12 December 2019

Law Council
OF AUSTRALIA

Business Law Section

The Chief Justice
Federal Court of Australia

By email: EA.AllsopCJ@fedcourt.gov.au

Dear Chief Justice

Proposed Cross-Border Insolvency Practice Note

The Insolvency & Reconstruction Committee (the **Committee**) of the Business Law Section (**BLS**) of the Law Council of Australia appreciates the opportunity to comment on the proposed Cross-Border Insolvency Practice Note (**Practice Note**).

The Committee recommends certain amendments be made to the Practice Note to take account of the following issues, the reasons for each of which will become apparent from the explanation included in each part of the following submissions.

Co-ordination position - default position

The Practice Note at paragraph 2.5 states, "*Cooperation between the Court and a foreign court or foreign representative under Article 25 will generally occur under a co-ordination agreement that has previously been approved by the Court, and is known to the parties, in the particular proceeding. Ordinarily it will be the parties who will draft the co-ordination agreement*." The Practice Note then goes on to outline various resources to which practitioners can refer in formulating the contents of a co-ordination agreement to be approved by the Court.

It is accepted that a co-ordination agreement will generally be required in Cross-Border insolvency cases so that matters such as those outlined in paragraph 2.5 of the Practice Note are clearly defined and managed. It is submitted that the default position should be that a co-ordination agreement is required, and that if an applicant considers that the circumstances of a case are such that such an agreement is unnecessary, then the applicant's attention should be specifically drawn by the Practice Note to the need to address the Court with clear reasons for not needing a co-ordination agreement. The purpose of a Practice Note includes assisting practitioners to ensure that all matters which the Court requires to be addressed in matters, are in fact addressed.

With that in mind, the Committee recommends the following additional paragraph be included in the Practice Note:

2.10 However, a co-ordination agreement may not necessarily be required in every case to which the *Cross-Border Insolvency Act* applies. In seeking the cooperation of the Court in Cross-Border insolvency matters, the applicant should address whether or not a co-ordination agreement is required in the circumstances of the case. If it is to be submitted that such an agreement is unnecessary, then reasons should be provided for the Court's consideration.

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Cross-Border Insolvency to which Model Law does not apply

There are instances of matters coming before the Court in which assistance is sought by foreign representatives, yet the *Cross-Border Insolvency Act* does not apply. The Practice Note appears to have been drafted on the basis that either the only Cross-Border insolvency matters that come before the Court are those to which the Act applies, or on the basis that the Practice Note is only intended to cover matters to which the Act applies.

Assistance may be sought by applicants in matters to which the *Cross-Border Insolvency Act* does not apply because the circumstances of the case do not attract the jurisdiction of the Court due to the foreign proceeding not being a foreign main proceeding or a foreign non-main proceeding as defined in Article 2 of the Model Law. In such a case, for example, application of section 29 of the *Bankruptcy Act 1966* may not be excluded under section 21 of the *Cross-Border Insolvency Act.*

Attention is drawn to the decision in *Official Assignee in Bankruptcy of the Property of Ma v Ma*[1] in which Moshinsky J stated at paragraph [6]:

> "In the course of the hearing today, I raised with the solicitor for the applicant whether it would be appropriate for the application to be made under the *Cross-Border Insolvency Act 2008* (Cth) in addition to s 29. The applicant submitted, and I accept, that there is some doubt as to whether that Act is available in the present circumstances. On the basis of the material presently before the Court, the New Zealand bankruptcy would not fall within the definition of "foreign main proceeding" in art 2 of the Model Law (which is Sch 1 to the Act) as the centre of Mr Ma's main interests is not in New Zealand. (It appears that the centre of his main interests is Australia.) Further, it is unclear whether the New Zealand bankruptcy would constitute a "foreign non-main proceeding" as defined in art 2 because it is unclear whether Mr Ma has an "establishment" as defined in sub-paragraph (f) of art 2 in New Zealand."

In such matters where assistance of the Court is sought, it is submitted that for consistency of approach, the applicant should still address as to whether or not a co-ordination agreement is necessary, having regard to the matters referred to in paragraph 2.9 of the Practice Note.

With that in mind, the Committee recommends the following additional paragraphs be included in the Practice Note:

2.11 Assistance may be sought by applicants in matters to which the *Cross-Border Insolvency Act* does not apply because the circumstances of the case do not attract the jurisdiction of the Court due to the foreign proceeding not being a foreign main proceeding or a foreign non-main proceeding as defined in Article 2 of the Model Law. In such a case, for example, the application of section 29 of the *Bankruptcy Act 1966* may not be excluded under section 21 of the *Cross-Border Insolvency Act (*or the application of section 581 of the *Corporations Act 2001* may not be excluded under section 22 of the *Cross-Border Insolvency Act).* See, for example, *Official Assignee in Bankruptcy of the Property of Ma v Ma* [2018] FCA 948 per Moshinsky J at paragraph [6].

2.12 In such matters where assistance of the Court is sought, the applicant should still address as to whether or not a co-ordination agreement is necessary, having regard to the matters referred to in paragraph 2.9 of this Practice Note.

[1] [2018] FCA 948

Seeking consequential relief under Article 21

Under the Model Law[2], an application is required for the recognition of a foreign insolvency administration and for the appointment of either the overseas trustee or liquidator directly or a representative to act on its behalf. The *Federal Court (Bankruptcy) Rules 2016* require that an *ex parte* interim application must be made for the purpose of seeking directions as to service and publication of notices[3]. A similar rule exists under the *Federal Court (Corporations) Rules 2000*.[4]

However, a strict reading of the provisions of the Model Law and the Rules suggest that yet a further interim application is required to be filed after the recognition orders are made for the purpose of granting any further relief that may be needed in the administration of the bankrupt estate. Rule 14.08(1) provides, "*If the Court has made an order for recognition of a foreign proceeding, any application by the applicant for relief under paragraph 1 of article 21 of the Model Law must be made by filing an interim application, and any supporting affidavit, in accordance with Form B3*." A similar rule exists under the *Federal Court (Corporations) Rules 2000.* [5]

One could understand the need for making a separate application in relation to the bankruptcy or liquidation where further relief might be required in the nature of, say, applications to set aside voidable transactions or other more contentious means of collecting and realising assets of the estate, especially where the rights of third parties can be affected. Examples of the further relief that is contemplated by the Rules are set out in the inclusive definition in Article 21(1) of the Model Law.

In Cross-Border bankruptcy matters, the mere recognition of the foreign proceeding would be insufficient to assist the foreign representative, as it will often be necessary to obtain further orders vesting assets in the foreign representative so that property which is currently registered in the name of the bankrupt can be dealt with.

In an Australian bankruptcy, the vesting of the property recorded in the name of the bankrupt would automatically occur under section 58 of the *Bankruptcy Act*. All that would then be needed would be to lodge with the relevant titles office a transmission in bankruptcy to transfer the title of the property to the trustee who could then deal with the title. With a foreign bankruptcy, there would need to be further orders sought to vest Australian property according to the law applicable here in Australia.

Where such consequential relief is sought simply to give effect to the recognition of the bankruptcy and allow the foreign representative to carry out usual functions of a trustee in bankruptcy, rather than proposing to bring more contentious proceedings involving third parties, it is submitted that it would be an unnecessary further expense to require the foreign representative to come back to Court on a separate hearing to obtain such consequential orders.

In *Official Assignee in Bankruptcy of the Property of McCormick v McCormick*[6]*,* the applicant gave notice in the originating application that it would seek consequential relief immediately upon the recognition order being made (that is, at the same hearing), that certain Australian real property vest in the name of the applicant pursuant to Article 21 of the Model Law. It was noted that granting the consequential relief on the same occasion as the recognition order is made was considered appropriate by Beach J in *Kapila, in the matter of Edelsten*[7].

[2] Article 15(1) of the Model Law.
[3] Rule 14.03(3).
[4] Rule 15A.3(3).
[5] Rule 15A.8.
[6] [2018] FCA 410
[7] [2014] FCA 1112

Pending a revision of the relevant Rules of Court, it is submitted that the possibility, indeed, the more practicable outcome, of making consequential orders at the same time as the recognition order should be addressed in the Practice Note so that practitioners are alerted to the preferred process. Thus would eliminate taking up the Court's time with further interim applications when the relief sought is merely consequential and does not unduly interfere with the rights of third parties. In due course, an amendment to the Rules of Court could specifically provide for an applicant to seek consequential relief when applying for a recognition order, subject to directions being made for notice being given to affected parties.

In the meantime, if the consequential orders that are required could adversely affect the interests of third parties, then it is appreciated that notice of an application for such orders should be given to those third parties. While one would ordinarily expect that parties be served with an interim application, the Rules contemplate that the Court could make other directions.[8] Such other directions could include serving third parties with the originating application and supporting material so that they are aware that consequential orders will be sought upon the hearing of the matter.

With that in mind, the Committee recommends the following additional paragraph be included in the Practice Note (which could be included either as part 4 and renumber the existing part 4 and paragraphs 4.1 and 4.2, or as a new part 5):

5. SEEKING CONSEQUENTIAL RELIEF UNDER ARTICLE 21

5.1 A strict interpretation of the Model Law and Rules of Court suggest that an interim application is required to be filed after a recognition order is made for the purpose of granting any further relief that may be needed in the administration of the foreign insolvency proceeding. See rule 14.08(1) of the *Federal Court (Bankruptcy) Rules 2016* and rule 15A.8 of the *Federal Court (Corporations) Rules 2000*.

5.2 However, where such consequential relief is sought simply to give effect to the recognition of the foreign proceeding and allow the foreign representative to carry out usual functions of its office, rather than proposing to bring more contentious proceedings involving third parties, it may be appropriate in the circumstances of the case for the consequential relief to be sought in the same hearing as when the recognition order is made so that further time and expense of requiring the foreign representative to come back to Court on a separate hearing to obtain such consequential orders can be avoided. For example, see *Official Assignee in Bankruptcy of the Property of McCormick v McCormick* [2018] FCA 410.

5.3 If the applicant in such a matter intends seeking directions from the Court to proceed to make consequential relief immediately upon the making of a recognition order rather than proceeding by way of a later separate interlocutory application, then the applicant must show the Court on the hearing of the originating application that adequate notice of the proposed consequential relief has been given to all parties that may reasonably be considered to be directly affected by the making of the consequential orders.

We submit the above amendments to the Practice Note will give greater assistance to practitioners, will assist the smooth conduct of Cross-Border insolvency matters and assist to reduce the Court time required in the administration and determination of such matters.

[8] For example, Federal Court (Bankruptcy) Rule 14.08(2): "Unless the Court otherwise orders, an interim application under subrule (1) and any supporting affidavit must be served at least 3 days before the date fixed for hearing of the interim application …"

Please contact the writer, who is the Chair of the BLS and a member of the Insolvency & Reconstruction Committee (greg.rodgers@rbglawyers.com.au or 0404 093 589) if you require further information or clarification.

Yours sincerely,

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Chair, Business Law Section