

# THE INTERACTION BETWEEN ADMIRALTY AND INSOLVENCY LAW

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## Introduction

Insolvency law is tricky enough to navigate in the context of domestic insolvency proceedings brought against companies registered and operating in the forum. Where foreign companies and/or windings-up are involved, they are murky and treacherous and must be navigated with care. However, it is impossible to ignore the interaction between the Admiralty process and insolvency proceedings, however underdeveloped that interaction may be – as to which Thomas put the position aptly:<sup>1</sup>

The law of [insolvency] seems to have developed with little regard to the Admiralty proceeding *in rem*. Certainly it is difficult to fit the Admiralty proceedings into the legislative language of the relevant statutes which regulate [insolvency proceedings]. Yet the need for the latter to accommodate the action *in rem* and the potential conflict between the two processes is plain. A *res* may concurrently be the subject of an arrest in the Admiralty Court and an asset capable of liquidation in [insolvency proceedings]. In such a circumstance it is important for a maritime claimant to be able to ascertain whether it is the jurisdiction of the Admiralty Court or some other court which prevails and which mode of legal process is available for the satisfaction of the claim. ...

This paper considers the interaction between admiralty and insolvency law where both sets of proceedings are brought within the same jurisdiction, examining the situations where *in rem* proceedings are commenced before as well as after the petition for winding up. It then looks briefly at the issues raised by cross-border insolvencies, particularly in the light of the *Cross-Border Insolvency Act 2008* (Cth). Finally, it considers the effect of an owner's insolvency on the constitution of a limitation fund pursuant to the *Limitation of Liability for Maritime Claims Act 1989* (Cth).

## Admiralty & insolvency within same jurisdiction

Where both sets of proceedings are brought in the same jurisdiction, two situations need to be considered:

- (1) where *in rem* claimants have issued proceedings in the Admiralty Court prior to the date of the presentation of a petition for a winding up order
- (2) where *in rem* claimants have issued proceedings in the Admiralty Court between the date of the presentation of a petition for the winding up and the date of the winding up order.

Many provisions of the *Corporations Act 2001*(Cth) are relevant in this connection but the following warrant highlighting:

- (1) Section 440B, which provides that during the administration of a company, a person cannot enforce a charge on property of the company without the consent of the administrator or leave of the court;
- (2) Section 440D, which provides during the administration of a company, no proceeding against the company or its property can be begun or proceeded with except with the consent of the administrator or leave of the court;

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<sup>1</sup> D R Thomas, *Maritime Liens* (1980), [99].

- (3) Section 440F, which provides that, during the administration of a company, no enforcement process in relation to property of the company can be begun or proceeded with except with the leave of the court;
- (4) Section 440G, which governs the obligations of an officer of the court in relation to the property of a company that is under administration;
- (5) Section 441A and 441B, which deal with the circumstance where property of the company is subject to a charge and enforcement of that charge is commenced before the beginning of the administration of the company;
- (6) Section 468, which provides that, in a winding up by the court, any disposition of the company's property made after the commencement of the winding up is, unless the court otherwise orders, void;
- (7) Section 468(4), the effect of which is that any attachment, sequestration, distress or execution put in force within the jurisdiction against the property of a company after the commencement of the winding up, is void where that company is being wound up by the court;
- (8) Section 471B, which, while a company is being wound-up in insolvency, prevents any person commencing or proceeding with a proceeding against the company or its property or the enforcement of process in relation to such property except with the leave of the court;
- (9) Section 471C, which provides that nothing in ss471A or B affects a secured creditor's right to realise or otherwise deal with the security.

It is at the outset important to bear in mind the difference in security terms between a maritime lien and a statutory action *in rem*. In the former case, the lien attaches to the ship as soon as the claim arises; in the latter, the security interest created by the provisions of the *Admiralty Act* 1988 (Cth) does not arise until the claim form is issued.

### *Issue of proceedings prior to petition for winding up*

Where *in rem* proceedings have been commenced before presentation of a petition for winding up, they will initially be stayed once the winding up order is granted, and an application to the court seised with the winding up for permission to proceed will be necessary.<sup>2</sup> That permission should ordinarily be forthcoming, however, because an *in rem* creditor who has issued his writ *in rem* before presentation of the winding up petition has already acquired the status of secured creditor.<sup>3</sup>

The court also has a broad discretion to do “what is right and fair according to the circumstances of each case,”<sup>4</sup> at least in the English context; in Australia the broad equitable jurisdiction of the courts is relevant to all determinations in the context of insolvency law. In *In re Aro*, the English Court of Appeal considered this “alternative approach” and, in that connection, was troubled by the practical implications of concluding, as Oliver J had at first instance, that it was arrest and not issue which rendered the *in rem* claimant a secured creditor.<sup>5</sup> Logically, this reasoning might suggest that the court would have permitted the *in rem* action to continue even if it had agreed with Oliver J. In the result, however it gave essentially the same reason for granting permission on this basis as it had on the first, which was that “[t]he service of the writ adds nothing to the status of the claimant vis-à-vis the vessel sued.”<sup>6</sup> It is not therefore clear from *In re Aro* what, if anything, this “alternative approach” adds in

<sup>2</sup> Pursuant to s 471B of the *Corporations Act* 2001 (Cth).

<sup>3</sup> *The Zafiro* [1960] P 1, [1959] 3 WLR 123, [1959] 2 All ER 537, [1959] 1 Lloyd's Rep 359; *In re Aro Co Ltd* [1980] Ch 196; *In re Lineas Navieras Bolivianas SAM* [1995] BCC 666. *In re Aro* was followed by the Court of Appeal in Singapore in *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 3 SLR 721. In Canada, by contrast, a claimant does not become a secured creditor by enforcing a statutory right *in rem*: *Benson Bros Shipbuilding Co (1960) Ltd v The Ship Miss Donna* [1978] 1 FC 379, 387.

<sup>4</sup> *In re Grosvenor Metal Co Ltd* [1950] Ch 63, 65; *Mitchell and another v Buckingham International plc (in liq) and others, Re Buckingham International lc (in liq) (No 2)* [1998] 2 BCLC 369; *Howden v Cook* (1915) 20 CLR 201.

<sup>5</sup> *In re Aro Co Ltd* [1980] Ch 196, 210A-211A.

<sup>6</sup> *Ibid*, 211B.

the context of *in rem* proceedings, although the case of *Re Lineas Navieras Bolivianas*,<sup>7</sup> considered below, may have taken the reasoning a stage further.

### *Issue of proceedings after petition for winding up*

Although the court's permission would be required in order to commence it (whether as an action against the company or its property),<sup>8</sup> the same result will obtain in an action *in rem* to enforce a maritime lien or a proprietary claim brought after presentation of the winding-up petition or even the making of a winding up order.<sup>9</sup> The Court's permission ought therefore to be readily forthcoming to, for example, the mortgagee or the holder of a maritime lien in order to permit him to realise his security.<sup>10</sup>

The position is less certain in relation to claims which attract only a statutory right of action *in rem*, particularly where the claimant must establish that the beneficial ownership of the ship to be arrested is vested in the "relevant person" at the time when the proceedings are commenced. That is because, in *Ayerst v C & K (Construction) Ltd*,<sup>11</sup> a case concerned with the construction of the *Finance Act* 1954 (UK), the House of Lords held that when a company was ordered to be wound up, the effect was to divest it of the "beneficial ownership" of its assets within the meaning of s 17(6)(a) of the 1954 Act. Lord Diplock, with whom the other members of the Appellate Committee agreed, derived his authority for this proposition from the decision a century earlier in *In re Oriental Inland Steam Co*,<sup>12</sup> observing that:

The authority of this case for the proposition that the property of the company ceases upon the winding up to belong beneficially to the company has now stood unchallenged for a hundred years.<sup>13</sup>

This would seem to be a formidable obstacle to the proposition that proceedings can be commenced *in rem* on a general maritime claim once a winding-up has commenced. However, both the High Court of Australia and the High Court of Hong Kong have recently refused to adopt the reasoning of Lord Diplock in *Ayerst*. Before turning to those authorities, it is necessary first to consider the difficult case of *Re Lineas Navieras Bolivianas SAM*,<sup>14</sup> on the assumption that the rule in *Ayerst* is indeed applicable in the Admiralty context.

The relevant facts in *Re Lineas Navieras Bolivianas SAM* were as follows. Prior to presentation of the winding up petition, the vessel had already been arrested by one creditor, and others had issued writs *in rem* against her. Between the presentation of the winding up petition and the making of the winding up order, (1) five further writs *in rem* were issued by the applicants, none of whose claims was such as to give rise to a maritime lien, and (2) the Admiralty Court made an order for the appraisal and sale of the ship, subject to the leave of the Companies Court, which leave was later granted. The applicants applied for permission to continue with their actions in the Admiralty Court. Arden J, as she then was, drew the distinction between claims brought to enforce maritime liens, and those brought pursuant to the statutory right of action *in rem*.<sup>15</sup>

First there is the claim of a maritime lienor. In his case the lien attaches to the ship as soon as the circumstances occur which gave rise to the lien. In contradistinction a statutory lien granted by s 20 of the Supreme Court Act 1981 does not affect the ship until the writ is issued.

Counsel for the liquidator sought to draw the obvious conclusion from this distinction, ie, that:<sup>16</sup>

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<sup>7</sup> [1995] BCC 666.

<sup>8</sup> Cf *In re Australian Direct Steam Navigation Co* (1875) LR 20 Eq 325; *The Constellation* [1965] 2 Lloyd's Rep 538.

<sup>9</sup> *Danny Morris & Anor v The Ship 'Kiama'* [1998] FCA 256; *In re Rio Grande do Sul Steamship Company* (1877) 5 Ch D 282.

<sup>10</sup> *ibid*; The case of *In re Australian Direct Steam Navigation Co* (1875) LR 20 Eq 325 is not to contrary effect. That case is best understood as one of procedural convenience, as Arden J (on this point, correctly) indicated in *In re Lineas Navieras Bolivianas* [1995] BCC 666, 677H.

<sup>11</sup> *Ayerst v C & K (Construction) Ltd* [1976] AC 167, [1975] 2 All ER 537.

<sup>12</sup> *In re Oriental Inland Steam Co* (1874) 9 Ch App 557.

<sup>13</sup> *Ayerst v C & K (Construction) Ltd* [1976] AC 167, 180, [1975] 2 All ER 537, 546 per Lord Diplock.

<sup>14</sup> [1995] BCC 666.

<sup>15</sup> *Ibid*, 669G.

<sup>16</sup> *Ibid*, 675C-D.

Upon commencement of the winding up the assets passed into the statutory scheme for dealing with the assets for the benefit of all creditors. Therefore there was not the necessary unity of ownership of the vessel between the time the claim arose and the time the claim was asserted by issue of the writ in rem (see *The Monica S* [1968] P 741). If the liquidator as opposed to the Admiralty Marshal sold the vessel, it would be encumbered by the claims of those who issued their writs in rem prior to the commencement of winding up when the vessel was still owned by [the relevant person], but it would not be encumbered by the claims of these applicants.

If *Ayerst* is to be followed, then that reasoning is plainly correct. However, the judge did not adopt it. Instead, having quoted from Lord Diplock's speech in *Ayerst*, Arden J continued:<sup>17</sup>

... a critical feature of this case was [the] ... order for the sale of the ship. Once that happened, the proceeds of sale were held by the Admiralty Court to be applied in accordance with its procedures. ... The effect of the order for sale ... on the assets of the company must have been to convert the company's interest in the ship into a right to receive the balance of the proceeds of sale remaining after satisfaction of the prior claimants. As a result of conversion [*sic*] it would appear that the present applicants do not in fact require leave under s 130(2) because they are not proceeding against either the company or the company's property.

It is suggested that such reasoning (which does not appear to have been advanced in argument) is flawed. The procedures of the Admiralty Court allow – indeed, in effect require – actions *in rem* which could have been brought against a vessel which has meanwhile been sold in accordance with its procedures, to be brought against the fund in court which has been generated by that sale.<sup>18</sup> If the sale (or, worse still, the order for sale) had the effect of transferring the beneficial ownership of the vessel or of the fund generated by its sale away from the owning company (query to whom), then it would be quite impossible for any claim *in rem* to be issued after the date of the sale or order. Whilst it is of course right in one sense that the proceeds of sale are “held by the Admiralty Court”, there is no reason in principle or practice to treat that holding as equivalent to the vesting of a company's property in a liquidator.

That is not to say, however, that Arden J was necessarily wrong on the facts of the case to grant the relief sought by the applicants. The third ground cited by her in support of her conclusion, echoing the “alternative approach” in *In re Aro* was that –

... refusal of leave would amount to preventing the applicants from enforcing security and would enable some only of the claimants on the proceeds of sale to scoop the pool.<sup>19</sup>

Leaving to one side that the applicants had no security to enforce, it may well have been “right and fair according to the circumstances of [the] case” to have granted leave to permit the proceedings to proceed. That is difficult to assess on the facts of *Re Lineas Navieras Bolivianas SAM*, because it was not necessary for Arden J to explain why, on the hypothesis that she was wrong about the existence of the applicants' “security,” it might nevertheless have been right and fair to have done so. But it is certainly possible to conceive of a case in which the grant of permission might well be “just and fair”. An obvious example would be where a claimant *in rem*, immediately following issue of the claim form, presented a winding up petition, with the object of ensuring, in effect, that his claim would be accorded a higher priority than other would-be statutory claimants *in rem*. It is not difficult to imagine a court looking askance at such an attempt to “steal a march” on other *in rem* creditors.<sup>20</sup>

Returning to the question of whether the rule in *Ayerst* is correct or should be followed in Admiralty proceedings, *Commissioner of Taxation v Linter Textiles Australia Ltd (in liquidation) (Linter)*,<sup>21</sup> also concerned a taxation statute, as did *Ayerst*. The relevant question before the Court for present purposes was whether, as a consequence of the winding up of the Linter Group, the shares in Linter Textiles had ceased to be beneficially owned by the Linter Group, thus making it ineligible to claim a sought-after tax deduction pursuant to s 80A of the *Income Tax*

<sup>17</sup> Ibid, 676D.

<sup>18</sup> *Corps v Owners of the Paddle Steamer 'Queen of the South'* [1968] P 449, [1968] 1 Lloyd's Rep 182; *The Leoborg (No 2)* [1963] 2 Lloyd's Rep 441; *The Silia* [1981] 2 Lloyd's Rep 534; *Admiralty Rules* 1988 r31.

<sup>19</sup> [1995] BCC 666, 677A.

<sup>20</sup> In *Re Lineas Navieras Bolivianas SAM*, the petition had been presented by one of the earlier *in rem* claimants, although that claimant had some claims which were purely personal and could not be brought *in rem*: [1995] BCC 666, 667H, 673E.

<sup>21</sup> *Commissioner of Taxation v Linter Textiles Australia Ltd (in liquidation)* [2005] HCA 20, (2005) 220 CLR 592.

*Assessment Act 1936* (Cth). The majority of the High Court<sup>22</sup> held that the winding up of a limited company does not have the effect of divesting the company of beneficial ownership of its assets. In their joint reasons, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ approved the decision of Menzies J in *Franklin's Selfserve v Commissioner of Taxation*<sup>23</sup> and declined to accept Lord Diplock's suggestion that "upon going into liquidation a company ceases to be the 'beneficial owner' of its assets as that expression has been used as a term of legal art since 1874."<sup>24</sup> The majority suggested that the continued acceptance of *Ayesrt* appears to stem from the use of the term "trustee" in circumstances where, at best, it was being used in a metaphorical or analogical sense,<sup>25</sup> noting that that very point had been made a few years after the decision in *In re Oriental Inland Steam Co* by Romer J in *Knowles v Scott*.<sup>26</sup>

In my judgment the liquidator is not a trustee in the strict sense,<sup>27</sup> with such liability affecting his position as has been contended by the Plaintiff. The consequences would be very serious if such a doctrine were to be upheld. If a liquidator were held to be a trustee for each creditor or contributory of the company, his liability would indeed be very onerous, and would render the position of a liquidator one which very few persons would care to occupy.

The High Court held instead that:<sup>28</sup>

The crucial point is that the change in the affairs of the company has no impact upon its beneficial ownership of its assets.  
By analogy with the general law, the circumscribing or suspension by reason of the appointment of the liquidator of the exercise by the usual organs of the company of the incidents of ownership of the assets of the company does not mean that the company itself has ceased to own beneficially its assets within the meaning of s 80A(1). Power to deal with an asset and matters of ownership or title are not interchangeable concepts.

The High Court of Hong Kong was confronted with circumstances which relate directly to the interaction between the admiralty jurisdiction and the insolvency provisions. In *International Transportation Service Inc v The Convenience Container*,<sup>29</sup> the owner of four vessels which had been arrested on the basis of general maritime claims sought to have the arrests set aside on the basis that the 'ownership' nexus required by s 12B of the *High Court Ordinance*<sup>30</sup> was not satisfied. The reason given was that, at the time when the writs *in rem* were issued, the owner had already entered into voluntary winding-up (in Singapore), the effect of which was to render the beneficial owner of the vessels a different person to their owner at the time when the causes of action arose. Rejecting that submission, Waung J held that the key to the reasoning in *Linter* was that there was no trust that a court of equity could recognize and that power or control of assets has no direct bearing on their ownership.<sup>31</sup> This, he observed, was consistent with the reasoning in *I Congresso del Partido*<sup>32</sup> in which Goff J explained that beneficial ownership in the context of the predecessor to s 21(4) of the *Supreme Court Act 1981* was concerned with title and not possession or control or use or benefit.<sup>33</sup> Waung J's view was that -

<sup>22</sup> Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

<sup>23</sup> *Franklin's Selfserve v Commissioner of Taxation* (1970) 125 CLR 52.

<sup>24</sup> *Commissioner of Taxation v Linter Textiles Australia Ltd (in liquidation)* [2005] HCA 20, (2005) 220 CLR 592, [24].

<sup>25</sup> *Ibid*, [32].

<sup>26</sup> *Knowles v Scott* [1891] 1 Ch 717.

<sup>27</sup> That is of course correct. In *Buchler v Talbot* [2004] 2 AC 298, 309A, Lord Hoffmann, having cited *Ayerst*, went on (in a passage noted by Kirby J, who was in the minority in *Linter*, at fn 229) to explain: It is a special kind of trust because neither the creditors nor anyone else have a proprietary interest in the fund. The creditors have only a right to have the assets administered by the liquidator in accordance with the provisions of the [1986 Act] ... .

<sup>28</sup> *Commissioner of Taxation v Linter Textiles Australia Ltd (in liquidation)* [2005] HCA 20, (2005) 220 CLR 592, [54]-[55].

<sup>29</sup> *International Transportation Service Inc v The Convenience Container* [2006] 902 HKCU 1 (Hong Kong Court of First Instance).

<sup>30</sup> s 12B of the *High Court Ordinance* is *in pari materia* with s 21(4) of the *Supreme Court Act 1981*(UK) and s 17 of the *Admiralty Act 1988* (Cth).

<sup>31</sup> *International Transportation Service Inc v The Convenience Container* [2006] 902 HKCU 1 (Hong Kong Court of First Instance) [34].

<sup>32</sup> *I Congresso del Partido* [1978] 1 QB 501, 538.

<sup>33</sup> *International Transportation Service Inc v The Convenience Container* [2006] 902 HKCU 1 (Hong Kong Court of First Instance) [22].

... when the legal principle is properly understood then all the common law jurisdiction [sic] earlier mentioned, whether Hong Kong, Singapore,<sup>34</sup> New Zealand or England should and would hold *Linter* to be the correct principle.<sup>35</sup>

As a consequence of these decisions, there is now a significant difference in approach between the courts of Australia and Hong Kong and it appears likely that, even in the context of admiralty proceedings *in rem*, the approach of the Australian and Hong Kong courts will not prevail in the English Courts over that of Lord Diplock in *Ayerst*, the principle of which has been a mainstay of the English law of insolvency for 125 years. Fundamental distinctions in approach, such as this, are unlikely to be resolved by legislative measures such as the *Cross-Border Insolvency Act 2008* (CBIA).

## Cross-Border Insolvencies

It is not surprising that the European countries have a more mature system for dealing with issues relating to cross-border insolvencies than has Australia. The European Insolvency Regulation accords recognition to liquidations commenced in other EU countries under art 16.1 and they are given effect to automatically under art 17.1. The effect of such proceedings on an admiralty action commenced thereafter will be for the law governing the liquidation to resolve. Where the *in rem* proceedings were commenced first, they will be unaffected, in the first instance at least, by the liquidation.<sup>36</sup>

The enactment of the CBIA, which gives effect to the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law), follows the implementation in the UK of the *Cross-Border Insolvency Regulations 2006*,<sup>37</sup> which deals with the recognition of foreign insolvency proceedings and with the co-ordination and administration of cross-border insolvencies of non-EU companies.

The effect of CBIA is that foreign insolvency proceedings will be recognised by Australian courts without the need for reciprocal treaty arrangements. Broadly, a foreign representative administering foreign insolvency proceedings can apply to an Australian court to commence proceedings or to participate in proceedings where the provisions of the *Bankruptcy Act 1966* (Cth) or the *Corporations Act 2001* (Cth) would otherwise apply in relation to the debtor<sup>38</sup> and can apply to an Australian court for recognition of the foreign proceedings in which the foreign representative has been appointed.<sup>39</sup> Article 1 of the Model provides that Law applies where:

- (a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) Assistance is sought in a foreign State in connection with a proceeding under [the *Bankruptcy Act 1966* or the *Corporations Act 2001*];<sup>40</sup>
- (c) A foreign proceeding and a proceeding under [the *Bankruptcy Act 1966* or the *Corporations Act 2001*] in respect of the same debtor are taking place concurrently; or
- (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in a proceeding under [the *Bankruptcy Act 1966* or the *Corporations Act 2001*].

<sup>34</sup> Three Singapore authorities had been cited. In *Low Gim Har v Low Gim Siah* [1992] 2 SLR 593 Chan J had examined the decisions in *Ayerst*, *Franklin* and *CSD v Livingstone* [1956] AC 694 and observed that, 'it is possible for me to conclude that it is still the general rule that in a winding-up of a company, the company retains the legal ownership (and no differentiation needs to be made with respect to its equitable ownership) of all its assets...'. In *Ng Wei Teck v Overseas-Chinese Banking Corp* [1998] 2 SLR 1 there was no reference to *Ayerst* nor to the central proposition under consideration. In *Kuock v CSD* [2003] 4 SLR 43, *Ayerst* was cited but nothing said as to whether it was correctly decided.

<sup>35</sup> *International Transportation Service Inc v The Convenience Container* [2006] 902 HKCU 1 (Hong Kong Court of First Instance) [35].

<sup>36</sup> *Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966, [2005] 1 Lloyd's Rep 41, [2005] 1 BCLC 305.

<sup>37</sup> The first apparent case to use the powers granted under the Regulations is *Re Samsun Logix Corporation*, 12 March 2009, per Morgan J.

<sup>38</sup> Articles 11 and 12.

<sup>39</sup> Article 15.

<sup>40</sup> CBIA s 8 provides that wherever the Model law provides that the laws of the enacting State relating to insolvency are to be identified that those laws are the *Bankruptcy Act 1966* and Chapter 5 (other than Parts 5.2 and 5.4A) and section 601CL of the *Corporations Act 2001*.

Article 4 provides:

The functions referred to in the present Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by

- [(a) if the functions relate to a proceeding involving a debtor who is an individual – the Federal Court of Australia;
- (b) if the function relate to a proceeding involving a debtor other than an individual:
  - (i) the Federal Court of Australia; and
  - (ii) the Supreme Court of a State or Territory.]<sup>41</sup>

The recognition of foreign insolvency proceedings as ‘main proceedings’ gives rise to an automatic stay which will apply to certain types of creditor actions including: the commencement of proceedings concerning the debtor company’s assets, rights, obligations or liabilities; execution against its assets and/or the transfer or disposal of its assets.<sup>42</sup> The CBIA makes no specific reference to admiralty claims but makes reference to the preservation of rights *in rem* in Article 32 which preserves, to some extent, the position of secured claims or rights *in rem*.

So far as the CBIA is concerned, the logical order of enquiry as to its impact, if any, on *in rem* proceedings on foot in Australia is as follows:

- (1) *Whether there is a foreign proceeding and/or a foreign main proceeding.*  
A foreign proceeding is a judicial or administrative proceeding pursuant to a law relating to insolvency; a foreign main proceeding means a foreign proceeding taking place where the debtor has the centre of its main interests.<sup>43</sup> This would normally be the place of its registered office although the term is no defined.
- (2) *Whether an application has been made to the court for recognition of the foreign proceedings in which the foreign representative has been appointed.*  
A foreign representative means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceedings.<sup>44</sup> Assuming that proceedings *in rem* have been commenced in Australia, one difficulty seems to arise from the definition of the courts, by virtue of s 10 of the CBIA, who are deemed competent to entertain such an application. It would appear that if the shipowner, whose vessel has been arrested in Australia, is an individual, who is the subject of foreign insolvency proceedings, then the Federal Court only is competent to deal with an application brought pursuant to Article 15. This could create some tension if the *in rem* proceedings have been commenced in a Supreme Court of a State.
- (3) *Whether the application has been brought in accordance with Article 15(2).*  
Prior to the CBIA, the relevant question was whether the forum where the *in rem* action is proceeding will recognise the foreign liquidation.<sup>45</sup> In general terms, a foreign liquidation would be recognized if the shipowner was incorporated or traded in the jurisdiction in which the liquidation is being conducted (or if the law of its incorporation would recognise the liquidation), or if it submitted to the jurisdiction of the foreign court.<sup>46</sup> There is little room left for the exercise of any discretion as to whether or not to recognize the foreign proceedings.<sup>47</sup>

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<sup>41</sup> CBIA, s 10.

<sup>42</sup> Article 20.

<sup>43</sup> Article 2.

<sup>44</sup> Ibid.

<sup>45</sup> *Felixstowe Dock & Rly Co v United States Line Inc* [1989] QB 360; *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCC 112; *Fournier v The Ship ‘Margaret Z’* [1997] NZLR 629; *Turners & Growers Exporters Ltd v the Ship Cornelis Verolme* [1997] 2 NZLR 110.

<sup>46</sup> Smart, *Cross-Border Insolvency*, (2<sup>nd</sup> edition, 1998), p 182. See, too, Dicey & Morris, *The Conflict of Laws*, § 30R-091f.

<sup>47</sup> Article 17.

(4) *The consequences of recognition.*<sup>48</sup>

Article 20 provides that upon recognition of a foreign proceeding that is a main foreign proceeding:

- (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- (b) Execution of the debtor's assets is stayed;
- (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

Neither the Model law nor the CBIA define the term 'execution.' It has been held in *Danny Morris & Anor v The Ship "Kiama"*<sup>49</sup> that the arrest and subsequent sale of a ship pursuant to the judicial order of an admiralty court does not amount to a process of execution. The English authority on this precise issue is unsettled. It was held in *In re Australian Direct Steam Navigation Company*<sup>50</sup> and *The Constellation*<sup>51</sup> that a sale following an arrest is the equivalent of execution within the meaning of the Insolvency Act. The contrary view was reached in *The Zafiro*<sup>52</sup> and it was the latter view that found favour with Carr J in *The Kiama* on the basis that '...as a matter of law, the arrest of the ship did not occur as part of a process of execution. It came about at the behest of the plaintiffs in accordance with the Admiralty Rules.'

Where, however, no security has been obtained over a ship at the time when a foreign winding-up order is made, the result is likely to be that the maritime claimant will be unable to bring *in rem* proceedings, and – unless the foreign court grants permission to sue *in rem* – will be limited to proving in the foreign liquidation. This is, in part, because a court exercising admiralty jurisdiction will not be court exercising jurisdiction pursuant to a law relating to insolvency and so admiralty proceedings, of themselves, cannot be 'foreign proceedings' within the definition of Article 2 of the Model Law. It may have been desirable had the Model Law included a provision along the lines of Article 5.1 of the EU Insolvency Regulation, which provides that:

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 ... belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

However, it will be noted that this provision only operates where the relevant asset is elsewhere within the EU when the (winding up) proceedings are commenced, which may very well not be the case in relation to a ship. In any other case, the ranking of claims is a matter for the law of the court in which the liquidation is proceeding.<sup>53</sup> No doubt this will be the case too in relation to admiralty claims which do happen to fall within the ambit of the CBIA. That means of course that there may be very different, and often less desirable, priority determinations for *in rem* claimants.

## The effect of the owner's insolvency on the constitution of a limitation fund

Section 468(1) of the *Corporations Act 2001* (Cth) provides that in a winding up by the court, any disposition of the company's property made after the commencement of the winding up is void unless the court otherwise orders. The word 'disposition' is traditionally accorded wide meaning in order to achieve the purposes of the section and includes any act which, in reducing or extinguishing the company's rights in an asset, transfers value to another person.<sup>54</sup> The constitution of a limitation fund in accordance with the provisions of the *Limitation of Liability for*

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<sup>48</sup> Articles 20-21.

<sup>49</sup> [1998] FCA 256.

<sup>50</sup> (1875) LR 20 Eq 325.

<sup>51</sup> [1966] 1 WLR 272.

<sup>52</sup> [1960] P 1.

<sup>53</sup> art 4.2(i).

<sup>54</sup> R M Good, *Principles of Corporate Insolvency Law* (2<sup>nd</sup> edn, 1997) 424.



*Maritime Claims Act* 1989 (Cth) and the *Admiralty Act* 1988 (Cth), even prior to a determination of liability, constitutes a transfer of value to another person. It is suggested that, by analogy with the decision in *Re Flint*, the fact that a fund may be constituted pursuant to a court order will not save it from validation.<sup>55</sup>

Further, s 468(4) provides, 'Any attachment, sequestration, distress or execution put in force against the property of the company after the commencement of the winding up by the Court is void'. It has been held that the arrest of a ship or other property by the Admiralty Marshal in an admiralty claim *in rem* is a 'sequestration' within the meaning of the equivalent UK provision, s 128(1) of the *Insolvency Act*, and that a sale following an arrest is the equivalent of execution within the meaning of s 183(1) of that Act.<sup>56</sup> Sir George Jessel said that the term 'sequestration' had no particular technical meaning but simply meant the detention of property by a Court of Justice for the purpose of answering a demand which is made.<sup>57</sup> Thus the arrest of a ship after a petition has been presented for the winding up of the shipowning company will be void. As the constitution of the limitation fund is essentially a substitution for the arrest of the vessel<sup>58</sup> it can by analogy be argued that the constitution of the fund is also a 'sequestration' within the meaning of s 468(4) of the *Corporations Act* 2001(Cth) and it is submitted that a court would so hold. Thus where a limitation claim has been commenced either before or subsequently to the commencement of the winding up, application should be made to the Court pursuant to s 471B of the *Corporations Act* 2001 (Cth) for leave to continue the proceedings.

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<sup>55</sup> *Re Flint* [1993] Ch 319.

<sup>56</sup> *In re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325; *The Constellation* [1966] 1 WLR 272; but cf *The Zafiro* [1960] P 1, 15.

<sup>57</sup> *In re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325, 326-327.

<sup>58</sup> *Limitation Convention* 1976, art 13.