foreign representatives or companies to approach to Court to achieve that end, either through Art 7 of the Model Law ('Additional assistance under other laws') and Art 21 ('Relief that may be granted upon

[43] *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2017] FCA 331 at [13] and following (Rares J); *Yakushiji v Daiichi Chuo Kisen Kaisha (No 2)* [2016] FCA 1277 at [20]-[22] (Allsop CJ).

[44] [2016] FCA 1277.

[45] Ibid at [25].

recognition of a foreign proceeding') or s 581 of the Corporations Act, which deals with the cooperation between courts in external administration matters.

61 Article 22 provides that when granting any of the above relief, the court must be satisfied that the interests of the creditors and other interested persons are adequately protected. The effect of Article 23, in the Australian context, is that upon recognition of a foreign proceeding, the foreign representative has standing to initiate the actions available to domestic administrators under Division 2 of Part 5.7B of the *Corporations Act* to avoid so called "voidable transactions". Those include uncommercial transactions, unfair loans, and unfair preferences given by the company to a creditor of the company.

Conclusion

62 In following the journey from recognition to relief, this paper has provided no more than a brief introduction into some of the Australian case law relating to the recognition of foreign proceedings. This, in turn, is only part of the regime created by the Model Law, which also has provisions relating to matters such as cooperation and concurrent proceedings. And that, of course, is only a part of the world of cross-border insolvency.

63 It would not be possible for a paper of this short length even to begin to traverse that broad world. I leave that to those other brave adventurers who encounter these issues on a more regular basis. Instead, it is hoped that this paper has introduced some of the aspects regarding the Australian application of the Model Law, and contributed to a discussion in this regard.