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Insolvency Law

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

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Case summaries

1. *In re Atlas Shipping A/S*[1]

Insolvency proceedings commenced against the debtor in Denmark in 2008. The insolvency representatives applied to a United States' court for vacation of certain maritime attachments which foreign creditors had obtained, both before and after commencement of the insolvency proceedings, on funds of the debtor held in New York banks. Under Danish law, all such attachments lapse on commencement of insolvency proceedings and no further attachments may be levied against the debtor's assets. The United States' court noted that in deciding whether or not to grant a foreign representative post-recognition relief additional to that automatically available under the United States' provision equivalent to art. 20 of the Model Law [11 USC § 1520], the court was to be generally guided by principles of comity and cooperation with foreign courts. The logical reason for this, the court noted, was that "deference to foreign insolvency proceedings will often facilitate the distribution of the debtor's assets in an equitable, orderly, efficient and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." The court considered that dissolving the attachments was consistent with granting comity to the Danish proceedings, both under the provisions applicable before the commencement of Chapter 15 and under Chapter 15.[2] More specifically, the court found that the type of relief sought fell within the terms of United States' provisions equivalent to art. 21 (1)(e) and 21 (2) [11 USC § 1521 (a)(5) and 1521 (b)], allowing the foreign representative to collect property in the United States and distribute it in a foreign case. The United States' court concluded that all the attachments should be vacated and the garnished funds turned over to the insolvency representatives for administration in the Danish proceedings.

2. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*[3]

The joint insolvency representatives of two debtors subject to insolvency proceedings in the Cayman Islands applied for recognition of the proceedings in the United States and sought relief under the United States equivalent of art. 21 of the Model Law (11 USC § 1521). In its reasoning, the court first noted that it had to make an independent determination as to whether the foreign proceeding met the definitional requirements of the provisions equivalent to arts. 2 and 17 of the Model Law [11 U.S.C. §§ 1502, 1517]. The court discussed the requirements of a foreign main proceeding and examined the presumption of art. 16 (3) of the Model Law [11 U.S.C. § 1516 (c)] that the debtor's registered office is the centre of its main interests. The court clarified that the presumption should only be applied in cases without any serious controversy, permitting and encouraging fast action in clear cases, and that the burden of proof was on the foreign representative. Examining the type of evidence that was needed to rebut the presumption, the court referred to

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[1] 404 B.R. 726 (Bankr. S.D.N.Y. April 2009).

[2] Chapter 15 of the United States' Bankruptcy Code enacts the Model Law in the United States.

[3] 374 B.R. 122 (Bankr. S.D.N.Y. Sep 2007) [CLOUT case no. 760]. On appeal, 389 B.R. 325 (Bankr. S.D.N.Y. May 2008) [CLOUT case no. 794].

art. 8 of the Model Law, which directed interpretation of the Model Law to be made in accordance with its international origin and the need to promote uniformity in its application. The court looked to the interpretation of the concept of "COMI" in the European Union context, noting the decision of the European Court of Justice in the Eurofood case that the "COMI" presumption might be rebutted "particular[ly] in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated". The United States' court held that in the instant case the foreign representatives themselves provided the evidence to the contrary: there were no employees or managers in the Cayman Islands; the investment manager for the Funds was located in New York; the administrator running the back-office operations of the Funds was in the United States along with the Funds' books and records; and prior to the commencement of the foreign proceedings, all of the Funds' liquid assets were located outside the Cayman Islands. The court also noted that the investor registries and accounts receivable were located outside the Cayman Islands and that no counterparties to master repurchase and swap agreements were based in the Cayman Islands.

Examining whether the Cayman proceedings might constitute foreign non-main proceedings according to art. 2 (c) of the Model Law [11 U.S.C. § 1502 (5)] on the basis of an establishment, the court noted that the debtors did not conduct any (pertinent) non-transitory economic activity in the Cayman Islands nor did they have any funds on deposit there before the Cayman Islands' insolvency proceedings commenced. The court denied recognition on the basis that the foreign proceedings were not pending in a country where the debtors had either their "COMI" or an establishment. The court noted that the applicants were, nevertheless, not left without a remedy upon non-recognition. It referred to the equivalent of art. 29 of the Model Law [11 U.S.C. § 1529], which mandated cooperation among and coordination of foreign and domestic proceedings taking place concurrently concerning the same debtor pursuant to arts. 25-27 of the Model Law [11 U.S.C. §§ 1525-1527].

3. *Re Betcorp Ltd (in liquidation)*[4]

At its incorporation in 1998, Betcorp operated only in Australia, but later expanded its operations to include the provision of online gambling services in the United States. This core part of its business was ended with the passage of the Unlawful Internet Gambling Enforcement Act (2006), which prohibited online gambling in the United States. The company halted its operations in the United States and ceased all operations shortly thereafter. At a meeting in September 2007, the shareholders voted overwhelmingly to appoint liquidators and put the company into voluntary winding up. According to the evidence presented to the court, the company was solvent. Following commencement in the United States of a lawsuit against Betcorp for copyright infringement, the Australian insolvency representatives sought recognition of the Australian proceeding in the United States with a view to resolving the copyright claims in the winding up proceeding. The United States' court found that the Australian proceeding satisfied the requirements of the United States' provision equivalent to art. 2 (a) of the Model Law [11 USC § 101 (23)] and recognized it as a foreign main proceeding.

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[4] 400 B.R. 266 at 284 (Bankr. D. Nev 2009) [CLOUT case no. 927].

4. ***Re British American Insurance Company Limited***[5]

The debtor was an insurance company chartered under the laws of the Bahamas, with branch operations in many other countries, including Saint Vincent and the Grenadines. Proceedings were commenced in both the Bahamas and Saint Vincent and the Grenadines ("SVG"), with insolvency representatives appointed in both of these proceedings. Both insolvency representatives applied for recognition of the each of the proceedings as a foreign main proceeding or, in the alternative, as a foreign non-main proceeding, relief under the provisions equivalent to arts. 20 and 21 of the Model Law[11 USC § 1520 and 1521], as well as coordination of multiple foreign proceedings under the equivalent of art. 30 [11 USC § 1530]. The difficult issue of the case concerned whether the Bahamian proceeding constituted either a main or non-main proceeding pursuant to the equivalent of art. 2, subpara. (b) and (c) of the Model Law [11 USC § 1502 (4)-(5)]. The court looked at management of the debtor's affairs (conducted from a wholly owned subsidiary in Trinidad and Tobago); the location of the debtor's primary assets and the majority of its creditors (neither or which was in the Bahamas); and perception of third parties. On the evidence, the court found that the debtor's COMI was not in the Bahamas.

The court also found that the debtor had no establishment in the Bahamas pursuant to the equivalent of art. 2, subparas. (c), (f) of the Model Law [11 USC § 1502 (2), (5)] and declined to recognize the Bahamian proceeding as a foreign non-main proceeding. It was undisputed that at the time of the filing of the recognition application, the debtor had no business operation in the Bahamas other than the foreign representative's activities pursuant to his appointment. With respect to SVG, evidence demonstrated that the debtor owned property in SVG, where it conducted business; retained employees at its SVG branch, performed insurance business activity; maintained an account in SVG relating to its insurance business in that country; and had existing policyholders. The court concluded that the debtor had an establishment in SVG and the SVG proceeding was thus a foreign non-main proceeding. The court denied relief under the equivalent of art. 30, on the basis that it had only recognized a single foreign non-main proceeding.

5. ***In re Condor Insurance Limited, Fogarty v Petroquest Resources Inc.***[6]

Following recognition in the United States of America of insolvency proceedings commenced under Nevis law against a Nevis insurance company, the Nevis representatives of the debtor brought an action under Nevis law to avoid allegedly fraudulent transfers made to another company. The defendant sought to dismiss the action on the grounds that the United States equivalent of arts. 21 and 23 of the Model Law [11 USC § 1521, 1523] did not authorize the foreign representatives of a foreign main or foreign non-main proceeding to commence avoidance actions, despite recognition of that proceeding, but rather permitted a foreign representative to bring such an action only following commencement of a liquidation or reorganization proceeding under United States' law. The United States' court dismissed the complaint, a decision that was affirmed on the first appeal. The foreign representatives further appealed, arguing that arts. 21 and 23 limited the powers of a foreign representative to bring an avoidance action under United States

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[5] 425 BR 884 (2010) [CLOUT case no. 1005].

[6] 601 F.3d 319, 2010 WL 961613 (5th Cir. 2010) [CLOUT cases no. 928 and 1006].

law, but not under foreign avoidance laws. The second appeal reversed the decision on the first appeal. The appeal court found that the United States' equivalents of arts. 21 and 23 only expressly precluded, in a Chapter 15 case, specified avoidance actions under United States' law, absent an application for commencement of insolvency proceedings under other chapters of the Bankruptcy Code (e.g. chapters 7 or 11). Because neither section precluded a foreign representative from bringing an avoidance action under foreign law, the court concluded that it did not necessarily follow that Congress intended to deny the foreign representative the use of powers of avoidance under applicable foreign law. After looking at the language of the statute and its legislative history, the court considered practical concerns. Absent its decision in the case, the Nevis representatives in the Nevis proceeding would have been unable to avoid the transactions at issue. Foreign insurance companies, like the debtor in the case, were ineligible for relief in a Chapter 7 or 11 proceeding under United States' insolvency law. As a result, the ordinary course of action — a Chapter 7 or 11 proceeding commenced by a foreign representative following recognition of the foreign proceeding — was not available. The court thought it unlikely that Congress had unwittingly facilitated tactics permitting debtors to hide assets in the United States out of the reach of the foreign jurisdiction, given that some defendants may defy the jurisdictional reaches of the court in which the foreign proceeding was pending. As a result, the court concluded that Congress did not intend to restrict the powers of the United States court to apply the law of the country where the main proceeding pended, and thus that nothing in Chapter 15 precluded such a result.

6. *In re Ephedra Products Liability Litigation*[7]

The Canadian insolvency representative applied to the United States' court, in which multi-district product liability litigation was pending against the same debtor, for recognition of the Canadian insolvency proceeding as a foreign main proceeding. After recognition of that proceeding as a foreign main proceeding by the United States' court, the Canadian court entered an order approving a claims resolution procedure for streamlined assessment and valuation of all product liability claims against the debtor. The Canadian insolvency representative then applied to the United States' court for recognition and enforcement of that order. Objections were raised on the grounds that the claims resolution procedure was manifestly contrary to the public policy of the United States pursuant to the United States provision equivalent to art. 6 of the Model Law [11 USC § 1506], in that it would deprive the creditors of due process and trial by jury. The court agreed that the claims resolution procedure, which provided for mandatory mediation and, if the mediation resulted in a plan approved by specified majorities of creditors, for the estimation and liquidation of the remaining claims, might be read as permitting the claims officer to refuse to receive evidence and to liquidate claims without granting interested parties an opportunity to be heard. The claims resolution procedure was amended to require such an opportunity to be provided and, based on that amendment, the court concluded that due process would be satisfied with that claims resolution process. As for the contention that the denial of jury trial rights was manifestly contrary to the public policy of the United States, the court held that neither the United States' provision equivalent to art. 6 nor any other law prevented a court from recognizing

[7] 349 B.R. 333 (Bankr. S.D.N.Y. 2006); [CLOUT case no. 765].

and enforcing a foreign insolvency procedure for liquidating claims simply because the procedure did not include a right to jury. In reaching that conclusion, the court looked both to the UNCITRAL Guide to Enactment of the Model Law and to United States' case law on the enforcement of foreign judgments, both of which stressed that a finding that recognition would be "manifestly contrary" to national public policy considerations must be justified by exceptional circumstances.

7. ***Re Eurofood IFSC Ltd***[8]

A wholly owned subsidiary of Parmalat, which was incorporated in Italy and operated through subsidiary companies in more than 30 countries, Eurofood was incorporated and registered in Ireland with the principal objective of providing financing facilities for companies in the Parmalat group. In December 2003, certain insolvency proceedings were commenced with respect to Parmalat in Italy. In January 2004, a creditor applied to the Irish courts for the commencement of insolvency proceedings against Eurofood. In February 2004, the Italian court ruled that insolvency proceedings should be commenced with respect to Eurofood in Italy, declaring it to be insolvent and determining that the centre of its main interests was in Italy. In March 2004, the Irish court ruled that, according to Irish law, the insolvency proceedings regarding Eurofood had commenced in Ireland on the date on which the application for commencement was submitted, namely 27 January 2004 and that those proceedings were main proceedings. The Italian insolvency representative appealed the Irish decision, the Irish appeal court then referring certain questions to the European Court of Justice (ECJ) for a preliminary ruling. With respect to the question concerning the determination of the COMI of a debtor, the ECJ ruled that where a debtor is a subsidiary company with its registered office and that of its parent company in two different member states, the presumption laid down in article 3 (1) of the EC Insolvency Regulation, that the COMI of that subsidiary is situated in the member state where its registered office is situated, can be rebutted only if factors that are both objective and ascertainable by third parties indicate that a different situation exists. This could be the case particularly where a company does not carry out any business in the territory of the member state in which its registered office is situated. By contrast, where a company carries on its business in the territory of the member state where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another member state is not enough to rebut the presumption laid down by the regulation.

8. ***In re Fairfield Sentry Limited, et al***[9]

The debtor companies were incorporated and maintained their registered offices in the British Virgin Islands (BVI) as vehicles for mainly non-United States persons and certain tax exempt United States entities to invest with Bernard Madoff Investment Securities LLC. The debtors had ceased doing business some months before their shareholders and creditors applied, in the BVI in 2009, for the appointment of liquidators to each of them. In 2010, recognition of the proceedings was sought in the United States as either main or non-main proceedings. The United

[8] [2006] Ch 508 (ECJ).

[9] Case no. 10-13164, United States Bankruptcy Court, Southern District of New York, 22 July 2010.

States' court found that the debtors' COMI was in the BVI, since that was the location of the debtors' nerve centre — the place where the debtors maintained their headquarters and directed, controlled and coordinated the corporation's activities. In looking at the time at which the COMI assessment should be made, the court noted that even courts that had focussed on the time of the application for recognition (*In re Ran, Betcorp and British American Insurance Company*) "would likely support a totality of circumstances approach where appropriate." The court went on to say that the emerging jurisprudence does not preclude looking into a broader temporal COMI assessment where there may have been "an opportunistic shift to establish COMI (i.e. insider exploitation, untoward manipulation, overt thwarting of third party expectations)." The court noted that where a debtor had ceased trading, the debtor's COMI might become lodged with the insolvency representative and that that fact, together with the location of the registered office, supported the debtors' COMI being located in the BVI.

9. ***In re Gold & Honey, Ltd***[10]

Around March 2008, a receivership proceeding was commenced in Israel and in late July 2008, reorganization proceedings were commenced in the United States, in which the court ordered that all assets of the debtor were subject to its jurisdiction. Notwithstanding the order of the United States' court, the Israeli court in which the Israeli proceeding was pending determined that it had jurisdiction and could proceed to liquidate the assets in Israel despite the proceedings in the United States and the application of the worldwide stay. In January 2009, the Israeli insolvency representatives applied for recognition of the Israeli proceedings in New York in order to transfer assets located in New York to Israel for application in the Israeli proceeding. The United States court denied recognition finding: (a) that the Israeli representatives had not met the burden of showing that the Israeli proceeding was a collective proceeding and that the debtor's assets and affairs were subject to the control or supervision of a foreign court pursuant to the definition in the equivalent of art. 2, subpara. (a) of the Model Law [11 U.S.C. § 101 (23)], (b) that the Israeli representatives had been appointed in violation of the automatic stay, and (c) that the threshold required to establish the public policy exception in the equivalent of art. 6 of the Model Law [11 U.S.C. § 1506)] had been met.

10. ***Re HIH Casualty and General Insurance Ltd;***[11] ***McGrath v Riddell***[12]

The HIH group was a large enterprise group involved in various insurance and reinsurance businesses in Australia, England and the United States, among other countries. Until its collapse in March 2001, the HIH group was the second largest insurance group in Australia. The case concerned four members of the group, each of which was involved to a greater or lesser extent in insurance and reinsurance business in the United Kingdom, conducted in various ways, including through branches or locally incorporated companies. Although the majority of assets of the companies were located in Australia, there were significant assets in England. Insolvency proceedings were commenced in Australia and in England. The English insolvency representatives sought direction from the English courts as to how the

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[10] 410 B.R. 357 (Bankr. E.D.N.Y. 2009); [CLOUT case no. 1008].

[11] [2005] EWHC 2125; First appeal [2006] EWCA Civ 732.

[12] Second appeal [2008] UKHL 21.

English assets of the debtors were to be dealt with given the differences between the Australian and English insolvency law and priority schemes. Australian insolvency law gave priority to insurance creditors with respect to reinsurance recoveries, while English law did not recognize such a priority and required *pari passu* distribution to all creditors. The Australian insolvency representatives obtained a letter of request from the Australian court seeking assistance from the English court (the case did not involve the legislation enacting the Model Law in either Australia or Great Britain). The Australian insolvency representatives requested that any assets collected in England be remitted to the Australian court for distribution in accordance with Australian insolvency law and priority schemes. At first instance, the English court ruled that it could not remit the English assets to Australia because the priority and distribution order was different to that applicable in England. On appeal, the court ruled that while it had the power to remit the assets, it declined to do so because it would prejudice the interests of the non-reinsurance creditors. On a second appeal, the court ruled that there was the power to remit the assets and that it should be exercised in this case. Different views were expressed by the court as to the source of the power, but the judges were unanimous on the question of remitting the funds (see above, para. 147).

11. ***Lavie v Ran (United States District Court)***;[13] ***In re Yuval Ran (United States Bankruptcy Court)***;[14] ***Lavie v Ran (United States District Court)***;[15] ***In the Matter of Yuval Ran, Lavie v Ran (United States Court of Appeals for the Fifth Circuit)***[16]

The debtor had been the Chief Executive Officer of an Israeli company. After that company encountered financial difficulties, the debtor left Israel in 1997 and moved to Texas. Involuntary insolvency proceedings were commenced against the debtor in Israel in 1997. The Israeli court declared the debtor insolvent, appointed an insolvency representative and ordered the liquidation of the debtor's estate. In 2006, the Israeli representative applied in the United States for recognition of the Israeli proceeding as either foreign main or non-main proceeding under Chapter 15. The United States' court denied the application and the Israeli representative appealed. The appeal court remanded the case for further factual findings. On remand, the court again declined to recognize the foreign proceeding as either a foreign main or foreign non-main proceeding. Following a further appeal, the refusal of recognition was affirmed. The decision not to recognize the debtor's COMI as located in Israel was based on the facts that the debtor (a) had left Israel nearly a decade before the application for recognition was made, (b) had established employment and residence in the United States, (c) maintained his finances exclusively in the United States and (d) indicated no intention of returning to Israel. With respect to recognition as a non-main proceeding, the decision was based on the debtor not having an establishment within the definition in art. 2 (c) of the Model Law [11 USC § 1502 (5)]. The foreign representative's argument that the foreign proceedings itself constituted an activity that would satisfy that definition was rejected.

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[13] 384 BR 469 (2008).
[14] 390 BR 257 (2008).
[15] 406 BR 277 (2009) [CLOUT case no. 929].
[16] 607 F. 3d 1017 (5th Cir. 2010).

12. ***In re Metcalfe and Mansfield Alternative Investments, et al***[17]

In March 2008, insolvency proceedings commenced against the debtors in Canada to restructure all outstanding third-party (non-bank sponsored) asset backed commercial paper obligations of the debtors. In June 2008, the Canadian court entered an Amended Sanction Order and Plan Implementation Order, after the plan has been approved by 96 per cent in number and value of all participating note holders. The order was upheld on appeal in August 2008 and became effective in January 2009. Interim cash distributions were made to note holders in January and May 2009, with final cash distributions authorized by the Canadian court. In November 2009, the Canadian insolvency representative applied under Chapter 15 for recognition of the Canadian proceedings in the United States as foreign main proceedings and for an order enforcing the Canadian orders for post-recognition relief in the United States. The Canadian proceedings were recognized as foreign main proceedings. With respect to the enforcement of the Canadian post-recognition relief, the Canadian orders included a third-party non-debtor release and injunction that was broader than might have been allowed under United States' law. The court considered the United States' provision equivalent to art. 7 of the Model Law [11 USC § 1507], which required consideration of a list of factors in determining whether to grant additional assistance to a foreign representative following recognition of a foreign proceeding. The court noted that post-recognition relief under that provision was largely discretionary and turned on subjective factors that embodied principles of comity, making reference to the decision in *In re Bear Stearns*. The court also noted that the provision equivalent to art. 6 of the Model Law [11 USC § 1506] placed a limitation on recognition if to do so would be manifestly contrary to the policy of the United States. Principles of comity did not, noted the court, require that the relief available in the United States and the foreign proceedings be identical, but the key determination was whether the procedures in Canada met the fundamental standards of fairness of the United States. The United States' court found that the Canadian orders fulfilled those fundamental standards of fairness and granted the Canadian representatives' request for enforcement of the post-recognition relief.

13. ***Rubin v Eurofinance SA***[18]

The representatives of insolvency proceedings commenced in the United States in 2007 against The Consumers Trust (TCT) sought recognition of those proceedings in England under the Cross-Border Insolvency Regulations 2006, which give effect to the Model Law in Great Britain, and enforcement of a judgement of the United States' court holding Eurofinance liable for the debts of TCT. TCT was a business trust, recognized as a legal entity under United States' law. In 2009, the English court recognized the foreign insolvency proceedings as main proceedings, but dismissed the application for enforcement of the judgement. In recognizing the insolvency proceedings, the court found that notwithstanding that English law did not recognize such a trust as a legal entity, the provisions of the Model Law, such as the stay under art. 20, could in practice apply to the debtor and it would be perverse having regard to the international origins of the Model Law, to adopt a parochial

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[17] 421 B.R. 683 (Bankr. S.D.N.Y. January 2010); [CLOUT case no. 1007].

[18] [2009] EWHC 2129 ; on appeal [2010] EWCA CIV 895.

interpretation of the term "debtor". The court also found that the foreign representatives were representatives of the proceedings which had led to the judgement against Eurofinance and that those proceedings were an integral part of the insolvency proceedings against TCT. With respect to the enforcement of the judgement, the court held that the judgement was *in personam* not *in rem* and that all the court could do was to authorize the foreign representative to bring an action on the judgement or to bring a fresh claim in England. Permitting the foreign representative to enforce the judgement of the United States' court would not constitute "cooperation" within the meaning of art. 27 of the Model Law.

On appeal against the dismissal of the application for enforcement, the court allowed the appeal, concluding that ordinary rules for enforcing or not enforcing foreign judgements in personam did not apply to insolvency proceedings and that the mechanisms available in insolvency proceedings to bring actions against third parties for the collective benefit of all creditors were integral to the collective nature of insolvency and not just merely incidental procedural matters. The orders against Eurofinance were therefore part of the insolvency proceedings and for the purpose of the collective enforcement regime of the insolvency proceedings. As such, the orders were not subject to the ordinary rules of private international law preventing the enforcement of judgements because the defendants were not subject to the jurisdiction of the foreign court. The court recognized the proceedings which had led to the judgement against Eurofinance as foreign main proceedings. The court found that assistance to foreign proceedings extended, under common law, to enforcing the orders made by the United States' court; with respect to art. 27 of the Model Law, the court noted that no mention was made of enforcement, and while "assistance to the maximum extent possible" would surely include enforcement, no conclusion on that point was required in this case.

14. *Re SPhinX Ltd*[19]

The debtors were hedge funds registered and incorporated under the laws of the Cayman Islands. They had an investment relationship with a broker of commodities and futures contracts that had commenced an insolvency proceeding in the United States, which involved the debtors in an avoidance action. Agreement was reached to settle that action, but before the settlement agreement could be approved, an insolvency proceeding was commenced in the Cayman Islands against the debtors. The debtors' insolvency representatives sought recognition of the foreign proceedings as "foreign main proceedings" in the same United States' court in which approval of the settlement agreement was pending. The court recognized those proceedings as foreign non-main proceedings rather than as "foreign main proceedings." It based this finding, in part, on the fact that the debtors did not conduct a trade or business in the Cayman Islands and had no employees, no physical offices and no assets in the Cayman Islands other than the corporate books and records required by Cayman law to be present there. The court also found pragmatic considerations to support its conclusion that the debtors' centre of main interests ("COMI") lay outside the Cayman Islands — i.e., that the lack of assets in the Caymans meant that the insolvency representatives would have to rely on the assistance of other courts to make distributions to creditors. Finally, the court

[19] 371 B.R. 10 (Bankr. S.D.N.Y July 2007) [CLOUT case no. 768].

emphasized that improper purposes had motivated the commencement of the Cayman proceedings and the application for recognition, namely seeking, through delay, to overturn the [SPhinX] settlement of the avoidance action without addressing the merits. The foreign representatives appealed the recognition decision. On appeal, the court affirmed the lower court's decision.

15. ***Stanford International Bank Ltd***[20]

In February 2009, the United States Securities Exchange Commission (SEC) filed a complaint against the owner of a group of companies ("Mr. X"), and companies belonging to Mr. X, including company "Y", alleging among other things, securities fraud. On the same day, a United States' court appointed a receiver over the assets of the group of companies belonging to Mr. X, including company Y, and of Mr. X himself. Mr. X was a national of both the United States and Antigua and Barbuda and company Y was incorporated and had its registered office in Antigua and Barbuda. In April 2009, the Antiguan court made a winding-up order and appointed two liquidators for company Y. Both the United States' receiver and the Antiguan liquidators applied for recognition in England under the Cross-Border Insolvency Regulations (2006)(CBIR), which give effect to the Model Law in Great Britain. Each of them claimed that the proceedings in which they had been respectively appointed were "foreign main proceedings" pursuant to the CBIR. The English court recognized the Antiguan proceeding as a foreign main proceeding, finding that it satisfied all aspects of the definition of "foreign proceeding" and that, following the test in Eurofood, the presumption that the COMI of company Y was at the place of its registered office, i.e. Antigua, had not been rebutted. With respect to the United States' proceeding, the court took the view that the SEC receivership was not a collective proceeding pursuant to an insolvency law (and thus not a foreign proceeding that could be recognized), because the intervention by the SEC was to "prevent a massive ongoing fraud" and thus prevent detriment to investors rather than to reorganize the debtor or to realize assets for the benefit of all creditors, as required by art. 2 (a) of the Model Law. That decision was upheld on appeal.

16. ***In re Tricontinental Exchange Ltd***[21]

The debtors were insurance companies registered under the laws of St. Vincent and the Grenadines ("SVG") and subject to insolvency proceedings in the Eastern Caribbean Supreme Court, High Court of Justice, under the SVG Companies Act. The debtors' only offices were located in St. Vincent, with approximately 20 employees. Although the debtors sold approximately 5,800 insurance policies to holders in the United States and Canada, all business was conducted through the debtors' registered offices in Kingstown, SVG. Premium payments were mailed to addresses in the United States, but bundles of mail from these "drop boxes" were forwarded to the debtors' offices in SVG, where they were endorsed for deposit and sent to bank accounts maintained by the debtors in the United States. The insolvency representatives sought recognition of the SVG proceeding as a foreign main proceeding in the United States under Chapter 15. The United States court recognized the SVG proceeding as a foreign main proceeding, on the basis that the

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[20] [2009] EWHC 1441 (Ch) [CLOUT case no. 923], on appeal [2010] EWCA Civ 137 [CLOUT case no. 1003].

[21] 349 B.R. 627 (Bankr. E.D. Cal. 2006) [CLOUT case no. 766].

debtors' centre of main interests was located in SVG, where they had their registered offices. The court further held that the debtors, as foreign insurance companies, would have been ineligible to apply for insolvency proceedings under United States law, but would have been eligible for relief under for Chapter 15.

17. Re Tucker, Aero Inventory (UK) Ltd v Aero Inventory (UK) Limited[22]
Re Tucker, Aero Inventory (UK) v Aero Inventory (UK) Limited (No. 2)[23]

In November 2009, insolvency proceedings commenced in the High Court of England and Wales against Aero Inventory and joint insolvency representatives were appointed. Aero Inventory owned and controlled movable aeronautical assets in Australia. The day after their appointment, the insolvency representatives applied, under the legislation enacting the UNCITRAL Model Law in Australia (*Cross-Border Insolvency Act 2008 (Cth)*), for recognition of the English proceedings as foreign main proceedings and for interim relief. The interim relief concerned protection of aircraft parts inventory stored at locations in Australia and controlled by Qantas, on the basis that they may be at risk because of a dispute as to the entitlement to the parts. The court granted interim relief under the equivalent of arts. 19 and 21 of the Model Law, preventing any dealing with the property of the debtor adverse to the interests of the joint insolvency representatives and its creditors. At the final hearing (Aero Inventory (No. 2)), the Australian court recognized the English proceedings, finding that the proceedings were foreign main proceedings, (the COMI of the debtor being based upon its registered office in England and there being no evidence sufficient to displace the presumption in art. 16 (3)) and that the representatives were foreign representatives as required by the Model Law. Pursuant to the provision equivalent to art. 21 (1)(e) of the Model Law, the court entrusted the administration and realisation of all of the debtor's assets in Australia to the foreign representatives, ordered that no person could enforce a charge on the property of the debtor and that a pledge or lienholder in possession of the property of the debtor could continue in possession, but could not sell or otherwise enforce the lien or pledge.

18. *Williams v Simpson;*[24] ***Williams v Simpson (No. 5)***[25]

On 9 September 2009, insolvency proceedings commenced against Mr. Simpson (the debtor) in England. The English proceedings commenced on the basis of a debt owed by the debtor to the applying creditor, which stated in its petition that the debtor's COMI was not within a Member State and on the basis that a creditor can apply for commencement of insolvency proceedings in respect of a debtor who has "carried on business in England and Wales". On 10 September 2010, the insolvency representative (Mr. Williams) applied for recognition of the English proceeding in New Zealand, under the legislation enacting the Model Law in New Zealand (*Insolvency (Cross-border) Act 2006*) and sought provisional relief. On 17 September, the provisional relief was granted on certain terms, with additional relief being granted over the following days. The recognition application was heard on 1 October 2010. The court found that while the English proceeding was a foreign

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[22] (2009) 76 ACSR 19; (2009) FCA 1354.
[23] (2010) 77 ACSR 510; (2009) FCA 1481 [CLOUT case no. 922].
[24] High Court of New Zealand, Hamilton, 17 September 2010.
[25] High Court of New Zealand, Hamilton, 12 October 2010.

proceeding as required by the Model Law, it was neither a foreign main proceeding, since the debtor's habitual residence was in New Zealand, nor a foreign non-main proceeding as the test for an establishment under the Model Law was not met. The court found that while under English law the debtor was subject to the insolvency laws of that country on the basis that he was still in the process of winding up business activities there, that was not a reason for holding that, in fact, he had a place of operations there from which he presently carried out the activity required under the definition of an establishment. Accordingly, the court declined to recognize the foreign proceedings. The court was, however, able to grant assistance in aid of the English proceedings under section 8 of the New Zealand law, a provision that could be applied in the rare circumstances in which the provisions enacting the Model Law were not available. That assistance was to enable the insolvency representative to collect and realize assets owned by the debtor in New Zealand, subject to any further directions that might be required in relation to the distribution of any proceeds of sale.