

Of Singaporean yachts, Chilean Ponzi schemes, and the Italian merchant marine (among others):

An update on cross-border insolvency law in Australia

The Hon Justice Julie Ward

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- 1 Speaking in Shanghai about a decade ago, the then Chief Justice of New South Wales, the Hon James Spigelman AC, QC, reminded his audience that “[i]n the contemporary global economy, in which corporations engage in transnational investments and contracts to an extent that is unprecedented in human history, the way in which those involved in insolvency conduct their affairs is of critical economic significance.”¹ The former Chief Justice said that the task of all of us — whether lawyers, judges, administrators, or accountants — is to ensure the orderly, efficient and cost-effective reorganisation or winding up of a corporation, in a manner which reverses improper disposition of assets or preferences and avoids wasteful litigation, unnecessary expense and excessive delay.²

- 2 At that time, the UNCITRAL Model Law on Cross-Border Insolvency was, at least in the Australian context, in its infancy. Although the Model Law was resolved upon by the United Nations General Assembly in 1997,³ it took until 2008 for Australia to incorporate it into domestic law. The *Cross-Border Insolvency Act 2008* (Cth) (“CBI Act”) has now, of course, been in force for ten years. This is therefore an appropriate time to review the progress to date in the interpretation and application of the Model Law’s provisions.

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¹ The Hon J J Spigelman AC, Chief Justice of New South Wales, “Cross-Border Insolvency: Co-operation or Conflict?” (INSOL International Annual Regional Conference, Shanghai, 16 September 2008), 1.

² *Ibid.*

³ Model Law on Cross-Border Insolvency of the United Nations Commission on International trade Law, set out in the Annex to United Nations General Assembly Resolution A/RES/52/158 (1997) (“Model Law”).

- 3 UNCITRAL Working Group V is currently in the process of drafting a new insolvency Model Law, specifically on the recognition and enforcement of insolvency-related judgments. That new Model Law is now in its final stages of drafting.
- 4 This paper considers recent case law developments with respect to the current Model Law. Although not disregarding the significance of earlier case law, this paper focusses on decisions within roughly the last two years and, in order to permit that focus (and to avoid repeating what is now well-traversed ground), I assume some familiarity with the CBI Act and Model Law.
- 5 A comprehensive summary of the scheme of the Model Law was provided by Barrett J (as his Honour then was) in an address to the BFSLA annual conference in 2005, when his Honour noted that although the Model Law was “quite a slim document ... just over eleven pages and not at all closely typed”, it was “packed with possibilities”.⁴ I turn to the manner in which those possibilities are now being worked out in practice.

Circumstances warranting non-recognition: the public policy exception

- 6 Article 6 of the Model Law provides a public policy exception. It is in the following terms:

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

- 7 The scope of this exception has been considered in two recent matters.
- 8 What I will call the “Abate matter” has been the subject of at least three judgments of the Federal Court in 2017 and 2018. Mr Abate applied to that Court in 2017 for recognition of a Chilean liquidation proceeding and associated consequential relief. The Chilean liquidation proceeding concerned Onix Capital SA (“Onix”), incorporated in Chile in 2009. Onix and another Chilean company were part of what Gleeson J described as a

⁴ The Hon R I Barrett, “Cross Border Insolvency – Aspects of the UNCITRAL Model Law” (22nd Annual Banking and Financial Services Law Association Annual Conference, Cairns, 6-7 August 2005).

“complex and opaque structure of companies in various jurisdictions, ultimately controlled by Mr [Chang Rajii]”.⁵

- 9 By way of background, it seems that Mr Chang Rajii was the author of what was described in evidence as “Chile’s largest Ponzi scheme”.⁶ He had been charged in Chile for fraud, money laundering, and violations of Chilean General Banking Law in relation to investments made in Onix.⁷ Mr Chang Rajii and Onix Capital LLC (a US company) had also been sued in the US by the US Securities and Exchange Commission for alleged violations of US antifraud laws.⁸ At the time of the first of the three judgments with which I am here concerned, Mr Chang Rajii had fled to Malta and a Maltese court had denied a Chilean extradition request; by the end of last year, his whereabouts were unknown.⁹
- 10 Article 6 arose for consideration in a judgment handed down by Gleeson J this year, in a related proceeding brought by Mr Abate in respect of Mr Chang Rajii’s personal insolvency.¹⁰ In 2017, a compulsory liquidation order was made by the 15th Civil Court of Santiago in respect of Mr Chang Rajii’s estate and Mr Abate was appointed as liquidator of his estate.¹¹ In this proceeding, Mr Abate sought orders under the CBI Act and Model Law recognising the Chilean bankruptcy proceeding as a “foreign main proceeding”, recognising himself as the authorised “foreign representative”, conferring upon him relevant powers under the *Bankruptcy Act 1966* (Cth), and other associated relief to assist with his investigations and recovery of assets in Australia.¹²
- 11 Gleeson J considered whether the potential for conflicts of interest between Mr Abate’s role of liquidator as Onix and liquidator of Mr Chang Rajii would engage the Article 6 exception. Her Honour took the view that this situation fell far short of being contrary to Australian public policy — let alone manifestly

⁵ *Abate, in his capacity as Liquidator of Onix Capital SA* [2017] FCA 751 at [27] per Gleeson J.

⁶ *Abate, in the matter of Rajii v Rajii* [2017] FCA 1583 at [6] per Yates J.

⁷ *Abate, in his capacity as Liquidator of Onix Capital SA* [2017] FCA 751 at [30] per Gleeson J.

⁸ *Ibid.*

⁹ *Ibid*; *Abate, in the matter of Rajii v Rajii* [2017] FCA 1583 at [6] per Yates J.

¹⁰ *Abate, in the matter of Chang Rajii v Chang Rajii (No 2)* [2018] FCA 241.

¹¹ *Ibid* at [3] per Gleeson J.

¹² *Ibid* at [5] per Gleeson J.

so — such that it would warrant Mr Chang Rajii’s non-recognition pursuant to Article 6, accepting the applicant’s submissions as to the three reasons supporting that conclusion.¹³

- 12 First, it could be inferred that the Civil Court of Santiago, which had specifically appointed Mr Abate as liquidator of Mr Chang Rajii in the knowledge of his position as liquidator of Onix, had considered the potential for conflict and was satisfied that it was appropriate and expedient for Mr Abate to act in both roles. This was said to be consistent with the position in Australia, particularly by reference to the 2016 decision of Beach J in *ASIC v Bilkurra Investments Pty Ltd*.¹⁴
- 13 Second, the particular similarity of facts and commonality of interests between the creditor groups meant cost savings and procedural efficiency could be achieved by the appointment of a single liquidator (the submissions again referring to *Bilkurra Investments* as to the relevance of efficiency and advantage to creditors).
- 14 Third, in an interesting employment of Article 8 of the Model Law, it was noted that Mr Abate was already acting as dual liquidator in many overseas jurisdictions. The Onix liquidation proceeding had already been recognised as a foreign main proceeding in accordance with the Model Law by the English High Court (on 4 November 2016) and by the Miami Division of the United States Bankruptcy Court, in the Southern District of Florida. By the time of Gleeson J’s judgment in 2018, the Chang Rajii bankruptcy proceeding had been recognised in Switzerland, England, the United States, and the Isle of Man. It was submitted — and Gleeson J accepted — that to require separate liquidators for Mr Chang Rajii and Onix in Australia would be

¹³ Ibid at [47] per Gleeson J.

¹⁴ *Australian Securities and Investments Commission (ASIC) v Bilkurra Investments Pty Ltd* [2016] FCA 371 at [115]-[117] (“*Bilkurra Investments*”). See also, the decision of the Supreme Court of NSW in *Re Nuhan Ltd and the Companies Act (1980)* 5 ACLR 69 at 76 per Needham J (one person appointed as liquidator of three related companies despite the fact that conflicts between two of the companies were apparent).

inconsistent with Article 8 of the Model Law, because that Article “promotes uniformity in the application of the Model Law”.¹⁵

15 Article 8, entitled “Interpretation”, is in the following terms:

In the interpretation of the present 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.

16 Gleeson J used Article 8 to justify both the conclusion with respect to Article 6 and the decision to recognise the Chang Rajii bankruptcy as a “foreign main proceeding”, referring in each regard to the result of the decisions in the English and US courts.¹⁶ This is perhaps new territory for Article 8 — or at least, an extension of its usage in Australia thus far — because here it is used to justify reaching the same factual conclusion (as to a particular debtor’s centre of main interests) as foreign courts (not merely to apply a consistent interpretation of an Article of the Model Law), and to construe Australian public policy as incorporating considerations of “uniformity” in the application of the Model Law.

17 Returning to Article 6, this was a case which, on any view, might be said to have fallen well short of being *manifestly* contrary to Australian public policy. A case which (at least in my view) came much closer to the line was the subject of the Victorian Supreme Court’s decision in *Legend International Holdings*.¹⁷

18 The background to this decision is important when considering the public policy arguments but the decision also offers a recent and significant consideration of some unresolved issues in cross-border insolvency.

19 The defendant, Legend, was incorporated in Delaware, US. The plaintiffs, IFFCO and its subsidiary (Kisan), were shareholders of Legend, both incorporated in India (IFFCO being based in India and Kisan in the United Arab Emirates). When IFFCO/Kisan and Legend fell into dispute (the details

¹⁵ *Abate, in the matter of Chang Rajii v Chang Rajii (No 2)* [2018] FCA 241 at [47] per Gleeson J.

¹⁶ *Ibid* at [47], [52] per Gleeson J.

¹⁷ *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* (2016) 52 VR 1; [2016] VSC 308 (“*Legend International Holdings*”).

of the dispute are not presently relevant), that dispute was arbitrated in Singapore in 2013, with English law as the governing law. The Singaporean arbitral tribunal made orders, including that Legend pay to IFFCO and Kisan the sum of US\$12,350,000 plus interest. In 2015, the High Court of Singapore granted IFFCO and Kisan leave to enforce the arbitral award in the same manner as a judgment of that Court; judgment was entered and the award was enforced in Singapore as against both Mr Gutnick (director of Legend) and Legend.

- 20 Later in 2015, IFFCO and Kisan applied to the Supreme Court of Victoria for orders to enforce the arbitral award. Croft J delivered judgment on 21 December 2015, enforcing the arbitral award against Legend, and subsequently granted an interim stay of execution until the hearing of an appeal on 5 February 2016.¹⁸ On 9 February 2016, the Victorian Court of Appeal dismissed the appeal and granted a further interim stay of execution until 12 February 2016.¹⁹
- 21 On 18 February 2016, after the expiration of that further stay, IFFCO and Kisan served a statutory demand on Legend. On 8 March 2016, Legend applied to the High Court of Australia for special leave to appeal. As at 2 June 2016, that application had not been heard (and indeed, as far as my searches can ascertain, it appears that the application for special leave was ultimately not pursued.)
- 22 On 11 April 2016, the time for compliance with the statutory demand having already expired, IFFCO and Kisan filed an application for the winding up of Legend. The matter was listed with a first return date of 11 May 2016. Before that date, on 8 May 2016, Legend filed Chapter 11 proceedings in the United States (under the US Bankruptcy Code). On 10 May 2016, being the day prior to the return date of the winding up application in the Victorian Supreme Court, Legend filed originating process in that Court, seeking recognition of the Chapter 11 proceedings in the United States. On 17 May 2016, Chief

¹⁸ *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 724; (2015) 304 FLR 199; *Indian Farmers Fertiliser Cooperative Ltd v Gutnick (No 2)* [2015] VSC 770.

¹⁹ *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* (2016) 49 VR 732; [2016] VSCA 5.

Judge Shannon of the US Bankruptcy Court adjourned the status conference hearing in the US proceedings, pending ascertainment of the outcome of the Victorian proceedings.

- 23 On 2 June 2016, Randall AsJ delivered judgment with respect to both Legend's recognition application and IFFCO/Kisan's application for the winding up of Legend.²⁰
- 24 On the recognition application, IFFCO and Kisan developed a public policy argument pursuant to Article 6 of the Model Law, in two ways. First, they submitted that recognition of the US Chapter 11 proceedings would "impinge the value and import of the Australian statutory rights of Legend and its liquidator creditors, such that granting comity would severely hinder the Australian Court's ability to carry out the most fundamental policies and purposes of those rights", because the effect of recognition would be that Legend's affairs would remain in the hands of its directors, outside the scrutiny of independent insolvency practitioners who are officers of the Court.²¹
- 25 The second (and arguably more persuasive) submission was based upon the fact that Legend's expressed reason for filing the Chapter 11 proceeding in the United States was to defeat the extant Australian liquidation proceeding. At the status conference before Chief Judge Shannon on 17 May 2016, the legal representatives of Legend stated that it was "[i]n order to stop that involuntary proceeding [the winding up application in Victoria] ... [that] the debtor filed for bankruptcy on May 8th and immediately moved, in Australia, for a recognition proceeding."²² It was submitted for IFFCO/Kisan that Legend clearly accepted that the Chapter 11 filing was aimed at circumventing the

²⁰ Again, this decision went on appeal to the Victorian Court of Appeal, and the appeal was dismissed. However, on appeal it was only the aspects of the primary decision which addressed s 581 of the *Corporations Act* which were under consideration, the Court of Appeal simply noting with respect to the Model Law that no challenge was brought to these aspects of the primary decision: *Legend International Holdings Inc v Indian Farmers Fertiliser Cooperative Ltd* (2016) 52 VR 40; [2016] VSCA 151 at [12].

²¹ *Legend International Holdings* (2016) 52 VR 1; [2016] VSC 308 at [34] per Randall AsJ.

²² *Ibid* at [46].

winding up proceeding commenced first in time in Australia, and that such a use of Chapter 11 proceedings was contrary to Australian public policy.

- 26 Randall AsJ rejected both arguments on public policy. As to the first, his Honour referred to the decision of the High Court of Hong Kong in *Modern Terminals (Berth 5) Ltd v States Steamship Company*, in which that Court was satisfied that Chapter 11 proceedings in the United States were “intended by the legislature primarily to be for the benefit of all creditors while at the same time affording an insolvent corporation the opportunity to recuperate”, and held that Hong Kong should respect the jurisdiction of the bankruptcy court in California.²³ *Modern Terminals* was referred to by the Full Court of the Federal Court in *Akers v Deputy Commissioner of Taxation* as an example of where a foreign procedure (the Chapter 11 proceeding) was for the benefit of all creditors.²⁴ Randall AsJ also noted the comments of the Privy Council in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc*, to the effect that Chapter 11 was “considerably more sophisticated” than the scheme of arrangement system in the United Kingdom.²⁵
- 27 Applying these authorities, his Honour concluded that there was no basis for the submission that Chapter 11 protection was contrary to public policy; and, quoting the remarks of Cardozo J in *Loucks v Standard Oil Co of New York*,²⁶ held that the Court was “not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home” — just because the Chapter 11 proceeding may not be consistent with the Australian voluntary administration regime, there was no reason to view it with any disquiet.²⁷

²³ *Modern Terminals (Berth 5) Ltd v States Steamship Company* [1979] HKLR 512 at 521 per Trainor J (“*Modern Terminals*”).

²⁴ *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8; [2014] FCAFC 57 at [105] per Allsop CJ (Robertson and Griffiths JJ agreeing at [168]-[169]).

²⁵ *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508; [2006] UKPC 26 at [4].

²⁶ *Loucks v Standard Oil Co of New York* (1918) 224 NY 99 at 110-11 per Cardozo J.

²⁷ *Legend International Holdings* (2016) 52 VR 1; [2016] VSC 308 at [36], [50]-[51] per Randall AsJ.

- 28 As to the second public policy argument, Randall AsJ appeared to take comfort from the fact that Chief Judge Shannon in the US Bankruptcy Court was “cognisant of the issues evolving” and had “quite properly” sought information about the Victorian proceeding and adjourned the status conference.²⁸ His Honour also applied the principle from the realm of private international law dealing with enforcement of foreign judgments that courts are “slow” to invoke public policy given the interests of comity, stating that there was no reason why the general concept of “slowness” should not also apply to invoking public policy in relation to recognition of a foreign proceeding.²⁹
- 29 These decisions illustrate, unsurprisingly, the high threshold imposed by the terms of Article 6, and are consistent with the position adopted in other jurisdictions as well as with the *UNCITRAL Guide to Enactment*, which explains that “the purpose of the expression “manifestly” as a qualifier of the expression “public policy”, is to emphasise that public policy exceptions should be interpreted restrictively and that Article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State”.³⁰

Recognition of foreign proceedings

- 30 The substantive operation of the Model Law turns upon recognition of a foreign proceeding as a “foreign main proceeding”, defined in Article 2(b) as a foreign proceeding taking place in the State where the debtor has its centre of main interests (“COMI”), or a “foreign non-main proceeding”.
- 31 Article 15 provides a procedure whereby a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign

²⁸ *Ibid* at [48].

²⁹ *Ibid* at [52]-[53], citing *Jenton Overseas Investment Pty Ltd v Townsing* (2008) 21 VR 241; [2008] VSC 470 per Whelan J at [20]; see also *Bouton v Labiche* (1994) 33 NSWLR 225 per Kirby P at [2]-[3].

³⁰ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014) at [104] (“*UNCITRAL Guide to Enactment*”).

representative has been appointed. The application must meet the procedural requirements set out in Article 15(2)-(4).

32 Article 16 provides a series of presumptions concerning recognition, and in particular, Article 16(3) provides:

In the absence of proof to the contrary, the 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.

33 Article 17 then provides what have come to be known as “procedural” and “status-based” criteria for recognition.³¹

34 A recent example of a finely balanced determination of a corporate debtor's COMI, in which the Article 16(3) presumption was decisive, is the *Astra Resources* litigation.

35 This litigation did not start life as a cross-border insolvency but, rather, as a claim by ASIC in relation to various alleged contraventions of the *Corporations Act 2001* (Cth) by Astra Resources Ltd, a related entity, and its directors. Having published findings of contraventions by the corporate entities,³² the Federal Court listed ASIC's remaining claims for hearing. By the time judgment came to be delivered in *ASIC v Astra (No 2)*,³³ Astra Resources was in liquidation pursuant to orders of the English High Court. Although the liquidators appointed in the United Kingdom intervened in the ASIC/Astra proceedings, they did not apply for recognition of the English liquidation proceedings until after the conclusion of the ASIC proceedings. Their application for recognition was therefore the subject of a third Astra Resources judgment, in *Wood v Astra Resources Ltd*.³⁴

36 There was no issue that the liquidators were a “foreign representative”, and that the petition in the English High Court was a “foreign proceeding”, as

³¹ See, eg, *Gladstone (Trustee) v Digrioli* [2016] FCA 1136.

³² *Australian Securities and Investments Commission v Astra Resources PLC* [2015] FCA 759; (2015) 107 ACSR 232.

³³ *Australian Securities and Investments Commission v Astra Resources Ltd (No 2)* [2016] FCA 560; (2016) 113 ACSR 162.

³⁴ *Wood v Astra Resources Ltd (UK Company No 07620218)* [2016] FCA 1192.

defined in Article 2 of the Model Law.³⁵ At the outset, White J noted that the purpose of the presumption in Article 16(3) is “the facilitation of a decision on an application for recognition at the earliest possible time in accordance with Art 17(3) when the variety of places at which the debtor carried on activities before the insolvency raises the possibility that more than one might be the debtor’s COMI”.³⁶

- 37 As mentioned earlier, this case was finely balanced. Astra Resources’ registered office was in the UK, and there were a number of objective factors indicating that the Article 16(3) presumption, which therefore arose, should not be displaced, including that: Astra’s corporate secretary was located in London, Astra had engaged solicitors and consultants in England in relation to the UK liquidation proceedings, had retained auditors in England, and had at one time been listed on the GXG Market Exchange operating in London.³⁷ There were also, however, connections to Canada and Macedonia, and indications that Astra may have pursued at least some form of activity in 11 different countries.³⁸ Moreover, there were a number of significant connections to Australia, as Astra: was a resident in Australia for tax purposes; had business premises in Adelaide and numerous subsidiaries incorporated in Australia; had distributed share application forms and made offers of shares to persons in Australia (with the result, apparently, that the great majority of its shareholders had addresses in Australia); had information brochures providing contact details in Australia; had previous directors located in Australia; and retained, or at least at some stage had retained, Australian accountants and Australian share brokers.³⁹
- 38 The liquidators submitted that the objective facts pointing towards the COMI being in Australia were “largely historical”. However, as White J noted, much the same could be said of many of the posited connections to the UK.⁴⁰ It

³⁵ Ibid at [7].

³⁶ Ibid at [11], citing in this regard *Akers v Saad Investments Company Limited (in official liquidation)* (2010) 190 FCR 285; [2010] FCA 1221 at [50] per Rares J.

³⁷ *Wood v Astra Resources Ltd (UK Company No 07620218)* [2016] FCA 1192 at [15].

³⁸ Ibid at [16].

³⁹ Ibid at [17]-[18].

⁴⁰ Ibid at [21].

was in this context that the presumption in Article 16(3) assumed crucial importance, his Honour remarking:

One of the difficulties in identifying the COMI, by reference to the actual factual circumstances of Astra Resources, is the absence of evidence as to the activities in which it did actually engage ... [The former directors'] description of the projects seemed to be more in the nature of "grand plans" ... There is a real possibility that some and perhaps many of the projects to which [the former directors] referred are embryonic, have not progressed beyond a preliminary documentary stage or are, in reality, illusory.

...
[T]he absence of evidence of an actual business or businesses being conducted by Astra Resources makes the identification of its COMI, in a conventional sense, difficult. In these circumstances, the presumption for which Art 16(3) provides is important. 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) applies.⁴¹

39 Therefore, in the result, in an otherwise equivocal case, Article 16(3) meant that the liquidators succeeded in their recognition application, and were granted the relief they sought pursuant to Articles 21(1)(e), (g), and (2) of the Model Law – it being in the interests of efficiency, of Astra Resources, and of all of its creditors (English and non-English) for there to be a single liquidation, namely, the liquidation already on foot in England.⁴²

40 In declining to find that the Article 16(3) presumption had been rebutted, White J emphasised that Australian courts have adopted the approach taken by the European Court of Justice in *Re Eurofood IFSC Ltd* in the determination of a debtor's COMI,⁴³ and that rebuttal of the presumption requires factors which are both "objective and ascertainable by third parties", warranting a conclusion that "an actual situation exists which is different from that which locating it at [the] registered office is deemed to reflect".⁴⁴

41 This relatively high threshold for rebuttal of the Article 16(3) presumption was met in the *Legend International Holdings* decision I referred to above. That

⁴¹ Ibid at [22].

⁴² Ibid at [31].

⁴³ *Re Eurofood IFSC Ltd* [2006] Ch 508; [2006] 3 WLR 309 (see especially at [33]-[34]).

⁴⁴ *Wood v Astra Resources Ltd (UK Company No 07620218)* [2016] FCA 1192 at [13]-[14], referring to: Ibid; *Akers v Saad Investments Company Limited (in official liquidation)* (2010) 190 FCR 285; [2010] FCA 1221 at [42]-[44] per Rares J; *Young Jr, in the matter of Buccaneer Energy Ltd v Buccaneer Energy Ltd* [2014] FCA 711 at [6] per Jagot J; *Kapila, in the matter of Edelsten* [2014] FCA 1112; (2014) 320 ALR 506 at [53] per Beach J.

decision illustrates the complexity that may attach to determining, for the purposes of Article 16(3), the location of a corporation's "registered office".

42 Having decided that the Article 6 public policy exception was not engaged, Randall AsJ then considered whether to recognise the US Chapter 11 proceedings as a foreign main or non-main proceeding. In relation to the Article 16(3) presumption, his Honour noted that neither the CBI Act nor the Model Law defines "registered office", and then traced back, through the *UNCITRAL Guide to Enactment*, to the Virgos-Schmit report, which preceded the European Commission's insolvency convention and stated:

Where companies and legal persons are concerned, the convention presumes, unless proved to the contrary, that the debtor's centre of main interest is the place of his registered office. This place normally corresponds to the debtor's head office.⁴⁵

43 In this case, a certificate of incorporation produced in 2001 gave as the registered office of Legend an address in Wilmington, Delaware. A certificate for renewal filed in 2012 set out that the registered office of Legend was located at another address in Wilmington, Delaware. An ASIC Extract obtained in May 2016 with respect to Legend's registration as a foreign company in Australia set out the registered office in Australia, and set out that the registered address in the place of incorporation was an address in Lewes, Delaware.⁴⁶

44 The debate was as to whether "registered office" in Article 16(3) refers to the office nominated in the place of the company's registration. Could the Court conclude that the registered office of Legend was in Melbourne (on the basis that this appeared to be the principal or head office), notwithstanding the existence of something called a "registered office" in the United States?

45 Randall AsJ concluded that it is possible to have more than one registered office; and that while the registered office in Australia did not displace the registered office in Delaware, the former was not in some way subjugated or

⁴⁵ *Legend International Holdings* (2016) 52 VR 1; [2016] VSC 308 at [66], referring to the *UNCITRAL Guide to Enactment* at [84] and the Virgos-Schmit report at [75].

⁴⁶ *Legend International Holdings* (2016) 52 VR 1; [2016] VSC 308 at [63]-[65].

secondary to the Delaware registered office in circumstances where the Model Law does not define registered office as the office in the state of initial incorporation. Accordingly, the presumption in Article 16(3) simply had no application (it being impossible for it to apply where two registered offices existed).⁴⁷

- 46 It could be argued that some aspects of the Court’s reasoning on this point conflate the concept of “registered office” in Article 16(3) with the determination of a debtor’s COMI, and confuse the initial engagement of the presumption with the separate question of whether it is displaced or rebutted.⁴⁸ It is a condition of registration as a foreign company in Australia under the *Corporations Act* that the company maintain a “registered office” in Australia. It may be implausible that, wherever this occurs, the consequent existence of two or more “registered offices” (e.g., in Australia and in the place of incorporation) renders Article 16(3) inapplicable. This would considerably diminish the efficacy of the presumption and is probably contrary to the purpose of Article 16(3), being to facilitate early determination of a debtor’s COMI by obviating the need, where possible, for potentially lengthy consideration of competing factors in favour of different COMIs.⁴⁹
- 47 Perhaps alive to these issues, Randall AsJ made a contingent finding that, if he were wrong and the registered office of Legend was in Delaware, then in any event the presumption in Article 16(3) was rebutted by “proof to the contrary” and Legend’s COMI was in Australia.⁵⁰ This is, in my view, probably a more logical approach, rather than effectively disregarding Article 16(3). Other recent cases, such as *McCormick*⁵¹ and *Hayes, in the matter of*

⁴⁷ Ibid at [81].

⁴⁸ Ibid at [67]-[81].

⁴⁹ See, eg, *Wood v Astra Resources Ltd (UK Company No 07620218)* [2016] FCA 1192 at [35], citing in this regard *Akers v Saad Investments Company Limited (in official liquidation)* (2010) 190 FCR 285; [2010] FCA 1221 at [50] per Rares J.

⁵⁰ *Legend International Holdings* (2016) 52 VR 1; [2016] VSC 308 at [82].

⁵¹ *Official Assignee in Bankruptcy of the Property of McCormick v McCormick* [2018] FCA 410 (“*McCormick*”) (albeit that here Article 16(3) was applied in the context of a natural person’s “habitual residence”).

Pumpkin Patch,⁵² have illustrated how effectively the Article 16(3) presumption can facilitate the efficient determination of a debtor's COMI.

48 Where the Article 16(3) presumption either does not apply or is displaced, the courts' approach to determining a corporate debtor's COMI in recent case law has been to follow the approach laid out in *Akers* (both in the first instance decision and then on appeal to the Full Federal Court).⁵³ In taking that approach, the Australian courts have made full use of the permission granted by Article 8 of the Model Law to have regard to decisions of foreign jurisdictions to ensure that Australian jurisprudence on the Model Law is in harmony with other jurisdictions.⁵⁴

49 In *Legend International Holdings*, the material was "replete" with references to Legend having its principal office in Melbourne, and there were suggestions in the evidence that the registered office in Delaware was "merely a post box".⁵⁵ There were competing factors in favour of each of Australia and the United States as Legend's COMI.⁵⁶ The balancing of these factors, will necessarily always depend on the specific facts of the case. Nevertheless it can be said that the following points emerge in relation to COMI:

- i. the relevant time for weighing up the relevant factors as to COMI is the time of the Court's determination;
- ii. the position of shareholders is "irrelevant" because the Court must have regard to the need for the COMI to be ascertainable by third parties, creditors and potential creditors; and
- iii. there is a query as to whether the activities of a holding company must be distinguished from the activities of a subsidiary for the

⁵² *Hayes, in the matter of Pumpkin Patch Originals Limited (Administrators Appointed) (in Receivership) v Pumpkin Patch Originals Limited (Administrators Appointed) (in Receivership)* [2016] FCA 1353.

⁵³ *Akers v Saad Investments Company Limited (in official liquidation)* (2010) 190 FCR 285; [2010] FCA 1221; *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8; [2014] FCAFC 57.

⁵⁴ For example, *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 389 BR 325 (SDNY 2008); *Re Betcorp Ltd* 400 BR 266 (Bankruptcy District of Nevada, 2009); *Re Eurofood IFSC Ltd* [2006] Ch 508; *In re Ran* 390 BR 257, 274-5 (Bankr SD Tex 2008); *In Re Stanford International Bank Ltd* [2010] 3 WLR 941.

⁵⁵ *Legend International Holdings* (2016) 52 VR 1; [2016] VSC 308 at [67]-[77].

⁵⁶ *Ibid* at [93]-[95].

purposes of determination of COMI, and an unresolved question as to the relevance of the location of the activities of a wholly owned subsidiary.⁵⁷

- 50 As to these matters, point (i) is by now orthodox,⁵⁸ although White J noted in *Wood v Astra Resources Ltd* that, in determining COMI, regard may be had to historical facts which led to the position at the time. White J also questioned point (ii), suggesting that the identity and location of shareholders will not always be unascertainable by third parties and shareholders' participation in the affairs of the company may have been more than passive.⁵⁹ Point (iii) has been left for another day.
- 51 Other recent examples of determination of COMI have been more straightforward. For example, in the *Abate* matter, it was clear that while Onix managed and invested private funds in various specified asset classes and securities around the world, all of the company's offices and employees, the (former) members of its board of directors, and its shareholders were located or principally resident in Chile; meetings of the board and shareholder meetings were held in Chile; and the company's investors were mostly domiciled in Chile. Therefore, Gleeson J was satisfied that Onix had its COMI in Chile and, accordingly, that the Court was required to recognise the Chilean liquidation proceeding as a foreign main proceeding.⁶⁰
- 52 Finally, before leaving Articles 15-17, it should be noted that in *Legend International Holdings* there was also some consideration of whether to recognise the Chapter 11 proceedings in the United States as a "foreign non-main proceeding" pursuant to Article 17(2)(b) (which required that Legend had an "establishment" in the United States within the meaning of Article 2(f)). Randall AsJ found that auditing activities, preparation of incorporation papers, and complying with regulatory supervision in the United States did not constitute "operations" or "economic activity" and were not sufficient to support

⁵⁷ *Ibid* at [96]-[123].

⁵⁸ And see *Official Assignee in Bankruptcy of the Property of Hanna, in the matter of Hanna v Hanna* [2018] FCA 156 at [82], where Gleeson J firmly rejected a submission that the debtor's COMI should be determined as at the time of his bankruptcy some nine years earlier.

⁵⁹ *Wood v Astra Resources Ltd (UK Company No 07620218)* [2016] FCA 1192 at [17]-[19].

⁶⁰ *Abate, in his capacity as Liquidator of Onix Capital SA* [2017] FCA 751 at [70]-[72].

the contention that there was an “establishment” in the United States. Accordingly, his Honour declined to recognise the Chapter 11 proceeding at all.⁶¹

Obligation to inform the Court of a “substantial change”

- 53 Rares J has delivered three recent judgments in what I will call the Rizzo-Bottiglieri matter. The Rizzo-Bottiglieri proceedings commenced in 2015 when the plaintiff, the board of directors of Rizzo-Bottiglieri, filed originating process seeking recognition under the Model Law of a *concordato preventivo* proceeding granted on 11 February 2015 in the Court of Torre Annunziata of Naples.⁶² Rizzo-Bottiglieri is an Italian merchant shipping company that owns and charters cargo ships.
- 54 On 17 June 2015, Rares J made orders under Articles 15, 19(1), and 20(1) and (3) of the Model Law that, until further order, the commencement or continuation of any individual action or legal proceeding against Rizzo-Bottiglieri or any of its assets, rights, obligations or liabilities not be commenced and that any current such action be stayed, respectively. His Honour also ordered that any application for the issue of a warrant for the arrest in Australia of any vessel owned or chartered by Rizzo-Bottiglieri, brought by a person claiming to hold a security interest, be made to judge of the Federal Court, in accordance with the judgment of Buchanan J in *Yu v STX Pan Ocean Co Ltd (South Korea)* (2013) 223 FCR 189. The proceedings were adjourned from time to time, pending what the plaintiff anticipated would ultimately be a final hearing under Article 21 of the Model Law for the recognition of the first *concordato preventivo* proceeding as a “foreign proceeding”.⁶³
- 55 However, in the event, the Italian Court dismissed the first *concordato preventivo* proceeding on 28 April 2016. Rather than disclosing that fact to the Australian Federal Court at that time, the plaintiff instead (in May 2016)

⁶¹ *Legend International Holdings* (2016) 52 VR 1; [2016] VSC 308 at [124]-[127].

⁶² See *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2017] FCA 331 at [1]-[4].

⁶³ *Ibid* at [4]-[5].

commenced a second, fresh, proceeding in the Italian Court for a *concordato preventivo*.⁶⁴

- 56 In the meantime, the plaintiff had also obtained interim stay orders in three other jurisdictions – in the United States from the US Bankruptcy Court in the Southern District of Texas; in England and Wales from the English High Court; and in South Africa from the High Court of South Africa.
- 57 Ultimately, after various delays, the plaintiff sought orders under an amended interlocutory process for the termination of the stay under the original orders made by Rares J in 2015 and for a new stay, based on the second *concordato preventivo*, pending the final hearing of the recognition proceeding.
- 58 The first issue that arose was as to the consequence of the Italian Court’s closure of the first *concordato preventivo*. Rares J noted a foreign representative’s continuing obligation under Article 18 of the Model Law to inform the Court promptly of any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative’s appointment. His Honour referred to *Yakushiji v Daiichi Chuo Kisen Kaisha (No 2)*, where Allsop CJ had quoted the *UNCITRAL Guide to Enactment* as to the circumstances where, pursuant to Article 18, it may be relevant to inform the Court of a “substantial change”.⁶⁵ In that decision, Allsop CJ had been faced with a situation then “without precedent” in Australia, and had noted that “[t]he purpose of the obligation [under Article 18] is to allow the court to modify or terminate the consequences of recognition”, given that it is possible that after recognition, changes will occur in the foreign proceeding that “would have affected the decision on recognition or the relief granted on the basis of recognition, such as termination of the foreign proceeding or conversion from one type of proceeding to another”.⁶⁶
- 59 Again quoting the *Guide*, Allsop CJ emphasised that it is of “particular importance that the court be informed of such modifications when its decision

⁶⁴ Ibid at [5].

⁶⁵ *Yakushiji v Daiichi Chuo Kisen Kaisha (No 2)* [2016] FCA 1277 at [20]-[22].

⁶⁶ Ibid at [14]-[15], [20]-[22].

on recognition concerns a foreign “interim proceeding” or a foreign representative has been “appointed on an interim basis” (referring to Article 2(a) and (d)). Moreover, his Honour said:

The reach of Art 20 should be understood to be for the currency of foreign main proceedings. If it is a liquidation, it will be unlikely that an end date for the orders will become relevant. For rehabilitation or reconstruction proceedings, an end date for the operation of orders will or may (as here) be relevant. Article 20, however, provides not for orders but the effect of operation of the Article. Plainly, however, Art 20 and orders under Art 21 are intended to be limited to the currency or life of the rehabilitation. I would not read the effect of Art 20 as lasting beyond the end of the foreign proceeding.⁶⁷

- 60 In the result, Rares J determined that the order terminating the stay granted on 17 June 2015 should operate retrospectively from 29 April 2016, being one day after the Italian Court terminated the first *concordato preventivo* proceeding.⁶⁸ His Honour indicated that he would grant a fresh stay in respect of the second *concordato preventivo*, but that, rather than amending the proceeding then on foot, the proper course was for the plaintiff to terminate the first recognition proceeding and file new originating process seeking recognition of the second Italian proceeding. As to the form of that fresh stay, Rares J noted that the effect of *concordato preventivo* under Italian law is similar to a debtor-in-possession reorganisation under Chapter 11 of the US Bankruptcy Code, and referred to *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404, where Jagot J had concluded that debtor-in-possession proceedings of that kind were more closely analogous to proceedings under Pt 5.3A of the *Corporations Act* than to other proceedings under Ch 5 of that Act and that, accordingly, the stay contemplated in the “delphically expressed Art 20(2) of the Model Law should be a stay imposed under Pt 5.3A”.
- 61 In another Rizzo-Bottiglieri judgment this year,⁶⁹ there emerged an even starker illustration of the problems created by Article 18. Rares J noted that the fate of Rizzo-Bottiglieri had hung in the balance in the Federal Court in what were by now four separate proceedings (since 2013). The 2018

⁶⁷ Ibid at [20]-[21].

⁶⁸ *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2017] FCA 331 at [24].

⁶⁹ *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2018] FCA 153.

proceedings had started in February 2018 when the three trustees appointed by the Naples Court to administer the liquidation of the company applied for interim relief under Article 19 of the Model Law, in aid of their application for the recognition in Australia of the Italian *fallimento* proceedings (equivalent to liquidation proceedings). What had happened was that ultimately, after at least three *concordato preventivo* proceedings had been attempted and dissolved in Italy, the Naples Court had ordered the liquidation of the company. Now, the trustees sought an interim stay similar to those granted in earlier orders, pending the hearing of their application for recognition of the liquidation proceeding as a “foreign main proceeding” and of their role as foreign representatives in respect of it.

- 62 The trustees also sought leave to intervene in the 2017 proceeding on the basis that their appointment has withdrawn any present ability of the board of directors to act either under the now concluded third *concordato preventivo* or otherwise on behalf of the company. The trustees sought orders to terminate the existing interlocutory stay in the 2017 proceeding and to have that proceeding dismissed.
- 63 Rares J explained that the circumstances of the 2017 and 2018 proceedings raised several issues that did not appear previously to have been considered in judgments in Australia under the CBI Act or the Model Law, in particular, whether a person in the position of the trustees may intervene in another proceeding under the Model Law to seek orders that a stay order made in it be set aside and the proceeding dismissed.
- 64 As to whether the trustees should be made interveners in the 2017 proceeding, Rares J noted that that r 1.3(2)(b) of the Corporations Rules provides that other rules of the Court including, obviously, the Federal Court Rules, apply to a proceeding in the Court under the CBI Act to the extent that they are relevant and not inconsistent with the Corporations Rules. His Honour noted that pursuant to r 9.12 of the Federal Court Rules, the Court has a wide discretion to grant leave to a person to intervene in a proceeding with such rights, privileges and liabilities as the Court may determine. Rares J concluded that the application by the trustees to intervene in the 2017

proceeding was “apposite” and the relief that they sought in it was “appropriate”, particularly given the need to bring to the Court’s attention promptly a substantial change to the status of a foreign representative’s appointment, namely its termination in the jurisdiction in which he or she had been appointed (noting the obligation on the foreign representative under Article 18(a) of the Model Law).

65 As his Honour explained:

This situation highlights a serious lacuna in the way in which Art 18(a) of the Model Law and Div 15A of the Corporations Rules operate that does not appear to have been anticipated by the drafters of the Model Law. The problem is that once the foreign proceeding, pursuant to which the foreign representative brought proceedings for recognition in the local forum, has been either terminated or withdrawn, that event necessarily also extinguishes the status or authority of the foreign representative to act in respect of the debtor and his, her or its affairs. In reality, the foreign representative subsequently will be highly unlikely to be in a position financially (or feel responsible) to inform the local court, that had acted earlier to recognise the foreign proceeding in the forum, of that fact under Art 18 of the Model Law.

As a matter of common sense, once the foreign representative ceases to occupy his or her position in the jurisdiction of the foreign court that appointed him or her (such as the Italian Court here), he or she will have no resort to funds of the debtor or, more particularly, no sense of responsibility to another court, such as this, to which the foreign representative may have no realistic chance of being made to account, if he or she fails to act under Art 18(a) to draw attention to any substantial change of status of himself or herself or the recognised foreign proceeding.

That practical reality means that any interim or final recognition orders by the local court (such as this Court) will remain in force in its jurisdiction even though the change of status in the jurisdiction of the foreign court has removed the very foundation of, or continuing justification for, the local court’s orders under the Model Law.⁷⁰

66 His Honour suggested that in the absence of amendment to address this problem, it may be desirable to consider, in future recognition applications under the Model Law, requiring a foreign representative to pay into court an amount by way of security. That could ensure that there will be funds in this jurisdiction available to support the foreign representative, or an intervener, applying for orders under Article 18 to take account of any relevant change of the foreign representative’s status. The existence of that security would be

⁷⁰ Ibid at [27].

likely to be known to the debtor or whomever succeeds to the position of the foreign representative to control the debtor's affairs after the change in status in the jurisdiction in which the foreign court or other appointing authority (such as the creditors or the debtor) is located. Hence, an application under Art 18 might be expected to regularise matters in relation to the recovery of the balance of any security held in court for the benefit of the debtor or his, her or its creditors. Alternatively, his Honour noted that another option may be to make any stay orders under Articles 19, 20 or 21 for a fixed period of say three months, and to require the foreign representative at regular intervals to report to the Court to justify each extension of the stay, failing which it would be vacated automatically. (That may, of course, cause unnecessary expense.)

67 The trustees were therefore granted interim relief pending the final hearing of the application for recognition, by ordering a stay according with s 16 of the CBI Act (namely, the stay that would apply if the 2018 proceeding were a liquidation by the Court or a winding up in insolvency for the purposes of Pt 5.4B of the *Corporations Act*). His Honour held that the order should reflect the provisions of ss 471B and 471C of the *Corporations Act*, so that secured and unsecured creditors would be made aware of their rights.

68 At the final hearing of the application for recognition of the *fallimento* proceeding commenced by the trustees appointed by the Naples Court to administer the liquidation of Rizzo-Bottiglieri, recognition orders were made.⁷¹ With a fleet that trades worldwide now up for sale, the trustees had published a notice of auction of the fleet, the evidence being that if the fleet was sold successfully at the auction on 24 July 2018, the purchaser would have a maximum of 80 days to complete and that the trustees expected on the available information that a sale would occur in consequence of the auction. None of the vessels had interrupted its ordinary trading activities since the Naples Court made its decree on 11 January 2018 placing the company into its *fallimento* process. In those circumstances, the trustees wished to continue to trade the vessels internationally and expected one vessel to arrive

⁷¹ *Alari (Trustee), in the matter of Rizzo-Bottiglieri-De Carlini Armatori SpA (Trustees in Bankruptcy appointed) v Rizzo-Bottiglieri-De Carlini Armatori SpA (No 2)* [2018] FCA 1067.

in Australia to load coal in about two weeks' time. Thus, they were seeking to have final orders for recognition made as of 29 June 2018 so as to protect the fleet's ability to continue trading and to be available, for the purposes of the auction, to be delivered to any purchaser without unnecessary complications that might stem from an arrest on a general maritime claim.

69 The trustees were content, however, for the recognition orders to include what Rares J noted was “now a usual order” in the Federal Court, being that any application by a creditor to arrest a vessel the subject of the stay under the Model Law should be subject to the ability of any person wishing to apply for an arrest of one of Rizzo-Bottiglieri's ships to make that application to a judge of the Court and bring to the judge's attention the order for recognition and the relevant authorities (being *Yu v STX Pan Ocean Co Ltd* (2013) 223 FCR 189 and *Yakushiji v Daiichi Chuo Kaisen Kaisha* [2015] FCA 1170). That would ensure that the judge asked to consider the issue of an arrest warrant would be able to evaluate whether the claim *in rem* sought to be asserted by the plaintiff had a sufficiently arguable foundation to warrant the arrest to be made in the circumstances of the existence of the recognition of the foreign main proceeding.⁷²

70 The trustees' evidence confirmed that Rizzo-Bottiglieri had no assets in Australia and that, once the proposed sale of the fleet has been completed, the trustees would cease to have any interest in any of the ships, so that the recognition orders and stay could then be vacated. In the result, his Honour was satisfied that the proceeding should be recognised by the Court in accordance with the requirements of Article 17, however found it appropriate to protect the interests of Rizzo-Bottiglieri, the trustees, and creditors, by limiting the effect of the recognition and stay under Article 22 of the Model Law so as to achieve the object identified by the trustees of securing, as best as could be done, the ability of the fleet to trade without the threat of an arrest, and then to bring the recognition and stay orders to an end consequent upon the anticipated completion of sale of the fleet.⁷³

⁷² *Ibid* at [7].

⁷³ *Ibid* at [17].

71 These proceedings sharply illustrate the compliance problems raised by Article 18, which were also evident in a number of other recent decisions, including *Suk v Hanjin Shipping Co*⁷⁴ and the second *Yakushiji* decision.⁷⁵ It remains to be seen whether any of the suggestions made in the Rizzo-Bottiglieri case for addressing these problems will be adopted in future.

Urgent provisional relief: the interface between maritime law and cross-border insolvency

72 The Rizzo-Bottiglieri proceedings are an example of proceedings relating to foreign shipping companies that have no assets in Australia but are seeking protection, substantively, from the arrest of vessels that from time to time may come into Australian waters. The same situation has played out in the Dragon Pearl Proceedings taking place in the Federal Court over the last few months.

73 Article 19 of the Model Law provides for the grant of urgent provisional relief pending recognition of foreign proceedings.

74 In *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)*, Perram J dismissed an application for an interlocutory injunction in recognition proceedings.⁷⁶ The interlocutory application sought to restrain the Respondent, Linkage, from removing from Australian waters the luxury cruise yacht "Dragon Pearl" or from alienating title in it pending the trial in the related "Second Dragon Pearl Proceeding".

75 The plaintiffs in the Second Dragon Pearl Proceeding (and the applicants for the injunction) were Zetta Jet (a Singaporean company) and Mr King, a trustee appointed to Zetta Jet by the US Bankruptcy Court for the Central District of California, Los Angeles Division, under Chapter 7 of Title 11 of the US Code.

76 Zetta Jet and Mr King alleged that one of Zetta Jet's former directors, a Mr Cassidy, misappropriated approximately AU\$4.5 million from Zetta Jet and

⁷⁴ *Suk v Hanjin Shipping Co Ltd* [2017] FCA 404.

⁷⁵ *Yakushiji v Daiichi Chuo Kisen Kaisha (No 2)* [2016] FCA 1277.

⁷⁶ *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCA 1130.

used it to purchase the freshly-built Dragon Pearl. The vessel was registered in the name of a company, DPL, which was initially under Mr Cassidy's control.

- 77 It was not in dispute that Zetta Jet did pay that amount to the shipwrights for the Dragon Pearl, nor that this was done at the behest of Mr Cassidy. In a related proceeding before the High Court of Singapore, Mr Cassidy had deposed that Zetta Jet and its subsidiaries were indebted to him and that the funds used to purchase the Dragon Pearl were set off against those debts. An accounting report prepared for Mr King into Zetta Jet's affairs concluded that no such debt existed.
- 78 Perram J held that in terms of determining whether interim relief ought now to be granted to keep the Dragon Pearl in Australian waters pending any final trial, there was clearly a sufficiently arguable case that Mr Cassidy, as a director of Zetta Jet, misappropriated the AU\$4.5 million to acquire the Dragon Pearl.⁷⁷
- 79 Mr Cassidy claimed to have disposed of his interest in the Dragon Pearl on 28 September 2017, to an entity called "New Target", apparently in satisfaction of a personal debt owed by Mr Cassidy to New Target. New Target caused Ms Du Yan to become the sole shareholder and director of DPL as its nominee. Since then, the Dragon Pearl has been caught up in litigation – and has at all material times been in Australian waters.
- 80 In the First Dragon Pearl Proceedings, the plaintiffs had sought (inter alia) the arrest of the vessel, claiming to have a proprietary maritime claim to the possession, title or ownership of the vessel by virtue of a constructive or resulting trust arising in favour of Zetta Jet from Mr Cassidy's alleged breaches of fiduciary duty. Due to difficulties experienced by the plaintiffs in obtaining evidence from their Singapore-based witnesses, the plaintiffs ultimately could not proceed with the case when it was called on for trial, with

⁷⁷ Ibid at [3].

the consequence that their case was dismissed.⁷⁸ The plaintiffs then appealed to the Full Court which, on 18 June 2018, dismissed the appeal.⁷⁹

81 Half an hour after the Full Court dismissed the appeal, DPL sold the vessel to Linkage for US\$1. The same solicitors acted on both sides of the sale (and are the solicitors on the record for the Dragon Pearl in the current Second Dragon Pearl Proceeding and the former First Dragon Pearl Proceeding). On the same day, the plaintiffs commenced a fresh proceeding against the Dragon Pearl in the Federal Court, the Second Dragon Pearl Proceeding, and sought once more the beleaguered vessel's arrest. Middleton J refused the issue of the warrant as a matter of discretion,⁸⁰ and the Second Dragon Pearl Proceeding then came before Perram J. In determination of the claim, Perram J accepted that the plaintiffs had an arguable case that Linkage was liable under the first limb of the rule in *Barnes v Addy* (1874) LR 9 Ch App 244.

82 In these proceedings before Perram J, Linkage submitted that the plaintiffs had no standing to bring the proceeding in the Federal Court. Perram J noted at the outset that Zetta Jet's standing to bring proceedings for the recovery of its property depended on the law of the country under whose law its insolvency was being administered (the United States). Under Chapter 7, a company subject to bankruptcy proceedings has no standing to bring proceedings for the recovery of its property in its own name which can, instead, only be brought by its trustee. It followed that Zetta Jet itself had no standing to pursue the injunction application — which directed attention to the second plaintiff, Mr King.

83 Perram J approved what had been said by the UK Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236; [2012] UKSC 46 at [13], [29]-[31], to the effect that as a matter of *common law*, the better view is that the Court will only recognise the liquidator of an insolvent corporation (howsoever described) appointed by the courts of the State in which the corporation was

⁷⁸ *Zetta Jet Pte Ltd v The Ship "Dragon Pearl"* [2018] FCA 878.

⁷⁹ *Zetta Jet Pte Ltd v The Ship "Dragon Pearl"* [2018] FCAFC 99.

⁸⁰ *Zetta Jet Pte Ltd v The Ship "Dragon Pearl"* [2018] FCA 981.

itself incorporated.⁸¹ (In this case, Zetta Jet was incorporated in Singapore and Mr King was appointed by the US Bankruptcy Court – therefore the Australian Federal Court could not recognise Mr King at common law.)

84 To surmount that problem, Mr King had commenced an application for recognition under the Model Law on 28 June 2018 (the Recognition Proceeding), this application being listed for its first hearing on 31 July 2018. Perram J noted in his judgment delivered that same day that it was likely, but not certain, that Mr King’s office as Chapter 7 trustee would be recognised either at the first hearing that day or perhaps at a subsequent hearing. However *until* an order for Mr King’s recognition is made under the Model Law, it was clear that he had no standing to seek an injunction under the general law.⁸²

85 However, Article 19(1) of the Model Law confers jurisdiction on the Court to grant, *pending the determination of a foreign representative’s recognition application*, urgent provisional relief. Perram J emphasised that Article 19(1) is the “urgent provisional form of the post-recognition relief available to a foreign representative under Art 21”.⁸³

86 Although the injunctions sought (non-disposition of title in, and non-removal of, the vessel from the jurisdiction) do not appear in the list of remedies which may be granted in Article 19(1), Perram J had no doubt that the Model Law conferred the power to make those injunctions, saying that the list was not expressed to be exclusive and that:

It appears obvious that the remedies available must include the ability to freeze an asset which the putative foreign representative asserts an entitlement to bring into the bankruptcy. If that argument were thought to lack a textual peg, the reference to Art 21(1)(g) [in art 19(1)(c)] would otherwise suffice. It picks up the Court’s post-recognition jurisdiction to grant to a recognised foreign representative any additional relief which might have been available under the general law if Mr King were a liquidator under the *Corporations Act 2001* (Cth).

⁸¹ *Zetta Jet Pte Ltd v The Ship “Dragon Pearl” (No 2)* [2018] FCA 1130 at [16].

⁸² *Ibid* at [18].

⁸³ *Ibid* at [19].

- 87 His Honour concluded that Mr King certainly had standing to seek Article 19(1) relief at this stage, and therefore that he would reject Linkage's challenge to Mr King's standing at this stage.
- 88 This was not dispositive of the case, because Linkage submitted that when DPL won its case due to Burley J refusing to adjourn, and then dismissing, the First Dragon Pearl proceeding, this created a *res judicata*. Briefly, Perram J held that the First Dragon Pearl Proceeding was an action *in rem* against the ship (citing *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 538; [1976] HCA 65; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; [2006] FCAFC 192 at [60]) and, drawing a distinction (in terms of the requirement for a hearing "on the merits") between *res judicata* and issue estoppel, held that Linkage was entitled to rely upon a plea of *res judicata* in the Second Dragon Pearl Proceeding. His Honour not only refused the interlocutory relief sought by the plaintiffs but, ultimately, entered summary judgment in favour of Linkage on the basis of satisfaction that the *res judicata* plea would inevitably succeed if the matter were to proceed to trial.
- 89 This judgment was again the subject of an appeal to the Full Court of the Federal Court, which delivered its judgment within the last fortnight.⁸⁴ The Full Court held that Perram J was correct in summarily dismissing the *in rem* proceedings against the vessel and in otherwise refusing the claim to injunctive relief based upon principles of *res judicata*, insofar as the claims before him depended upon a *Barnes v Addy* claim to ownership in equity by Zetta Jet of the vessel or other proprietary claim based on an alleged alienation to defend creditors. However, the Court held that Perram J erred in failing to consider the significance, if any, of the foreshadowed claim to relief under s 588FF of the *Corporations Act* for the application for injunctive relief (and remitted the matter to the primary judge on this basis).⁸⁵ The last word on the Dragon Pearl proceedings is therefore still to come.

Conclusion

⁸⁴ *Zetta Jet Pte Ltd v The Ship "Dragon Pearl" (No 2)* [2018] FCAFC 132.

⁸⁵ *Ibid* at [11]-[13].

- 90 The importance of the orderly resolution of cross-border insolvencies has only become more acute in the decade since the enactment of the CBI Act in Australia and, in that period, Australia has already made a significant contribution to the development of Model Law jurisprudence.
- 91 On reviewing the cases of the last two years or so in this field it appears that while a number of central issues — such as the principles governing determination of COMI were resolved some time ago now and are at least relatively settled, other more practical or technical aspects of the Model Law's application, such as meaningful enforcement of Article 18 or the interaction between Article 19 and maritime law, are still being resolved.
- 92 As we enter a second decade of Model Law jurisprudence, it is clear that it will remain necessary to continue interpreting and applying the Model Law's provisions so as to achieve the goals of harmonised, fair, and efficient administration of cross-border insolvencies.