

FEDERAL COURT OF AUSTRALIA

Yu v STX Pan Ocean Co Ltd (South Korea), in the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea) [2013] FCA 680

Citation: Yu v STX Pan Ocean Co Ltd (South Korea), in the matter of STX Pan Ocean Co Ltd (receivers appointed in South Korea) [2013] FCA 680

Parties: **CHUN IL YU IN HIS CAPACITY AS FOREIGN REPRESENTATIVE OF STX PAN OCEAN CO LTD (SOUTH KOREA) v STX PAN OCEAN CO LTD (RECEIVERS APPOINTED IN SOUTH KOREA)**

File number: NSD 1178 of 2013

Judge: **BUCHANAN J**

Date of judgment: 11 July 2013

Catchwords: **BANKRUPTCY AND INSOLVENCY** – cross-border insolvency – recognition of foreign proceedings – rights of secured creditors – right to commence proceedings with leave

ADMIRALTY – maritime lien – actions *in rem* – whether “additional orders” under the Model Law concerning cross-border insolvency

Legislation: *Admiralty Act 1988* (Cth)
Bankruptcy Act 1966 (Cth)
Corporations Act 2001 (Cth)
Cross-Border Insolvency Act 2008 (Cth)

Cases cited: *Aichhorn & Co KG and Switzerland General Insurance Co Ltd v The Ship MV “Talabot”* (1974) 132 CLR 449
Re Aro Co Ltd [1980] Ch 196; 1 All ER 1067
The “Bold Buccleugh” (1851) 13 ER 884; 7 Moo PC 267
Johnson v Black; The “Two Ellens” (1872) LR 4 PC 161

Date of hearing: 9 July 2013

Date of last submissions: 8 July 2013

Place: Sydney

Division: GENERAL DIVISION

Category:	Catchwords
Number of paragraphs:	48
Counsel for the Plaintiff:	Ms C Amato
Solicitor for the Plaintiff:	Watson Mangioni Lawyers Pty Limited
Solicitor for the Defendant:	No appearance

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1178 of 2013

**IN THE MATTER OF STX PAN OCEAN CO LTD (SOUTH KOREA) (RECEIVERS
APPOINTED IN SOUTH KOREA)**

BETWEEN: **CHUN IL YU IN HIS CAPACITY AS FOREIGN
REPRESENTATIVE OF STX PAN OCEAN CO LTD (SOUTH
KOREA)
Plaintiff**

AND: **STX PAN OCEAN CO LTD (RECEIVERS APPOINTED IN
SOUTH KOREA)
Defendant**

JUDGE: **BUCHANAN J**

DATE OF ORDER: **11 JULY 2013**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The originating process, interlocutory process and affidavit of Chun Il Yu filed 25 June 2013 are taken to have been served on the defendant on 5 July 2013 in accordance with the steps deposed to in the affidavit of Jin Kook Lee filed 9 July 2013.
2. The rehabilitation proceedings in the Seoul Central District Court, Bankruptcy Department, Case 2013hoehab110 hoesaeng, by which the plaintiff was appointed receiver of the defendant on 17 June 2013 (“the Korean Proceeding”), be recognised as a foreign proceeding within the meaning of paragraph (a) of Article 2 of Schedule 1 to the *Cross-Border Insolvency Act 2008* (Cth) (“the Model Law”).
3. Chun Il Yu be recognised as a foreign representative within the meaning of paragraph (d) of Article 2 to the Model Law.
4. The Korean Proceeding be recognised as a foreign proceeding pursuant to Article 17(1) of the Model Law.
5. The Korean Proceeding be recognised as a foreign main proceeding pursuant to Article 17(2) of the Model Law.

6. In accordance with Rule 15A.7(1)(c)-(d) of the *Federal Court (Corporations) Rules 2000* (Cth), the plaintiff is directed to:
 - 6.1 publish a notice of the making of this order in accordance with Form 21 in a daily newspaper circulating generally in Australia; and
 - 6.2 send a notice of the making of this order in accordance with Form 21 to each Australian creditor of the defendant known to the plaintiff by registered post to the registered office of each creditor, or by facsimile, or by email;
 - 6.3 send a notice of the making of this order in accordance with Form 21 to Sea Trader International Ltd by way of facsimile transmission to the firm of solicitors Wellners Lawyers, 1566 Wynnum Road, and Tingalpa QLD 4173.
7. Any application for the issue of a warrant of arrest in Australia of any vessel owned or chartered by the defendant be dealt with by a Judge of this Court and these Reasons for Judgment be drawn to the attention of the Court at the time any such application is made.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION**

NSD 1178 of 2013

**IN THE MATTER OF STX PAN OCEAN CO LTD (SOUTH KOREA) (RECEIVERS
APPOINTED IN SOUTH KOREA)**

BETWEEN: **CHUN IL YU IN HIS CAPACITY AS FOREIGN
REPRESENTATIVE OF STX PAN OCEAN CO LTD (SOUTH
KOREA)
Plaintiff**

AND: **STX PAN OCEAN CO LTD (RECEIVERS APPOINTED IN
SOUTH KOREA)
Defendant**

JUDGE: **BUCHANAN J**

DATE: **11 JULY 2013**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

Introduction

1 The plaintiff has applied for recognition as a “foreign representative” of STX Pan Ocean Co Ltd (South Korea) and for recognition of proceedings commenced in Korea as a “foreign proceeding” under the *Cross-Border Insolvency Act 2008* (Cth) (“the Act”).

2 This judgment deals with that application and with the potential significance of the fact that ships owned or operated by the defendant pass through Australian waters and may be subject to arrest under the *Admiralty Act 1988* (Cth) (“the Admiralty Act”) in accordance with generally accepted maritime conventions. In particular, the judgment deals with whether “additional orders” should, or should not, be granted to supplement statutory consequences arising automatically under the Act if recognition is granted as claimed.

The Cross-Border Insolvency Act

3 The Act commenced operation (so far as its principal provisions were concerned) on 1 July 2008. It provides that the English text of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, set out in the Annex to the

United Nations General Assembly Resolution A/RES/52/158 (1997) (“the Model Law”) has the force of law in Australia, subject to the modifications made by the Act itself. The Model Law is set out in Schedule 1 to the Act. At various places the Model Law provides for the identification of the laws of an enacting state relating to insolvency. For the purpose of the Model Law as it operates in Australia, the statutes relating to insolvency are identified by s 8 of the Act as the *Bankruptcy Act 1966* (Cth) and Chapter 5 (with some exceptions) and s 601CL of the *Corporations Act 2001* (Cth) (“the Corporations Act”).

4 The Federal Court is identified by s 10 of the Act as a court competent to perform functions referred to in the Model Law.

The Model Law

5 The preamble to the Model Law, as in force in Australia through operation of the Act, is as follows:

PREAMBLE

The purpose of the present Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor’s assets;
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

6 The following definitions, relevant for present purposes, are supplied by Article 2 of the Model Law.

Article 2

Definitions

For the purposes of the present Law:

- (a) “Foreign proceeding” means a collective judicial or administrative

proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) “Foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

...

(d) “Foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

...

7 Article 6 provides:

Article 6

Public policy exception

Nothing in the present Law prevents the court from refusing to take an action governed by the present Law if the action would be manifestly contrary to the public policy of this State.

8 Article 8 provides:

Article 8

Interpretation

In the interpretation of the present Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

9 Article 9 provides:

Article 9

A foreign representative is entitled to apply directly to a court in this State.

10 Chapter III of the Model Law is entitled “Recognition of a Foreign Proceeding and Relief”. Chapter III of the Model Law provides as follows (in Articles 15 to 24):

Article 15

Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
2. An application for recognition shall be accompanied by:
 - (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
 - (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.
3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 16

Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.
2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.
3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

Article 17

Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:
 - (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
 - (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
 - (c) The application meets the requirements of paragraph 2 of article 15;
 - (d) The application has been submitted to the court referred to in article 4.
2. The foreign proceeding shall be recognized:

(a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.

3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Article 18

Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

(a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment;

(b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 19

Relief that may be granted upon application for recognition of a foreign proceeding

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the debtor's assets;

(b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21 below.

2. *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]*

3. Unless extended under paragraph 1 (f) of article 21, the relief granted under the present article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under the present article if such relief would interfere with the administration of a foreign main proceeding.

Article 20

Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding:
 - (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
 - (b) Execution against the debtor's assets is stayed;
 - (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of the present article are subject to *[refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of the present article]*.
3. Paragraph 1 (a) of the present article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.
4. Paragraph 1 of the present article does not affect the right to request the commencement of a proceeding under *[identify laws of the enacting State relating to insolvency]* or the right to file claims in such a proceeding.

Article 21

Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
 - (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;
 - (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;
 - (c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;
 - (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
 - (e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) Extending relief granted under paragraph 1 of article 19;

(g) Granting any additional relief that may be available to *[insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State]* under the laws of this State.

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under the present article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 22

Protection of creditors and other interested persons

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of the present article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Article 23

Actions to avoid acts detrimental to creditors

1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate *[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation]*.

2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

Article 24

Intervention by a foreign representative in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

11 Under these provisions, a foreign representative may apply to the Court for recognition of a foreign proceeding (Article 15(1)). Subject to Article 6 (the public policy exception), a foreign proceeding shall be recognised if the conditions in Article 17 are met. In particular, the foreign proceeding will be recognised as a “foreign main proceeding” if it is taking place in the State where the debtor has the centre of its main interests (Article 17(2)(a)). If a proceeding is recognised as a foreign main proceeding (as it must be under Article 17 if the stated conditions are met), then Article 20 has the prima facie effect of staying or suspending actions, proceedings, execution and disposition against, or of, assets of a debtor.

12 Upon recognition of a foreign proceeding, a court may, under Article 21, grant relief which is additional to the operation of Article 20. Article 22 directs courts that, in granting relief under Articles 19 or 21 (i.e. provisional relief or relief additional to the operation of Article 20), a court must be satisfied that the interests of creditors and other interested persons are adequately protected. To that end, Article 22 provides that a court may grant relief under Articles 19 and 21 (i.e. provisional or additional relief) subject to conditions and modify or terminate such relief.

13 It is a notable feature of the Act and the Model Law that no reference has been made to the terms or operation of the Admiralty Act or to rights which arise under admiralty and maritime law in its national and international operation.

The provisional orders

14 The present proceedings were commenced by originating process filed on 25 June 2013. At the same time an interlocutory process was filed seeking immediate relief. The originating process sought recognition of rehabilitation proceedings in the Seoul District Court, Bankruptcy Department (“the Korean proceeding”) as a foreign main proceeding within the meaning of Article 2 of the Model Law. The originating process also sought orders pursuant to Article 21 of the Model Law – i.e. orders additional in their effect to the operation of Article 20 of the Model Law.

15 The interlocutory process sought orders under Articles 19 and 21 of the Model Law. Provisional orders under the Model Law were made by Jagot J on that day, 25 June 2013. Those orders were in the following terms:

1. This application be made returnable *instanter* and *ex parte*.
2. Pursuant to Articles 19 and 21 of Schedule 1 of the *Cross-Border Insolvency Act 2008 (Cth)*, until this proceeding is finally heard and determined or further order or unless with the plaintiff's written consent:
 - a. No person may enforce a charge on the property of the Defendant.
 - b. If:
 - i. property of the defendant is subject to lien or pledge; and
 - ii. property of the defendant is in the lawful possession of the holder of the lien or pledge; then,
 - iii. the holder of the lien or pledge:
 - iv. may continue to possess the property; and
 - v. cannot sell the property or otherwise enforce the lien or pledge.
 - c. The owner or lessor of property that is used or occupied by, or in the possession of, the defendant, cannot take possession of the property or otherwise recover it.
 - d. No proceeding in any court against the defendant, or in relation to any of its property, may be begun or proceeded with.
 - e. No enforcement process in relation to property of the defendant may be begun or proceeded with.
3. The Plaintiff is granted leave to file in Court the Originating Process and Affidavit of Chun Il Yu sworn on 24 June 2013.
4. The Plaintiff is to serve the Originating Process and Affidavit of Chun Il Yu sworn on 24 June 2013 on the Defendant in accordance with r2.7(1) of the *Federal Court (Corporations) Rules 2000 (the Rules)*.
5. The Plaintiff is to serve:
 - a. each of the persons identified at Annexure CIY-8 to the Affidavit of Chun Il Yu; and
 - b. Sea Trader International Limited.with a notice in the form of **Annexure A** to this document by no later than **28 June 2013**.
6. Service of the notice in Order 5(a) above may be effected by sending the notices by registered post to the registered office of each creditor, or by facsimile, or by email;

7. Service of the notice in Order 5(b) above may be effected by sending the notice by facsimile to the firm of solicitors Wellners Lawyers, 1566 Wynnum Road, Tingalpa QLD 4173.
8. The Plaintiff is to cause to be published in The Australian newspaper a notice in the form of **Annexure B** to this document by no later than **28 June 2013**.
9. The proceedings be listed for final hearing on **[to be advised by the Court]**
10. Liberty to apply on 24 hours notice is granted to the parties and any persons with an interest in Order 2 above.
11. Liberty to apply on 2 hours notice is granted to the parties and any other person with an interest in the Supreme Court of Queensland, in Admiralty (Brisbane registry) proceedings 5274 of 2013 (*Sea Trader International Ltd v The Ship MV "New Joy"*) in respect of Order 2 above.
12. These orders are entered forthwith.

16 The proceedings were listed for an expedited final hearing on 9 July 2013.

17 Under Article 19(3), the orders made under Article 19 cease to operate when recognition is granted. Although orders were sought and made under Article 21 as well as Article 19 of the Model Law, it does not seem to me that orders under Article 21 were available prior to recognition of the foreign proceeding. Although Article 19 refers to the possibility that "relief mentioned in" Article 21 may be granted on a provisional basis, the source of power to grant provisional relief of that kind seems to me to lie in Article 19, and not Article 21. Accordingly, the provisional orders will cease to operate altogether when recognition is granted. From that time, apart from the consequences of the operation of Article 20, additional orders under Article 21 are required if consequences additional to those accomplished by Article 20 are intended.

Service

18 Service in accordance with the requirements of order 4 of the provisional orders was effected by personal service upon Ms Young Joo Kim, in-house counsel of the defendant, on 5 July 2013. I am satisfied from the terms of an affidavit of Jin Kook Lee filed 9 July 2013 that service was effected in accordance with order 4 and Korean law. However, a concern developed that it might also be necessary to comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents ("the Hague Convention"). As personal service on the defendant has been effected, I am satisfied that it is appropriate to

dispense with further service under the Hague Convention and an order to that effect will be made.

19 I am satisfied by the terms of an affidavit of Zoe Claire Banton filed on 9 July 2013 that service was effected on all but one creditor, and on Sea Trader International Ltd, in accordance with orders 5, 6 and 7 of the provisional orders. I am satisfied by the terms of an affidavit of Zoe Claire Banton filed on 9 July 2013 that all reasonable steps were taken to serve one further identified creditor and that further steps are not necessary.

20 I am satisfied from the terms of an affidavit of Reaymond McGuinness filed on 9 July 2013 that publication of the provisional orders was effected in accordance with order 8 of those orders.

21 Service and publication of the provisional orders advised the date of the hearing for recognition of the foreign proceedings. No creditor or other person sought to appear at the hearing. The defendant did not appear. The proceedings therefore continued *ex parte* on 9 July 2013.

The issues now arising

22 If the rehabilitation proceedings are recognised as a foreign main proceeding, the provisions of, and consequences from, Article 20 of the Model Law will take effect. In that event, the remaining question for attention is whether additional relief should be granted under Article 21 of the Model Law. The two questions may conveniently be addressed in that order.

Recognition of the foreign proceedings

23 The originating process and the interlocutory process were supported by an affidavit of Chun Il Yu filed on 25 June 2013. I am satisfied on the basis of that affidavit that Chun Il Yu is a “foreign representative” within the meaning of the definition of that term in Article 2 of the Model Law. I am satisfied also that he has identified proceedings in Korea commenced by petition filed on 7 June 2013 with the Seoul Central District Court, Fifth Bankruptcy Division (South Korea) which are a “foreign proceeding” within the meaning of Article 2 and Article 17(1) of the Model Law. I am satisfied on the basis of the affidavit that

the defendant is a company registered in South Korea with its head office in South Korea. Accordingly I am satisfied that the proceedings in South Korea which have been identified are a “foreign main proceeding” within the meaning of Article 2 and Article 17(2) of the Model Law. There does not appear to me to be any circumstance revealed by the information before the Court which would engage the operation of Article 6 of the Model Law.

24 Accordingly, Chun Il Yu was entitled to apply directly to this Court for relief including recognition of the foreign proceeding.

25 The application for recognition meets the requirements of Article 15 of the Model Law because it is accompanied by the documents referred to in Article 15(2)(a) and (b) and by a statement as required by Article 15(3).

26 The findings I have made about those matters are assisted by the presumptions stated in Article 16 of the Model Law.

27 Having regard to the findings which I have made, Article 17 of the Model Law requires that the foreign proceeding be recognised as a foreign main proceeding.

Additional relief sought

28 The next question which requires attention is whether additional relief should be granted under Article 21 of the Model Law.

29 The orders sought in the originating process pursuant to Article 21 of the Model Law are as follows:

5. Pursuant to paragraph (e) of Article 21(1) of the Model Law, the administration and realisation of all of the Defendant’s assets located in Australia be entrusted to the foreign representative.
6. Pursuant to Article 21 of the Model Law, except with the leave of this court or with the foreign representatives’ written consent:
 - a. No person may enforce a charge on the property of the Defendant.
 - b. If:
 - i. property of the Defendant is subject to lien or pledge; and
 - ii. property of the Defendant is in the lawful possession of the holder of the lien or pledge; then

the holder of the lien or pledge:

- iii. may continue to possess the property; and
 - iv. cannot sell the property or otherwise enforce the lien or pledge.
 - c. The owner or lessor of property that is used or occupied by, or in the possession of, the Defendant, cannot take possession of the property or otherwise recover it.
 - d. No proceeding in any court against the Defendant, or in relation to any of its property, may be begun or proceeded with.
 - e. No enforcement process in relation to property of the Defendant may be begun or proceeded with.
7. In accordance with Rule 15A.7(1)(c)-(d) of the *Federal Court (Corporations) Rules 2000*, the Plaintiff is directed to:
- a. Publish a notice of the making of this order in accordance with Form 21 in a daily newspaper circulating generally in Australia; and
 - b. Send a notice of the making of this order in accordance with Form 21 to each Australian creditor of the Defendant known to the Plaintiff by registered post to the registered office of each creditor, or by facsimile, or by email;
 - c. Send a notice of the making of this order in accordance with Form 21 to Sea Trader International Limited by way of facsimile transmission to the firm of solicitors Wellners Lawyers, 1566 Wynnum Road, and Tingalpa QLD 4173.
8. Liberty to any person to apply to the Court in respect of Order 6 on 2 days' notice.

The evidence

30 So far as proceedings and potential interests in Australia are concerned, the affidavit of Chun Il Yu set out the following matters:

Other foreign proceedings involving the Defendant

...

22. I am not aware of any proceedings in Australia which involve the Defendant, in relation to the following:
- (a) proceedings under the *Bankruptcy Act 1966*;
 - (b) the appointment of a receiver (within the meaning of section 416 of

the *Corporations Act 2001*), or a controller or a managing controller (both within the meaning of section 9 of that Act), in relation to the property of STX Pan Ocean Co. Ltd; and

- (c) proceedings under Chapter 5, or section 601CL, of the *Corporations Act 2001* in respect of the Defendant.

Nature of the Defendant's business and presence of assets in Australia

- 23. The Defendant does not have any assets permanently situated in Australia.
- 24. However, vessels owned and operated by the Defendant regularly call into Australian ports to pick up and deliver cargo for shipments to Korea as well as other countries. I address this further at paragraphs 32 to 40 below.

Known creditors of the Defendant in the Australian jurisdiction

- 25. I am aware that the entities appearing in the list of creditors annexed and marked **CIY-8** are creditors of the Defendant with registered offices located in Australia. I am not aware of any other creditors of the Defendant with registered offices located in Australia, other than those listed in **CIY-8**.

Grounds for provisional relief

Ground 1 – arrest of other ships in Australian waters

- 26. The Defendant operates 371 vessels and owns 94 vessels, including 71 dry bulk cargo vessels. The vessels travel around the world delivering cargo.
- 27. As at 24 June 2013, 20 vessels have been arrested worldwide.
- 28. The Defendant's vessels regularly call into Australian ports to deliver or pick up cargo.
- 29. Annexed and marked **CIY-9** is a copy of a docking schedule for vessels owned or operated by the Defendant in Australia ports for the period May 2012-July 2013. The third column of the docking schedule shows the dates on which vessels are scheduled to dock in Australia [sic] ports.
- 30. The schedule indicates [sic] following vessels owned by the Defendant are presently docked in Australian ports or due to dock at the dates indicated below:
 - (a) On 20 June 2013, the ship STX ACE2 was scheduled to dock at Botany Bay port. It is scheduled to depart Botany Bay port on 26 June 2013;
 - (b) On 28 June 2013, the ship STX ACE2 is scheduled to dock at Brisbane port;
 - (c) On 5 July 2013 the ship STX ACE2 it is scheduled to dock at Torres Strait port;
 - (d) On 6 July 2013, the ship STX Amber is scheduled to dock at Gladstone port;

- (e) On 13 July 2013, the ship STX Jasmine is scheduled to dock at Geraldton port;
 - (f) On 7 July 2013, the ship New Emerald is scheduled to dock at Torres Strait port;
 - (g) On 12 July 2013, the ship Seastar Empress is scheduled to dock at Kwinana port. The Seastar Empress is subsequently scheduled to dock at Albany port on 17 July 2013 and Esperance port of [sic] 20 July 2013.
31. There is a risk that creditors of the Defendant located in Australia (listed in **CIY-8**) may take steps to arrest ships owned and operated by the Defendant when they call into Australian ports. I am informed by Mr Jin Joo Kim, manager of the legal department of the Defendant, and believe that vessels owned by the Defendant, that is, (vessels with “STX” included in the name), that are due to enter Australian waters have been drifting in nearby waters for fear being subject to arrest or attachment. Numerous vessels owned by the Defendant which were scheduled to call into Australian ports have been not been able to enter into Australia.
32. The arrest and delay of ships in Australia will cause a chain reaction of delays as the vessels are scheduled to depart Australia to other destinations around the world. The arrest and delay of ships may lead to severe liquidation damage payments and termination of contract of affreightments with the Defendant’s major customers, one of the main sources of the Defendant’s revenues.
33. If the vessels owned by the Defendant are subject to arrest or attachment in Australia there will be little possibility for the Defendant to achieve a successful reorganisation that will see it continue in business. The Defendant’s ships regularly circle the globe and often call into Australian ports to load cargo and deliver such cargo throughout the world. As Australia is a leading producer of natural resources, Australia is one of the countries most frequently visited by its vessels. If the Defendant was unable to call into Australian ports, voyages to other countries would be meaningless since there would be no cargo to deliver. This business is the main source of revenue for the Defendant.
34. Moreover, if the Defendant was required to pay security deposits for the release of arrested vessels it would not have any working capital to operate its business.

Ground 2 – the New Joy Proceeding

35. On 12 June 2008, Sea Trader International Ltd (**Sea Trader**), a creditor of the Defendant with its registered office located in Hong Kong, commenced action against a ship owned by the Defendant, MV “New Joy” in the Supreme Court of Queensland (“**the New Joy Proceedings**”). An arrest warrant was issued by the Court on that day. A copy of the documents relating to the proceedings is annexed and marked **CIY-10**.
36. Shortly thereafter, the warrant executed on the MV “New Joy”. The ship is

presently held in Gladstone, Queensland. Annexed and marked **CIY-11** is a document summarising the details of the arrest, prepared by Ms Jin Joo Kim, manager of the legal department of the Defendant.

37. The following relief is sought in the New Joy Proceedings:
- (a) Sale of the New Joy;
 - (b) Judgment in the amount of USD \$1,389,000 plus interest, or an order for the sale of the ship MV “New Joy”. The judgment sum is said to represent unpaid fees for bunkers supplied to the vessel on 13 May 2013.
38. As to the sale of the ship, I do not presently know whether that sale is imminent. However, if it were, the consequences for the Defendant and the rehabilitation proceedings would be considerable as it would constitute a dissipation of a very valuable asset.
39. As to the payment of the judgment sum sought, the Defendant is presently prohibited from paying Sea Traders claim due to restrictions imposed in the Korean proceedings, unless approval of the Court is sought. I am concerned that if the Defendant is ultimately ordered to pay Sea Trader the amount of US\$1,389,000 plus interest, the rehabilitation proceedings will not be successful.

31 It was upon the basis of the information set out in the affidavit that provisional relief under Article 19 of the Model Law was granted on 25 June 2013.

32 That evidence in the affidavit of Chun Il Yu is, however, subject to an important qualification. Despite paragraph 35 of the affidavit of Chun Il Yu, it appears from submissions made at the hearing that the ship MV “New Joy” is not owned by the defendant. Paragraph 38 of the affidavit may therefore be disregarded for present purposes.

Proposed order 5

33 Article 21(2) requires consideration of the interests of creditors in Australia before an order such as proposed order 5 is made. Article 22(1) contains a similar requirement.

34 The affidavit of Chun Il Yu confirmed that the defendant has no assets permanently situated in Australia, although vessels owned and operated by the defendant call into Australian ports. It is clear from the affidavit that a significant element in the claim for provisional relief was the possibility that the defendant’s vessels might be arrested in Australian ports. The orders made by Jagot J on 25 June 2013 responded to that possibility

on a provisional basis, but those orders terminate when the application for recognition is determined, unless extended under Article 21(f) (see Article 19(3)).

35 Important questions arise from the terms of proposed order 5, which terms appear to me to go beyond the operation of Article 20. An order in those terms is contemplated by Article 21(1)(e), but in the present case the justification for additional relief of this kind must be assessed in light of the fact that the defendant has no permanent assets in Australia to which such an order might apply, and the fact that such assets as may be subject to the order are ships.

36 Article 20 of the Model Law, which is engaged automatically upon recognition of a foreign proceeding as a foreign main proceeding, is subject to the circumstances identified in Article 20(2), (3) and (4). In particular, Article 20(2) preserves the operation of local insolvency laws. For the purpose of the Model Law, the laws relating to insolvency which are identified by the Act (s 8) include Chapter 5 (other than Parts 5.2 and 5.4A) and s 601CL of the Corporations Act. Chapter 5 of the Corporations Act deals with external administration. Part 5.2 (which deals with receivers and other controllers of property of corporations) and Part 5.4A (which deals with winding up by the Court on grounds other than failure to satisfy the statutory demand) are excluded. Section 601CL of the Corporations Act deals with registered foreign companies ceasing to carry on business.

37 Importantly, s 471B of the Corporations Act (in Part 5.4B of Chapter 5) provides :

471B Stay of proceedings and suspension of enforcement process

While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:

- (a) a proceeding in a court against the company or in relation to property of the company; or
- (b) enforcement process in relation to such property;

except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

and s 471C (also in Part 5.4B of Chapter 5) provides:

471C Secured creditor's rights not affected

Nothing in section 471A or 471B affects a secured creditor's right to realise or otherwise deal with the security.

38 Those provisions preserve the rights of secured creditors and recognise a power in the Court to grant leave to commence a proceeding or an enforcement process in appropriate circumstances. Recognition of a foreign main proceeding does not, through the engagement of Article 20, change those matters. However, additional orders under Article 21 may do so, and that appears to be what is sought in the present case.

39 Criticism has been made of the terms of the Model Law by reason of its failure to recognise and take appropriate account of international maritime law and the operation in Australian jurisdictions of the Admiralty Act. I do not propose to take up those matters in the present judgment, but those criticisms draw attention to the fact that, for centuries, international maritime law developed its own security regimes for reasons which remain generally observed around the world, including in Australia.

40 An action *in rem* is sometimes described as an action to obtain a security which will enable a judgment to be satisfied out of the *res* (see e.g. *Aichhorn & Co KG and Switzerland General Insurance Co Ltd v The Ship MV "Talabot"* (1974) 132 CLR 449; *Re Aro Co Ltd* [1980] Ch 196; 1 All ER 1067 ("*Re Aro*") at 1074). In the case of a maritime lien, proceedings *in rem* vindicate an existing security right (*The "Bold Buccleugh"* (1851) 13 ER 884; 7 Moo PC 267; *Johnson v Black*; *The "Two Ellens"* (1872) LR 4 PC 161; *Re Aro* at 1072). In particular, the arrest of individual vessels to enforce the security of a maritime lien (e.g. for damage done by a ship, for seamen's wages, for salvage etc) is an important facility. There are significant questions of public interest connected with the ability to enforce the security of a maritime lien (as well as other claims) by the use of an action *in rem*.

41 I can see no reason at present why an action *in rem* to enforce a maritime lien would not fall within the operation of s 471C of the Corporations Act, as contemplated by Article 20(4) of the Model Law. I can see no basis, either, for extinguishing or modifying at the present time any recourse to s 471B of the Corporations Act. Those potential rights may require assessment according to the circumstances of particular cases but, to take a simple example, there may be a very good reason why a claim for seamen's wages, normally enforceable as a maritime lien, should not be affected by recognition of the foreign main proceedings.

42 I see no reason at present either to curtail or foreclose the exercise of rights which are recognised by the Model Law itself. The terms of Article 20 of the Model Law will take effect automatically, but I see no reason why the arrest of a ship owned or operated by the defendant which is in Australian waters could not be sought in appropriate circumstances, without having to overcome an order such as proposed order 5. Whether an arrest warrant would issue would depend on the circumstances, the reason why the arrest was sought and the interest sought to be vindicated by the action *in rem*. Such an application should be made to a Judge of the Court rather than to a Registrar. Full disclosure should be made to the Court that the foreign proceedings have been recognised under the *Cross-Border Insolvency Act 2008* (Cth) and the terms of this judgment should be drawn to the attention of the Judge at the time any such application is made.

43 I am, at present at least, not prepared to make an order in the terms of proposed order 5.

Proposed orders 6 - 8

44 So far as proposed order 6 is concerned, no specific operation of that order, additional to the effect of Article 20 of the Model Law, has been identified by the evidence or otherwise. I do not see the present need for such an order, particularly in the light of the ongoing obligation imposed on the foreign representative by Article 18 of the Model Law. As there is no present need for an order in the terms of proposed order 6, there is no need to grant liberty to apply in the terms of the proposed order 8.

45 The proposed order 7 seems appropriate and will be made.

Orders to be made

46 An order dispensing with the need for service under the Hague Convention will be made, as earlier indicated.

47 The orders proposed by the plaintiff as 1 to 4 and 7 (appropriately renumbered) will be made.

48 I also propose to order that any application for the issue of a warrant of arrest in Australia of any vessel owned or chartered by the defendant be dealt with by a Judge of this

Court, and that these Reasons for Judgment be drawn to the attention of the Court at the time any such application is made.

I certify that the preceding forty-eight (48) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 11 July 2013