United Nations A/CN.9/732/Add.1

General Assembly

Distr.: General
15 April 2011

Original: English

**United Nations Commission on International Trade Law**
**Forty-fourth session**
Vienna, 27 June-8 July 2011

# Insolvency Law

**Addendum**

# The UNCITRAL Model Law on Cross-Border Insolvency: The judicial perspective (*continued*)

Contents



(*Continued in A/CN.9/732/Add.2*)

V.11-82563 (E) 260411 270411

# II. Interpretation and application of the Model Law (*continued*)

## C. The process of recognition

### 1. Introductory comments

56. To qualify as a "foreign proceeding" the foreign representative must persuade the receiving court that the relevant proceeding is:[1]

(a) A (interim or final) collective judicial or administrative proceeding in a foreign State;

(b) Brought 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; and

(c) For the purpose of reorganization or liquidation.

57. In unpacking the elements of the definition of "foreign proceeding", questions arise over the meaning of the terms "collective judicial or administrative proceeding", the nature of a "law relating to insolvency" and whether there is "control or supervision by a foreign court". Those concepts reflect jurisdictional requirements, and, logically, fall to be determined before deciding whether the "foreign proceeding" is a "main" or "non-main" proceeding.[2]

58. If the receiving court were to find that a "foreign proceeding" existed, it turns its attention to the status of that proceeding. The terms "foreign main proceeding" and "foreign non-main proceeding" are defined in article 2.

59. The critical question, in determining whether a foreign proceeding (in respect of a corporate debtor) should be characterised as "main" is whether it is taking place "in the State where the debtor has the centre of its main interests".[3] In the case of a natural person, the "centre of main interests" is presumed to be the person's "habitual residence".[4]

60. Demonstration of the existence of a "non-main proceeding" requires proof of a lesser connection, namely that the debtor has "an establishment" within the State

---

[1] Ibid., art. 2(a), definition of "foreign proceeding".

[2] Ibid., art. 17(2) which identifies the need to determine the status of the foreign proceeding the receiving court is recognizing.

[3] See the discussion in paras. 75-110 below.

[4] UNCITRAL Model Law, art. 16(3), in the context of a presumption of "centre of main interests" for both corporate and natural persons. See paras 58, 81-104 below. For a discussion of the term "habitual residence" in this context, see *Re Stojevic* [2007] BPIR 141, at para. 58 and following. The court found that, essentially, a man's habitual residence is his settled, permanent home, the place where he lives with his wife and family, until, in the case of the younger members of the family, they grow up and leave home, the place to which he returns from business trips elsewhere or abroad. It also noted that a man may have another residence, here called an ordinary residence, which is a place where he lives, which is not his settled, permanent home, the place where he lives when away from home on business or on holiday with his wife and family. Depending on the nature of his work, a man may well live away from his settled, permanent home for a greater number of days in any given year than he spends there with his wife and family. See also *Williams v Simpson* (No. 5), paras. 41-49.

where the foreign proceeding is taking place. The term "establishment" is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services".[5] The term "non-transitory" could refer either to the duration of a relevant economic activity or to a location at which such activity is carried on.

61. As noted above,[6] the decision to recognize as either a "main" or "non-main" proceeding has important ramifications. Once a foreign proceeding is recognized as the "main" proceeding automatic relief follows, in the nature of stays of various enforcement actions that could otherwise be taken in the receiving court's jurisdiction.[7] In contrast,, only discretionary relief is available to a foreign representative in respect of a "non-main" proceeding.[8]

62. From an evidential perspective, the receiving court is entitled:

(a) To presume that any decision or certificate of the type to which article 15(2) refers is authentic;[9]

(b) To presume that all documents submitted in support of the application for recognition are authentic, whether or not they have been "legalised";[10]

(c) "In the absence of proof to the contrary", to presume "the debtor's registered office or habitual residence in the case of an individual" to be the centre of the debtor's main interests.[11]

63. Ordinarily, whether a "foreign proceeding" is of a character that meets the criteria of a "main" proceeding will be a matter of expert evidence on the relevant domestic law of the State in which the proceeding was initiated. Determination of whether an "establishment" exists (to demonstrate a non-main proceeding) involves a question of fact. Depending upon applicable national law, the receiving court might be able to rely, in the absence of expert evidence, on reproduction of statutes and other aids to interpretation to determine the status of the particular form of insolvency proceeding in issue.[12]

64. A number of the decided cases considering the meaning of "foreign proceeding", "foreign main proceeding" and "foreign non-main proceeding" have involved members of enterprise groups. The UNCITRAL Model Law is, however, directed to individual entities, not to an enterprise group as a whole.[13] For Model Law purposes, the focus is on each and every member of an enterprise group as a distinct legal entity. It may be that the COMI of each individual group member is

---

[5] UNCITRAL Model Law, art. 2(f) and the discussion in paras. 111-114 below.

[6] See above, para. 52.

[7] UNCITRAL Model Law, art. 20. See also paras. 128-135 below.

[8] Ibid., art. 21. See also paras. 136-153 below.

[9] Ibid., art. 16(1).

[10] Ibid., art. 16(2).

[11] Ibid., art. 16(3).

[12] An illustration of that approach can be found in *Betcorp*, in which the United States Bankruptcy Court used explanatory memoranda which accompanies draft legislation in Australia and is prepared to assist Parliament to understand the purpose and structure of the legislation it is being asked to consider. Such a memo may be used by a domestic court in Australia as an aid to resolving ambiguities, but it is not bound to do so.

[13] See also *Eurofood*, para. 37.

found to lie in the same jurisdiction, in which case the insolvency of those group members can be addressed together, but there is no scope for addressing the COMI of the enterprise group as such under the Model Law.

65. In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under the laws of the recognizing State, proof that the debtor is insolvent.[14]

### 2. Collective judicial or administrative proceeding

66. The UNCITRAL Model Law was intended to apply only to particular types of insolvency regimes. The notion of a "collective" insolvency proceeding is based on the ability of a single insolvency representative to control the realization of assets for the purpose of pro rata distribution among all creditors (subject to domestic statutory priorities), as opposed to a proceeding designed to assist a particular creditor to obtain payment or a process designed for some purpose other than to address the insolvency of the debtor.

67. Within the parameters of the definition of "foreign proceedings", a variety of collective proceedings might be eligible for recognition. It was anticipated that some of those proceedings would be compulsory, while others might be voluntary. Some might relate to the liquidation of assets of a debtor; others might focus on the reorganization of the debtor's affairs. The Model Law was also intended to cover circumstances in which a debtor (corporate or individual) retained some measure of control over its assets, albeit subject to supervision by a court or other competent authority.[15]

68. Judges may be asked to determine whether there is a "collective" insolvency proceeding that engages the Model Law. Several cases may be of assistance.

69. In *Betcorp*, a voluntary liquidation, commenced under Australian law, was held, by a court in the United States, to be an administrative proceeding falling within the scope of the Model Law. Because the voluntary liquidation realized assets for the benefit of all creditors, the requisite aspect of a "collective" proceeding was held to be present.[16] In *Gold & Honey*, a receivership commenced under Israeli law, was held by a United States court not to be an insolvency or collective proceeding on the basis that it did not require the receivers to consider the rights and obligations of all creditors and was primarily designed to allow a certain

---

[14] UNCITRAL Model Law, art. 31.

[15] Guide to Enactment, para 24. For e.g. a so-called debtor in possession.

[16] *Betcorp*, p. 281. A different view of that type of voluntary proceeding was referred to by the Australian court in *Tucker (no. 2)*, p1485-86 (see case summaries) in the context of considering the meaning of "insolvency proceedings" in art. 2. The court quoted the explanatory memorandum to the Cross-Border Insolvency Bill 2008, which noted that "The expression 'insolvency proceedings' may have a technical meaning, but it is intended in subparagraph (a) [*referring to art. 2 of the Model Law*] to refer broadly to proceedings involving companies in severe financial distress." The court also referred to a consultation paper prepared by the Australian Treasury, which stated that in the context of the Australian Corporations Act, the scope of the Model Law would extend to liquidations arising from insolvency, reconstructions and reorganizations under Part 5.1 and voluntary administrations under Part 5.3A. […] It would also not extend to a members' voluntary winding up or winding up by a court … " [Corporate Law Economic Reform Program's Proposals for Reform: Paper no 8, Cross-Border Insolvency – Promoting international cooperation and coordination, p23].

party to collect its debts.[17] In *British American Insurance*, the court concurred with the courts in both *Betcorp* and *Gold & Honey* as to the meaning of "collective", noting that such proceedings contemplated both the consideration and eventual treatment of claims of various types of creditors, was well as the possibility that creditors may take part in the foreign action.[18]

70. In another case, *Stanford International Bank*, a receivership order made by a court in the United States was held, by the court in England, not to be a collective proceeding pursuant to an insolvency law. The receiving court held that the order was made after an intervention by the United States' Securities Exchange Commission "to prevent a massive ongoing fraud". The purpose of the order was to prevent detriment to investors, rather than to reorganize the corporation or to realize assets for the benefit of all creditors.[19] That view was upheld on appeal, largely for the reasons given in the English lower court.[20]

### 3. Subject to control or supervision by a "foreign court"

71. No distinction is drawn, in the definition of "foreign court"[21] between a reorganization or liquidation proceeding controlled or supervised by a judicial or administrative body. That approach was taken to ensure that those legal systems in which control or supervision was undertaken by non-judicial authorities would still fall within the definition of "foreign proceeding".[22]

72. The concept of "control or supervision" has received little judicial attention to date. There are two possible approaches, the first of which was discussed in *Betcorp*. Notwithstanding that the type of proceeding for which recognition was sought is commenced without any court involvement by a vote of the company concerned, the court held that the "control or supervision" criterion[23] was met, based on administrative or judicial oversight of the liquidators responsible for administering the collective proceeding on behalf of all creditors, as opposed to control or supervision of the assets and affairs of the debtor. The judge held that the Australian Securities and Investment Commission had responsibilities for supervising liquidators in the performance of their duties, could require liquidators to obtain permission before undertaking certain actions (e.g. destruction of books and records) and had the ability to remove or revoke the authority of any person to be a liquidator. On that basis, the judge considered that the Australian Securities and Investment Commission was "an authority competent to control and supervise a foreign proceeding" for the purposes of the definition of "foreign proceeding" under the UNCITRAL Model Law.[24]

---

[17] *Gold & Honey*, p. 370.

[18] *British American Insurance*, p. 902.

[19] *Stanford International Bank*, paras. 73 and 84.

[20] *Stanford International Bank* (on appeal), paras. 26-27.

[21] UNCITRAL Model Law, art. 2(e).

[22] Guide to Enactment, para 74.

[23] UNCITRAL Model Law, art. 2(a).

[24] *Betcorp*, p. 284. In support of that proposition the judge relied on *Tradex Swiss AG* 384 BR 34 at 42 (2008), in which case the Swiss Federal Banking Commission was held to be a "foreign court" because it controlled and supervised liquidation of entities in the brokerage trade.

73. A different view is that the existence of some regulatory regime does not, of itself, constitute control or supervision of the assets and affairs of the debtor, particularly in cases where the regulator's powers are restricted to ensuring that insolvency representatives perform their functions properly, as opposed to supervising particular insolvency proceedings.

74. The court in *Betcorp* held, in addition to the conclusion with respect to the regulator, that the voluntary liquidation proceeding was subject to supervision by a judicial authority; the Australian courts. That view was based on three factors: (a) the ability of liquidators and creditors in a voluntary liquidation to seek court determination of any question arising in the liquidation; (b) the general supervisory jurisdiction of Australian courts over actions of liquidators; and (c) the ability of any person "aggrieved by any act, omission or decision" of a liquidator to appeal to an Australian court, which could "confirm, reverse or modify the act or decision or remedy the omission, as the case may be".[25]

### 4. The "main" proceeding: centre of main interests

75. In the case of a corporate debtor, to recognize a foreign proceeding as a "main" proceeding the receiving court must determine that the "centre of [the debtor's] main interests" was situated within the State in which the foreign proceeding originated.[26] The origin of the concept of "centre of main interests" and the way in which it has been applied in decided cases might be of assistance to judges grappling with this issue.

76. For the purposes of the UNCITRAL Model Law, a deliberate decision was taken not to define "centre of main interests". The notion was taken from the Convention on Insolvency Proceedings of the European Union (the European Convention), for reasons of consistency.[27] At the time the Model Law was finalized, the European Convention had not come into force and it subsequently lapsed for lack of ratification by all Member States.[28]

77. Subsequently, the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation) applied to Member States (except Denmark) of the European Union as a means of dealing with cross-border insolvency issues within the European Union. The concepts of "main proceedings" and "centre of main interests" were carried forward into the text of the EC Regulation.[29] In contrast to the UNCITRAL Model Law provision, the EC Regulation stresses the need for the centre of main interests to be "ascertainable by third parties".[30] The Guide to Enactment of the Model Law notes that the notion of "centre of main interests" corresponds to the formulation in article 3 of the European Convention and acknowledges the desirability of "building on the

---

[25] *Betcorp*, pp. 283-284.

[26] UNCITRAL Model Law, art. 2(b).

[27] See Guide to Enactment, para. 31; cf art. 3 of the European Convention.

[28] For relevant history see the opinions of Advocates General in *Re Staubitz-Schreiber* [2006] ECR I-701 and *Eurofood*, at para 2. For a more extensive discussion see Moss, Fletcher and Isaacs, *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2nd ed. 2009 Oxford University Press), paras 1.01-1.25.

[29] EC Regulation, Recitals (12) and (13) set out below.

[30] Ibid., Recital (13).

emerging harmonization as regards the notion of 'main' proceeding".[31] Although the concepts in the two texts are similar, they serve a different purpose. The determination of "centre of main interests" under the EC Regulation relates to the jurisdiction in which main proceedings should be commenced. The determination of "centre of main interests" under the Model Law relates to the effects of recognition, principal amongst those being the relief available to assist the foreign proceeding.

78. Recitals (12) and (13) of the EC Regulation state:

> "(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.[32]
>
> "(13) The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

79. In anticipation of ratification of the European Convention by all Member States, an explanatory report on the Convention had been prepared (the Virgos-Schmit Report).[33] That report provided guidance on the concept of "main insolvency proceedings" and, notwithstanding the subsequent demise of the Convention, has been accepted generally as an aid to interpretation of the term "centre of main interests" in the EC Regulation.

80. The Virgos-Schmit Report explained the concept of "main insolvency proceedings" as follows:

> "**73. Main insolvency proceedings**
>
> "Article 3(1) enables main insolvency universal proceedings to be opened in the Contracting State where the debtor has his centre of main interests. Main insolvency proceedings have universal scope. They aim at

---

[31] Guide to Enactment, para. 31. See A/52/17, para. 153 which indicates that "… the interpretation of the term in the context of the Convention would be useful also in the context of the Model [Law]". It should be noted that the EC Regulation does not define centre of main interests — see recital 13 below. During discussion in the UNCITRAL working group negotiating the Model Law it was noted that the selection of the concept of COMI to determine main proceedings offered several advantages, including that it would be in harmony with the approach and terminology utilized in the European Convention. That would enable use of the Model Law to contribute to the development of a standardized and widely understood terminology, rather than inadvertently contributing to an undesirable diversification of terminology (A/CN.9/422, p. 20, para. 90).

[32] The EC Regulation refers to secondary proceedings while the Model Law uses non-main proceedings. Secondary proceedings under the EC Regulation are winding up proceedings: art. 3.3.

[33] See Glossary, para. 7(g). The report was prepared prior to the Convention being opened for signature on 23 November 1995.

encompassing all the debtor's assets on a world-wide basis and at affecting all creditors, wherever located.

"Only one set of main proceedings may be opened in the territory covered by the Convention.

...

"75. The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

"The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

"By using the term "interests", the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression "main" serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

"In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence.

"Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office."

81. There have now been a number of court decisions which consider the meaning of the phrase "centre of main interests", either in the context of the EC Regulation or domestic laws based on the UNCITRAL Model Law. A number of subtle differences in approach have emerged. But, the differences may be more apparent than real.

82. The leading European decision is *Eurofood*, which arose out of a dispute between Irish and Italian courts about whether an insolvent subsidiary company with a registered office in a State different from the parent company had its "centre of main interests" in the State of its registered office or that of the parent company.

83. To answer that question, the European Court of Justice (ECJ) had to determine the strength of the presumption that the registered office would be regarded as the centre of a particular company's main interests. For the purpose of the EC Regulation, the presumption is found in article 3(1):[34]

[34] Compare UNCITRAL Model Law, art. 16(3). See also Virgos-Schmit, para. 76.

*Article 3*
**International jurisdiction**

> "1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

84. The ECJ held that, "in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community Legislature in favour of the registered office ... can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect".[35]

85. In considering the presumption, the ECJ suggested that it could be rebutted in the case of a "letterbox company" which does not carry out any business in the territory of the State in which its registered office is situated.[36] In contrast, it took the view that "the mere fact" that a parent company makes economic choices (for example, for tax reasons) as to where the registered office of the subsidiary might be situated, will not be enough to rebut the presumption.[37]

86. *Eurofood* places significant weight on the need for predictability in determining the centre of main interests of a debtor. In contrast to *Eurofood*, the first appellate court decision in the United States, *SPhinX*, took a more expansive view of the power to determine the centre of main interests.

87. Under Chapter 15 of the United States Bankruptcy Code (the chapter adopting the UNCITRAL Model Law) the wording of the presumption was changed from "proof" to the contrary to "evidence" to the contrary.[38] The legislative history to that change suggests it was one reflecting terminology, namely that the way in which the word "evidence" is used in the United States may more closely reflect the term "proof", as used in some other English speaking States.[39] *SPhinX* and subsequent decisions of the United States courts must be read in that context.

88. *SPhinX* involved a petition by the provisional insolvency representatives of a company registered in the Cayman Islands for recognition of that regime as a "main proceeding". The court declined to do so, recognizing it as a non-main proceeding. *SPhinX* suggests that a finding of improper forum shopping might be a factor that could be taken into account in determining the centre of the debtor company's interests. The appellate Court said:[40]

---

[35] *Eurofood*, para. 34.

[36] Ibid., para. 35.

[37] Ibid., para 36. See also the full summary of the court's conclusions on this topic at para. 37 of the judgment.

[38] Section 1516(c) of the US Bankruptcy Code: "[in] the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the centre of the debtor's main interests."

[39] The United States Congressional Report sets out the legislative history: HR Rep No 31, 109th Cong, 1st Session 1516 (2005).

[40] *SPhinX*, p. 21.

> "Collectively, these improper purpose and rebuttal analyses, combined with pragmatic considerations, led the Bankruptcy Court to conclude, where so many objective factors point to the Cayman Islands not being the debtor's COMI, and no negative consequences would appear to result from recognising the Cayman Islands proceedings as non-main proceedings, that is the better choice.
>
> "Overall, it was appropriate for the Bankruptcy Court to consider the factors it considered, to retain its flexibility, and to reach a pragmatic resolution supported by the facts found. No authority has been cited to the contrary."

89. In *Bear Stearns*, the United States' court gave further consideration to the question of determination of the centre of main interests of a debtor. Again, the application for recognition involved a company registered in the Cayman Islands which had been placed into provisional liquidation in that jurisdiction.

90. The court identified the rationale for the change made to the presumption by the United States' legislation, replacing "proof" with "evidence". The judge said, by reference to the legislative history of the provision:

> "The presumption that the place of the registered office is also the centre of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy."[41]

91. The judge stated that this "permits and encourages fast action in cases where speed may be essential, while leaving the debtor's true "centre" open to dispute in cases where the facts are more doubtful". He added that this "presumption is not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat".[42]

92. The court, in *Bear Stearns*, referred to the burden of displacing the presumption. The court regarded the onus as being on the foreign representative seeking recognition to demonstrate the centre of main interests was in some place other than the registered office.[43] In the particular case, the court regarded the presumption as having been displaced by the evidence adduced by the foreign representative in support of the petition. All evidence pointed towards the principal place of business being in the United States.

93. After discussing the *Eurofood* judgment, the United States' court expressed the view that the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties generally equates with the concept of the "principal place of business" in United States law.[44] More recently, the term "principal place of business" has been defined as the "nerve centre" for the purposes of certain laws by the United States Supreme Court in

---

[41] See note 38.
[42] *Bear Stearns*, p.128.
[43] Ibid., p. 128.
[44] Ibid., p. 129.

*Hertz Corp v Friend*.[45] That approach appears to have been followed in *Fairfield Sentry*, for Model Law purposes.[46]

94. The decision in *Bear Stearns* was appealed, on the grounds that the judgment did not "accede" to principles of comity and cooperation and an asserted erroneous interpretation of the presumption by the judge. On appeal, the appellate judge had no difficulty in holding that principles of comity had been overtaken by the concept of recognition. The appellate judge held that "recognition" ought to be distinguished from "relief". The *Bear Stearns* decision was followed in *Atlas Shipping*, where the court held that once a court has recognized a foreign main proceeding, Chapter 15 specifically contemplates that the court will exercise its discretion to fashion appropriate post-recognition relief consistent with the principles of comity.[47] It was also followed in *Metcalfe and Mansfield*, in which the United States court was asked to enforce certain orders for relief issued by a Canadian court, orders that were broader than would have been permitted under United States' law. The court noted that principles of comity did not require the relief granted in the foreign proceedings and the relief available in the United States to be identical. The key determination was whether the procedures used in the foreign proceeding met the fundamental standards of fairness in the United States; the court held that the Canadian procedures met that test.[48]

95. In *SPhinX*, the appellate court considered that it might be appropriate to regard the presumption as rebutted if there were no opposition by a party to such a finding. In *Bear Stearns*, the appellate court affirmed the lower court's decision that the burden lay on a foreign representative to rebut the presumption and that the court had a duty, independently, to determine whether that had been done, irrespective of whether party opposition was or was not present.[49]

96. In common with the lower court, the appellate court in *Bear Stearns* accepted that the concept of centre of main interests and the presumption were derived from the European Convention, that the "centre of main interests" equated to the "principal place of business". The appellate court also affirmed a list of factors set out in the first instance decision, to be taken into account in assessing whether centre of main interests has been established in accordance with the application for recognition. The factors identified were:[50]

(a) The location of the debtor's headquarters;

---

[45] 130 S Ct 1181 (2010). The Supreme Court indicated that courts should focus on the actual place where the coordination, direction and control of the corporation was taking place, observing that the location would likely be obvious to members of the public dealing with it.

[46] *Fairfield Sentry*, p. 6. The court found that the facts before it suggested the debtor's most feasible administrative nerve centre as having existed for some time in the British Virgin Islands (BVI). Those facts included the composition and site of decision-making of an independent litigation committee that governed the debtor's affairs; the conduct of board meeting telephonically with the debtor's counsel in the BVI; and since the commencement of the BVI liquidation in 2009, the BVI liquidators had been directing and coordinating the debtor's affairs and had BVI resident employees and offices.

[47] *Atlas Shipping*, p. 78.

[48] *Metcalf and Mansfield*, pp. 697-698.

[49] *Bear Stearns* (on appeal), p. 335.

[50] *Bear Stearns*, p. 128; *Bear Stearns* (on appeal), p. 336.

(b) The location of those who direct the debtor company;

(c) The location of the debtor's primary assets;

(d) The location of the majority of creditors, or at least those affected by the case;

(e) Applicable law in relation to disputes that might arise between debtor and creditor.

97. In *Betcorp*, although the centre of main interests of the Australian company did not appear to be seriously in dispute, the judge offered some thoughts on the subject. He concluded that "... a commonality of cases analysing debtors' [centre of main interests] demonstrates that courts do not apply any rigid formula or consistently find one factor dispositive; instead courts analyse a variety of factors to discern, objectively, where a particular debtor has its principal place of business. That inquiry examines the debtors' administration, management and operations along with whether reasonable and ordinary third parties can discern or perceive where the debtor is conducting these various functions".[51] The judge held that the time at which the centre of main interests should be determined reflected the time at which the application for recognition was made.[52] That interpretation seems to arise from the tense in which the definition of "foreign main proceeding" is expressed — "means a foreign proceeding ... taking place in the State where the debtor has the centre of its main interests". A similar problem arises in relation to the place of an "establishment", under the definition of "foreign non-main proceeding" — "means a foreign proceeding ... taking place in a State where the debtor has an establishment … ". The approach in *Betcorp* was followed in *Yuval Ran* and *British American Insurance*.

98. The remaining decisions are those at first instance and on appeal in *Stanford International Bank*. That case involved an application for recognition in England of a proceeding commenced in Antigua and Barbuda. It considered whether a "head office functions" test, articulated in earlier decisions by English courts was still good law, having regard to *Eurofood*.

99. At first instance, the judge accepted a submission that ascertainment by third parties is an overarching consideration, following the approach set out in *Eurofood*.[53] The judge made that decision in the context of the Cross-Border Insolvency Regulations 2006 (enacting the UNCITRAL Model Law in Great Britain), rather than under the EC Regulation. In determining what was meant by the term "ascertainable" the judge referred to information in the public domain and what a typical third party would learn from dealings with the debtor.[54] In doing so, the judge declined to follow an earlier decision of his own in which he had applied the "head office functions" test.[55]

100. The judge observed that the difference in approach, in relation to rebuttal of the presumption, between United States' and European courts was that the

---

[51] *Betcorp*, p. 292.
[52] Ibid.
[53] *Stanford International Bank*, para. 61.
[54] Ibid., para. 62.
[55] Ibid., para. 61.

United States' courts placed the burden on the person asserting that the particular proceedings were "main proceedings", while *Eurofood* put the burden on the party seeking to rebut the presumption.[56]

101. The judge expressed some doubt about whether the factors listed in *Bear Stearns*,[57] had been qualified by a requirement of "ascertainability", indicating that it had been a requirement of *Eurofood*. However, even though the specific list of criteria was not qualified in that way by the United States' court, it would seem plausible that an informed creditor could be aware, at least, of the location of those who directed the debtor company, its headquarters, the place where primary assets could be found and whether the debtor was trading domestically or internationally.[58] The importance of the first instance observation in *Stanford International Bank* lies in its implicit emphasis on the need for evidence of what factors were ascertainable to third parties dealing with the debtor.

102. The decision in *Stanford International Bank* was upheld on appeal. In the principal judgment, the presiding judge held there was a clear correlation between the words used in the UNCITRAL Model Law and the EC Regulation, both in relation to "centre of main interests" and the presumption.[59] After discussing United States' and other authorities, he held that the first instance judge was correct to follow *Eurofood* and confirmed that the explanation in the Virgos-Schmit Report[60] (concerning ascertainability) was equally apposite for Model Law proceedings. The presiding judge did not necessarily see the United States as applying a different onus on rebutting the presumption, but left that question open.[61]

103. The presiding judge was joined by one other member of the court, who agreed with his reasons.[62] The third member of the court, while agreeing generally with the views expressed by the presiding judge, expressed a view on the "head office functions" test:[63]

> "I respectfully differ [from the presiding judge] to a small extent on the test to be applied to review the first instance decision on where the [centre of main interests] is situated. What the judge has to do is to make findings as to what activities were conducted in each potential [centre of main interests] and then ask whether they amounted to the carrying on of head office functions and then quantitatively and qualitatively whether they were more significant than those conducted at the registered office."

Those observations might be seen as suggesting that a court is required to judge objectively, on evidence before it, where the centre of main interests of the debtor lies, as opposed to making that finding based on evidence of what was actually ascertainable by creditors and other interested parties who dealt with the debtor during the course of its trading life. The remaining appellate judgments in

---

[56] Ibid., paras. 63 and 65.
[57] See para. 96 above.
[58] *Stanford International Bank*, para. 67. Compare the list of factors set out at para. 92 above.
[59] *Stanford International Bank*, (on appeal), para. 39.
[60] Virgos-Schmit Report, para. 75; see para. 80 above.
[61] *Stanford International Bank*, (on appeal) para 55.
[62] Ibid., para. 159.
[63] Ibid., para. 153.

*Stanford International Bank* and the decision in *Eurofood* tend to support the latter proposition.

104. A review of cases dealing with the vexed question of the "centre of main interests" indicates the following areas of conflict:

(a) On whom does the onus of proof lie to rebut the "registered office" presumption?

(b) Should "centre of main interests" be interpreted differently under the Model Law and the European Regulation, given the different purposes for which that test is used?

(c) What objectively ascertainable circumstances can be taken into account in determining where the "centre of main interests" is located? In particular:

(i) Should the issue be addressed by reference to the principal place of business (or "nerve centre"), by reference to what those dealing with the company would regard as the actual place where coordination, direction and control of the debtor occurred?

(ii) What factors are ascertainable objectively by third parties in the sense contemplated by *Eurofood*? In particular, at what time does the inquiry into the centre of main interests occur — is it at the time the debtor is trading with third parties, at the time it is placed into a collective insolvency proceeding or at the time of the recognition hearing?

(iii) Can the court take into account attempts by the debtor to seek a better forum, from its perspective, in determining whether recognition should be granted?

105. The issues identified are ones which, in interpreting domestic legislation based on the UNCITRAL Model Law, a judge will need to consider, having regard to the international jurisprudence and relevant public policy factors.

106. As noted previously,[64] the party on whom the onus of displacing the presumption lies is unlikely to be determinative in the vast majority of cases. Ordinarily, from the evidence adduced by relevant parties, it will be clear whether the place in which the registered office is situated constitutes the centre of main interests. Only in a case where the evidence is in a state of equipoise is it likely that the burden of displacing the presumption will be determinative of the application for recognition.

107. While there are differences in approach to determination of the centre of main interests of a debtor, the general trend of the decided cases seems to support objective ascertainment by third parties dealing with the debtor at relevant times.[65] The issue lies more in the focus in some jurisdictions on specific factors, such as the "nerve centre" or "head office" of the particular entity to which the recognition application is directed.

108. On a recognition application, ought the court be able to take account of abuse of its processes as a ground to decline recognition? There is nothing in the

---

[64] See para. 92 above.

[65] *Eurofood* and *Bear Stearns*.

UNCITRAL Model Law itself which suggests that extraneous circumstances, such as abuse of process, should be taken into account on a recognition application. The Model Law envisages the application being determined by reference to the specific criteria set out in the definitions of "foreign proceeding", "foreign main proceeding" and "foreign non-main proceeding". Yet, there is plainly a problem if illegitimate forum shopping has resulted in a debtor being placed in a more advantageous position, with consequential prejudice to creditors. The Model Law does not prevent receiving courts from applying domestic law, particularly procedural rules, to respond to any abuse of process.

109. An alternative way of dealing with the illegitimate forum shopping concern may be to consider whether recognition could be refused on grounds of public policy.[66] Viewed in that way, the issue of illegitimate forum shopping falls within the wider ambit of abuse of the processes of a court. A case could be made to support the proposition that an application for recognition as a main proceeding is an abuse of process if those responsible for pursuing the application know that the centre of main interests was elsewhere and yet deliberately decide to move the registered office to a different location to argue otherwise and/or to suppress information of that type when applying for recognition. An approach based on the "public policy" exception has the advantage of separating the recognition inquiry and any abuse of process issues in a manner reflecting the terms and spirit of the UNCITRAL Model Law.

110. In *Gold & Honey*, a United States court refused recognition of Israeli proceedings on public policy grounds. In that case, after liquidation proceedings had been commenced in the United States and, after the automatic stay had come into force, a receivership order was made in Israel in respect of the debtor company. The United States' judge declined to recognize that receivership proceeding because to do so "would reward and legitimize [the] violation of both the automatic stay and [subsequent orders of the court] regarding the stay".[67] Because recognition "would severely hinder United States bankruptcy courts' abilities to carry out two of the most fundamental policies and purposes of the automatic stay — namely, preventing one creditor from obtaining an advantage over other creditors, and providing for the efficient and orderly distribution of a debtor's assets to all creditors in accordance with their relative priorities",[68] the United States' judge considered that the high threshold required to establish the public policy exception had been met.

### 5. Non-main proceedings — "establishment"

111. In order to be recognized as a "non-main proceeding" a debtor must have "an establishment" in the foreign jurisdiction. The term "establishment" forms part of the UNCITRAL Model Law's definition of "foreign non-main proceeding". It is also used, in the EC Regulation, to assist courts of Member States to determine whether jurisdiction exists to open secondary insolvency proceedings, when the centre of main interests is in another Member State. Article 3(2) of the EC Regulations states:

---

[66] See the discussion of the public policy exception at paras. 47-51 above.

[67] *Gold & Honey*, p. 371.

[68] Ibid., p. 372.

*Article 3*
**International jurisdiction**

> "2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State."

112. The Guide to Enactment notes[69] that the definition of "establishment" was inspired by article 2, subparagraph (h) of the European Union Convention on Insolvency Proceedings. The Virgos-Schmit Report on that Convention provides some further explanation of "establishment":

> "Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional. The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an "establishment". A certain stability is required. The negative formula ("non-transitory") aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor."[70]

113. Whether an "establishment" exists is largely a question of fact; no presumption is provided in the Model Law. Necessarily, that factual question will turn on specific evidence adduced. It must be established that the debtor "carries out a non-transitory economic activity with human means and goods or services" within the relevant State.[71] There is, however, a legal issue as to whether the term "non-transitory" is referable to the duration of a relevant economic activity or to the specific location at which the activity is carried on.

114. The term "establishment" has been discussed in some of the authorities. In *Bear Stearns*,[72] "establishment" was equated with "a local place of business". In that case, the court held there was no evidence to establish that non-transitory economic activity was taking place in the Cayman Islands. On appeal, the appellate court made it clear that auditing activities carried out in preparation of incorporation documents did not constitute "operations" or "economic activity" for the purposes of an "establishment", nor did investigations carried out by the provisional liquidators into whether antecedent transactions could be avoided.[73]

115. It may be that more emphasis should be given to the words "with human means and goods and services", in the definition of "establishment". A business operation, run by human beings and involving goods or services, seems to be

---

[69] Guide to Enactment, para. 75.
[70] Virgos-Schmit Report, para. 7.1.
[71] UNCITRAL Model Law, art. 2(f).
[72] *Bear Stearns*, p. 131; see also *Lavie v Ran (2009)*, pp. 286-287; *British American Insurance*, pp. 914-915.
[73] *Bear Stearns* (on appeal), p.339.

implicit in the type of local business activity which will be sufficient to meet the definition of the term "establishment".

116. In *In the matter of Yuval Ran*, the appellate court considered the issue of establishment from the point of view of the individual debtor and what might be sufficient to constitute an establishment. The court noted the source of the definition of establishment in the Model Law, and the requirement, in the context of corporate debtors, for there to be a place of business.[74] The court said that "equating a corporation's principal place of business to an individual debtor's primary or habitual residence, a place of business could conceivably align with the debtor having a secondary residence or possibly a place of employment in the country where the receiver claims that he has an establishment".[75] The receiver argued that the presence of debts and the insolvency proceedings in Israel constituted an "establishment" for the purposes of recognition. The court disagreed, taking the view that the existence of insolvency proceedings and debts in Israel would not qualify the Israeli proceedings for recognition as non-main proceedings.[76]

---

[74] *Bear Stearns*, p. 131.

[75] *In the Matter of Yuval Ran* (2010), p. 16.

[76] Ibid., pp. 17-18.