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Insolvency Law: possible future work

Addendum

Proposal by the delegation of the United States of America: background paper

[*This paper has been prepared by the delegation of the United States of America in support of its proposal (see A/CN.9/WG.V/WP.93/Add.1) for Working Group V (Insolvency) to consider model law provisions or legislative guidance on selected International insolvency law issues relevant both to corporate group and other cross-border matters.*]

1. We are proposing a narrow and selected range of issues so as to be achievable. It is expected that others may wish to add additional related issues, but we believe it advisable in expanding the scope of the work to avoid a broad effort. The format can be considered at a later stage as the content of possible recommendations or guidance becomes clearer. This proposal is based on the assumption that no changes to the UNCITRAL Model Law on Cross-border Insolvency (the "Model Law") are required. Supplemental provisions or guidance to the Model Law, or supplemental recommendations or guidance to the Legislative Guide and/or the Practice Guide could be developed.

A. Overview

2. The current work of Working Group V has highlighted the need for clarification of cross-cutting issues which can serve to make implementation of the Commission's prior legal texts more effective, including the Model Law, the Legislative Guide and the recent Practice Guide. These issues may be best focused via the Model Law. Clarification can be in the nature of separate model provisions,

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as a supplement to the Model Law, or in another format. The Model Law with Guide to Enactment was adopted by General Assembly Resolution 52/158 of 15 December 1997. Since the adoption by the United Nations General Assembly of the Model Law a number of States have adopted it. The current list of States that have adopted and incorporated the Model Law:

> Australia (2008), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), and United States of America (2005).

3. Other countries have drawn on the Model Law as the basis for consideration or enactment of insolvency law change, and precedent developed in such countries would also be taken into account.

> The preamble to the Model Law sets forth its intended purpose. The preamble states:
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> "The purpose of this law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives: (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency; (b) greater legal certainty for trade and investment; (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; (d) protection and maximization of the value of the debtor's assets; and (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment."

4. The ideals and principles set out as a basis for the Model Law remain as relevant and important today as they were when the Model Law was formulated.

5. In today's global economy, States have experienced substantial financial stress based upon the current global economic conditions. To promote and develop trade and commerce among States (UNCITRAL's primary goal) modern functional insolvency laws both on a domestic and an international basis are critical. This aspect is even more pronounced in emerging and developing States whose economies are more fragile. As a result, for these States, predictability and certainty are especially critical.

6. As legislation is promulgated, a number of court decisions interpret and highlight issues which arise in the implementation and interpretation of such legislation. The basic concepts and ideals of the Model Law still provide a fundamental base, but various issues which have arisen in these court decisions demonstrate the need for additional review and clarification.

7. While the majority of legal proceedings which have been implemented as a result of the Model Law have been undisputed as to the debtor's centre of main interest (COMI) being the registered office of the debtor, which is the starting point as a presumption, a number of decisions have raised issues which need to be examined and clarified. One of these is the scope of what is permitted as a rebuttal of the presumption based on place of registration (or incorporation in certain

country systems), whether challenge may be made to a decision by a given State accepting jurisdiction to commence an insolvency case or other similar decision, and what criteria may be employed to answer these questions. Harmonizing such criteria may be an important factor in raising predictability in this important area of the law, as the insights of the collaborative body that first negotiated the Model Law are likely to be persuasive in many jurisdictions.

8. In order to better understand the impact of these issues, it is necessary to look at several of the basic definitions from the Model Law. These definitions are as follows:

(a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

9. With these basic definitions in mind, the Model Law in Article 16 contains a presumption that sets forth the location of the COMI of a company. The presumption is as follows: (3) "In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be to the centre of the debtor's main interests."

10. The Model Law does not set out what evidentiary basis or criteria are necessary to overcome the presumption that the COMI of a company is its registered office.

11. In order to better understand the effect of various court decisions on interpretation and application of the Model Law, a review of a number of cases and decisions would be helpful. This review initially includes decisions from within the European Union, since the language relating to COMI is the same as that of the EU Regulation No. 1346/2000 on insolvency proceedings, (the "EU Insolvency Regulation"). Despite the common language, however, the trends in different jurisdictions have diverged, so that harmonization would be an important achievement. Precedent and legislation from other countries will also be drawn on at the initial stage if a study by the Secretariat is authorized.

B. Decisions under the EU Insolvency Regulation and the Model Law

12. The following cases address various issues in interpreting the EU Insolvency Regulation and the Model Law.

1. Decisions under the EU Insolvency Regulation

(a) DAISY TEK- ISA LTD Ors[1]

13. Daisy Tek was a subsidiary of a United States corporation which filed a Chapter 11 reorganization proceeding in the United States on May 7, 2003. Daisy Tek was also itself a holding company for a number of European companies including three German companies and a French company. Daisy Tek was a processor for European resellers and wholesale distributors of electronic office supplies. Its operations in the United Kingdom were centred in Bradford, England. The three German companies had their registered offices in Neuss, Germany but actually conducted business operations from Freilassing, Magdeburg and Mulhain, Germany. The French company had its registered office in France and operated from facilities in France.

14. Daisy Tek commenced insolvency proceedings in the United Kingdom in 2003. The two primary issues before the English court were determining what was Daisy Tek's COMI and whether the English court had jurisdiction to make administration orders in regard to the French and German companies. The determinations were made pursuant to the EU Insolvency Regulation under Recital (13) and Article 3(1). The English court ultimately determined that the COMI for both Daisy Tek and the French and German subsidiary companies was in the United Kingdom, and that the English court had jurisdiction to grant administration orders in regard to both the French and German companies. The court considered Recital (13) of the Regulation that the COMI corresponds to the place where the debtor conducts the administration of its business on a regular basis and is therefore ascertainable by third parties. The court further recognized under Article 3(1) that the company's place of its registered office was presumed to be its COMI in the absence of proof to the contrary. The court in its decision determined the majority of the administration of the German companies was conducted from the Bradford head office, financing of the German companies was organized in the Bradford head office and seventy percent (70%) of the goods supplied to the German companies were supplied under contracts made by the holding company in Bradford. The court further found the functions carried out in Bradford were very significant and important and by comparison the local function of the companies in Germany was limited. The court made similar determinations regarding the French company.

15. The administration orders made in respect to the French registered company by the English court were initially greeted with disbelief and overturned by the Tribunal de Commerce of Cergy-Pontoise, based on a conviction that the English court confused the notion of a separately incorporated subsidiary with a mere branch. On appeal however, the Court of Appeals of Versailles reversed the lower court decision, validating the opening of the main proceedings in England and the

[1] Daisytek-ISA Ltd, Re [2003] B.C.C. 562 (Ch D (Leeds District Registry), May 16, 2003).

English court's determination as to the location of the COMI being in England. The French appeals court determined under European Union Law that once an insolvency proceeding is opened by a Member State of the European Union then all Member States must defer to the determination, a ruling which was later ratified by European Court of Justice in its ruling in Eurofoods as part of the Parmalat case.

(b) ROVER FRANCE SAS

16. In the case of Rover France SAS,[2] the Tribunal de Commerce of Nanterre in 2005 recognized the opening of foreign main proceedings by an English court for a French company found to be operating and having its COMI in Birmingham, England. This case also was appealed to the Court of Appeals in Versailles which upheld the recognition decision. The Court of Appeals found that it could not review how the first instance court had determined COMI as that factual finding had already been made by another Member State, and that decision had to be respected in accordance with the European Regulation. Thus, the Court of Appeals ruled that the initial opening of an insolvency proceeding in another Member State and a finding of fact therein regarding COMI pre-empted any subsequent independent determination by the recognizing State as to whether COMI was properly determined by the Member State in which the insolvency proceeding was opened.

(c) EUROFOODS[3]

17. The determination of COMI by a Member State was again challenged in the Eurofoods proceedings. Parmalat was a conglomerate headquartered in Italy, which operated in over thirty countries and employed over thirty thousand employees throughout the world. After allegations of fraud were asserted against Parmalat, various directors and professionals related to Parmalat were imprisoned by the Italian Government. On December 23, 2003, the Italian Parliament enacted a law providing for the "extraordinary administration" of Parmalat and its related subsidiaries, and on December 24, 2003, the parent company of Parmalat was admitted to extraordinary administration proceedings in Italy and an administrator was appointed.

18. Eurofoods was an Irish company whose primary business activity was to provide financing facilities for companies in the Parmalat group. Eurofoods was incorporated in 1997 and had its registered office in Dublin, Ireland. On January 27, 2004, a winding up petition for Eurofoods was filed by Bank of America before the Irish High Court which in turn appointed a provisional liquidator for Eurofoods. Thereafter the provisional liquidator notified the Parmalat extraordinary administrator of the Irish filing and his appointment. Notwithstanding the appointment for the provisional liquidator by the Irish court, on February 9, 2004, the Italian Ministry appointed the extraordinary administer of Parmalat as the extraordinary administer of Eurofoods in Italy. During the process each court independently determined that Eurofood's COMI was in each court's respective jurisdiction.

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[2] SAS Rover France, Re [2005] EWHC 874 (Ch).

[3] Eurofood IFSC Ltd, Re (C-341/04) [2006] E.C.R. I-3813; Eurofood IFSC Ltd (No.1), Re [2004] B.C.C. 383 (HC (Irl)); *see also* The Aftermath of "Eurofood" – Benq Holding BV and the Deficiencies of the ECJ Decision, Insolv. Int. 2007, 20(6), 85-87, Christoph G. Paulus.

19. The Irish court found COMI in Ireland since Eurofoods was incorporated and had its registered office in Dublin. This court further found that Eurofoods was subject to supervision by the Irish Minister of Finance and the taxing authorities of Ireland and its administration was conducted pursuant to a management agreement with Bank of America in Ireland, its annual accounts were prepared and audited in accordance with Irish law and accounting principles, its books of account were maintained in Dublin, its auditors were Irish, and Eurofoods had two Irish directors and two Italian directors and that both of the Italian directors resigned prior to the winding up petition being filed. The Italian court found COMI in Italy since, among other things, Eurofoods was a subsidiary of Parmalat, the directors of Eurofoods were mandated by Parmalat and all decisions regarding Eurofoods' operation were conducted and determined in Italy by the parent company. The respective decisions were appealed to the highest courts in Ireland and Italy, both courts affirming the determination of their lower courts that each respective country was the centre of Eurofoods' main interests.

20. The matter was then appealed to the European Court of Justice, which was created in coordination with the European Union as a commercial court to decide commercial disputes between Member States. The European Court of Justice had jurisdiction to render a final determination as to whether Eurofoods' COMI was in Italy or Ireland.

21. The European Court of Justice ruled that Eurofoods' COMI was in Ireland. The Court based its decision on several factors, including that insolvency proceedings were initiated and first opened in Ireland, Eurofoods' registered office was in Ireland and the presumption in the EU Insolvency Regulation that the COMI is where the registered office is located was not rebutted.

22. Although Parmalat consisted of a group of companies with global operations, the European Court of Justice centred on Eurofoods as a single and separate company in determining COMI, rather than determining COMI for the entire Parmalat group.

23. The Eurofoods decision by the European Court of Justice stands for the proposition that the court in which insolvency proceedings are initially opened controls the determination of the COMI of the debtor. The Eurofoods decision buttressed and supported the determinations made by the English courts in Daisy Tek and related cases.

(d) MPOTEC GmbH[4]

24. After the Eurofoods decision by the European Court of Justice, the Tribunal de Commerce of Nanterre issued its opinion that MPOTEC GmbH's COMI was in France and opened a proceeding as a main proceeding. Although MPOTEC GmbH was a German registered company, it was part of the French group of companies of EMTEC. The French Court found the COMI was in France on the basis the headquarter functions of MPOTEC GmbH were carried out in France. Factors considered in addressing the issue of COMI were that the place of the meeting of the board of directors was in France, the law governing the main contracts of the company was French law, business relations with clients were conducted from

[4] MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre).

France, the commercial policy of the group was determined was in France, the authorization of the parent company to enter into financial arrangements was provided in France, the locations of the debtors primary bank was in France, and the centralized management of the purchasing policy, the staff, accounts payable and computers systems for the company were all located in France.

25. The concept of a determination as to "head office functions" followed the prior decisions in England and Germany to determine COMI.

(e) ENERGOTECH SARL, RE[5]

26. In this proceeding the Tribunal de Commerce of Lure opened main proceedings for a Polish company which was part of a French group of companies. The same criteria used in the MPOTEC GmbH proceeding was utilized here as well. Although the Polish company had its registered office in Poland and business operations there, the French Court found the "head office functions" were proof to the contrary sufficient to rebut the presumption that it's COMI was the company's registered office.

27. These two decisions by the French courts use and rely on the concept of "head office functions" as a major determinant of COMI. Whether that is a proper standard for the determination of the COMI of a company by a Member State in the European Union remains open, as the issue has not yet been presented to the European Court of Justice.

(f) EUROTUNNEL FINANCE, LTD.[6]

28. The Paris Commercial Court in line with prior cases found COMI in France and opened main proceedings notwithstanding Eurotunnel Finance, Ltd was an English registered company with offices and operations in England.

29. The French Court found the location of the COMI of the company in France was ascertainable by third parties based on a number of factors. Those factors included that operational management of the Eurotunnel entities was exercised by a joint committee located in Paris, that the registered office of the two main French companies of the group, Eurotunnel SA and France Manche are located in France, that employees and assets are equally located in France, and that negotiations as to its debt restructuring were conducted in Paris.

(g) BEN Q HOLDING, BV AND BEN Q OHG[7]

30. In an unreported decision, Ben Q OHG filed a voluntary insolvency petition in Munich, Germany and a provisional administrator was appointed by the Munich Court. Ben Q Holding, BV was incorporated in the Netherlands and the majority of the Dutch corporation's activities were carried out in Munich. Employees of Ben Q OHG spent as much as seventy percent (70%) of their time working for Ben Q Holding, BV in Germany. Ben Q Holding, BV also had employees in Amsterdam primarily doing work for other group member companies.

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[5] Energotech Sarl, Re [2007] B.C.C. 123 (Ch).

[6] Eurotunnel Finance Ltd. (Paris Commercial Court, 2 August 2006).

[7] BenQ Holding BV, Re (Unreported, February 2007) (Germany).

31. Ben Q OHG first filed a petition in Amsterdam then two days later a petition for insolvency was filed in Munich. Both insolvency courts in Amsterdam and Munich granted interim relief as requested. Neither court decided whether the proceedings in each respective jurisdiction would be main or non-main proceedings.

32. The German judge then called the Dutch judge and after a discussion between the courts, the German judge said that he would defer to the Dutch judge as to a decision of whether the Dutch proceeding should be a main or non-main proceeding. The Dutch judge elected to have the proceeding in the Netherlands be the main proceeding.

(h) MG PROBUD GDYNIA SP. Z O.O.

33. The European Court of Justice on January 21, 2010 issued an opinion following up on its Eurofoods decision. In MG Probud the Polish court opened insolvency proceedings based upon an application that was filed before it. MG Probud had additional operations in Germany and as a result of financial difficulties was not able to pay its workers and related operational expenses. An action was filed in Germany to attach assets in order to pay the wages of workers and operating expenses. A dispute arose between the Polish and German proceedings with the Polish liquidator taking the position that the Polish proceedings were prior in time and as a result all claims and entitlements by creditors of whatever style or nature would have to be determined under Polish law in the Polish proceeding. The German authorities wanted to retain assets sufficient to pay workers' wages and other related expenses and so baulked at turning those assets over to the Polish administrator.

34. The European Court of Justice found that after a main insolvency proceeding has been opened in a Member State, the Member States of the European Union are required to recognize and enforce all judgments relating to the main insolvency proceedings and therefore may not entertain enforcement measures relating to the assets of the debtor in another proceeding contrary to the laws of the state in which the main insolvency proceeding has been opened. The European Court of Justice has thus expanded its Eurofoods decision, finding the laws of the State in which the main proceedings are opened control as to the liquidation of the firm's assets wherever situated, even though that law may be adverse or contrary to that of the Member State in which assets are located.

2. Decisions under the Model Law[8]

35. As noted above, seventeen countries have enacted the Model Law with other countries considering enactment. A body of case law interpreting the Model Law has been developed in the United States and other enacting States.

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[8] References in the following section to Chapters 7, 11 or 15 are to the relevant chapters of the United States Bankruptcy Code. Chapter 15 is the chapter enacting the UNCITRAL Model Law on Cross-Border Insolvency in the United States.

(a) IN RE TRADEX SWISS AG[9]

36. Tradex was a company whose registered office was in Switzerland, but which had an office in Boston, Massachusetts. Prior to the insolvency of Tradex, the operations of the company were transferred from Switzerland to Boston. The primary business operations of the debtor were conducted in Boston. Tradex was an interest-based foreign exchange trading company.

37. Prior to an insolvency filing, the Swiss Federal Banking Commission had appointed two examiners to investigate Tradex based upon allegations that Tradex was converting investor's deposits. An involuntary Chapter 7 proceeding was later filed by employees against Tradex in Boston. Tradex had at that time eighteen employees in Boston and two in Switzerland. The Swiss examiners objected to the filing of the insolvency Chapter 7 insolvency proceeding and requested assistance under Chapter 15 maintaining that Tradex's COMI was in Switzerland. The U.S. Court agreed that the registered office of Tradex was in Switzerland but the presumption that a proceeding in Switzerland could be the main proceeding was overcome by evidence of the extensive operations of Tradex in Boston. The Court did find the proceeding in Switzerland was a non-main proceeding because Tradex conducted non-transitory economic activity in Switzerland, meaning that it had an establishment there.

(b) SPHINX MANAGED FUTURES FUND, LTD[10]

38. One of the initial cases under the Model Law as enacted in the U.S. was filed by Sphinx, Ltd. Its petition for recognition under Chapter 15 was filed on July 31, 2006 by the joint official liquidators of Sphinx Managed Futures Fund, STC acting under the supervision of the Grand Court of the Cayman Islands. After a contested hearing on August 16, 2006, the court granted the Chapter 15 petition in part, denied the petition in part, reserving some issues for a later written decision.

39. The court ruling found that the Cayman Islands proceeding in which the joint official liquidators were appointed qualified as a foreign proceeding but took under advisement whether the proceeding should be recognized as a foreign main proceeding or a foreign non-main proceeding. In its written decision, the court found that the Sphinx, Ltd. funds were hedge funds whose business consisted of buying and selling securities and commodities. Sphinx, Ltd's registered office was in the Cayman Islands. The court observed that Sphinx, Ltd. was incorporated as an excepted business under Cayman Island law and as a result Sphinx funds could not, under Cayman law, conduct any trade or business in the Cayman Islands. The court noted that the funds had no employees or physical offices in the Cayman Islands, and that Sphinx funds was a hedge fund conducted under a fully discretionary investment management contract with a Delaware corporation located in New York City. The court ruled that, although Chapter 15 replaced former section 304 of the Bankruptcy Code, Chapter 15 still retained the concept of comity from that former section. In some respects, said the court, Chapter 15 enhances the maximum flexibility standard that underlay former section 304 in light of the principles

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[9] In re Tradex Swiss AG, 384 B.R. 34 (Bankr.D.Mass. 2008).

[10] In re SPhinX, Ltd., 351 B.R. 103 (Bankr.S.D.N.Y. Sep 06, 2006).

supporting a concept of COMI and the ability to respect the laws and judgments of other nations.

40. The court noted that the real dispute was whether the Cayman Islands proceedings should be recognized as a foreign main proceeding or a foreign non-main proceeding. On that point, the court acknowledged, that the Cayman Island proceedings are presumed under Article 16, paragraph 3 of Chapter 15, to be a foreign main proceeding because of the location of the funds' registered office. The Court found most persuasive the then recent opinion by the European Court of Justice in the Eurofoods case that one of the factors to be utilized in determining the COMI of a debtor is to determine the place where the debtor conducts the administration of his business on a regular basis and whether that location is ascertainable by third parties. Based on the evidence presented the court, it declined to find that the Cayman proceeding qualified as a foreign main proceeding, though it granted the Chapter 15 petition for recognition as a foreign non-main proceeding, despite the evidence that the funds did not have an "establishment" in the Cayman Islands, as that term is defined in the Model Law.

41. The decision by the court in Sphinx, Ltd. was highly criticized by many academics and practitioners for its utilization of comity as a basis for granting recognition as a foreign non-main proceeding despite the lack of evidence of an establishment. Criticism centred around the concept that the Model Law was developed to promote transparency and predictability and deviation from the statutory requirements frustrates that objective. Criticism also centred around the fact that the evidence was not sufficient to find Sphinx, Ltd. a foreign proceeding, a foreign main proceeding or a foreign non-main proceeding and therefore recognition should have been denied, as recognition must be upon a jurisdictional and statutory basis under the Model Law rather than on mere comity.

(c) TRI-CONTINENTAL EXCHANGE LTD[11]

42. This proceeding involved a company formed under the laws of St. Vincent and the Grenadines. A petition was filed seeking recognition of the debtor insurance companies' insolvency proceeding in St. Vincent and the Grenadines as a foreign non-main proceeding by a creditor.

43. Proceedings were filed in the Eastern Caribbean Supreme Court to wind up Tri-Continental Exchange Ltd and Alternative Exchange, Ltd and joint provisional liquidators were appointed. The debtor's only offices were located in Kingston, St. Vincent. The debtors conducted an insurance scam and generated premiums from customers in the United States and Canada of over forty-five million dollars. The United States seized one million six hundred thousand dollars which the joint liquidators requested to be turned over in the Chapter 15 petition.

44. After contested hearings, the court granted recognition to the liquidators and found the St. Vincent proceedings were foreign main proceedings. The evidence before the court was the operations in St. Vincent were its only operations, and as a result granted turnover of funds to the liquidators but maintained jurisdiction in the United States for further determination as to distribution to creditors.

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[11] In re Tri-Continental, 349 B.R. 627 (Bankr.E.D.Cal. 2006).

(d) BEAR STEARNS HIGH GRADE STRUCTURED CREDIT STRATEGIES MASTER FUNDS LTD[12]

45. The issues addressed in the Sphinx, Ltd. decision were revisited in the Bear Stearns proceeding. The joint provisional liquidators from the Cayman Islands filed a Chapter 15 petition for recognition of the Cayman Island proceedings of the Bear Stearns fund, either as a foreign main proceeding or a foreign non-main proceeding. The petition for recognition under Chapter 15 was not contested, and after an evidentiary hearing the court found that the evidence before it was not sufficient to establish recognition of the Cayman Islands proceedings either as a foreign main or foreign non-main proceeding. The request for recognition was denied.

46. The facts elicited were similar to those in the Sphinx, Ltd. proceeding in that Bear Stearns was an exempted company not allowed to conduct trade or business in the Cayman Islands. The court found the investment activities of Bear Stearns were conducted primarily in the United States in New York and that if a proceeding did not qualify as main or non-main, then recognition could not be granted. The lack of an establishment in the Cayman Islands prevented the Bear Stearns proceeding there from qualifying as a non-main proceeding under the Model Law. The decision was appealed to the United States District Court which affirmed. The official liquidators argued on appeal that the presumption under Section 1516, subparagraph C, of Chapter 15 provided that the COMI of the debtor should be the registered office and that evidence to the contrary was not provided. On appeal, the District Court, consistent with the bankruptcy judge's opinion, found that a judge has an independent duty of inquiry on any matter before that court and that evidence to the contrary was in fact in the record before the lower court.

47. In this case, this District Court found that the lower court correctly reviewed and analysed independently whether the evidentiary basis for recognition was established and whether the presumption had been rebutted. The District Court agreed with the lower court's findings that Bear Stearns did not have an office or employees in the Cayman Islands and did not conduct business activity in the Cayman Islands since it was an exempted company. Because non-transitory economic activity was not being (and could not be) conducted there, Bear Stearns did not have an establishment in the Caymans, so the insolvency proceeding there could not qualify as non-main under the statute. The court further found that the COMI of Bear Stearns was in fact not in the Cayman Islands, but in the United States, rebutting the presumption raised by the location of the funds' registration.

48. The decision by the District Court in Bear Stearns is recognized as having overturned the opinion in the Sphinx, Ltd. proceedings. The jurisprudence in the United States under Chapter 15 at this point in time supports the proposition that the statutory and jurisdiction requirements as to foreign main proceeding, foreign non-main proceeding and establishment must be clearly and affirmatively demonstrated before recognition can be granted.

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[12] In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325 (Bankr.S.D.N.Y. May 27, 2008); in re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122 (Bankr.S.D.N.Y. Sep 5, 2007); *see also* *Bear Stearns* Appeal Decision, 17 J. Bankr. L. & Prac. 5 Art. 3, Glosband (August 2008).

(e) BASIS YIELD ALPHA MASTER[13]

49. In this Chapter 15 proceeding, joint provisional liquidators for a debtor whose registered office was in the Cayman Islands sought a determination that the Cayman Islands was the debtor's COMI. As such, the provisional liquidators asked the U.S. Court to determine the Cayman Islands proceeding was a foreign main proceeding.

50. Counsel for the provisional liquidator relied upon the statutory presumption that the registered office in the Cayman Islands was the COMI of the debtor. The court in its opinion stated that issues of material fact precluded a recognition order being granted. The court noted that the company was an exempted company and as a result could not conduct business on the island and that its business was conducted in other jurisdictions. Thus, the proceeding could not qualify as a non-main proceeding, because there was no establishment, and could not qualify as a main proceeding because the facts on the ground clearly rebutted the facial presumption that place of registration was the debtor's COMI. This opinion follows the rationale set forth in the Bear Stearns opinion as to both the criteria for recognition and the duty of the court to independently determine whether relief should be granted.

(f) IN RE ERNST & YOUNG, INC (KLYTIE'S)[14]

51. Klytie's involved both Canadian and U.S. companies. The eighty percent (80 per cent) owners of Klytie's business were Israeli citizens who had lived in Canada but at the time of the application lived in California. The other twenty percent (20 per cent) ownership of Klytie's resided in Colorado. Klytie's was accused of defrauding investors in a real estate investment fund business. After litigation was filed against Klytie's, the Canadian court appointed the firm of Ernst & Young as receivers of the Canadian company.

52. The receivers in turn filed a petition under Chapter 15 for recognition which was opposed by creditors from the United States. The creditors argued that because the administrative costs were higher in Canada, fewer funds would be received by creditors than if the main proceeding was conducted in the United States.

53. The United States court granted recognition and found the Canadian proceeding was the foreign main proceeding as the COMI of Klytie's was in Canada. The court based its opinion on evidence that the principals of the company directed affairs from Canada, the creditors recognized the company operated in Canada, the main assets of the company were in Canada and the cash management system was in Canada.

54. The court further relied on the statutory provisions of Chapter 15 stating that the goal of Chapter 15 was to facilitate cooperation between the U.S. courts and courts of foreign countries.

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[13] In re Basis Yield Alpha Fund (Master), 381 B.R. 37 (Bankr.S.D.N.Y. 2008).

[14] In re Ernst & Young, Inc., 383 B.R. 773 (Bankr.D.Colo. 2008).

(g) ROBERT ALLEN STANFORD PROCEEDINGS IN THE ENGLAND AND CANADA[15]

55. Allen Stanford's business empire collapsed when the United States Securities and Exchange Commission ("SEC") filed a complaint against Allen Stanford and others alleging securities fraud and violation of securities laws. An SEC receiver was appointed over Stanford International Bank, Stanford Group Company and entities under the control of Allen Stanford and others. Meanwhile, in February of 2009 the Financial Services Regulatory Commission of Antigua and Barbuda ("FSRC") appointed interim receivers and managers of Stanford International Bank and Stanford Trust Company in Antigua. Thereafter the Antiguan court ordered a winding up of the company and appointed joint liquidators to effectuate the same.

56. Since initiation of proceedings against Stanford International Bank and related entities, Ralph Janvey, the ("SEC receiver") and Mr. Hamilton-Smith and Mr. Wastell as joint liquidators in the Antiguan proceeding (the "liquidators") have been waging a battle for recognition in many jurisdictions including the United Kingdom and Canada. At the High Court of Justice in London, the Honourable Mr. Justice Lewison heard competing applications for recognition from both the SEC receiver and the liquidators, each requesting a determination of COMI in the US and in Antigua respectively, each striving to exercise control over the assets of Stanford International Bank and related entities in regard to assets of Stanford International Bank and related entities in the United Kingdom. Mr. Justice Lewison on July 3, 2009, issued a judgment recognizing the liquidators in a well reasoned and comprehensive opinion.

57. Mr. Justice Lewison carefully reviewed the Cross-Border Insolvency Regulation of 2006 which give effect to the Model Law in Great Britain. The High Court recognized as a starting point that Stanford International Banks' registered office was in Antigua and, as a result, Antigua is presumed to be the location of its COMI. The High Court further recognized the test to be applied to the competing applications to be whether the court can be satisfied that the company's COMI is not in the state in which its registered office is located. The High Court reviewed the historical operations of Stanford International Bank in Antigua after its incorporation in December of 1990. The court found that Stanford International Bank in Antigua had an accounts department, human resources department, IT department, payroll department, and operating software. The High Court further found that Stanford International Bank accepted deposits from investors worldwide and in particular from North, Central and South America. Stanford International Bank issued certificates of deposit from Saint John's, Antigua.

58. The High Court noted that in the Bear Stearns opinion the factors to be considered were location of the debtor's headquarters, the location of those who actually managed the debtor, the location of the debtor's primary assets, the location of the majority of the debtor's creditors who would be affected by the case and the jurisdiction whose law would apply to most disputes. The High Court further noted that American jurisprudence is not qualified by a requirement that creditors be able

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[15] In Re Stanford International Bank Ltd (In Receivership), Re (Ch D (Companies Ct)) Chancery Division (Companies Court) 2009 WL 1949459, July 3, 2009; In Re Stanford International Bank Ltd., Re Superior Court of Quebec, 2009 CarswellQue 9216, September 11, 2009, and 2009 CarswellQue 9211.

to ascertain the COMI of the company. The High Court found that since the registered office of Stanford International Bank is in Antigua, the burden of rebutting the presumption lies on the SEC receiver and that presumption will only be rebutted by factors that are objective. Further objective factors will not count unless they are also ascertainable by third parties, are in the public domain and are what third parties would learn in the ordinary course of business with the company.

59. The High Court then had to address which of the parties to recognize as the foreign representative. The court found that the SEC proceeding did not qualify as a foreign proceeding so that the SEC receiver was not a foreign representative under the Cross-Border Insolvency Regulation. The High Court observed that the SEC proceeding was not an insolvency proceeding, was not for the benefit of creditors and was not based on a law relating to insolvency.

60. The court then turned to the question of whether the Antiguan liquidation was a foreign proceeding. The court determined that the Antiguan proceeding was a winding up proceeding, that the Antiguan judge was satisfied that Stanford International Bank was insolvent, that the liquidators were appointed pursuant to a law relating to the insolvency and, as a result, the liquidators were entitled to be recognized as foreign representatives of a foreign proceeding. The court then determined that the evidence presented by the SEC receiver was not sufficient to rebut the presumption of the COMI of Stanford International Bank being in Antigua. Thus Antigua was found to be the location of the COMI of Stanford International Bank. The High Court granted recognition to the liquidators as foreign representatives of a foreign main proceeding, as those provisions are contained in the Cross-Border Regulation.

61. The next contest for recognition was in Canada. Both the SEC receiver and the liquidators filed applications in the Superior Court in the District of Montreal in the province of Quebec, requesting recognition as foreign representatives. The Honourable Justice Claude Auclair presided over the proceedings. The court initially addressed the proceedings in the United Kingdom by Justice Lewison noting the Antiguan proceeding had been recognized there as a main proceeding and the Liquidators as foreign representatives. Accordingly, in the English decision, the Antiguan liquidators were entitled to the funds of SIB in the United Kingdom. The Canadian court acknowledged that the English High Court had held the COMI of SIB was located in Antigua and the American receivership had been found inadmissible as a foreign proceeding because the appointment of the US Receiver was not based on an insolvency related law.

62. The Canadian court then proceeded with an historical analysis of Stanford International Bank and actions undertaken by the SEC receiver and the liquidators. The Canadian court in its opinion noted that Part 13 of the Bankruptcy and Insolvency Act of Canada permits an applicant to become qualified as a foreign representative by requesting authorization from the court, thus facilitating a coordination of procedures with regard to the "insolvency proceeding." The court further stated that Section 268, subparagraph 6 of the Bankruptcy and Insolvency Act states that "this section does not require the court to make an order contrary to Canadian law or to give effect to orders issued by a foreign court." The Court admitted that collaboration between different jurisdictions is important, but then added that the Court must safeguard the interests of the Canadian creditors and preserve the fundamentals of the Canadian judicial system. The Court noted that any

person applying to the court for an exercise of the court's judicial discretion must do so in good faith and with "clean hands."

63. The Court found that the liquidators had filed a prior application for recognition and had failed to advise the SEC receiver of that application. The court further found that the Liquidators took possession of assets in Canada without prior authorization from the Canadian court and erased original electronic documents after having made copies and transported copies out of Canada. The Canadian court found further that investigation by government authorities in Canada was undertaken in regard to Stanford International Bank and that the liquidators had not provided information as requested and had entered into acts which were illegal as they were not authorized trustees under Canadian law. The court further found actions on the part of the Antiguan liquidators were flagrant and inexcusable. The Canadian court denied the application for recognition by the liquidators and instead recognized the application of the SEC receiver for recognition.

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64. A Chapter 15 was filed in the United States Bankruptcy Court for the Eastern District of New York in January of 2009. The Chapter 15 proceeding was filed by Israeli receivers in relation to an Israeli receivership proceeding. Previously the debtor had filed a Chapter 11 proceeding in the United States Bankruptcy Court for the Eastern District of New York. The United States Bankruptcy Court had issued an order that all assets in the Chapter 11 proceeding were subject to the Bankruptcy Court's jurisdiction. Notwithstanding that order, the Israeli Court in which receivership proceedings were pending determined that it had jurisdiction and could proceed to liquidate the assets in Israel despite the order from the court in New York. The Chapter 15 petition for recognition was then filed by the Israeli receivers in order to have assets located in the New York proceedings transferred to Israel for application in Israeli proceedings.

65. The United States Bankruptcy Court denied recognition finding that the receivership proceeding was not an insolvency or collective proceeding and further concluding that since the receivers had violated the provisions of the automatic stay, the denial of recognition was appropriate based on the public policy exception in Chapter 15.

C. Possible issues to be considered by Working Group V in regard to the U.S. proposal for future work

66. As a result of the various court decisions, articles and discussions which have occurred since the formulation of the Model Law and the implementation of the EU Regulation where there is a common treatment of issues dealt with by the Model Law, a number of issues have emerged which need definition and clarification. Others may be suggested by the Secretariat or added by the Working Group.

67. The United States Delegation submits that Working Group V may wish to consider the following issues:

1. Criteria for a determination as to what constitutes an insolvency proceeding.

(a) Is a receivership proceeding a collective proceeding that falls within the ambit of an "insolvency proceeding" as used in the Model Law, the Guide or the Practice Guide?

(b) Should criteria be established to outline the fundamental provisions necessary for a collective proceeding to be considered an insolvency proceeding?

(c) Should criteria be established to determine what is necessary to constitute an insolvency proceeding and what constitutes a collective proceeding?

(d) If a proceeding is not a collective proceeding, should it still be eligible for recognition under the UNCITRAL Model Law?

2. A Court's jurisdiction is essential to being able to proceed and render determinations in regard to issues before it.

(a) Should a court be satisfied that a proceeding under the Model Law is a foreign main proceeding or a foreign non-main proceeding, as a pre-condition of recognition?

(b) What is the procedure that should be established to make this determination clear and definitive? Should a menu of options be established to make this process clear and definitive so that it can be harmonized to the extent feasible?

3. Under what circumstances should the public policy exception set forth in Article 6 of the Model Law be implemented by a court addressing issues of recognition under the Model Law?

(a) If an applicant requesting relief under the Model Law has violated a country's established laws or established procedure, should such activity be a basis for denial of recognition under the public policy exception?

4. The Model Law clearly sets forth a presumption that the registered office of the debtor company is presumed to be its COMI.

(a) Should the criteria be clearly established as to what evidence is necessary to overcome the presumption that debtor's COMI is its registered office?

(b) Should specific factors, such as for example, the location of the "nerve centre" of the debtor, be developed for rebutting the presumption?

(c) Is the physical location of operations a factor to be considered?

(d) Should the location in which management decisions are made and from which the company is operated be utilized as a determinate?

(e) Should the location of the debtor be predictable and readily ascertainable by creditors?

5. Should the time period in which a company maintains its COMI in a jurisdiction be a factor in determining the COMI of a debtor?

(a) Should the COMI of a debtor be determined as at the date on which the company was actually transacting business and conducting business operations prior to insolvency or thereafter when the company is insolvent and under the direction of a liquidator?

(b) Should a location of a debtor business that is ascertainable by third parties be an important factor for overcoming the presumption of the debtor's COMI?

6. To address the above issues in the context of a group of companies both on a domestic and international basis.

7. To consider whether supplementary guidance on the Model Law is useful for corporate group cases in regard to the issues of recognition and enforcement.

D. Policy determinations

68. Determinations made previously by Working Group V with respect to any of the questions and issues raised above should be set forth and form the basis for any further policy determinations that are made. The policy determination that the registered office of a debtor company should be presumed to be the COMI of that company is important and the background basis for that policy choice should be detailed in the current policy considerations of Working Group V.

69. In considering the questions raised above, the Working Group should set out the policy rationale for any conclusions it may reach that could form the basis of guidance to be provided on interpretation of the Model Law. Such an approach will facilitate courts and other users understanding that guidance and applying it on a sound basis. The same approach should be adopted with respect to any conclusions reached concerning enterprise groups as opposed to individual debtors.

70. Such policy determinations, background and detail can provide a helpful "legislative history" for a jurist or insolvency authority to understand the scope and meaning of the various provisions and any additional work product that is developed by the Working Group in regard to the above issues. Achieving these objectives can be an important factor for States to gain economic benefits and reduce systemic risk by modernizing their business insolvency law regimes. It will promote both cross-border trade as well as domestic capacity-building.

SUMMARY

71. This paper has been intended to detail some of the areas which the United States delegation is proposing should be considered by this Working Group. This list is not exhaustive and the Working Group will of course need to determine the extent of a proposal to be recommended to the Commission at its next Plenary Session. We recommend that the Commission's approval be sought to authorize work as generally described, subject to refinement by the Working Group thereafter, and that

the Secretariat be authorized to amplify this recommendation with further studies within available resources.