FEDERAL COURT OF AUSTRALIA

Tai-Soo Suk v Hanjin Shipping Co Ltd [2016] FCA 1404

File number(s):	NSD 1634 of 2016
Judge(s):	**JAGOT J**
Date of judgment:	23 November 2016
Catchwords:	**BANKRUPTCY AND INSOLVENCY –** Admiralty – *Cross-Border Insolvency Act 2008* (Cth) – Recognition of foreign main proceeding and foreign representative – nature and operation of stay and suspension arising pursuant to article 20 of the Model Law on Cross-Border Insolvency
Legislation:	*Corporations Act 2001* (Cth) ss 440A – 440JA, 411, 467, 471B, 471C, 500, 581 *Cross-Border Insolvency Act 2008* (Cth) ss 6, 13, 16; sch 1
Cases cited:	*Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57; (2014) 223 FCR 8 *Hur v Samsun Logix Corporation* [2009] FCA 372 *Hur v Samsun Logix Corporation* [2015] FCA 1154; (2015) 238 FCR 483 *Kim v Daebo International Shipping Co Ltd* [2015] FCA 684; (2015) 232 FCR 275 *Kim v SW Shipping Co Ltd* [2016] FCA 428; (2016) 113 ACSR 260 *ML Ubase Holdings Co Ltd v Trigem Computer Inc* [2007] NSWSC 859; (2007) 69 NSWLR 577 *Yakushiji v Daiichi Chuo Kisen Kaisha* [2015] FCA 1170; (2015) 333 ALR 513 *Yu v STX Pan Ocean Co Ltd* (2013) [2013] FCA 680; 223 FCR 189 *Corporate Reorganisation Act 1962* (Republic of Korea) *Debtor Rehabilitation and Bankruptcy Act 2005* (Republic of Korea) arts 1, 6, 34, 43 – 44, 50, 56, 58-59, 61, 74, 81, 89, 118, 131, 141, 146 – 7, 170, 179 – 180, 189, 195, 220, 224, 232, 237, 243 – 4, 251, 257, 286 – 8 Explanatory Memorandum, Cross-Border Insolvency Bill 2008 (Cth) cll 1.27 – 1.28, 2.55, 2.57 Justice Steven Rares, "Consistency and Conflict - Cross-Border Insolvency" (Speech delivered at 32nd Annual Conference of the Banking & Financial Services Law

Association, Brisbane, 4 September 2015)

United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency (1997) arts 2, 6, 15 – 17, 19 – 22

Date of hearing:	11 November 2016
Registry:	New South Wales
Division:	General Division
National Practice Area:	Admiralty and Maritime
Category:	Catchwords
Number of paragraphs:	65
Counsel for the Plaintiff:	Mr S J Maiden
Solicitor for the Plaintiff:	Thomson Geer
Counsel for the Defendant:	The Defendant did not appear

ORDERS

NSD 1634 of 2016

BETWEEN:	**TAI-SOO SUK IN HIS CAPACITY AS CUSTODIAN OF HANJIN SHIPPING CO., LTD** Plaintiff
AND:	**HANJIN SHIPPING CO., LTD** Defendant

JUDGE: **JAGOT J**

DATE OF ORDER: **11 NOVEMBER 2016**

THE COURT ORDERS THAT:

1. The time referred to in order 8 of the orders of 30 September 2016 for publication of the forms 20 and 21 in The Australian Newspaper be extended, nunc pro tunc, to 17 October 2016.
2. The time referred to in order 9 of the orders of 30 September 2016 for filing of affidavits to be relied upon by the Plaintiff be extended, nunc pro tunc, to 11 November 2016.
3. The rehabilitation proceeding in the Seoul Central District Court in the Republic of Korea (Case 2016 HoeHap 100211 Rehabilitation) by which the plaintiff was recognised as custodian of the defendant on 1 September 2016 (**the Korean Proceeding**) is recognised as a foreign proceeding within the meaning of Articles 2(a) and 17 (1) of Schedule 1 of the *Cross Border Insolvency Act 2008* (Cth) (**Model Law**).
4. The Korean Proceeding is recognised as a foreign main proceeding pursuant to article 17(2) of the Model Law.
5. The plaintiff, Mr Tai-Soo Suk, is recognised as a foreign representative within the meaning of Article 2(d) of the Model Law.
6. 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).

7. Pursuant to article 21 of the Model Law, except with the written consent of the plaintiff, or until further order of the Court:

   (a) No person may enforce a charge or lien on the property of the defendant or execute against the property of the Defendant.

   (b) No person may enforce a charge or lien over any vessel in the possession or control of the defendant, its cargo, containers and bunker fuel and oil.

   (c) The owner or lessor of property (other than cargo) that is used or occupied by, or in any vessel in the possession or control of the defendant cannot take possession of the property or otherwise recover it.

   (d) If:

      (i) property of the defendant is subject to a lien or pledge; and

      (ii) property of the defendant is in the lawful possession of the holder of the lien or pledge;

      then, the holder of the lien or pledge:

      (iii) may continue to possess the property; and

      (iv) cannot sell the property or otherwise enforce the lien or pledge.

   (e) The owner or lessor of property that is used or occupied by, or in the possession of, the defendant, cannot take possession of the property or otherwise recover it, without the written consent of the plaintiff or the leave of the court.

   (f) A proceeding in any court or by way of arbitration against the defendant, or in relation to any of its property, cannot be begun or proceeded with, without the written consent of the plaintiff or the leave of the Court.

   (g) No enforcement process in relation to property of the defendant can be begun or proceeded with, or application for issue of a warrant for the arrest in Australia of any vessel owned or chartered by the defendant can be made, without the written consent of the plaintiff or leave of the Court.

8. Pursuant to article 21 of the Model Law, the plaintiff may, as he deems appropriate, examine witnesses, take evidence or require the delivery of information concerning the defendant’s assets, affairs, rights obligations or liabilities.

9. Pursuant to article 21 of the Model Law, the administration, realisation and distribution of all of the defendant's assets located in Australia is entrusted to the plaintiff.

10. Subject to order 7 above, any application for leave to issue a warrant for the arrest in Australia of any vessel owned or chartered by the Defendant be made to a judge of this Court with reasons for judgment in this case, *Chun Il Yu (in his capacity as foreign representative of STX Pan Ocean Co Ltd (South Korea)) v STX Pan Ocean Co Ltd (South Korea) (recs and mgrs apptd in South Korea)* (2013) 223 FCR 189; [2013] FCA 680, *Yakushiji (in his capacity as foreign representative of Kaisha) v Kaisha* [2015] FCA 1170 and *Kim (in his capacity as foreign representative of SS Shipping Co Ltd) v SW Shipping Co Ltd* (2016) 113 ACSR 260; [2016] FCA 428 drawn to the attention of the Court at the time any such application is made.

11. The plaintiff:

    (a) publish in the *Shipping Daily of Korea*;

    (b) publish in *The Australian* newspaper;

    (c) publish in the *International Edition of Lloyd's List*;

    (d) publish in the hard copy edition of *Lloyd's List Australia*; and

    (e) send to each Australian creditor of the defendant known to the plaintiff -

    a notice in accordance with Form 21 of the *Federal Court (Corporations) Rules 2000* (Cth) by **2 December 2016** and compliance with r 15A.7 will be deemed complete upon satisfaction of this order.

12. Any person who claims to hold a security interest in any property or vessel owned or chartered by the defendant, or who claims to be a creditor of the Defendant, has liberty to apply to a Judge of the Federal Court of Australia, on the giving of three days' written notice to the plaintiff, to vary or rescind any of these orders.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JAGOT J:

Orders

1 On 11 November 2016, I made orders:

(1) recognising a rehabilitation proceeding in the Republic of Korea in relation to the defendant company, Hanjin Shipping Co Ltd (**Hanjin**), as a "foreign main proceeding" pursuant to articles 2(b) and 17(2)(a) of Schedule 1 to the *Cross-Border Insolvency Act 2008* (Cth) (the **Model Law**);

(2) recognising the plaintiff, Mr Tai-Soo Suk, as a "foreign representative" within the meaning of article 2(d) of the Model Law; and

(3) granting further consequential relief, including a declaration that the scope of the stay and suspension of enforcement and insolvency proceedings consequential upon recognition is the same as would apply as if arising under Pt 5.3A of the *Corporations Act 2001* (Cth) (**Corporations Act**);

2 I indicated that I would publish my reasons for judgment at a later date. These are my reasons. They reflect the submissions put for the plaintiff. As the matter was heard *ex parte*, there was no contradictor to the plaintiff's case but, given the nature of the issues which the application involves, I have set out my reasons at greater length than I might otherwise have done on an *ex parte* application.

Background

3 Hanjin is a shipping and ship-building company incorporated under the laws of the Republic of Korea which specialises in shipping, port operating systems and development, harbor loading and unloading services. At 1 September 2016, Hanjin was the ninth largest container shipping company in the world, and operated approximately 60 regular freight lines, with approximately 140 vessels.

4 Following the 2007/08 global financial crisis and its consequential effects on the shipping industry, Hanjin saw a "deep deterioration" in both its "performance and financial standing". A legal officer of Hanjin said that at 2 November 2016, there were approximately 3600 creditors of Hanjin, whose claims against the company totalled approximately $1.1 billion.

5 On 1 September 2016, after Hanjin's failed attempt at consensual debt restructuring and recovery, the 6th Bench of the Bankruptcy Division of the Seoul Central District Court (the **Korean Court**) ordered that a rehabilitation procedure for Hanjin be commenced pursuant to Pt 2, Ch 1 of the *Debtor Rehabilitation and Bankruptcy Act 2005* (Republic of Korea) (the **Rehabilitation Act** or **DRBA**). I refer to the process required by the orders of the Korean Court as the **rehabilitation proceedings**. Pursuant to article 74 of the Rehabilitation Act, the plaintiff, previously a director of Hanjin, was appointed as the Korean Court's custodian for the purposes of the rehabilitation proceedings.

6 On 23 September 2016, pursuant to s 13 of the CBIA and article 15 of the Model Law, the plaintiff applied to this Court seeking recognition of the rehabilitation proceedings as "foreign main proceedings", and the plaintiff's recognition as a "foreign representative" for the purposes of the CBIA. On that date, I made orders prohibiting any enforcement or recovery action against the defendant's ship, the Hanjin Milano, without further order of the Court. On 30 September 2016, and pursuant to article 19 of the Model Law, I extended this prohibition on enforcement, execution or arrest without leave of the Court until the determination of the recognition application.

7 On each occasion the orders I made included a requirement that the plaintiff publish notice of making of the orders including, on 30 September 2016, notice of the hearing date of the originating process on 11 November 2016 in each of the Shipping Daily of Korea, The Australian newspaper, the International Edition of Lloyd's list and the hard copy edition of Lloyd's List Australia. The plaintiff substantially complied with these orders. The only non-compliance, which I propose to excuse, was a delay in publishing a notice in The Australian newspaper caused by a circumstance beyond the plaintiff's control (a delay in obtaining approval for expenditure from the Korean Court).

8 Before the hearing on 11 November 2016, the plaintiff did not receive notice from any person of any proposed appearance at the hearing. When the matter was called for hearing on 11 November 2016, there was no appearance other than on behalf of the plaintiff. As noted, the matter was thus heard *ex parte*.

9 Having particular regard to the *ex parte* nature of the hearing, the orders I made on 11 November 2016 include a requirement for the publication of notice of the orders (order 11) and a right for any person claiming to hold a security interest in any property or vessel owned

or chartered by Hanjin, or who claims to be a creditor of Hanjin, to apply to set aside or vary the orders on three days' notice.

Recognition of foreign main proceedings and foreign representative

10 Subject to the public policy exemption in article 6 of the Model Law which is not engaged in the present case, article 17(1) of the Model Law (which has the force of law in Australia by reason of s 6 of the CBIA) requires this Court to recognise an insolvency proceeding in a foreign state for the purposes of the CBIA where the following conditions are satisfied:

(1) The proceedings subject to the application are a "foreign proceeding" within the meaning of article 2(a) of the Model Law (article 17(1)(a)), being a:

> "collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation".

(2) The application for recognition is brought by a "foreign representative" as defined in article 2(d) of the Model Law in relation to the proceedings in which they have been appointed (articles 15(1), 17(1)(b)), namely:

> "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".

(3) The application is accompanied by all the relevant documentation, including evidence of the foreign proceedings, appointment of the foreign representative, and a statement identifying all other foreign proceedings or other insolvency proceedings known to the foreign representative (articles 15(2)-(4), article 17(1)(c)).

11 If the application seeks recognition of the proceedings as "foreign main proceedings", it must also be shown that the foreign proceedings "are taking place in the State where the debtor has the centre of its main interests" (article 17(2)).

12 Wan Shik Lee is a partner of a law firm in Korea. His firm has been retained by Hanjin and authorised by the Korean Court to represent Hanjin as Korean counsel in connection with this application. Mr Lee gave evidence about the operation of the Rehabilitation Act, explaining that:

> [9] The goal of rehabilitation proceedings is to rehabilitate insolvent debtors by restructuring their debt pursuant to a rehabilitation plan approved by the creditors and

the Rehabilitation Court (Article 1 of the DRBA).

13 The rehabilitation proceedings satisfy each element of the definition of "foreign proceeding", being:

(a) a 'collective proceeding', because it binds all creditors save for some 'public interest' creditors;

(b) a 'judicial or administrative proceeding', because it is opened, supervised and (in part) administered by a court;

(c) 'pursuant to a law relating to insolvency', because the DRBA concerns rehabilitation and liquidation proceedings concerning insolvent debtors; and

(d) one in which "the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation", because the assets and affairs, while under the control of the Custodian, are subject to the direct supervision of the Korean court, for the purpose of achieving the reorganizational objectives of the DRBA.

14 This conclusion is consistent with other decisions, most recently in *Kim v SW Shipping Co Ltd* [2016] FCA 428; (2016) 113 ACSR 260 (***Kim v SW***).

15 The plaintiff is also "authorised … to administer the reorganisation … of [Hanjin's] assets or affairs or to act as a representative of the foreign proceeding", and therefore meets the definition of a "foreign representative". As Mr Lee said (referring to the plaintiff as the "administrator"):

> [12] The administrator has the power to conduct all of the debtor's business and manage all of its property, subject to the Rehabilitation Court's supervision (Articles 56, 61 and 89 of the DRBA). The administrator administers, subject to the supervision of the Rehabilitation Court, the rehabilitation of the debtor company by typically preparing and implementing the debtor company's rehabilitation plan (Articles 81, 220 and 257 of the DRBA). The administrator is also authorised to do, on behalf of the debtor company, whatever a foreign court permits within that foreign court's territorial jurisdiction, which includes acting as a representative of the Korean rehabilitation proceedings in relation to proceedings for recognition by foreign courts (Article 640 of the DRBA).

16 Article 16(3) of the Model Law provides that '[i]n the absence of proof to the contrary, the debtor's registered office … is presumed to be the centre of the debtor's main interests." Hanjin's registered head office is in Seoul, the company's books and records are held in the Republic of Korea, its employees are employed in the Republic of Korea and the company otherwise "holds itself out to the world as operating from Korea". Accordingly, I am satisfied that Hanjin's centre of main interests is in the Republic of Korea.

17 For these reasons the rehabilitation proceedings must be recognised as a foreign main proceeding in Australia pursuant to article 17 of the Model Law, and the plaintiff recognised in Australia as their foreign representative.

Article 20 - stay and suspension provisions

18 Article 20 of the Model Law provides that:

> 1. Upon recognition of a foreign proceeding that is a foreign main proceeding:
>
> (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
>
> (b) Execution against the debtor's assets is stayed;
>
> (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
>
> 2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of the present article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of the present article*].
>
> 3. Paragraph 1 (a) of the present article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.
>
> 4. Paragraph 1 of the present article does not affect the right to request the commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] or the right to file claims in such a proceeding.

19 Article 20(2) is subject to s 16 of the CBIA which states that:

> For the purposes of paragraph 2 of Article 20 of the Model Law (as it has the force of law in Australia), the scope and the modification or termination of the stay or suspension referred to in paragraph 1 of that Article, are the same as would apply if the stay or suspension arose under:
>
> (a) the Bankruptcy Act 1966; or
>
> (b) Chapter 5 (other than Parts 5.2 and 5.4A) of the *Corporations Act 2001*;
>
> as the case requires.

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

(1) Part 5.1 (scheme of arrangement) – no stay applies.

(2) Part 5.3A (voluntary administration) – ss 440A-440JA provide for stays.

(3) Part 5.4/Part 5.4B (Court-ordered liquidation) – ss 467, 471B and 471C provide for stays.

(4) Part 5.5 (voluntary liquidation) –s 500 provides for a stay.

21 The plaintiff sought a declaration that the "scope and the modification or termination of the stay or suspension" arising under article 20(1) of the Model Law as affected by s 16 of the CBIA, "are the same as would apply if the stay and suspension arose under Part 5.3A of the *Corporations Act 2001* (Cth)". The plaintiff did so on the basis that article 20(2) (as affected by s 16) imposes a duty on the court to identify the type of proceedings under the relevant provisions of Chapter 5 of the Corporations Act which the foreign proceedings most closely resemble. Once that is done, by force of the CBIA and the Model Law, the stay is the same as that which is provided for that type of proceedings in the Corporations Act. In the present case, the rehabilitation proceedings most closely resemble a voluntary administration under Part 5.3A of the Corporations Act. As a result, the scope of the stay which applies is the same as that in s 440D of the Corporations Act. On its proper construction, s 440D does not exclude any action against Hanjin's property under a maritime lien.

22 I accept that, by the relevant provisions, the Court is required to determine what the "case requires". In context, this means that it is for the Court to identify which of the Parts of the Corporations Act would apply to the foreign proceedings if they were taking place under that Act. If it had been intended that the Court select the stays and suspensions from the nominated Parts of the Corporations Act on a discretionary basis then another criterion, not "as the case requires", would have been used.

23 The explanatory memorandum to the Cross-Border Insolvency Bill 2008 (Cth) (which may be considered under s 15AB(2)(e) of the *Acts Interpretation Act 2001* (Cth)) supports this approach. It provides that:

> [1.27] Paragraph 2 of article 20 of the Model Law allows for the scope, and the modification or termination, of the stay that comes into effect upon recognition of a foreign proceeding to be made subject to provisions of the law of the enacting State. …
>
> [1.28] The stay that comes into effect when a foreign main proceeding is recognised is to be **the same** in scope and effect as if the stay or suspension arose under the Bankruptcy Act or under Chapter 5 of the Corporations Act, other than Parts 5.2 and 5.4A, as the case requires. 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 … (emphasis added)
>
> [2.55] The automatic consequences envisaged in article 20 are necessary to allow steps to be taken to administer an orderly and equitable cross-border insolvency proceeding. In order to achieve those benefits, the consequences of article 20 are imposed on proceedings even if the State where the centre of the debtor's main

> interests is situated poses different (possibly less stringent) conditions for the commencement of insolvency proceedings or if the automatic effects of the insolvency proceeding in the country of origin are different from the effects of article 20. Recognition, therefore, has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State. ….
>
> [2.57] Notwithstanding the 'automatic' or 'mandatory' nature of the effects under article 20, it is expressly provided that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State.

24 The stay which "should apply" is the stay the "case requires" which is determined by the nature of the foreign proceedings compared to the nature of proceedings under the relevant Parts of the Corporations Act.

25 Further, in *Hur v Samsun Logix Corporation* [2009] FCA 372 at [13], Jacobson J said that "[t]he effect of that section appears to be that **the stay is to be to the same extent and effect** as under the provisions of the *Bankruptcy Act 1966* (Cth) or the *Corporations Act*" (emphasis added).

26 Given that, by definition, the foreign proceedings are not proceedings under the Corporations Act, the task imposed on the court is not straightforward. No doubt this underlies the observation of Rares J in *Hur v Samsun Logix Corporation* [2015] FCA 1154; (2015) 238 FCR 483 (***Hur***) at [21] that 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".

27 The interaction between the provisions and maritime law, in particular, has prompted comment.

28 In *Yu v STX Pan Ocean Co Ltd* (2013) [2013] FCA 680; 223 FCR 189 (***Yu***), when considering the recognition of a "receiver' appointed to a shipping company under similar rehabilitation proceedings in the Republic of Korea, Buchanan J considered how enforcement actions in admiralty law might otherwise be displaced by the relevant stay and suspension provisions of the Model Law:

> [2] This judgment deals with that application and with the potential significance of the fact that ships owned or operated by the defendant pass through Australian waters and may be subject to arrest under the *Admiralty Act 1988* (Cth) in accordance with generally accepted maritime conventions. In particular, the judgment deals with whether "additional orders" should, or should not, be granted to supplement statutory consequences arising automatically under the Act if recognition is granted as claimed.
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> …

> [13] It is a notable feature of the Act and the Model Law that no reference has been made to the terms or operation of the Admiralty Act or to rights which arise under admiralty and maritime law in its national and international operation.
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> …
>
> [39] Criticism has been made of the terms of the Model Law by reason of its failure to recognise and take appropriate account of international maritime law and the operation in Australian jurisdictions of the Admiralty Act. I do not propose to take up those matters in the present judgment, but those criticisms draw attention to the fact that, for centuries, international maritime law developed its own security regimes for reasons which remain generally observed around the world, including in Australia.
>
> [40] An action *in rem* is sometimes described as an action to obtain a security which will enable a judgment to be satisfied out of the res (see eg *Aichhorn & Company KG v Ship MV Talabot* (1974) 132 CLR 449; *Re Aro Company Ltd* [1980] 1 All ER 1067 (Re Aro) at 1074). In the case of a maritime lien, proceedings *in rem* vindicate an existing security right *(Harmer v Bell (The Bold Buccleugh)* (1851) 13 ER 884; 7 Moo PC 267; *Johnson v Black (The Two Ellens)* (1872) LR 4 PC 161; *Re Aro* at 1072). In particular, the arrest of individual vessels to enforce the security of a maritime lien (eg for damage done by a ship, for seamen's wages, for salvage etc) is an important facility. There are significant questions of public interest connected with the ability to enforce the security of a maritime lien (as well as other claims) by the use of an action *in rem*.

29 After outlining the operation of the stay and suspension in the event of liquidation in s 471B of the Corporations Act and the exemption for secured creditors provided for by s 471C, his Honour said:

> [38] Those provisions preserve the rights of secured creditors and recognise a power in the Court to grant leave to commence a proceeding or an enforcement process in appropriate circumstances. Recognition of a foreign main proceeding does not, through the engagement of Art 20, change those matters. However, additional orders under Art 21 may do so, and that appears to be what is sought in the present case.
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> …
>
> [41] I can see no reason at present why an action *in rem* to enforce a maritime lien would not fall within the operation of s 471C of the *Corporations Act*, as contemplated by Art 20(4) of the Model Law. I can see no basis, either, for extinguishing or modifying at the present time any recourse to s 471B of the *Corporations Act*. Those potential rights may require assessment according to the circumstances of particular cases but, to take a simple example, there may be a very good reason why a claim for seamen's wages, normally enforceable as a maritime lien, should not be affected by recognition of the foreign main proceedings.
>
> [42] I see no reason at present either to curtail or foreclose the exercise of rights which are recognised by the Model Law itself. The terms of Art 20 of the Model Law will take effect automatically, but I see no reason why the arrest of a ship owned or operated by the defendant which is in Australian waters could not be sought in appropriate circumstances, without having to overcome an order such as proposed order 5. Whether an arrest warrant would issue would depend on the circumstances, the reason why the arrest was sought and the interest sought to be vindicated by the action *in rem*. Such an application should be made to a judge of the Court rather than to a registrar. Full disclosure should be made to the Court that the foreign

> proceedings have been recognised under the Act and the terms of this judgment should be drawn to the attention of the Judge at the time any such application is made.

30 It will be apparent that his Honour's analysis proceeded on the basis that the relevant provisions of the Corporations Act were those in Part 5.4B of the Corporations Act in respect of liquidation of corporations. His Honour was not called upon to consider Part 5.3A of the Corporations Act.

31 *Kim v Daebo International Shipping Co Ltd* [2015] FCA 684; (2015) 232 FCR 275 (***Kim***) involved an application for recognition brought by a custodian of another Korean shipping company undergoing rehabilitation proceedings. Rares J said:

> [8] A plaintiff may have a proprietary or secured claim that can be enforced by an action *in rem* under the *Admiralty Act 1988* (Cth), which may be enforceable and not affected by any stay under Art 20(2) of the *Model Law* and s 16 of the *Cross-Border Insolvency Act*. For example, a plaintiff who commences a proceeding on a maritime claim against a ship as an action *in rem* under any of ss 17, 18 and 19 of the *Admiralty Act* before any stay came into effect under Arts 19 or 20(2) of the *Model Law*, will have a secured interest in respect of that claim simply because of the timing of the commencement of the proceeding *in rem*: *In re Aro Co Ltd* [1980] Ch 196; *Programmed Total Marine Services Pty Ltd v Ships Hako Endeavour* (2014) 315 ALR 66 at 71 [22] per Allsop CJ, with whom I agreed on this aspect at 74 [37].
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> …
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> [10] It is not necessary in these reasons to explore what the exact nature of such a stay is, having regard to whatever may be the structure of the Korean proceedings under Art 34 of the Korean Act and their characterisation for the purposes of Art 20. That can occur if the occasion arises in the future. That is because these proceedings involve a debtor that operates 19 vessels in the international shipping market. It may also be helpful, in considering the appropriate relief to be granted in a case like this, to appreciate that ordinarily, under s 471C of the *Corporations Act*, a secured creditor retains his, her or its right to realise or otherwise deal with a security interest. That is so notwithstanding the stay imposed by s 471B, on proceedings in a Court against the company or in relation to its property and enforcement processes in relation to such property, that would otherwise apply were there to be a winding up in insolvency by the Court.
>
> …
>
> [14] The Admiralty Act reflects long established principles of international maritime law developed by sea trading nations over millennia, to protect the interests of those who trade or have encounters with a peripatetic ship and those interested in her which may never again call in a port of the creditor's own jurisdiction. International conventions now reflect some of those principles, such as the *1952 International Convention relating to the Arrest of Seagoing Ships* and the *1999 International Convention on Arrest of Ships*, as do domestic laws relating to the bringing of actions in rem or against ships. It may be thought unlikely that the *Model Law* was understood or intended by either its creators or by the Parliament when giving it the force of law in Australia under s 6 of the *Cross-Border Insolvency Act*, to supervene or impliedly repeal the domestic statutory remedies provided in States Parties,

including those in Australia's *Admiralty Act*, in respect of maritime creditors' rights to proceed in rem on a secured or proprietary claim that pre-existed any interim or final orders recognising a foreign proceeding under Arts 19 or 20 of the *Model Law*.

32 His Honour also discussed the operation of article 20 in *Hur*:

> [22] … Each nation has its own individually tailored legislation for the administration of insolvent debtors, be they individuals or corporations, and various processes that are not necessarily analogous to the plethora of those available under the *Corporations Act* or the *Bankruptcy Act*.
>
> [23] In general, both Australian Acts dealing with insolvency recognise that the position of secured creditors warrants separate treatment from that of unsecured creditors and, in general, stay provisions such as ss 440B and 440D can be seen to have the purpose of preserving the insolvent's financial status quo pending the making of a decision by creditors as to how the debtor's financial affairs should be administered when proceedings under Pt 5.3A are involved.
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> …
>
> [26] The UNCITRAL Guide to Enactment of the Model Law at [33] identified that the purpose of Art 20(2), to which s 16 of the *Cross-Border Insolvency Act* gives effect, was to provide exceptions and limitations to the scope of the stay and suspension. It gave, as examples, "exceptions for secured claims, payments by the debtor made in the ordinary course of business, set-off, execution of rights *in rem*". The *Guide* stated at [34] that the *Model Law* authorised a court to grant discretionary relief for the benefit of any foreign proceeding, whether a foreign main proceeding or not. The *Guide* explained at [148] that Art 20(2) would be governed by the exceptions or limitations that existed in the law of the enacting State in respect of the automatic stay, saying:
>
> > "Those exceptions may be, for example, the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, initiation of court action for claims that have arisen after the commencement of the insolvency proceeding (or after recognition of a foreign main proceeding) or completion of open financial-market transactions."
>
> …
>
> [28] It is evident that those who both wrote the *Guide* and drafted s 16 of the *Cross Border Insolvency Act* did not consider the impact of any stay in respect of proceedings in rem on a maritime lien or a secured or proprietary claim in admiralty matters. …
>
> [29] In *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8 at 36-37 [120], Allsop CJ, with whom Robertson and Griffiths JJ agreed, said that:
>
> > "Whilst the Model Law reflects universalism, *there is nothing in the Model Law or the UNCITRAL Working Papers prior to its formulation, or in the CBI [Cross Border Insolvency] Act, which would justify the stripping of rights of a local creditor by reason of recognition*. … (emphasis added)
>
> …
>
> [31] A person with a right to proceed on a maritime lien *in rem* under the *Admiralty Act* is in a position that is *sui generis* in respect of other remedies provided by domestic law because of the peripatetic nature of ships, particularly ships of the kind involved in the conduct of Samsun's business. Crews and other persons who may

> have maritime liens can only enforce those secured claims against a ship that is, necessarily, temporarily in the jurisdiction of the Admiralty court, in which an arrest or attachment proceeding is brought. That underpins the basis on which Buchanan J in *Yu* 223 FCR 189 made the orders that he did.
>
> [32] It may be that in future proceedings of this kind, consideration might be given to framing an order to clarify that a secured creditor, to the extent necessary, should have leave to, and may, exercise all the rights to bring proceedings against or in respect of any property of the debtor, including the commencement and prosecution of proceedings in rem under the Admiralty Act, to which the security interest of that creditor extends. An order so framed would make clear that, in cases where the proceedings *in rem* are on a maritime lien under s 15 of the *Admiralty Act*, they can be brought because they are of a kind that ss 471C and 444F ordinarily recognise are appropriately excluded from an automatic stay of remedies that would otherwise be open to unsecured creditors in order properly to protect a secured creditor's rights.
>
> [33] It will be of little comfort to an unpaid ship's crew to be told that they can prove against their defaulting employer in a foreign country in foreign main proceedings if they wish, but, by the operation of the stay in Art 20(2), they have been denied the right to exercise their security interest consisting of their maritime lien, recognised almost universally in the maritime law of nations as protecting their right to be paid their wages: see s 15(2)(c) of the *Admiralty Act*. The fact that they are unpaid and are on a ship from which, if penniless, they cannot escape is a very good reason to ensure that however else the automatic stay in Art 20(2) of the *Model Law* operates, claims to such maritime liens are protected and immediately enforceable without any requirement for prior leave to be sought. If the stay in Art 20(2) were construed to preclude members of a ship's unpaid crew from exercising their maritime lien by arresting or attaching the ship when she reached port, the consequence might be the de facto forced labour or enslavement of the crew until the ship finally reached the crew's or ship's home port.

33 It will be apparent that, in common with the circumstance in *Yu*, in both *Kim* and *Hur* the focus was on the stays which arise on liquidation of a company under Part 5.4B of the Corporations Act. It is also apparent that the discretion identified in the UNCITRAL Guide to Enactment of the Model Law to which Rares J refers at [26] in *Hur* is embodied in s 16 of the CBIA. It is s 16 that provides that "the scope and the modification or termination of the stay or suspension referred to in paragraph 1 of [article 20], are the same as would apply if the stay or suspension arose under", relevantly, Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act.

34 Further, the observations in *Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57; (2014) 223 FCR 8 (***Akers***), to which Rares J refers at [29] in *Hur*, need to be understood in the context in which they were made. *Akers* concerned an appeal against the modification of an order made under the CBIA, the effect of which was to permit the Deputy Commissioner to proceed against funds to be retained in Australia for a tax debt. The debt could not be proved in the insolvency in the Cayman Islands on the basis that to do so would be to enforce

foreign revenue laws. The orders were modified pursuant to an application under article 22 of the Model Law which provides that:

> 1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of the present article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
>
> 2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
>
> 3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

35 Article 19 is concerned with urgent relief sought after filing but before the determination of an application. Article 21 is concerned with relief which may be granted upon recognition of a foreign proceeding, either main or non-main, "necessary to protect the assets of the debtor or the interests of the creditors". Article 20, however, is concerned with the effect of recognition of a foreign main proceeding. The effect is that provided for in article 20, read subject to s 16 of the CBIA.

36 In *Akers*, Allsop CJ said:

> [56] The regime imposed by Art 20 does not therefore import foreign insolvency law into Australia. Article 20, as modified by the laws picked up by Art 20.2, governs the effect of recognition. It should also be noted that nothing in Art 20 prevents a local insolvency proceeding being commenced: Art 20.4.
>
> …
>
> [96] Subject to the operation of Art 20.1(a) and (b) and any leave under s 471B, and orders under Art 21 (such as aspects of Recognition Order 5(a) that go beyond the effect of Art 20.1) and any modification or termination of such by Art 22.3, the DCT has rights in Australia not affected by the winding up in the Cayman Islands and the recognition of those proceedings as foreign main proceedings.
>
> [97] The affectation of such rights of the DCT to pursue Saad in Australia (subject to questions of service and the like) in furtherance of rights and obligations created under the laws of Australia must flow from a relevant law (written or unwritten) of Australia. Relevantly, the Model Law (in provisions such as Arts 19, 20, 21, 22, 23 and 24) and the provisions of the CBI Act provide for such affectation.
>
> [98] Nowhere in the Model Law or the CBI Act are the rights of the DCT destroyed. Article 20.1 provides for the stay and suspension of legal proceedings upon recognition; but that is qualified by Art 20.2 (and s 16) and the availability of the law picked up by s 16 to provide the basis for modifying or terminating such stay or suspension. Article 21 provides for further relief beyond Art 20; but that is qualified by Art 22.3.
>
> …

> [114] These statements can be accepted; but they do 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. Nor do the statements adequately incorporate the aim of the protection of local creditors seen in Art 21.2 or the fact that the Model Law was not intended to bring about a change to the substantive law of the recognising State and was procedural in character.
>
> …
>
> [116] Universalism can be recognised in the preamble to the Model Law; but it is universalism that promotes the objectives of all creditors, and which protects local creditors.

37 Nothing in these observations is inconsistent with the conclusions reached in the present case. To the contrary, as Allsop CJ said at [98] in *Akers* it is the "law picked up by s 16" which provides the basis for modifying or terminating the stay or suspension which applies. That law, for present purposes, is the relevant Part of the Corporations Act. Consistent with the reasoning in *Akers*, in the present case, no rights against Hanjin (including maritime liens) are destroyed. If the "case requires" that the rehabilitation proceedings be identified as more akin to proceedings under Part 5.3A of the Corporations Act than any other Part of that Act, then the stays and suspensions in accordance with the provisions of Part 5.3A apply.

38 In *Yakushiji v Daiichi Chuo Kisen Kaisha* [2015] FCA 1170; (2015) 333 ALR 513 (***Yakushiji***), Allsop CJ said:

> [21] The point of the above discussion is that the protection given by the orders to a shipping company should not be seen as necessarily defeating proper maritime claims that are lien claims, and the question of the status of any claims that are lien claims (as well as the status of any claims that are "quasi lien claims", to which I have referred), would need to be resolved in any litigation unless the matter were agreed. It would be wrong to make orders now that would forestall any vindication by such claimants against the interests of the rehabilitation. Likewise, it would be wrong to prevent the rehabilitation being supported by the Act on the mere possibility of the existence of these claims.
>
> [22] Therefore the orders contemplate that there be an ability for creditors to deal with and vary these orders should a particular proceeding, such as by way of enforcement of maritime lien claim, be appropriate.
>
> [23] As I indicated to Mr Rose of counsel, who, with his solicitor, gave the Court helpful assistance, it may be that in any particular circumstance, a foreign representative would want this, or any other maritime court, to have charge of the sale of a ship. If that ship were to be sold, its highest price may well be obtained by a maritime court because it would be only through the sale by that maritime court that the ship could have its hull "cleaned" of all other maritime liens. Thus, it may well be that the maritime court in its sale process would obtain the highest price possible for that asset (the ship) if it were to be sold. However, as is plain, with a large

> shipping line such as DCKK, and its subsidiary Star Bulk, the rehabilitation, if the group or company is in financial difficulty, should be supported by the ordered process of the rehabilitation scheme in Tokyo, with such support being the statutory purpose of the Act.

39 In the present case, there is no suggestion by the plaintiff that any maritime claim is defeated.

40 In a paper titled *Consistency and Conflict - Cross-Border Insolvency* (***Consistency and Conflict***), Rares J also observed that:

> [35] Importantly, Arts 21(2) and 22 allow a court to modify a stay imposed by force of Art 20(1). Ordinarily, Art 21(2) contemplates that upon recognition of a foreign proceeding, the Court may entrust the debtor's local assets to the foreign representative or another person appointed by the Court "provided that the Court is satisfied that the interests of creditors in this State are adequately protected". And Art 22 allows the Court to modify a stay on the basis of the criterion that "the interests of the creditors and other interested persons, including the debtor, are adequately protected". The Court has wide powers to mould the nature of any stay where such a modification is warranted.

41 As noted, article 22 permits modification or termination of relief under articles 19 and 22, not article 20.

42 Article 21(2) provides that:

> Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

43 This is a power which operates separately from the effect provided for in article 20.

44 In other words, while there is no question that the powers in articles 22 and 21(2) exist, if engaged they operate according to their own terms. They do not vest in the Court a discretion to modify any stay or suspension which takes effect by force of article 20.

45 For these reasons I accept that in determining what the "case requires" under article 20 of the Model Law (read subject to s 16 of the CBIA) the relevant exercise is evaluative, but not discretionary. By the terms of those provisions, once the appropriate Part of the Corporations Act is identified, the stays and suspensions that apply are "the same as would apply if the stay or suspension arose under" that Part. Article 20 is concerned only with the effect of recognition of a foreign main proceeding. The effect is that provided for in the article. Accordingly, if the "case requires" that the effect in the present case is as contended for by the plaintiff, there is no sound basis upon which to refuse to grant the declaration which is sought.

46 What then is required in the present case?

47 In *Consistency and Conflict*, Rares J said:

> [29] … An administration of the business property and affairs of an insolvent company under Pt 5.3A is initiated, and ordinarily occurs entirely, without any involvement of a court. The administration commences when the directors of a company, its liquidator, provisional liquidator or a secured creditor appoint an administrator. The assets and affairs of the company in an administration under Pt 5.3A are under the control or supervision of an administrator a deed administrator or a liquidator appointed out of court by the creditors. The administrator has control of the company's business, property and affairs while it is under administration by force of s 437A. The administrator must investigate the company's business, property, affairs and financial circumstances and form an opinion as to whether it would be in the interests of the creditors of the company for it to execute a deed of company administration, to cease to be under administration or to be wound up. The creditors then decide which of those courses the company will take.

48 These differences may be accepted.

49 In *ML Ubase Holdings Co Ltd v Trigem Computer Inc* [2007] NSWSC 859; (2007) 69 NSWLR 577 (***Ubase***), Brereton J considered that a similar "reorganisation" under the *Corporate Reorganisation Act 1962* (Republic of Korea) were "not winding up proceedings, but are akin to a scheme of arrangement". Schemes of arrangement, governed by Part 5.1 of the Corporations Act, do not attract an automatic stay of proceedings, but once a proposed arrangement has been reached between the parties, the Court has a discretion to "restrain further proceedings in any action or other civil proceeding against the body except by leave of the Court and subject to such terms as the Court imposes" (Corporations Act s 411(16)).

50 Again, it may be accepted that the rehabilitation proceedings in the present case share some similarities with a scheme of arrangement.

51 However, I am persuaded by the plaintiff's submissions that the present "case requires" acceptance of the proposition that the relevant stay is the one which would arise under Part 5.3A of the Corporations Act because the rehabilitation proceedings most closely resemble a voluntary administration under that Part.

52 My reasons follow.

53 **First**, it does not appear that any of the cases above directly consider proceedings such as the rehabilitation proceedings in the context of Part 5.3A of the Corporations Act. In particular, *Ubase* concerned a statute which was repealed following the passage of the Rehabilitation

Act, and Brereton J's observations were made in the context of a claim to invoke the provisions of s 581 of the Corporations Act, relating to assistance between courts.

54 **Second**, Mr Lee gave extensive evidence about the nature of the rehabilitation proceedings. He identified that in rehabilitation proceedings:

(1) The goal is to rehabilitate insolvent debtors by restructuring their debt pursuant to a rehabilitation plan approved by the creditors and the Rehabilitation Court (article 1 of the Rehabilitation Act).

(2) A debtor company may file for commencement of rehabilitation proceedings, which commence only when the Court issues a commencement order (article 34)

(3) Upon commencement, the Court appoints a custodian; usually an existing representative of the company unless the insolvency was caused by the representative, in which case the Court will appoint an independent administrator (article 74).

(4) The custodian has the power to conduct all of the debtor's business and manage all of its property, subject to the Court's supervision. However, if/when the custodian intends to perform any of a designated list of acts affecting the debtor's property or liability, approval from the Rehabilitation Court is required (articles 56, 61, 89).

(5) The custodian typically administers the rehabilitation by preparing and implementing the debtor company's rehabilitation plan, which may call for rescheduling of the debtor's debt over a period of up to 10 years (articles 50, 81, 195, 220, 257).

(6) Between filing and the commencement of the rehabilitation, the Court may grant interim relief prohibiting the debtor company from disposing of its assets and/or making repayments, and staying any/all administrative or judicial proceedings against the debtor, until the Court has determined the application (articles 43-44).

(7) Upon commencement of rehabilitation proceedings, any litigation related to the debtor company's assets will be suspended and enforcement actions against the debtor are prohibited or suspended (articles 58-59).

(8) The administrator will prepare lists of claims held by all creditors, grouped as either:

(a) creditors with unsecured rehabilitation claims (article 118);

(b) creditors with secured rehabilitation claims (article 141); and

(c) creditors with "common benefit claims" (article 179).

However, if claims are omitted or incorrect, creditors must file proofs. Failure to do so may either nullify or fix the claim as specified (articles 118, 141, 147, 189).

(9) With limited exceptions, creditors, other than those with "common benefit" claims (which are outside the rehabilitation plan), may not receive payment of their claims other than as provided for in the rehabilitation plan (articles 131, 141, 179 and 180).

(10) If the administrator, debtor, or a rehabilitation creditor does not accept the filing of a claim, the creditor must apply to the court to rule on the filing (article 170).

(11) Interested parties' meetings are convened to present the administrator's report on the debtor's prospects for recovery and the status of the rehabilitation claims. An interested parties' meeting is held for deliberating and voting on the draft rehabilitation plan, which is subject to approval by each class of shareholders as well as both secured and unsecured pre-rehabilitation creditors. Shareholders have voting rights only when the total value of the debtor's assets exceeds the total value of its debts. Approval is required of creditors constituting three-quarters of the secured rehabilitation claims, two-thirds of unsecured rehabilitation claims, and a majority vote of the shareholders present (articles 146, 224, 232, 237).

(12) Once approved, the draft plan is submitted to the court for consideration of whether the plan meets all legal requirements and is fair to the interested parties. Even where the interested parties have not approved the rehabilitation plan, the Court in its discretion may provide other means for protection and adopt the rehabilitation plan over the objection of some classes of creditor (articles 243-244).

(13) If it becomes apparent that the debtor cannot be rehabilitated, the Court may, in its discretion or upon the administrator's or a creditor's request, discontinue the rehabilitation, declare the debtor company bankrupt and liquidate it (articles 6, 286-288).

(14) Any claims which are not recognised under the court-approved rehabilitation plan are irrevocably extinguished (article 251).

55 **Third**, counsel for Hanjin submitted and I accept that:

> Mr Lee's explanation of the operation of the Korean rehabilitation proceedings demonstrates that they are similar in operation to, although far from identical to, voluntary administration proceedings. The goal of rehabilitation proceedings is similar to, although not congruent with, the objectives of voluntary administration under Part 5.3A of the Corporations Act, when considered in conjunction with ss 439A and 439C. The circumstances in which the proceedings can be opened are

> similar. While rehabilitation proceedings can in some circumstances (such as the present) be run as 'debtor in possession' proceedings, the appointment of an independent custodian is possible, and there is in every case a person overseeing the process. The extent to which a custodian must seek the imprimatur of the court in the course of managing the business and assets in the pre-approval period is a significant departure from the independence of a voluntary administrator, but a voluntary administrator is ultimately subject to the supervision and sanction of the court under Corporations Act Div 13 of Part 5.3A and s 449B.
>
> The court's involvement in the conduct of the initial meeting of creditors in a rehabilitation, and the potential for members and equity holders to have a vote on the rehabilitation plan in some circumstances, are significant points of departure. The extent of the court's involvement in Korean rehabilitation proceedings was sufficient to cause Rares J, writing extra-curially, to conclude that "[a]n administration under Pt 5.3A is unlike proceedings under the [DRBA] (and Ch 11)." But with respect to Rares J, none of the differences identified above is decisive for present purposes, particularly given the significant common characteristics of voluntary administration and rehabilitation proceedings: both procedures are formal restructuring schemes that rely on the oversight of a court-supervised professional and the ultimate consent of a majority of creditors (by value), with the ultimate aim of maintaining the debtor's business where possible, and the potential outcome of liquidation otherwise.

56 **Fourth**, counsel for Hanjin also submitted and I accept that:

> While it is true that the scheme of arrangement procedure and the Korean rehabilitation procedure have in common the need for the court to convene meetings and approve the reorganisation plan or the scheme, and the court's power to approve a scheme subject to alterations or conditions under s 411(6) is similar to the Korean court's power to amend the plan to grant adequate protection under DRBA art 244, Corporations Act Part 5.1 lacks significant characteristics which Korean rehabilitation proceedings have in common with voluntary administration, namely:
>
> (a) it is not purpose-built to maximize the chances of rehabilitating an insolvent debtor if possible;
>
> (b) it does not provide a regime for the control of the debtor's business and assets and the ongoing conduct of the debtor's business during the pendency of the proceeding;
>
> (c) it does not provide for the appointment of a custodian or administrator answerable to the court;
>
> (d) it does not provide for the assessment and determination of claims of creditors or prescribe a regime for prioritising creditor recoveries;
>
> (e) it does not provide for automatic moratoria; and
>
> (f) it does not provide a pathway to liquidation in the event that the scheme proposal is unsuccessful.

57 **Fifth**, the stay arising under Part 5.3A, in common with the stays elsewhere in Part 5 of the Corporations Act, is subject to a capacity for leave to be obtained to proceed and prosecute any claim. The peripatetic nature of ships, to which Rares J referred in *Hur* at [33], is a given. It is not apparent, however, why the capacity for the grant of a leave to enforce a

maritime claim is insufficient protection for such claims, albeit recognising their unique nature. To take an unpaid crew as an example, as did his Honour in *Hur* at [33], the potential for arrest of the ship arises once the ship reaches port. Arrest requires an application. An application for arrest and for leave to proceed despite the stay may be made simultaneously. If leave is granted, the crew are in the same position as they would have been if the stay did not apply to their claim. Any risk of de facto forced labour or enslavement of the crew would be relevant to the grant of leave.

58 **Sixth,** and as is now commonplace in orders under the CBIA and Model Law, further protection can be given to creditors by requiring notice of the making of the orders to be given and by permitting creditors to vary or rescind the orders. Orders to this effect were proposed by the plaintiff and have been made.

Article 21

59 The plaintiff also sought further relief pursuant to article 21 of the Model Law entrusting the realisation of Hanjin's assets in Australia to the plaintiff, granting him a range of evidence-gathering powers, and restraining the enforcement of any charges, liens or pledges, including the exercise of any power of arrest against the property of the defendant or that in its possession or control, without the consent of either the Court or the plaintiff.

60 Article 21 of the Model Law states:

> **Article 21 Relief that may be granted upon recognition of a foreign proceeding**
>
> 1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
>
> (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;
>
> (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
>
> (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;
>
> (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
>
> (e) Entrusting the administration or realization of all or part of the debtor's

> assets located in this State to the foreign representative or another person designated by the court;
>
> (f) Extending relief granted under paragraph 1 of article 19;
>
> (g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.
>
> 2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.
>
> 3. In granting relief under the present article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

61 The orders sought are within the scope of those contemplated by article 21. I am also satisfied that such relief is "necessary to protect the assets of the debtor or the interests of the creditors", and the interests of the creditors are appropriately protected.

62 Many of the orders sought reflect the provisional relief which I granted on 30 September 2016, pursuant to article 19 of the Model Law, which expire upon recognition of the foreign proceedings pursuant to article 19(3).

63 As the plaintiff's submissions explained:

> (a) Hanjin's creditors have sought, and continue to seek, to seize and / or exercise liens on the Company's vessels and containers, which are its principal business assets;
>
> (b) Hanjin's financial difficulties have been "well publicized"; and
>
> (c) the uncertainty of the Company's ability to trade and to assure regular line services means that a mass of transport contracts face cancellation, which would result in a decrease in the company's income.

64 I am satisfied that the relief sought is necessary to protect the major revenue-generating assets of Hanjin in Australia, enable an orderly and equitable administration of rehabilitation proceedings, and to appropriately empower the plaintiff to deal with Hanjin's assets in Australia as and when necessary.

65 Finally, in accordance with paragraph 3.1 of the "Cross-Border Insolvency Practice Note: Cooperation with Foreign Courts or Foreign Representatives (GPN-XBDR)" practice note, the orders require that any application for leave to issue a warrant for the arrest in Australia

of any vessel owned or chartered by the defendant be accompanied by these reasons for judgment and those of the Court in *Yu*, *Yakushiji* and *Kim v SW*.

I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 23 November 2016