UNITED NATIONS DAY LECTURE 2019: TWENTY-FIVE YEARS OF CROSS BORDER INSOLVENCY LAW REFORM 1994-2014

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> *If the difficulties in the way of a perfect system are insuperable, let us have an imperfect system.*
>
> Sir Samuel Griffith

In considering the last quarter century's reforms of cross-border insolvency law, we cannot confine our focus to that period only. International insolvency problems have existed for as long as people have been engaged in trade across borders – that is to say, since time immemorial. And lawmakers have been focused on some of the intricacies that still bother us now for much longer than one might expect.

One example is particularly instructive. On 25 November 1886, the government of the United Kingdom invited representatives of the colonies to attend a conference in London for the purpose of discussing matters of common interest. In his letter of invitation, the Secretary of State for the Colonies, barrister Sir Edward Stanhope, wrote:

> The promotion of commercial and social relations by the development of our postal and telegraphic communications could be considered with much advantage by the proposed Conference. It is a subject the conditions of which are constantly changing. New requirements come into existence, and new projects are formulated, every year.[1]

The more things change, the more they stay the same. But it was not only matters of technology that were to concern the conference when it met in April and May 1887; the impressive cast of characters who constituted the conference engaged in debate concerning a wide range of subjects, among them the laws of insolvency.

The Australian colonies were ably represented. Among their emissaries were Alfred Deakin and James Service of Victoria, John Downer of South Australia, John Forrest of Western Australia and Sir Samuel Griffith, then Premier of Queensland.

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1 Her Majesty's Stationary Office, *Proceedings of the Colonial Conference 1887*, vol 1, vii.

The conference's discussion of insolvency matters is illuminating. It illustrates the remarkable differences between bankruptcy systems in various British colonies at the time, and demonstrates that problems which occupy us today were even then causing consternation among legal minds.

Section 118 of the *Bankruptcy Act 1883* gave British courts with jurisdiction in bankruptcy or insolvency the mandate to act in aid of and auxiliary to each other in all matters of bankruptcy and provided that

> an order of the court seeking aid, with the request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order, such jurisdiction as either the court which made the request or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

But that did not surmount the many and varied issues that had arisen in the colonial experience. As Sir Samuel Griffith observed:

> There are so many points in the Bankruptcy Law which are not settled. There are a great many things that we do not know: for instance, that an act of bankruptcy in one country may not be in another country be an act of bankruptcy; but which court has paramount jurisdiction in bankruptcy over a debtor, that has never been decided, and I doubt if anybody knows. It used to be laid down, I think, as a principle that the personal property of the bankrupt passed to his trustee wherever it was situated, that is supposing he was properly amenable to the jurisdiction of the court which made him bankrupt. But there is a question which is constantly arising. A man carries on business in several parts of the world and has something in each of them, and in each of them he is a judged bankrupt, to which of them does he owe allegiance, and which of the courts has jurisdiction? It may be that the court where he is resident has jurisdiction, it may be that every court where he has property or assets has jurisdiction, and if so, there is a conflict at once. I do not know that anybody knows exactly what the law is. I think what is first necessary is that somebody should take the matter in hand and codify the law.[2]

Reading the transcripts of the proceedings, it is amusing to find cynical comments concerning the expense of insolvency proceedings, and particularly the exhaustion of estates by the fees of liquidators and lawyers.[3] The more things change, the more they stay the same!

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2 Above n 1, vol 1, 70.

3 Above n 1, vol 1, 143.

The conference appears not to have come to any defined conclusions and certainly did not suggest a uniform law or approach to questions of bankruptcy across the Empire, but it did receive a set of suggested rules drafted by Griffith.[4]

The subject matter across which the conference debates ranged has a ring of familiarity to those of us engaged in cross-border insolvency law now, more than 130 years later. What shall be done about the assets of an insolvent in one jurisdiction where there are creditors in another? Are creditors in various jurisdictions to receive the same dividend out of all assets, or are local credits to be preferred? How can assets from one jurisdiction be transferred to another? Who is to administer an insolvent estate in each jurisdiction, and what is to be the relationship between them? Which courts have authority over a debtor's property, and where there is more than one of them, what is the relationship between them and between the judgments they make about the insolvency? How are we to determine which proceeding should have principal application to any given debtor? What is the effect of a discharge granted in one jurisdiction where the debtor does business in another? Many of those questions still trouble us today.

What I hope to show, in a brief survey of some of the issues that have emerged from recent law reforms, is that a statement made by Sir Samuel at the Colonial Conference (concerning more general questions about the execution of judgments) rings true when applied to the current state of cross-border insolvency law in Australia: *"If the difficulties in the way of a perfect system are insuperable, let us have an imperfect system."*[5]

Cross-border insolvency: where are we now?

The twenty-five years referred to in the subject of this year's lectures refers to the approximate period which ends this year and began with a joint colloquium on cross-border insolvency convened by the United Nations Commission on International Trade Law (UNCITRAL) and INSOL International in Vienna in 1994. The colloquium

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4 Above n 1, vol 2, 45-46. Griffith was a skilled draftsman: he went on to become the architect of the 'Griffith Code' which still provides the basis of the criminal law in Queensland, Tasmania and Western Australia, and a principal contributor to the drafting of Australia's constitution.

5 Above n 1, vol 1, 459.

appears to have sparked UNCITRAL's work in developing a legal instrument relating to cross-border insolvency which culminated in the promulgation of the *UNCITRAL Model Law on Cross-border Insolvency* in 1997 (the **MLCBI**). There had been a patchwork of earlier efforts, too: Lord Collins of Mapesbury provided a thumbnail sketch of some of those in *Rubin v Eurofinance SA* [2013] 1 AC 236 (***Rubin***).[6]

At the date of writing, the MLCBI had been adopted in a total of 46 states across 48 jurisdictions. Australia adopted it with the *Cross-border Insolvency Act 2008* (Cth) (**CBIA**), which is supported by the Cross-border Insolvency Regulations 2008 and (near uniform) rules of court in each of the Federal Court of Australia and the Supreme Courts of the several states and territories.[7]

The MLCBI is divided in to four chapters. They deal with: (a) access of foreign representatives of foreign insolvency proceedings and foreign creditors to local courts; (b) local recognition of foreign proceedings and relief granted in aid of such proceedings; (c) co-operation with foreign courts and foreign representatives; and (d) concurrent local and foreign proceedings. The MLCBI is not intended to include choice of law rules or substantive principles of law: it "respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law."[8]

This paper is not the place to describe the operation of the MLCBI in general. Readers not familiar with its general operation of the law would benefit from reference to one of the sources described in the footnote.[9] A description of those particular aspects of the MLCBI with which I am presently concerned appears below.

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6 *Rubin v Eurofinance SA* [2013] 1 AC 236, 251 [11] – 255 [23].

7 See for example Federal Court (Corporations) Rules 2000, Div 15A.

8 *UNCITRAL Model Law on Cross-border Insolvency with Guide to Enactment and Interpretation* (2013) (**MLCBI Guide**), [3].

9 In '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(2) *Insolvency Law Journal 63,* I offered an article-by-article comparison of Australia's implementation of the MLCBI with those of the two other polities. More detailed descriptions of the Australian law can be found in Sandeep Gopalan and Michael Guihot, *Cross-Border Insolvency Law* (LexisNexis Butterworths, 2016) and Neil Hannan, *Cross-Border Insolvency* (Springer, 2017). The most comprehensive treatment of the subject on an international scale appears in Look Chan Ho, *Cross-Border Insolvency* (4th Ed., Globe Law and Business, 2017).

Modified universalism: a primer or a refresher[10]

In order to understand why the MLCBI operates as it does, it is important to recognise that the current trend in private international law is that insolvency (whether personal or corporate) should be unitary and universal. That is, there should be a unitary insolvency proceeding in the court of the debtor's domicile which should receive world-wide recognition and should apply universally to all of the debtor's assets.[11] That principle, qualified by limited protections for local creditors' rights, has come to be called 'modified universalism'.[12]

In *Re HIH*, Lord Hoffman called the principle a *"golden thread running through English cross-border insolvency law since the 18th century"* and summarised it as follows:

> That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.[13]

In *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, Lord Hoffman (delivering the opinion of the Privy Council) stated:

> The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.[14]

Of course, modified universalism does not require the 'stripping' of local creditors' rights.[15] In *Singularis Holdings Limited v PricewaterhouseCoopers* [2015] AC 1675, 1694 [19], Lord Sumption stated:

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10 The material in this section is derived from work jointly prepared with Nicholas Wallwork of the Victorian Bar. Any errors or omissions are my own.

11 *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8 (***Akers***), 16 [28]; *In Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 (***Re HIH***) at 856-857 [6] (Lord Hoffman, Lord Phillips of Worth Matravers and Lord Walker of Gestingthorpe agreeing).

12 *Akers*, 16 [28]; 37 [120].

13 *Re HIH*, 861 [30].

14 *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, 518 [16].

15 *Akers*, 37 [120]; MLCBI, preamble, (c).

> In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers.

The acceptance of the modified universalism doctrine is now so well established that in *(Foreign Representative of the Ojsc International Bank of Azerbaijan) v Sberbank of Russia* [2018] EWCA Civ 2802, Henderson LJ stated:

> …there may now be a strong case for saying that, in the absence of a stipulation to the contrary, contracting parties should generally be taken to envisage that, upon the supervening insolvency of one party, a single law closely associated with that party should govern the rights of its creditors, wherever in the world its assets happen to be situated, and regardless of the proper law of the contract.[16]

We shall see later that modified universalism is neither ubiquitous or unrestricted in its application. But speaking generally, once a foreign insolvency proceeding is recognised by the local courts, the principle of modified universalism should apply. In *Yakushiji v Daiichi Chuo Kisen Kaisha* (2015) 333 ALR 513, Allsop CJ considered a rehabilitation proceeding in respect of a large Japanese shipping line, and stated that:

> if the group or company is in financial difficulty, [the rehabilitation] should be supported by the ordered process of the rehabilitation scheme in Tokyo, with such support being the statutory purpose of the [CBIA].[17]

The principle of modified universalism underpins the MLCBI. In the MLCBI Guide, UNCITRAL notes that:

> In principle, the proceeding pending in the debtor's centre of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has asset and creditors, subject to appropriate coordination principles to accommodate local needs.[18]

By my count, there have been around 90 published decisions concerning the MLCBI since the enactment of the CBIA. I now turn to examine some of the more recent cases, judging their impact in light of (among other things) the principle of modified universalism.

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16 *(Foreign Representative of the Ojsc International Bank of Azerbaijan) v Sberbank of Russia* [2018] EWCA Civ 2802, [31].

17 *Yakushiji v Daiichi Chuo Kisen Kaisha* (2015) 333 ALR 513, 517 [23].

18 MLCBI Guide, [1].

Some recent developments in Australia

Zetta Jet – determining COMI, and the application of Australian avoidance laws

The criteria for recognition of a foreign proceeding are set out in MLCBI art 17. If all of those criteria are satisfied, then recognition is mandatory, so long as it is not "manifestly contrary to the public policy" of Australia within the meaning of art 6.[19]

The criterion in art 17(2) must be taken to require that the foreign proceeding be either a foreign main proceeding or a foreign non-main proceeding.[20] But the text of the MLCBI is silent as to the time at which that criterion must be satisfied. There has been no appellate-level consideration of the point in Australia, and the question is the subject of conflicting first instance authorities. Those authorities were surveyed by Perram J in *Re King* [2018] FCA 1932 (***Re King***) as follows (with paragraph breaks added):

> There is confusion as to when the questions posed by Art 17(2) are to be decided. I doubt, with respect, the assumption made by Logan J in *Gainsford v Tannenbaum* [2012] FCA 904; 216 FCR 543 ("Gainsford") at 555 [45] that they are to be answered at the time the recognition proceeding is filed. It is possible that by the time that a recognition application is made that a debtor may be engaged in no activities at all.
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> For a similar reason, therefore, it also seems awkward to think that the question should be answered as at the date the Court is called on to make the decision under Art 17(2) as Emmett J held in *Moore as Debtor-in Possession of Australian Equity Investors v Australian Equity Investors* [2012] FCA 1002 ("Moore") at [18]. …
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> Beach J has reasoned that … it makes sense for the question to be asked at the time that the foreign insolvency proceeding is opened: *Kapila, in the matter of Edelsten* [2014] FCA 1112 ("Kapila") at [35]-[39].[21]

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19 *Christie (Trustee), in the matter of Kian (Bankrupt) v Kian* [2019] FCA 1141, [6].

20 That is, that the foreign proceeding be one in the jurisdiction of the debtor's 'centre of main interests' (**COMI**) (foreign main proceeding) or in a jurisdiction in which the debtor has an 'establishment' (foreign non-main proceeding): See *Williams v Simpson (No 5)* [2011] 2 NZLR 380 (HCNZ); *In Re Bear Sterns High Grade Structured Credit Strategies Master Fund Ltd* 389 B.R. 325 (SDNY 2008), 334; *Legend International Holdings Inc* [2016] VSC 308. Contrast the situation in Canada, where the definition of "foreign non-main proceeding" is ""a foreign proceeding, other than a foreign main proceeding": *Companies' Creditors Arrangement Act* R.S.C., 1985, c. C-36: s 45(1). See too the discussion in Neil Hannan, *Cross-Border Insolvency*, (Springer, Singapore, 2017), 111-121. *Official Assignee in Bankruptcy of the Property of Hanna, in the matter of Hanna v Hanna* [2018] FCA 156, in which the Court appears to have recognised a foreign proceeding despite having found that it was not a foreign main proceeding and not having found that it was a foreign non-main proceeding, is anomalous.

21 *Re King*, [11]-[12].

> These three authorities are not readily reconciled. However, Kapila is the only decision in which there has been any analysis of the question. I prefer it and propose to follow it in preference to Gainsford and Moore on this point.[22]

Unfortunately, his Honour's decision is inconsistent with the approach taken by the Supreme Court of Singapore in its decision concerning recognition of the same foreign proceeding.[23] In that case, Justice Abdullah considered the English, United States and Australian approaches and followed what his Honour found to be the United States approach of answering the question at the date of filing the recognition application. While his Honour's approach is instructive, it cannot determine how a future Australian court would approach the question and it remains an open question.

This is not the place to reagitate the many issues involved in determining the normative answer to the question of what time at which COMI becomes relevant. Fortunately, application of the different tests will be an academic question in most cases, as a debtor's COMI will rarely change following the opening of foreign main proceedings (which experience has shown form the majority of recognition applications in Australia). For the time being, the takeaway lessons are that the relevant COMI date remains a contestable issue and that there is plenty of juridical material upon which to build an argument for any of the possible outcomes.

Re King concerned the United States bankruptcy of a Singaporean company, Zetta Jet Pte Ltd (**Zetta Jet**). Zetta Jet's United States bankruptcy trustee is attempting to pursue a luxury yacht, the 'Dragon Pearl', which he alleges was purchased using Zetta Jet's funds from an Australian shipbuilder by Dragon Pearl Limited, a Singaporean company related to a director of Zetta Jet. The trustee brought an in rem claim against the vessel in the Federal Court of Australia, claiming that it was held on trust for Zetta Jet. At trial, the trustee failed to prove his case, and his proceeding was dismissed.[24] The trustee filed an appeal, which was dismissed.[25] He then filed a second maritime proceeding, which was dismissed on the basis of res judicata.[26] An appeal against that decision was also dismissed.[27] The trustee then obtained recognition of

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22 *Re King* [2018] FCA 1932, [11]-[12] (Perram J).

23 *Re Zetta Jet Pte Ltd* [2019] SGHC 53, [39] – [61] (Aedit Abdullah J).

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

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

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

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

Zetta Jet's bankruptcy under the MLCBI,[28] and commenced proceedings to set aside the purchase of the vessel by Dragon Pearl Limited under Part 5.7B of the *Corporations Act 2001* (C'th) (the **Corporations Act**). The only connection between the impugned transaction and Australia was the fact that the five payments that Zetta Jet made to the shipwrights were made in Australia.[29]

The trustee's action invoked s 588FF of the Corporations Act, which concerns "a transaction of the company". In the Corporations Act, unless the contrary expression appears, 'company' takes its meaning from the definition of that term in s 9. In summary, the s 9 definition extends to companies incorporated in Australia, foreign companies registered in Australia and foreign companies carrying on business within Australia. Zetta Jet did not fall within any of those categories.[30]

The trustee sought to invoke the CBIA to avoid that limitation in s 588FF. He argued that art 23 of the MLCBI, read with s 17 of the CBIA, had effect as follows:

> Upon recognition of a foreign [insolvency] proceeding, the foreign representative has standing to initiate actions arising under the provisions of Division 2 of Part 5.7B of the Corporations Act 2001 (Cth), with appropriate changes, as if the foreign [insolvency] proceeding in relation to a 'company' was an Australian [insolvency] proceeding in relation to a 'company'.

Consequently, the trustee argued, the effect of the MLCBI was that s 588FF applied to a company the subject of a recognition order as if it were a 'company' as defined by s 9 of the Corporations Act.[31] Article 23 gives a foreign representative standing to commence proceedings under s 588FF of the Corporations Act, but the trustee argued that it also expands the operation of s 588FF so that it applies to companies the subject of MLCBI recognition in Australia. The effect of that submission was summarised by the judge, Perram J. If correct, it would:

> alter the substantive insolvency law of Australia so that voidable transaction claims of the kind referred to in Division 2 of Part 5.7B can now be brought with respect to the affairs of foreign corporations which do not conduct business in Australia and which are not registered there either.

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28 *King, in the matter of Zetta Jet Pte. Ltd* [2018] FCA 1932.

29 *King, in the matter of Zetta Jet Pte. Ltd* [2018] FCA 1979, [19].

30 *King, in the matter of Zetta Jet Pte. Ltd* [2018] FCA 1979, [21]-[22].

31 *King, in the matter of Zetta Jet Pte. Ltd* [2018] FCA 1979, [21]-[22].

His Honour rejected those arguments, finding that art 23 was a rule about standing. Neither its ordinary language or its explanatory materials justified assigning a substantive effect to it. His Honour also drew from the MLCBI Guide, which provides at [185] that

> [t]o the extent that the enacting State authorizes particular actions to be taken by a foreign representative, they may be taken only if an insolvency representative within the enacting State could have brought those proceedings. No substantive rights are created by article 23, nor are conflict-of-laws rules stated.

Re King therefore establishes that avoidance actions under s 588FF are not available to foreign companies which are not registered in Australia and did not carry on business here, whether or not insolvency proceedings concerning those companies have been recognised under the CBIA.

Real property – Palmer, Christie and Chang Raji

Article 21(1)(e) of the MLCBI enables the court at the request of the foreign representative to entrust the administration or realisation of all or part of the debtor's assets located in Australia to the foreign representative or another person designated by the court. In making any such order, the court must be satisfied that the interests of the debtor, the creditors and "other interested persons" are protected: art 22(1), and may attach such conditions to relief as it considers appropriate: art 22(2).

The importance and impact of such orders is illustrated by the bankruptcy case of *Palmer v Registrar-General of Land Titles of the ACT* [2017] ACTSC 407. The English trustee of the bankrupt estate of an English debtor who owned land in the Australian Capital Territory had obtained orders recognising the English proceeding as a foreign main proceeding and appointing local representatives in Australia to administer and realise the bankrupt's local assets. Later, the trustee (as foreign representative of the estate) sought orders requiring the Registrar-General of Land Titles to remove the local representatives' details from the register as proprietors of the ACT land and record the foreign representative in their place.

Principles of private international law meant that English bankruptcy law did not have the effect of automatically vesting title to the real property in the trustee. Mossop J summarised those principles at [34]:

> Generally speaking, Australian courts treat a foreign bankruptcy as an assignment of all of the bankrupt's movable property situated in the forum to the foreign trustee provided that the foreign law purports to apply to property situated in the forum: Davies et al, *Nygh's Conflict of Laws In Australia* (LexisNexis Butterworths, 9th ed, 2014) at [36.3]. However a foreign bankruptcy has, by itself, no effect on the bankrupt's title to immovable property situated in the forum. That is because of the rule of private international law that an assignment of the bankrupt's property effected by foreign law by the making of an adjudication by a foreign court having jurisdiction over the bankrupt's person is not recognised in the forum as operating as an assignment of the bankrupts immovable property within the forum: *Australian Mutual Provident Society v Gregory* [1908] HCA 7; (1908) 5 CLR 615 at 623, 625, 628, 630; *Radich v Bank of NZ* [1993] FCA 450; (1993) 116 ALR 676 at 693; *Nygh's Conflict of Laws In Australia at* [36.4].

As a result of the order appointing the local representatives, his Honour held that it was those representatives, and not the trustee, who were entitled to become the registered proprietors of the property. The following passage from the judgment at [39] explains why:

> The scheme of the CBI Act and Model Law is not such as to give expressly, or to imply, any general power of administration of assets within Australia. Rather, the specific consequences of recognition of foreign proceedings are spelt out. Those consequences vary as between main proceedings and non-main proceedings. They are a mixture of consequences which arise automatically and consequences which only arise upon the making of orders by the Federal Court. I do not accept the plaintiff's submission that the combined operation of ss 6, 8 and 11 of the CBI Act is "to cloak [the plaintiff] with all the rights that a trustee would have who has been appointed under the act Bankruptcy Act, to administer the bankrupt estate in Australia". Rather, except where stated to arise automatically as a result of recognition of the foreign main proceeding, the powers of the foreign representative are those which are granted under Article 21 or those that arise in accordance with the principles of private international law.

Although there are some cases in which the question appears not to have been raised,[32] vesting orders in respect of real property now seem to be anodyne: see e.g. *Christie (Trustee), in the matter of Kian (Bankrupt) v Kian* [2019] FCA 1141. Another example is *Abate, in the matter of Chang Rajii v Chang Rajii (No 4)* [2019] FCA 1394. There, Gleeson J was satisfied that an order compelling the delivery to the foreign representative of a certificate of title to Australian property was necessary to protect the interests of the foreign bankrupt's creditors, "those interests being to obtain a

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[32] See *Williams v Arnold* [2010] FCA 732, [18] and *Official Assignee in Bankruptcy of the Property of Ma v Ma* [2018] FCA 948, [17] in which orders were made (apparently erroneously) declaring that Australian real property vested in foreign trustees in bankruptcy. In neither case does the principle described by *Palmer v Registrar-General of Land Titles of the ACT* [2017] ACTSC 407 at [34] appear to have been brought to the Court's attention.

distribution of [the bankrupt's] assets."[33] The same reasoning had founded her Honour's earlier decision in *Abate, in the matter of Chang Rajii v Chang Rajii (No 3)* [2019] FCA 577 to vest the Australian property in the foreign representative under art 21(1)(e) and to order the Registrar-General to record the foreign representative as the registered proprietor of the property under s 138 of the *Real Property Act 1900* (NSW).[34] Her Honour also ordered that the proceeds of sale of that property be applied in part to payment of the bankrupt's only Australian creditor, the owner's corporation for the property. The latter order having been made, her Honour was satisfied that all Australian creditors had been adequately protected within the meaning of art 22.[35]

While the MLCBI makes it easy for foreign representatives to obtain the necessary access to, and protection of their rights in, local real property, the lesson that emerges from the recent cases is that foreign representatives should take care (1) to seek orders that make clear who has title to any Australian real property; and (2) that the person in whom title is vested (or who is entrusted with realisation of that property) can exercise any powers necessary to deal with it.

Halifax - The tantalising prospect of joint hearings

The potential for parallel insolvency proceedings concerning the same or related debtors in different jurisdictions leads to the prospect that multiple courts will be called on to consider issues arising from the same circumstances. Where the two courts are called on to decide overlapping questions of fact or law, it would be perverse (and productive of great practical problems) if their decisions conflicted.

Joint hearings are a potential response to such issues. Perhaps the most important example of such a hearing recently is provided by the Nortel bankruptcy, in which the United States Bankruptcy Court for the District of Delaware and the Ontario Superior Court held simultaneous and linked hearings concerning the distribution of proceeds of an insolvent estate held in a 'lockbox'. Professor Pottow describes how the trial was run:[36]

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33 *Abate, in the matter of Chang Rajii v Chang Rajii (No 4)* [2019] FCA 1394, [7].

34 *Abate, in the matter of Chang Rajii v Chang Rajii (No 3)* [2019] FCA 577: [14], [22].

35 *Abate, in the matter of Chang Rajii v Chang Rajii (No 3)* [2019] FCA 577, [15] – [16]; *Abate, in the matter of Chang Rajii v Chang Rajii (No 4)* [2019] FCA 1394, [9].

36 Pottow, John A. E., Two Cheers for Universalism: Nortel's Nifty Novelty (November 1, 2015). U of Michigan Public Law Research Paper No. 487; U of Michigan Law &

> The trial on how to allocate the lockbox proceeds was run in two different courtrooms in Toronto, Ontario and Wilmington, Delaware simultaneously, with the judges engaged in frank and frequent communications between themselves.[37] Witnesses were video-linked from one courtroom to the other, and litigants in each venue could see in live time what was afoot in the other. But as the respective courts made clear, each judge would arrive ultimately at his own determination on what the applicable bankruptcy law demanded for allocation of the lockbox proceeds across jurisdictional borders.[38]

To the best of my knowledge, to date there has been no joint hearing involving an Australian court. But the CBIA and the MLCBI allow for it. And in *Kelly, in the matter of Halifax Investment Services Pty Ltd (in liquidation) (No 5)* [2019] FCA 1341 (***Halifax***), it appears that it might occur (albeit perhaps not using the mechanism of the MLCBI).

Halifax arose under s 581(4) of the Corporations Act, not the CBIA. The same liquidators had been appointed to an Australian company and to a related New Zealand company which had introduced investors to the Australian company. Both companies had bank accounts containing substantial sums which may have been held in trust for investors from Australia and New Zealand. The funds were intermixed and it was impossible to untangle the accounts to determine the extent of beneficial ownership. The liquidators wanted to obtain judicial advice to the effect that they could pool the funds and as to how the funds should be distributed. For that purpose, they applied to the Federal Court of Australia for the issue of a letter of request to the High Court of New Zealand. The letter would have asked the New Zealand court to sit concurrently with the Australian court, each to hear a pooling application in respect of the various accounts, and the courts to consult with one another before reaching separate decisions. Gleeson J held that such an order would be within the scope of the s 581(4) power, but declined the application on the basis that no contradictors had been identified or notified.

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37 "The Courts have had discussions following the trial of the allocation dispute in an effort to avoid the travesty of reaching contrary results which would lead to further and potentially greater uncertainty and delay." In re Nortel Networks, Inc, 532 BR at 532.

38 *Ibid* at 556 ("[T]he US Court and the Canadian Court independently arrived at the same conclusion."); *Re Nortel Networks Corp*, 2015 CarswellOnt 7072 (Ont SCJ [Commercial List]), para 10 ("We have come to this conclusion in the exercise of our independent and exclusive jurisdiction in each of our jurisdictions.").

Halifax is a case that seems ripe for joint hearing to determine the difficult question of pooling in circumstances where there will likely be creditors in each jurisdiction who would benefit from having a local hearing. If the Australian and New Zealand courts can be convinced to undertake the exercise, it will provide a useful precedent. The profession is watching it closely.

Addressing three criticisms: Professor Davies' lecture

On 9 July 2019, Professor Martin Davies delivered a seminar at the University of Sydney Law School entitled *"The UNICTRAL Model Law on Cross-Border Insolvency: neither a law nor much of a model."* Professor Davies, a widely-published academic whose work includes co-authorship of authoritative Australian texts on private international law[39] and admiralty law[40] is well-credentialled to critique the Model Law. I propose to use his views as a vehicle to explore the topical issues that his lecture identified.

Criticism 1: The MLCBI does not provide for the enforcement of foreign judgments

The MLCBI provides mechanisms for the recognition of judgments opening foreign insolvency proceedings (for example, judicial orders commencing proceedings under Chapter 11 of the United States Bankruptcy Code). But in many jurisdictions including Australia, it does not provide for the enforcement of judgments obtained within such proceedings. Professor Davies rightly identified that as a shortcoming of the MLCBI.

Insolvency proceedings generate any number of judgments, many of which require recognition and enforcement in jurisdictions other than that in which they were obtained. Such judgments include *in personam* judgments for the recovery of property made in the course of an insolvency administration, judgments for the reversal of antecedent transactions or relief responding to such transactions, and judgments giving effect to the insolvency process, in jurisdictions where court orders are necessary to effect the reorganisation of debt, the restructure of capital or the discharge of the debtor from pre-insolvency obligations.

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39 Martin Davies, Andrew Bell and Paul Brereton, *Nygh's Conflict of Laws in Australia* (9th Ed, LexisNexis Butterworths, 2014).

40 Martin Davies and Anthony Dickey, *Shipping Law* (4th Ed, Thomson Reuters, 2016).

And so it follows that recognition and assistance of a foreign insolvency proceeding is only part of the cross-border puzzle. Any effective international insolvency regime must also provide a means by which judgments rendered in foreign insolvency proceedings can be recognised and given effect locally. It is no good recognising the foreign proceeding if relief obtained from foreign courts in aid of that proceeding cannot be relied on locally without the risk, delay and expense of relitigation.

And it is not merely a question of efficiency. The absence of a mechanism to recognise and enforce judgments would undermine the efficacy of the insolvency system itself, and even uncertainty in the availability and operation of such a mechanism carries a real risk of substantial injustice. That is of particular moment where the judgment in question is one that gives effect to a reorganisation or discharge. Professor Jay Westbrook points out that the effectiveness of an insolvency reorganisation is dependent on it binding all creditors and affecting all compromised debts. "In that way, all of the creditors and other stakeholders in the debtor company can be content that the debtor's financial obligations at a moment in time are knowable and fixed."[41] Accordingly, a reorganisation is only of value if its effect extends throughout the debtor's entire market. Failure to recognise the judgment in any one part of that market (for example, a country in which a creditor resides or does business) not only undermines the efficacy of the reorganisation, but creates a real risk that the system could be gamed. Using the prospect of an English court failing to give effect to a judgment in a Chapter 11 case,[42] Professor Westbrook describes a concern that:

> … a United States reorganization judgment could be ignored by manipulating corporate shells that would carefully avoid contact with the United States debtor while their sister companies and principals had a full and fair opportunity to object to the United States proceedings.
>
> If that were permitted, the judgment arising from approval of a reorganization would be of dramatically reduced value. For example, an off-shore shell that had taken assignment of the debt could sue the reorganized company in England for the full amount originally owed while the rest of the creditors had settled for less. In turn, that prospect would make it far less likely the other creditors would agree to a plan in the first place—the classic holdout problem that both United Kingdom and United States reorganization (or rescue) provisions are designed to overcome.[43]

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41 Jay Lawrence Westbrook, 'Ian Fletcher and the Internationalist Principle', (2015) 3 *Nottingham Insolvency and Business Law e-Journal* 565, 569.

42 For reasons that will become clear below.

43 Above n 41, 568 (footnote omitted).

There is thus a demonstrable imperative for reliable and predictable mechanisms for the enforcement of foreign insolvency judgments. It is surprising, then, that the principal international instruments on judgment recognition have not covered insolvency-related judgments. For example, neither the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters or the Convention of 30 June 2005 on Choice of Court Agreements (both developed by the Hague Conference on Private International Law) exclude insolvency-related judgments. Recent draft conventions and model laws suffer similarly: the Hague Conference published a draft Convention on the Recognition and Enforcement of Foreign Judgments in May 2018,[44] and the Commonwealth of Nations published a Model Law on the Recognition and Enforcement of Foreign Judgments in 2017.[45] Neither covers insolvency-related judgments. And nor does the MLCBI.

In corporate insolvency cases, Australian law contains four potential means by which a foreign judgment might be recognised: (a) under the *Foreign Judgments Act 1991* (Cth), which provides for the registration of judgments "in relation to nations which the Governor-General is satisfied accord substantial reciprocity to Australian judgments"[46]; (b) under quite limited common law rules;[47] (c) pursuant to the 'act in aid of and ancillary to' power in s 581 of the Corporations Act; and (d) under the MLCBI. Each has its own limitations, and even between them they do not create a anything approaching a comprehensive scheme for the enforcement of foreign insolvency judgments. Further, following the decision of the Supreme Court of the United Kingdom in *Rubin*, it is most unlikely that an Australian court would find that the MLCBI of itself provides an Australian court with the power to enforce a foreign judgment.[48]

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44 https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf (accessed 9 May 2019).

45 See Commonwealth Secretariat (2017) 'Improving the recognition of foreign judgments: model law on the recognition and enforcement of Foreign Judgments', *Commonwealth Law Bulletin*, 43:3-4, 545-576

46 Nye Perram, *Issues in Recognition and Enforcement of Foreign Insolvency Judgments – An Australian Perspective*, [2016] Federal Judicial Scholarship 13, 6-7.

47 Described in Martin Davies, Andrew Bell and Justice Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia*, (Lexis Nexis, 9th ed, 2014) 895 -903.

48 The arguments are set out in R I Barrett, *Commentary on "Cross-Border Insolvency — Judicial Assistance in the Post-Hoffmann Era*" [2013] New South Wales Judicial Scholarship 26, 4-5; Gerard McCormack and Anil Hargovan, *Australia and the*

It is also important to note that unfettered enforcement of insolvency-related judgments is not an uncontestably good thing. Professor Briggs explains the two competing approaches to recognition as follows:[49]

> Insolvency practitioners, especially those engaged in cross-border mega-insolvencies, appear to regard the idea of cross-border cooperation as fundamental to the way they do their business, not least because every instance in which cooperation is unavailable and something more contentious is triggered, the only losers are the general creditors: the judgment in *Beluga Chartering*[50] is a fine example of what an insolvency lawyer's judgment would look like.
>
> By contrast, the natural instinct of private international lawyers, when presented with a foreign default judgment, is to apply stringent conditions to its recognition, with the result that a defendant who was not present within the court's territorial jurisdiction, and who did not submit to that jurisdiction, will not be bound by it, and will not be affected by it in any other way: he is either bound, or he is entirely free; there are no half measures.

Later in the same paper, Professor Briggs expands as follows:[51]

> If one asks whether we should be disposed to assist the general creditors, of course we should: why wouldn't we? But if one asks whether we should fund this by simply stripping assets from defendants who have not yet been well and truly tried, it is less obvious that we should be so keen. Defendants have rights, and private international law seeks to ensure that these are not trampled in the rush to be seen to do good. There is no free money, only money which a court orders to be paid so as to enrich some at the expense of others.

The existence of the two competing approaches is demonstrated by two cases which are widely seen as obstacles to the effective implementation of modified universalism in the United Kingdom, and by UNCITRAL's response to them.

In *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 (***Gibbs***), the Court of Appeal held that the law of England did not recognise the discharge of a debt by the operation of the insolvency law of a jurisdiction

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International Insolvency Paradigm (2015) 37 Syd LR 389, 412, and Perram, above n 46, 8-10.

49 Adrian Briggs, *Rubin and New Cap: Foreign Judgments in Insolvency* Legal Studies Research Paper 7/2013, Singapore Management University, School of Law, April 2013, 4-5. The paragraph break has been inserted to make my point.

50 *Beluga Chartering GmbH (in liq) v Beluga Projects (Singapore) Pte Ltd (in liq)* [2013] SGHC 60.

51 Adrian Briggs, above n 49, 9.

other than that which governed the debt.[52] On the facts of the case, a purchaser's debt under a contract for the sale of copper which the parties had agreed was governed by English law was held not to have been discharged by the law of France, under which the debtor had been liquidated. The late Professor Fletcher summarised the effect of what has become known as the 'Rule in *Gibbs*' as follows:

> whatever may be the purported effect of the liquidation according to the law of the country in which it has been conducted, the position at English law is that a debt owed to or by a dissolved company is not considered to be extinguished unless that is the effect according to the law which, in the eyes of English private international law, constitutes the proper law of the debt in question.[53]

The rule does not apply if the creditor submits to the foreign insolvency proceeding.[54]

English courts have acknowledged that the rule in *Gibbs* seems an anomalous fraying of the golden thread of modified universalism. And yet, bound by the rules of precedent, they continue to follow it. For example, in *Gunel Bakhshiyeva v Sberbank of Russia & Ors* [2018] EWCA Civ 2802 (***Gunel Bakshiyeva***), Henderson LJ stated:

> the rule may be though increasingly anachronistic in a world where the principle of modified universalism has been the inspiration for much cross-border cooperation in insolvency matters, including the UNCITRAL Model Law, and has also been recognised as forming part of the common law: see *Singularis Holdings Limited v Pricewaterhouse Coopers* [2014] UKPC 36, [2015] AC 1675, at [19] per Lord Sumption. In particular, there may now be a strong case for saying that, in the absence of a stipulation to the contrary, contracting parties should generally be taken to envisage that, upon the supervening insolvency of one party, a single law closely associated with that party should govern the rights of its creditors, wherever in the world its assets happen to be situated, and regardless of the proper law of the contract.

Nevertheless, the rule in *Gibbs* continues to form part of the common law in England, and the provisions of the MLCBI which allow the court to grant discretionary relief attendant upon recognition of a foreign insolvency proceeding do not enable its

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52 *Gibbs*, 405-406 (Lord Esher MR); 410 (Lindley LJ); 411 (Lopes LJ).

53 Ian Fletcher, *The Law of Insolvency* (5e, 2017), at para 30-061.

54 *Gunel Bakhshiyeva*, [28] (Henderson J, Barker and Lewison LJJ agreeing).

circumvention,[55] even if they might temporarily prevent the enforcement of the rights which it protects during the pendency of the proceeding.[56]

In *Rubin*, the receivers of an English trust commenced a proceeding under Chapter 11 of the United States Bankruptcy Code and commenced proceedings in a United States court against former officers of the trust to recover antecedent transactions. The former officers did not submit to the jurisdiction of the American court, and the court entered default judgment against them. The High Court of England and Wales granted recognition of the Chapter 11 proceeding under the *Cross-border Insolvency Regulation 2006*,[57] and the receivers sought to enforce the default judgments. The case reached the Supreme Court, which found that the default judgments were unenforceable in the United Kingdom because the defendants were not resident in the United States and had not submitted to the jurisdiction of the United States court. Neither the equivalent of Corporations Act s 581 nor the common law allowed recognition. And properly interpreted, none of articles 21, 25 or 27 of the CBIA gave the High Court the power to enforce a foreign judgment.

Gibbs and *Rubin* are unpopular with insolvency lawyers for a shared characteristic: they elevate formal rules of private international law above the principle of modified universalism. Neither case represents a harmonised position world over: the principle underlying the rule in *Gibbs* has been applied in Australia,[58] but commentators suggest that its adoption elsewhere in the common law world is far from uniform.[59] And *Rubin* does not reflect the law in the United States, for example.

The fact that the rule in *Gibbs* and the holdings in *Rubin* might not be applied in other countries does not remove the necessity to address them: if the law of a jurisdiction as important to international trade as the United Kingdom refuses to recognise the compromise of certain debts by insolvency-related judgments originating

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55 *Gunel Bakhshiyeva*, [91], [95] (Henderson J, Barker and Lewison LJJ agreeing).

56 See Sonya Van de Graaf and Ed Downer, 'A second UNICTRAL Model Law', *Global Turnaround*, February 2019, 10, 11.

57 The CBIA implements the MLCBI in England and Wales.

58 See e.g. *Primary Producers Bank of Australia Ltd v Hughes* (1931) 32 SR (NSW) 14 and *Fiske v Sterling Investment Co Pty Ltd* (1977) 3 ACLR 158.

59 See Tom Pugh and Devi Shah, 'Universally Territorial: Recognisable?' (2018) 15(5) *International Corporate Rescue* 285.

outside that jurisdiction, it is a concern for the efficacy of the cross-border insolvency regimes of any entities that have significant creditors within it.[60]

And so the decision in *Rubin* drew attention to the potential limitations of the MLCBI, and motivated *"UNCITRAL's Working Group V [to start] deliberations on what further guidance it was appropriate to give to nations in the field on cross-border cooperation."*[61] The deliberations of Working Group V culminated in UNCITRAL's adoption on 2 July 2018 of the Model Law on Recognition and Enforcement of Insolvency-related Judgments (**MLRE**). Like the MLCBI, it is published together with a Guide to Enactment.[62]

On 20 December 2018, the General Assembly of the United Nations resolved to recommend that all states give favourable consideration to the MLRE when revising or adopting insolvency legislation. So far as I am aware, it is yet to be implemented in the legislation of any state.

The MLRE is independent of, but designed to complement, the MLCBI.[63] This paper is not the place to enter in to a detailed description of the provisions of the MLRE; a short summary must suffice.

The MLRE covers two distinct concepts: recognition of judgments and enforcement of judgments. Recognition means that the local court will give effect to the foreign court's determination of legal rights and obligations; enforcement means the application of local mechanisms to ensure compliance with the judgment.[64] While recognition must always precede enforcement, it need not be followed by enforcement.[65]

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60 See generally Westbrook, above n 0.

61 Jenny Clift and Neil Cooper, 'UNCITRAL Mode Law on the Recognition and Enforcement of Insolvency-related Judgments', *INSOL World* (4th Quarter, 2018), 24. The influence of Rubin is acknowledged in the Guide to Enactment published in conjunction with the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (the **MLRE Guide**): see [2].

62 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf (accessed 9 May 2019).

63 MLRE Guide, [1], [35].

64 MLRE Guide, [78].

65 MLRE Guide, [79].

An 'insolvency-related judgment' is a decision issued by a court or an administrative authority (other than an interim measure of protection) which was issued on or after the commencement of an insolvency proceeding, and "arises as a consequence or is materially associated with" that insolvency proceeding, whether or not the insolvency proceeding has closed. Recognition can be sought of all or part of a judgment, and provisional relief is available.

Recognition may be sought by a person who is authorised in an insolvency proceeding to administer a reorganisation or liquidation or to act as the representative of the proceeding, or is otherwise entitled to seek recognition and enforcement under the law of the originating state.[66]

The two crucial criteria for recognition are that the judgment is legally valid and operative in the originating state and, where enforcement is sought, that the judgment is enforceable in the originating state. There is a list of the grounds which, if present, create a discretion to refuse recognition or enforcement. They include matters relating to notice, fraud, inconsistency with other judgments and interference with local orders, absence of jurisdiction of the originating court, and the fact that the debtor had neither COMI nor establishment in the originating state (judged according to the MLCBI of the recognising state).

The MLRE provides a possible means addresses Professor Davies' first criticism. But before it can do so effectively it must be given the force of law.

Criticism 2: the 'serious lacuna' – informing the court on change of status

The second shortcoming identified by Professor Davies is the absence of any mechanism to ensure compliance with MLCBI art 18, which operates from the time of recognition of a foreign proceeding and requires the foreign representative to inform the court promptly of:

(a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and

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66 Arts 13(b), 2(b) and 11(a).

(b) any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

The most important circumstances in which art 18 operates is when the foreign proceeding has come to an end. But in such circumstances, the foreign representative may no longer have the authority or the funds to comply with art 18.

That is no small thing: in the absence of notification, orders made on the basis of the status of the proceeding at the time of recognition may continue to operate and to affect rights; and parties might organise their affairs in reliance on such orders.

The art 18 problem has already come to light in Australia in cases concerning the Neapolitan shipping firm Rizzo-Bottiglieri-De Carlini Armatori SPA (**RBDCA**). In the RBDCA cases,[67] Rares J formulated an approach to the art 18 problem which is (1) likely to be effective; (2) likely to be adopted by courts outside Australia (given its utility and the international character of the Model Law); and (3) at least arguably necessary for foreign representatives to bring to the attention of the court whenever applying for recognition of a foreign proceeding.

The procedural history of the RBDCA cases is complicated. The board of RBDCA board commenced three consecutive *concordato preventivo* (restructuring) proceedings in Italy. The first was recognised as a foreign main proceeding by Jacobson J in *Board of Directors of RBDCA* [2013] FCA 157. The Australian court record does not make clear what became of that first Italian proceeding.

The second *concordato preventivo* proceeding was the subject of interim CBIA orders made by Rares J on 17 June 2015.[68] The Federal Court proceeding was adjourned from time to time and had not come on for final hearing when the second *concordato preventivo* proceeding was dismissed by the Italian court on 28 April 2016. However, the board did not comply with its obligation under art 18 to inform the Australian court that the foreign proceeding had been dismissed. A similar

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67 Four sets of reasons have been published by the Federal Court of Australia concerning CBIA applications made by that company; all bear the name of the company itself; for ease of reference, I will cite them only by reference to its acronym.

68 *Board of Directors of RBDCA v RBDCA* [2017] FCA 331, [3].

situation seems to have pertained in respect of recognition proceedings brought in the United States, England, and South Africa.[69]

Less than a month later, on 24 May 2016, the board commenced a third *concordato preventive* proceeding. In August 2016, it notified the Federal Court that it intended to amend its originating process to refer to the third *concordato preventivo* proceeding and seek interim relief based on that proceeding rather than on the second (in respect of which it still had the benefit of the June 2015 orders). In February 2017, it sought to vacate the June 2015 orders and obtain further interim orders based on the third *concordato preventivo* pending final hearing of its existing recognition proceeding (which was based on the second *concordato preventivo*).

In reasons published in February 2017,[70] Rares J followed Allsop CJ in *Yakushiji (No 2)* [2016] FCA 1277 and Judge Lifland in *In re Daewoo Logistics Corporation* 461 BR 175 at 179 (SDNY, 2011) in finding that once a foreign proceeding had ended, there was no longer any basis for recognition or a concomitant stay. In those circumstances, his Honour found that it was incumbent on the foreign representative to make an application to vacate the orders concerning the second *concordato preventivo* proceeding (and art 18 imposed an obligation on the foreign representative to inform the local court of the change in that proceeding in any event).

Rares J also held that it would cause confusion, and would not be appropriate, to allow an application for recognition to be amended to seek recognition of a different foreign proceeding than that the subject of the original application. His Honour stated that the appropriate procedure is to terminate the first application and to file a new originating process.

The interim orders in respect of the second *concordato preventivo* proceeding were vacated and on 14 February 2017, the Court granted similar interim relief in respect of the third *concordato preventive* proceeding.

On 6 July 2017, a creditor sought orders winding up RBDCA in insolvency in Italy. In early January 2018, the Italian Court dissolved the third *concordato preventivo* proceeding and ordered that RBDCA be wound up in a *falliamento* (liquidation)

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69 *Board of Directors of RBDCA v RBDCA* [2017] FCA 331, [6].

70 *Board of Directors of RBDCA v RBDCA* [2017] FCA 331.

proceeding.

In February 2018, Rares J heard two applications by the trustees appointed in the *fallimento* proceeding: the first, seeking to intervene in the recognition proceedings concerning the third *concordato preventive* proceeding, and the second seeking interim orders to protect the company pending the final hearing of an application under the CBIA that the *fallimento* proceeding be recognised in Australia as foreign main proceedings under the Model Law.

Rares J commented on the fact that it was the trustees in the *fallimento* proceeding rather than the board of the company that had brought the termination of third *concordato preventivo* proceeding to his attention. His Honour observed[71] that those facts highlighted a "serious lacuna" in the operation of Model Law Art 18(a): once a foreign proceeding has been terminated or withdrawn, the foreign representative may lack the authority, power, funds or incentive to comply with that obligation. The local recognition orders (and consequent stays) would then remain on foot, despite the foreign proceeding which provided the foundation for them having ended, unless the local court were to vacate those orders on the application of some other party or on its own motion.[72] In such circumstances, his Honour pointed out, there may be no realistic chance of the foreign representative being held to account for the breach of art 18.

His Honour suggested three possible means by which the gap that he identified might be filled: (1) by an amendment to the uniform rules of court governing applications under the CBIA (although to what effect, the judgment does not say); (2) by compelling foreign representatives to pay in to court an amount of security upon the making of recognition orders, to create an incentive and financial support for the foreign representative (or an intervener) to bring an art 18 application; and (3) to make any stay orders under arts 19, 20 or 21 for a fixed period which could be renewed on the application of the foreign representative.[73]

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71 *Board of Directors of RBDCA v RBDCA* [2018] FCA 153, [27] – [29].

72 As occurred in *Suk v Hanjin Shipping Co Ltd* [2017] FCA 404, for example.

73 *Board of Directors of RBDCA v RBDCA* [2018] FCA 153, [30] – [31].

In the proceeding to hand, his Honour vacated the earlier interim orders, finding that the appropriate date from which such orders should be vacated was the date on which the third *concordato preventivo* had been dissolved.[74]

His Honour then went on to grant interim relief under the CBIA to the trustees in the *fallimento* proceeding, finding that such proceedings are equivalent to an Australian liquidation.

The trustees' application came before Rares J for final hearing on 29 June 2018.[75] His Honour recognized the *fallimento* proceeding as a foreign main proceeding and the trustees as its foreign representatives. He declared that the scope of the stay referred to in Model Law art 20 was the same as would apply under Part 5.4 of the *Corporations Act 2001* (C'th).

In the final decision, his Honour went one step further than he had suggested in his earlier judgment, and subjected the recognition order itself to a further order made pursuant to the power under art 17(4), which caused the recognition automatically to vacate without need for further order on a date after the proposed sale of the fleet which was the company's principal asset. While the further order was no doubt framed in part to address the art 18 lacuna that his Honour had recognised in his earlier reasons, it was also made to avoid the need for the trustees to return to court to have the recognition and stay orders vacated once they ceased to be of utility.[76]

That was the first such order made in an Australian proceeding under the Model Law, and might be the first ever made. Stewart and Petch correctly argue that it is a practical and efficient response to the potential difficulties created by the art 18 'lacuna'.[77] Given the requirement in art 8 for courts applying the Model Law to have regard to its status as an international instrument, it is an approach to which foreign courts will have regard and may well adopt.

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74 *Board of Directors of RBDCA v RBDCA* [2018] FCA 153, [33] – [34].

75 *Alari (Trustee), in the matter of RBDCA (Trustees in Bankruptcy appointed) v RBDCA (No 2)* [2018] FCA 1067 (Rares J).

76 *Alari (Trustee), in the matter of RBDCA (Trustees in Bankruptcy appointed) v RBDCA (No 2)* [2018] FCA 1067 (Rares J), [13] – [15].

77 Angus Stewart and Karen Petch, 'Cross-border insolvency law in Australia and shipping insolvencies: unique challenges or issues of wider significance?', (2018) Insol. L. B. 114.

Given that applications for recognition of foreign proceedings under the CBIA are often made *ex parte*, foreign representatives making applications have an obligation of candour. In such circumstances, they arguably should bring the existence of the art 18 issue and Rares J's suggestions to the attention of any court to which recognition applications are made.

Criticism 3: secured claims: 'filling in the blanks' in the art 20 stay[78]

The third criticism levelled by Professor Davies is one frequently made of the MLCBI by admiralty lawyers:[79] the statutory moratoria that arise under art 20 do not necessarily carry any protection for the rights of maritime creditors to bring in rem claims against vessels whose owners become the subject of foreign main proceedings recognised under the MLCBI.

The art 20 stay arises automatically as a consequence of recognition of the foreign main proceeding. It arises by operation of law, not by order of the Court.[80] In so far as the art 20 stay is concerned, the task of the Court is confined to "identify[ing] which of the Parts of the Corporations Act would apply to the foreign proceedings if they were taking place under that Act."[81] There is no discretion involved; the task is "evaluative, but not discretionary".[82] It follows that once the Court determines which of the Corporations Act stays applies to a foreign main proceeding, the scope of that stay and its ancillary exceptions, limitations, modifications and termination are determined by the relevant provisions of the

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78 Parts of the material in this section are derived from work jointly prepared with Nicholas Wallwork of the Victorian Bar. Any errors or omissions are my own.

79 See e.g. *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 (***Hanjin***), [28] – [32] and Justice Steven Rares, 'Consistency and conflict - cross-border insolvency' [2015] FedJSchol 14.

80 *Akers*, 20 [55]. See too Explanatory Memorandum, Cross-Border Insolvency Bill 2008, (**Explanatory Memorandum**) [2.55] and MLCBI Guide, [176]. Courts can have regard to those two instruments in construing the CBIA and the Australian Model Law. As to the Explanatory Memorandum: *Acts Interpretation Act 2001* (Cth), s 15AB(2)(e); as to the MLCBI Guide, see *Akers*, 18 [41]; *King v Linkage Access Ltd* [2018] FCA 1979, [39] (Perram J).

81 *Hanjin*, [22] (Jagot J).

82 *Hanjin*, [45].

Corporations Act; the Model Law creates no power or discretion to limit the scope of, or modify, the Model Law stay.[83]

Since the *Hanjin* decision, the form of order commonly made by courts recognising foreign main proceedings concerning corporations includes a declaration as to which of the Corporations Act stays applies. In *In re Senvion GmbH* concerned a debtor in possession under a German reorganisation proceeding. That proceeding was most closely analogous to an Australian voluntary administration, but did not involve the appointment of any natural person with a role similar to that of an administrator. Consequently, the usual order had the potential to create confusion as to the identity of the person who could consent to proceedings under Corporations Act s 440D (as picked up by MLCBI art 20). For that reason, the usual order was supplemented as follows:

> For the purposes of Article 20(2) of the Model Law and s 16 of the Act, the scope, and the modification or termination, of the stay and suspension referred to in Article 20(1) of the Model Law with respect to the defendant be the same as would apply if the stay or suspension arose under Part 5.3A in Chapter 5 of the Corporations Act 2001 (Cth) (Corporations Act), and as if:
>
> (a) Part 5.3A of the Corporations Act applied to the defendant (as a company subject to administration under that Part); and
>
> (b) References in Part 5.3A of the Corporations Act to the consent of the company's administrators are taken to be references to the consent of the company.

Returning to the situation of maritime claimants, Professor Davies pointed out that the state of the law in Australia makes clear that where the foreign proceeding is in the nature of a liquidation, the Corporations Act part 5.4 stay will apply, with the result that maritime liens can be exercised, but if the foreign proceeding is undergoing a restructuring procedure akin to voluntary administration, the Corporations Act part 5.3A stay will apply, with the effect that maritime liens cannot be exercised without leave of the court or consent of the administrator (or the relevant analogue of that person).[84] Professor Davies refers to that outcome as "quote sensible, but probably accidentally so." He points to the Singaporean instantiation of the MLCBI as an example of legislation which makes specific provision for maritime lien claims, concluding that Singaporean lawmakers had drawn from the experience of the Korean

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83 *Senvion GmbH, in the matter of Senvion GmbH (No 2)* [2019] FCA 1732 (Anastassiou J), [27] – [29].

84 Professor Davies reached the same conclusion.

and Japanese shipowner insolvencies in the early 2010s when enacting the Singaporean legislation in 2017.

I do not share the professor's cynicism about the reason for the state of the Australian law. Despite their antiquity there is, in my mind, no relevant difference between maritime liens and any other form of commercial lien security. There is therefore nothing to justify treating them differently in insolvency. I am not aware of any initiative to elevate maritime lien claims over other liens or security interests in domestic voluntary administration, and can see no good reason to apply different stays in the case of domestic and cross-border debtors. While a case might be made that there are situations where maritime lien claimants are in a particularly vulnerable situation – faced with one or more of a peripatetic asset, remotely-located ship owner (often in a flag of convenience jurisdiction) and position of relative powerlessness (particularly when it comes to sailors' wages claims),[85] Australian law provides for claimants to seek urgent injunctions on an *ex parte* basis, and there is no reason why a leave application under s 440D could not be made on an interim basis at the same time as the application to arrest a ship was made. For those reasons, there would be good reason for the parliament not to have considered that any special treatment was warranted for maritime claimants.

That normative analysis is reflected in the positive law. A model law is a legislative text recommended to states for incorporation in their national laws. In incorporating the Model Law in their own legal systems, states can add to, subtract from and amend its provisions.[86] The framers of the Model Law envisaged that individual nations might make provision for the art 20 stay to be subject to court orders modifying or terminating its effect.[87] The Parliament of New Zealand and the British Parliament have done so. The instantiation of the Model Law in New Zealand[88] replaces art 20(2) with the following:

> Paragraph (1) of this article does not prevent the Court, on the application of any creditor or interested person, from making an order, subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets.

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85 See *Hur v Samsun Logix Corporation* (2015) 109 ACSR 137, 143 [32] – [33] (Rares J).

86 MLCBI Guide, paras 19 and 20.

87 MLCBI Guide, para 184.

88 *Insolvency (Cross-border) Act 2006* (NZ), Sch 1.

In Great Britain, the Cross-Border Insolvency Regulations 2006 contains art 20(6), which is similar in effect to art 20(2) in New Zealand's version of the Model Law:

> In addition to and without prejudice to any powers of the court under or by virtue of paragraph 2 of this article, the court may, on the application of the foreign representative or a person affected by the stay and suspension referred to in paragraph 1 of this article, or of its own motion, modify or terminate such stay and suspension or any part of it, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

It is clear then that in those two jurisdictions, a 'carve out' order may be made, which might effect some additional protection for maritime claimants, because the national legislation expressly provides for it. But there is no equivalent provision in the Model Law of Australia, and authority recognises that the intention of Parliament in omitting such a provision must be respected.[89]

Conclusion

Professor Davies' conclusion is expressed in the pithy line that the MLCBI "seemed like a good idea at the time." He goes on to observe that "the holy grail of universalism sounds good … but often founders on inconvenient rocks of national law." He points out that unlike conventions, Model Laws cannot override 'inconvenient' domestic laws, and therefore require accommodations with domestic laws and policies.

To my mind, those necessary accommodations are what provides the MLCBI with its strength. The European Union has the benefit of a supranational parliament which can (and did) impose a single insolvency law across all of its member states.[90] The recast *European Union Regulation on Insolvency Proceedings 2015*[91] contains substantive laws which bind member states and which include (for example) choice of law rules, rules regarding rights in rem and rules regarding set-off. All of those matters are affected by public policy considerations which might differ dramatically between states and therefore reduce the probability that states not governed by a supranational legislature would agree to a treaty or convention which covered their subject matter.

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89 *Senvion GmbH, in the matter of Senvion GmbH (No 2)* [2019] FCA 1732 (Anastassiou J), [27] – [29].

90 Excluding Denmark.

91 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (EU Insolvency Regulation).

In contrast, a model law sets up a framework which can be moulded around a state's local laws while retaining sufficient commonality (and therefore interoperability) with other enacting states to enable tolerable certainty for international business decision-making. Like so many other decisions involved in law making, the balance is one between predictability and flexibility.

The Australian experience shows the strengths of the Model Law approach, but also demonstrates some of its vulnerabilities. *Zetta Jet* and *Senvion* show the maturation of the model law in Australia as courts grapple with the issues that it raises in practice. *Senvion* shows that the MLCBI respects the developed local rules regarding the statutory moratoria that arise in winding up and restructuring proceedings, and has no ambition to confine those rules merely because a proceeding originated offshore. And *Zetta Jet* demonstrates that the Model Law does not attempt to extend the jurisdictional reach of local anti-avoidance actions beyond its usual bounds. This is modified universalism in its best sense: applying local rules to assist the unitary foreign insolvency proceeding while maintaining the predictability of those rules (upon which parties may have relied in organizing their affairs before insolvency intervened). *Halifax* gives us a hint of what modified universalism might still have to offer, letting us imagine international courts co-operating to overcome problems including commingling issues that have plagued courts of equity for centuries.

On the other hand, *Rizzo* shows us that the MLCBI is not without its flaws. And the varied approaches of the Federal Court and the Singapore High Court to the determination of Zetta Jet's COMI – despite the existence of MLCBI art 8 – illustrate that the law remains in part unsettled and uncertain. *Palmer*, *Chang Raji* and *Gunel Bakshiyeva* show us that common law choice of law rules retain their meaning and effect. Stare decisis will not wilt in the face of broad principles like modified universalism, but requires hard legislation to shape common law principles to fit the modern cross-border environment. While *Chang Raji* provides an example of rules that can be overcome by court orders where necessary, *Gibbs* demonstrates the need for further law reform. UNCITRAL has grappled with the need for that reform by promulgating the MLRE and a further instrument, the Model Law on Enterprise Groups, but there are cogent arguments on both sides of the debate concerning

judgment recognition, and we cannot safely assume that the MLRE will be enacted locally – at least not in an unadulterated form.

The judiciary, the profession and the academy all have a role to play in assisting the legislature to grapple with the materials that UNCITRAL has provided, and to take the opportunity to turn them in to valuable tools for the benefit of our economy. In the meantime, if the price that we have to pay for the MLCBI is a degree of uncertainty and imprecision, then we ought to recognise the wisdom in those words uttered by the man who went on to become our first High Court Chief Justice, all those years ago: *"If the difficulties in the way of a perfect system are insuperable, let us have an imperfect system."* Ours may be an imperfect system, but it is one worth building upon.

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