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NAVIGATING SHIP ARRESTS IN THE CONTEXT OF FOREIGN INSOLVENCY PROCEEDINGS

The recent interim decision of the Federal Court of Australia in Michele Bottigliere Armatore SPA, Michele Bottigliere Armatore S.P.A [2021] FCA 795 highlights the Australian courts' willingness to recognise cross-border insolvencies in the context of foreshadowed arrests of vessels entering Australian waters.

Many companies who trade internationally will have assets and creditors in more than one jurisdiction, giving rise to cross border considerations in the event of insolvency. One example of this is where the vessel of an insolvent company registered in a foreign jurisdiction is the subject of a potential arrest by a creditor on entering Australian waters. In these circumstances, the insolvent company may be able to defend, or seek a stay of, the foreshadowed arrest by applying for recognition of the existing foreign insolvency proceedings in Australia.

Italian Shipowner company, Michele Bottigliere Armatore SpA, Michele Bottigliere Armatore S.P.A ("**Bottigliere**") filed proceedings in the Federal Court of Australia to recognise the debtor-in-possession proceedings known as a *concordato preventivo* under the *Italian Bankruptcy Law* as foreign main proceedings through the *Cross-Border Insolvency Act 2008* (Cth) ("**Act**"). The Act largely incorporates the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law* ("**Model Law**"). Bottigliere did so fearing that one of its secured creditors, Davy Investment Fund Services Limited ("**Davy**"), would seek to arrest one of Bottigliere's vessels, the *MBA GIOVANNI* ("**Giovanni**") which was imminently due in Australia. Bottigliere had a genuine fear that Davy would seek to arrest Giovanni given that it had previously sought to arrest her in the People's Republic of China and had successfully arrested her sister ship, *MBA GUISEPPE*, in Canada.

Prior to commencing the Federal Court proceedings, on 13 April 2021, Bottigliere filed proceedings in the Italian Courts for the *concordato preventivo*. The *concordato preventivo* procedure allows a company experiencing financial difficulties to seek a rearrangement with its creditors and / or to restructure its debt. The Italian Court's decree was approved under Article 161(6) of the *Italian Bankruptcy Law*, such that Bottigliere was to attend to the filing of the pre-petition for a composition of creditors. The Federal Court heard that, under *Italian Bankruptcy Law*, a company has 120 days in which to submit a proposal after negotiating with its creditors in respect of any suggested restructure. The Italian Courts would review the proposal, including hearing argument and submissions as to whether it should be adopted, reinforced, or rejected, before approving the restructure. Bottigliere noted that, although the Italian Courts supervise the management of a company during the moratorium while a *concordato preventivo* is in place, no external person is appointed to administer the debtor-in possession-process under the *concordato preventivo*, but rather the company's directors administer that process themselves.

On 28 April 2021, the Italian Courts made a decree for the *concordato preventivo* to proceed. The decree recited that Article 168 of the *Italian Bankruptcy Law* applied from the date of publication (on 14 April 2021) of the pre-petition in the Companies Register until a ratification decree of an arrangement with creditors becomes irrevocable so that there arises a moratorium over all creditors' claims anterior to the commencement of the *concordato preventivo*. It is understood that Davy was to become the assignee of debt finance provided to Bottigliere by three Italian banks. Further, it was disclosed during the pre-petition process that Davy had also sought to have assigned to it Bottigliere's mortgaged vessels.

Under Article 2(b) of the Model Law, a "foreign main proceeding" is defined as a foreign proceeding taking place in the State where the debtor has the centre of its main interests ("**COMI**"). Companies in financial distress with assets in multiple jurisdictions often seek to establish "foreign main proceedings" with a view to preserving the value of their assets globally. In order to establish that the Italian proceeding was the foreign main proceeding, Bottigliere adduced the following evidence in the Federal Court proceedings:

- the company's bank accounts were in Italy;
- lenders for the purchase of the fleet were all Italian banks;

- the company's registered office was in Naples;
- the company was incorporated under Italian law; and
- all of the company's directors lived and worked in Italy.

Whilst the company owned and chartered ships to Australia on a regular basis, Bottiglieri adduced evidence to establish that it did not have any property nor creditors in Australia.

Having regard to the above, the Court was satisfied on a *prima facie* basis that, in due course, the *concordato preventivo* would likely be recognised as a foreign main proceeding under Article 17 of the Model Law as it fell within the meaning of a foreign proceeding under Article 2(a) of the Model Law; and the foreign representative, that being the company itself, as the debtor-in-possession, is a person or body authorised in the *concordato preventivo* to administer Bottiglieri's reorganisation within the meaning of Article 2(d) of the Model Law. Further, the Court was satisfied *prima facie* that the evidence demonstrated that the *concordato preventivo* taking place in Italy supported the assertion that Italy was the centre of Bottiglieri's main interests within the meaning of Article 2(b): *Ackers v Saad Investments Company Ltd (in official liquidation)* (2010) 190 FCR 285.

Having come to the above conclusion, the Court made interim orders staying the commencement or continuation of any action or legal proceedings against Bottiglieri or any of its assets, rights and obligations until the originating process in the proceeding is determined or until further order of the Court. Further, any application for the issue of a warrant of arrest in Australia of any vessel owned or chartered by Bottiglieri was to be dealt with, amongst other things, in consideration of the stay orders.

This decision reinforces the powerful tool that is the Model Law in recognising foreign main proceedings and, in doing so, staying enforcement proceedings in Australia in order to preserve a debtor's assets. It remains to be seen whether Davy will nonetheless seek to proceed with an arrest against Giovanni, and if it does, whether such an application will be successful in light of the interim stay. The Federal Court of Australia has recognised the complexity of such situations, providing procedural guidance by way of the [Cross-Border Insolvency Practice Note: Cooperation with Foreign Courts or Foreign Representatives \(GPN-XBDR\)](#) and [Admiralty and Maritime Practice Note \(A&M-1\)](#), for a recognition application in respect of vessels.

For more information, please contact the authors of this alert:



RANJANI SUNDAR

Partner, Sydney

T +61 (0)2 9320 4609

E ranjani.sundar@hfw.com



LUCY HEE

Associate, Sydney

T +61 (0)2 9320 4643

E lucy.hee@hfw.com