INSOLVENCY | JULY 2022

MODEL LAW ON CROSS-BORDER INSOLVENCY

Naumets (Trustee), Dorokhov (Bankrupt) v Dorokhov [2022] FCA 748
In the matter of Hydrodec Group Plc [2021] NSWSC 755

The UNCITRAL Law on Cross-Border Insolvency (Model Law) came into force in Australia in 2008. Since the date of the Act coming into force, there has been a steady increase in the number of proceedings brought in the Australian courts for recognition under the Model Law. Naturally, with the increase in proceedings, there is also a notable increase in the guidance as to the criteria by which the courts determine whether 'foreign proceedings' will be recognised. In this briefing, we summarise the key principles arising from two recent decisions delivered in the Federal Court of Australia and Supreme Court of New South Wales respectively, regarding recognition of 'foreign proceedings'.

The aim of the Model Law is to promote: (a) greater cooperation between courts of Australia and foreign States; (b) [g]reater legal certainty for trade and investment; (c) [f]air and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested parties; (d) the protection and maximisation of a debtor's assets; and (e) [f]acilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[1] In short, the Model Law enables recognition of foreign judicial or administrative proceedings under insolvency laws, in Australian courts.

In the recent decision of *Naumets (Trustee), Re Dorokhov (Bankrupt) v Dorokhov,*[2] orders were sought recognising a foreign main proceeding in the Russian Federation pursuant to which Mr Naumets was appointed administrator of the estate of the debtor, Mr Dorokhov (**Application**). The 'foreign proceeding' was a proceeding in the Arbitration Court of Primorsky Krai.

Leave was granted to serve the Application on Mr Dorokhov at his address in Russia in October 2021. The court was satisfied that service was effected, but Mr Dorokhov did not appear in the Australian proceeding.

At the time the Application was made, Mr Dorokhov was the registered proprietor of real property in Queensland. Mr Dorokhov gave an irrevocable authority to his solicitor to account for the net proceeds from the sale of this property to the administrator's solicitor. At the time judgment was delivered in the Application, there was an amount just short of $60,000 in the solicitor's trust account. The administrator sought orders under the Model Law recognising the Russian insolvency proceedings and *entrusting of the distribution of all of the respondent's assets located in this jurisdiction to the applicant or another person designated by the court.*[3] Judgment was made on the papers.

Under the Model Law (reflected in the Act), the court will recognise a foreign proceeding where, amongst other things, the foreign proceeding is a 'foreign main proceeding' (that is, there are not other proceedings in other jurisdictions, which are in fact the main proceedings dealing with the particular insolvent or bankrupt estate) and the foreign proceeding must be taking place *in the State where the debtor has the centre of its main interests.*[4]

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[1] United Nations Commission on International Trade, *UNCITRAL Model Law on Cross-Border Insolvency,* UN GA Res 52/158 (15 December 1997) Preamble para 1.

[22] [2022] FCA 748.

[3] [4].

[4] Article 17(2)(a).

The Application was largely uncontroversial, and orders were made in the form sought by the administrator. Notably, there was no issue taken that the foreign court was an 'Arbitration Court' and no discussion as to whether this might impact proceedings for recognition under the Model Law.

The case is a good example of the procedural analysis undertaken by the court of the elements of which the court must be satisfied before it makes orders for recognition under the Act and Model Law. In particular, his Honour accepted[5] that the phrase "*centre of main interest*":

(a) *should correspond to the place where the debtor conducts the administration of the debtor's interest on a regular basis and is, therefore, ascertainable by third parties*; and

(b) *must be identified by reference to criteria that are both objective and ascertainable by the parties*.

Article 16(3) of the Model Law stipulates that, in the absence of proof to the contrary, the debtor's registered office (in the case of a body corporate) or habitual residence (in the case of an individual), is presumed to be the centre of main interest. The court was satisfied by evidence of Mr Dorokhov's Russian citizenship and residence in Primorsky Krai, Russia, that the *respondent's habitual residence is in Russia so as to engage the presumption under Article 16(3) [of the Model Law]*.[6]

A contrasting decision was handed down by the Supreme Court of New South Wales in June 2021. In *In the matter of Hydrodec Group Plc,*[7] the court heard applications (concurrently) for orders recognising as a foreign proceeding a moratorium under the *Insolvency Act 1986* (UK) (**UK Insolvency Act**) and an application for a stay of winding up proceedings under the *Corporations Act* 2001 (Cth).

Hydraloc was a company incorporated in the United Kingdom and registered in Australia as a foreign company. Judgment had been delivered against Hydraloc and its Australian subsidiary in proceedings commenced in the Supreme Court by Southern Oil Refining Pty Ltd (**Southern Oil**) for a sum of $1,594,433. The Australian subsidiary was placed into a creditors' voluntary winding up in February 2021. A statutory demand was served on Hydrodec in March 2021; Hydrodec did not comply with the demand and instead promptly lodged a notice of cessation of business with the Australian Securities and Investments Commission.

In May 2021, the directors of Hydrodec passed a resolution to obtain a moratorium under the UK Insolvency Act; proceedings were commenced in the English High Court of Justice (**English proceedings**). The moratorium came into effect on 21 May 2021 and was due to expire on 21 July 2021.

The court identified two questions for consideration in relation to the recognition application: first, the question of whether the English proceedings were a 'foreign proceeding' under the Model Law; and, secondly, whether the application for recognition was being made by a 'foreign representative' under the Model Law. The judge was otherwise satisfied that the procedural requirements for recognition were satisfied.

The judge observed that '*[i]t is common ground that a foreign proceeding can only be recognised under the Model Law if it is a "foreign main proceeding" or "foreign non-main proceeding": see Article 17 of the Model Law*'[8] and '*[t]he question of whether the UK proceeding is a foreign main proceeding (assuming it is a foreign proceeding) depends on whether the Company has its "centre of main interests" in the United Kingdom: Article 2(b) of the Model Law*'[9].

Having considered the provisions of the UK Insolvency Act pursuant to which the moratorium came into force and noting that there was no submission before the court that the moratorium was otherwise than in accordance with law, the court concluded that the English proceedings were a 'foreign proceeding'. The court also accepted (the joint monitors having been joined as applicants at the commencement of the hearing) that those monitors were 'foreign representatives' for the purpose of the application.

The court then turned to the question of whether the United Kingdom was the 'centre of main interests' so as to satisfy the requirement that the foreign proceeding was a 'foreign main proceeding'. The court examined in detail the factual matrix concerning the management and operations of Hydrodec, including statements made in its annual reports: its financial reports and announcements made to the UK Stock Exchange. In so doing, the court included an examination of the company's activities in the United Kingdom, Australia and the United States of America.

The applicants submitted, in short, that the United Kingdom was the centre of main interests because it was presumed to be so by virtue of its registered office in that jurisdiction (Article 16(3) of the Model Law). They relied on other evidence of activities in and otherwise connected with the United Kingdom. Southern Oil submitted that the

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[5] In reliance on the earlier decision of *Official Assignee in Bankruptcy of the Property of McCormack v McCormack* [2018] FCA 410.

[6] [16].

[7] [2021] NSWSC 755.

[8] [28].

[9] [29].

presumption arising from the location of the registered office did not apply, primarily because the company had registered offices in both United Kingdom and Sydney. The court observed:

> *In cases such as the present where a company has more than one registered office, there is nothing in the Model Law or the Cross-Border Act that requires only one of those offices to be treated as relevant for the purpose of the presumption in Article 16.3 of the Model Law. In my opinion, it must follow that the presumption does not apply in respect of the location of any of the company's registered offices, and the Court must determine the location of the company's centre of main interests in accordance with all of the relevant evidence concerning the company and its operations.*[10]

On the evidence before it, the court found that Hydrodec's centre of main interest was the United States of America. The judgment sets out the factors taken into account in reaching this conclusion, noting:

> *The expression "centre of main interests" is not defined in the Model Law but has been considered in a number of cases. As Jagot J said in Young, Jr, Re Buccaneer Energy Ltd v Buccaneer Energy Ltd [2014] FCA 711 at [7], the key proposition that emerges from the authorities is that the centre of main interests must be identified by reference to criteria that are objective and ascertainable by third parties. Whilst there has been some divergence of views expressed in the authorities as to whether the centre of main interests is to be determined at the date of commencement of the relevant foreign proceeding or as at the date of the hearing of the application for recognition, the evidence in the present case does not suggest that one approach may result in a different outcome compared to the other approach and it is therefore not necessary to consider which approach is preferred.*[11]

After further examination of the corporate structure, including companies interposed between a US incorporated company and Hydrodec, the court concluded that the English proceedings were not taking place in the centre of main interests of Hydrodec and, therefore *it follows that the UK proceeding cannot be recognised as a foreign main proceeding under Article 17.2 of the Model Law and all of the plaintiffs' claims for relief under the Model Law must be dismissed.*[12] The court went on to consider the application for winding up, dismissing an application before it for a stay of that aspect of the proceeding. Orders were made for the winding up of Hydrodec.

The abovementioned decisions provide further clarity as to the concept of 'centre of main interests'. In particular, notwithstanding the presumption in Article 16(3) of the Model Law, the Australian courts have demonstrated that they are prepared to determine the 'centre of main interests' on a case-by-case basis, by reference to objective criteria and all of the relevant evidence concerning the subject company and its operations. Although the Australian courts have shown that they will give effect to the Model Law and recognise 'foreign proceedings' as appropriate, it remains incumbent on the applicant to establish the requirements for recognition in each case.

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[10] [136]; His Honour noted that this was consistent with the approach taken in *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* [2016] VSC 308.

[11] [139].

[12] [155].

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