

KEY POINTS

- In explaining centre of main interests ('COMI') within the Cross-Border Insolvency Regulations 2006 ('CBIR'), the court in *Re Stanford International Bank* over-emphasised third-party ascertainability due to an apparent lack of appreciation of the different functions performed by the COMI concept under the CBIR and the EC Insolvency Regulation.
- In cases of fraud, the court's approach to the COMI presumption risks the court concreting the fraudsters' house of cards.
- The decision also unnecessarily jars with case-law under Chapter 15 of the US Bankruptcy Code.

Author Look Chan Ho

Cross-border fraud and cross-border insolvency: proving COMI and seeking recognition under the UK Model Law

Cross-border fraud often leads to knotty cross-border insolvency problems which test the efficacy of contemporary cross-border insolvency regimes. So it was in the 20th century (eg Maxwell and BCCI); so it is in the 21st century (eg Madoff and Stanford). (Sir Allen Stanford denies all allegations of wrongdoing).

The recent case of *Re Stanford International Bank* [2009] EWHC 1441 (Ch) involves three out of the four English cross-border insolvency regimes, namely, Council Regulation (EC) 1346/2000 on insolvency proceedings ('EC Insolvency Regulation'), CBIR, and the common law. It is also the first major contested case on the CBIR.

This commentary reviews and evaluates how the *Stanford* judgment fares in terms of principle and authority.

THE FACTS AND DECISION

For present purposes, the key entity is Stanford International Bank Ltd ('SIB'), a company incorporated in Antigua and Barbuda and having its registered office there.

On 16 February 2009 the US Securities Exchange Commission ('SEC') filed a complaint against, among others, Sir Allen and SIB, alleging, among other causes of action, securities fraud. On the same day the Texas District Court made an order appointing a receiver ('Receiver') over the assets worldwide of SIB and Sir Allen, and all entities owned or controlled by them.

There were parallel actions by the Antigua regulatory authorities against SIB. On 19 February 2009, the Financial Services Regulatory Commission of Antigua

Look Chan Ho examines and dissects the decision in *Re Stanford International Bank* which can fairly be described as a judicial inauguration of the Cross-Border Insolvency Regulations 2006 ('CBIR'). It will be shown that, whilst commendable in some areas, the key elements of the decision were inadequately reasoned.

and Barbuda ('FSRC') appointed receivers-managers of SIB. On 26 February 2009, the Antiguan court made an order appointing the receivers-managers as Antiguan receivers for SIB. On 24 March 2009, the FSRC presented a winding-up petition against SIB. On 15 April 2009, the Antiguan court made a winding-up order and appointed the Antiguan receivers as liquidators of SIB ('Liquidators').

Due to disagreement between the Receiver and the Liquidators, they both applied for recognition under the CBIR in order to control SIB's assets in the UK. Each of them argued that the proceedings in which they had been respectively appointed were 'foreign main proceedings' for the purposes of the CBIR.

In favour of the Liquidators, the court held as follows. The US receivership was not a 'foreign proceeding' and the Receiver was not a 'foreign representative' within the CBIR, whereas the Antiguan liquidation was a foreign proceeding and SIB's centre of main interests ('COMI') was in Antigua. Accordingly, the Antiguan liquidation was a foreign main proceeding.

Nevertheless, the court recognised the Receiver as a matter of common law, except in so far as his appointment dealt with the assets of SIB.

CONCEPTUAL APPARATUS

Before evaluating the court's reasoning, it may be helpful to consider some key concepts

under the CBIR which enacted almost verbatim the UNCITRAL Model Law on Cross-Border Insolvency ('Model Law').

In order to be granted assistance under the CBIR, the foreign insolvency process has to be a 'foreign proceeding' within the CBIR, namely '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 reorganisation or liquidation' (art 2(i) of Sch 1 to the CBIR).

The operation of most of the CBIR provisions depends on whether one is concerned with a foreign main proceeding or a foreign non-main proceeding. A 'foreign main proceeding' is a foreign proceeding taking place in the State where the debtor has its COMI (art 2(g) of Sch 1 to the CBIR); a 'foreign non-main proceeding' is a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment – that is, any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services (arts 2(e) and (h) of Sch 1 to the CBIR). Although COMI is not defined, there is a presumption that the debtor's registered office, or habitual residence in the case of an individual, is the debtor's COMI (art 16(3) of Sch 1 to the CBIR).

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These concepts appear almost verbatim in Chapter 15 of the US Bankruptcy Code.

It is with this conceptual background that we now turn to the evaluation of the reasoning in *Stanford*.

SIB'S COMI

The court's reasoning on SIB's COMI is most thought-provoking.

Since SIB's registered office was in Antigua, it was presumed in the absence of proof to the contrary that its COMI was in Antigua. According to the court, the presumption could be rebutted only by factors that were objective and ascertainable by third parties, namely factors in the public domain which third parties would learn in the ordinary course of business with SIB. If the presumption of SIB's COMI in Antigua was to be rebutted, the burden lay on the Receiver. After reviewing the facts, the court concluded that the Receiver had not rebutted the COMI presumption.

The court based its reasoning on the decision of the European Court of Justice ('ECJ') in *Re Eurofood IFSC* [2006] 1 Ch 508 which held that, for the purposes of the EC Insolvency Regulation, COMI must be identified by reference to criteria that were both objective and ascertainable by third parties in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open insolvency proceedings. The court felt able to import the *Eurofood* reasoning into the CBIR because it figured that the intention of the framers of the Model Law was that the COMI concept in the Model Law would bear the same meaning as in the EC Insolvency Regulation (*Stanford* at [45] and [46]). Reliance was placed on paras 19 and 31 of the Guide to Enactment of the Model Law which show the origin of the COMI concept.

Prior to the present case, the learned judge had favoured the head office functions test to determine the COMI location (eg *Re Lennox Holdings* [2009] BCC 155). In adopting the *Eurofood* reasoning here, the learned judge valiantly admitted that his Lordship's previous judgments on the same issue were mistaken. Accordingly '[p]re-*Eurofood* decisions by English courts should no longer be followed in this respect' (*Stanford* at [61]).

Assuming the court's view on COMI was correct for the purposes of the EC Insolvency Regulation, this commentator is not convinced that the court was correct to say 'the framers of the Model Law envisaged that the interpretation of COMI in the EC Regulation ... would be equally applicable to COMI in the Model Law' (*Stanford* at [46]). There are a few reasons for doubting the court's conclusion.

To begin with, the respective references to COMI in the EC Insolvency Regulation and the Model Law have their origin in the EU Convention on Insolvency Proceedings. For that reason, one would expect courts interpreting the Model Law to regard as persuasive authority case-law on the meaning of COMI under the EC Insolvency Regulation. But it does not follow from this shared historical origin that the meaning of COMI under these two instruments is identical. Especially given that COMI is not a defined term and is thus capable of a spectrum of interpretation, its true meaning is to be determined by reference to the purpose and context of the legislation in question. The COMI spectrum must be refracted and administered through the prism of legislative purpose. However, the court appeared to have paid no regard to the different functions of the EC Insolvency Regulation and the Model Law.

Once one goes beyond history, one finds the COMI concept performing rather different functions in each piece of legislation. Under the EC Insolvency Regulation, the COMI concept controls which jurisdiction may open insolvency proceedings; whereas under the Model Law, the COMI concept merely determines the nature of the foreign insolvency proceedings for recognition purposes. The Model Law does not determine the jurisdiction to open insolvency proceedings at all.

That the COMI concept has different functional significance under the EC Insolvency Regulation and the Model Law ought to inform three matters, namely the weight of the COMI presumption, comparative analysis of the interpretation of the Model Law, and the ingredients of COMI.

The COMI presumption

The COMI presumption under the EC Insolvency Regulation helps to simplify the application of the COMI concept and reduce the risk of different conclusions being reached by different courts: see M Virgós and F Garcimartín, 'The European Insolvency Regulation: Law and Practice' (*Kluwer International*, 2004), p 38. In short, it redounds to certainty.

When one is concerned with the monopoly of jurisdiction to open insolvency proceedings within the European Union with the attendant choice of law consequences, certainty of jurisdiction becomes paramount for many reasons. For example, creditors need to be able to assess with reasonable certainty the insolvency risks associated with a debtor before extending credit. Similarly, before acceding to the creditors' request for a warranty that the debtor's COMI will be maintained in a particular jurisdiction for the purposes of the EC Insolvency Regulation, the debtor's directors need to be able to assess with reasonable certainty the location of COMI.

Furthermore, the ECJ jurisprudence on jurisdiction issues generally prizes rigid certainty above everything else, eg *Erich Gasser v MISAT* [2005] 1 QB 1; *Owusu v Jackson* [2005] 1 QB 801 in relation to jurisdictional certainty required under Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Judgments Regulation'). The ECJ in *Owusu v Jackson* insisted that 'principles of legal certainty and uniform application of the rules of jurisdiction were decisive, and ... outweighed any 'negative consequences' both practical and procedural': *Catalyst Investment Group v Lewinsohn* [2009] EWHC 1964 (Ch) at [65].

In these circumstances, it is not at all surprising that the ECJ gave the COMI presumption a significant weight.

But one should not assume that the rationale for attaching a particular weight to the COMI presumption under the EC Insolvency Regulation transposes itself seamlessly to the Model Law setting. While certainty is important, the kind of 'slavish' certainty favoured in the ECJ jurisprudence is not and should not be the goal of the Model

Law. Indeed, the fabric of the Model Law and CBIR tolerates and enshrines a degree of *prime facie* uncertainty with regard to the location of COMI for at least three reasons.

First, when assessing the impact of insolvency before entering into transactions, creditors frequently are concerned with the enforceability of security interests and set-off, plus the risks of insolvency clawback. Hence it is important to predict with certainty the jurisdiction in which insolvency proceedings may be opened so that relevant local advice may be sought *ex ante* (in advance). But creditors are usually much less concerned with the assistance local insolvency proceedings may obtain abroad, the realm of the Model Law.

Secondly, foreign main proceedings (wherever located) are entitled to essentially the same recognition and assistance under the Model Law. If creditors need to predict the assistance to be granted under the Model Law, it may be irrelevant *ex ante* where the debtor's COMI is located because provided the debtor is subject to foreign main proceedings somewhere, the same assistance may be obtained under the Model Law. For example, if creditors are concerned with the risks of transaction clawback pursuant to assistance granted under art 23 of the Model Law, it may not matter where the debtor's foreign main proceedings are opened. The present case is another example. The relief sought was the transfer of assets located in the UK. The same relief would be available regardless of whether SIB's COMI was in the US or Antigua.

Thirdly, provided a foreign proceeding may be recognised as either a main or a non-main proceeding under the Model Law, there is plenty of scope for the recognising court to tailor its relief according to the circumstances of the case.

Therefore, instead of being shackled by the COMI presumption, the recognising court should have the liberty of sussing out the truth, the true location of the debtor's COMI. Where there is evidence showing that the COMI presumption may be factually incorrect, the recognising court should not let an insolvency representative win or lose by dint of a mere presumption. In the Model Law setting, a robust insistence on the COMI presumption under the EC Insolvency Regulation is to

be replaced with a robust assessment of all COMI evidence. It is submitted that the US court's approach under Chapter 15 is correct:

'[T]he registered office (or place of incorporation) is evidence that is probative of, and that may in the absence of other evidence be accepted as a proxy for, [COMI]. The registered office, however, does not otherwise have special evidentiary value and does not shift the risk of non-persuasion, ie the burden of proof, away from the foreign representative seeking recognition as a main proceeding.

Thus, if the foreign proceeding is not in the country of the registered office, then the foreign representative has the burden of proof on the question of [COMI]. Correlatively, if the foreign proceeding is in the country of the registered office, and if there is evidence that the [COMI] might be elsewhere, then the foreign representative must prove [that the COMI] is in the same country as the registered office.

It follows that the burden of proof as to the [COMI] is never on the party opposing "main" status and that such an opponent has only a burden of going forward to adduce some evidence inconsistent with the registered office warranting a conclusion of "main" status': *In re Tri-Continental Exchange*, 349 BR 627, 635 (Bankr ED Cal 2006).

Comparative analysis

Because the court in the present case seemingly failed to appreciate the different functional significance of the COMI concept under the EC Insolvency Regulation and the Model Law, it also seemingly failed to appreciate the desired harmonisation of the interpretation of the Model Law in different jurisdictions. The court seems to have disregarded art 8 of Sch 1 to the CBIR which provides that in the interpretation of the CBIR, 'regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith'. The importance of art 8 when interpreting the CBIR is shown in *Rubin v Eurofinance* [2009] EWHC 2129 (Ch) at [40].

Had the learned judge given art 8 a proper consideration, he probably would not have felt chained by the ECJ jurisprudence and thus would not have dismissed the relevance of US case-law summarily. His Lordship offered the following reason for departing from the US approach:

'The USA gave effect to the Model Law as Chapter 15 of the Federal Bankruptcy Code. However, in enacting the equivalent of art 16(3) Congress changed the wording. Instead of providing for the presumption in the absence of "proof" to the contrary, the equivalent provision in Chapter 15 provides for the presumption in the absence of "evidence" to the contrary. The American jurisprudence thus holds that the burden of proof lies on the person who is asserting that particular proceedings are "main proceedings" and that the burden of proof is never on the party opposing that contention: *Re Tri-Continental Exchange Ltd* 349 BR 629, 635, per Judge Klein. In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 374 BR 122 Judge Lifland said that except where there is no contrary evidence the registered office does not have any special evidentiary value. This change in language of the enactment, as it seems to me, may well explain why the jurisprudence of the American courts has diverged from that of the ECJ' (*Stanford* at [65]).

The above passage suggests that the distinction between the US approach and the ECJ approach is due to the specific legislative wording in Chapter 15: The use of the word 'evidence' (as opposed to 'proof') in s 1516(3) has downgraded the otherwise weighty COMI presumption under the Model Law. Put another way, had s 1516(3) used the word 'proof', the US courts would have placed a special weight on the COMI presumption, just as the ECJ did in *Eurofood*.

However, this explanation for the distinction between Chapter 15 and the EC Insolvency Regulation misses the mark and seems to have overlooked the Chapter 15 legislative history.

The rationale behind the COMI presumption in the Model Law is clear: It is

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only to expedite the evidentiary process, but does not hinder a full airing and weighing of the totality of the evidence if the conclusion suggested by the presumption is called into question. Paragraph 122 of the Guide to Enactment of the Model Law makes this clear:

'Article 16 establishes presumptions that allow the court to expedite the evidentiary process; at the same time they do not prevent ... calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party.'

Section 1516 reflects the Model Law rationale:

'The word "proof" in subsection (3) has been changed to 'evidence' to make it clearer using United States terminology that the ultimate burden is on the foreign representative ... The presumption that the place of the registered office is also the center of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy': House of Representatives Report No. 109-31, at 113-114 (2005) (emphasis added).

It is thus lucid that no substantive change was effected by s 1516(3) through the use of the word 'evidence'. It was only to make clearer the existing Model Law position. Hence the consistent position under US case-law:

'[T]he section 1516 presumption exists for the purposes of speed and convenience, and to save stakeholders costs in straightforward cases, but does not tie the hands of a court to examine the facts more closely in any instances where the court regards the issues to be sufficiently material to warrant further inquiry ... Section 1516(c) merely creates a rebuttable presumption and does not shift the burden of proof in supporting a petition for recognition': *In re Basis Yield Alpha Fund (Master)*, 381 BR 37, 52-53 (Bankr SDNY 2008). See also *In re Gold & Honey, Ltd*, 2009 Bankr LEXIS 2238 (Bankr EDNY 21 August 2009).

To reiterate, under both the Model Law and Chapter 15, the COMI presumption is to be accorded a limited weight. The recognising courts are to evaluate the totality of the evidence to determine the true COMI location. There is every reason to think that the position under the CBIR is also the same. The court in the present case thought differently due to insufficient understanding of the US legislative history which led to a premature compartmentalisation of the US case-law.

The ingredients of COMI

Prior to the present case, the English courts' approach was thought to be in favour of the head office functions test to determine the COMI location, namely the place where the debtor's head office functions are carried out. See Gabriel Moss, Ian F Fletcher and Stuart Issacs (eds), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide* (2nd edn OUP, 2009), pp 255-256.

As mentioned above, the court in the present case held that COMI must be identified by reference to factors that are both objective and ascertainable by third parties. What is ascertainable by a third party is what is in the public domain, and what a typical third party would learn as a result of dealing with the company. '[O]ne of the important features is the perception of the objective observer' (*Stanford* at [62] (original emphasis)).

The court offered the following policy justification for its holding: 'One important purpose of COMI is that it provides certainty and foreseeability for creditors of the company at the time they enter into a transaction' (*Stanford* at [62]).

This is entirely consistent with the COMI function under the EC Insolvency Regulation. If the emphasis is on rigid legal certainty, as the ECJ jurisprudence has reminded us, it is entirely logical that objective ascertainability by third parties is crucial; hence the importance of third parties' perception which may or may not reflect the truth.

But as mentioned above, the Model Law is more concerned with ferreting out the truth, the true location of the debtor's COMI. Rigid legal certainty is not the Model Law's prized object; hence the limited weight of the COMI presumption.

In circumstances where the debtor's business was a fraud, the approaches of the EC Insolvency Regulation and the Model Law may produce starkly different outcomes. Under the EC Insolvency Regulation, the smoke and mirrors orchestrated by the fraudster to engineer a public perception that its business is run from the registered office will be almost determinative of the COMI location. A court applying the EC Insolvency Regulation will feel bound by the smoke and mirrors, and this conduces to the jurisdictional certainty under the EU legislation.

However, a court applying the Model Law should not feel bound by the smoke and mirrors and should feel free to determine the true location of the debtor's COMI. In order to determine the location out of which the debtor's fraudulent business is run, the debtor's head office functions become highly relevant. (Note that the place out of which the debtor's fraudulent business is run is not necessarily the same as the location of the debtor's principal. An example is *In re Tri-Continental Exchange* where the debtors' fraudulent business was administered from St. Vincent and the Grenadines, while the debtors' principal was resident in Barbados.)

Taking account of the debtor's head office functions would be in keeping with the US approach where COMI is often seen to be equivalent to the concept of 'principal place of business'. Accordingly, 'such factors as the location of a debtor's headquarters; the location of a debtor's management; the location of its assets and creditors; and the site of the controlling law are important in determining COMI': *In re Tradex Swiss AG*, 384 BR 34, 43 (Bankr D Mass 2008).

As an illustration of the starkly different outcomes under the EC Insolvency Regulation and the Model Law, one may consider *In re Ernst & Young, Inc*, 383 BR 773 (Bankr D Colo 2008). In that case, fraudsters resident in Canada set up a company in Canada and a company in the State of Colorado, USA, as part of their fraudulent scheme to solicit investments. A Colorado resident was responsible for the operation of the Colorado company under the direction of the principal fraudsters in Canada. The Canadian court appointed a receiver over both

companies (similar to the US receivership in the present case). The Canadian receiver then sought recognition under Chapter 15. The US bankruptcy court recognised the Canadian receivership as a foreign main proceeding. In concluding that both companies' COMI was in Canada, the court took into account 'the location of those who manage the debtor' and found that the fraudsters formed their fraudulent organisation and directed the operations of both companies from Canada. In other words, the US bankruptcy court applied the test of head office functions.

However, if *Ernst & Young* were to be decided using the *Eurofood* approach, one would probably conclude that the Colorado company's COMI was in Colorado even though the Colorado location was merely smoke and mirrors. Because the physical location of the Colorado company would be objective and ascertainable by third parties, it would probably be determinative of the COMI location, although 'there was no real business being operated out of [the Colorado company]' (*In re Ernst & Young, Inc*, 383 BR 773, 780 (Bankr D Colo 2008)).

Now this is not to say that the court's conclusion on SIB's COMI was necessarily defective. But the methodology it used seems flawed. Head office functions were discounted simply on grounds of lack of third party ascertainability. Over-emphasising third party ascertainability risks the court being enslaved by the fraudster's smoke and mirrors, and risks the court being used as an instrument of fraud.

FOREIGN PROCEEDING

The court correctly held that in determining whether the US receivership was a foreign proceeding within the CBIR, it is important to consider the actual powers and duties conferred or imposed on the Receiver by the US court order. The label of foreign receivership is hardly determinative of recognition issues (eg *In re Gold & Honey, Ltd*).

The court then concluded that the powers and duties of the Receiver were not sufficient to render the receivership a foreign proceeding (*Stanford* at [84]). But the court's two key reasons are questionable.

First, the court said the recited purpose of the US court order was to prevent dissipation and waste, not to liquidate or reorganise the

debtors' estates. The powers conferred on and duties imposed on the Receiver were to gather in and preserve assets, not to liquidate or distribute them.

It is true that a foreign proceeding within the CBIR has to be 'for the purpose of reorganisation or liquidation'. It seems unlikely that the US receivership was for the purpose of reorganising the debtors. But why was the US receivership not for the purpose of liquidation? Even though the Receiver had no immediate power to make a general distribution, it seems likely that the US receivership would ultimately lead to a distribution of the debtors' assets. In applying for the US receivership, the SEC stated that '[a] receiver is necessary here to marshal, liquidate and distribute assets to the victims of the defendants' [Ponzi] scheme': SEC's memorandum of law in support of motion for ex parte temporary restraining order, preliminary injunction and other emergency relief, available at www.sec.gov/litigation/litrelases/2009/lr20901-memo.pdf (emphasis added). Indeed the court here acknowledged that 'in due course the Receiver might apply to the court to sanction a distribution plan' (*Stanford* at [83]).

In these circumstances, it is strongly arguable that the US receivership was an interim proceeding for the purpose of liquidation. It is curious that the court did not seem to entertain this possibility. In fact, such interim proceedings are not uncommon. For instance, the usual reason for a provisional liquidation is also to prevent asset dissipation, rather than to distribute assets immediately (*Re Namco UK* [2003] EWHC 989 (Ch); [2003] 2 BCLC 78 at [13]).

There is no doubt that a provisional liquidation such as that in *Eurofood* would constitute a foreign proceeding within the CBIR on the basis that it is an interim proceeding.

Indeed, the English provisional liquidation of Madoff Securities (*Re Madoff Securities International Ltd* (No 11527 of 2008) (19 December 2008)) was granted recognition as a foreign main proceeding under Chapter 15 (*In re Madoff Securities International Limited*, Case No 09-12998 (BRL) (Bankr SDNY 11 June 2009)), even though the English provisional liquidation order did not confer on the provisional liquidators a power of distribution.

Examples concerning receivership include *In re Ernst & Young, Inc* (discussed above) and *In re Innua Canada Ltd* 2009 Bankr. LEXIS 995 (Bankr DNJ April 15, 2009). In *Ernst & Young* a Canadian court order appointing a receiver pursuant to section 99 of the Canadian Business Corporations Act, RSA 2000, c B-9, was recognised as a foreign main proceeding under Chapter 15, even though the Canadian order did not confer on the receiver a power of distribution. The Canadian receivership was said to be based on legal doctrines 'arising under the common law of Canada and the United Kingdom relating to insolvency' (*In re Ernst & Young, Inc*, 383 BR 773, 776 (Bankr D Colo 2008)).

In *Innua Canada* a Canadian court order appointing an interim receiver pursuant to s 47 of the Canadian Bankruptcy and Insolvency Act, RSC 1985, c B-3, was recognised as a foreign main proceeding under Chapter 15, even though the Canadian order did not confer on the interim receiver a power of distribution.

Readers might demur that the proceedings in *Eurofood*, *Madoff*, *Ernst & Young* and *Innua Canada* were probably based on the debtors' insolvency. This leads to the second reason given by the court: the underlying cause of action which led to the appointment of the Receiver had nothing to do with insolvency and no allegation of insolvency featured in the SEC's complaint. It is correct that a foreign process which has nothing to do with the insolvency of the debtor should not constitute a foreign proceeding within the CBIR because the foreign process would not be pursuant to 'a law relating to insolvency' (cf *In re Betcorp Limited* 400 BR 266 (Bankr D Nev 2009); LC Ho, 'Recognising an Australian Solvent Liquidation under the UNCITRAL Model Law: *In re Betcorp*' [2009] JIBLR 418). The phrase 'a law relating to insolvency' is to be given a purposive construction (*Rubin v Eurofinance* at [48]). Here SIB was clearly insolvent. The SEC's complaint was that SIB had been a major Ponzi scheme operator for years; see the SEC's complaint dated 16 February 2009, available at www.sec.gov/litigation/complaints/2009/comp20901.pdf. A major Ponzi scheme operator must be by definition most likely insolvent. Insolvency must thus feature at least implicitly in the SEC's complaint.

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Biog box

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It is interesting to compare and contrast the court's approach to the US receivership and the Antiguan liquidation. The Antiguan winding-up order was made following a winding-up petition presented under s 300 of the Antigua and Barbuda International Business Corporations Act, Cap 222 ('IBCA') which does not list insolvency as a ground for winding-up. But the court managed to conclude that the Antiguan winding-up order was partly based on insolvency, not just s 300 of the IBCA, for the following reason:

'[The Antiguan court] made the order because, having considered the evidence, it concluded that it was just and equitable that SIB be wound up. An important part of the evidence was that SIB was insolvent ... [A]t least one of the reasons why [the Antiguan court] made the order that [it] did was that [it] was satisfied that SIB was insolvent' (*Stanford* at [94]).

If the above was sufficient to constitute 'a law relating to insolvency' for CBIR purposes, the US receivership should not be far off. As mentioned above, the evidence before the US court must be at least implicitly premised on SIB's insolvency which led the US court to declare that appointing a receiver was both 'necessary and appropriate in order to prevent waste and dissipation of assets'; see the US receivership order dated 12 March 2009, available at http://www.stanfordfinancialreceivership.com/documents/Amended_Order_Appointing_Receiver.pdf.

It therefore appears that the court's attempted distinction between the US receivership and the Antiguan liquidation – on grounds of insolvency – is only superficially attractive, but lacks substantive coherence. Ultimately the nature of the US receivership is a matter of US law. It is rather surprising that the judgment did not discuss nor call for US expert evidence on this issue.

FOREIGN REPRESENTATIVE

After holding that the US receivership was not a foreign proceeding, the court made this remark: '[S]ince the Receiver has not yet been authorised to administer the liquidation or reorganisation of SIB he is not yet a

"foreign representative" as defined, even if the receivership is a "foreign proceeding" (*Stanford* at [85]).

The above remark is most puzzling. A 'foreign representative' is 'a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding' (art 2(j) of Sch 1 to the CBIR (emphasis added)).

If the US receivership was a foreign proceeding, the Receiver must be a foreign representative in that he was authorised to act as a representative of the US receivership. The US receivership order specifically authorised the Receiver to collect assets of the receivership estate, 'wherever located', and to commence or become party to 'such actions or proceedings in state, federal, or foreign courts that the Receiver deems necessary and advisable' to preserve the receivership estate or carry out the Receiver's mandate: see the US receivership order dated 12 March 2009, available at http://www.stanfordfinancialreceivership.com/documents/Amended_Order_Appointing_Receiver.pdf. Here the Receiver was seeking recognition in order to collect assets located in the UK.

The court also tried to distinguish *Innuva Canada* on the following basis:

'[T]he Canadian court [in *Innuva Canada*] that had appointed [the interim receiver] had declared that he was the foreign representative of a foreign proceeding and had specifically authorised him to seek recognition in the USA under Chapter 15. The US court was therefore entitled to apply and did apply the presumption in art 16(1) of the Model Law. The Texas court in the present case did not make any such declaration' (*Stanford* at [80]).

It makes one wonder if the court had overlooked the specific terms of the US receivership order.

RECOGNITION AT COMMON LAW

The court was clearly correct to hold that the CBIR supplements the common law and does not extinguish it. As 'the common law

remains in being as regards corporations that are expressly excluded from the ambit of the [CBIR], it must surely also continue to exist as regards entities that fail to satisfy the definition of 'foreign representative' (*Stanford* at [100]). This conclusion is supported by art 7 of Sch 1 to the CBIR. See also *Rubin v Eurofinance* at [22].

The court must also be correct that the common law should not trump the operation of the CBIR (*Stanford* at [104]-[105]).

CONCLUSION

Whilst not the first decision on the CBIR, the present case can fairly be described as a judicial inauguration of the CBIR. In addition to issuing a meticulous and thought-provoking judgment, the learned judge showed admirable intellectual courage in overturning his Lordship's own precedents on the COMI test. The judgment also helpfully confirms the parallel operation of the CBIR and common law.

However, some key aspects of the judgment show that one cannot claim this a successful judicial inauguration of the CBIR. In particular, in equating the meaning of COMI within the EC Insolvency Regulation to that within the CBIR, the court over-relied on COMI's historical origin, and lost sight of COMI's different functional dimensions under each legislation. The court also did not appear to appreciate that the goal of the Model Law, unlike the EC Insolvency Regulation, is not rigid legal certainty. This contributed to two consequences.

First, the court over-emphasised the need for third-party ascertainability and the weight of the COMI presumption. In cases of fraud, such over-emphasis risks letting a party win by dint of a factually erroneous presumption, thereby shoring up the fraudsters' house of cards and potentially turning the court into a vehicle of fraud. That is not sound reasoning; nor is it sound policy for the Model Law.

Secondly, the court prematurely compartmentalised US case-law on the COMI concept, apparently overlooking art 8 of Sch 1 to the CBIR.

Finally, the court's understanding of 'foreign proceeding' and 'foreign representative' within the CBIR does not sit comfortably with the Chapter 15 jurisprudence. ■