

FEDERAL COURT OF AUSTRALIA

Didyasarin v Thai Airways International Public Company Limited

[2020] FCA 1154

File number: NSD 685 of 2020

Judge: **MARKOVIC J**

Date of judgment: 3 August 2020

Date of publication of reasons: 12 August 2020

Catchwords: **BANKRUPTCY AND INSOLVENCY** – cross-border insolvency – application for recognition of foreign proceeding pursuant to Art 17 of the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (Model Law)* and s 6 of the *Cross-Border Insolvency Act 2008 (Cth) (CBI Act)* – application for orders pursuant to Art 20 of the Model Law and s 16 of the CBI Act for the scope and modification or termination of a stay to be the same as would apply if it arose under Pt 5.3A of the *Corporations Act 2001 (Cth)* – application allowed

Legislation: *Corporations Act 2001 (Cth)*, Pt 5.3A
Cross-Border Insolvency Act 2008 (Cth), ss 6, 10, 13, 16
Federal Court (Corporations) Rules 2000 (Cth), Div 15A

Cases cited: *Hur v Samsun Logix Corporation* [2009] FCA 372
Kapila, in the matter of Edelsten [2014] FCA 1112; (2014) 320 ALR 506
Senvion GmbH, in the matter of Senvion GmbH (No 2) [2019] FCA 1732; (2019) 140 ACSR 20
Wood v Astra Resources Ltd [2016] FCA 1192

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Solicitor for the Plaintiffs:	Baker McKenzie
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ORDERS

NSD 685 of 2020

BETWEEN: **AIR CHIEF MARSHAL CHAIYAPRUK DIDYASARIN AND
MR PERAPHON THAWORNSUPACHAROEN IN THEIR
CAPACITY AS FOREIGN REPRESENTATIVES OF THAI
AIRWAYS INTERNATIONAL PUBLIC COMPANY
LIMITED**
Plaintiffs

AND: **THAI AIRWAYS INTERNATIONAL PUBLIC COMPANY
LIMITED**
Defendant

ST MARTINS CENTRE PTY LTD
Interested Person

JUDGE: **MARKOVIC J**

DATE OF ORDER: **3 AUGUST 2020**

THE COURT ORDERS THAT:

Variation to previous notification orders

1. Leave be granted to the plaintiffs to file the interlocutory process dated 31 July 2020.
2. The interlocutory process dated 31 July 2020 be returnable *instanter*.
3. Pursuant to r 39.05(c) of the *Federal Court Rules 2011* (Cth), Order 2 of the Orders made by the Court on 23 June 2020 and Order 2 of the Orders made by the Court on 30 June 2020 be varied such that:
 - (a) the date by which notifications under Order 2(c) must be given to persons who are only creditors, or only claim to be creditors, of the defendant by reason of their having purchased Thai Airways travel tickets is to be “10 business days before the final hearing on 3 August 2020” in lieu of “10 business days of the making of these Orders”; and
 - (b) excluding from the notification requirement in Order 2(c) persons who are only creditors, or only claim to be creditors, of the defendant by reason of their being members of the defendant’s frequent flyer program or having frequent flyer points pursuant to that program.

Recognition of foreign proceedings

4. Pursuant to Art 17(1) of the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (Model Law)* and s 6 of the *Cross-Border Insolvency Act 2008* (Cth) (**Cross-Border Insolvency Act**), the proceeding Black Case No. 10/2563 in the Central Bankruptcy Court of the Kingdom of Thailand (Thai Reorganisation Proceeding) in relation to the defendant, Thai Airways International Public Company Limited, is recognised as a foreign proceeding.
5. Pursuant to Art 17(2)(a) of the Model Law, the Thai Reorganisation Proceeding is recognised as a foreign main proceeding within the meaning of Art 2(b) of the Model Law.
6. Air Chief Marshal Chaiyapruk Didyasarin and Mr Peraphon Thawornsupacharoen are recognised as foreign representatives within the meaning of Art 2(d) of the Model Law.

Relief upon recognition of foreign proceedings

7. For the purposes of Art 20(2) of the Model Law and s 16 of the Cross-Border Insolvency Act, the scope, and the modification or termination, of the stay and suspension referred to in Art 20(1) of the Model Law with respect to the defendant are the same as would apply if the stay or suspension arose under Pt 5.3A in Ch 5 of the *Corporations Act 2001* (Cth) (**Corporations Act**), and as if:
 - (a) Pt 5.3A of the Corporations Act applied to the defendant (as a company subject to administration under that Part); and
 - (b) references in Pt 5.3A of the Corporations Act to the consent of the company's administrators are taken to be references to the consent of the company.

Notification

8. The requirements of r 15A.6 and r 15A.7 of the *Federal Court (Corporations) Rules 2000* (Cth) (**Rules**) be dispensed with and in lieu thereof the plaintiffs, within 10 business days of the making of these Orders:
 - (a) publish notice in the form of Form 21 in The Australian and Australian Financial Review newspapers;
 - (b) publish notice in the form of Form 21 on the Thai Airways website;
 - (c) give notice of the making of these Orders in the form of Form 21 by email to each person for whom the defendant has a valid email address who is:
 - (i) to the knowledge of the defendant is a creditor of the defendant or claims to be a creditor of the defendant; and

(ii) either:

(A) is domiciled in Australia; or

(B) has a claim to be a creditor arising from dealing with the defendant in Australia;

but excluding those persons who are only creditors, or only claim to be creditors, of the defendant by reason of their being members of the defendant's frequent flyer program or having frequent flyer points pursuant to that program; and

(d) give notice of the making of these Orders in the form of Form 21 in the Rules by email to each aircraft lessor.

Adjourned hearing

9. Paragraph 5 of the plaintiffs' originating process, together with any interlocutory process filed by St Martins Centre Pty Ltd, be listed for hearing at 10.15 am on 3 September 2020.

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

REASONS FOR JUDGMENT

MARKOVIC J:

1 On 3 August 2020 on the application of Air Chief Marshal Chaipayruk Didysarin and
Mr Peraphon Thawornsupacharoen (**Foreign Representatives**) as plaintiffs I made orders
including an order under s 6 of the *Cross-Border Insolvency Act 2008* (Cth) (**CBI Act**) and
Art 17(1) of the *Model Law on Cross-Border Insolvency of the United Nations Commission on*
International Trade Law (**Model Law**), being Sch 1 to the CBI Act, that the Thai
Reorganisation Proceeding (see [11] below) be recognised as a foreign proceeding and an order
pursuant to Art 17(2)(a) of the Model Law that that proceeding be recognised as a foreign main
proceeding within the meaning of Art 2(b) of the Model Law.

2 At the hearing only one creditor, St Martins Centre Pty Ltd (**St Martins**), appeared but did not
oppose the making of the orders sought by the Foreign Representatives for recognition of the
Thai Reorganisation Proceeding. The proceeding has been stood over to a later date to consider
the relief sought by the Foreign Representatives pursuant to Art 21(1)(e) of the Model Law and
any application St Martins intends to make.

3 These are my reasons for making the orders made on 3 August 2020.

BACKGROUND

4 The defendant, Thai Airways International Public Company Limited (**Thai Airways**), is
registered and publicly listed on the stock exchange in Thailand and is a registered foreign
company in Australia. It is the national airline of Thailand.

5 Thai Airways was incorporated in Thailand in 1960 under the Thai Civil and Commercial Code
as Thai Airways International Limited. On 20 May 1994 it converted to a public company
under the *Thai Public Limited Company Act, B.E. 2535 (1992)* (Thai).

6 In terms of the composition of its board and the location of its head office and principal place
of business:

- (1) all of the directors of Thai Airways are Thai nationals, as are the majority of
its employees;

- (2) Thai Airways' address registered with the Thai Department of Business Development and its centre of administration are in Thailand. This has been the case since 20 May 1994;
- (3) since 2006 Thai Airways has had its airport base, principal place of business and centre of logistics at Suvarnabhumi Airport, the main international airport in Bangkok. Prior to that time Thai Airways had its airport base, principal place of business and centre of logistics at Don Mueang International Airport, which at the time was Bangkok's main international airport; and
- (4) at all times since 20 May 1994, Thai Airways has had its principal place of business in Thailand.

7 Thai Airways is a full service airline providing domestic and international passenger travel, cargo and mail services, ground customer services, ground equipment services, catering services, repair and maintenance services, flight facilitation services, inflight duty free sales services, flight simulation services and souvenir sales. It is also a member of the Star Alliance group of airlines and offers a frequent flyer program, "Royal Orchid Plus" (**ROP**). There are approximately 1.398 million members of ROP (**ROP Members**) of which 87,346 are Australian.

8 Thai Airways owns or leases 120 aircraft of which 31 are subject to finance leases and 42 are subject to operating leases.

9 On 22 May 2020 the Thai Ministry of Finance reduced its shareholding in Thai Airways from more than 50% of the shares to 47.86% such that, from that date, Thai Airways ceased to be treated as a state owned enterprise.

10 The financial statements for Thai Airways and consolidated subsidiaries for the year ended 31 December 2019 disclosed that it had total assets of approximately AUD 12.1 billion, total liabilities of approximately AUD 11.6 billion and trading losses for that period of approximately AUD 567.7 million.

Thai Airways commences a reorganisation proceeding in Thailand

11 On 26 May 2020, pursuant to Chapter III/I of the *Bankruptcy Act, B.E. 2483 (1940)* (Thai) (**Thai Business Reorganisation Law**), Thai Airways filed a petition (**Petition**) for a business reorganisation (**Thai Reorganisation Proceeding**) at the Central Bankruptcy Court of Thailand (**Thai Bankruptcy Court**).

- 12 On 27 May 2020 the Thai Bankruptcy Court formally accepted the Petition and scheduled an examination hearing on 17 August 2020. According to Chakkrit Parapuntakul, the acting president of Thai Airways who has been appointed as the attorney of the Foreign Representatives with authority to act on their behalf including in obtaining recognition of the Thai Reorganisation Proceeding and taking other actions in relation to Thai Airways outside Thailand, at that hearing the Thai Bankruptcy Court will proceed with the examination of the Petition and do one of three things: issue an order granting permission to reorganise Thai Airways' operations; issue an order granting permission to reorganise Thai Airways' operations and appoint a planner (see [54(6)] below); or dismiss the Petition for failure to meet the reorganisation criteria.
- 13 Upon the Thai Bankruptcy Court's acceptance of the Petition, an automatic stay order came into effect pursuant to s 90/12 of the Thai Business Reorganisation Law.
- 14 On 26 May 2020 Thai Airways filed a further petition in the Thai Bankruptcy Court seeking permission, pursuant to s 90/12(9) of the Thai Business Reorganisation Law, for Thai Airways to proceed with foreign legal proceedings to recognise the Thai Reorganisation Proceeding. Thai Airways requested that the Foreign Representatives, who are directors of Thai Airways, be authorised to sign jointly as representatives in carrying out the foreign actions of Thai Airways in other jurisdictions. On 27 May 2020 the Thai Bankruptcy Court also granted that request.
- 15 Paralee Techajongjintana, a partner of Baker & McKenzie Limited in its Bangkok office who is the Thai counsel to the Foreign Representatives, explains that the Foreign Representatives were only appointed to pursue foreign recognition proceedings and that the "foreign representative" is not a known concept under the Thai Business Reorganisation Law. Ms Techajongjintana further explains that the Foreign Representatives have no power in that capacity, as distinct from in their roles as directors of Thai Airways, other than pursuant to the orders made by the Thai Bankruptcy Court referred to in the preceding paragraph.
- 16 On 1 June 2020 the Thai Bankruptcy Court approved the costs and expenses related to an application to be made in Australia under the Model Law for recognition of the Thai Reorganisation Proceeding.

Thai Airways' assets in Australia

- 17 In Australia, Thai Airways operates from leased premises in Perth, Brisbane, Sydney and Melbourne. Its assets consist of cash, leased office premises in Perth, Brisbane, Sydney and Melbourne, leased airport and cargo offices at Perth, Brisbane, Sydney and Melbourne airports, ground handling contracts in place in relation to each of Perth, Brisbane, Sydney and Melbourne airports; arrangements for access to gates, runway, lounge, check-in counters and parking at Perth, Brisbane, Sydney and Melbourne airports, and office equipment.
- 18 Passenger flights operated by Thai Airways ceased on 27 March 2020 due to novel coronavirus (COVID-19) pandemic restrictions but Thai Airways has continued to operate cargo flights to Australia since that time.
- 19 Thai Airways is subject to demands and threats of legal action from its Australian based creditors including SNP Security, Menzies Aviation, Sydney Airport Corporation, Brisbane Airport Corporation, Melbourne Airport Corporation, Perth Airport Corporation, ISS Security, KGB Security and Dnata Catering. In addition, Thai Airways has received numerous refund requests and threats of legal action from passengers and travel agents in Australia.

Other proceedings in relation to the Thai Reorganisation Proceeding

- 20 As at 31 July 2020 the following proceedings were on foot for recognition of the Thai Reorganisation Proceeding:
- (1) on 27 May 2020 Thai Airways commenced a proceeding seeking publication of the Thai Reorganisation Proceeding in Germany in the Insolvency Court of Frankfurt and on 3 June 2020 that court ordered the publication of the order from the Thai Bankruptcy Court in relation to the Petition;
 - (2) on 29 May 2020 Thai Airways commenced a proceeding seeking recognition of the Thai Reorganisation Proceeding in Switzerland in the Zurich District Court and on 23 June 2020 that court ordered that the decision of the Thai Bankruptcy Court concerning the opening of a reorganisation proceeding is recognised for the territory of Switzerland;
 - (3) a recognition proceeding was commenced under the Model Law in Singapore and on 24 June 2020 the High Court of Singapore made orders including an order recognising the Thai Reorganisation Proceeding as a foreign main proceeding “within the meaning

of Art 2(f) of the [Model Law] as adopted in Singapore by way of Part X Division 6 and the 10th Schedule of the Companies Act (Cap. 50)”; and

- (4) on 30 June 2020 a recognition proceeding under the Model Law was commenced in Japan in the Tokyo District Court.

21 Mr Parapuntakul was not aware of any relevant proceedings in Australia.

Notification of this proceeding

22 On 23 June 2020 interim orders were made (**23 June Orders**) in this proceeding, and subsequently varied on 30 June 2020 (**Consolidated Orders**), which required the notification within 10 business days of the making of the orders of Thai Airways’ creditors by way of publication of notices substantially in the form of Forms 20 and 21 (see Sch 1 to the *Federal Court (Corporations) Rules 2000* (Cth) (**Rules**)) in national newspapers, on Thai Airways’ website and by email to known creditors domiciled in Australia or who have a claim to be a creditor arising out of dealings with Thai Airways in Australia and to aircraft lessors.

23 Putting to one side ROP Members, the evidence before me established that:

- (1) notification was given in accordance with the 23 June Orders and the Consolidated Orders by publication as required by those Orders and by email to:
 - (a) 264 Australian creditors of Thai Airways;
 - (b) 74 aircraft lessors to Thai Airways; and
 - (c) 146 travel agents in their capacity as agents for 18,956 passengers who had booked a ticket to fly on Thai Airways but have not yet used those tickets (**Refund Creditors**);
- (2) late notification was given to at least 861 Refund Creditors as follows:
 - (a) 796 additional Refund Creditors and 12 travel agents in their capacity as agents for an unspecified number of Refund Creditors were notified by email after the 10 business days provided for in the 23 June Orders had expired; and
 - (b) 49 additional Refund Creditors and four travel agents in their capacity as agents for an unspecified number of Refund Creditors were notified by email after the 10 business days provided for in the 23 June Orders and the Consolidated Orders had expired.

24 In total, over 1,300 creditors (including the 146 travel agents of the 18,956 Refund Creditors referred to in [23(1)(c)] above) were notified by email. Of those emails, 70 were returned as undeliverable. Alternative email addresses have not been provided for those creditors.

25 A number of responses were received from creditors, the detail of which was the subject of evidence before me. Notwithstanding that, as set out at [2] above, only one creditor, St Martins, the landlord of premises leased by Thai Airways in Perth, sought to appear at the hearing of the application.

ROP and ROP Members

26 As set out at [7] above, ROP is Thai Airways' customer loyalty or frequent flyer programme. Relevantly:

- (1) there are approximately 1.398 million ROP Members;
- (2) ROP Members' details are not maintained in a single searchable data base;
- (3) Thai Airways has only been able to provide the solicitors for the Foreign Representatives with spreadsheets of ROP Members organised by "number of miles" categories; and
- (4) based on those ROP Members who have provided their contact details, there are 87,346 Australian ROP Members of which 85,770 have provided an email address.

27 Maria Coffill O'Brien, a partner of Baker McKenzie, the Foreign Representatives' solicitors, gave evidence that notification to the 87,346 Australian ROP Members would be logistically difficult, time consuming and costly particularly given that some of those members would need to be notified by post, landline telephone calls or SMS to mobile numbers. Ms O'Brien deposes that even sending emails to the 85,770 ROP Members for whom such addresses are available would be onerous and would, in any event, be of little utility given that:

- (1) in Ms O'Brien's opinion it is difficult to see what interest ROP Members have in the assets of Thai Airways in Australia such that they would have a legitimate interest in opposing the Foreign Representatives' application; and
- (2) a planner (see [54(6)] below) will likely be appointed in the Thai Reorganisation Proceeding on 17 August 2020 before which time there will be nothing definitive to communicate to the ROP Members about the treatment of their claims.

LEGISLATIVE FRAMEWORK

28 Section 6 of the CBI Act provides that, subject to that Act, the Model Law with the modifications set out in Pt 2 of the CBI Act, has the force of law in Australia.

29 Article 2 of the Model Law includes the following definitions:

- (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;

30 This Court is a court referred to in Art 4 of the Model Law: see s 10 of the CBI Act.

31 Article 15 of the Model Law relevantly provides:

- 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.

32 Section 13 of the CBI Act modifies Art 15 of the Model Law and requires that, in addition to the requirement of Art 15(3), an application for recognition must also be accompanied by a statement identifying, relevantly, any appointment of a receiver (within the meaning of s 416 of the *Corporations Act 2001* (Cth) (**Corporations Act**)) or a controller or managing controller (as defined in s 9 of the Corporations Act) in relation to the property of the debtor and all proceedings under Ch 5 of the Corporations Act, s 601CL of that Act or Sch 2 to that Act in respect of the debtor that are known to the foreign representative.

33 Article 16 of the Model Law provides for certain presumptions that a court is entitled to make including relevantly that:

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.
- ...
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 interest.

34 Article 17 of the Model Law relevantly provides:

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.

35 By reason of Art 20(1) of the Model Law, and subject to s 16 of the CBI Act, upon recognition of 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.

36 Section 16 of the CBI Act provides that, for the purposes of Art 20(2) of the Model Law, the scope and modification or termination of the stay or suspension referred to in Art 20(1) are the same as would apply if, relevantly, the stay or suspension arose under Ch 5 (other than Pt 5.2 and Pt 5.4A) of the Corporations Act.

RECOGNITION OF THE FOREIGN PROCEEDING

37 If certain requirements are established (see in particular Art 15 and Art 17 above) a foreign proceeding must be recognised, unless recognition would be manifestly contrary to the public policy of Australia: *Kapila, in the matter of Edelsten* [2014] FCA 1112; (2014) 320 ALR 506 (**Re Edelsten**) at [22].

38 It was clear that the Foreign Representatives had satisfied the requirements of Art 15 and Art 17 of the Model Law and Div 15A of the Rules and, accordingly, that the Thai Reorganisation Proceeding should be recognised.

39 First, the Thai Reorganisation Proceeding is a foreign proceeding for the purposes of Art 2(a) of the Model Law in that:

- (1) it is a judicial proceeding in a court in Thailand, a foreign state;
- (2) the proceeding is collective in nature in that, as described by Ms Techajongjintana, it is a proceeding for the benefit of Thai Airways' creditors which has as its objective the implementation of a plan for the reorganisation of Thai Airways' business, with any such plan being subject to creditor and court approval;
- (3) during the proceeding Thai Airways' assets and affairs are subject to control or supervision of the Thai Bankruptcy Court; and
- (4) it is being conducted pursuant to a law relating to insolvency, the Thai Business Reorganisation Law, and is for the purpose of reorganisation or liquidation.

40 Secondly, the Foreign Representatives are “foreign representatives” for the purpose of Art 2(d) of the Model Law. They have been authorised by the Thai Bankruptcy Court to act as representatives in this proceeding.

41 Thirdly, a certified copy of the Petition together with a certified translation of the orders made by the Thai Bankruptcy Court were in evidence before me.

42 Fourthly, as noted at [30] above, this Court is a court for the purposes of Art 4 of the Model Law.

43 Lastly, as required by Art 15(3) of the Model Law as modified by s 13 of the CBI Act:

- (1) there was evidence before me of all known foreign proceedings in respect of Thai Airways; and
- (2) Mr Parapuntakul was not aware of any proceedings falling within the terms of s 13 of the CBI Act in Australia.

44 The next issue to consider was whether, as the Foreign Representatives contended, the Thai Reorganisation Proceeding, is a “foreign main proceeding” for the purposes of Art 2(b) of the Model Law. That depends on whether the centre of main interests for Thai Airways is Thailand.

45 As set out at [33] above, Art 16(3) of the Model Law provides that, in the absence of evidence to the contrary, a company’s centre of its main interests is presumed to be in the state where its registered office is located. For Thai Airways that is Thailand (see [6] above).

46 In *Re Edelsten* at [53] Beach J said the following about factors relevant to rebutting the presumption that arises by operation of Art 16(3) of the Model Law in relation to the centre of a debtor’s main interests:

In terms of principle, the centre of main interests is where the debtor conducts the administration of the debtor’s interests on a regular basis (*Moore* at [20] per Emmett J). In making a determination, the court must have regard to the need for the centre of main interests to be ascertainable by third parties, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what the debtor will be perceived to be doing by an objective observer. It is important also to have regard to the need, if the centre of main interests is to be ascertainable via third parties, for an element of permanency.

47 In order to rebut the presumption for which Art 16(3) provides, factors must warrant a conclusion that “an actual situation exists which is different that which locating it at [the]

registered office is deemed to reflect”: see *Wood v Astra Resources Ltd* [2016] FCA 1192 at [14].

48 In this case there was nothing to displace the presumption that arises by operation of Art 16(3) of the Model Law. To the contrary, the evidence overwhelmingly supported the conclusion that the centre of Thai Airways’ main interests is Thailand (see [4]-[6] above).

49 Finally, there was nothing to suggest that making the order sought would be contrary to the public policy of Australia.

50 Accordingly, I was satisfied that I should make orders recognising the Thai Reorganisation Proceeding as a foreign proceeding and as a foreign main proceeding and the Foreign Representatives as foreign representatives.

THE ARTICLE 20 STAY

51 Article 20(1) is set out at [35] above. It provides for a stay of any proceedings concerning the debtor’s assets, rights, obligations or liabilities upon the recognition of a foreign proceeding as a foreign main proceeding. The Court does not have power to modify the scope of the stay imposed by Art 20(1) of the Model Law: see *Senvion GmbH, in the matter of Senvion GmbH (No 2)* [2019] FCA 1732; (2019) 140 ACSR 20 (*Re Senvion*) at [24]-[29].

52 Relevantly, pursuant to s 16 of the CBI Act, the scope and modification or termination of the stay imposed by Art 20(1) is the same as if the stay arose under Ch 5 (other than Pt 5.2 and Pt 5.4A) of the Corporations Act. In *Hur v Samsun Logix Corporation* [2009] FCA 372 at [13] Jacobson J observed that “[t]he effect of [s 16 of the CBI Act] appears to be that the stay is to be to the same extent and effect as under the provisions of the *Bankruptcy Act 1966* (Cth) or the *Corporations Act*”.

53 In this case the Foreign Representatives submitted, and I accepted, that as there was no precise analogue in Australian law to the Thai Business Reorganisation Law, the proceeding is most closely analogous to the voluntary administration process under the Corporations Act and, accordingly, the stay under Art 20 of the Model Law should be the same as would apply if it arose under Pt 5.3A of the Corporations Act. A similar conclusion was reached in *Re Senvion* at [23].

54 Ms Techajongjintana gave detailed evidence about the nature of a Thai business reorganisation proceeding commenced pursuant to the Thai Business Reorganisation Law. As summarised by the Foreign Representatives at [12] above, the steps usually taken in such a proceeding are:

- (1) creditors, the debtor or a government agency may file a petition. After a petition is filed the Thai Bankruptcy Court considers whether the statutory requirements for filing have been met and whether there is reasonable cause and prospects for the reorganisation of the debtor's business;
- (2) if the Thai Bankruptcy Court accepts the petition, an automatic stay arises pursuant to which creditors are prohibited from, among other things, commencing litigation, revoking licences, commencing a civil case or arbitration in relation to the debtor's assets, enforcing a judgment against the debtor's assets, enforcing security without the approval of the Thai Bankruptcy Court or suspending utility services. The stay affects both secured and unsecured creditors;
- (3) an owner of property which is essential for the operation of the debtor's business under a contract of hire purchase is not permitted to exercise the right to recover the property in the possession of the debtors;
- (4) while the automatic stay is in effect, the debtor may not dispose of or encumber its property except as necessary for conducting the ordinary business of the debtor or as otherwise provided by an order of the court;
- (5) the Thai Bankruptcy Court schedules a hearing to examine the petition, typically within two to four months of the acceptance of the petition;
- (6) following the hearing to examine the petition, the Thai Bankruptcy Court may make an order granting permission to reorganise the debtor's business operations, with or without the appointment at that time of a "plan preparer", referred to as the **planner**, or it may dismiss the petition. If appointed, the planner assumes control of the management powers of the debtor as well as most shareholder rights;
- (7) after the Thai Bankruptcy Court makes an order granting permission to reorganise and appoints a planner, the steps that are then taken usually include creditors being required to submit their applications for the repayment of debts to the Thai Official Receiver within one month and the Official Receiver then approving or denying each claim;
- (8) within three months of his or her appointment, the planner is obliged to prepare a plan for the debtor company's reorganisation and submit it to the Official Receiver, with the

period of implementation of such a plan not to exceed five years. One of the requirements for a plan is that it includes details about the person who will manage the business and property of the debtor in accordance with the plan, referred to as the **plan administrator**; and

- (9) within three to four weeks after the plan is submitted, the Official Receiver convenes and holds a creditors' meeting at which creditors consider the plan and may vote to either approve or reject it. If the plan is approved at the creditors' meeting, the Thai Bankruptcy Court then schedules a hearing to consider it. The court can approve or reject a plan. If approved, the plan administrator implements the plan.

55 As submitted by the Foreign Representatives, until the appointment of a planner by the Thai Bankruptcy Court the Thai Business Reorganisation Law is a debtor in possession regime with no analogue in Australian law. However, following the appointment of the planner the operation of a Thai business reorganisation proceeding is analogous to that of an Australian voluntary administration. That is, a planner, like a voluntary administrator, works to determine a plan, similar to a deed of company arrangement, to be sanctioned by the creditors under the supervision of a plan administrator, similar to a deed administrator.

56 That said, there are, of course, some significant differences between the two processes, including the need for the plan to be sanctioned by the Thai Bankruptcy Court. However, I accepted the submission that, while they are not entirely coterminous, the goals and procedure of the Thai Business Reorganisation Law align more closely with voluntary administration than with any other form of external administration under Australian law and it was therefore appropriate that an order be made that the stay under Art 20(1) of the Model Law operate as if it arose under Pt 5.3A of the Corporations Act.

COMPLIANCE WITH THE 23 JUNE ORDERS

57 The steps taken to comply with the notification requirements in the 23 June Orders are set out at [22]-[24] above. As is apparent there was late notification to at least 861 Refund Creditors and no notification to the Australian ROP Members.

58 The Foreign Representatives sought orders nunc pro tunc to accommodate the late notification to those Refund Creditors and remove the obligation to notify the Australian ROP Members.

59 I was satisfied that those orders should be made.

- 60 Insofar as the late notification to some of Refund Creditors was concerned, despite the notification to those creditors being after the time required in the 23 June Orders and the Consolidated Orders, it was still given approximately three weeks prior to the hearing. In those circumstances, I am satisfied that those creditors had sufficient time to raise any queries or to appear at the hearing if they had so wished.
- 61 In relation to the Australian ROP Members, for the reasons explained by Ms O'Brien, I was satisfied that, in the circumstances, it was appropriate that the requirement for notification not extend to them. I note that, for the same reasons, I accepted that the Australian ROP Members should be excluded from notification of the orders made on 3 August 2020.

CONCLUSION

- 62 For those reasons I made the orders sought by the Foreign Representatives.

I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic.

Associate:



Dated: 12 August 2020