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Making Waves: Examinations by Foreign Representatives in Australia under the Model Law on Cross-Border Insolvency

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In *Crumpler*[1], a recent first instance decision of the Federal Court of Australia, liquidators from the British Virgin Islands (BVI) applied for recognition and for the examination of and the production of documents by a former director of the debtor company. It is the latest Australian decision to consider the Model Law and the Court provided some interesting analysis in granting the request for examinations and production.

The debtor company, Global Tradewaves Ltd, was incorporated in the BVI and had its registered office there. With little controversy the Court was satisfied the liquidation in the BVI was a foreign main proceeding, with the applicant liquidators being the debtor's foreign representatives. Having satisfied itself with the question of recognition, the Court then considered the application for production of documents by and the examination of the debtor's former director, Mr Mahmood Riaz, an Australian resident. In addition to making this application under the Model Law, as legislated into Australian law by the *Cross-Border Insolvency Act 2008* (Cth) (CBIA), a letter of request was also issued from the BVI Court seeking assistance from the Australian Court to the same end.

The Australian Court considered the relevant provisions of the Model Law as incorporated by the CBIA, namely, articles 21(1)(d) and (g). The first of these provisions enables the Court, where it considers it appropriate relief, to provide for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities. The second provision empowers the Court, again where it considers it appropriate relief, to grant any additional relief that may be available to, in this case, a liquidator appointed under Chapter 5 of the Australian *Corporations Act 2001* (Cth)(CA).

Importantly, the Court referenced s.6 of the CBIA, which provides that the Model Law has the force of law in Australia. Accordingly, the Court considered article 21(1)(d) of the Model Law was itself a source of authority for the Court to order the examination and production of documents. Similarly, and again as its own jurisprudence, article 21(1)(g) of the Model Law incorporated into a foreign representative's arsenal of powers the examination and document production powers available to Australian liquidators in Division1 of Part 5.9 of the CA. Finally, the letter of request was also a source of power as, in the circumstances, it enlivened the Australian Court's jurisdiction under s.581(3) of the CA to aid the BVI Court, such that the Australian Court was able to exercise such powers with respect to the debtor's winding up as it could have if the winding up had arisen in Australia.

After considering the evidence, including Mr Riaz's Australian residency and numerous emails relating to the affairs of the debtor company which had originated from Mr Riaz after he had resigned his directorship of the debtor and taken up residence in Australia, the Court granted its relief. This included an order pursuant to article 21(1)(g) of the Model Law, that the foreign representatives be conferred with all powers available to liquidators appointed under the CA as if the foreign representatives were themselves liquidators appointed under the CA. Additionally, pursuant to article 21(1)(d) of the Model Law, s.581 of the CA and s.596B of the CA - which empowers the Court to grant discretionary examinations - Mr Riaz was summoned to appear at Court for examination on oath as to the debtor's affairs and produce any documents in his possession related to those affairs.

There are four things that warrant *Crumpler* being considered more than just another elementary Model Law decision. The first is the notion of the Model Law being its own source of authority. This is particularly so having regard to the procedural requirements that normally apply to applications for examinations under the CA. Such applications are generally made to the registrar of the Court, not a judge and further, are made in chambers "on the papers", i.e., without the need for an appearance. They are also made *ex parte* and without notice to the examinee(s) or recipient(s) of the order for production. Further, the affidavit sworn by the insolvency practitioner setting out the basis for the application is kept confidential. This is the case even where an examinee or recipient of an order for production might later seek to set aside, generally by application to a judge, the orders granting the

[1] *Crumpler (as liquidator and joint representative) of Global Tradewaves Ltd (a company registered in the British Virgin Islands) v Global Tradewaves Ltd (in liquidation) [2013] FCA 1127*

examination or production order. Substantively, under s.596A of the CA, an application to examine a director or other officer of the company is mandatory, the Court must grant it if the liquidator demonstrates the proposed examinee is a director. In *Crumpler*, a mandatory examination could not be ordered as Mr Riaz had resigned his directorship of the debtor company.

The above practices would not appear to apply where an order for examination is sought under article 21(1)(d) of the Model Law; certainly the Court in *Crumpler* did not state so. In those circumstances, the ability of an interested or affected person, which would include an intended examinee or recipient of an order for production, to utilise article 22 of the Model Law to modify or terminate the granting of the examination or order takes on some significance. In those circumstances, upon making an application under that article and appearing in the proceeding, the person would have the otherwise unavailable advantage of having access to the foreign representative's affidavit. In this respect, a foreign representative may consider applying under the provisions of ss.596A and 596B of the CA, through the window of article 21(1)(g) of the Model Law, as more strategically advantageous.

Secondly, *Crumpler* demonstrates the inherently plenary nature of the relief the Court can grant under article 21 and for that matter, article 19, of the Model Law. Both provisions empower the Court jurisdiction to "grant any appropriate relief". Of course, the Court must exercise this discretionary power judicially and be satisfied, on cause being shown by the applicant, that the relief sought is appropriate in the circumstances and that creditors and other interested parties have the protection mandated by article 22(1) of the Model Law.

Thirdly, the case demonstrates how the Model Law is one of several tools that increases access for foreign representatives to the protection and other relief that recognition provides. At least this is the case in jurisdictions such as Australia and the United Kingdom where enactment of the Model Law was not accompanied by a foreclosure of other avenues for recognition.

Finally, it is interesting or at least topical to note that the Australian Court acknowledged, at least on material then available to it, that there was no evidence of there being any creditors in Australia or of the debtor having carried on business in Australia and in consequence, it is assumed here that there was also no evidence of the debtor having property in Australia. If this assumption is correct, this approach contrasts with the recent decision by the United States Court of Appeals, *In re Barnet*[2], in which the US Court required evidence that the debtor held property in the United States before recognition could be granted. Without wishing to question the merits of the decision in *Barnet*, if the interpretation given to the statute by the second circuit is correct, then Congress would do well to make appropriate amendments given the seemingly prevailing view that Chapter 15 is the single gateway to recognition in the United States.

2 No. 13-612 (2d Cir. 11 December 2013),