FEDERAL COURT OF AUSTRALIA

Hur v Samsun Logix Corporation
[2015] FCA 1154

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| Citation: | Hur v Samsun Logix Corporation [2015] FCA 1154 |
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| Parties: | **HYUN-CHUL HUR IN HIS CAPACITY AS FOREIGN REPRESENTATIVE OF SAMSUN LOGIX CORPORATION v SAMSUN LOGIX CORPORATION** |
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| File number: | NSD 949 of 2015 |
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| Judge: | **RARES J** |
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| Date of judgment: | 24 September 2015 |
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| Legislation: | *Admiralty Act 1988* (Cth)*Bankruptcy Act 1966* (Cth)*Corporations Act 2001* (Cth)*Cross-Border Insolvency Act 2008* (Cth)*UNCITRAL Guide to Enactment of the Model Law**Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law*  |
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| Cases cited: | *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8 *Hur v Samsun Logix Corporation* [2009] FCA 372*Kim v Daebo International Shipping Co Limited* [2015] FCA 684*Re Capital General Corporation Limited, Rogers v Radly* (2000) 37 ACSR 158*Yu v STX Pan Ocean Co Limited* (2013) 223 FCR 189 |
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| Date of hearing: | 24 September 2015 |
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| Place: | Sydney |
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| Division: | GENERAL DIVISION |
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| Category: | No catchwords |
|  |  |
| Number of paragraphs: | 34 |
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| Solicitor for the Plaintiff: | Mr D Greenberg of Ashurst Australia |
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| Counsel for the Defendant: | The defendant did not appear |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| in admiralty |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 949 of 2015 |

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| BETWEEN: | HYUN-CHUL HUR IN HIS CAPACITY AS FOREIGN REPRESENTATIVE OF SAMSUN LOGIX CORPORATIONPlaintiff |
| AND: | SAMSUN LOGIX CORPORATIONDefendant |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 24 SEPTEMBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. Pursuant to articles 2(a) and 17(1) of Schedule 1 to the *Cross-Border Insolvency Act 2008* (Cth) (**the Model Law**), the foreign proceedings in the Seoul Central District Court in the Republic of Korea (Case 2015 Heohap 100203) relating to the defendant (**the Korean proceeding**), be hereby recognised as a foreign proceeding.
2. Pursuant to articles 2(b) and 17(2) of the Model Law, the Korean proceeding be recognised as a foreign main proceeding.
3. Pursuant to article 2(d) of the Model Law, the plaintiff, Hyun-Chul Hur, be recognised as a foreign representative of the defendant in Australia.
4. The plaintiff cause to be published, on or before 16 October 2015, in:
	1. the *Shipping Daily of Korea*;
	2. *The Australian* newspaper; and
	3. *Lloyd’s List Australia*

a notice of the making of this order in accordance with Form 21 of the *Federal Court (Corporations) Rules 2000* (Cth).

1. On or before 16 October 2015, the plaintiff send a notice of the making of this order, in accordance with Form 21 of the *Federal Court (Corporations) Rules 2000* (Cth) to each Australian creditor of the defendant known to the plaintiff and listed in section E of the originating process filed on 12 August 2015.
2. Any application for the issue of a warrant for the arrest, in Australia, of any vessel owned or chartered by the defendant, brought by a person claiming to hold a security interest, be made to a judge of this Court with the reasons for judgment for the orders made today and those in *Yu v STX Pan Ocean Co Ltd (South Koreea)* (2013) 223 FCR 189 to 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*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 949 of 2015 |

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| BETWEEN: | HYUN-CHUL HUR IN HIS CAPACITY AS FOREIGN REPRESENTATIVE OF SAMSUN LOGIX CORPORATIONPlaintiff |
| AND: | SAMSUN LOGIX CORPORATIONDefendant |

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| JUDGE: | RARES J |
| DATE: | 24 SEPTEMBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

**(REVISED FROM THE TRANSCRIPT)**

1. The plaintiff, Mr Hyun-Chul **Hur**, is the receiver of **Samsun** Logix Corporation, the present defendant, appointed by the Seoul Central District Court, Fourth Bankruptcy Division (**the Korean Court**)on 3 August 2015. On that day, the Korean Court made orders under Art 34(1) of the *Debtor Rehabilitation and Bankruptcy Act* of the Republic of Korea (**the Korean Act**) that rehabilitation proceedings should be commenced with respect to Samsun as debtor and that Mr Hur, a director of Samsun, would be appointed as its receiver.
2. Mr Hur seeks final orders under the ***Model Law*** *on Cross-Border Insolvency of the United Nations Commission on International Trade Law*, being Sch 1 of the *Cross-Border Insolvency Act 2008* (Cth), recognising him as foreign representative of Samsun in Australia under Art 2(d), and the proceeding in the Korean Court (**the Korean proceedings**) as a foreign main proceeding under Art 17(2).

## Background

1. In 2009, orders made by Jacobson J in *Hur v Samsun Logix Corporation* [2009] FCA 372, recognised Mr Hur as foreign representative of Samsun and the status of a previous rehabilitation proceeding under the *Korean Act* as a foreign main proceeding under Art 17(2) of the *Model Law*. As the Korean Court noted in its reasons of 3 August 2015, the earlier proceedings had commenced on 6 February 2009 and that Court had approved Samsun’s rehabilitation plan on 5 February 2010. On 18 May 2011, Samsun was, as the Korean Court stated in its recent reasons, “consummated from the rehabilitation proceeding”.
2. The Korean Court found in its 3 August 2015 reasons, that Samsun could not overcome the recession that had occurred in the shipping market following the commencement of the global financial crisis in 2008, that had led to the first rehabilitation proceedings in 2009. The Korean Court observed that Samsun was only able to pay 50% of what was due under the earlier reorganisation plan in 2013 and could not pay in full what was due in the 2014 year amounting to a total of KRW18.6 billion. The Korean Court found that Samsun was unable to repay its debts as they became due without significantly burdening its business operations and that there was a risk that it may become insolvent. Accordingly, it concluded that it should make an order under Art 34(1) of the *Korean Act* for a second time.
3. I am satisfied by the affidavit of James Marshall, sworn on 10 August 2015, that there are no proceedings relevantly in respect of Samsun under the *Bankruptcy Act 1966* (Cth) or under Ch 5 or s 601CL of the *Corporations Act 2001* (Cth) and it has not had any person appointed as a receiver pursuant to s 416, or as a controller or managing controller in relation to its property in Australia.
4. Mr Hur has made similar applications for recognition under the domestic equivalents of the *Model Law* in the United States of America, the United Kingdom, New Zealand and Singapore. Those applications are ancillary to the Korean proceedings and seek their recognition as foreign main proceedings with ancillary relief.
5. Samsun is not registered to trade in Australia. It was incorporated in Seoul, South Korea on 6 September 1983 and has its head office in Seoul. Samsun conducts a business involving its ownership, management and operation of ships that are engaged in moving bulk and unitised cargoes worldwide and the carriage by sea of raw materials into and out of South Korea. Samsun’s trading activities in Australia are limited, generally, to the loading and shipping of export products, including coal, for delivery to Korean customers and the provision of goods and services in aid of its ships in Australian waters.
6. There are nine known Australian creditors. I am satisfied by the evidence of Justine Fox in her affidavit of 23 September 2015 that each of those creditors has been served with notice of the orders that I made on 12 August 2015 pursuant to Arts 15 and 19(1) of the *Model Law* and related orders. None of those creditors has appeared today. I am satisfied by Ms Fox’s affidavit that advertisements of those orders appeared in *The Australian* newspaper on 20 August 2015 and in *Lloyd’s List Australia* on the same day.
7. Samsun leases, owns or charters six ships that appear regularly to call at Australian ports. Mr Hur is concerned that creditors may seek to commence proceedings under the *Admiralty Act 1988* (Cth) for the arrest of ships that Samsun owns, charters or utilises in the course of its trading activities when they enter Australian waters to obtain payment of their debts outside the processes of the orderly administration contemplated by the *Model Law* and the rehabilitation proceedings in the Korean Court, which is still considering whether to grant a final rehabilitation plan for the reorganisation of Samsun’s finances.
8. A memorandum of advice by Bae, Kim & Lee LLC, a Korean law firm, noted that the Korean Court has power either to approve a rehabilitation plan, or if it becomes apparent either before or after the plan is approved that the debtor cannot be rehabilitated, the Court may, in its discretion, or on the request of the receiver or creditors, order the discontinuance of the rehabilitation proceeding and place the debtor into liquidation. The memorandum noted that creditors with secured rehabilitation claims are subject to the rehabilitation proceeding and, generally, cannot otherwise receive payment or repayment of their respective claims, with certain exceptions, including the set-off of claims that are exercised within particular periods permitted under the *Korean Act*. However, the memorandum gave no exhaustive explanation of the rights, or postponement of rights, of secured creditors, and, in particular, creditors with claims *in rem* against ships that may or may not involve the personal liability of the debtor as owner or operator of the ship.
9. Samsun disclosed, in its application for the commencement of the rehabilitation procedures filed in the Korean Court, that it is currently party to two London arbitrations and a proceeding in the Seoul Central District Court in respect of claims amounting to over USD100 million, or KRW155,844,000,000. It also disclosed that Samsun’s liabilities as at 31 December 2014 exceeded its assets by KRW121.6 billion, and stated:

It is difficult for the Debtor to repay its debts due to such excessive liabilities.

## Consideration

1. I discussed the legislative scheme of the *Model Law* in *Kim v Daebo International Shipping Co Limited* [2015] FCA 684, and some of the issues that arise in respect of the interaction between the *Model Law*, the operation of the *Cross-Border Insolvency Act* and proceedings under the *Admiralty Act* for the enforcement of claims *in rem*, particularly maritime liens which are secured claims.
2. Based on the evidence in Mr Marshall’s affidavit concerning the nine existing Australian creditors, it is likely that none of those creditors has any maritime lien, but only had a claim based on its supply of goods or services that are general maritime claims under s 4(3) of the *Admiralty Act*.
3. Part 3 of the *Admiralty Act* creates rights to proceed in admiralty by actions *in rem* against a ship or other property. In particular, s 15 creates the right to proceed in an action *in rem* against a ship or other property on a maritime lien or other charge in respect of the ship or other property. Similarly, s 16 gives a right to proceed on a proprietary maritime claim, as defined in s 4(2), including a claim relating to possession of, title to, ownership of or a mortgage of a ship or share in a ship, or a mortgage of its freight.
4. I am satisfied by the evidence before the Korean Court that Samsun has its head office in Seoul, and a branch office in Busan in South Korea. It has five officers, being four directors, and an auditor, and 52 employees in Korea. Samsun also has 106 officers and employees who that evidence described as being “offshore”, presumably mostly seafarers, including masters of the vessels operated in the course of Samsun’s business. Accordingly, I am satisfied that, on the evidence before me, the presumption in Art 16(3) of the *Model Law* should be given effect, and that Korea is the centre of Samsun’s main interest. For that reason I am also satisfied, on the evidence before me, that the Korean proceeding is a foreign proceeding within the meaning of Arts 2(a) and 17(1)(a), being a judicial proceeding in Korea pursuant to a law relating to insolvency in which the assets and affairs of Samsun are subject to control or supervision by the Korean Court for the purpose of reorganisation.
5. I am also satisfied that the Korean proceeding is a foreign main proceeding because it is taking place in Korea, where Samsun has its centre of main interests. I am satisfied that Mr Hur is a foreign representative, being a person authorised in the Korean proceeding to administer the reorganisation of Samsun’s assets and affairs, or to act as a representative in the foreign proceeding within the meaning of Arts 2(d) and 17(1)(b).
6. The Korean proceedings for reorganisation are similar in character to those considered by Jacobson J in *Hur* [2009] FCA 732, Buchanan J in *Yu v STX Pan Ocean Co Limited* (2013) 223 FCR 189, and myself in *Kim* [2015] FCA 684. The requirements for recognition in Art 15 have been established by the certified copy of the Korean Court’s decision and its orders of 3 August 2015 commencing the Korean proceedings and appointing Mr Hur as foreign representative.
7. Samsun has applied for recognition of the Korean proceedings in four other jurisdictions and it is involved in the two London arbitrations and the other proceedings in Korea to which I have referred. Accordingly, I am satisfied the requirements of Art 15(3) and ss 6 and 13 of the *Cross-Border Insolvency Act* have been met by the identification of all foreign proceedings known to the foreign representative in respect of the debtor, as well as the evidence that there are no such proceedings in this country.
8. For these reasons, I am satisfied that the Korean proceeding should be recognised as a foreign, and foreign main, proceeding and that Mr Hur should be recognised as a foreign representative.
9. In both *Yu* 223 FCR 189 and *Kim* [2015] FCA 684, Buchanan J and I respectively made orders 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 the Court and that the judge’s reasons for judgment be drawn to the attention of the Court at the time any such application was made. Mr Hur accepts that such an order is appropriate in these proceedings.
10. As I noted in *Kim* [2015] FCA 684 at [7], the nature and extent of the stay regulated under Art 20(2) by s 16 of the Act is beguilingly ambiguous, since the *Corporations Act* has a variety of different stay provisions that differentially affect the position of secured creditors, sometimes at different points in the same overall process, such as under Pt 5.3A as provided in ss 440B, 441B, 444F and, where there is a liquidation by the Court under Pt 5.4B, in s 471C, or in a voluntary winding up under s 500(2).
11. This legislative morass is confusing for all persons dealing with companies in financially distressed circumstances. Why precisely the *Corporations Act* contains such byzantine complexities of this kind is difficult to ascertain, particularly when provisions such as s 16 of the *Cross-Border Insolvency Act* leave confused and uncertain exactly what the Parliament intended occur in respect of the recognition of proceedings under the laws of different countries. Each nation has its own individually tailored legislation for the administration of insolvent debtors, be they individuals or corporations, and various processes that are not necessarily analogous to the plethora of those available under the *Corporations Act* or the *Bankruptcy Act*.
12. In general, both Australian Acts dealing with insolvency recognise that the position of secured creditors warrants separate treatment from that of unsecured creditors and, in general, stay provisions such as ss 440B and 440D can be seen to have the purpose of preserving the insolvent’s financial *status quo* pending the making of a decision by creditors as to how the debtor’s financial affairs should be administered when proceedings under Pt 5.3A are involved.
13. In *Re Capital General Corporation Limited, Rogers v Radly* (2000) 37 ACSR 158 at 162-163 [20]-[21], Warren J held that s 440D(1) should be construed to give effect to its intention to stay proceedings “against the company” or “in relation to any of its property” in order to prevent the creation of preferences or interference with the disposition of the company’s property or the distraction of the administrator from the performance of his or her task.
14. Moreover, the scheme of Pt 5.3A is to allow a limited period, subject to any extensions that the Court is authorised to grant, for the administrator to propose a deed of company arrangement in order that the creditors may decide on that proposal. The scheme of the *Korean Act* is different in that it is the Korean Court that controls the rehabilitation proceeding and, in doing so, it acts judicially. As occurred in Samsun’s previous rehabilitation proceeding, that process can be quite protracted. Indeed, with an insolvency of the current size, that is perhaps inevitable.
15. The *UNCITRAL Guide to Enactment of the Model Law* at [33] identified that the purpose of Art 20(2), to which s 16 of the *Cross-Border Insolvency Act* gives effect, was to provide exceptions and limitations to the scope of the stay and suspension. It gave, as examples, “exceptions for secured claims, payments by the debtor made in the ordinary course of business, set-off, execution of rights *in rem*”. The *Guide* stated at [34] that the *Model Law* authorised a court to grant discretionary relief for the benefit of any foreign proceeding, whether a foreign main proceeding or not. The *Guide* explained at [148] that Art 20(2) would be governed by the exceptions or limitations that existed in the law of the enacting State in respect of the automatic stay, saying:

Those exceptions may be, for example, the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, initiation of court action for claims that have arisen after the commencement of the insolvency proceeding (or after recognition of a foreign main proceeding) or completion of open financial-market transactions.

1. The *Guide* went on to note at [151]-[152] that Art 20(3) had been inserted because it was necessary to protect creditors from losing their claims were a limitation period to expire while a stay was in force pursuant to Art 20(1)(a). In other words, creditors should be able to preserve their claims against a debtor, although once the claim had been preserved, the *Guide* noted that the action would then be covered by the stay.
2. It is evident that those who both wrote the *Guide* and drafted s 16 of the *Cross Border Insolvency Act* did not consider the impact of any stay in respect of proceedings *in rem* on a maritime lien or a secured or proprietary claim in admiralty matters. Under s 471B of the *Corporations Act*,there is an automatic stay of proceedings against the company and suspension of enforcement processes in a winding up in insolvency or by the Court, including a prohibition on commencing proceedings against the company, but, relevantly, s 471C provides that:

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

1. In *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8 at 36-37 [120], Allsop CJ, with whom Robertson and Griffiths JJ agreed, said that:

Whilst the Model Law reflects universalism, **there is nothing in the Model Law or the UNCITRAL Working Papers prior to its formulation, or in the CBI [Cross Border Insolvency] Act, which would justify the stripping of rights of a local creditor by reason of recognition**. The universalism that underpins the Model Law and CBI Act is one for the benefit of all creditors, and the protection of local creditors is expressly recognised. It is not inappropriate to call it “modified universalism” for what such an appellation is worth. (emphasis added)

1. His Honour was there dealing with the position of an unsecured creditor, namely, the Commissioner of Taxation, who had a taxation debt that was not a provable debt in the foreign main proceedings.
2. A person with a right to proceed on a maritime lien *in rem* under the *Admiralty Act* is in a position that is *sui generis* in respect of other remedies provided by domestic law because of the peripatetic nature of ships, particularly ships of the kind involved in the conduct of Samsun’s business. Crews and other persons who may have maritime liens can only enforce those secured claims against a ship that is, necessarily, temporarily in the jurisdiction of the Admiralty court, in which an arrest or attachment proceeding is brought. That underpins the basis on which Buchanan J in *Yu* 223 FCR 189 made the orders that he did.
3. It may be that in future proceedings of this kind, consideration might be given to framing an order to clarify that a secured creditor, to the extent necessary, should have leave to, and may, exercise all the rights to bring proceedings against or in respect of any property of the debtor, including the commencement and prosecution of proceedings *in rem* under the *Admiralty Act*, to which the security interest of that creditor extends. An order so framed would make clear that, in cases where the proceedings *in rem* are on a maritime lien under s 15 of the *Admiralty Act*, they can be brought because they are of a kind that ss 471C and 444F ordinarily recognise are appropriately excluded from an automatic stay of remedies that would otherwise be open to unsecured creditors in order properly to protect a secured creditor’s rights.
4. It will be of little comfort to an unpaid ship’s crew to be told that they can prove against their defaulting employer in a foreign country in foreign main proceedings if they wish, but, by the operation of the stay in Art 20(2), they have been denied the right to exercise their security interest consisting of their maritime lien, recognised almost universally in the maritime law of nations as protecting their right to be paid their wages: see s 15(2)(c) of the *Admiralty Act*. The fact that they are unpaid and are on a ship from which, if penniless, they cannot escape is a very good reason to ensure that however else the automatic stay in Art 20(2) of the *Model Law* operates, claims to such maritime liens are protected and immediately enforceable without any requirement for prior leave to be sought. If the stay in Art 20(2) were construed to preclude members of a ship’s unpaid crew from exercising their maritime lien by arresting or attaching the ship when she reached port, the consequence might be the *de facto* forced labour or enslavement of the crew until the ship finally reached the crew’s or ship’s home port.
5. I will make orders to give effect to the recognition sought, subject to the conditions to which I have referred in [20] above.

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| I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate:

Dated: 27 October 2015