CONSISTENCY AND CONFLICT – CROSS-BORDER INSOLVENCY

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1. The second half of last century and the first fifteen years of this one have seen the inexorable march of global corporate imperialism, for good and bad. Multinational corporate groups have been able to operate seamlessly across nation states' borders, generally to the benefit of consumers and the detriment of tax collectors. One happy consequence for corporate lawyers and insolvency professionals is that the capitalist system has not lost its ruthlessness. Collapses of multinational groups are not mere ripples in national ponds but can produce tsunamis of cross-border litigation and reconstructive activity.

2. Traditionally, courts had to balance the primacy of domestic law remedies in the reconstruction or administration of insolvent estates against the reality that foreign creditors may suffer prejudice from too parochial an approach. The high water mark of common law pragmatism in cross-border insolvency came out of the decision of the House of Lords in *In re HIH Casualty and General Insurance Ltd*[1]. There, Lord Hoffmann said that the primary rule of English private international law applicable to cross-border insolvencies was the principle of (modified) universalism, namely that English Courts, so far as was consistent with domestic public policy, co-operate with the courts of the debtor's principal liquidation or bankruptcy to ensure that all of its, his or her assets are distributed to the insolvent's creditors under a single system of distribution.

3. However, the legal basis on, and extent to, which the Court of the forum will depart from its local law in co-operating with the law of an insolvent's domicile or centre of main interests is not settled, as Allsop CJ, with the agreement of Robertson and Griffiths

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A paper presented at the 32nd Annual Conference of the Banking & Financial Services Law Association in Brisbane on 4 September 2015.

1 [2008] 1 WLR 852 at 861-862 [30]

JJ said in *Akers v Deputy Commissioner of Taxation*[2]. Two recent decisions of the Privy Council discussed this uncertain, but developing area of law, the *first* unanimously in upholding an anti-suit injunction granted in the insolvent's domicile restraining one creditor from pursuing remedies in a foreign (Dutch) court[3], and the *second*, by a three-two majority, holding that there was a limited power at common law for the courts of the forum to assist officers of a foreign court, such as liquidators or trustees in bankruptcy, in the administration of the insolvent estate[4]. As Professor Adrian Briggs recently noted in his paper *Judicial assistance still in need of judicial assistance*[5], Lord Neuberger of Abbotsbury PSC pithily observed in his judgment in *Singularis*[6] that the state of the law on this topic at present is "somewhat confused". Lord Neuberger continued:

> "that very confusion underlines the need for caution. The extent of the extra-statutory powers of a common law court to assist foreign liquidators is a very tricky topic on which the Board, the House of Lords and the Supreme Court have not been conspicuously successful in giving clear or consistent guidance."

Maritime cross-border insolvency

4. However, centuries earlier, maritime lawyers had developed a sophisticated and generally harmonious system of dealing with cross-border insolvencies. Indeed, in 1759 the great English commercial judge, Lord Mansfield CJ said[7]: "*... the maritime law is not the law of a particular country, but the general law of nations*". The supply of goods and services to ships, self-evidently, has always been potentially hazardous. Ships can be quite elusive debtors. They can also incur liabilities from, for example, collisions with other vessels or port infrastructure before sailing away across the deep blue sea. And, more ominously for the creditor or person whose property has been damaged, that ship can leave the jurisdiction where the debtor liability was incurred. Her owners can be a legal entity incorporated in a country or flag state of convenience, where justice is far to seek and the entity's assets are even less accessible.

5. Maritime law developed a system that enabled creditors and claimants to arrest or attach a ship when she was in the jurisdiction of a court of (vice) Admiralty. Obviously, this

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2 (2014) 223 FCR 8 at 16 [28]
3 *Stichting Shell Pensioenfonds v Krys* [2015] AC 616 at 625-631 [14]-[25], 633-634 [34], 636
4 *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] 2 WLR 971)
5 [2015] LMCLQ 179 at 179
6 [2015] 2 WLR at 1020 [152]-[154]
7 *Luke v Lyde* (1759) 2 Burr 882 at 887

system worked among only sea and riverine trading nations but it did so efficiently, in both common law and civilian jurisdictions. The shipowner then had three choices, *first*, he could decide to pay the claim, *secondly*, he could appear in the proceedings and put up security to obtain release of the ship so that, in general, the fund could answer the claim if the Admiralty court found in favour of the claimant, or, *thirdly*, he could ignore the process and allow the Admiralty Court to sell the ship and distribute the proceeds amongst all persons who made and established maritime claims against the ship. And, as might be expected, maritime law also developed a system of priorities for the payment of those claims, including the maritime lien, ships mortgages and claims that ranked lower, in the nature of unsecured liabilities.

6. A maritime lien is a secured interest, or in Roman law terms, a privilege. A maritime lien attaches to and travels with the *res* or ship, as an interest that can only be discharged by payment of the lienee's full claim or by a judicial sale of the ship. Importantly, a maritime lien can be enforced in priority to the interests of a *bona fide* purchaser of ship and his mortgagee each of whom may have had no notice of the existence of the lien[8].

7. The reason that these remedies developed in a relatively consistent way may be due to the pervasiveness of Roman law concepts and the demands of the early international mercantile community for a coherent means of enforcing claims against a peripatetic asset. Critically, the maritime law remedy of arrest or attachment operated on the asset, being the ship, not the owner of the asset. The owner could be solvent or insolvent. The owner had a choice of joining himself to the proceedings and exposing himself to personal liability. But, if the owner decided not to appear, or become a party, the Admiralty court treated the ship as the party or defendant or the owner's answer to the claims and sold her to realise a fund that was used to meet the claims proved against her.

8. There are, as with all insolvency and judicial regimes, local twists. Thus, the maritime law of North America accords the status of a maritime lien to many categories of obligation, such as the supply of goods or services, like bunkers and supplies, to a ship that Anglo-Australasian law ranks lower in priority.

The role of the *Model Law*

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[8] see *Ship Hako Endeavour v Programmed Total Marine Services Pty Ltd* (2013) 211 FCR 369 at 395 [91]-[93] where I discussed this

9. The UNCITRAL ***Model Law*** *on Cross-Border Insolvency*, and its European Union analogue, have sought to bring some harmony to the administration of international insolvencies of corporations and individuals. Australia has given the *Model Law* the force of law by dint of s 6 of the *Cross-Border Insolvency Act 2008* (Cth), as has the United States of America in Ch 15 of Title 46 in the United States Code, and about 20 other nations including the United Kingdom, Canada and South Korea. Recently, some Korean shipping lines have availed themselves here of their local equivalent of what is colloquially called "Ch 11" in the United States. This has highlighted the fact that those who drafted the *Model Law* did not take into account the existing, functional and well developed international law maritime.

Lehman Bros – a developing space

10. Fascinating as the topic of dealing with the collapse of **Lehman Bros** Holdings Inc on 15 September 2008 is, not just because of its connection to the phenomenon of what we know as the Global Financial Crisis or GFC, but also because of the wonderfully intricate and complex legal issues it has spawned, I must be more restrained in my discussion of it than my co-presenter, the Hon James Peck, who now has the benefit of both judicial retirement and celebrity.

11. I have two current Lehman Bros cases in my docket, each of which has raised intriguing legal and factual issues – issues akin to the apocryphal Chinese curse of "*may you live in interesting times*". Australia's late corporate tycoon, Kerry Packer, said, when he bought back a television network he had sold to Bond for $1 billion at a fraction of that price after a previous global financial calamity, that: "*You only get one Alan Bond in your lifetime and I've had mine*". However, Lehman Bros is, at least intellectually and litigously, a gift that keeps on giving.

12. In September 2012, I decided the first stage of a class action that subsequently settled, in which three Australian local government councils sued **Lehman Bros Australia** Ltd (In Liq) for damages for breach of contract, negligence, breach of fiduciary duty and breach of statutory obligations. I found for the councils on all of those bases. Lehman Bros Australia had sold synthetic collateralised debt obligations (**SCDOs**) to the councils as if those investments were as safe as Australian government bonds. The GFC demonstrated the fallacy of that assumption.

13. As many in this audience will be aware, the subject matter of an SCDO is as mythical as the fruit on the tree that was always just out of Tantalus' reach. An SCDO is a synthetic, hypothetically constructed and highly complex financial instrument that, in a broad, if oversimplified sense, is a sophisticated bet. One of the many problems in the case I decided in 2012, *Wingecarribee Shire Council v Lehman Bros Australia Ltd (In Liq)*[9], was how to value the appropriately named, Dante notes. These were at least 11 different SCDOs in which Lehman Bros Special Financing Inc (**LBSF**) was the contractual counterparty. Oddly enough, associations with the infernal nature of these instruments only came to be made once their true nature became exposed after conflicting decisions of the English Courts and Judge Peck[10] on the operation of the flip clause.

14. In effect, that conflict had the practical result, while it was unresolved, that the Dante notes were both unsaleable and unrealisable. That was because none of the persons with interests in, or who held, the collateral, was prepared to risk paying out lest one or other country's courts objected. However, I had to value these priceless, synthetic financial fictions as at the date of my decision in order to quantify the councils' losses. I described this desultory situation saying [11]:

> "the Dante noteholders would be justified in thinking that their products were in a series that was aptly named. Dante wrote in *The Inferno*, of reading the inscription on the Gate of Hell as he passed through it. That inscription concluded: "Abandon all hope, ye who enter here"."

15. In the end, it was necessary to take account of the existence of the Dante cross-border judicial impasse to value the notes at the mid-points of what the note holders would have received were the final distribution to be made under the respective laws of England or the United States. In some cases those mid-points could be assessed based on actual transactions in some series of the notes, in others based on the highest recent, but unaccepted, bid for the relevant series and in yet others based on a 30% discount of the expert's valuations. That was because, I considered, the value of the Dante notes in the council's hands at the date of judgment was significantly less than that of a liquid asset, and, if put to market, could be expected to realise a substantial discount to their

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9 (2012) 301 ALR 1

10 I described these in *Wingecarribee* 301 ALR at 220-223 [822]-837]

11 301 ALR at 223 [838]

face values. I found that this was both arbitrary and unsatisfactory, but the only way to reflect a net present value for notes that might not be redeemed for some years[12].

16. I have to determine, in a hearing beginning in mid October 2015, whether Australian local government councils, including some in the original class action I decided, and other investors who bought SCDOs from Lehman Bros Australia can succeed in a second class action against the American ratings agency, Standard & Poor's. This cause of action is based on claims that the high ratings that it gave to those financial products were flawed.

17. And, I also have to a decide a new case brought earlier this year by the liquidators of Lehman Bros Australia against LBSF on the efficacy of the "flip clause" in an SCDO, known as "**Federation**". The Federation notes were denominated in Australian dollars and sold here, but their transaction documents are, I am told, governed by United States law. That feature may distinguish how the "flip clause" operates in this particular SCDO from the way in which the Supreme Court of the United Kingdom held it operated in similar, but not identical, instruments, the proper law of which was English law in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd*[13]; cp: Judge Peck's decision *Lehman Bros Special Financing Inc v BNY Corporate Trustee Services Ltd*[14] and the valuation problem that both conflicting decisions created in *Wingecarribee*[15].

18. At the moment the parties in that new case have raised a pot pourri of legal issues that I suspect academics would almost kill to discuss. These include whether the case should be heard in Australia or the United States and how the statute laws of each of those jurisdictions will recognise the rights and liabilities of each insolvent protagonist and its creditors. Importantly, in late October 2008, the money in issue was paid to the then administrators of Lehman Bros Australia as the contractual collateral under the Federation SCDO by Bank of New York, the security or stakeholder of the collateral for those notes.

19. The questions involve consideration of whether, *first*, LBSF can prove for the money in the Australian liquidation at all, and *secondly*, the proper forum to decide who is

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[12] 301 ALR at 279-280 [1072]-[1073]
[13] [2012] 1 AC 383
[14] 422 BR 407 (2010)
[15] (2012) 301 ALR 1 at 275-280[1053]-[1073]

entitled to the money is Australia or the United States and, if here, how an Australian court should decide how the proper law of the notes – being that of the United States – operates. Judge Peck has described in his paper his view in *Lehman Bros Special Financing*[16] of how the flip clause operated. As he would acknowledge, his view, was described by Judge Colleen McMahon of the United States District Court for the Southern District of New York, when considering whether an appeal could be brought from his judgment, as a "one-of-a-kind decision [that] will need to be tested on appeal"[17]. I suspect that the law of the United States on this point is yet to be definitively stated.

20. Both parties raised these issues when LBSF first appeared to challenge the jurisdiction of the Federal Court of Australia on 21 August 2015. I raised with the parties a query whether, as in the Nortel litigation, one possibility to resolve the apparent conflict of laws, could be that I could sit with Judge Peck's successor, Judge Chapman, and we could hear the cases together. The parties are considering their options in this intricate forensic feast.

21. At the moment, like Tantalus, I see the desideratum of how to resolve those, among issues, in that litigation concurrently with Judge Chapman, in the absence of guidance from the parties, as somewhat out of my grasp. Even if I am not in Hades, in this litigation I suspect I am at its forensic gate.

Identifying the nature of the stay under the *Model Law*

22. Let me turn to another topic of some difficulty under the *Model Law*, namely the nature of the stay of proceedings imposed under Art 20(1)(a) and (b) when an Australian court makes an order recognising a foreign proceeding under Art 17. Relevantly, Art 20(1) provides:

> 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;
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>   (b) Execution against the debtor's assets is stayed;
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> 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*

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16 422 BR 407

17 see *Wingecarribee* 301 ALR at 279 [1069]

> *exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of the present article*].

23. Delphically, s 16 of the *Cross Border Insolvency Act* provides that, for the purposes of Art 20(2):

> "… 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:
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> (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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> as the case requires."

24. Where the foreign proceeding has the character of a reorganisation under Ch 11 of Title 46 of the United States Code, including the analogous South Korean *Debtor Rehabilitation and Bankruptcy Act*, there is an open question as to which of the various stay provisions in the *Corporations Act* or *Bankruptcy Act* applies. This poses for domestic Australian purposes a number of unfortunate and unnecessary problems.

25. There is one set of stay provisions for administration proceedings under Pt 5.3A of the *Corporations Act*, another in ss 471B and 471C for corporations being wound up by the Court, and more for other types of winding up. But, there is no stay, unless ordered by the Court, if a scheme of arrangement is proposed under Pt 5.1. A scheme of arrangement has some analogies with Ch 11 as does a decision of a company's creditors to approve entry into a deed of company arrangement under Pt 5.3A.

26. Thus, it can be necessary to identify, in each particular case, for the purposes of s 16 of the *Cross Border Insolvency Act*, what provisions of Ch 5 of the *Corporations Act* define the scope and modification or termination of the stay or suspension referred to in Art 20(1) of the *Model Law*. That section provides, relevantly, that the scope of the stay is the same as would apply if it arose under Ch 5 of the *Corporations Act* other than under Pt 5.2 (which deals with receivers and other controllers of the property of a corporation) and Pt 5.4A (which deals with winding up by the Court other than on the ground of insolvency).

27. In earlier decisions I used the principles in the *Vienna Convention on the Law of Treaties*[18] in approaching the construction of the *Model Law*, having regard to its

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[18] done at Vienna on 23 May 1969; [1974] ATS 2

interpretative provision in Art 8[19]. That article provides that in interpreting the *Model 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".

28. In my opinion, that article is a pithy summary of the principles in Arts 31 and 32 of the *Vienna Convention*. The High Court of Australia has held that the principles in the *Vienna Convention* should be used in construing an international convention so as to adopt, if possible, a construction here that conforms with any generally accepted construction in other countries that subscribe to that convention[20]. However, Prof Bruno Zeller has written recently that this use of the *Vienna Convention* is "completely wrong"[21]. He asserted that in *Ackers*[22], I questioned whether extrinsic material could be used to assist in the interpretation of ambiguities in the *Model Law*. Having spent over six pages of the law report discussing texts, articles and foreign case law in analysing what the expression "*centre of main interests*" in the *Model Law* meant, I am more than usually curious as to how I managed in that academic's view to make such a meal of my task.

29. An administration under Pt 5.3A is unlike proceedings under the *Debtor Rehabilitation Act* (and under Ch 11). An administration of the business property and affairs of an insolvent company under Pt 5.3A is initiated, and ordinarily occurs entirely, without any involvement of a court. The administration commences when the directors of a company, its liquidator, provisional liquidator or a secured creditor appoint an administrator[23]. The assets and affairs of the company in an administration under Pt 5.3A are under the control or supervision of an administrator[24] a deed administrator[25] or a liquidator appointed out of court by the creditors[26]. The administrator has control of the company's business, property and affairs while it is under administration by force of s 437A. The administrator must investigate the company's business, property, affairs and financial circumstances and form an opinion as to whether it would be in

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19 see e.g. *Ackers v Saad Investments Co Ltd (In Official Liquidation)* (2010) 190 FCR 285 at 295-296 [45]-[49]

20 *Minister for Immigration and Multicultlural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14-16 [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ

21 Statutory Interpretation – The Two Step Approach (2015) *I Curtin Law and Taxation Review* 38 at 53

22 190 FCR at 295 [45]

23 ss 436A, 436B, 436C

24 s 437A

25 s 444A(2), (4)(a)

26 s 439C(c)

the interests of the creditors of the company for it to execute a deed of company administration, to cease to be under administration or to be wound up[27]. The creditors then decide which of those courses the company will take[28].

30. If the creditors decide that the company should execute a deed of company arrangement, the execution of the deed by the company and the administrator creates and defines a new legal relationship between the company and the creditors in respect of all claims arising on or before the day the administration commenced by force of ss 444C and 444D. This gives effect to the will of the requisite majority of the creditors of a company who vote at a meeting held under s 439A[29].

31. There is no role for the Court in those processes under Pt 5.3A unless a person commences proceedings in respect of them seeking to terminate the deed on a basis provided for under s 445D or to set aside, under s 600A, a resolution passed by a meeting of creditors that was carried with votes cast by creditors related to the company. The action under s 600A may succeed if the passing of the resolution was either contrary to the interests of the creditors as a whole or likely to prejudice unreasonably the interests of the defeated creditors. As French CJ, Gummow, Hayne and Kiefel JJ said in *Lehman Bros* 240 CLR at 521 [32]:

> "The chief difference between Pt 5.3A and earlier provisions for statutory composition and arrangements in corporate insolvency[30] is the role played by the Court. Earlier provisions required court approval *before* the scheme was effective; Pt 5.3A provides for disallowance by the Court *after* the deed has been made."

32. There are very wide stay and suspension provisions in Pt 5.3A such as ss 440D, 440F and 440G, in respect of the period before the creditors meet to decide whether to proceed under a deed of company arrangement or otherwise, and under ss 444E and 444F, if a deed is executed. It may be difficult to identify those provisions as the ones intended to provide, under s 16 of the *Cross Border Insolvency Act* and Art 20(2) of the *Model Law*, for the scope, modification and termination of the stay and suspension of

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27 s 438A

28 s 439C

29 *Lehman Bros Holdings Inc v City of Swan* (2010) 240 CLR 509 at 521 [31] per French CJ, Gummow, Hayne and Kiefel JJ

30 see, eg, *Joint Stock Companies Arrangement Act 1870* (UK), s 2. Examples of similar provisions made in colonial legislation include *Companies Act 1899* (NSW), s 160; *Companies Act Amendment Act 1889* (Qld), s 35; *Companies Act 1893* (WA), s 174

proceedings concerning the assets, rights obligations and liabilities of a debtor in a Ch 11 type proceeding under Art 20(1).

33. Importantly, the *Model Law* deals with the recognition of a foreign proceeding as defined in Art 2(a). It is a necessary element in that definition of "foreign proceeding" that there is a proceeding in which the assets and affairs of the debtor are subject to control or supervision by a foreign court. The definition of "foreign proceeding" in Art 2(a) comprehends both judicial and administrative proceedings having the characteristic that the assets and affairs of the debtor are subject to control or supervision by the foreign court for the purpose of re-organisation or liquidation.

34. An Australian court, in a sense, can control or supervise an administration under Pt 5.3A by disallowing a deed after it has been made, granting leave under ss 440B or 440D, for example, by determining that a procedural step in initiating the administration should be varied (such as extending the time for a meeting of creditors under s 439A(7)) or be found invalid. However, that judicial control or supervision appears to be directed principally towards the conduct of the administrator or the creditors, under Pt 5.3A, rather than the assets and affairs of the debtor.

35. Importantly, Arts 21(2) and 22 allow a court to modify a stay imposed by force of Art 20(1). Ordinarily, Art 21(2) contemplates that upon recognition of a foreign proceeding, the Court may entrust the debtor's local assets to the foreign representative or another person appointed by the Court "*provided that the Court is satisfied that the interests of creditors in this State are adequately protected*". And Art 22 allows the Court to modify a stay on the basis of the criterion that "*the interests of the creditors and other interested persons, including the debtor, are adequately protected*". The Court has wide powers to mould the nature of any stay where such a modification is warranted[31]. As Allsop CJ said in *Akers*[32]:

> "Whilst the Model Law reflects universalism, there is nothing in the Model Law or the UNCITRAL Working Papers prior to its formulation, or in the CBI Act, which would justify the stripping of rights of a local creditor by reason of recognition. The universalism that underpins the Model Law and CBI Act is one for the benefit of all creditors, and the protection of local creditors is expressly recognised. It is not inappropriate to call it "modified universalism" for what such an appellation is worth."

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31 *Akers* 223 FCR at 30-31 [89], [91]

32 223 FCR at 36-37 [120]

36. The Chief Justice recognised that any modification of the stay imposed by Art 20(1) required an evaluation and balancing of the protection afforded to relevant creditors[33]. He distinguished the decision of the United States Bankruptcy Court in *Re Atlas Shipping A/S*[34] when dealing with a statutory stay that prevented a secured creditor enforcing its rights under s 1521(b) of the *United States Bankruptcy Code* similar to that under s 441D of the *Corporations Act*.

37. In *Akers*[35], the creditor was the Commissioner of Taxation who could not prove a tax debt in the foreign main winding up proceeding. The Full Court upheld the modified stay that I had imposed, that had allowed the Commissioner to recoup from the debtor's local assets, under his statutory powers, a sum not greater than he would have been able to prove for were the liquidation here.

38. The UNCITRAL *Guide to Enactment and Interpretation of the Model Law*[36] supports this approach to the construction of the scope of the stay provided in Art 20(1)(a). That *Guide* gave[37] as examples of exceptions and limitations to the scope of the stay and suspension, "exceptions for secured claims, payments made by the debtor in the ordinary course of business, set off, execution of rights *in rem*". The *Guide* also stated at [38], that the exceptions and limitations to the scope, and the possibility of modifying or terminating, the stay and suspension "are determined by provisions governing comparable stays and suspensions in insolvency proceedings under the laws of the enacting State (article 20, paragraph 2)"[38].

39. Initially, in 2009, Jacobson J had held, albeit on an *ex parte* hearing in *Hur v Samsun Logix Corporation*[39], that proceedings under the *Korean Debtor Rehabilitation Act*, are more akin to, or to the effect of, proceedings under Ch 11 of the United States' Bankruptcy Code rather than those under Pt 5.3A of the *Corporations Act*.

40. As I have sought to explain above the issues in cross-border insolvencies of shipping companies are not as straightforward as in other cases. A maritime creditor with an existing secured claim, such as a maritime lien, over a ship that sails into the jurisdiction

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33 223 FCR at 38 [126]-[128]
34 (2009) 404 BR 726
35 223 FCR 8
36 *Guide to Enactment and Interpretation of the Model* at the UNCITRAL *Model Law on Cross-Border Insolvency*
37 at [33]
38 see also at [148]
39 [2009] FCA 372 at [3]

of the forum is in a similar position to a creditor with security over real property in the forum. Ordinarily, the interests of a secured creditor are different to those of unsecured creditors of an insolvent. Indeed, the very purpose of the security is to create such a difference in the assets from which secured and unsecured claims will be met in the event of an insolvency.

41. It would be very unusual for secured creditors in the forum to be deprived of the benefit of their security by reason of the insolvency laws of another jurisdiction that could not confer of their own force any right on anyone in the forum. It is difficult to think that the rights and interests of a secured creditor in the forum would be "adequately protected" if its security could be brought into hotchpot with other assets to meet claims of unsecured and general creditors in the jurisdiction of the foreign main proceeding under the *Model Law*. Indeed, in an ordinary winding up, s 471C of the *Corporations Act*, simply excludes the automatic application of stays and other incidents of insolvency from affecting a secured creditor's ability to exercise its rights in full.

42. For that reason Buchanan J held in *Yu v STX Pan Ocean Co Ltd*[40], another case involving the *Korean Debtor Rehabilitation Act*, that it would not be appropriate to make a stay order that would entirely prevent a person from applying to arrest a ship here when he made an order recognising a foreign main proceeding under the *Model Law*. I followed that decision in yet another Korean case, *Kim v Daebo International Shipping Co Ltd*[41].

43. In both cases, the Court ordered that any application to arrest a ship be brought before a judge in the Federal Court's Admiralty and Maritime National Practice Area who could assess whether it was appropriate to issue an arrest warrant or whether the plaintiff ought simply prove in the foreign main proceeding. If a warrant resulted in the arrest of a ship, the foreign representative would be able to argue for the discharge of the warrant in a contested application in which all relevant considerations would be before the Court, including the exact nature of any stay that ought apply under the *Model Law* and the asserted secured right of the plaintiff.

44. With these complexities in mind, the Comité Maritime International established an international working group on cross-border insolvency in 2010 to consider the

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40 (2013) 223 FCR 189 at 202-203 [40]-[42]
41 [2015] FCA 684 at [3]-[15]

interaction between the *Model Law* and, particularly, the exercise of *in rem*, arrest[42], jurisdiction by Admiralty courts in both civil and common law countries. This, as much in this field, is a work in progress.

Conclusion

45. Cross-border insolvencies often involve conflicts between the laws of the forum or situs of an asset of the debtor and those of the debtor's centre of main interests. Such conflicts are inevitable because different countries have differing perceptions of what is a fair and just way of allocating the risks of the recovery and loss in insolvency contexts. The *Model Law* operates within an international legal framework that includes the well-developed law of nations, the *lex maritima*, or law maritime. The ripples from the pond into which Lehman Bros collapsed are still making waves in the law's progress.

42 or attachment