Relief in Cross-Border Insolvency and Maritime Law

Table of Contents

1. Introduction

The intersection between cross-border insolvency (**CBI**) and maritime law (**ML**) is well documented across academic literature and judicial interpretation. The UNCITRAL Model Law on Cross-Border Insolvency (the **Model Law**)[1], designed with a view to harmonizing the law on CBI and providing uniformity and predictability, has often left admiralty practitioners sighing. The Model Law makes no express reference to its operation ML[2] , and this has since led to a body of case law which must address issues of CBI within the admiralty context.

It cannot be said however that international bodies have simply sat back and watched from the side-lines as the law on CBI developed.[3] UNICTRAL published the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (the **Guide**),[4] the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (the **Judicial Perspective**),[5] and the UNCITRAL Digest of Case Law on the UNICTRAL Model Law on Cross-Border Insolvency, with associated system CLOUT,[6] among others.[7]

Yet again, this begs the question of what happened to ML? Within the CBI arena there are various areas wherein CBI and ML clash.[8] How to choose which area to focus on? The Judicial Perspective helpfully

[1] *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (UNCITRAL, Secretariat, 2014).
[2] ibid, art 32. CMI, Questionnaire – CMI International Working Group on Cross-Border Insolvency" (2012) < https://comitemaritime.org/work/cross-border-insolvencies/> accessed 15 April 2022 and CMI, Report on the work of the International Working Group on Cross-Border Insolvency (5 April 2016) < https://comitemaritime.org/work/cross-border-insolvencies/> accessed 15 April 2022.
[3] See the work of the Judicial Insolvency Network < https://jin-global.org/> accessed 30 April 2022.
[4] (n 1).
[5] *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*, (UNCITRAL, Secretariat, 2014).
[6] "Case Law on UNCITRAL Texts (CLOUT)" (UNCITRAL) < https://uncitral.un.org/en/case_law>.
[7] See *UNICTRAL Practice Guide on Cross-Border Insolvency Co-operation* (UNCITRAL, Secretariat, 2010), *Cross-Border Insolvency II: A Guide to Recognition and Enforcement* (INSOL International, 2012) for further discussion of UNCITRAL publications. The Judicial Insolvency Network has also issued various publications.
[8] Termed the "clash of two international titans" in Julie Soars, "Cross-border insolvency and shipping – a practical guide" (The Federal Court of Australia, 11 April 2016) < https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/julie-soars-2015> accessed 19 April 2022.

identifies four principles which govern the interpretation and application of the Model Law; the 'access' principle, the 'recognition principle', the 'relief' principle, and the 'cooperation and coordination' principle.[9] This essay will focus on the 'relief' principle and look at how it operates alongside additional principles upon which the Model Law is built, relevant maritime case law, and offer some concluding remarks.

The Judicial Perspective refers to the three distinction situations[10] within the relief principle: interim relief,[11] automatic relief,[12] and additional discretionary relief.[13] This triptych will provide the framework for the case law, the majority of which hails from common law jurisdictions, analysed in this essay.

2. Principles

The Model Law is procedural but in order to achieve its purpose, reference is often made to numerous principles. One such principle, which has engendered much academic contemplation, is comity. Comity, as described in the United States case of *Hilton v Guyot* is:

> neither a matter of absolute obligation … nor of mere courtesy and good will ... it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of it laws.[14]

However, the application of comity has led to different judicial outcomes in different jurisdictions.[15] The purpose of the Model Law, articulated in the preamble, illustrates a desire to provide effective mechanisms for dealing with cases of CBI and to promote various objectives, including public policy objectives.[16] Article 6 of the Model Law further notes that "[n]othing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State." The Guide indicates that no definition is provided for what constitutes public policy due the notion varying across States and expresses an intention that the public policy exception should be used in "exceptional and limited"[17] circumstances only.

Opposing principles of territoriality and universality, and the adoption of modified universalism by the Model Law are further matters which circulate within the CBI sphere.[18] Modified universalism was described by Lord Hoffman in *Re HIH Casualty* as:

> the golden thread … [t]hat principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal

[9] *Judicial Perspective* (n 5) p 5 and 6.
[10] ibid [14].
[11] *Model Law* (n 1) art 19.
[12] Art 20.
[13] Art 21.
[14] 159 US 113 (1895) 163-64. See also *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)* [2001] 3 SCR 907 [66].
[15] Jennifer Devlin, 'The UNCITRAL Model Law on Cross-Border Insolvency and its impact on maritime creditors' (2010) 21 JBFLP 91 p 104.
[16] *Judicial Perspective* 15.
[17] *Guide* 30.
[18] Wai Lee Wan and Gerard McCormack, 'Implementing Strategies for the Model Law on Cross-Border Insolvency: The Divergence in Asia-Pacific and Lessons for UNCITRAL"'(2020) 36 Emory Bankruptcy Developments Journal < https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1004&context=ebdj> accessed 27 April 2022,

> liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.[19]

It must be borne in mind that, currently, 50 States have implemented the Model Law.[20] The New Zealand Law Commission, in their report reflecting on the impact of adoption of the Model Law including the provision of various recommendations, highlighted that due to the theoretical differences underpinning domestic insolvency law that 'for any insolvency law to function, a healthy mix of principle and pragmatism is required.'[21]

However, the Judicial Perspective acknowledges that CBI judgments may differ as judges, from varying jurisdictions, are impacted by differing legal traditions.[22] Nonetheless, it may not be that simple. It has been argued that moderately territorialist States considering adopting the modified universalist approach will implement the Model Law, whereas exclusively terriorialist States will require more accommodations in order to implement the Model Law.[23] This friction has led to the fashioning of distinct comity proposals as a path between territoriality and universalism. [24]

Furthermore, the interpretation of the Model Law must have regard to the need to promote uniformity.[25] This is another principle which operates complementary to the relief principle. As this essay traverses various case law, it may become apparent to the reader that uniformity is in fact not always being achieved. Must this be seen as a failure of the Model Law or it is product of the clash between CBI and ML? The immediate answer may be found in the Introduction of the Judicial Perspective, wherein it is stated that 'in practical terms, no single approach is possible or desirable. Flexibility of approach is all-important in an area where the economic dynamics of a situation may change suddenly.'[26] *The Cornelis Verlome*, further articulated this call to react to changing circumstances as:

> it is appropriate that solutions to the legal problems created by international transactions, and by cross-border insolvencies in particular, should reflect modern international commercial practice and not be anachronistically encumbered by dictates from another age derived from different circumstances.[27]

It is clear that the principles affecting the Model Law do not operate in a vacuum. Recognition is one of the four principles of the Model Law and is of importance to the availability of relief.[28] The EU

---

[19] [2008] UKHL 21 [6]-[9] and [30]. See also *Rubin and another v Eurofinance SA and others; New Cap Reinsurance Corporation Ltd (in liquidation) and another v Grant and others (as members of Lloyd's syndicate 991 for the 1997 year of account) and another* [2013] ALL ER 521 (SC).

[20] "Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)" (UNCITRAL) <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>

[21] New Zealand Law Commission, *Cross Border Insolvency: Should NZ Adopt the UNCITRAL Model Law on Cross-Border Insolvency?* (R52, 1999) p 10.

[22] *Judicial Perspective* 19.

[23] "Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)" (UNCITRAL) < https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>.

[24] 'Reciprocal comity' as seen in Martin Davies, "Cross-border insolvency and admiralty: a middle path of reciprocal comity" (CMI, 2018) < https://comitemaritime.org/wp-content/uploads/2018/05/Cross-border-insolvency-and-admiralty-a-middle-path-Martin-Davies-.pdf> accessed 27 April 2022.

[25] Art 8. Maritime law should be uniform as considered in the preface of William Tetley, *Maritime Liens and Claims* (1st ed, Business Law Communications Ltd, 1983).

[26] *Judicial Perspective*, 3.

[27] *Turners & Growers Exporters Ltd v Cornelis Verlome* (1996) 1 BCSLR 334 350.

[28] Relationship between art 17 of the Model Law, art 19, art 19(1)(c) also references any relief mentioned in paragraph 1(c), (d) and (g) of art 21, art 20, and art 21.

Regulations on CBI also operate within this sphere where the Commission Regulation (EC) No 1346/2000[29] has been updated via the Regulation (EU) 2015/848 (known as the **Recast Regulations**).[30] As this essay's assessment of case law will include case law from the United Kingdom (the **UK**), the effects of Brexit will be briefly observed here but not assessed in their entirety. The UK will remain open to insolvencies where the "centre of main interest" (the **COMI**) has been recognised however there will be no automatic recognition in Member States.[31] This will have an effect on both incoming and outgoing proceedings.[32] As such, consideration of the Model Law and English common law principles regarding comity will increase in prevalence.[33]

3. Admiralty

Before beginning an assessment of case law on the relief principle, this essay would be remiss in not addressing the tension between statutory rights *in rem* and maritime liens. This conflict plays out within the relief context of CBI as actions taken to provide relief are often dependent on the priority of rights as viewed through an insolvency and admiralty lens respectively.[34] This is because claims 'rank *pari passu* in insolvency proceedings but the Admiralty Court will apply its own rules of priority.'[35] The status of maritime claimants in insolvency proceedings as secured creditors is therefore crucial.[36] Maritime liens[37], secured rights peculiar to maritime law, are a privilege against a ship which attaches and gains priority without any court action or any deed or any registration,[38] and statutory rights *in rem,* which are not equivalent in priority,[39] are further reflective of the unique characteristics of ML. For certain claims, maritime liens are created by an action *in rem* while other claims can be brought by way of an action *in rem* but do not qualify as maritime liens.[40] This conflict often finds its way into judgments and such case law brings to light the lack of address of ML characteristics in the Model Law.

ML often refers to the *Harmer v Bell (The Bold Buccleugh*) where the Privy Council expressed maritime liens as:

---

[29] Commission Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2002] OJ L 160.

[30] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141. Most recently amended by Regulation (EU) 2021/2260 of the European Parliament and of the Council, amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B. The EU Member States that have implemented the Model Law are Greece, Poland, Romania, and Slovenia. Per *The Insolvency (Amendment) (EU Exit) Regulations 2019* (SI 2019/46), which came into force on 31 December 2020, the UK will still largely apply the Recast Regulations and make changes to UK insolvency legislation such as *The Cross-Border Insolvency Regulations 2006*. f

[31] "What is the impact of Brexit on cross-border insolvency?" (The Gazette: Official Public Record, updated 25 March 2021) <https://www.thegazette.co.uk/all-notices/content/103914> accessed 29 April 2022. See also Philip Wells and Lucy Aconley "How to get recognised: cross-border recognition of insolvency and restructuring proceedings post-Brexit" (2021) 3 JIBFL 187. See also *Gategroup Guarantee Ltd, Re* [2021] EWHC 304 (Ch) for reference to the recognition principle, however this case was not considered in the admiralty context.

[32] The Gazette, n 17.

[33] ibid.

[34] See William Tetley (n 25) p 481 on bankruptcy.

[35] Nigel Meeson and John A. Kimbell, *Admiralty Jurisdiction and Practice* (5th ed, Informa law from Routledge, 2018) p 110, referring here to the Admiralty Court as part of the Queen's Bench Division of the High Court and also part of 'The Business and Property Courts of England & Wales.'

[36] *Re Aro Co Ltd* [1980] All ER 1067 (EWCA).

[37] For a history of maritime liens see Chapter 1 of William Tetley (n 25).

[38] William Tetley (n 25) p 40-41. Holders of maritime liens will always be given leave to commence a claim *in rem* after an order for winding up has been made, see Nigel Meeson and John A. Kimbell (n 35) p 115.

[39] ibid. Also considered in *Re Aro Co Ltd* [1980] All ER 1067 (EWCA).

[40] D.C Jackson, *Enforcement of Maritime Claims* (4th ed, Informa Law from Routledge, 2005) p 467.

> well defined … to mean a claim or privilege upon a thing to be carried into effect by legal process; and … that process to be a proceeding *in rem,* and … wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches …[41]

Allsop CJ in the the Federal Court of Australia (the **FCA**) also noted in the context of CBI and ML:

> [t]here 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.[42]

Maritime liens were notably considered in *Banks Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle*), where the majority held that the determination of whether there existed a maritime lien or statutory right *in rem* was for English law to determine[43] while the minority considered 'the balance of authorities, the comity of nations, private international law and natural justice'[44] meant the *lex loci contractus* took predecence.[45] The minority view has been considered to address the 'unsatisfactory'[46] nature of the majority view. The dialogue between, and surrounding, maritime liens and statutory rights *in rem* is thus ongoing.[47]

4. The 'relief' principle

The three situations which arise in the context of providing relief under the Model Law are:[48]

(a) Interim (urgent) relief that can be sought at any time after the application to recognize a foreign proceeding has been made;[49]

(b) Automatic relief consequent upon recognition of a foreign proceeding as a "foreign main proceeding"; and[50]

(c) Discretionary relief consequent upon recognition of the foreign proceedings as either a main or non-main proceeding.[51]

When relief is sought within the context of ML and CBI it is often sought in pursuit of a protection against arrest or a stay of proceedings. This often results in consideration of articles 19, 20, and 21 of

[41] (1852) 7 Moo PC 267 p 284-285.
[42] *Yakushiji v Daiichi Chuo Kisen Kaisha* [2015] FCA 1170 [18].
[43] *Banks Trust International Ltd v Todd Shipyards Corp (The Halycon Isle*) [1980] 3 All ER 197 p 203 -204.
[44] ibid p 212.
[45] ibid.
[46] Steven Rares, "The Far from Halycon Isle: Maritime liens, renvoi and conflicts of law" (The Federal Court of Australia, 19 September 2013) < https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20130919#_ftn94> accessed 27 April 2022.
[47] ibid. See also *Reiter Petroleum Inc v Ship "Sam Hawk"* [2015] FCA 1005.
[48] *Judicial Perspective* 48.
[49] *UNCITRAL Model Law*, art. 19.
[50] ibid, art 20.
[51] Art 21.

the Model Law but this writer has tried to separate the case law, to the best of this writers' abilities, into the separate categories of relief sought.

a. Interim Relief (Article 19)

The interactive nature of the three situations of the relief principle is directly apparent upon consideration of article 19 as it appears in article 21(2) as follows:

> [i]n granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

Therefore, in navigating the body of case law on the interaction between ML and CBI the three situations should never be far from the reader's mind. The relief of a provisional nature under article 19(1) includes staying execution against the debtor's assets, entrusting the administration or realization of the debtor's assets to the foreign representative, or any relief mentioned in paragraph 1 (c), (d) and (g) of article 21. In *Yu v STX Pan Ocean Ltd (**Yu**)*,[52] the plaintiff applied for recognition as a "foreign representative"[53] and for recognition of proceedings commenced in Korea as "foreign main proceedings,"(**FMP**) with the concern being that ships owned by the defendant might pass through Australian waters and may be subject to arrest.[54] Interim relief was granted[55] upon affidavit evidence which suggested that if the vessels owned by the Defendant were to be subject to arrest it may cause a chain reaction of delays, it would be difficult for the defendant to organize it's affairs to continue in business, and the payment of security deposits for the release of arrested vessels would result in the defendant not having sufficient working capital to operate.[56]

Buchanan J observed that '[c]riticism 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.' [57] The FCA looked at the matter of interim relief again in *Kim v SW Shipping*[58] where a similar concern existed regarding the possible arrest of vessels.[59] Of note in this case, interim orders were made where any application for an issue of a warrant of arrest in Australia of any vessel owned or chartered by the defendant had to be specifically notified to the plaintiffs' solicitors.[60]

This notice to solicitors was not carried forward in *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA*,[61] where Rares J, after having granted interim orders in 2015[62] and 2017[63], considered further the effects of granting interim orders in the local court against the foreign court in another

---

[52] *Yu v STX Pan Ocean Co Ltd (South Korea)* [2013] FCA 680.
[53] *Model Law*, art 2 for definition of foreign representative.
[54] *Yu* (n 52) [2]. In this case, the ships may have been subject to arrest under the Admiralty Act 1988 (Cth) (Au).
[55] ibid [15].
[56] [30].
[57] [39].
[58] [2016] FCA 428.
[59] ibid [9].
[60] [10], full list of orders also [10].
[61] *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2018] FCA 153, *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo Bottiglieri-De Carlini Armatori SpA* [2017] FCA 331. The earlier case [2013] FCA 157 was not heavily concerned with interim relief. The 2018 and 2017 cases were concerned with *concordato preventivo* under the *Italian Bankruptcy Act*.
[62] ibid [4].
[63] ibid [6].

jurisdiction[64] , ultimately holding it was appropriate to grant the trustees interim relief of a stay of judicial proceedings subject to the *Yu* 'special order'.[65]

The fall of Hanjin Shipping resulted in various international insolvency proceedings some of which further considered the operation of article 19. The High Court of Singapore[66] considered an application for interim orders where the Applicant argued that the application was an 'essential part of the series of applications that Hanjin had made across the world to prevent piecemeal and haphazard resolution of the companies' difficulties', the was a potential for disruption in global trade, and the application was required to provide the 'time and space … needed for Hanjin to coordinate its rehabilitation plans.'[67] This last point appears to reflect the necessary 'breathing space' provided by stay of proceedings as indicated by the Guide.[68] Ultimately, the court ordered a stay of all present proceedings against Hanjin,[69] and was satisfied that the Korean rehabilitation orders should be recognized and assistance rendered even though the court was mindful that that decision would restrain admiralty proceedings.[70]

The Applicant in that case had put before the court an 'alternative prayer,' where, had the court decided:

> against affecting the admiralty proceedings by granting a restraint of any enforcement or execution against vessels beneficially owned or chartered by Hanjin and the Subsidiaries, the Applicant asked in that event that any application for the issue of a warrant for the arrest of those vessels be heard by a judge (instead of by an Assistant Registrar). This followed the approach taken in several Australian decisions.[71]

However, the court was of the view that the relevant Singaporean legislation[72] and case law did not prevent them from issuing orders which would restrain arrest of ships and stay other admiralty proceedings.[73] The court also indicated a 'carve-out', since the orders did not operate in respect of the vessel, the *Hanjin Rome* which had been arrested earlier.[74]

The FCA in *King (Trustee), in the matter of Zetta Jet Pte Ltd v Linkage Access Limited*[75] granted initial interim relief restraining Linkage from removing the *Dragon Pearl* from Australian waters[76] however refused the plaintiff's further application for an injunction, as interim relief, as the plaintiffs had no reasonable prospect of success.[77] Courts could therefore be seen as forward thinking with respect to granting relief. In *Michele Bottiglieri Armatore SpA,*[78] where a stay under article 21(1) was sought,[79] the

---

[64] *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA* (n 61) [48].
[65] ibid [57].
[66] *Re Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] SGHC 195. Singapore is listed among the participants of the Model Law "Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)" (UNCITRAL) < https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status>
[67] *Re Tai-Soo Suk* (n 66) [8] – [10].
[68] *Guide* [37].
[69] *Re Tai-Soo Suk* (n 66) [12].
[70] ibid [13].
[71] [24].
[72] High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed).
[73] *Re Tai-Soo Suk* (n 66) [25].
[74] ibid [12].
[75] [2018] FCA 1979.
[76] The history of orders is set out at paragraphs 6 – 11 of *King (Trustee)* (n 75).
[77] *King (Trustee)* (n 75) [16].
[78] *Michele Bottiglieri Armatore SpA v Michele Bottiglieri Armatore SpA* [2021] FCA 795.
[79] The applicant sought interim recognition of the *concordato preventive*, under the *Italian Bankruptcy Law*, as a foreign main proceeding under Art 17 of the Model Law and a stay under Art 21(1).

Court considered article 19 and was satisfied on a prima facie basis that the proceeding would likely be recognized as a FMP and so granted provisional relief that commencement or continuation of proceedings against Bottiglieri be stayed, subject to the specific form of order laid out in *Yu*.[80]

This reflects a judicial willingness to assess surrounding circumstances in issues of CBI and ML. The court in *The Cornelis Verlome* considered that 'fortunes cross international boundaries at the click of a mouse'[81], thereby requiring ML to respond to changing circumstances and consequently refused a stay of actions regarding crew wages.[82] However, interim relief remains of central importance to the place of ML within CBI.

b. Automatic Relief (Article 20)

The existence of automatic relief upon recognition of a FMP, a key component of the Model Law, is necessary for it provides 'breathing space'[83] until appropriate measures can be taken for 'reorganization or liquidation of the assets of the debtor.'[84] However, the automatic stay on proceedings under the Model Law ceases when the foreign proceeding is closed.[85]

Buchanan J, in *Yu*,[86] acknowledged that article 20 of the Model Law will take effect automatically but saw no reason why arrest of a ship owned or operated by the defendant could not be sought in appropriate circumstances.[87] This indicates again how the relevant articles of the Model Law overlap as such a decision was reached following contemplation of additional relief under article 21 of the Model Law. The arrest warrant would be dependent on 'the circumstances, the reason why the arrest was sought and the interest sought to be vindicated by the action *in rem*.'[88]

Buchanan J then went on to mention two further points which have become a red thread through Australian authority on admiralty and insolvency. Firstly, application of the kind contemplated in *Yu* ought to be made to a Judge of the Court, not a Registrar, and the terms of the *Yu* judgment should be drawn to the attention of the Judge.[89] This was later described by Rares J in *Kim v Daebo International Shipping Limited*[90] as a 'special order'[91] where 'before an arrest warrant was issued in a proceeding *in rem* under the Admiralty Act, a judge considers whether the plaintiff's claim against the ship was based on an existing secured interest such as would be given by a maritime lien.'[92] Justice Rares, in *Hur v*

---

[80] *Yu* (n 52) [42].
[81] *The Cornelis Verlome* (n 27) p 350.
[82] ibid 351.
[83] *UNCITRAL Model Law on Cross-Border Insolvency* (n 1) [3] and [37].
[84] ibid [37].
[85] *Board of Directors of Rizzo-Bottiglieri-De-Carlini Armatori SpA v Rizzo-Bottiglieri-De-Carlini Armatori SpA [*2017] FCA 331 [17] – [19].
[86] *Yu* (n 52).
[87] ibid [42].
[88] ibid.
[89] ibid. The FCA has also issued Practice Notes as guidance on matters of CBI and ML, see Cross-Border Insolvency Practice Note: Cooperation with Foreign Courts or Foreign Representatives (GPN-XBDR) and Admiralty and Maritime Practice Note (A&M-1) (The Federal Court of Australia) <https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/more#Practice>. Accessed 30 April 2022.
[90] [2015] FCA 684.
[91] ibid [11].
[92] ibid [11]. This existing secured interest as considered to be such as given by a maritime lien recognised under s 15 of that Admiralty Act 1988(Cth).

Samsun Logix Corp[93], which concerned the recognizing of a foreign representative and the proceeding as a FMP, both of which were successful, and where the 'special order' from *Yu* was accepted by the applicant, further held that it was evident that the authors of the Guide and the Australian Cross-Border Insolvency Act[94] 'did not consider the impact of any stay in respect of proceedings *in rem* on a maritime lien or a secured or proprietary claim in admiralty matters.'[95] Nevertheless, the Yu 'special order' solidifies the importance of ML in CBI.

Of importance to this consideration of the relief principle is article 20(2) of the Model Law:

> The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this 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 this article*].

Justice Rares considered the nature and extent of a stay regulated under article 20(2) as 'beguilingly ambiguous'[96] and Allsop CJ held in *Akers v Deputy Commissioner of Taxation:*

> *Two things are important to appreciate about Art 20. First, Art 20 … 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.*[97]

The idea of a carve-out thus requires some attention.[98] The Recast Regulations include such a carve-out in article 8(1) where:

> 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 immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

It has been suggested that this article be adopted into the Model Law[99] but, at the time of writing, this has not been done. In enacting the Model Law, States have utilized article 20(2) by incorporating domestic stays of proceedings as opposed to adopting the Model Law wording.[100] This can be seen in the UK Cross-Border Insolvency Regulations 2006, the United States Bankruptcy Code, and Australian Cross-Border Insolvency Act 2008 (Cth), however this has not been followed in New Zealand.[101]

---

[93] [2015] FCA 1154.
[94] Cross Border Insolvency Act 2008 (Cth) (Au).
[95] *Hur v Samsun Logix Corp* (n 93) [28].
[96] ibid [7].
[97] *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8 [55].
[98] John A.E. Pottow,'Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law' (2014) 9 Brook. J. Corp. Fin. & Com. L. <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1018&context=bjcfcl> accessed 30 April 2022.
[99] Julie Soars, "Cross-border insolvency and shipping – a practical guide" (The Federal Court of Australia, 11 April 2016) < https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/julie-soars-2015> accessed 19 April 2022.
[100] Jennifer Devlin, 'The UNCITRAL Model Law on Cross-Border Insolvency and its impact on maritime creditors' (2010) 21 JBFLP 91 p 113-114.
[101] ibid 113 – 114. And the *Insolvency (Cross-Border) Act 2006* (NZ).

Kim and Yu v STX Pan Ocean Co. Ltd[102] addressed two issues of relevance to this discussion. Firstly, whether the admiralty proceedings were covered by a New Zealand stay, and secondly, if so, whether leave should be granted to continue the admiralty proceeding (as the administrative proceedings in Korea, recognized as FMP, had the effect of staying the admiralty proceedings).[103] The High Court of New Zealand held that admiralty proceedings were covered by the stay which came into effect in New Zealand by operation of law following the Court's recognition of the Korean administration proceeding as a FMP.[104] The Court then considered article 20(2) of the Model Law, as to the discretion to allow a person to commence or continue proceedings, when assessing whether to grant leave and held:

> [i]n considering whether to grant leave in the present case, it is first necessary to examine the nature of the claimants' rights and when they arose. The claimants do not have maritime liens and therefore did not acquire any secured interest in New Giant at the time their services were provided. The claimants have only statutory *in rem* rights arising under the Admiralty Act.[105]

This brings forth again the interaction between priority of claims. The Court considered the status of such claims with reference to the English Court of Appeal decision *Re Aro. Ltd*,[106] and did not consider that the interim orders made affected their analysis as to whether leave should not be granted to enable claimants to pursue *in rem* claims and establish their secured rights against the ship.[107] The Court further noted the undesirable effect that 'if leave was declined, other creditors would gain a benefit to which they are not entitled and [this] would put them in a better position than they would have been in had STX not been placed in administration.'[108]

The Court also considered preceding actions, or lack thereof, by STX in reaching its decision on granting leave. Notably, it considered that STX did not apply for recognition of the proceedings nor for interim relief under article 19 to protect either its own assets or the interests of creditors pending determination of a recognition application.[109] The Court held that either of these two pathways would have been available at the time the interim orders were issued.[110] Further, the Court considered that STX would have known of the location of its shipping fleet and understood that these assets were 'vulnerable to arrest by maritime lien claimants and other suppliers with rights in rem in admiralty. Yet they took no steps to prevent any such creditors from exercising these rights.'[111] Ultimately, the Court ordered that the stay did not apply to admiralty proceedings and leave to continue the proceedings, in this case, statutory claims *in rem*, against the vessel the *New Giant* was granted.[112] The delineation between the three situations referred to in the relief principle of the Model Law, within the context of ML, thus becomes harder to draw.

[102] [2014] NZHC 845.
[103] ibid [6].
[104] *Kim and Yu v STX Pan Ocean Co. Ltd* (n 102) [19].
[105] ibid [26].
[106] [26], citing *Re Aro Co Ltd* [1980] All ER 1067 (EWCA).
[107] *Kim and Yu v STX Pan Ocean Co. Ltd* (n 102) [42].
[108] ibid [43].
[109] [40].
[110] [40].
[111] [41].
[112] [45].

c. Additional relief (Article 21(1)(g))

This article, 'post-recognition relief',[113] applies upon recognition of the proceeding as a FMP or a foreign non-main proceeding where, if it is 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:

> (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.

It was considered in the *Fibria Celulose*[114] that the scope of the additional relief in article 21(1)(g) would not include relief which would not be available to the court when dealing with a domestic insolvency.[115] The provision for 'adequate protection' appears in article 21(2) however 'adequate protection' is not defined by the Model Law. Nonetheless, weight is afforded to paragraph 2 of article 21 as it 'reflects a degree of modified universalism in the Model Law.'[116] However, in *Yu*, the application for additional relief, expressed as order 5, was refused[117] following consideration of the fact that the defendant had no permanent assets in Australia and that such assets as may have been subject to the order were ships.[118] Orders 6 and 8 were also declined however order 7 was granted. [119]

Hanjin Shipping litigation further included consideration of article 21, such as by the Supreme Court of British Columbia.[120] In *Tai-Soo Suk v Hanjin Shipping Co Ltd*,[121] the FCA may orders pursuant to article 21 of the Model Law, including orders that no person may enforce a charge or lien on the property of the defendant, that no application for issue of a warrant for the arrest in Australia of any vessel owned or chartered by the defendant can be made, without the written consent of the plaintiff or leave of the Court, and the *Yu* 'special order'[122] as the FCA was satisfied that such relief was necessary to protect the assets of the debtor or the interests of the creditors and the interests of the creditors were appropriately protected.[123] The insolvency history of Hanjin Shipping, somewhat affectionately termed one of the 'unthinkable unsinkables'[124] serves as a reminder of the interaction between CBI and ML.

5. Conclusion

The clash between CBI and ML continues to address issues of priority as part of the interaction between CBI and the unique characteristics of ML. This has resulted in case law which, while domestic in nature,

---

[113] *Judicial Perspective* p 57.
[114] *Re Pan Ocean Co. Ltd; Fibria Celulose S/A v Pan Ocean Co. Ltd and another* [2014] EWHC 2124 (Ch).
[115] ibid [108].
[116] *Akers v Deputy Commissioner of Taxation* (n 97) [58].
[117] *Yu* (n 52) [41] – [43].
[118] ibid [35].
[119] [44]-[45].
[120] *Hanjin Shipping Co., Ltd. (Re)*, 2016 BCSC 2213.
[121] *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 [19].
[122] Order 7, NSD 1634 of 2016 in *Tai-Soo Suk v Hanjin Shipping Co Ltd* (n 121).
[123] *Tai-Soo Suk v Hanjin Shipping Co Ltd* (n 121) [61].
[124] J. Stephen Simms, 'Preparing for the Next Unthinkable Sinking' (The Maritime Executive, 12 October 2016) < https://www.maritime-executive.com/editorials/preparing-for-the-next-unthinkable-sinking> accessed 9 April 2022.

has acquired an "international flavour"[125] and indicates the obstacles towards achieving global consistency on matters of CBI. The approach of the Australian courts is of merit as matters of admiralty are dealt with by courts with admiralty experience.[126] Perhaps, the international nature of ML, flexible as it may be, means that ML and CBI can only respond to changing global dynamics and should thus respond under the guidance of those with the experience to do so.

[125] New Zealand Law Commission (n 21) p 46. Although this phrase was used by the New Zealand Law Commission in a speculative sense as they anticipated what the case law landscape would look like, this writer submits the phrase is still of relevance as is evident from the case law.

[126] Julie Soars, "Cross-border insolvency and shipping – a practical guide" (The Federal Court of Australia, 11 April 2016) < https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/julie-soars-2015> accessed 19 April 2022.