

# INSOL International/UNCITRAL/World Bank Judicial Colloquium in Insolvency

## Lessons from recent cases on cross-board insolvency - Australia

21 March 2015

Justice Ashley Black

Supreme Court of New South Wales

I should first say something as to the general structure of the power of Australian Courts to assist foreign insolvency practitioners. The relevant Australian provisions are, first, the *Corporations Act* 2001 (Cth), which is legislation passed by the Commonwealth Parliament, as to which both the Federal Court of Australia and the Supreme Courts of each of the States have jurisdiction. Part 5.6 Div 9 of the *Corporations Act* provides for cooperation between Australian and foreign courts in external administration matters, which include, broadly, a winding up outside Australia of a body corporate or the insolvency of a body corporate. Section 581(2) of the *Corporations Act* requires the Federal Court of Australia and the State Supreme Courts to act in aid of, and be auxiliary to, the Courts of prescribed countries that have jurisdiction in external administration matters. The prescribed countries include, inter alia, Jersey, Canada, The Republic of Singapore, the United Kingdom and the United States of America. That section also permits, but does not require the Federal Court of Australia and the State Supreme Courts to act in aid of, and be auxiliary to, the Courts of other countries that have jurisdiction in external administration matters. Section 581(3) provides that, where the Court receives a letter of request from a Court of a country other than Australia, it may exercise such powers as it could exercise if the matter had arisen in its own jurisdiction.

Part 5.7 of the *Corporations Act* allows a foreign company that is registered in Australia or carries on business in Australia to be wound up in Australia, even if it has been wound up, dissolved, deregistered or ceased to exist under the laws of the place where it is incorporated. Section 601CL of the *Corporations Act* (contained in Pt 5B.2 of the *Act* which deals with, relevantly, registered foreign companies) contains a specific power in relation to a foreign company that is registered in Australia, usually because it carries on business in Australia. Where a registered foreign company is wound up in its place of origin, a liquidator appointed by an Australian Court to that registered foreign company, must, unless the Court otherwise orders, recover and realise that foreign company's property in Australia and pay the net amount recovered to the liquidator of the foreign company in its place of origin.

Second, the *Cross-Border Insolvency Act* 2008 (Cth) gives effect to the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law (1997), and commenced operation in Australia on 1 July 2008.<sup>1</sup> The Model Law took effect in Australia in respect of both personal insolvency, governed by the *Bankruptcy Act* 1966 (Cth) and corporate insolvency, governed by Ch 5 of the *Corporations Act* 2001 (Cth). Both the Federal Court of Australia and the Supreme Courts of the Australian States and Territories have jurisdiction to recognise foreign proceedings and cooperate with foreign Courts in

relation to insolvency proceedings under the Model Law.<sup>2</sup> The Australian Courts are required to have regard to the international origin of the Model Law and the need to promote uniformity in its application.<sup>3</sup>

### **Recognition of foreign main proceeding**

The provisions in the Model Law dealing with recognition of a foreign proceeding will be familiar to this audience and are applied in Australia by the *Cross-Border Insolvency Act*. Article 15 of the Model Law allows a foreign representative to apply to an Australian court for recognition of foreign proceedings in which the foreign representative was appointed. Foreign proceedings are recognised under article 17 as either a foreign main proceeding or a foreign non-main proceeding. A foreign proceeding is recognised as a foreign main proceeding if it takes place in the state where the debtor has its centre of main interests (“COMI”).<sup>4</sup> Article 16.3 provides that, 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 debtor’s COMI.<sup>5</sup> On the other hand, a foreign proceeding is recognised as a non-main proceeding if it takes place in a state where the debtor has an establishment.<sup>6</sup>

Australian Courts have determined many applications for recognition of foreign main proceedings under article 17 of the Model Law, as foreign main proceedings or foreign non-main proceedings, many of which have been relatively uncontroversial and successful.<sup>7</sup> The matters relevant to the determination of the COMI were considered by Rares J in *Akers (as joint foreign representative) v Saad Investments Co Ltd (in official liquidation)* (2010) 190 FCR 285; (2010) 276 ALR 508; [2010] FCA 1221. The applicant liquidators had been appointed by the Grand Court of the Cayman Islands to a company that was incorporated and had its registered office in the Cayman Islands, and was the holding company of a global group of companies. The books and records of the company were held by a related company registered in Switzerland and it engaged in commercial activities in several other jurisdictions. The Australian assets of the company included securities listed on the Australian Securities Exchange, and the Australian Taxation Office had a tax claim against the company that significantly exceeded the value of its Australian assets. The company’s liquidation in the Cayman Islands had been recognised as a foreign main proceeding in the United Kingdom, Bermuda and Jersey and was also recognised in Australia under the Model Law. Rares J pointed to differences of approach in other jurisdictions as to the concept of the COMI<sup>8</sup> and treated article 16.3 as allowing the Court to dispense with formal proof that the COMI is situated where the debtor’s registered office is situated, but leaving the contrary finding open on the evidence. To that extent, he preferred the approach in *Re Eurofood IFSC Limited* [2006] Ch 508 at [33]-[35]<sup>9</sup> and *Re Stanford International Bank Ltd* [2011] Ch 33; [2010] EWCA Civ 137 which had followed that approach, while noting a difference of approach in at least some US decisions, and he emphasised (at [49]):

“the importance to international commerce and, to third parties, of having an objective ascertainable basis upon which to commence and decide proceedings that will govern winding up and insolvency of a debtor under the Model Law.”<sup>10</sup>

Last year, in *Kapila, in the matter of Edelsten* [2014] FCA 1112 at [46], the Federal Court had to determine the COMI in respect of an individual. Beach J noted (citing *Moore as debtor in possession of Australian Equity Investors* [2012] FCA 1002)

that the COMI is “where the debtor conducts the administration of the debtor’s interests on a regular basis” and referred to factors identified in the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.<sup>11</sup> His Honour identified two competing views as to when the COMI was to be determined, being either when the application for recognition was filed with the Court<sup>12</sup> or when the foreign proceedings were commenced in the foreign jurisdiction; observed that the “better view” was that the question was to be determined when the foreign proceedings were commenced, on the basis that that would encourage consistency and certainty in recognition proceedings, particularly where they could be commenced in several jurisdictions at different times (at [37]); but applied both approaches in determining the COMI in that case. His Honour held that there was not sufficient evidence to establish that the US was the debtor’s COMI and that the US bankruptcy proceedings should not be recognised as foreign main proceedings, but nonetheless recognised those proceedings as foreign non-main proceedings, where the debtor had had significant business dealings in the US, and granted relevant relief under article 21 of the Model Law.

### **Limiting recognition of foreign main proceeding to preserve tax debts**

I now turn to Australian cases involving an application for leave for the Australian Taxation Office to take enforcement action, where the relevant tax debt would not be admitted to proof in the foreign main proceedings. Commentators have recognised the possibility that the treatment of tax debts, or other debts not recognised by the law of the COMI, may raise challenges for the application of the Model Law. That issue was noted by Professor Westbrook in an article in 2012, which argued that:

“... the proper general rule is universalist, with local rules to be applied only where there is a substantial connection to specific assets and therefore arguably a legitimate reliance on local rules. These instances are not necessarily rare. They would include workers’ reliance on the assets associated with their workplace and customers’ reliance on funds required by regulators to be maintained in local accounts. Certain taxes and secured claims might also be exceptions for similar reasons, although this article does not work through those two important categories of cases. Thus there is room in a universalist regime for a choice of law rule based on the existence of such expectations, permitting local assets to be distributed under local rules where appropriate.”<sup>13</sup>

Professor Westbrook also qualified an observation in that article as to the lack of discrimination between the treatment of local and foreign creditors under the Bankruptcy Code (US) by recognising, in a footnote, that there may be an exception in respect of taxes and other public law claims.<sup>14</sup>

The Australian cases dealing with this question turn on the scope of articles 20 and 22 of the Model Law and the statutory power, under the *Corporations Act*, for a court to grant leave to take enforcement action against a company in liquidation. Article 20 of the Model Law, as applied by the *Cross-Border Insolvency Act* in Australia, deals with the legal effect of the recognition of a foreign main proceeding.<sup>15</sup> Article 20.1 provides that, if the court recognises a foreign main proceeding, then (1) the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed; (2) execution against the debtor’s assets is stayed; and (3) the right to transfer, encumber or otherwise dispose of the debtor’s assets is

suspended. That effect arises by operation of law on recognition of the foreign main proceeding, not by any order of the Court. The extent of that effect may be modified by the laws referred to in article 20.2 which preserve the operation of local insolvency laws, relevantly Chapter 5 of the *Corporations Act* with specified exclusions.<sup>16</sup> The provisions which are preserved by the Model Law as adopted in Australia include those which allow an Australian Court to grant leave to bring proceedings or take certain enforcement actions<sup>17</sup> and preserve a secured creditor's ability to realise or deal with its security.

Article 21.1 of the Model Law provides that, on recognition of a main or non-main foreign proceeding, and where necessary to protect the debtor's assets or creditors' interests, the Court may grant relief including entrusting the administration or realisation of all or part of the debtor's assets located in the state to the foreign representative or another person and granting additional relief that may be available to an administrator or liquidator under Australian law. Article 21.2 allows the Court to entrust the distribution of local assets to the foreign representative if Australian creditors are adequately protected.<sup>18</sup> Article 21.3 provides that, where a proceeding has been recognised as a foreign non-main proceeding, that relief is limited to assets that, under Australian law, should be administered in that foreign non-main proceeding or concerning information required in that proceeding. Article 22 provides that the Court must have regard to the interests of creditors, interested persons and the debtor in determining whether to grant or refuse relief under, relevantly, article 21 or grant such relief on terms. That article does not itself limit the effect of recognition of main proceedings under article 20 of the Model Law.

Australian Courts have recently considered whether the effect of recognition of a foreign main proceeding should be qualified so as to preserve the Australian Taxation Office's ability to enforce, against Australian assets, tax debts that would not be provable in the liquidation in the COMI. I have referred to the first decision in *Akers (as joint foreign representative) v Saad Investments Co Ltd (in official liquidation)*, dealing with the recognition of the foreign main proceedings, above. The liquidator in the Cayman Islands was there entrusted with administration of the company's Australian assets, on terms that it would give notice to the Deputy Commissioner of Taxation before remitting those assets to the Cayman Islands. The liquidator gave such notice in late 2012 and the Deputy Commissioner of Taxation applied to modify the recognition orders to permit it to issue statutory notices and take enforcement steps under the *Taxation Administration Act 1953* (Cth). The Deputy Commissioner of Taxation had lodged a proof of debt and participated in a meeting of creditors in the Cayman Islands liquidation. However, the case proceeded on the basis that the Deputy Commissioner of Taxation's proof of debt would not be accepted in the Cayman Islands on the basis that it would amount to the enforcement of a foreign (Australian) revenue law.

In a second decision in *Akers (as joint foreign representative) v Saad Investments Co Ltd (in official liquidation)* [2013] FCA 738, Rares J modified the recognition orders to permit the Deputy Commissioner of Taxation to exercise rights and issue statutory notices so as to recover the amount that it would have received, on a *pari passu* basis, had it been entitled to prove for the taxation debt as an unsecured creditor in the Cayman Islands liquidation. His Honour relied on article 20.3 which preserves the Court's power to grant leave under s 471B of the *Corporations Act*

and article 22 for that result. His Honour noted that the remission of the funds to the Cayman Islands would give a windfall to creditors other than the Deputy Commissioner of Taxation and did not accept that it would, in the language of Lord Hoffman in *HIH Insurance Ltd* [2008] 1 WLR 852 at 862; [2008] UKHL 21, give effect to the expectations of creditors as a whole.

On appeal in *Akers as joint representative of Saad Investments Company Ltd (in official liquidation) v Deputy Commissioner of Taxation* (2014) 311 ALR 167, [2014] FCAFC 57, the liquidator argued that the approach adopted at first instance undermined the universalist intent of the Model Law and that the Australian Taxation Office's inability to prove for its tax debt in the Cayman Islands reflected the accepted international approach that did not recognise claims of foreign revenue creditors in a liquidation. The Full Court of the Federal Court (in a judgment of Allsop CJ, with whom Robertson and Griffiths JJ agreed) upheld the decision at first instance that the stay arising from the recognition of the Cayman Islands liquidation as a foreign main proceeding should be limited to permit the Australian Taxation Office to take enforcement action against the company's Australian assets, to the extent necessary to recover a pro rata distribution calculated against all of its assets.

Allsop CJ acknowledged the universalist approach of the Model Law, and referred to the decision of the House of lords in *HIH Casualty & General Insurance Ltd; McGrath v Riddell* [2008] UKHL 21; (2008) 1 WLR 552 and also to the decision of the Third Circuit in *Re ABC Learning Centres Ltd* 728 F (3d) 301 (2013). However, his Honour observed (at [114]) that general statements of the principal of universalism did not:

“direct attention to the particular case of how a local (recognising) Court should approach the question of the position of a creditor who has enforceable rights in the local (recognising) jurisdiction, but who will be stripped of all the benefit of those rights if assets are sent to the foreign main proceeding, because the law of that jurisdiction will not permit the enforcement of such a debt.”

His Honour also pointed to the aim of protection of local creditors under article 21.2 of the Model Law; that the Model Law was not intended to bring about a change to the substantive law of the recognising state; and (at [116]) that the policy of universalism adopted in the Model Law was one that “protects local creditors” and (at [118]) did not necessarily warrant the sacrifice of the rights of local creditors. In particular, his Honour noted that the effect of recognition of a foreign proceeding approach was qualified by the Court's ability to modify the effects of that recognition under article 20.2 of the Model Law; that, although article 20 applied automatically on the recognition of foreign main proceedings, it could be affected under article 20.2 by Australian laws relating to the scope and the modification or termination of the stay and suspension; and that article and s 471B of the *Corporations Act* (Cth) allowed the Court to grant leave to take action which would otherwise have been subject to a stay in an Australian liquidation. His Honour also observed that orders made under article 21 were discretionary and subject to further order of the Court and the recognition of local creditors' interests under article 21.2.

The Full Court did not accept the submission put by the liquidator that the Deputy Commissioner of Taxation should be limited to a pro rata share of the funds held in

Australia, where other creditors would also be entitled to prove against funds held in the Cayman Islands, and noted that the previous Australian law would have required other creditors claiming in an ancillary winding up in Australia to bring to account their recovery in the Cayman Islands liquidation. His Honour held (at [138]) that “the most potent informing principle is the notion of fair and equal treatment of all creditors” and that a balance of the protection of local creditors under article 21.2 and the protection of all creditors would be achieved by recognising the equality of all creditors in dealing with the company’s funds. For completeness, his Honour also held that the submission of a proof of debt, for voting purposes, by the Deputy Commissioner of Taxation at an early point in the liquidation in the Cayman Islands did not disentitle it from bringing its application to the Australian Court.

This approach has potential application beyond tax claims, and the Full Court recognised that similar issues might also arise in respect of claims that were unenforceable for other reasons in the COMI.<sup>19</sup> The High Court of Australia subsequently declined to grant special leave to appeal ([2014] HCA Trans 231) on the basis that it was not persuaded that there was sufficient reason to doubt the correctness of the decision of the Full Court of the Federal Court.

In *Kapila, in the matter of Edelsten* above, Beach J followed *Akers* in qualifying orders made under article 21 of the Model Law, in the case of a foreign non-main proceeding, to preserve the position of tax debts that were not provable in the foreign jurisdiction (the United States) so that the Australian Taxation Office’s access to a pro rata distribution of the debtor’s assets would be preserved.

It is worthwhile to go back in time to contrast the result in *Akers as joint representative of Saad Investments Company Ltd (in official liquidation) v Deputy Commissioner of Taxation* with that of an earlier decision of the House of Lords with an Australian connection, *HIH Casualty & General Insurance Ltd; McGrath v Riddell* above. Allsop CJ referred to that decision in *Saad Investments* (at [104]) and noted that *Saad Investments* concerned an inability to prove in a foreign administration, whereas *HIH Casualty & General Insurance Ltd; McGrath v Riddell* dealt with disadvantage to some creditors if amounts were remitted from the United Kingdom to, and distributed in, Australia. The two cases plainly involve different results but also, arguably, quite different issues.

In *HIH Casualty & General Insurance Ltd; McGrath v Riddell* above, the English Courts had to consider an application by the Australian liquidator of an Australian insurance company, HIH, for an order under s 426(4) of the *Insolvency Act 1986* (UK), that English assets of the HIH Group be remitted to Australia for distribution. That order was sought on the basis of a letter of request issued by the Supreme Court of New South Wales to the English court. A potential obstacle to that order was that the Australian Corporations legislation provided for distribution of the proceeds of reinsurance recoveries to holders of insurance policies, in priority to other creditors, and to that extent qualified the pari passu approach which would then have been adopted under English law. The Model Law implemented by the *Cross-Border Insolvency Regulations 2006* (UK) did not apply in that case, both because insurance companies were excluded from its scope and because the insolvency had commenced before it took effect.

At first instance, the High Court (UK) denied relief on the basis that the scheme for distribution in the Australian liquidation, which would give priority to holders of insurance policies, was inconsistent with the English law. The Court of Appeal reached the same result, on the somewhat different basis that there was not sufficient advantage from a transfer of the assets to Australia to outweigh the prejudice to other creditors.

The majority in the House of Lords, Lord Scott, Lord Neuberger and Lord Phillips held that the Court had jurisdiction under s 426 of *the Insolvency Act* to grant the request by the Supreme Court of New South Wales and that the basis to transfer the assets to Australia had been established. Both Lord Neuberger and Lord Scott doubted whether that jurisdiction would exist at general law, beyond the extent to which it was available under s 426 of the *Insolvency Act*, if another jurisdiction which did not distribute the assets in accordance with statutory rights under English insolvency legislation. On the other hand, Lord Hoffman (with whom Lord Walker agreed) observed that the Court should remit the assets at general law if it found that the requesting jurisdiction was more appropriate to deal with the winding up, even if that distribution would not follow *pari passu* principles under English law. He referred to a principle of “modified universalism” in broad terms, consistent with the views he had previously expressed in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UK PSC 26; [2007] 1 AC 508, and suggested that, where possible, there should be a “unitary bankruptcy proceeding in the Court of the bankrupt’s domicile which requires world-wide recognition and which should apply “universally to all the bankrupt’s assets”. Lord Phillips limited his decision to the application of s 426 of the *Insolvency Act*, and did not address the difference between the other Law Lords as to the extent of the jurisdiction at general law.<sup>20</sup> The principle of “modified universalism” in the broad form expressed by Lord Hoffman in *Cambridge Gas* and *HIH* has since been, at the least, qualified by in UK decisions in other contexts, including *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236 and to some extent in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2014] BLC 397 (Privy Council).<sup>21</sup>

The apparent difference in the result in the two cases is that, in *HIH Casualty & General Insurance Ltd; McGrath v Riddell* above, the House of Lords was prepared to remit assets to Australia notwithstanding that one class of creditors, the non-insurance creditors, would on one view be disadvantaged in an Australian liquidation as against insurance creditors. In *Saad Investments*, assets would only be remitted after permitting enforcement action against them (which in practice would exhaust them) where one creditor, the Australian Taxation Office, would have been significantly disadvantaged by the transfer of assets as against creditors generally. However, there seems to me to be a fundamental difference between the two cases. All that was involved in *HIH Casualty & General Insurance Ltd; McGrath v Riddell* was whether the English assets should be remitted to Australia. In *Saad Investments*, the Australian Taxation Office had statutory rights that could be exercised over the assets in Australia unless a restraint on their exercise was continued. The question was therefore not only whether to remit the assets, but whether the Australian Taxation Office could fairly be prevented from exercising those statutory rights in Australia where it could not prove for its debt in the Cayman Islands.

## Ancillary relief under Article 21

In *Crumpler (as liquidator and joint representative of Global Tradewaves Ltd) v Global Tradewaves (in liq)* [2013] FCA 1127, an Australian Court also permitted reliance on article 21.1 of the Model Law to support ancillary relief, including the issue of an examination summons to an Australian resident and a requirement for the production of documents. That course was taken although there was no evidence that the relevant company had carried on business or had creditors in Australia.

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<sup>1</sup> Sections 2 and 6 of the *Cross-Border Insolvency Act 2008* (Cth). See generally J Martin, "Cross-Border Insolvency and the Common Law" in KE Lindgren (ed), *International Commercial Litigation and Dispute Resolution* pp 213-223; S Maiden, "A comparative analysis of the use of the UNCITRAL model law on cross-border insolvency in Australia, Great Britain and the United States (2010) 18 *Insolv LJ* 63; S Atkins & R Mason, "Australia" in LC Ho (ed), *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law*, 3<sup>rd</sup> ed, 2012, pp15-53;

<sup>2</sup> Section 10 of the *Cross-Border Insolvency Act 2008* (Cth).

<sup>3</sup> Section 6 of the *Cross-Border Insolvency Act 2008* (Cth) and article 8 of the Model Law.

<sup>4</sup> Article 17.2 of the Model Law.

<sup>5</sup> By contrast with article 16.3, the corresponding US provision refers to evidence to the contrary, rather than proof to the contrary, and has been treated as having the result that the location of the registered office will not establish the COMI except where there is no contrary evidence: *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122 (SDNY 2007), aff'd 389 BR 325 (SDNY 2008).

<sup>6</sup> The term "establishment" is defined in article 2(f) as "any place of operations where the debtor carries on a non-transitory economic activity with human means and goods or services".

<sup>7</sup> *Hur (in his capacity as foreign representative of Samsun Logix Corporation) v Samsun Logix Corporation* [2009] FCA 372 (recognition of South Korean receivership); *Tucker, in the matter of Aero Inventory (UK) Ltd v Aero Inventory (UK) Ltd (No 2)* (2010) 77 ACSR 510; [2009] FCA 1481 (recognition of UK voluntary administration); *Katayama v Japan Airlines Corporation* (2010) 79 ACSR 286; [2010] FCA 794 (recognition of trusteeship for corporate reorganisation); *Akers (as joint foreign representative) v Saad Investments Co Ltd (in official liquidation)* [2010] FCA 1221 (recognition of liquidation in Cayman Islands); *Re Chow Cho Poon (Private Ltd)* [2011] NSWSC 300 (recognition of Singapore liquidation); *Lawrence v Northern Crest Investments Ltd (in liq)* [2011] FCA 672 (recognition of New Zealand liquidation); *Sheahan v Ex Ced Foods* [2011] FCA 692 (recognition of New Zealand liquidation).

<sup>8</sup> His Honour referred to the decisions in *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 389 BR 325 (SDNY 2008) and *Re Betcorp Ltd* (2009) 400 BR 266 and to the decisions of the European Court of Justice in *Re Eurofood IFSC Ltd* [2006] Ch 508 and the English Court of Appeal in *Re Stanford International Bank Ltd* Ch 508; [2011] Ch 33; [2010] EWCA (Co) 137 (denial of recognition of the US receivership, holding that the COMI of a Stanford subsidiary was in Antigua rather than the US); for discussion as to difference between the English and US approaches, see G McCormack, "COMI and comity in UK and US insolvency law" (2012) 128 *LQR* 140.

<sup>9</sup> The European Court of Justice had observed that:

"... the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. ...

It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

That could be so in particular in the case of a "letterbox" company not carrying out any business in the territory of the member state in which its registered office is situated."

<sup>10</sup> Subsequent Australian decisions applying that approach include *Moore, as debtor in possession of Australian Equity Investors v Australian Equity Investors* [2012] FCA 1002 at [19] – [20], where Emmett JA observed that:



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“The centre of main interests is to be determined in the light of the facts as at the relevant time for determination, but those facts may include historical facts that have led to the position as it is at the time for determination. In making a determination, the court must have regard to the need for the centre of main interests to be ascertainable by third parties, creditors and potential creditors in particular. It is important, therefore, to have regard not only to what the debtor is doing, but also to what the debtor would be perceived to be doing by an objective observer. It is important also to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence. ...

The centre of main interests should correspond to the place where the debtor conducts the administration of the debtor’s interests on a regular basis and that is therefore ascertainable by third parties. It must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment are necessary to ensure legal certainty and foreseeability concerning the determination of which court has jurisdiction to consider insolvency proceedings. In determining the centre of the main interests of a debtor company, the simple presumption laid down by the Model Law can be rebutted only if factors that are both objective and ascertainable by third parties enable it to be established that an actual situation exists that is different from that which locating it at the registered office is deemed to reflect.”

See also *Young Jr, In the Matter of Buccaneer Energy Ltd v Buccaneer Energy Ltd* [2014] FCA 711 at [7].

<sup>11</sup> *Kapila, in the matter of Edelsten* [2014] FCA 1112 at [53]. The identified factors include the location of the debtor’s books and records; where financing was organised; the location of the debtor’s principal assets or operations; the location of its principal bank or principal lender; the location of any administration, payroll, accounts payable or cash management activity relating to the debtor’s business; the location of any taxation authority relevant to the debtor’s income from personal exertion and taxation on it; and the location of the majority of creditors.

<sup>12</sup> That test was applied as at the date of the application for recognition in two earlier Australian cases, *Moore, as debtor in possession of Australian Equity Investors v Australian Equity Investors* above and *Gainsford v Tannenbaum* (2012) 216 FCR 543; [2012] FCA 904 and, in *Gainsford*, Logan J recognised, with apparent regret, the possibility that a debtor’s habitual residence may have altered, whether before or after his or her bankruptcy, so that it was no longer located in the jurisdiction in which the relevant bankruptcy proceedings were taking place. A similar issue arose in *In re Ran* 607 F 3d1017 (5<sup>th</sup> Cir 2010), noted AL Gropper “The Arbitration of Cross-Border Insolvencies” (2012) 86 *Am Bankr LJ* 201 at 208.

<sup>13</sup> JL Westbrook, “Breaking away: Local priorities and global assets” (2011) 46 *Tex Int’l LJ* 601 at 603; see also JM Weiss, “Tax Claims in Transnational Insolvencies: A ‘Revenue Rule’ Approach” (2010) *Virginia Tax Revenue* 261.

<sup>14</sup> Westbrook, above at note 25.

<sup>15</sup> The operation of the corresponding provision, s 1520, in Chapter 15 of the Bankruptcy Code (US) is considered in Westbrook, above at 618.

<sup>16</sup> The provisions that are not preserved are Pt 5.2, dealing with receivers and other controllers and Pt 5.4A, dealing with winding up on grounds other than insolvency, and s 601CL of the *Corporations Act*

<sup>17</sup> Sections 471B–471C of the *Corporations Act*.

<sup>18</sup> A US Bankruptcy Court has also relied on the corresponding provision, s 1521, in Chapter 15 of the Bankruptcy Code (US) in declining to authorise the transfer of US assets until a foreign representative provided evidence as to the protection of US creditors in the COMI: *In re International Banking Corp* BSC 439 BR 614 (Bankr SDNY 2010); see AL Gropper, “The payment of Priority Claims in Cross-Border Insolvency Cases” (2011) *Tex Int’l LJ* 559 at 565

<sup>19</sup> For discussion of this case, see R Mason, “Comment” in K Lindgren and N Perram (eds), *International Commercial Law, Litigation and Arbitration*, 2011, p 329; L Powers, “Cross-Border Insolvency: The Australian Approach to Ascertain COMI” (2011) 22 *JBFLP* 64; S Maiden, “Saad Investments asks more questions than it answers” (2013) 21 *Insolv LJ* 202; L Powers, “Protecting the interests of local creditors in an international context: Ackers [sic] v Saad Investments Co Ltd revisited” (2013) 24 *JBFLP* 315.

<sup>20</sup> See J Spigelman, “Cross-Border Insolvency: Cooperation or Conflict” (2009) 83 *ALJ* 44; H Thom, “Ancillary Liquidations and Pari Passu Distribution in a Winding-Up by the Court” ( ) *Lloyds Maritime*

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*and Commercial Law Quarterly* 113; RI Barrett, "Commentary on Cross-Border Insolvency: Judicial Assistance in the Post-Hoffman Era", 30 August 2013.

<sup>21</sup> See A Watters, "Cooperation in international insolvency; and era of retrenchment" (2014) 35 *Comp Law* 235; H Rajak, "Modified universalism in international insolvency and the Rubin case: one step backwards" (2014) *Co LN* 350, 1-4; J Kelly, "The enforcement of foreign judgments in avoidance proceedings in insolvency" (2014) 22 *Insolv LJ* 81; H Rajak, "Between Scylla and Charybdis; the increasingly unwieldy world of cross-border insolvency" (2015) *Co LN* 367.