

# Cross-border insolvency and shipping – a practical guide<sup>1</sup>

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*A 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.<sup>4</sup>*

*Admiralty law is only an arcane or obscure branch of the law to those whose legal thinking is informed exclusively by land-based human activity...<sup>5</sup>*

*(in the context of the “international feud” between admiralty and bankruptcy)  
Two households, both alike in dignity...<sup>6</sup>*

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<sup>2</sup> [Link to CV](#)

<sup>3</sup> The writer would also like to acknowledge the research assistance of Leo Rees-Murphy in preparing this paper.

<sup>4</sup> Buchanan J in *Yu v STX Pan Ocean Co Ltd (South Korea), in the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea) Yu v STX Pan Ocean Co Ltd* (2013) 223 FCR 189 [2013] FCA 680 (**Yu**) at [39].

<sup>5</sup> Allsop, Justice James ‘Admiralty Jurisdiction - Some Basic Considerations and Some Recent Australian Cases’ (FCA) [2007] FedJSchol 5 (**Admiralty Jurisdiction**).

<sup>6</sup> From the title of the article by Alfred J. Falzone, “*Two households, both alike in dignity*”: *The International Feud between Admiralty and Bankruptcy*”, 39 Brook. J. Int’l L. 1175-1206 (2014), with reference to William Shakespeare’s *Romeo and Juliet*.

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## Introduction

1. “Cross-border insolvency” describes circumstances in which an insolvent debtor has assets and/or creditors in more than one country.<sup>7</sup> Australia as an island nation is heavily dependent on shipping for trade. This inevitably causes the shipping industry to frequently have to confront circumstances of cross-border insolvency.
2. Ships are peripatetic and incur liabilities internationally, making obtaining and enforcing security over them by their creditors particularly important.
3. Rares J in *The Xin Tai Hai (No. 2)* [2012] FCA 1497; 215 FCR 265 at [98] explained the position as follows:

*Ships are elusive, as Lord Simon of Glaisdale observed in his dissenting speech in The Atlantic Star [1974] AC 436, 472H. Ships engaged in international trade and commerce are literally here today and gone tomorrow. Sheen J accurately noted in The “Freccia del Nord” [1989] 1 Lloyd’s Rep 388 at 392 that many a writ in rem has been issued in the hope or expectation that the ship against which the plaintiff has claimed will sail into the jurisdiction. Frequently, that hope or expectation is frustrated or thwarted by a change in sailing orders to the ship’s master.<sup>8</sup>*

<sup>7</sup> Explanatory Memorandum (**Explanatory Memorandum**) to the Cross-border Insolvency Bill 2008 p3.

<sup>8</sup> See also *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)* [2001] 3 SCR 97 at [25].

4. Since 2008 the shipping industry has experienced financial difficulties and the credit crunch has been hindering it.<sup>9</sup> According to a recent press report<sup>10</sup> the shipping industry is facing its worse crisis in living memory, as years of rapid expansion fuelled by cheap debt have coincided with an economic slowdown in China. There is an oversupply of ships which has weakened freight rates.<sup>11</sup> Ship owners are drowning in debt and the banks are reluctant to pull the plug because they would be forced to recognise their losses.<sup>12</sup>

5. Further, a number of ships are now the ‘zombies of the high seas’:

*What is damaging shipping is a zombie fleet, which accepts freight at maverick prices just to keep going. A zombie ship is one that can make some contribution to interest payments on its debts, but has no hope of repaying the capital.*<sup>13</sup>

6. More cross-border insolvency cases involving international shipping companies are likely to arise given these worsening market conditions.

7. This paper is about the clash of two international titans – one being admiralty law which has ancient origins, and the other being the relatively newly developed UNCITRAL Model Law on Cross-border Insolvency (**Model Law**). The clash is in particular between the important and unique admiralty law remedy available to the admiralty creditor, the action *in rem* which allows the arrest of the *res* in relation to which the debt arose, and the “universalist”<sup>14</sup> (or more accurately, modified universalist in their application) Model Law principles.

<sup>9</sup> Giorgio Berlingieri *Defaulting Shipowners and the regulation of their insolvency status* available at:

<sup>10</sup> <http://www.comitemaritime.org/Cross-Border-Insolvency/0,27129,112932,00.html>.

<sup>11</sup> Ficenec, John “*Zombies of the high seas*”, Australian Financial Review, 29 January 2016 p 3R (**Ficenec article**).

<sup>12</sup> According to the Ficenec article the average charter rate for Capesize has fallen to about US\$2700 per day, down from US\$15,000-25,000 in the last 2 years and from a rate of up to US\$250,000 in 2008. Many trips are now loss making because the cost of running a Capesize ship can be US\$7500 per day.

<sup>13</sup> Ibid.

<sup>14</sup> Per James Kidwell chief executive of London based broker Braemar Shipping as quoted in the Ficenec article.

<sup>15</sup> See Allsop CJ in *Akers as a joint foreign representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57; (2014) 223 FCR 8 (**Akers**) at [111]–[113] and [120].

8. Insolvency practitioners, usually being primarily “land-based” and coming from a corporate and bankruptcy law background, may be forgiven for thinking at first blush that the principles underpinning admiralty law are arcane and obscure. Admiralty law and cross-border insolvency law, while both having an international origin, employ very different concepts and have very different perspectives. The question for this paper is: can they coexist and how will the differences be reconciled in practice?
9. The Model Law refers to *in rem* rights only once. That is in Article 32 which excludes those rights from the prohibition on claiming in concurrent proceedings.<sup>15</sup> It is instructive to note that in the 2009 UNCITRAL Guide to enactment (**2009 Guide**) on the Model Law there was no substantive mention of the issues raised by the Model Law coming into conflict with admiralty or shipping law.
10. This has been somewhat corrected in the 2013 UNCITRAL Guide to enactment (**2013 Guide**) which when addressing relief available provides at [38]:

*Exceptions and limitations to the scope of the stay and suspension (e.g. exceptions for secured claims ... execution of rights in rem) and the possibility of modifying or terminating the stay or suspension are determined by provisions governing comparable stays or suspensions in insolvency proceedings under the laws of the enacting State (article 20, paragraph 2).*

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<sup>15</sup> Article 32 provides – “*Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [ identify laws of the enacting State relating to insolvency ] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received*”. In *Akers Allsop* CJ held at [67] that Article 32: “...can be seen to enshrine the rule of equality or hotchpot to ensure that creditors are treated equally in circumstances of multiple funds against which access may be gained by different creditors: see PR Wood *Principles of International Insolvency* (Thomson; Sweet and Maxwell) 2<sup>nd</sup> Ed at 970 [31-062]; LC Ho (Ed) *Cross-Border Insolvency; A Commentary on the UNCITRAL Model Law* 3<sup>rd</sup> Ed at 244; R F Mason “Hotchpot and other Tasty Morsels in International Insolvency” (1995) 3 *Insolvency Law Journal* 149.”

11. The 2013 Guide also refers to *in rem* rights when addressing Article 32 (at [240]-[241]):

*240. Article 32 does not affect the ranking of claims as established by the law of the enacting State and is solely intended to establish the equal treatment of creditors of the same class. To the extent claims of secured creditors or creditors with rights in rem are paid in full (a matter that depends on the law of the State where the proceeding is conducted), those claims are not affected by the provision.*

*241. The words “secured claims” are used to refer generally to claims guaranteed by particular assets, while the words “rights in rem” are intended to indicate rights relating to a particular property that are enforceable also against third parties. A given right may fall within the ambit of both expressions, depending on the classification and terminology of the applicable law. The enacting State may use another term or terms for expressing those concepts.*

12. In the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (**Judicial Perspective document**) there is only a passing reference to *in rem* rights in relation to Article 32.
13. Admiralty matters and *in rem* rights are not referred to in the Explanatory Memorandum to the *Cross-Border Insolvency Act 2008 (Cth)* (**CBI Act**), which incorporates the Model Law into Australian law. It may be that this is because shipping lawyers were not formally consulted before the Model Law was developed and promulgated.<sup>16</sup>
14. Yet shipping lawyers now appear to be united in perceiving there to be issues arising from the conflict between these sets of principles in practice.<sup>17</sup>

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<sup>16</sup> The writer has been informed that there is no record of CMI (Comité Maritime International (**CMI**), a leading non governmental and not for profit body committed to the harmonization of shipping law and which has as the backbone of its members the many associations of shipping lawyers from around the world) being formally consulted by the UNCITRAL working group internationally.

<sup>17</sup> CMI has formed an International Working Group on cross-border insolvency (papers in relation to it can be accessed at <http://www.comitemaritime.org/Cross-Border-Insolvency/0,27129,112932,00.html>) and is in the process of surveying its member states “with the object of ascertaining whether there is any scope for the sensible harmonisation of the approach to the interaction of insolvency and shipping law.” (Professor S Derrington, “*An introduction to cross-border insolvency law*” at 371 available at: <http://www.comitemaritime.org/Uploads/Cross%20Border/Paper%20of%20Sarah%20Derrington.pdf>. A questionnaire which CMI sent out in 2012 has sought to ascertain which

15. The paper will first provide a general overview of the Model Law on cross-border insolvency, consider how admiralty law treats *in rem* claims and the remedy of the arrest of the *res*, and then look at what happens in practice when the “worlds” of admiralty and cross-border insolvency collide.
16. It will review the Australian cases to date that have considered the interface of these colliding principles, noting that with recent downturns in the shipping industry there are likely to be more opportunities for the courts to consider them.
17. It will also consider whether in the event of a clash between admiralty law and cross-border insolvency law at the interface of these colliding principles, it should be admiralty law principles that prevail or how these colliding principles should be harmonised.

### **Introduction to the UNCITRAL Model Law on Cross-Border Insolvency in Australia**

18. A very useful background to the Model Law and its adoption into Australian law is set out in the recent leading judgment of Allsop CJ in *Akers as a joint foreign representative of Saad Investments Company Limited (in Official Liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57; (2014) 223 FCR 8 (**Akers**) at [27]-[41]. Additional background is set out below.
19. The United Nations Commission on International Trade Law<sup>18</sup> (**UNCITRAL**) was formed in 1966 with the express mandate to further the progressive harmonisation and unification of international trade law, which it does by the

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jurisdictions amongst National Maritime Law Associations have given effect to the UNCITRAL Model Law, how those jurisdictions deal with the question of foreign creditors or a foreign insolvency administrator where cross-border maritime insolvencies occur, and the procedures to be followed in such situations. This process is ongoing and while some responses have been received, no draft instrument has yet been prepared, nor has a debate on such an instrument yet taken place.

<sup>18</sup> Comprised of 60 member states of the UN General Assembly who are elected for terms of 6 years.

formation of working groups. Australia has adopted a number of UNCITRAL model laws.<sup>19</sup>

20. In May 1997 UNCITRAL adopted the Model Law and in 2004 published the first Guide.<sup>20</sup> The Model Law applies to both corporate and individual debtors. The Model Law takes into account other international efforts.<sup>21</sup> The preamble to the Model Law states its purpose is to provide effective and efficient mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of cooperation between courts, greater certainty for trade and investment, fair and efficient administration of cross border insolvencies that protect the interests of creditors and other interested persons, protection and maximisation of the value of assets and facilitation of the rescue of financially troubled businesses.
21. The Model Law is said to be an example of another “Model soft law” – where a country may adopt a standard law drafted by international experts but may also incorporate minor differences to address unique domestic concerns.<sup>22</sup> The Model Soft Law approach to harmonisation is increasingly being used where domestic policy concerns make hard law (such as that created by binding conventions) uniformity difficult and in countries that lack modern legislation covering the substantive topics.<sup>23</sup>
22. The Model Law takes a “universal” approach which assumes that one insolvency proceeding will be universally recognised by the jurisdictions in which the entity has assets or carries on business (to be compared with a territorial approach which assumes that each country will have exclusive

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<sup>19</sup> Such as the 1985 UNCITRAL Model Law on International Commercial Arbitration (now a schedule to the *International Arbitration Act 1974* (C'th)) and the 1996 UNCITRAL Model Law on Electronic Commerce (enacted into both Commonwealth and state legislation, relevantly, the *Electronic Transactions Act 2000* (NSW) and the *Electronic Transactions Act 1999* (C'th).

<sup>20</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/2004Guide.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html).

<sup>21</sup> Explanatory Memorandum at p3.

<sup>22</sup> Kent Anderson “*Testing the Model Soft Law Approach to International Harmonisation: A Case-Study Examining the UNCITRAL Model Law on Cross-Border Insolvency*” (2004) 23 *Yearbook of International Law* 1 at 2.

<sup>23</sup> *Ibid.*

jurisdiction over the insolvency of a particular debtor and that separate proceedings for each country under that country's laws will be undertaken).<sup>24</sup>

23. Further, in *Akers*, Allsop CJ explained the following (at [28]):

*The Model Law finds its place in the private international law framework that preceded it. That framework was often expressed in terms of universalism and territorialism: see MGR Gronow, McPherson's Law of Company Liquidation (Thomson Reuters, 5<sup>th</sup> Ed) Vol 1 at 17-051 [17.50]. Even before the Model Law, most developed jurisdictions adopted what might be called modified universalism, extending a degree of co-operation to foreign insolvency proceedings whilst also protecting local interests: see the discussion of Lord Hoffmann in In re HIH Casualty and General Insurance Ltd [2008] UKHL 21; [2008] 1 WLR 852 at 856-857 [6]-[9]. The degree of, and legal basis for, any departure from local law in the effects of that co-operation was a matter of debate, a debate reflected in the different views of Lord Hoffmann and Lord Scott of Foscote in In re HIH at [6]-[9] and [59], respectively.*

24. UNCITRAL describes the Model Law as respecting differences among national procedural laws and concedes that it does not attempt a substantive unification of insolvency law. Rather it is said to offer "solutions" in a "significant way".<sup>25</sup>
25. An updated list of countries that have adopted the Model Law is available on the UNCITRAL website and includes a number of other Western nations and trading partners of Australia, notably the United Kingdom of Great Britain and Northern Ireland, the United States of America, Japan, South Korea and New Zealand.<sup>26</sup> China and its special administrative region Hong Kong have not

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<sup>24</sup> The Commonwealth Department of Treasury's Corporate Law and Economic Reform Program Proposals for Reform: *Paper No. 8 Cross-border Insolvency: Promoting International Cooperation and Coordination (CLERP 8)* at 17 and 21.

<sup>25</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html) – these "solutions" include foreign assistance for an insolvency proceeding taking place in the enacting state; foreign representatives access to courts of the enacting state; recognition of foreign proceedings; cross border cooperation; and coordination of concurrent proceedings.

<sup>26</sup> An updated status list can be found on the UNCITRAL website at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html). According to that website, the following states have implemented legislation based on the Model Law on Cross-Border Insolvency: British Virgin Islands; overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005), Colombia (2006), Eritrea, Great Britain (2006), Japan (2000), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), South Africa (2000), and the United States of America (2005).

adopted the Model Law. As at the date of this paper according to the UNCITRAL website, legislation based on the Model Law has been adopted in 41 states in a total of 43 jurisdictions.<sup>27</sup>

26. Due to the fact that the Model Law is not binding on state signatories (compared to the binding nature of international conventions or treaties) and that states can change its terms on implementation, there is some controversy as to whether some states, notably Japan, have fully implemented the Model Law, or whether they have changed it unrecognisably.<sup>28</sup>
27. An interesting point to note is that the application of the Model Law does not depend on reciprocity<sup>29</sup> or that the state of origin of the foreign representative or party seeking to rely on the Model Law has itself enacted the Model Law (cf. for example the 1958 UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) which applies only where there is reciprocity between signatory states). It is, however, necessary to bear in mind that Mexico, South Africa and Romania have nevertheless included a reciprocity requirement in their enacting legislation.<sup>30</sup>

### **The important provisions of the Model Law**

28. The CBI Act came into force on 26 May 2008 (although Parts 2, 3, 4, and Schedule 1, commenced on 1 July 2008). The Model Law is a stand-alone schedule to the CBI Act (section 6 provides that the Model Law has the force of law in Australia).
29. The Model Law applies to both corporate and personal debtors, with the only exclusions from its application being deposit taking institutions and insurance companies (s 9 of the CBI Act and proposed regulations to the CBI Act as identified in the Explanatory Memorandum).<sup>31</sup> The courts nominated as courts competent to perform the functions referred to in the Model Law relating to the

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<sup>27</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html)

<sup>28</sup> Anderson, supra 11-14.

<sup>29</sup> CLERP 8 at 13 and 21.

<sup>30</sup> Judicial Perspective at [46] and fn65.

<sup>31</sup> Explanatory Memorandum at Chapter 1 para [14].

recognition of foreign proceedings and cooperation with foreign courts are the Federal Court in respect of individual debtors and the Federal Court and the Supreme Courts of the States and Territories in respect of non-individual or corporate debtors (s 10 of the CBI Act).

30. In *Akers*, Allsop CJ at [68] described the changes brought about by the Model Law in the following way:

*From the above brief introduction, one can discern the four key elements of the Model Law:*

*(a) access to local courts for foreign representatives;*  
*(b) recognition of certain orders of foreign courts;*  
*(c) relief to assist foreign proceedings; and*  
*(d) co-operation amongst courts of the states where assets are held and co-ordination of concurrent proceedings: see the Guide to Enactment at [24] and the Judicial Perspective at [13]. See also the Preamble to the Model Law.*

31. The Model Law extends to liquidations arising from insolvency, reconstructions and reorganisations under Part 5.1 and voluntary administrations under Part 5.3A of the *Corporations Act 2001* (**Corporations Act**). According to the Explanatory Memorandum, it does not extend to receiverships involving the private appointment of a controller.<sup>32</sup> It is also said that it does not apply to a member's voluntary winding up<sup>33</sup> or a winding up by a court on just and equitable grounds as such proceedings may not be insolvency related.<sup>34</sup>
32. Any inconsistencies between the Model Law and the existing *Corporations Act* and *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) are dealt with by sections 21 and 22 of the CBI Act. In general terms these sections provide that the Model Law will prevail over both the *Corporations Act* and the *Bankruptcy Act* in the event of inconsistency.
33. The Model Law contains 32 Articles which in summary<sup>35</sup> deal with the following:

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<sup>32</sup> See also Judicial Perspective at [79]-[92].

<sup>33</sup> This has yet to be tested in Australia, see Judicial Perspective at [79]-[92], noting that the US decision in *Betcorp* referred to in these passages has been the subject of some criticism.

<sup>34</sup> CLERP 8 at 23.

<sup>35</sup> CLERP 8 at 22-23.

- (a) Chapter II - sets out the conditions under which the person administering a foreign insolvency proceeding, and foreign creditors, will have access to the courts of a Model Law state;
  - (b) Articles 13-14 – allow foreign creditors to participate in proceedings in the local jurisdiction;
  - (c) Chapter III – sets out the conditions for recognition of a foreign insolvency proceeding and for granting relief to the representative of such foreign proceeding;
  - (d) Chapter IV – permits courts and insolvency administrators from different countries to cooperate more effectively; and
  - (e) Chapter V – makes provision for the coordination of insolvency proceedings that are taking place concurrently in different states.
34. The relevant concepts/Articles from the point of view of a recognition application are as follows:
- 34.1 a “foreign representative” is defined as “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” (Article 2(d) Model Law);
  - 34.2 a “foreign proceeding” is defined in Article 2 of the Model Law as a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency which must entail control or supervision of the assets and affairs of the debtor by a foreign court for the purpose of reorganisation or liquidation;
  - 34.3 a foreign proceeding is either a “foreign main proceeding” (where the proceeding is taking place in a state in which the debtor has its centre of main interests (**COMI**)<sup>36</sup>) or a “foreign non-main proceeding” (Art 2) – this distinction is important and has ramifications for the relief available.

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<sup>36</sup>

A number of the European cases to date under the EU Regulation have related to disputes concerning the COMI of the debtor and the consequential classification of proceedings as foreign main proceedings.<sup>36</sup> The COMI issue has come up in Australian cases, the most recent being *Wild (Foreign Representative) v Coin Co International PLC (Administrators Appointed)* [2015] FCA 354, and see also *Akers supra*, but to date there has not been a lot of dispute or disagreement as to the COMI. See Judicial Perspective at [81].

The term COMI is not defined in the Model Law,<sup>37</sup> however, Article 16(3) of the Model Law contains a presumption that in the absence of proof to the contrary, the debtor's place of registration, or where the debtor is an individual his or her habitual residence, is the COMI; a foreign non-main proceeding is defined as a foreign proceeding that is not a foreign main proceeding where the debtor has an establishment in the foreign state (Art 2).

35. If the foreign proceeding is recognised as the foreign main proceeding then commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities in the state in which the application is made will be stayed, and any execution against the debtor or its assets and the right to transfer, encumber or otherwise dispose of the debtor's assets will also be stayed (Article 20 – with additional relief being possible under Article 21 of the Model Law). Proceedings by the foreign representative to seek to “clawback” antecedent transactions may be commenced (Article 23 and s 17 of the CBI Act).

### **Interpretation of the Model Law**

36. Australian cases which concern the Model Law are likely to involve reference to overseas authority concerning the relevant Model Law provisions at issue in the dispute, consistent with the interpretation provision in Article 8 of the Model Law which expressly provides that in the interpretation of the Model Law regard is to be had to its international origin and the need to promote uniformity in its application. UNCITRAL maintains a website database of case law relating to the Model Law (called CLOUT – case law on UNCITRAL texts) which may assist in locating these case authorities.<sup>38</sup>

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<sup>37</sup> Explanatory Memorandum supra Chapter 1 para [7] which provides that: “The Bill does not seek to define COMI as a considerable body of common law exists in overseas jurisdictions in relation to that concept. It is expected that Australian courts will be guided by that body of law in considering the definition of COMI in the context of this Bill. Such an approach will ensure that Australian law is in harmony with other jurisdictions.”

<sup>38</sup> See:  
<http://www.uncitral.org/clout/searchDocument.do;jsessionid=75F637934AA6785F7E13361EF7AC508F.WEB01>.

37. In *Akers*, Allsop CJ held at [42]-[43], relevantly:

[42] *Article 8 deals with interpretation, and states:*

*In the interpretation of the present Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.*

[43] *It is unnecessary to express in any detail the principles governing the interpretation of international instruments. Reference must be made in the first instance to the Vienna Convention on the Laws of Treaties 1969 done at Vienna on 23 May 1969. As to authoritative guidance see *Povey v Qantas Airways Ltd* [2005] HCA 33; 223 CLR 189 at 202; and the authorities cited in *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] FCAFC 202; 140 FCR 296 at [142]-[144] and in *NBGM v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 60; 150 FCR 522 at 562-563 [156]-[160].*

## Recognition generally

38. In Australia recognition proceedings must comply with Articles 15 and 17 of the Model Law, as well as comply with Part 15A of the Corporations Rules and PN Corp 2 [6.1] for corporate debtors. The applicant for recognition can call in aid the presumptions in Article 16.

39. There have been approximately 26 cases so far in the Federal Court of Australia<sup>39</sup> involving both corporate and individual debtors in which different types of foreign proceedings from a number of countries or States have been recognised.

40. In summary those foreign proceedings that have concerned a corporate debtor are:

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<sup>39</sup> There may be more – this is the number of cases in which judgments were handed down cf. where orders only are made. Also, while the Supreme Courts of States and Territories also have jurisdiction under s10 of the CBI Act to determine matters under the CBI Act, they have not been asked to deal with recognition cases, although there have been some cooperation/letter of request cases under the CBI Act, particularly in the Supreme Court of NSW, which are beyond the scope of this paper.

- 40.1 proceedings under Ch 11 of the US Bankruptcy Code;<sup>40</sup>
- 40.2 an Italian insolvency *concordato preventivo* proceeding which has the effect that the board of directors of the company is in the position of a debtor in possession, similar to Ch 11 of the US Bankruptcy Code;<sup>41</sup>
- 40.3 liquidator of a BVI company,<sup>42</sup> a Cayman Islands company,<sup>43</sup> the Nauruan liquidator of Bank of Nauru<sup>44</sup> the liquidator of a NZ company<sup>45</sup> and an Icelandic winding up board;<sup>46</sup>
- 40.4 debtor in possession under the US Bankruptcy Code;<sup>47</sup>
- 40.5 receiver/administrator in a rehabilitation proceeding under Korean law,<sup>48</sup>
- 40.6 trustee under corporate re-organisation in Japan;<sup>49</sup>
- 40.7 UK creditor's voluntary winding up following an administration;<sup>50</sup>
- 40.8 UK special administrators under Investment Banking regulations;<sup>51</sup> and
- 40.9 UK administrator.<sup>52</sup>

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<sup>40</sup> *Young, Jr, in the matter of Buccaneer Energy Limited v Buccaneer Energy Limited* [2014] FCA 711.

<sup>41</sup> *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori spA as Debtor-in Possession of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2013] FCA 157.

<sup>42</sup> *Crumpler (as liquidator and joint representative) of Global Tradewaves Ltd (a company registered in the British Virgin Islands) v Global Tradewaves (in liquidation), in the matter of Global Tradewaves Ltd (in liquidation)* [\[2013\] FCA 1127](#).

<sup>43</sup> *Akers (as joint foreign representative) v Saad Investments Company Limited (in official liquidation) (a company registered in the Cayman Islands)* [\[2010\] FCA 1221](#).

<sup>44</sup> *Cussen v Bank of Nauru* [\[2011\] FCA 1009](#).

<sup>45</sup> *Lawrence v Northern Crest Investments Limited (In Liquidation)* [\[2011\] FCA 925](#); *Sheahan v Ex Ced Foods* [\[2011\] FCA 692](#).

<sup>46</sup> *Backman v Landsbanki Islands hf* [\[2011\] FCA 1430](#).

<sup>47</sup> *Moore, as Debtor-In-Possession of Australian Equity Investors v Australian Equity Investors* [2012] FCA 1002.

<sup>48</sup> *Yu; Chang-Jung Kim in his capacity as foreign representative of Daeho International Shipping Co Ltd* – a case being heard in the Federal Court. Interlocutory orders were made by Rares J on 20 April 2015, the final hearing is still to take place; *Hur v Samsung Logix Corporation* [\[2009\] FCA 372](#).

<sup>49</sup> *Asafuji (in his capacity as the Foreign Representative of the Sanko Steamship Co., Ltd) v The Sanko Steamship Co., Ltd (No 2)* [\[2012\] FCA 1314](#); *Katayama v Japan Airlines Corporation* [\[2010\] FCA 794](#).

<sup>50</sup> *Raithatha (liquidator) v Ariel Industries PLC (in creditors voluntary liquidation), in the matter of Ariel Industries PLC (in creditors voluntary liquidation)* [\[2012\] FCA 1526](#).

<sup>51</sup> *Pink v MF Global UK Limited (In Special Administration)* [\[2012\] FCA 260](#).

## Article 20 – in the context of *in rem* proceedings/ship arrest

41. Article 20 of the Model Law sets out certain automatic or mandatory consequences flowing from the recognition of a proceeding as a *foreign main proceeding*. The effect of recognition depends on the scope of any modifications or exceptions in the applicable Australian law referred to in Article 20(2).

### **Article 20 - Effects of recognition of a foreign main proceeding**

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.*
42. Depending on the circumstances the automatic consequences of Article 20(1)(a) following recognition *may* be sufficient:

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<sup>52</sup> *Wild (Foreign Representative) v Coin Co International PLC (Administrators Appointed)* [2015] FCA 354; *In the Matter of Coin Co International PLC (Administrators Appointed)* [2015] FCA 354; *Appleyard, in the matter of Crawford Farms Limited v Crawford Farms Limited* [2012] FCA 1373; *Tucker, in the matter of Aero Inventory (UK) Limited v Aero Inventory (UK) Limited* [2009] FCA 1354.

- 42.1 to prevent a ship from being arrested (for instance because the arrest proceeding is an action in respect of monies owed by the debtor or is an action against an asset of the debtor); or
- 42.2 in those circumstances to require the party seeking to arrest the ship to apply to the Court for leave to proceed with its *in rem* proceeding (or leave to file its proposed *in rem* proceeding) and to arrest the ship in that proceeding, before the ship may be arrested.
43. Article 20(1)(b) on its own is probably not sufficient to prevent arrest *per se* because it has been suggested that the arrest of a ship may not amount to an execution against the assets of the debtor (see *Danny Morris v the ship "Kiama"* [1998] FCA 256 at pp. 15-16).<sup>53</sup> In any event, Article 20(1)(a) arguably catches ship arrest (when it refers to the commencement of proceedings).
44. The Explanatory Memorandum at [56] described the consequences of Article 20 as being:

*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.*

45. Section 16 of the CBI Act provides:

*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;*

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<sup>53</sup> "I am satisfied that, as a matter of law, the arrest of the ship did not occur as part of a process of execution. It came about at the behest of the plaintiffs in accordance with the Admiralty Rules." The arrest of a ship was therefore not a process of execution for s440G CA, following Hewson J in *The "Zafiro"* [1960] P1 at p 15.

*as the case requires.*

46. Article 20(2) preserves the operation of local insolvency laws and these have precedence or operate as exceptions to Article 20(1).<sup>54</sup>
47. What is not always made express in the recognition judgments is the provisions of the local law that are imported under Article 20 by the particular foreign proceeding. This raises the need to characterise the foreign proceedings by reference to their equivalent proceeding under the Corporations Act or Bankruptcy Act in order to identify the moratorium/stay provisions that will apply under Article 20, especially in relation to international shipping companies due to the need to be very clear as what are the moratorium provisions applying to different types of maritime creditors. It is the writer's view that this is not always done by counsel or in the recognition judgments and that this can lead to uncertainty as to whether and how *in rem* claims are affected by recognition.
48. The insolvency laws identified by s 8 of the CBI Act include Chapter 5 (which deals with external administration) (other than Parts 5.2 and 5.4A) and s 601CL of the Corporations Act. Relevantly, Chapter 5 of the Corporations Act imposes a stay in the following circumstances:
- 48.1 s 471B - in a winding up in insolvency or by the Court, a person cannot begin or proceed with a proceeding in a court against the company in relation to the property of the company, or enforcement process in relation to such property, except with the leave of the Court and subject to such terms (if any) as the Court imposes, save that a secured creditor's rights are not affected (s 471C);
- 48.2 s 500(2) - on a voluntary winding-up, after the passing of a resolution for voluntary winding up, no action or civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes; and

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See Judicial Perspective at [135] – some exceptions noted are the enforcement of claims by secured creditors, payments by debtors in the ordinary course of business, initiation of court actions for claims arising after commencement.

48.3 s 440D(1), upon a voluntary administration, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with except with the administrator's written consent or with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

49. Buchanan J in *Yu*<sup>55</sup> at [37] appears to have assumed that what was picked up in Article 20(2) in relation to the debtor in that case was ss.471B and 471C of the Corporations Act, which provide as follows:

***471B Stay of proceedings and suspension of enforcement process***

*While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:*

- (a) a proceeding in a court against the company or in relation to property of the company; or*
- (b) enforcement process in relation to such property; except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.*

and

***471C Secured creditor's rights not affected***

*Nothing in section 471A or 471B affects a secured creditor's right to realise or otherwise deal with the security.*

50. The effect of s 471C is to permit a secured creditor to enforce its security notwithstanding the making of an order that would otherwise bring s.471B into play.
51. As set out above, the holder of a maritime lien or an *in rem* claimant may in certain circumstances be treated as a secured creditor (see *Yu*: [40]-[41] and the cases there cited), and hence fall within s 471C.
52. Indeed, on one view (in the writer's view the correct view), Article 20(1) operates not according to its own terms but on the terms of that provision within

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<sup>55</sup> Cf Gilbert J in the NZ case of *Kim and Yu v STX Pan Ocean Co. Ltd* [2014] NZHC 845 [29 April 2014] held at [9] that the Korean rehabilitation proceedings were the New Zealand equivalent of administration proceedings.

the local insolvency law which contains an analogous restraint and is **thereby also subject to any relevant exceptions to that restraint found in the local insolvency law**,<sup>56</sup> and see *Akers* per Allsop CJ at [60] referred to below. This is also consistent with the approach taken by the English Court to Article 21 in *Fibria Celulose S/A v. Pan Ocean* [2014] EWHC 2124 (Ch) (**Fibria Celulose**) referred to below.

53. Either way, Articles 20(1) and (2) *may* impact on the ability of a person wishing to pursue a claim (*the in rem creditor*) as an action *in rem* against a ship associated with the debtor, depending on the particular circumstances of both that claim and the relationship with the ship.
54. There is an argument, that wasn't ventilated before Buchanan J in *Yu*, that the nature of the appointment of the receiver in Korea is in fact more akin to the appointment of an administrator under Part 5.3A of the Corporations Act, if so then ss 440B, 440D and 440F of the Corporations Act would apply – rather than ss 471B and 471C which Buchanan J referred to in the judgment (at paras [37]-[41]).
55. S 440B of the Corporations Act imposes a stay not only on unsecured creditors but also certain secured creditors (cf. s 471B which is subject to the exception in s 471C – there is no similar exception to s 440B). A secured creditor may therefore not be able to its security during the period of the administration under Part 5.3A (or here the period of the *foreign main proceeding* recognised by the orders made under the CBI Act and Model Law) without the leave of the Court or consent of the administrator (here *foreign representative*).
56. If s 440B is the applicable provision that is picked up by Article 20(2) then:
- 56.1 this may preclude a secured creditor from taking steps to enforce its security, even though it is a secured creditor (cf. s 471C);

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<sup>56</sup> This was an issue in recent proceedings involving STX before the Federal Court, however those proceedings were settled before judgment was delivered and the question/issue was not answered.

- 56.2 if so, then this may preclude the holder of a maritime lien or *in rem* claim from pursuing its claim by commencing an action *in rem* and arresting the subject of that claim notwithstanding that it is a secured creditor.
57. The same applies to s 440D and the prohibition it contains (so far as secured creditors are concerned), if it is picked up by Article 20(2) of the Model Law.
58. The scope of the carve out in Article 20(3) is of importance – in particular whether it permits ship arrests to **preserve** rights (given that it is the commencement of statutory *in rem* claims by the filing of the writ that creates the secured interest). The Explanatory Memorandum to the CBI Act at [58] states that Article 20(3) authorises the commencement of individual action to the extent necessary to preserve claims against the debtor. Once the claim has been preserved, the action continues to be covered by the stay.
59. In *Akers*, Allsop CJ held at [55]-[56] and at [60]:

[55] *Two things are important to appreciate about Art 20. First, Art 20 (together with s 6 of the CBI Act) provides for an effect or state of affairs described in Art 20.1, by law, not by order of the Court. Secondly, the extent of such an effect or of such a state of affairs can be affected (“the scope, and the modification or termination, of the stay and suspension”) by the operation of the laws referred to in Art 20.2. Section 16 of the CBI Act identifies the Australian law relevant to Art 20.2.*

[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.*

.....

[60] *It is important to note that Art 22 does not provide for the amelioration of the legal effect of recognition in Art 20. Such, if it is to occur, comes from the results of an application under the laws picked up by Art 20.2 and s 16 of the CBI Act.*

**The additional discretionary relief available under Article 21 - in the context of *in rem* proceedings/ship arrest**

60. Article 21 sets out additional post recognition relief that can be granted by the court upon the recognition of a foreign proceeding (note it is not necessary that it be a foreign main proceeding as per Article 20) and provides:

*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.*
61. Article 21 relief is based on a general discretionary power to grant "appropriate relief" consequential upon recognition of both a foreign main proceeding and a foreign non main proceeding and a specific order must be sought pursuant to that Article. International cases to date have distinguished the question of recognition from any additional relief to be ordered – appropriate post-

recognition relief will be fashioned by the Court in its discretion taking into account principles of comity, but may not be identical to that ordered in other States.<sup>57</sup>

62. *Yu* is currently one of the leading Australian cases on the interface between cross-border insolvency and shipping. In *Yu* the Korean administrator/receiver made an application for Article 21 relief (dealt with at [28]-[29]), this additional relief seems in part to have been directed against the possibility of the arrest of an STX ship (although the orders sought did not refer to *arrest* specifically).
63. This was similar to the basis on which provisional relief had been earlier sought in *Yu* and obtained from Jagot J (see paras [26] to [34] of the passage quoted in *Yu* at [30]). This referred specifically to the risk of creditors taking steps to arrest ships owned and operated by the Defendant (STX) when they call at Australian ports and the potential consequences of such arrests (see *Yu* at [30]-[31]).
64. However, the application for this additional relief was refused by Buchanan J (*Yu* at [33] to [43]), holding at [43]:

*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 Article 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 Cross-Border Insolvency Act 2008 (Cth) and the terms of this judgment should be drawn to the attention of the Judge at the time any such application is made.*

65. Buchanan J made an additional order in relation to arrests, notwithstanding his refusal to grant the Article 21 relief sought (the **Yu Order**), ordering that:

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<sup>57</sup> Judicial Perspective at [149].

[48] *Any application for the issue of a warrant of arrest in Australia of any vessel owned or chartered by the defendant [i.e. STX] be dealt with by a judge of this Court and these Reasons for Judgment be drawn to the attention of the Court at the time any such application is made.*

66. The effect of this order was that even where Article 20(1) does not prevent a creditor from arresting a vessel in which STX had an interest or in support of a claim against STX, the creditor had to nevertheless:

66.1 apply to a judge rather than just apply to the Court Registry in the usual way (presumably *ex parte* at least at first instance) in order to obtain the arrest of that ship; and

66.2 bring to that Judge's attention the orders and judgment of Buchanan J.

67. It follows from this that the arresting party would have to be in a position either:

67.1 to satisfy the judge why the arrest of the ship sought in the circumstances of that proceeding is not prevented by Article 20(1) of the Model Law; alternatively

67.2 if the arrest is prevented by Article 20(1), to persuade the Court:

- (a) first that it has power to allow the arresting party leave to proceed with the arrest despite Article 20(1); and
- (b) secondly that the Court should exercise that power in the particular circumstances of the case (for instance because the arresting party is a secured creditor enforcing its security and under the local insolvency laws a security could do so under s.471C).

68. Query whether an order in the nature of the *Yu* Order provides the right balance in ship arrest situations between not impeding the *in rem* creditor's rights to protect its security while also ensuring that the Court supervises whether *in rem* creditors have established a *prima facie* basis for relief by way of arrest. It seems to the writer that this is the most practical solution to date.

69. In *Akers*, Allsop CJ held the following at [58] in relation to Article 21:

[58] *Paragraph 2 of Art 21 is important. It contains an express recognition of the need adequately to protect the interests of local creditors. This*

*provision, together with Art 22.1, must be recalled and taken account of when statements of universalist principles of the Model Law are being relied on. If this language of characterisation is to be employed, Art 21.2 reflects a degree of modified universalism in the Model Law. Article 21.2 is not directed, in terms, to Art 20 or applications under Art 20.2; but it concerns entrusting the distribution of local assets to the foreign representative, a subject closely related to the subjects of Art 20.1, especially Art 20.1(c).*

70. Article 22(1) expressly requires the Court when granting or denying relief under Article 21 to be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected and allows relief to be granted on conditions.
71. In the recent UK case of *Fibra Celulose*<sup>58</sup> Morgan J held in relation to a claim for Article 21 relief under sub paragraph 1(g)“other relief” to restrain a counterparty from terminating a contract relying on an “ipso facto” clause that effectively the court could do so only if this was a type of relief available under UK domestic insolvency law, thereby taking a “modified universalism” approach to Article 21. Morgan J held:

[107] *I am directed by reg. 2 of the CBIR to consider the documents relating to the working group on the Model Law. On my reading of the reports of the working group, it was not intended that "any appropriate relief" would allow the recognising court to go beyond the relief it would grant in relation to a domestic insolvency. I do not think that there is sufficient in the discussion in those reports which would allow me to conclude (as the court concluded in Re Condor Insurance Co Ltd) that the words "any appropriate relief" were intended to replicate the position under section 304 of the former US Bankruptcy Code. I also note that whenever the legal position under article 21 has been described in an English case or in a textbook on the CBIR, the discussion proceeds on the basis that "any appropriate relief" allows the court to grant the same sort of relief as it would grant in relation to a domestic insolvency.*

[108] *Accordingly, I am not persuaded that that the words "any appropriate relief" allow me to grant relief which would not be available to the court when dealing with a domestic insolvency.*

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<sup>58</sup> <http://www.bailii.org/ew/cases/EWHC/Ch/2014/2124.html>.

[115] *I do not have power under article 21(1)(a) to order a "stay" in relation to Fibria's entitlement to serve a termination notice under clause 28.1 of the contract. I do not have power under article 21(1) to make an order restraining Fibria from serving such a notice; if I had such power, I would not exercise it as I would hold such an order was not "appropriate relief". In any case, if it is said that I should do what a Korean court would do in this case, then I am not persuaded that a Korean court would make an order restraining the service of a termination notice. On my understanding of the expert evidence, what the Korean court would do would be to hold that a termination notice, if served, would be ineffective to determine the contract. Thus, it is not necessary or appropriate to make an order restraining Fibria from serving a termination notice.*

### **Article 19 and interim relief - in the context of *in rem* proceedings/ship arrest**

72. It may seem out of order considering interim relief after substantive relief under Articles 20 and 21. This order is explained because Article 19 relief is in practice based on the substantive relief that is being sought (in particular Article 21 relief), which includes relief under (1)(g) "additional relief", and is subject to the same considerations as apply to Article 21 relief by reason of Article 22(1) (that is to take into account the interests of *inter alia* the creditors and the debtor).
73. There has been a variation in the terms of the interim relief ordered in relation to shipping companies in a cross-border insolvency context (for example see *Rizzo, Asafuji, Yu*). In the first case the writer is aware of post *Yu* where interim relief was sought where the debtor was an international shipping company (*Rizzo No. 2*)<sup>59</sup>, the interim relief ordered was, relevantly, in the following terms:

*Unless a Judge of this Court otherwise orders for the purposes of order 2, pursuant to section 6 of the Cross-Border Insolvency Act 2008 (Cth) (Act) and articles 15 and 19(1) of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law which is in Schedule 1 to the Act, (Model Law) and subject to Article 20(3) of the Model Law, until further order, the commencement or continuation of any individual action or legal proceeding (including, without limitation, any*

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<sup>59</sup> Next listed in Court on 20 May 2016 for directions/final hearing.

*arbitration, mediation or any judicial, quasi-judicial, administrative action, proceeding or process whatsoever) against the respondent or any of its assets, rights, obligations or liabilities not be commenced and any such action be stayed respectively.*

*Any application for issue of a warrant for the arrest in Australia of any vessel owned or chartered by the respondent, brought by a person claiming to hold a security interest, be made to a Judge of this Court with these orders made today and the reasons for judgment in Yu v STX Pan Ocean Co Ltd (South Korea) [2013] FCA 680; (2013) 223 FCR 189 drawn to the attention of the Court at the time any such application is made.*

74. In the latest case of *Gyeong-Duek Kim in his capacity as foreign representative of SW Shipping Co Ltd v SW Shipping Co Ltd* SAD443/2015 on 18 December 2015, Besanko J made interim orders as follows:

*Unless a Judge of this Court otherwise orders for the purposes of Order 3 below, then until further order, pursuant to section 6 of the Cross Border Insolvency Act 2008 (Cth) and Articles 15 and 19(1) of the Model Law (and subject to Article 20(3) of the Model Law) , the commencement or continuation of any individual action or legal proceeding (including, without limitation, any arbitration, mediation or any judicial, quasi judicial, administrative action, proceeding or process whatsoever) against the respondent or any of its assets, rights obligations or liabilities is not to be commenced and any such action be stayed respectively.*

*Any application for issue of a warrant for the arrest in Australia of any vessel owned or chartered by the defendant be made:*

*a. with a minimum of 4 hours' notice to the Australian legal representatives for the plaintiff;*

*b. to a judge of this Court with reasons for judgment in this case, Yu v STX Pan Ocean Co Ltd (South Korea) (2013) FCR 189 and Yakushiji v Kaisha [2015] FCA 1170 drawn to the attention of the court at the time any such application is made.*

75. The interim order in the *SW Shipping* case differs from and is more extensive than the relief previously ordered because it requires notice of an application for issue of a warrant of arrest to be given to the **plaintiff's solicitor** – this goes beyond what was ordered in *Yu* and strays into what was sought in other cases such as *Daebo* but not ordered. No interlocutory judgment has yet been handed down to identify the reasons for this extension, and it will be interesting to see if the matter was fully argued before Besanko J.

76. There is a possibility of relief under Article 23 in relation to a suspect antecedent transaction.<sup>60</sup>

### Introduction to admiralty proceedings *in rem*

77. Allsop CJ has described Australian admiralty jurisdiction as:

*... not just a collection of suits found to have been within the cognisance of, and administered by, the English Admiralty Court (exemplified by the action in rem against the ship itself and the capacity to arrest the ship irrespective of the presence within the jurisdiction of any party said to be personally responsible for any claim). It is more than that. It is a body of law, and the administration of a body of law, with roots in public international law, civil law, international commerce, international agreement and the law of nations. Its history is rich and its contents are vibrant and modern. It is only an arcane or obscure branch of the law to those whose legal thinking is informed exclusively by land-based human activity. Admiralty and maritime law is a branch of the law central to the economic life of this country, being a great trading nation accounting for a significant portion of the world's maritime task, both by volume and by value. It is a branch of the law of immense public importance to an island continent with claims over, and responsibility for, vast marine areas, including Antarctic seas. It is the law of maritime affairs.*<sup>61</sup>

78. Shipping lawyers will be familiar with the circumstances in which a claim to a right to proceed *in rem* and to arrest the *res* (*res* for the purposes of the *Admiralty Act* 1988 (C'th) (**Admiralty Act**) includes the ship<sup>62</sup> and other property, such as cargo, but bunkers are not amenable to separate arrest under Australian law as it currently stands<sup>63</sup> (or at least not to date!<sup>64</sup>).
79. The action *in rem* and the unique corresponding remedy of the arrest of the *res* is an important remedy available to an admiralty creditor because it confers a security interest in the arresting creditor who is entitled, in the absence of those with an interest in the *res* posting suitable security, to force a sale of the *res* with the arresting creditor having priority to the proceeds of sale (subject to higher ranking claims such as the marshal's costs and expenses, crew wages

<sup>60</sup> See the Judicial Perspective at [150]-[153] for more details.

<sup>61</sup> Allsop, Justice James, Admiralty Jurisdiction.

<sup>62</sup> Defined in s3(2) of the Admiralty Act.

<sup>63</sup> See the Full Federal Court's decision in *Scandinavian Bunkering AS v The Bunkers on Board the Ship FV Taruman* (2006) 151 FCR 126, in particular at [12]

<sup>64</sup> Rares Quintin 'Can You Arrest Bunkers in Australia?' (2015) 29 ANZ Mar LJ 111.

etc). Arrest is available as a remedy to secure claims in proceedings before Australian courts, as well as for foreign arbitrations or proceedings,<sup>65</sup> making it a powerful and expansive remedy. Further, given the operation of the “paid to be paid” or “pay first” rule in the indemnity insurance provided by P&I Clubs (Protection and Indemnity Clubs),<sup>66</sup> direct action against insurers to obtain access to insurance proceeds in respect of certain liabilities may not be available in an insolvency situation, making the arrest remedy even more important.

80. The gateway to the admiralty jurisdiction is the maritime claim as defined in s 4 of the Admiralty Act: a claimant must either assert a maritime claim or a claim for damage done to a ship to enliven admiralty jurisdiction (s 9). Maritime claims are of two classes, proprietary maritime claims (s 4(2)) and general maritime claims (s 4(3)). The former includes claims relating to possession, title and mortgage. The latter cover the maritime field and include claims for damage done by a ship and for loss of or damage to goods carried in a ship, claims arising from contracts for the use or hire of a ship, and claims in respect of salvage, general average, towage, pilotage, the repair of a ship, the supply of goods or services to a ship, and so on.
81. The Admiralty Act does not confer jurisdiction on a court, or invest a court with jurisdiction, in a matter that is not of a kind mentioned in paragraph 76(ii) or (iii) of the Constitution, i.e. arising under any laws made by the Parliament and of admiralty and maritime jurisdiction (s 13).
82. Whilst there are domestic variations, the scope of admiralty jurisdiction across maritime nations is remarkably similar and is based for the most part on the terms of the 1952 Arrest Convention. That Convention also informs the circumstances in which the unique remedy of arrest is made available.

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<sup>65</sup> Admiralty Act, s 29.

<sup>66</sup> As interpreted so far by the Courts of the UK (“*The Fanti*” and “*The Padre Island*” [1990] 2 Lloyd’s Rep 191) and South Africa (*The Cargo Explorer* 1995 CLD 617 and *The Gallant II* 2003 SCOSA B 195), but not yet having been considered in Australia.

83. In Australia arrest of a ship is available (leaving other forms of property to one side) in the following circumstances:
- 83.1 On a maritime lien in respect of the ship (s 15), which in Australia are claims for salvage, damage done by a ship, wages of the Master or crew and master's disbursements;
  - 83.2 On a proprietary maritime claim concerning the ship (s 16);
  - 83.3 In respect of a liability of the owner of the ship if that person (referred to as the relevant person) was the owner or charterer of, or in possession or control of, the ship when the cause of action arose and is the owner of the ship when the proceeding is commenced (s 17);
  - 83.4 In respect of the liability of a demise charterer of the ship if that person was the owner or charterer of, or in possession or control of, the ship when the cause of action arose and is the demise charterer of the ship when the proceeding is commenced (s 18);
  - 83.5 When the ship is a surrogate ship of the ship in respect of which the claim arose, being if the relevant person was the owner or charterer of, or in possession or control of, the ship in respect of which the claim arose and is the owner of the surrogate ship when the proceedings are commenced (s 19).
84. Admiralty jurisdiction is truly international in its potential application – the *in rem* claim does not need to have arisen under Australian law or in Australia – it just needs to satisfy the Australian requirements to bring an *in rem* claim. Hence claimants and defendants are often foreign parties.
85. The characteristics of a maritime lien were identified by the Full Court of the Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [112]-[114]. A maritime lien is treated as a secured claim and the holder of a maritime lien as a secured creditor. The claimant's security/secured interest arises under a maritime lien from the moment of the events giving rise to the lien. When the lien arises is not dependent upon when *in rem* proceedings to enforce the lien are first commenced (cf a statutory right of action *in rem*).

86. Allsop J, as he then was, described the maritime lien as “the foundation of the proceedings *in rem*”, arising “at the moment the relevant claim or privilege attaches” and conferring “a true charge of a proprietary kind, undefeated by *bona fide* purchasers of the *res* for value without notice, and irrespective of possession. For a description see *The Bold Buccleugh* [1851] EngR 985; (1851) 7 Moo PC 267 at 284-85; [1851] EngR 985; 13 ER 884 at 890-91; and *The Tolten* [1946] P 135, 150.”<sup>67</sup>
87. See also Allsop CJ sitting at first instance in *Yakushiji v Daiichi Chuo Kisen Kaisha* [2015] FCA 1170 (DCKK case) at [17]-[22] who helpfully said as follows in relation to maritime liens:

[17] *The intersection between international insolvency law, and, in particular, the Act and the law of the enforcement of maritime claims, is not without its difficulty. This has been recognised in the above case and is the reason for para 6.1 of Practice Note Corp 2. The international mechanisms for the enforcement of maritime claims vary to a degree around the world. Some countries, such as Australia, Hong Kong, Singapore, England, South Africa, New Zealand, and many other countries, have a proceeding by way of an in rem claim against the ship. I leave to one side the additional complexities of the nature of the in rem claim that might be seen in the debate caused by the Republic of India v India Steamship Co Ltd (No 2) (The ‘Indian Grace’) [1997] UKHL 40; [1998] AC 878 as discussed in Comandate Marine Corp v Pan Australian Shipping Pty Ltd [2006] FCAFC 192; 157 FCR 45 at [99]- [132]. Civilian countries do not have, generally speaking, in rem actions, but seek enforcement of maritime claims through maritime attachment. The differences in the two systems are mediated through two conventions: the 1952 Arrest Convention and the 1999 Arrest Convention, variously adopted by different countries. The United States has both in rem claims and maritime attachment.*

[18] *There is also a variety of recognition of maritime liens. Maritime liens are a particular feature of maritime law. They do not found themselves on possession. They found themselves on particular types of events or activity in relation to a ship – collision, payment of seafarers’ wages, and other matters. Some countries (for example, the United States) have a wide variety of maritime liens; other countries have a narrower focus.*

<sup>67</sup> Allsop, Justice James --- “Admiralty Jurisdiction and Marine Insurance” (FCA) [2003] FedJSchol 17 <http://www.austlii.edu.au/au/journals/FedJSchol/2003/17.html> at [26].

[19] The point of this discussion is that there is a real jurisprudential question as to the nature of the maritime lien and its place as a security interest or privilege in the hull of the ship: see the recent decision of McKerracher J in this Court *Reiter Petroleum Inc v Ship "Sam Hawk"* [2015] FCA 1005. The importance of a maritime lien is that it runs with the ship irrespective of sale. The only mechanisms for the removal of a lien from the hull of a ship are either by payment of the claim or by sale of the ship by an Admiralty Court pursuant to a maritime process.

[20] There is also the question under Australian law as to the status (whether secured or not) of non-lien claims made pursuant to the Admiralty Act 1988 (Cth) as an *in rem* action that have been filed. For reasons set out in *Tisand (Pty) Ltd and Others v Owners of the Ship MV "Cape Moreton" (Ex "Freya")* [2005] FCAFC 68; 219 ALR 48 per Ryan and Allsop JJ, such claims may, once reflected in a filing in this Court, be seen to create a form or species of qualified or quasi security. See generally *Kim v Daebo International Shipping Co Ltd* [2015] FCA 684 per Rares J (referring to *In re Aro Co Ltd* [1980] Ch 196). Whether or not such claims amount to secured claims is a live issue.

[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.

88. On the other hand, the other bases for arrest (ss 17, 18 and 19), which are referred to as the statutory lien:
- 88.1 give rise to a secured interest in the ship and the holder of the claim is treated as a secured creditor (*Re Aro Co Ltd* [1980] Ch 196);
  - 88.2 but that secured interest only arises from the moment the proceeding on that statutory lien is first commenced (i.e. filed). Unlike the maritime lien, it does not arise upon the occurrence of the events that give rise to the claim in the first place.

89. It is therefore important to note the different security consequences of a maritime lien and a statutory lien. A maritime lien recognised under Australian law attaches to the ship as soon as the claim arises. A statutory lien under the Admiralty Act does not give rise to a security interest until the date that the writ (originating process) is issued. The consequences of the different timing of these events will be addressed in further detail below.
90. The somewhat vexed “Halcyon Isles” question of whether a claim recognised as a maritime lien under an applicable foreign system of law should be accorded that same status under Australian law can also in theory give rise to a clash of principles. It has already arisen once in Australia in the context of the entering into rehabilitation of the debtor Pan Ocean Co Ltd and involving the vessel *STX Bona*, but the case settled after argument and before judgment. A resolution of this issue is beyond the scope of this paper – those interested should follow the outcome of the appeal from the decision of McKerracher J in *Reiter Petroleum Inc v Ship “Sam Hawk”* [2015] FCA 1005 which was heard by the Full Federal Court in February 2016, judgment currently reserved, and see the discussion of these issues in Justice Rares’ recent paper.<sup>68</sup>
91. Property arrested in admiralty proceedings crucially provides security for the claim in respect of which it was arrested. Usually the property is released against the provision of security in the form of a letter of undertaking from a P&I Club or a guarantee from a financial institution so the proceedings in which the claim is determined can progress towards resolution whilst not holding the property up. However, where no security is posted the property can be sold by the Court and a fund thereby created. That fund is held as security for the claim, and can also be arrested in pursuit of other maritime claims (s 24).
92. The fund is then distributed to all claimants in accordance with a recognized hierarchy of claims, or priorities.

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<sup>68</sup> Justice Steven Rares *The Far from Halcyon Isles*, <http://www.fedcourt.gov.au/publications/judges-speeches/justice-raises/raises-j-20130919> and see Steven Rares, ‘Maritime Liens, Renvoi And Conflicts Of Law: The Far From Halcyon Isle’ [2014] 2 Lloyd’s Maritime and Commercial Law Quarterly 183

### The different perspectives on an application for recognition

93. From the perspective of the foreign representative of a corporate entity, his or her priority is usually to obtain the provisional relief urgently (in particular to try to defeat any unsecured *in rem* claims where proceedings have not yet been filed and to secure the assets as soon as possible) with as broad as possible orders (including additional relief under Article 21), so as to allow ships to come to Australia and to continue to trade while minimising the risk of arrest. Confidentiality prior to obtaining interim orders is important.
94. From the perspective of an admiralty creditor with rights *in rem*, its priority is usually to achieve the status of secured creditor as quickly as possible (including by filing a writ *in rem*) and to effect an arrest in order to secure its claims. It does not always have the right to prove in the foreign proceeding for its debt, and it usually wishes to try to engineer a situation whereby it is paid now instead of having to wait and/or discount its debt and not be forced to prove the claim (or be forced to accept a compromise) in the foreign insolvency proceedings. It wants to have the benefit of the priority regime in admiralty not that which would apply in a normal insolvency.

### The Australian experience of cross-border insolvency cases involving ships

95. Of the approximately 26 cases in the Federal Court of Australia (not including interim applications and appeals) involving recognition of a foreign proceeding relating to a corporate debtor under the Model Law, on nine occasions the foreign representative of an international shipping company has sought recognition in Australia of foreign proceedings for insolvency or rehabilitation (in respect of seven international shipping companies<sup>69</sup> - two have been through a rehabilitation and recognition procedure twice).<sup>70</sup>
96. At the outset there will be a short summary of each case.

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<sup>69</sup> Again, this is the number of cases in which judgments were handed down cf. where orders only are made, although the practice of the Federal Court appears to be to deliver a judgment in these matters.

<sup>70</sup> Rizzo-Bottiglieri-De Carlini Armatori SpA and Samsun Logix Corporation – see the summary below.

97. **First case - *Hur v Samsun Logix Corporation* [\[2009\] FCA 372](#)**
- 97.1 Concerned Samsun Logix Corporation (Samsun), a South Korean incorporated company specializing in dry cargo which had applied to the South Korean court for rehabilitation;
- 97.2 The case was heard in 2009;
- 97.3 The reason for Samsun’s collapse is not set out in the judgment; and
- 97.4 Samsun was said to be an “ocean freight forwarder”.
98. **Second case - *Asafuji (in his capacity as the Foreign Representative of the Sanko Steamship Co., Ltd) v The Sanko Steamship Co., Ltd (No 2)* [\[2012\] FCA 1314](#)**
- 98.1 Concerned the Sanko Steamship Co Limited<sup>71</sup> (Sanko), a Japanese incorporated company specializing in dry cargo shipping as a tramp, which had applied to the Japanese court for corporate reorganization;
- 98.2 The global financial crisis in conjunction with significant prior financial commitments, was said to have led to Sanko’s insolvency in late May 2012. The case was heard in July 2012; and
- 98.3 Sanko operated bulk carriers, tankers, LPG carriers and offshore support vessels.
99. **Third case - *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA as Debtor-in-Possession Of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo -Bottiglieri-De Carlini Armatori SpA* [\[2013\] FCA 157](#)**
- 99.1 Concerned Rizzo Bottiglieri De Carlini Armatori SpA (Rizzo) a corporation incorporated in Italy with its base in Naples Italy;
- 99.2 The first application was heard in February 2013; and
- 99.3 Rizzo’s fleet is not identified in the judgment.
100. **Fourth case - *Yu v STX Pan Ocean Co Ltd (South Korea), in the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea)* [\[2013\] FCA 680; \(2013\) 223 FCR 189](#)**

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<sup>71</sup> Following a recent merger now known as Sanko line.

- 100.1 Concerned STX Pan Ocean Co Ltd (STX Pan Ocean, now known as Pan Ocean), a South Korean incorporated company specializing in dry cargo which had applied to the South Korean court for rehabilitation;
- 100.2 The case was heard in July 2013; and
- 100.3 Details of its fleet as at 2013 are not referred to in the judgment, but according to its website it is said to offer container, tanker car carrier and LPG carrier services.

101. **Fifth case - *Kim v Daebo International Shipping Co Limited* [\[2015\] FCA 684](#)**

- 101.1 Concerned Daebo International Shipping Co Limited (Daebo), a South Korean incorporated company which had applied to the South Korean court for rehabilitation;
- 101.2 The case was heard in May 2015;
- 101.3 It was said that Daebo's "economic collapse" could be traced to the fact that the shipping industry had been in recession since 2009, Daebo had large uncollectable book debts, its liquidity was deteriorating and it owed substantial damages by reason of its termination of charter parties; and
- 101.4 At the time of the application in the Korean Court Daebo operated a total of 19 vessels: it owned one, held bareboat or demise charters in respect of three others, operated two more under financing lease agreements, five under long-term time charters and a further eight under short-term charter parties.

102. **Sixth case - *Hur v Samsun Logix Corporation* [\[2015\] FCA 1154](#)**

- 102.1 Concerned Samsun Logix Corporation (Samsun), a South Korean incorporated company specializing in dry cargo which had applied to the South Korean court for rehabilitation;
- 102.2 The case was heard in September 2015 (following a prior rehabilitation proceeding in Korea in 2009 that was also recognized in Australia in 2009 and addressed in paragraph 97 above);
- 102.3 The reason for Samsun's collapse was said to be an exposure to claims in a London arbitration and proceedings in the Seoul District Court of in excess of USD100 million that it could not pay;

- 102.4 Samsun was said to lease, own or charter six ships that appear regularly to call at Australian ports (three Capsize, two Panamax and two Handy vessels).
103. **Seventh case - *Yakushiji v Daiichi Chuo Kisen Kaisha* [\[2015\] FCA 1170](#)**
- 103.1 Concerned Daiichi Chuo Kisen Kaisha (DCKK) and its subsidiary Star Bulk,<sup>72</sup> DCKK being a corporation incorporated in Japan. DCKK transported dry bulk cargo, including grain, iron ore and commodities. Much of the business of DCKK was undertaken in the tramp trade by the use of vessels which were owned, demise chartered or time chartered;
- 103.2 The application was heard in November 2015;
- 103.3 The reason for DCKK's collapse was said to be that following the global financial crisis in 2008 and continuing, the business of DCKK had been difficult, by reason of the fluctuations in the markets for shipping, both as to cargo to be carried for remuneration and as to the chartering market for the obtaining of vessels. In particular, there are a number of long-term time charters which DCKK and Star Bulk had entered into which in a falling market became at very high rates;
- 103.4 As at the time of its collapse on 31 March 2015, DCKK owned, either itself, or through its subsidiaries, 45 vessels and had chartered another 140 vessels.
104. **Eighth case - *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA as Debtor-in-Possession Of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo -Bottiglieri-De Carlini Armatori SpA* – current case filed 2015, interim orders made and final hearing pending and scheduled for April 2016**
- 104.1 Concerns Rizzo Bottiglieri De Carlini Armatori SpA (**Rizzo**) a corporation incorporated in Italy with its base in Naples Italy;

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<sup>72</sup> Star Bulk was one of its subsidiaries - a "*shikumisen* subsidiary", being a company incorporated in a country (relevantly Panama) where the tax systems and other laws are advantageous to the carrying on the business of shipping.

- 104.2 This is the second application for recognition of a foreign proceeding for restructuring (in the nature of a debtor in possession proceeding). The Originating Process was filed in 2015, interim orders made in 2015 and the further directions/final hearing is scheduled for May 2016; and
- 104.3 Rizzo's current fleet is said to consist of bulk carriers and specialist oil and gas carriers.<sup>73</sup>
105. **Ninth case – *Gyeong-Duek Kim in his capacity as foreign representative of SW Shipping Co Ltd v SW Shipping Co Ltd* SAD443/2015**
- 105.1 As no judgments have been delivered in this matter yet, it is necessary to refer to press reports which identify that SW Shipping Co Ltd is another South Korean shipping company experiencing difficulties which has entered into a rehabilitation proceedings;<sup>74</sup> and
- 105.2 The Originating Process was filed on 17 December 2015, interim orders were made on 18 December 2015, the final hearing took place on 4 March 2016 and judgment was reserved.

**A summary of the issues that have arisen in Australian cases or of which the author is aware**

106. These include the following.
- 106.1 **Issue 1 - Whether the relevant articles of the Model Law incorporate domestic insolvency provisions (modified universalism) or give rise to other new relief**
- (a) This is a critical issue because it determines the scope of the exceptions that apply to the automatic stay following recognition and the scope of "other relief" available under Article 21;
- (b) The general approach of the Australian courts (and their New Zealand counterparts) to date has been to consider the nature of the foreign proceeding and to find the most equivalent Australian proceeding in order to identify those provisions of Australian law that will apply. This

<sup>73</sup> <https://sin.clarksons.net/Register#/fleet>.

<sup>74</sup> Xiaolin Zeng, *South Korea's SW Shipping files for court protection* Fairplay <http://fairplay.ihs.com/commerce/article/4257396/south-korea-s-sw-shipping-files-for-court-protection>.

does not always work precisely due to differences in insolvency regimes - for example there is no Chapter 11 or Debtor in Possession procedure under Australian law, the closest arguably being administration, which is quite a different procedure as the debtor and/or its directors, have no control over the rehabilitation;

- (c) In *Yu v STX Pan Ocean Co Ltd (South Korea), in the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea)* [2013] FCA 680 (2013) 223 FCR 189 – Buchanan J held at [36]:

*Article 20 of the Model Law, which is engaged automatically upon recognition of a foreign proceeding as a foreign main proceeding, is subject to the circumstances identified in Article 20(2), (3) and (4). In particular, Article 20(2) preserves the operation of local insolvency laws.*

- (d) In the *Fibra Celulose* case one of the issues was whether “other relief” in Article 21 empowered the court to issue an order restraining a contracting party with Pan Ocean from relying on the “*ipso facto*” clause. This case raised whether on its proper construction Article 21 imported the domestic insolvency provisions and the relief available under those provisions, rather than creating new relief (modified universalism). Morgan J held at [108] that he was not persuaded that that the words “*any appropriate relief*” allowed him to grant relief which would not be available to the court when dealing with a domestic insolvency. Morgan J came to that conclusion because based on the reports of the working group, it was not intended that “*any appropriate relief*” would allow the recognising court to go beyond the relief it would grant in relation to a domestic insolvency. Morgan J also referred to other English cases and textbooks as supporting this approach.

**106.2 Issue 2 - What interests of the debtor in a shipping context are protected by the automatic moratorium which follows recognition under Article 20 (or Article 19 interim relief)**

- (a) As noted in the case summaries above, many international shipping companies do not own vessels outright. They are often owned by subsidiaries and then leased to the operating company in the group

under a charter arrangement. Sometimes ships are also chartered by the debtor from third parties. Article 20(1)(a) applies the automatic stay or moratorium to “*the debtor’s assets, rights, obligations or liabilities*”. While an interest as owner of a vessel would be an “asset”, the question arises whether an interest of the debtor as non-owner but as charterer (demise, bareboat, time or voyage charterer etc) will be sufficient to get protection from arrest. This issue has not yet been fully ventilated before the courts and may depend on the nature of the charter interest (and whether it carries with it rights akin to ownership, such as a bareboat or demise charter where the charterer is treated as an owner *pro hac vice* as opposed to a time or voyage charter where the charterer is not);

- (b) This issue arose in 2013 in litigation in the Federal Court of Australia<sup>75</sup> involving the validity of an arrest of the vessel STX Bona based on a foreign maritime lien (this case also raised the *Halcyon Isles* foreign maritime lien point addressed above). The STX Bona case concerned the construction of Articles 20 and 21 of the Model Law, and whether if Article 20 applied, leave to proceed should be granted. The STX Bona case settled after hearing and before judgment;
- (c) It also arose in the New Zealand case of *Kim and Yu v STX Pan Ocean Co. Ltd* [\[2014\] NZHC 845](#) which involved an application by the claimants for leave to proceed with their statutory claims *in rem* against the vessel “*New Giant*”. The claimants had provided shore services to the vessel. STX Pan Ocean was the demise charterer of the vessel;
- (d) Initially there was an issue as to whether the “*New Giant*” was an “asset” of STX Pan Ocean (at [14]), but by the hearing this had been conceded. Gilbert J held at [18] that STX Pan Ocean’s interest under the charter by demise was an asset of STX Pan Ocean for the purposes of the Act. Even if this was not the case, the admiralty proceedings for leave to proceed with their statutory claims *in rem* against the vessel “*New Giant*” were held to concern STX’s “rights,

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<sup>75</sup> Proceedings NSD1345 of 2013.

obligations or liabilities” in terms of art 20(1)(a). The proceedings were therefore caught by article 20 and were stayed; and

- (e) This issue is still to be fully worked through by the courts.

106.3 **Issue 3 - How the automatic moratorium system following recognition under Article 20 will work in the context of maritime creditors: (1) maritime lien holders; and (2) holders of statutory rights *in rem***

**Maritime lien holders**

- (a) Under Australian law as noted above the interest of a maritime lienholder recognised by Australian law is “*not necessarily*” affected by any moratorium arising from recognition under the CBI Act (per Allsop CJ in the *DCKK* case at [17]-[22], presumably because of the exception for secured creditors that generally exists, regardless of the type of insolvency proceeding, under Australian law);

**Holders of statutory rights *in rem***

- (b) As seen above, a security interest in favour of a statutory lien holder arises on the filing of a writ *in rem* (regardless of whether an arrest warrant has issued). The interesting issue is whether that filing (and security interest thereby created) has to take place: (1) before the commencement of the foreign proceeding; or (2) is it sufficient if the filing takes place before interim or final recognition in Australia of the foreign proceeding;
- (c) In *DCKK* Allsop CJ sitting at first instance held at [20] that there was a live question under Australian law as to the status (whether secured or not) of non-lien claims made pursuant to the Admiralty Act as an *in rem* action that have been filed: once filed such claims were a form or species of qualified or quasi security;
- (d) In *Daebo Rares J* at [14] considered it:
- “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 s6 of the Cross-Border Insolvency Act, to supervene or impliedly repeal the domestic statutory remedies...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 Article 19 or 20 of the Model Law;*

- (e) This approach suggests that the date of commencement of the foreign proceeding is not relevant to this issue. When this question falls to be fully considered in a case it is likely involve further consideration,<sup>76</sup> including grappling with the principle in *Ayerst v C & K (Construction) Ltd* [1976] AC 167 per Lord Diplock at 180 given the suggestion that it provides a “*formidable obstacle*” to the proposition that proceedings can be commenced *in rem* on a general maritime claim once a winding up has commenced;<sup>77</sup>
- (f) It is also interesting to note that in relation to obtaining leave to issue an arrest warrant once admiralty proceedings have been commenced, it has been suggested that the arrest of a ship may not amount to an execution against the assets of the debtor (see *Morris v the ship “Kiama”* [1998] FCA 256 at pp. 15-16, hence the arrest of a ship is outside of the prohibition in Art 20(1)(b));
- (g) Query also whether the filing of a writ *in rem* falls within the exception in Article 20(3) of the Model Law in any event, the argument being that the filing of it is necessary to “*preserve a claim against the debtor*”. While it has been suggested that this exception should be limited to preserving claims for the purpose of limitation periods, in relation to ships there is a limited window in which to arrest them when within territorial waters and hence an argument that by analogy leave should be given to file and arrest when the ship comes to Australia;
- (h) In *Kim and Yu v STX Pan Ocean Co. Ltd* [2014] NZHC 845 this issue was considered. The chronology was as follows:
  - (1) On 7 June 2013 STX applied for an order commencing rehabilitation proceedings from the Korean court (**Korean**

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<sup>76</sup> Another issue is by what law the determination of this question will be governed – the law of incorporation of the debtor or the law of the forum?

<sup>77</sup> See also the discussion by Sarah Derrington concerning this issue in the context of admiralty claims in Sarah C Derrington *The Interaction between Admiralty and Insolvency Law* (2009) 23 ANZ Mar LJ 38.

- proceeding**) and for interim orders preventing rehabilitation creditors from conducting compulsory execution, provisional seizure etc based on secured rehabilitation claims;
- (2) Between 12 and 14 June 2013 the claimants filed statutory *in rem* admiralty proceedings against the *New Giant* in New Zealand;
- (3) On 17 June 2013 the Korean court made orders placing STX in rehabilitation and appointing the applicants as administrators;
- (4) On 25 June 2013 the administrators applied for recognition in New Zealand of the Korean proceeding, which was recognised as a foreign main proceeding on 1 July 2013;
- (i) The interim orders made on 7 June 2013 in the Korean proceeding were held by Gilbert J at [39] on their terms not to restrict creditors with maritime liens or statutory rights *in rem* against the *New Giant*. Further Gilbert J held at [40] that the interim orders did not purport to have extraterritorial reach. It was conceded by the claimants that the Article 20 stay applied to the statutory *in rem* proceeding (at [14]). The claimant therefore as a result of the recognition in New Zealand of the Korean proceeding needed leave to proceed;
- (j) Gilbert J held at [26] that the first step was to examine the nature of the claimants' rights and when they arose – the claimants did not have maritime liens and therefore did not acquire any secured interest in *New Giant* at the time their services were provided. The claimants had only statutory *in rem* rights arising under the Admiralty Act. At [27] Gilbert J followed *Re Aro* held at [29] that the secured rights in relation to the statutory claims arose at the time the writ was issued;
- (k) Gilbert J also held at [43] that the claimants should be given leave to continue their claims against the *New Giant*. At the time the Korean proceedings were formally commenced on 17 June 2013 (although filed on 7 June 2013 and interim orders made on 7 June 2013), STX's rights to *New Giant* were subject to the rights of the claimants. The grant of leave met the purposes of the Act and did not put the

claimants in a better position than if STX had not been placed in administration;

- (l) As an interesting postscript to this case, Gilbert J held at [44] that the claimants failed in the action notwithstanding this ruling because the wrong claimant had been named in the writ, rather than a mis-description. Gilbert J also held that granting the substitution application would allow an unsecured creditor to promote themselves to secured creditor status, which would be contrary to the NZ Admiralty Act.

**106.4 Issue 4 - Whether it is appropriate for a recognizing court to order “*other relief*” in respect of a shipping company debtor under Article 21 of the Model Law, given that such relief may foreclose rights of an admiralty creditor**

- (a) The trend in Australia to date is not to order other relief under Article 21 in addition to the recognition orders, other than on the terms of the *Yu* Order which in essence provides for closer control of subsequently commenced admiralty proceedings by a judge (as opposed to the Registrar);<sup>78</sup>
- (b) In the *Yu* case there was an application for Article 21 relief by the foreign representative, which although not referring expressly to arrest, seems to have included wording intended to preclude arrest. The application for the additional relief was refused by Buchanan J at [33] to [43], who said at [43]:

*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 Article 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*

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<sup>78</sup> Given that the Australian State and Territory Supreme Courts also have jurisdiction over the *Admiralty Act*, an interesting question arises as to what extent a *Yu* order made on a recognition application binds the Supreme Court when dealing with any subsequent application to file a writ *in rem*/issue a warrant of arrest against a ship in that Court – depending on the answer to this question, this may raise the possibility of forum shopping.

*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 Cross-Border Insolvency Act 2008 (Cth) and the terms of this judgment should be drawn to the attention of the Judge at the time any such application is made.*

- (c) Also in the *Daebo* case identified above, the foreign representative sought in the Originating Process additional relief under Article 21 that the foreign representative be put on prior notice of any arrest application. Ultimately the claim for this additional relief was not pressed at the final hearing;
- (d) In the US and Canadian cases involving recognition of the foreign proceedings relating to STX Pan Ocean no detailed judgments have been published in the recognition proceedings as far as the writer is aware and only the orders made have been published. In each case additional Article 21 relief was sought and granted which had an impact on whether future arrest proceedings could be commenced. Without a detailed judgment it is not possible to know what (if any) matters were taken into account in granting the additional Article 21 relief by the US and Canadian courts;
- (e) In orders that the writer has seen from other countries in respect of the same foreign proceeding, the courts when recognizing foreign proceedings in those countries often order other relief. This favours the shipowners and their foreign representatives rather than the admiralty creditors;
- (f) To date, aside from the Federal Court of Australia, it does not appear to be the practice of courts of other jurisdictions in which the Model Law applies to give a written judgment when recognition orders have been made on a final or interim basis in relation to ships (at least so far as the writer is aware). It is therefore difficult to know the basis for or reasoning behind these decisions and it does not assist with the development of a coherent body of jurisprudence.

106.5 **Issue 5 - how the unique priority system for marine claims and the rules for the distribution of proceeds from a sale of security are going to operate in the context of a cross-border insolvency**

- (a) This is an issue of international significance currently being considered by CMI, as reported on an interim basis by the International Working Group on Cross-Border Insolvency on 7-9 June 2015, which identified the following:

*Another area of uncertainty is the extent to which foreign recognition may be granted to reorganization proceedings such as those under Chapter 11 of the United States Bankruptcy Code, in which eventual restructuring of debt or payment to credits may differ from generally accepted priority ranking of creditors' claims against a ship.*<sup>79</sup>

- (b) The question (as yet unresolved due to a lack of cases to date) is whether the usual priorities that would apply for distribution of proceeds in admiralty will be applied by the Australian court.

**What can be done to resolve these conflicting principles?**

107. As mentioned above, practitioners are likely to continue to look to CMI for guidance and recommendations on how best to resolve the conflict while recognising the unique character of *in rem* claims.
108. CMI is next meeting in New York on 2-6 May 2016 and has under consideration amongst other things, the following issues:
- 108.1 recommending a protocol to the Model Law specifically addressing *in rem* actions;
- 108.2 developing a set of best practices based on the comparative analysis of the replies to the questionnaire received to date;
- 108.3 identifying conflicts between existing cross-border insolvency legal regimes and international maritime conventions;
- 108.4 promoting certainty and uniformity in the legal effect given to judicial sales of ships following a cross-border insolvency; and

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<sup>79</sup> <http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Cross-Border%20Insolvency/Assembly%20attachment%2011.pdf>.

- 108.5 (perhaps) encouraging countries that have a substantial maritime sector and have yet to adopt a cross-border insolvency legal regime to do so in an effort to promote harmonization of the law in this area.<sup>80</sup>
109. The writer awaits further reports or recommendations for action from CMI.
110. The European Union (**EU**) has for some time had in place Regulation 1346/2000 (in force from 31 May 2002) (**EU Regulation**) which is said to be largely based on the Model Law. It applies only in relation to matters arising between EU member states ie. *intra* EU. The EU Regulation has been a source of case law which is likely to influence how the Model Law is interpreted. With the United Kingdom adopting the Model Law, it is expected that other EU member states will follow suit, although the United Kingdom will continue to apply the EU Regulation to cross-border insolvency issues relating to other EU states (other than Denmark which is not a party to the EU Regulation and so in relation to proceedings involving Denmark in the United Kingdom the Model Law will apply). The EU Regulation contains a “carve-out” in regulation 5.1 in the following terms:

*The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible moveable or immovable assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.*

111. Another jurisdiction that has sought to deal expressly with the relationship between admiralty and insolvency law is South Africa. Its *Admiralty Jurisdiction Regulation Act 105 of 1983* is also based substantially on the 1952 Arrest Convention and the English admiralty law but has certain innovative features. One such feature is s 10 which provides as follows:

*Any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty*

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<sup>80</sup> From the Report of the CMI International Working Group on cross-border insolvency given in Istanbul on 7-9 June 2015.

*jurisdiction, shall not, except as provided in section 11(13), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property or of any other person who might otherwise be entitled to such property, security or proceeds, and no proceedings in respect of such property, security or proceeds, or the claim in respect of which that property was arrested, shall be stayed by or by reason of any sequestration, winding-up or judicial management with respect to that owner or person.*

112. The section 11(13) which is referred to in section 10 merely provides that when all maritime claims against a fund have been paid then the balance of the fund will be paid to the owner of the property that was sold to create the fund.
113. It will be noted that s 10 has two consequences if the property is arrested before the intervention of insolvency: the property does not fall to be dealt with in the insolvency, and proceedings in respect of the property are not stayed.
114. In the more than 30 years since the Act commenced there have been few controversies created by this section and none that have considered this section in the context of South Africa having adopted the Model Law as far as the writer is aware. The only reported cases deal with the prosaic question of which came first in the particular case, the arrest or the insolvency.<sup>81</sup> It should however be noted that it is only if the arrest takes place first that the arrested property does not fall to be dealt with in the insolvency; true maritime lien claims and statutory lien claims that have not been perfected by arrest are not protected. But once the property has been red-lined from the insolvency, other maritime creditors can pursue their claims against it (or the proceeds of its sale) rather than in the insolvency, or they can choose rather to prove claims in the insolvency.
115. As South Africa has also enacted the Model Law (*Cross Border Insolvency Act 42 of 2000*), s 10 of the *Admiralty Jurisdiction Regulation Act* will also operate in relation to foreign insolvency proceedings that are recognised in South African under the Model Law.

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<sup>81</sup> *Rennie NO v South African Sea Products Ltd* 1986 (2) SA 138 (C) and *The Nantai Princess* 1997 (2) SA 580 (D).

116. A practical way of resolving the potential conflict is for an order in terms of the *Yu* Order to be made upon recognition. Not all practitioners are in favour of the making of this order and some shipping practitioners are concerned that it may lead to an increase in the costs of arresting and delay:

*As a practical matter, the requirements of the court arising from Yu v STX Pan Ocean mean that it will not be possible to arrest a debtor's ship without first obtaining an order from the court where the cross-border insolvency regime applies.*

*While it is still possible to arrest a ship in such circumstances, maritime claimants seeking to arrest a ship should allow more time for the arrest and assume additional costs will be incurred noting that a short hearing to obtain leave from the court to arrest a ship will be necessary.<sup>82</sup>*

## Conclusion

117. Subject to any alternative recommendations made in due course by CMI, for the reasons set out above, taking up the “polite” suggestion of Dr Sarah Derrington,<sup>83</sup> it is the writer’s view that MLAANZ should work within CMI to lobby for a carve out in the Model Law along the lines of that in the EU Regulation and/or that contained in the South African Act.
118. The Australian government should lead the way and in the interests of certainty modify the cross-border insolvency regime to introduce a “carve out” into its cross border insolvency regime along the lines of that contained in the EU Regulation 5.1 (without any requirement that it only carve out such claims for member states, consistent with the lack of reciprocity requirement in the Model Law). Alternatively, the Australian government should incorporate a similar provision to that found in s10 of the South African *Admiralty Jurisdiction Regulation Act 105 of 1983*.

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<sup>82</sup> D Maybury and M Tang “*When two systems collide – the intersection between cross-border insolvency protection and the Admiralty action in rem*” available at: <http://www.nortonrosefulbright.com/au/knowledge/publications/114176/when-two-systems-collide-the-intersection-between-cross-border-insolvency-protection-and-the-admiralty-action-emin-remem>

<sup>83</sup> Most recently in Dr Sarah Derrington, “*Introduction to Cross-Border Insolvency*” available at 2012 <http://www.comitemaritime.org/Uploads/Cross%20Border/Introduction%20Cross-Border%20Insolvency.pdf>.

119. Further the current position should continue to apply. That is, in the event of any clash of principles between the areas of cross-border insolvency and admiralty law, as a matter of interpretation, admiralty principles should prevail or at the very least be taken into account, as they were by Buchanan J in making the Yu Order in *Yu* and care should continue to be taken by the courts when ordering relief under Articles 19 and 21 (in particular Article 21(1)(g)), where the debtor is a commercial shipping company.
120. In order for the law in this area to develop uniformly, it is important that all of the courts<sup>84</sup> dealing with cross-border insolvency issues have admiralty experience where an admiralty issue has or may arise in connection with cross-border insolvency, and that those courts give written judgments containing detailed reasoning where any additional orders under Articles 19 or 21 are made, or any issues related to admiralty claimants are addressed in the judgment/orders.
121. The Federal Court of Australia through operating a national admiralty and maritime court and as reflected in the approach already taken by Buchanan J in *Yu*, appears to already be taking this approach. Further, in the relevant Federal Court practice note (*CORP 2: Cross-border insolvency - cooperation with foreign courts or foreign representatives*) dealing with cross-border insolvency matters, it includes at [6.1]:

*Where an application under the Act relates to an owner of a ship or ships engaged in any commercial trade, that matter must be brought to the Court's attention before, or at the time, the application is filed together with a copy of the reasons of the Court in Yu v STX Pan Ocean Co Ltd (South Korea) In the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea) [2013] FCA 680.<sup>85</sup>*

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<sup>84</sup> Noting that the State Supreme and the Federal Courts in Australia have jurisdiction to consider matters under s10 of the CBI Act.

<sup>85</sup> <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/corp2> – see para 6.1.

122. In particular, Australian courts should continue the practice of being careful not to order extended relief under Articles 19 or 21 if it may prejudice the interests of admiralty creditors, without at least first giving them an opportunity to be heard or preserving their right to be heard.

**Dated: 11 April 2016**

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