Developments in International Recognition of Insolvency Administrations and Cross Border Insolvency

Paul Nicols

Partner

Allens Arthur Robinson

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1. What is Cross Border Insolvency?

A cross border insolvency arises when an insolvent entity has assets or debts in more than one State. The term also encompasses the following scenarios:

- winding up foreign companies
- recovery of foreign assets
- examination of foreign residents
- access to documents and information which is overseas
- foreign creditors and priority conflicts
- claims against local assets by a foreign insolvency administrator
- concurrent insolvency administrations.

2. Universal Versus Territorial Approach

Over many years an international debate has occurred whether an insolvency has universal application or whether its application is limited to the place of adjudication. Those competing theories are known as the *universal* and *territorial* theories of insolvency law. Out of that debate, the theory of *modified universality* has emerged.

The *universal* approach would dictate that one insolvency administration is to be universally recognised by all other jurisdictions in which the insolvent entity has dealings. Accordingly, one insolvency administrator, universally recognised, collects in all of the assets and has total administrative responsibility for the insolvency. Foreign creditors submit to the insolvency laws of that one insolvency administration and accept the result of that submission.

A modification to that universal approach applies where there are concurrent insolvency proceedings. The proceedings in the place of incorporation are normally acknowledged as the *principal* or *primary* proceedings and the other proceedings are treated as secondary or *ancillary* proceedings. The insolvency administrator in charge of the primary proceedings will be responsible for realising all of the assets of the company worldwide and the insolvency administrator of the ancillary proceedings will be obliged to concentrate on getting in and realising local assets and remitting the fund to the insolvency administrator of the primary proceedings.

On the other hand, the *territorial* approach involves each country employing its own insolvency laws to grab local assets and administer them locally according to the procedures and priorities of that country's laws. Under the strict territorial approach, there is no recognition of foreign proceedings and a separate insolvency administration is required in each country in which the insolvent entity operates.

The major disadvantages of a territorial approach include the following:

- Reorganisation of an enterprise is difficult or impossible because each unco-ordinated local proceeding focuses on maximising returns for local creditors rather than the total pool of creditors.
- Even in a liquidation, realisations of greater value can be achieved if national borders are ignored. For example, a division of a company may have manufacturing and distribution facilities in several countries with each division being saleable for a higher price as a unit than would be received for each bundle of assets in each State. Nevertheless, existing laws make it very difficult to sell assets in multinational packages.
- Although virtually all national insolvency laws endorse the principle of equality of distribution to creditors, territorialism produces highly unequal results. Aside from differing priority rules in each country, the distributions vary greatly depending on the assets seizable in each country at the moment of bankruptcy. Local creditors benefit where they are lucky enough to have more assets in their country at that moment and suffer where their jurisdiction is less fortunate. A very few sophisticated international creditors may collect in several proceedings and do very well, but most smaller creditors cannot play that game. The results are arbitrary and inconsistent with the principles of virtually every country's laws. Above all, they are unpredictable, creating substantially increased transaction costs in international financing.
- Shrewd debtors can exploit modern technology and the globalisation of commerce to move assets rapidly from one jurisdiction to another and to transfer assets to insiders or preferred creditors in other countries. Because recognition of foreign insolvency proceedings and co-operation with those proceedings is so cumbersome in most countries, it is very hard for administrators or liquidators to pursue and capture the assets.
- Although overt discrimination against foreign creditors is relatively rare, they often receive little or no real notice of insolvency proceedings and too often suffer de facto discrimination in those proceedings.

Australia's statutory provisions and common law principles, position it toward the *internationalist* or *universal* end of the spectrum.

3. Foreign Companies Carrying on Business in Australia

Section 601CD(1) of the Corporations Act 2001 (Cth) prohibits a *foreign company* from *carrying on business* in Australia unless it is registered under Part 5B.2 Division 2 of the Corporations Act.

A *foreign company* is defined as a body corporate incorporated outside Australia.

The phrase *carrying on business* is defined in ss18 to 21 of the Corporations Act. Section 21(1) provides that a body corporate that has a place of business in Australia carries on business in Australia. The establishment or use of a share registration office in Australia or

a dealing with property situated in Australia as an agent, legal personal representative or trustee, whether by employees or agents or otherwise will also constitute the carrying on of business in Australia pursuant to s21(2).

A number of exceptions are contained in s21(3). A body corporate does not carry on business in Australia merely because it:

(a) is a party to proceedings or settles proceedings or a claim or dispute;

(b) holds meetings of its directors or shareholders;

(c) maintains a bank account;

(d) effects a sale through an independent contractor;

(e) elicits or procures an order that becomes a binding contract only if the order is accepted outside Australia;

(f) creates evidence of a debt or creates a charge on property;

(g) secures or collects any of its debts or enforces securities relating to such debts;

(h) conducts an isolated transaction that is completed within 31 days, not being one of a number of similar transactions repeated from time to time;

(i) invests any of its funds or holds any property.

A foreign company may apply for registration under s601CE of the Corporations Act. If it does so, the foreign company must appoint a natural person or a company resident in Australia as a local agent. A local agent of a registered foreign company is answerable for the doing of all acts that the foreign company is required to do under the Corporations Act and is personally liable for a penalty imposed on the foreign company for a contravention of the Corporations Act. Under s601CK(1) a registered foreign company is required, at least every calendar year, to lodge a copy of its latest balance sheet, cash flow statement and profit and loss statement.

In view of those obligations, an alternative for a foreign company seeking to carry on business in Australia is to incorporate an Australian company as a wholly owned subsidiary of the foreign company.

Where a foreign company carries on business in Australia but is not registered under Part 5B.2 Division 2, it commits a breach of s601CD(1) but that fact does not mean that Australian Courts do not have jurisdiction in respect of that company for insolvency purposes.

4. Winding Up Foreign Companies

4.1 Part 5.4 does not apply

Part 5.4 of the Corporations Act contains the Court's power to order that an insolvent *company* be wound up in insolvency.

Section 9 defines a *company* as a company registered under the Corporations Act. There is no longer any reference in the definition of company to a company incorporated under the Corporations Act. Notwithstanding that, the reference in the definition of company to a

Part 5.7 body being a company for the purposes of Part 5.7B (which deals with recovering property or compensation for the benefit of creditors of an insolvent company) together with the fact that the independent part (Part 5.7) that deals with winding up bodies other than companies is retained, strongly suggests that the legislature did not intend that foreign companies registered under Part 5B.2 Division 2 would fall within the definition of *company* and therefore be subject to winding up under Part 5.4 of the Corporations Act. Accordingly, the better view is that Part 5.4 does not apply to foreign companies.

4.2 Winding up a registered foreign company subject to a foreign insolvency administration

Section 601CL(14) provides that where a *registered foreign company* commences to be *wound up, or is dissolved or deregistered, in its place of origin*, the local agent of the foreign company must lodge notice of that fact and, when a liquidator is appointed, notice of the appointment with ASIC. The section also provides that the Australian Court must, on application by the liquidator for the foreign company's place of origin, or by ASIC, appoint an Australian liquidator of the foreign company.

The duties of the Australian liquidator of a registered foreign company who is appointed by the Australian Court are circumscribed by s601CL(15). The Australian liquidator must, before any distribution of the foreign company's property is made, advertise widely in each State where the foreign company carried on business at any time during the six years before the liquidation and invite all creditors to make their claims against the foreign company within a reasonable time before the distribution. The Australian liquidator must not, without obtaining an order of the Court, pay out a creditor of the foreign company to the exclusion of another creditor of the foreign company and must, unless the Court otherwise orders, recover and realise the property of the foreign company in Australia and shall pay the net amount so recovered and realised to the liquidator of the foreign company for its place of origin.

The limitations of these provisions from the point of view of Australian creditors are obvious.

First, the provisions only apply to a *registered foreign company*.

Secondly, the provisions only apply to a foreign company which commenced to be wound up or is dissolved or deregistered in its place of origin. They do not apply upon the commencement of any other form of insolvency administration.

Thirdly, there is nothing in s601CL or anywhere else in the Corporations Act which provides that the general winding up provisions of the Corporations Act contained in Chapter 5 apply to the liquidation of a registered foreign company pursuant to s601CL(14). This contrasts with the position in relation to the winding up of Part 5.7 bodies and the specific provisions contained in ss582 and 583 of the Corporations Act which apply Chapter 5 to the winding up of a Part 5.7 body.

Fourthly, a creditor of the registered foreign company cannot itself initiate the appointment of an Australian liquidator. Only the foreign liquidator or ASIC can apply to the Court for the appointment of an Australian liquidator of the foreign company.

Fifthly, there is uncertainty as to whether the Australian liquidator can make payments to Australian creditors before paying the *net amount* to the foreign liquidator. Section 601CL(15)(c) seems to require the Australian liquidator to remit all amounts realised less the costs of realisation. However, ss601CL(15)(a) and (b) seem to contemplate the Australian liquidator paying Australian creditors of the foreign company.

Section 601CL(14) appears to be the adoption by the legislature of a provision consistent with the universal approach to cross border insolvency. Under that section, the Court does not have the power to wind up the registered foreign company but only the power to appoint an Australian liquidator of the foreign company. The role of the Australian liquidator of the foreign company appears to be directed towards identifying Australian creditors and assisting the foreign liquidator in the orderly winding up of the foreign company.

In view of the limitations and uncertainty referred to above, Australian creditors are likely to favour the Part 5.7 approach referred to below.

4.3 Winding up a foreign company under Part 5.7

Part 5.7 of the Corporations Act contains the general sections which establish the regime for winding up foreign companies. The application of Part 5.7 is limited to *Part 5.7 bodies*.

A *Part 5.7 body* is defined in s9 of the Corporations Act to mean a foreign company that:

(a) is registered under Part 5B.2 Division 2 (referred to in Section 3 above); or

(b) carries on business in Australia.

Establishing whether a foreign company is registered or not is simple. Determining whether it is carrying on business in Australia may involve complex issues when it comes to applying the definitions contained in s21 of the Corporations Act (as referred to in Section 3 above).

As referred to above, there is an overlap between the application of Part 5.7 and s601CL of the Corporations Act. Section 582(1) provides that Part 5.7 has effect in addition to, and not in derogation of, s601CL and any provisions contained in the Corporations Act or any other law with respect to the winding up of bodies.

Importantly, s582(1) also provides that the liquidator or Court may exercise any powers or do any act in the case of Part 5.7 bodies that might be exercised or done by him, her or it in the winding up of companies.

A foreign company which meets the definition of a Part 5.7 body may be wound up under Part 5.7 notwithstanding that it is being wound up or has been dissolved, deregistered or has otherwise ceased to exist as a body corporate under the laws of the place under which it was incorporated (s582(3)).

The possibility of a foreign company being wound up in *both* Australia and its place of incorporation which is inherent in s582(3) of the Corporations Act, highlights the need for a framework for co-operation between Australian and foreign Courts and their respective liquidators in external administration matters.

Under s583 of the Corporations Act, a Part 5.7 body may be wound up under Chapter 5 and Chapter 5 applies accordingly to a Part 5.7 body with such adaptations as are necessary. The circumstances in which a Part 5.7 body may be wound up are as follows:

(a) if the Part 5.7 body is unable to pay its debts, has been dissolved or deregistered, has ceased to carry on business in Australia;

(b) if the Court is of the opinion that it is just and equitable that the Part 5.7 body should be wound up;

(c) if ASIC is of the opinion that the Part 5.7 body cannot pay its debts and should be wound up or that it is in the interests of the public, shareholders or creditors that the Part 5.7 body should be wound up.

Section 585 goes on to describe the circumstances in which a Part 5.7 body shall be deemed to be unable to pay its debts for the purposes of s583. In particular, s585(a) deals with a situation analogous to the failure to meet a statutory demand provisions contained in Part 5.4 of the Corporations Act.

4.4 Part 5.4 vs Part 5.7

The Peninsular Group Limited v Kintsu Co Limited (1998) 27 ACSR 679 Santow J (NSWSC) and (1998) 44 NSWLR 534 Meagher, Sheller JJA and Sheppard AJA (NSWCA)

The difficulty for a creditor who is owed a debt by a Part 5.7 body is this: should it issue a demand for the payment of that debt pursuant to s585 or pursuant to the statutory demand procedures contained in Part 5.4?

This issue arises because of the way in which the legislature chose to deal with the interrelationship between the new Part 5.4 and the essentially unchanged Part 5.7. The Court at first instance in *The Peninsular Group Limited v Kintsu Co Limited* (***Kintsu***) described the drafting as *"indubitably lazy and imprecise"*.

In Kintsu, the facts were as follows.

(a) The defendant, The Peninsular Group Limited, was a Part 5.7 body as it was incorporated in the West Indies and registered as a foreign company pursuant to the Corporations Law.

(b) The plaintiff issued a creditor's statutory demand pursuant to s459E of the Corporations Law and commenced proceedings seeking an order that the defendant be wound up in insolvency under the Corporations Law relying upon the failure of the defendant to comply with that statutory demand.

The defendant argued that the statutory demand served on it did not comply with s585(a) of the Corporations Law and therefore was not valid and effective to ground a winding up order against it. It argued that s585(a) mandated the form of demand and that the provisions of s583 that sought to apply Chapter 5 (together with the statutory demand procedures outlined in Part 5.4) only applied to a Part 5.7 body those parts of Chapter 5 that were *necessary*. As s585(a) provided for a form of demand, the provisions of Part 5.4 dealing with statutory demands were not *necessary*.

At first instance, Santow J was of the opinion that the defendant's interpretation would offend "the substantial conformity that has existed for nearly sixty years between the provisions relating to the winding up of foreign companies for deemed inability to pay debts and the like winding up of local companies." He noted that there was nothing in the explanatory memorandum or in the first or second reading speeches or in any contemporaneous law reform report upon the introduction of the new Part 5.4 which evinced any intention to differentiate foreign companies. He stated that "there is no obvious logic or policy why the statutory demand regime should work radically different for the winding up of a foreign company". In concluding that the plaintiff could rely on the statutory demand it had issued, Santow J made the following comments:

> The complete junction of the new Part 5.4 to the essentially unchanged Part 5.7 is neither smooth nor seamless, relying as it does on supplementation pursuant to s582 and the directive to make necessary adaptations. I am satisfied that this is the result, despite drafting which was indubitably lazy and imprecise.
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> Such a result accords with almost sixty years of legislative history – one which equates foreign and local liquidations in all essential aspects. It is entirely consistent with the broad nondiscriminatory approach to local and foreign companies now evinced by the new Chapter 5. That in turn underpins the co-operation required for cross border insolvencies, which Part 5.7 expressly encourages.
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> There is no logic to differentiate between a demand against a locally incorporated company and a foreign company in such a manner. One has only to envisage a demand in relation to the same debt guaranteed by a group of companies, both local and foreign, to appreciate the inconvenience and improbable consequences from such an interpretation.

The Court of Appeal had a very different view. It held that the provisions of Part 5.4 of the Corporations Law dealing with statutory demands do not apply to the winding up of a foreign company on the grounds of insolvency. In coming to its conclusion, the Court of Appeal had regard to the following matters:

- Part 5.7 bodies are defined to include a variety of incorporated and unincorporated bodies in addition to foreign companies. A wide range of undertakings is involved in that expression yet the same provisions apply to all notwithstanding that there may be substantial differences in their character and the nature of their activities. Although there may be some uncertainty as to which parts of Chapter 5 apply to a Part 5.7 body, when it comes to the circumstances in which a Part 5.7 body may be wound up, the provisions of s583(c) and s585 provide a comprehensive procedure. They provide, if not a code, then an exhaustive list of the grounds upon which a Part 5.7 body may be wound up. They include grounds not based on insolvency. There is thus a clear intention not to import into Part 5.7, for instance, the provisions of s461 dealing with the winding up of companies on grounds other than insolvency.
- The comprehensive form of s585, means that it is not "necessary" to adapt the application of other provisions of Chapter 5 so as to include within it the relevant provisions of Part 5.4.
- While the Court of Appeal accepted the force of the point made by Santow J about the undesirability of different treatment as between local and foreign companies, it

was not persuaded that the clear words of s583 and s585 should be displaced by a consideration of that kind.

Interestingly, the Court noted that although the plaintiff's statutory demand could not have been an effective statutory demand within the meaning of s459E of the Corporations Law, it may nevertheless have been an effective demand under s585(a).

In summary, two propositions emerge from the Court of Appeal decision in *Kintsu*. First, a creditor may be able to obtain an order for the winding up of a foreign company under s583 if its un-met statutory demand, although framed in terms of s459E, satisfies the requirements of s585(a). Secondly, a creditor who issues a s585(a) demand, without more, will then be able to seek a winding up order under s583 (although the scope of the defences to any such application is uncertain).

In general terms, the Part 5.7 regime is, in contrast to the s601CL approach, an approach at the territorial end of the universal versus territorial spectrum.

4.5 Voluntary Administration of a foreign company under Part 5.7?

Part 5.7 is limited in its application to the *winding up* of foreign companies. There does not appear to be any sound legal or policy reason why foreign companies should not be subject to the voluntary administration procedure contained in Part 5.3A of the Corporations Act particularly in circumstances where the foreign company is already involved in that procedure.

5. Co-operation Between Australian and Foreign Courts in External Administration Matters

Division 9 of Part 5.6 of the Corporations Act is as far as Australian law has gone down the *universal* path (although, as discussed below, the proposed enactment of the UNCITRAL Model Law on Cross-Border Insolvency would commit Australia to a universal approach). Similar provisions exist in other countries, notably s426 of the UK Insolvency Act 1986 and s304 of the United States Bankruptcy Code, however, Australia's provisions are probably the most internationalist.

Section 581(2) of the Corporations Act provides as follows:

> In all external administration matters, the Court:
> (a) must act in aid of, and be auxiliary to, the courts of
> (i) external Territories; and
> (ii) States that are not in this juris diction; and
> (iii) prescribed countries;
> that have jurisdiction in external administration matters, and
> (b) may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters.

Section 581(3) of the Corporations Act provides as follows:

> Where a letter of request from a court… of a country other than Australia, requesting aid in an external administration matter is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

Section 581(4) of the Corporations Act provides as follows:

> The Court may request a court of… a country other than Australia, that has jurisdiction in external administration matters to act in aid of, and be auxiliary to, it in an external administration matter.

The phrase ***external administration matter*** means a matter relating to the winding up under Chapter 5 of a company or a Part 5.7 body, the winding up outside Australia of a body corporate or a Part 5.7 body or the insolvency of a body corporate or of a Part 5.7 body.

The ***prescribed countries*** are:

(a) The Bailiwick of Jersey;

(b) Canada;

(c) The Independent State of Papua New Guinea;

(d) Malaysia;

(e) New Zealand;

(f) The Republic of Singapore;

(g) Switzerland;

(h) The United Kingdom;

(i) The United States of America.

(Regulation 5.6.74 of the Corporations Regulations).

The authority given and the obligations imposed on the Court referred to above depend on whether there is an *external administration matter*. Whether there is a *winding up* outside Australia of a Part 5.7 body or the *insolvency* of a Part 5.7 body will depend on how those terms are construed by an Australian Court which, in turn, may involve the analysis and construction of foreign insolvency laws and procedures. The position would have been clearer had the legislature inserted a definition which sought to encompass foreign procedures which corresponded in general terms with the Australian procedures notwithstanding the foreign label applied to those procedures.

The distinction between subsections (a) and (b) of s581(2) should be noted. The Court *shall* act in aid of the Courts of prescribed countries however it *may* act in aid of the Courts of other countries.

The interrelationship (if any) between s581(2) and s581(3) is unclear. Section 581(2) obliges or authorises, as the case may be, the Court to act in aid of various Courts. Section 581(3) deals with the specific situation where a *letter of request* is received from a Court requesting aid in an external administration matter and that letter of request is filed in the Court. In that situation, the Court is given a discretion to exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction. Apart from the general obligation of the Court to act in aid of a Court of a prescribed country, it appears as though an Australian Court has an unfettered discretion as to how it should exercise the powers it has pursuant to s581(3).

It is also not clear whether a Court of a foreign country or a representative or officer of that Court (such as a foreign liquidator of a foreign company) can seek the aid of an Australian Court directly pursuant to s581(2) without complying with the provisions of s581(3) and obtaining a formal letter of request from the relevant Court and arranging for that letter of request to be filed in the Australian Court.

Section 581(4) contains a provision that authorises an Australian Court to request a Court of a country other than Australia that has jurisdiction in external administration matters to act in aid of and be auxiliary to the Australian Court in an external administration matter. Presumably, that will most commonly be done by way of a formal letter of request issued by the Australian Court.

5.1 Obtaining a Letter of Request from an Australian Court

Re AFG Insurances Limited [2002] NSWSC 844 Barrett J 11 September 2002

In this recent case, the administrators of AFG Insurances Limited (***AFG***) made an application under s581(4) seeking the issue of a letter of request directed to the High Court of Justice in England to act in aid of the Australian Court in its external administration of AFG.

An earlier application by AFG (*Re AFG Insurances Limited* [2002] NSWSC 735) had been denied on 2 grounds:

(a) the Court was not satisfied that there was a situation of 'insolvency' as required by paragraph (c) of the definition of 'external administration matter' at s580; and

(b) the orders that the English court would have been asked by the letter of request to make were not orders in the making of which that court would 'act in aid of, and be auxiliary to' the Australian Court in relation to an 'external administration matter' as required by s581(4).

In granting the second application, the Court noted that the issue of insolvency was resolved by the presentation of more comprehensive evidence of the financial position of AFG. It further noted that the letter of request had been amended to an acceptable form. In considering the meaning of the phrase 'act in aid of, and be auxiliary to' in the context of s581(4), Barrett J stated:

> The relevant concept of acting in aid of and being auxiliary to this court is not, I think, confined to recognising or giving effect to an order of this court, although the concept certainly has that aspect. An additional aspect, I am persuaded, involves the making by the foreign court, within and for the purposes of its jurisdiction, of orders that this court could have made in relation to the relevant subject matter had this court's jurisdiction, in the territorially limited sense, extended that far.

Re Dallhold Estates (UK) Ltd (Prov Liq Apptd) [1991] 6ACSR 378 Gummow J 27 November 1991

Dallhold Estates was a wholly owned subsidiary of Dallhold Investments. Dallhold Investments was in liquidation and the liquidator served a demand upon Dallhold Estates. Dallhold Estates' main asset was a leasehold interest in a large estate in England. The landlord and its controller claimed they were creditors of Dallhold Estates and were taking steps to terminate the lease the terms of which included a provision that on a final winding

up order being made, the landlord would be entitled to terminate the lease. Under the relevant UK law, the lessee could not obtain relief against forfeiture.

The liquidators of Dallhold Investments sought the assistance of the Australian Court in making a request to the UK Court pursuant to s426 of the Insolvency Act 1986 that an administration order be made over Dallhold Estates to prevent Dallhold Estates being wound up and any security over its property being enforced without the consent of the administrator or the leave of the Court. In deciding that it was appropriate to issue a letter of request, Gummow J stated that:

> It is desirable that the best possible realisation of the assets of Dallhold Estates be achieved for the benefit of all its unsecured creditors. I will make a declaration that it is desirable to request the assistance of the English Courts. That assistance may be provided by the making of an administration order, if the English Court having charge of the matter thinks it fit so to order, or by the making of such further order or other order as it may consider appropriate.

5.2 Assistance from UK Courts

Shortly after judgment was delivered, a letter of request was issued to the High Court of Justice in England. Initially, the UK court authorised the English provisional liquidator of Dallhold Estates and Dallhold Investments to present a petition for an administration order in respect of Dallhold Estates.

In granting the petition order made shortly thereafter, the UK Court applied the relevant provisions of s426 of the Insolvency Act 1986 which are as follows:

> (4) The Courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the Courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> (5) For the purposes of subsection (4) a request made to a Court in any part of the United Kingdom by a Court in any other part of the United Kingdom or in a relevant country or territory is authority for the Court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either Court in relation to comparable matters falling within its jurisdiction.
>
> In exercising its discretion under this subsection, a Court shall have regard in particular to the rules of private international law.

The Court reviewed the matter in this way. The matter specified in the letter of request was an application for an administration order. The relevant provisions in relation to the grant of an administration order were contained in s8 of the Insolvency Act 1986. Having satisfied itself that the conditions contained in that section for the grant of an administration order were present, the Court concluded that as s426 of the Insolvency Act 1986 obliged the requested Court to assist the foreign Court, the requested Court ought to make an administration order in that case *unless there is some compelling reason why that should not be done*. In other words, the UK Court held that the usual discretion as to whether it ought to make an administration order did not apply to the same extent where jurisdiction was conferred on the Court by s426. A similar approach has been adopted in Australia which is dealt with below.

The UK court highlighted the significance of the matters specified in the letter of request from the Australian Court. It is the matters specified in that request which confer jurisdiction upon the UK court and the court was of the view that it was not open for it to engage in a far ranging inquiry which goes beyond the matters specified in the request. Accordingly, it is very important that the party seeking the issue of a letter of request by an Australian court drafts its request very carefully to ensure that the UK Court will be satisfied of its jurisdiction to provide the requested assistance.

Another example of a request made pursuant to s426 of the Insolvency Act 1986 was the request by the provisional liquidator of New Cap Reinsurance Corporation (Bermuda) Limited to the High Court of Justice in England for assistance to the Supreme Court of Bermuda by appointing joint provisional liquidators of that company and conferring powers and functions on the joint provisional liquidator as may be necessary or desirable with a view to ensuring that the company's affairs and business are fully investigated, the company's assets situated within the jurisdiction of the High Court of Justice in England are located, protected, secured and got in and the company's books and records situated within the jurisdiction of the High Court of Justice in England are located, protected and secured.

5.3 Assistance from United States Courts

Section 304 of the US Bankruptcy Code provides as follows:

> 304. Cases ancillary to foreign proceedings.
>
> 1.1 A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
>
> 2.1 Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the Court may –
>
> (1) enjoin the commencement or continuation of –
>
> (A) any action against -
>
> (i) a debtor with respect to property involved in such foreign proceeding; or
>
> (ii) such property; or
>
> (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
>
> (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
>
> (3) order other appropriate relief.
>
> (c) In determining whether to grant relief under subsection (b) of this section, the Court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with -
>
> (1) just treatment of all holders of claims against or interests in such estate;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

Section 304(a) does not depend on a request from a foreign Court.

An example of an application to the United States Bankruptcy Court for orders under s304 of the Bankruptcy Code is the petition by the provisional liquidator of New Cap Reinsurance Corporation (Bermuda) Limited. In that case, the United States Bankruptcy Court was satisfied based on the evidence put before it that the provisional liquidator had demonstrated a substantial likelihood of success or had a raised serious questions on the merits of his contentions that the company was subject to a pending foreign proceeding, that he was the foreign representative of the company and that the relief requested was consistent with the factors set forth in s304(c) of the Bankruptcy Code. Accordingly, the Court temporarily restrained the commencement or continuation of any proceeding against the company or any property in the United States that is involved in the foreign proceeding pursuant to s304 of the Bankruptcy Code *to permit the expeditious and economical administration of the company's foreign estate in the proceeding brought under foreign law.*

5.4 Use in Australia of a Letter of Request issued by a Foreign Court Re New Cap Reinsurance Corporation Holdings Limited [1999] NSWSC 536 Young J 3 June 1999

The provisional liquidator of New Cap Reinsurance Corporation (Bermuda) Limited (***Bermuda***) and its holding company, New Cap Reinsurance Corporation Holdings Limited (***Holdings***) obtained letters of request from the Supreme Court of Bermuda requesting that the Supreme Court of New South Wales assist the proceedings in relation to Bermuda and Holdings by appointing joint provisional liquidators to Bermuda and Holdings in Australia.

Holdings was registered in Australia as a foreign corporation. Bermuda was not so registered.

Young J noted the provisions of s581 of the Corporations Law and determined that that section did not require him to act in aid of the courts of Bermuda as Bermuda was not a *prescribed country* for the purposes of that section. However, as Holdings was registered under Part 5B.2 is was clearly a Part 5.7 body and that was sufficient to give the New South Wales Court jurisdiction to appoint the joint provisional liquidator to Holdings. On the other hand, Bermuda would only be a Part 5.7 body if it carried on business in Australia and Young J considered that there was a prima facie case that Bermuda was a Part 5.7 body.

Accordingly, he found that both Holdings and Bermuda were Part 5.7 bodies and may be wound up under s583 of the Corporations Law. Additionally, so far as Holdings was concerned, Young J also found that s601CL(14) of the Corporations Law authorised the New South Wales Supreme Court to wind up Holdings in New South Wales.

It is worth noting the comments made by Young J in the course of his judgment which bear on the likelihood of the court adopting a universal as opposed to a territorial approach to cross border insolvency. Young J said:

> In recent years, the problem of corporations in trouble which have assets around the world has become an increasing problem. Winding up law is still basically a fairly local affair but when there are troubles with the company or group of companies which have assets throughout the world, then special action has to be taken to ensure as much as possible that the worldwide public is protected. To this end the courts throughout the world and particularly courts in Australia must obey the philosophy of s581 of the Corporations Law and facilitate as much as possible the control of assets throughout the world. Of course, proper considerations must be given at each step to the right of the corporators, the directors and others, but it is often necessary to act quickly to protect assets and if any error is to be made, to err on the side of protection rather than permitting assets to be in jeopardy.

Young J referred with approval to the approach taken in multinational liquidations by the UK court in *Re Dallhold Estates* referred to above. He said:

> As far as I am aware, there are no Australian cases on this point, but in my view Australian courts should apply the same principle as is applied in England.

6. UNCITRAL Model Law on Cross Border Insolvency

6.1 Nature of Model Law

A broad framework for dealing with cross border insolvency issues has been established by the United Nations Commission on International Trade Law (***UNCITRAL***) in its model law on cross border insolvency (***the Model Law***), adopted by consensus on 30 May 1997 at the thirtieth session of UNCITRAL. In December of 1997, the General Assembly of the United Nations adopted resolution 52/159, in which it expressed its appreciation to UNCITRAL for completing and adopting the Model Law.

Because the text is a Model Law rather than a treaty, it is meant to be adopted as part of the law of each enacting State. The Guide to Enactment as prepared by the UN Secretariat states that the Model Law is designed to assist the States to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross border insolvency. The Guide says that the Model Law reflects practices in cross border insolvency matters that are characteristic of modern, efficient insolvency systems. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. The solutions it offers include:

- providing access for the person administering a foreign insolvency proceeding *("foreign representative")* to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary *"breathing space"*, and allowing the courts in the enacting State to determine what co-ordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;
- determining when a foreign insolvency proceeding should be accorded *"recognition"*, and what the consequences of recognition may be;

- providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;
- permitting courts in the enacting State to co-operate more effectively with foreign courts and foreign representatives involved in an insolvency matter;
- authorising courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;
- providing for court jurisdiction and establishing rules for co-ordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State;
- establishing rules for co-ordination of relief granted in the enacting State in favour of two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

6.2 Scope

The model law applies in a number of cross border insolvency situations. Those situations include, where:

(a) assistance is sought in Australia by a foreign court or a foreign representative in connection with a foreign proceeding;

(b) assistance is sought in a foreign State in connection with a proceeding under Australian law;

(c) a foreign proceeding and a proceeding under Australian law in respect of the same debtor are taking place concurrently;

(d) creditors in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under Australian law (article 1).

6.3 Access

The model law gives a *foreign representative* the right to appear in local courts. A direct application for assistance can be made and proceedings can be commenced under the enacting State's laws. In addition, the foreign representative may participate in a proceeding regarding the debtor in the enacting State providing the foreign proceedings are first *recognised* (articles 9, 11 and 12). The Guide states that an important objective of the Model Law is to provide expedited and direct access for foreign representatives to the courts of the enacting State. The law avoids the need to rely on cumbersome and time consuming letters rogatory or other forms of diplomatic or consular communications, which might otherwise have to be used.

6.4 Recognition of Foreign Proceedings

Articles 15-17 establish the criteria for determining whether a foreign proceeding is to be recognised. The decision includes a determination whether the jurisdictional basis on which the foreign proceeding was commenced was such that it should be recognised as the *"main"* or instead as the *"non-main"* foreign insolvency proceeding. A foreign proceeding is deemed to be the *"main"* proceeding if it has been commenced in the State

where *"the debtor has the centre of its main interests"*. The determination that a foreign proceeding is a *"main"* proceeding may affect the nature of the relief accorded to the foreign representative.

Key elements of the relief accorded on recognition of the representative of a foreign *"main"* proceeding include a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the assets of the debtor and a suspension of the debtor's right to transfer or encumber its assets (article 20). Article 21 authorises the court to grant discretionary relief for the benefit of any foreign proceeding, whether *"main"* or not.

6.5 Treatment of Foreign Creditors

Article 13 of the Model Law gives foreign creditors the same rights regarding the commencement of, and participation in, a proceeding under the laws of the enacting State as creditors in that State. However, article 13 does permit the enacting State to grant or deny equivalent treatment for foreign creditors as to priorities, but provides a general floor of treatment as a general, unsecured creditor.

6.6 Cross Border Co-operation

As the Guide puts it, a widespread limitation on co-operation and co-ordination between judges from different jurisdictions in cases of cross border insolvency is derived from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, for pursuing co-operation with foreign courts.

Articles 25 to 27 of the Model Law oblige and empower local courts to co-operate to the maximum extent possible with foreign courts or foreign representatives and examples of forms of co-operation are contained in article 27.

6.7 Co-ordination of Concurrent Proceedings

Recognising the reality of the politics of international co-operation, article 28 of the Model Law does not significantly limit the jurisdiction of the local courts to commence or continue insolvency proceedings. Under article 28, even after recognition of a foreign *"main"* proceeding, jurisdiction remains with the local courts to institute an insolvency proceeding if the debtor has assets in the enacting State and the effects of that proceeding are to be substantially restricted to the assets of the debtor that are located in that State.

The Model Law deals with co-ordination between a local proceeding and a foreign proceeding concerning the same debtor (article 29) and facilitates co-ordination between two or more foreign proceedings concerning the same debtor (article 30). The guide states that the objective of the provisions is to foster co-ordinated decisions that would best achieve the objectives of both proceedings (eg maximisation of the value of the debtor's assets or the most advantageous restructuring of the enterprise).

When the court is faced with more than one foreign proceeding, article 30 calls for tailoring relief in such a way that will facilitate co-ordination of the foreign proceedings. If one of the foreign proceedings is a *"main"* proceeding, any relief must be consistent with that *"main"* proceeding.

Article 32 of the Model Law is designed to enhance co-ordination of concurrent proceedings by adjusting payments to creditors. It provides that a creditor, by claiming in more than one proceeding, does not receive more than the proportion of payment that is obtained by other creditors of the same class.

7. Adoption of the Model Law

7.1 International moves towards enacting the Model Law

Since its adoption by UNCITRAL in 1997, only a small number of countries have formally enacted the Model Law: Eritrea, Mexico, South Africa, Montenegro, Japan and India. Others, including the United States, the United Kingdom, Canada, New Zealand and Malaysia, have made positive statements supporting incorporation of the Model Law into their respective legal systems but have not yet taken any positive steps towards enacting the necessary legislation. The relatively slow adoption of the Model Law is not so much an indication of a lack of support for its principles as a hesitation on the part of many governments to enact the Model Law before a critical mass of jurisdictions have done so.

In recent years, both the World Bank (in its April 2001 paper *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*) and the International Monetary Fund (in its 1999 report *Orderly & Effective Insolvency Procedures*) have expressed their support for the enactment of the Model Law.

7.2 Australian moves towards enacting the Model Law

The adoption and enactment of the Model Law in Australia has been considered recently as a part of the Government's Corporate Law Economic Reform Program – CLERP 8. In October 2002, the government released a discussion paper on Cross-Border Insolvency in which the advantages and disadvantages of enacting the Model Law are considered.

In the forward to the Government's discussion paper, Senator the Hon Ian Campbell, Parliamentary Secretary to the Treasurer, states that effective cross-border insolvency arrangements 'have the potential to enhance the operation of the global financial system, providing long-term benefits to Australian business.' To that end, the paper set out 14 proposals for the reform of Australia's cross-border insolvency regime and invited comments on the possible enactment of the Model Law by the Commonwealth Parliament.

7.3 Benefits of Enacting the Model Law for Australia

In considering the benefits that would accrue to Australia should the Model Law be enacted, the discussion paper emphasises Australia's leadership role in the international insolvency community and the opportunity for Australia to encourage by example the adoption of the Model Law, particularly in the Asia-Pacific. Australia played a major role in the development of the Model Law. The Government considers that its adoption of the Model Law will have substantial persuasive value in the region. The position taken by New Zealand, which has proposed to enact the Model Law but not until it has been implemented in Australia, is set out as one example of the impact that Australia's enactment of the Model Law would have.

As the Model Law does not require reciprocity, the discussion paper recognises that the major benefits, in terms of equality of treatment for Australian creditors, ease of recovering assets from foreign jurisdictions and more efficient treatment of international insolvencies involving Australian businesses, will only accrue once other jurisdictions have also adopted the Model Law.

The discussion paper notes that Australia is not currently a party to a multilateral convention on cross-border insolvency and that there is no convention which it could appropriately enter into for this purpose. It concludes that, for Australia, 'the UNCITRAL Model Law is the leading initiative on this issue.'

7.4 Proposals by the Australian Government

The main proposals made by the Government in its discussion paper are that:

(a) Australia enact the Model Law by a separate Act of the Commonwealth Parliament, subject to specific proposals regarding the details of its implementation;

(b) the Insolvency and Trustee Service Australia make recommendations to the Government about the application of the Model Law to individual debtors;

(c) entities currently subject to special insolvency regimes in Australia (including financial institutions) be excluded from the scope of the Model Law;

(d) the sections of the Corporations Act dealing with cross-border insolvency be retained with the following provisions:

  (i) subsections 601CL (14)-(16), concerning the cessation of business of a foreign company, will only apply if the circumstances fall outside of the scope of the Model Law or if the Model Law is not invoked;

  (ii) Part 5.7 *Winding Up Bodies other than Companies* be amended as necessary to ensure harmonious operation with the Model Law;

  (iii) Division 9 of Part 5.6 be retained in relation to external administration matters arising under the Corporations Act;

(e) Articles 1 – 14 of the Model Law be adopted essentially as written, together with the optional provision of Article 13(2) concerning the exclusion from the Model Law provisions of revenue claims by a foreign state from insolvency proceedings under Australian law;

(f) Articles 15 – 18 of the Model Law be adopted as written;

(g) Articles 19 – 24 of the Model law be adopted as written with Article 20(2) specifying the exceptions as the right of a secured creditor to enforce a security over property of the debtor or specific relief from the effects of the stay granted by a court and Article 23(1) setting out the voidable transactions provisions in Division 2 of Part 5.7B of the Corporations Act;

(h) Articles 25 – 27 be adopted as written;

(i) Articles 28 – 32 be adopted essentially as written; and

(j) in the enactment of the Model Law, a facility be set out by which the Model Law may be streamlined and tailored as it applies to particular types of proceedings or proceedings involving a specific State.