RECENT DEVELOPMENTS IN AUSTRALIAN CROSS-BORDER INSOLVENCY LAW

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We discuss in this article some recent cases arising under the UNCITRAL Model Law on Cross-Border Insolvency and the Australian *Corporations Act 2001* (Cth), including *Garuda*, a case that examines the intersection between foreign state immunity and winding up proceedings, *Halifax*, the first ever joint sitting of the Federal Court of Australia and the High Court of New Zealand, *Hydrodec,* the first case worldwide concerning the treatment of the UK's Part A1 moratorium under the Model Law and *Astora*, which illustrates the flexibility of the Model Law as a tool for co-operation, in this case, in relation to the US Chapter 11 of the Endo International Group.

Halifax

1. *Re Kelly (as joint and several liquidators of Halifax Investment Services Pty Ltd (in liq)) and Others* (No 5) (2019) 139 ACSR 56 involved the first joint hearing between Australian and New Zealand courts, and private conferral between the Federal Court of Australia and the High Court of New Zealand before the two Courts delivered separate reasons. The proceedings were described as a "classic candidate" for cross-border cooperation between courts to facilitate a fair and efficient winding of the companies.

2. The case concerned the insolvency of the Halifax Investment Services group, whose Australian and New Zealand entities were placed into liquidation in 2019. Client funds held on trust by each entity had been commingled. The liquidators commenced a proceeding in Australia and in New Zealand, in effect, seeking in each court directions and/or judicial advice in relation to the distribution of funds in the companies' liquidation estates having regard to the interests of different classes of investors.

3. The liquidators approached each Court and requested that the Courts sit together and act in aid of and auxiliary to each other. The final hearing took place via audio-visual link with counsel appearing simultaneously in both Courts.

4. The presiding judges, first Gleeson J and then Markovic J of the Federal Court of Australia and Venning J of the High Court of New Zealand communicated in the absence of the parties both on procedural matters and matters of substance, conferring prior to issuing separate judgments in their respective proceedings.

5. The statutory regimes in Australia and New Zealand that create client money trusts are substantially similar and so, as it transpired, the Courts were able to reach largely consistent decisions that enabled the liquidators to pool the assets of both Halifax Australia and Halifax New Zealand and to distribute them pari passu among entitled creditors.

Hydrodec

6. *In the matter of Hydrodec Group Plc* (2021) 152 ACSR 408 (Williams J) was the first court decision worldwide concerning recognition under the Model Law of the UK's corporate moratorium in Part A1 of the *Insolvency Act 1986* (UK). The case establishes that the UK moratorium procedure qualifies for recognition as an insolvency proceeding under the Model Law. It provides useful guidance on the test for COMI (centre of main interest) under the Model Law in Australia, and it also deals with the winding up of foreign companies in Australia.

7. Hydrodec Group Plc was the UK holding company of oil refining companies in the US, Australia and Japan. At the time of the decision, only the US companies were operational. Southern Oil Refining Pty Ltd **(SOR)** had obtained a $1.6 million judgment debt against Hydrodec in Australia. SOR applied for the winding up of Hydrodec in Australia.

8. Hydrodec sought orders under the Model Law recognising the UK moratorium proceeding as a 'foreign main proceeding' and a discretionary stay of the winding up application under Article 21 of the Model Law. Alternatively, it sought a stay under s 581 of the *Corporations Act*, under which Australian courts can – and must in the case of certain countries – 'act in aid of and be auxiliary to' the foreign court in external administration matters.

9. The Court accepted that the UK moratorium procedure

was a 'foreign proceeding' eligible for recognition and that the joint monitors appointed to oversee the operation of the moratorium (rather than the company itself) were the 'foreign representatives' that the Court would recognise under the Model Law. However, the application failed on the facts.

10. Hydrodec had applied for recognition of a foreign main proceeding but could not prove that its COMI was in the UK. The presumption as to COMI in Article 16(3) did not operate because, based on previous Australian authority (*Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* (2016) 52 VR 1), where a company has registered offices in two countries the presumption does not operate. As required by Australian legislation, Hydrodec had registered offices in both the UK and in Australia.

11. The Court also declined the application for a stay under s 581 of the Corporations Act. Relying on *Legend International Holdings Inc (in liq) v Indian Farmers Fertiliser Cooperative Limited* (2016) 52 VR 40, the Court held that it would not be proper in all the circumstances to provide aid to the English Court by staying the Australian winding up application in circumstances where Hydrodec had no real plan for restructuring and there were apparent voidable transactions that could be investigated by an Australian liquidator.

12. Accordingly, the Court ordered that Hydrodec be wound up in Australia.

13. A similar fact pattern arose in the Supreme Court about a year later in which an Australian company sought the adjournment of an Australian winding up application to pursue a restructuring in Singapore: *In the matter of Vietnam Industrial Investments Pty Ltd* [2022] NSWSC 1411. The outcome was the same: the adjournment was refused and the company wound up.

Astora Women's Health

14. *Philipsen v Astora Women's Health, LLC* [2022] FCA 1196 is one of only a few cases in which orders for co-operation have been made by an Australian court under Article 25 of the Model Law. Astora, the respondent in multiple transvaginal-mesh class actions in Australia, had become subject to Chapter 11 proceedings in the United States along with the rest of the Endo International Group, which was facing opiod-related mass tort litigation in the US. US law requires that all creditors be notified of the Chapter 11 proceedings and a list of creditors be prepared and made public. Astora had obtained the names and contact details of the Australian class members through documents which were held in Australia subject to the *Harman* undertaking, that is, an undertaking not to use the documents for any purpose other than the relevant Australian class action. The information was also subject to Australian privacy law.

15. The US representatives applied to the Federal Court of Australia simultaneously for interim recognition under the Model Law, for release from the Harman undertaking and for assistance under Article 25 of the Model Law authorising the release of the names and contact details to the US representatives, which release might otherwise have been in breach of Australian privacy law.

16. The Court granted all of the relief sought, finding that Article 25 was an appropriate source of power for the orders sought to sidestep the privacy legislation, and that it was appropriate, and necessary and in the interests of the claimants, for that information to be used for the purposes of notifying the claimants of their interests in the Chapter 11 proceeding, subject to the information being redacted in the publicly available version of the US list of creditors.

Garuda Indonesia

17. *Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd* [2023] NSWCA 134 is the first case worldwide to consider the interface between foreign state immunity and winding up applications. Two Irish aircraft lessors (Greylag) applied to have Garuda Indonesia (Garuda), the national airline of Indonesia, wound up as a foreign company registered in Australia. Garuda responded by bringing an application claiming foreign state immunity under the Foreign States *Immunities Act 1985* (Cth).

18. Greylag relied on an exception in the Immunities Act which provides, under the heading 'Ownership, possession and use of property etc' that:

    > A foreign State is not immune in a proceeding in so far as the proceeding concerns […] bankruptcy, insolvency or the winding up of a body corporate.

19. The Supreme Court of New South Wales found that Garuda was entitled to foreign state immunity despite the exception because the 'body corporate' referred to at the end of the exception is not the same entity as the 'foreign State' referred to at the beginning of the exception. Greylag appealed.

20. The New South Wales Court of Appeal agreed that the exception does not make a foreign State susceptible to a winding up proceeding. Rather, on its proper construction, the exception relates to a bankruptcy, insolvency or winding up *in which a foreign state has or claims an interest in property* forming part of the estate of a bankrupt, insolvent company or body corporate being wound up. In reaching this conclusion, the Court of Appeal relied heavily on the Australian Law Reform Commission Report that led to the introduction of the Immunities Act, as well as the work of the International Law Commission and the various foreign statutes that take a similar approach drawing on the same body of scholarship.

21. Greylag have now applied for special leave to appeal to Australia's highest court.