

UN Day Lecture 2019

Commentary by Scott Butler¹

Introduction

I am grateful to have been asked to provide some additional commentary to complement Professor Mason's paper, which provides an excellent overview of UNCITRAL's work and contribution to cross-border insolvency over the years.

Unlike the US,² UK³ and more recently Singapore,⁴ Australia's insolvency regime is not, by its nature (or design), one that attracts insolvency filings by foreign companies seeking to use our insolvency processes to restructure. Accordingly, our cross-border insolvency matters generally consist of applications seeking recognition of foreign insolvencies under the UNCITRAL Model Law on Cross-Border Insolvency (**Model Law**) and related orders available under the Model Law either prior to or post recognition.

Australia's adoption of the Model Law expanded the ability of foreign representatives of foreign insolvencies to obtain assistance from Australian courts and, to that end, it is to be commended, however, there remain a number of issues in practice about how the Model Law operates which require consideration and potentially reform in the manner in which Australia has adopted the Model Law. I have chosen a few of them to highlight today.

The definition of a foreign main proceeding and a foreign non-main proceeding

The Model Law is just that; a model law. It is a model, which countries that elect to implement it, can use as a framework. Some countries implement it with little or no modification, such as Australia which implemented the Model Law with minimal changes by reproducing it in a schedule to the *Cross-Border Insolvency Act 2008* (Cth) (**CBIA**) and including the modifications necessary for implementation in Australia in the provisions of the Act. Others modify it substantially.⁵ Unless otherwise stated, references in this paper to the Model Law are references to it as enacted in Australia.

The Model Law allows for a foreign insolvency representative to apply to an Australian court for recognition of a foreign insolvency proceeding.⁶ Recognition of the foreign proceeding as a foreign main proceeding brings about an automatic stay of proceedings in Australia against the foreign debtor or its assets.⁷ Recognition as either a foreign main proceeding or a foreign non-main proceeding allows the courts to make various orders, such as a stay, allowing the foreign representative to take possession of assets or to transfer assets out of the jurisdiction, to examine witnesses, etc.⁸

Article 17(2)(a) of the Model Law provides that a foreign proceeding shall be recognised as a foreign main proceeding if it is taking place in the State (i.e. country) where the debtor has the centre of its main interests (**COMI**). 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 centre of the debtor's main interests.

The Australian courts have adopted the test set out by the Court of Justice of the European Communities (**ECJ**) in *In re Eurofood IFSC Ltd* [2006] Ch 508 to determine whether the presumption as to the location

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² Via Chapter 11 of the US Bankruptcy Code.

³ Via a UK Scheme of Arrangement.

⁴ Via a Singapore Scheme of Arrangement.

⁵ Canada, for example, only enacted 20 of the 32 Articles in the Model Law.

⁶ Article 15 of the Model Law.

⁷ Article 20 of the Model Law.

⁸ Article 21 of the Model Law.

of COMI in article 16(3) is rebutted.⁹ In *Eurofood*, the ECJ held that to rebut the presumption in article 16(3), there must be factors, which are both objective and ascertainable by third parties, which are sufficient to establish the COMI is elsewhere.

Article 17(2)(b) of the Model Law provides that a foreign proceeding shall be recognised as a foreign non-main proceeding if the debtor has an establishment in the foreign State. "Establishment" is defined in Article 2(f) to mean "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services." That is, it requires a permanent, or semi permanent, place of business.

Where an individual made bankrupt in a foreign jurisdiction resides in Australia and no longer carries on any permanent business in the foreign jurisdiction, they neither have a COMI in the foreign jurisdiction, nor do they have an establishment in the foreign jurisdiction. That leads to the situation where the foreign bankruptcy cannot be recognised under the Model Law as either a foreign main proceeding or a foreign non-main proceeding.¹⁰ That leaves the foreign representative with the fall back position of using the letter of request regime under section 29 of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) to seek assistance.

The requirement for either COMI or an establishment to be present in the jurisdiction where the foreign insolvency is taking place can also prevent recognition of foreign insolvencies in jurisdictions which allow filing with only limited connection to the jurisdiction. In the US, for example, a debtor can establish jurisdiction to file for Chapter 11 or another form of bankruptcy if they have any property in the United States.¹¹ This requirement can be satisfied by having only nominal amounts in the US, including funds held on retainer by US lawyers.¹²

Similarly, Singapore recently introduced amendments to its insolvency laws which included making it easier for foreign companies to file insolvency proceedings in Singapore. A foreign company need only have a "substantial connection" with Singapore, which includes carrying on business in Singapore, having substantial assets in Singapore or having Singapore law-governed finance documents.¹³

A debtor company that relies on such limited jurisdictional connections to file for bankruptcy relief in the US or an insolvency proceeding in Singapore, may not have either its COMI or an establishment in the US or Singapore and accordingly, the foreign proceeding may not be able to be recognised in Australia under the Model Law.¹⁴ This is a concern as the ability to recognise a foreign insolvency proceeding in other jurisdictions where the entity has assets may be a relevant factor in deciding where to file the proceeding.¹⁵

The issues associated with having to prove either COMI or an establishment in the foreign jurisdiction could be avoided by Australia amending the definition of foreign non-main proceeding in our adoption of the Model Law. In Canada, for example, when adopting the Model Law, they did so with a simplified

⁹ See for example, *Ackers (as joint foreign representative) v Saad Investments Company Limited (in official liquidation) (a company registered in the Cayman Islands)* [2010] FCA 1221; *Young, Jr, in the matter of Buccaneer Energy Limited v Buccaneer Energy Limited* [2014] FCA 711.

¹⁰ For example, see *Gainsford v Tannenbaum* (2012) 216 FCR 543; *Official Assignee in Bankruptcy of the Property of Ma v Ma* [2018] FCA 948; *Official Assignee in Bankruptcy of the Property of Hanna; Hanna v Hanna* [2018] FCA 156.

¹¹ *In re Golobo Comunicacoes E Participacoes S.A.*, 317 B.R. 235, 249 (Bankr. S.D.N.Y. 2004).

¹² *In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014); *In re Suntech Power Holdings Co., Ltd* 520 B.R. 399 (Bankr. S.D.N.Y. 2014).

¹³ See sections 63(3), 88(1), 246(1)(d) and 246(3) of the *Insolvency, Restructuring and Dissolution Act 2018* (Singapore).

¹⁴ For an example of where recognition was refused because a foreign debtor in Chapter 11 Bankruptcy did not have either its COMI or an establishment in the US see *Legend International Holdings Inc (as debtor in possession of the assets of Legend International Holdings Inc) v Legend International Holdings Inc; sub nom Indian Farmers Fertilizer Cooperative Ltd v Legend International Holdings Inc* (ACSR) (2016) 52 VR 1; (2016) 113 ACSR 568; [2016] VSC 308; BC201604229.

¹⁵ The foreign representatives of these insolvencies are left to use the letter of request procedure under section 581 of the Corporations Act to seek assistance from Australian courts.

definition of foreign non-main proceeding being 'a foreign proceeding, other than a main proceeding',¹⁶ which has the effect of ensuring that foreign proceedings will be a non-main proceeding if they are not a main proceeding.

The limits to Article 23

Article 23 of the Model Law as enacted in Australia,¹⁷ provides that, upon recognition of a foreign proceeding, the foreign representative has standing to initiate voidable transaction actions arising under or because of:

- (a) section 120, 121, 121A, 122, 128B or 128C or Division 4A of Part VI of the Bankruptcy Act; or
- (b) Division 2 of Part 5.7B of the *Corporations Act 2001* (Cth).

In the recent decision of *King (Trustee), in the matter of Zetta Jet Pte Ltd v Linkage Access Limited*,¹⁸ Justice Perram confirmed that Article 23 of the Model Law, whilst giving foreign representatives "standing" to initiate such claims, does not create any cause of action that the foreign representative can enforce if the domestic laws do not confer such a cause of action.

In the Zetta Jet matter, following recognition of the US bankruptcy of Zetta Jet Pte Ltd (a Singaporean registered company), the foreign representative sought to commence an action to set aside certain transactions entered into by Zetta Jet Pte Ltd as voidable transactions under section 588FB of the Corporations Act. However, section 588FB is concerned with a transaction of a 'company' and, to be a company under the Corporations Act, Zetta Jet, as a foreign company, needed to be registered as a foreign company with ASIC or, if not so registered, must have carried on business in Australia. Zetta Jet had done neither. Accordingly, the foreign representative could not bring a voidable transaction claim.

This to me is a distinct shortcoming of the way the Model Law operates. It means that Article 23 of the Model Law is useless unless a foreign company satisfies the test of being a company under the Corporations Act. Similar restrictions on commencing voidable transaction actions under the Bankruptcy Act are likely to apply to foreign representatives of the insolvent estate of individuals.¹⁹

Given these issues, in my view, consideration should be given to amending the way Article 23 is incorporated to grant automatic jurisdiction to foreign representatives to take such voidable transaction claims once the foreign insolvency has been recognised. UNCITRAL's Working Group V will be considering such choice of law issues in a colloquium discussions in New York in May next year and so it may be that UNCITRAL can come up with some guidance on this point in due course.

When COMI is to be determined

There remains a question in Australia as to what is the appropriate time to consider whether the foreign proceeding is a foreign main or foreign non-main proceeding.

Recently in *King, in the matter of Zetta Jet Pte Ltd*²⁰ Perram J decided the question should be asked at the time that the foreign insolvency proceeding is opened. This followed the approach of Beach J in *Kapila, in the matter of Edelsten*²¹ (**Kapila**). Perram J noted that this would avoid the situation where the debtor had an establishment in the foreign country when the insolvency commenced, but no longer

¹⁶ *Companies Creditors Arrangement Act*, RSC 1985, c C-36 s 45(1); *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 268(1).

¹⁷ Section 17 of the *Cross-Border Insolvency Act 2008* (Cth) sets out the relevant provisions of the Bankruptcy Act and Corporations Act which are available to a foreign representative under Article 23.

¹⁸ [2018] FCA 1979.

¹⁹ This point is yet to be directly considered by a court as far as I am aware.

²⁰ [2018] FCA 1932.

²¹ [2014] FCA 1112 at [35]-[39].

had one at the time of filing the recognition proceedings, because the operations had been closed down by the foreign representative.²²

This approach is consistent with the current Guide to Enactment and Interpretation of the Model Law issued by UNCITRAL in January 2014.²³ UNCITRAL's original Guide to Enactment issued in 1997, when the Model Law was first adopted, said nothing about the relevant date for determining a debtor's COMI or the existence of an establishment. This inclusion and the reasoning behind it have, however, been the subject of well reasoned and, in my view, persuasive academic criticism.²⁴

Earlier in *Gainsford v Tannenbaum*²⁵ Logan J found the question should be answered at the time the recognition proceeding is filed. This accords with the US approach which was set down by the US Court of Appeals for the 2nd Circuit in *In re Fairfield Sentry Ltd.*, 714 F. 3d 127 Court of Appeals, 2nd Circuit 2013 and is now accepted across all Circuits as the proper approach. This approach has led to the US courts sometimes finding that COMI has shifted from where it was when the foreign proceedings were initiated to when the recognition proceeding was filed.

In *Fairfield*,²⁶ Fairfield Sentry Limited (**Fairfield**), a British Virgin Islands (**BVI**) company, was wound up in the BVI. At the time of the order for its winding up, its COMI was in New York as it conducted a funds management business from New York. By the time the liquidators filed recognition proceedings in New York, Fairfield had no place of business, no management, and no tangible assets located in the United States. Rather, its activities for an extended period of time had been conducted only in connection with winding up of its business, which had been conducted by the liquidators from the BVI. Accordingly, the Court of Appeals, Second Circuit held that its COMI at the time of filing the recognition petition was in the BVI.

A similar result was reached in *In re Suntech Power Holdings Co., Ltd*²⁷ where Suntech's COMI shifted from China at the time it was ordered to be wound up in the Cayman Islands to the Cayman Islands at the time recognition proceedings were filed in the US due to the liquidation being conducted from the Cayman Islands. The ability for the courts to find that COMI is where the foreign insolvency is being conducted avoids the issue identified above by Perram J of the debtor no longer having an establishment when recognition proceedings are filed.

A third approach was taken by Emmett J in *Moore as Debtor-in-Possession of Australian Equity Investors v Australian Equity Investors*²⁸ who thought the question should be answered as at the time the Australian court is called on to make the decision.

This issue needs to be resolved at appellate level or by legislation so that we have some certainty.

The nature of the automatic stay

Article 20 provides that recognition of a foreign main proceeding automatically invokes an automatic stay on the commencement and continuance of proceedings against the foreign debtor. The scope of this stay is governed by section 16(b) of the *Cross-Border Insolvency Act 2008* (Cth) which provides that the scope is the same as would apply if the stay arose under:

- (a) the Bankruptcy Act; or
- (b) Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act,

²² [2018] FCA 1932 at [11] and [12].

²³ See paras 31 and 157-160.

²⁴ Look Chan Ho, 'The Revised UNCITRAL Model Law Enactment Guide—A Welcome Product?', 2014, *Journal of International Banking Law and Regulation*, Issue 6, p 325.

²⁵ [2012] FCA 904; 216 FCR 543 at 555 [45].

²⁶ *In re Fairfield Sentry Ltd.*, 714 F. 3d 127 Court of Appeals, 2nd Circuit 2013.

²⁷ *In re Suntech Power Holdings Co., Ltd* 520 B.R. 399 (Bankr. S.D.N.Y. 2014).

²⁸ [2012] FCA 1002 at [18].

as the case requires.

Chapter 5 of the Corporations Act includes the provisions relating to schemes of arrangement, voluntary administration and liquidation. The scope of the applicable stay, or lack thereof, differs for each.²⁹ For example, there is no automatic stay for schemes of arrangement. In voluntary administration the stay extends to secured creditors in certain circumstances,³⁰ whilst there is no stay on the actions of secured creditors in liquidation.³¹ As Rares J observed in *Hur v Samsun Logix Corporation* [2015] FCA 1154; (2015) 238 FCR 483 (Hur) at [21], the operation of these provisions is “beguilingly ambiguous, since the Corporations Act has a variety of different stay provisions that differentially affect the position of secured creditors, sometimes at different points in the same overall process”.

The explanatory memorandum to the *Cross-Border Insolvency Bill 2008 (Cth)*³² explains that it is left to the court to decide which stay should apply in any particular case, having regard to all the circumstances of the case. Thus, for example, if the foreign proceedings are more akin to voluntary administration proceedings under Part 5.3A of the Corporations Act than any other Part, the stays and suspensions in accordance with the provisions of Part 5.3A apply.³³

Ultimately, the court needs to make this determination even though foreign insolvency processes can often have characteristics which straddle different Australian insolvency processes. To assist the court, the foreign representative will often lead evidence about the nature of the foreign insolvency procedure, generally from an insolvency expert from the foreign jurisdiction. Once the determination has been made, the court should make a declaration as to which Australian insolvency procedure’s stay provisions apply.³⁴

Other jurisdictions have enacted the Model Law with greater certainty as to the nature of the automatic stay. For example, Article 20 of the Model Law as enacted in Singapore³⁵ and Great Britain³⁶ states the stay which arises is the same in scope and effect as if the debtor had been made the subject of a winding up order, notwithstanding that both jurisdictions have other insolvency procedures which may be more akin to the foreign proceeding. In Canada, the relevant stay is also expressly set out.³⁷ It would be preferable in my view if Australia had adopted a similar position. This would also avoid some of the issues which arise in relation to lack of compliance with Article 18 as discussed below.

Lack of compliance with Article 18 of the Model Law

Article 18 of the Model Law requires the foreign representative 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. As discussed above, the status of the foreign proceeding is relevant to the

²⁹ Chapter 5 of the Corporations Act, to the extent relevant, includes the following Parts:

- (a) Part 5.1 (scheme of arrangement) – no stay applies.
- (b) Part 5.3A (voluntary administration) – ss 440A-440JA provide for stays.
- (c) Part 5.4/Part 5.4B (Court-ordered liquidation) – ss 467, 471B and 471C provide for stays.
- (d) Part 5.5 (voluntary liquidation) –s 500 provides for a stay.

³⁰ See sections 440B and 441A.

³¹ The stay is contained within section 471B for court ordered liquidations and section 500 for voluntary liquidations and neither apply to secured creditors.

³² At paragraph 1.28.

³³ *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 at [37].

³⁴ In *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 the declaration made by the court was ‘*The Court declares that for the purpose of section 16 of the Cross-Border Insolvency Act 2008 (Cth) and article 20(2) of the Model Law, the scope and modification or termination of the stay and suspension referred to in article 20(1) of the Model Law are the same as would apply if the stay and suspension arose under Part 5.3A of the Corporations Act 2001 (Cth).*’

³⁵ Article 20(1) of the Model Law as enacted within the Third Schedule of the *Insolvency, Restructuring and Dissolution Act 2018* (Singapore).

³⁶ Article 20(1) of the Model Law as enacted in *The Cross-Border Insolvency Regulations 2006*.

³⁷ *Companies Creditors Arrangement Act*, RSC 1985, c C-36 s 48; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 271.

nature of the stay that is appropriate at any point in time. If, for example, the foreign proceeding transitions from a rehabilitation or restructuring procedure most akin to voluntary administration to a liquidation type procedure, the terms of the automatic stay should move from a voluntary administration type stay to a liquidation type stay. If the foreign proceeding is dismissed or withdrawn, the stay should be lifted.

Unfortunately, it is not uncommon for foreign representatives to fail to update Australian courts about changes in the status of the foreign proceeding.³⁸ This can be due to oversight or forgetfulness (for example, forgetting to advise the court that the foreign proceeding has transitioned to a liquidation style proceeding from an earlier rehabilitation style proceeding), but it also can be because once the foreign main proceedings is dismissed or withdrawn, the foreign representative no longer has authority to act on behalf of the debtor and thus has no authority or funds available to inform recognising courts.

Rares J has described this as a “*serious lacuna in the way in which Art 18(a) of the Model Law ... operate[s] that does not appear to have been anticipated by the drafters of the Model Law*”.³⁹ His Honour has suggested that, unless this issue is addressed in amendments to the way Article 18 of the Model Law is incorporated into law in Australia, the courts may consider steps such as requiring foreign representatives to pay money into court by way of security upon recognition applications, which could be retrieved upon making an application under Article 18 when the foreign proceeding is finalised (and which could also be used to cover the costs of application).⁴⁰ Alternatively, his Honour suggests the court could fix the period of the stays (for example, for a period of months), which would require the foreign representatives to update the court when seeking periodic extensions of the stay.⁴¹

Whilst Rares J’s suggestions have merit, I think a simpler option would be for the court, when making the orders for the stay, to specify the circumstances under which the stay will transition to a different form of stay or terminate. For example, most foreign proceedings that are rehabilitation type proceedings will either terminate upon a successful rehabilitation or transition to a liquidation style proceeding. The court should be able to gain sufficient understanding of the possible outcomes of the foreign proceeding to frame appropriate orders.

³⁸ See, for example, *Yakushiji v Daiichi Chuo Kisen Kaisha (No 2)* [2016] FCA 1277; *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2017] FCA 331; *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2018] FCA 153.

³⁹ *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2018] FCA 153 at [27].

⁴⁰ *Ibid* at [30].

⁴¹ *Supra* n 39 at [31].