FEDERAL COURT OF AUSTRALIA

Ackers (as joint foreign representative) v Saad Investments Company Limited (in official liquidation) (a company registered in the Cayman Islands) [2010] FCA 1221

Citation:	Ackers (as joint foreign representative) v Saad Investments Company Limited (in official liquidation) (a company registered in the Cayman Islands) [2010] FCA 1221
	IN THE MATTER OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS)
Parties:	**STEPHEN JOHN AKERS AS A JOINT FOREIGN REPRESENTATIVE OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS), HUGH DICKSON AS A JOINT FOREIGN REPRESENTATIVE OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS) and MARK BYERS AS A JOINT FOREIGN REPRESENTATIVE OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS) v SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS) and DEPUTY COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA**
File number:	NSD 1168 of 2010
Judge:	**RARES J**
Date of judgment:	22 October 2010
Catchwords:	**BANKRUPTCY AND INSOLVENCY** – application for recognition of foreign main proceeding under the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law* given force of law in Australia by s 6 of the *Cross-Border Insolvency Act 2008* (Cth) – debtor's centre of main interests (*COMI*) – presumption COMI deemed to be where registered office is

absent of proof to the contrary under Art 16(3) of the *Model Law* – standard of proof required to rebut presumption

Held: presumption provided for in Art 16(3) not displaced

Words and Phrases: "Centre of main interests" – "in the absence of proof to the contrary"

Legislation:
Cross-Border Insolvency Act 2008 (Cth) s 6
European Union Convention on Insolvency Proceedings
Federal Court (Corporations Rules) 2000 (Cth) r 15A.5
Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law Arts 2, 8, 15(1), 16(3), 17, 20(1)
Title 11 *United States Code* (Bankruptcy) § 1516(c)
Vienna Convention on the Law of Treaties 1969 done at Vienna on 23 May 1969 [1974] ATS 2

Cases cited:
Chief Executive Officer of Customs v El Hajje (2005) 224 CLR 159 applied
Gabriel v Ah Mook (1924) 34 CLR 591 applied
In Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited (In Provisional Liquidation) 389 BR 325 (SDNY 2008) considered
In Re Stanford International Bank Limited [2010] 3 WLR 941 approved and applied
Re Betcorp Limited 400 BR 266 (Bankruptcy District of Nevada, 2009) applied
Re Eurofood IFSC Limited [2006] Ch 508 approved and applied
Re HIH Insurance Limited [2008] 1 WLR 852 applied
Strong Wise Limited v Esso Australia Resources Limited (2010) 185 FCR 149 applied
Victrawl Pty Limited v Telstra Corporation (1995) 183 CLR 595 applied

Texts cited:
Judge Allan L Gropper, *Chapter 15 of the United States Bankruptcy Code* as published in K E Lindgren, *International Commercial Litigation and Dispute Resolution*, Ross Parsons Centre of Commercial, Corporate and Taxation Law, Publication Series, Sydney 2010 at 149
K E Lindgren, *International Commercial Litigation and Dispute Resolution*, Ross Parsons Centre of Commercial, Corporate and Taxation Law, Publication Series, Sydney 2010 per Professor Sarah Derrington at 272

Date of hearing: 22 October 2010

Place: Sydney

Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	59
Counsel for the Plaintiffs:	J Sheehan SC and N Manousaridis
Solicitor for the Plaintiffs:	Henry Davis York
Counsel for the Second Defendant:	F Gleeson SC and E Glover
Solicitor for the Second Defendant:	Australian Taxation Office Legal Services Branch

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1168 of 2010**

IN THE MATTER OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS)

BETWEEN:	**STEPHEN JOHN AKERS AS A JOINT FOREIGN REPRESENTATIVE OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS)** **First Plaintiff**
	HUGH DICKSON AS A JOINT FOREIGN REPRESENTATIVE OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS) **Second Plaintiff**
	MARK BYERS AS A JOINT FOREIGN REPRESENTATIVE OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS) **Third Plaintiff**
AND:	**SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS)** **First Defendant**
	DEPUTY COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA **Second Defendant**

JUDGE: **RARES J**
DATE OF ORDER: **22 OCTOBER 2010**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT UPON THE UNDERTAKINGS OF:

(a) the second defendant by its counsel not to issue any additional notices pursuant to Div 260 of Sch 1 to the *Taxation Administration Act 1953* (**TAA**) upon the plaintiffs, the first defendant or any of its assets, or Mr Said Jahani without 14 days written notice being provided to the plaintiffs or the first defendant; and

(b) the plaintiffs and the first defendant by its counsel not to remit outside of Australia the proceeds of any realisation or sale of any assets of the first defendant located in Australia without 14 days written notice being provided to the second defendant:

1. The Commissioner of Taxation of the Commonwealth of Australia be joined as a party to the proceeding.

2. Pursuant to cl 1 of Art 17 of the *Model Law on Cross Border Insolvency* in Schedule 1 to the *Cross-Border Insolvency Act 2008* (Cth) (**Model Law**), the proceeding of the Grand Court of the Cayman Islands Cause No 361 of 2009 relating to the first defendant (**Cayman Islands Proceeding**) in which the plaintiffs were appointed joint official liquidators of the first defendant be and is hereby recognised as a foreign proceeding.

3. Pursuant to cl 2 of Art 17 of the *Model Law*, the Cayman Islands Proceeding be and is hereby recognised as a foreign main proceeding.

4. Pursuant to cl (d) of Art 2 of the *Model Law*, the plaintiffs be and are hereby recognised as foreign representatives.

5. Pursuant to Art 21 of the *Model Law*, except with the leave of the Court or the plaintiffs' written consent:

   (a) the commencement, continuation or enforcement of any individual action or legal proceeding (including without limitation any arbitration, mediation or any judicial, quasi judicial, administrative action, proceeding or process whatsoever) against the first defendant or any of its assets, rights and obligations is stayed;

   (b) the enforcement or execution of any judgment, order, award against the first defendant or its assets, rights and obligations is stayed;

   (c) the right to transfer, encumber or otherwise dispose of any of the first defendant's assets be suspended;

   (d) the plaintiffs, in their capacities as joint foreign representatives of the first defendant, may, as they deem appropriate, examine witnesses, take evidence and obtain delivery of information concerning the first defendant's assets, affairs, rights, obligations or liabilities;

(e) the administration, realisation and distribution of all of the first defendant's assets located in Australia be entrusted to the plaintiffs, in their capacities as joint foreign representatives of the defendant; and

6. Pursuant to par 1(g) of Art 21(1) of the *Model Law*, subject to the provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**), all powers normally available to liquidators appointed under the provisions of the Corporations Act, be made available to the plaintiffs.

7. Each party and each creditor or person claiming to be a creditor of the first defendant have liberty to apply on 3 days notice.

8. In respect of rule 15A.7 of the *Federal Court (Corporations) Rules* 2000:

(a) the plaintiffs send a notice of the making of Orders 1–7 above in accordance with Form 21 to each person in Australia whose claim to be a creditor of the first defendant is known to them; and

(b) the plaintiffs publish a notice of the making of those Orders in accordance with Form 21 in *The Australian* newspaper.

9. Stand over the second defendant's Interlocutory Process filed on 22 September 2010 to 12 November 2010.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1168 of 2010**

IN THE MATTER OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS)

BETWEEN:	**STEPHEN JOHN AKERS AS A JOINT FOREIGN REPRESENTATIVE OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS)** **First Plaintiff**
	HUGH DICKSON AS A JOINT FOREIGN REPRESENTATIVE OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS) **Second Plaintiff**
	MARK BYERS AS A JOINT FOREIGN REPRESENTATIVE OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS) **Third Plaintiff**
AND:	**SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) (A COMPANY REGISTERED IN THE CAYMAN ISLANDS)** **First Defendant**
	DEPUTY COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA **Second Defendant**
JUDGE:	**RARES J**
DATE:	**22 OCTOBER 2010**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

(REVISED FROM THE TRANSCRIPT)

1 The plaintiffs were appointed by the Grand Court of the Cayman Islands, as official liquidators of Saad Investments Company Limited (**Saad Investments**). They have applied to have the liquidation in the Cayman Islands proceedings recognised as a foreign main

proceeding for the purposes of the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law*. With some amendments, the *Model Law* is given the force of law in Australia by s 6 of the *Cross-Border Insolvency Act 2008* (Cth).

2 One critical issue for present purposes is whether the centre of main interests (sometimes abbreviated as COMI) of Saad Investments should be deemed to be where its registered office is, as provided in Art 16(3) of the *Model Law*. This issue arises because of the complex business dealings with which it was involved prior to its liquidation. It has been necessary to give these reasons urgently because, among other things, the parties have requested me to do so and Art 17(3) of the *Model Law* provides that an application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

THE LEGISLATIVE SCHEME IN THE *MODEL LAW*

3 The preamble to the *Model Law* explained that one of its purposes is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote objectives including:

- greater legal certainty for trade and investment (preamble (b));
- fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor (preamble (c)).

4 Article 2 defines a number of key concepts. A **foreign proceeding** is defined as including a judicial proceeding in a foreign State, pursuant to a law relating to insolvency in which the assets and affairs of the debtor are subject to control or supervision of the foreign court for the purpose of reorganisation or liquidation (Art 2(a)).

5 A **foreign main proceeding** means a foreign proceeding taking place in a State where the debtor has its centre of main interests (Art 2(b)). In contrast, a **foreign non-main proceeding** means a foreign proceeding other than a foreign main proceeding taking place in a State the debtor has an establishment (i.e. any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services (Arts 2(c) and (f)).

6 A **foreign representative** includes a person or body, authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs (Art 2(d)). A foreign representative is entitled to apply directly to this Court (and also, in cases of corporate and non-individual insolvencies, to a Supreme Court of a State or Territory) (s 10, Art 9).

7 Importantly, the *Model Law* provides:

> "Article 8
>
> *Interpretation*
>
> In the interpretation of the present Law, 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.
> …
>
> Article 15(1)
>
> *Application for recognition of a foreign proceeding*
>
> A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
> …
>
> Article 16(3)
>
> In the absence of proof to the contrary, **the debtor's registered office** or habitual residence, in the case of an individual, **is presumed to be the centre of the debtor's main interests**.
> …
>
> Article 17(3)
>
> An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time." (emphasis added)

8 Additionally, Art 17(1) requires the Court to recognise a foreign proceeding if it falls within the definition in Art 2(a), a foreign representative within the definition in Art 2(d) applies for that recognition and, the evidence required by Art 15(2) (dealing with proof of the foreign proceedings) is provided. Article 17(2)(a) requires a foreign proceeding to be recognised as a foreign main proceeding if it is taking place in the State where the debtor has its centre of main interests. If that criterion is not met, then Art 17(2)(b) requires the foreign proceeding to be recognised as a foreign non-main proceeding if the debtor has an establishment within Art 2(f) in the foreign State.

9 Critically, Art 20(1) provides:

> "Upon recognition of a foreign proceeding that is a foreign main proceeding:
>
> (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
>
> (b) Execution against the debtor's assets is stayed;
>
> (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended."

BACKGROUND

10 The substantive facts are not in issue. Saad Investments was incorporated in the Cayman Islands on or about 9 July 1990 under the *Companies Law* (as amended) of the Cayman Islands. It was an exempted limited liability company, limited by shares. At the time that the Grand Court made the liquidation order, Saad Investment's registered office was in Grand Cayman in the Cayman Islands. It held some of the offshore assets of Mr Maan Al-Sanea and his family. In 2009, the business magazine, *Forbes*, listed him as the 62nd wealthiest person in the world and asserted that his net worth was approximately USD7 billion.

11 The liquidators' investigations have revealed, on a preliminary basis, that Saad Investments appeared originally to have been formed to carry on the business of a holding company, as part of a large global group of companies comprising, among others, of about 40 companies based in the Cayman Islands. The company's immediate parent is also incorporated in the Cayman Islands and held by a trust, nominally also located there. The liquidators understand that there are approximately 80 companies in the group scattered throughout the world and that Saad Investments has links with other group entities as a shareholder, creditor, or historic provider of investment management services.

12 The company's audited accounts for the year to 31 December 2008 described its activities as involvement in money market operations together with investment in marketable securities and real estate. Those accounts reported a net loss for the year of USD75 million, arrived at after taking into account interest and investment income of USD214 million. The balance sheet showed net assets of USD4.4 billion.

13 One or more of the liquidators has been appointed as liquidator of a number of the related companies of Saad Investments. The company's books and records were held and maintained by Saad Financial Services SA, a company registered in Switzerland and based in Geneva. The directors of Saad Financial Services included its chairman, Mr Al-Sanea and his wife. It had a services agreement with Saad Investments that had been entered into in 1997. Saad Financial Services had been engaged to provide comprehensive investment advisory and back-office services to the company, and these included maintaining its financial and other records. That agreement was terminated in late January 2010, after the present liquidation had been commenced. The liquidators have not been able to obtain access to a complete set of Saad Investments' books and records from Saad Financial Services in circumstances that need not be discussed for the purpose of these reasons.

14 The winding up of Saad Investments was triggered by a decision of the Saudi Arabian Monetary Authority to freeze the Saudi Arabian assets of certain entities and individuals associated with the group of companies of which Saad Investments is a part. In late August 2007 the company entered into a facility agreement with various lenders that was governed by English law. Under that agreement the lenders made available to Saad Investments a revolving loan facility in an aggregate amount of approximately USD2,815,000,000. In early June 2009, after the Saudi Arabian Monetary Authority took steps to freeze the Saudi Arabian assets, the credit rating agency, Moody's, withdrew its credit rating for Saad Investments' debt. That constituted an event of default under the facility agreement. A number of the group's creditors then proceeded to take steps to protect their commercial interests. On 6 July 2009 a notice of acceleration on behalf of the lenders was served on Saad Investments.

15 On 27 July 2009, Ahmad Hamad Algosaibi & Brothers Company commenced proceedings in the Grand Court of the Cayman Island against Saad Investments, Mr Al-Sanea and a number of other associated companies registered in that jurisdiction (**the AHAB proceedings**). AHAB made a number of allegations against Saad Investments and its associates in the AHAB proceedings, including, what the liquidators described as, claims of conspiracy, breach of fiduciary duty, dishonest assistance and knowing receipt. At around the same time in those proceedings, the Grand Court appointed receivers to Saad Investments and imposed a world-wide freezing order against it and the other defendants, up to a value of USD2 billion.

THE CAYMAN ISLAND WINDING UP PROCEEDINGS

16 Saad Investments made no payment in response to the lenders' notice of acceleration. As a consequence, on 30 July 2009 some of the lenders presented a petition in the Grand Court to wind the company up. On 5 August 2009 the liquidators were appointed joint provisional liquidators of Saad Investments on an ex parte application. That order was continued inter partes on 11 August 2009. On 18 September 2009, the Grand Court ordered that Saad Investments be wound up and that the provisional liquidators be appointed as joint official liquidators. At the same time the Grand Court discharged its previous appointment of the receivers in the AHAB proceedings.

17 The balance sheet of Saad Investments as at 31 December 2008 is markedly different to that as at 5 August 2009, just over seven months later. The latter recorded total assets as being about two thirds of those in the 31 December 2008 version. As at the date of the provisional liquidation, 5 August 2009, Saad Investments appeared to have had assets worth approximately USD6.2 billion and liabilities of about USD4 billion. The vast majority of the total liabilities appeared to be debts owed to the lenders under the facility agreement. The statement of assets suggested that Saad Investments held equities worth about USD1.4 billion. Of these, about USD13 million were recorded as equities listed on the Australian Stock Exchange. The liquidators understand that about USD9 million of those equities were the subject of unresolved claims for security or set off made by creditors of Saad Investments and that the Australian equities represent the only assets that that company held in this jurisdiction.

THE INTEREST CLAIMED BY THE COMMISSIONER OF TAXATION

18 Saad Investments does not have an Australian tax file number and is not registered in Australia as a foreign company under the provisions of the *Corporations Act 2001* (Cth). The only Australian-based creditor, of which the liquidators are aware, is the Commissioner of Taxation. In early December 2009, the Australian Taxation Office lodged a proof of debt with the liquidators for AUD83,271,545.70. The Commissioner has sought to prove that debt in the liquidation in the Cayman Islands. The proof of debt was based on a notice of assessment for the year ended 30 June 2009. It assessed the company to income tax in the sum of AUD47,583,740.40 and imposed a penalty for failure to lodge a tax return in the sum of AUD35,687,805.30.

19 The Commissioner asserted that the basis of the assessment arose from the company's disposition of approximately 67 million shares in an Australian company, Sunshine Gas Limited, to Queensland Gas Company Limited.

THE CAYMAN ISLANDS LIQUIDATION

20 In their report to creditors of 2 November 2009 the liquidators said that they had formed the view, supported by comments made by the Grand Court in hearings on these issues, that:

> "If there is to be adequate oversight and understanding of the complex affairs of the various companies in the group, it is essential the control over the group is not fragmented and that there are common liquidators across as many entities in the group as possible."

21 They reported that the allegations made in the AHAB proceedings placed Saad Investments in a central role in the alleged fraud. According to the report to creditors, Saad Investments had cash assets in various countries, equities, options and private equity investments in various entities, as well as bonds held in a number of countries. The report also listed, as assets, the debts due to Saad Investments by companies within the group located in a number of countries.

APPLICATIONS FOR FOREIGN RECOGNITION OF THE CAYMAN ISLAND LIQUIDATION

22 The liquidation by the Grand Court has been recognised as a foreign main proceeding under the *Model Law* in three other jurisdictions:

- in the High Court of Justice, Chancery Division and Companies Court on 25 September 2009, by an order made by Mr Registrar Derrett;
- in the Supreme Court of Bermuda, by Kawalby J, on 8 June 2010; and
- in the Royal Court of Jersey on 23 July 2010.

23 However, the liquidators' application for recognition of their appointment as joint official liquidators of Saad Investments in Switzerland, so far, has been unsuccessful. On 7 December 2009, they applied for that recognition to the Tribunal at First Instance, in Geneva

so that they might be in a position to speak with, and access information of the company held by, institutions, including financial institutions, in Switzerland, and, thus, penetrate Swiss privacy and secrecy laws, as the recognised agents of Saad Investments for the purposes of Swiss law. The liquidators did not seek powers in that application for the purpose of enabling them to deal with or realise the company's assets. The Tribunal at First Instance, refused that application on 1 February 2010. The Court of Justice dismissed an appeal from that decision on 27 May 2010. An appeal has been taken to the Supreme Court of Switzerland, which is yet to give its decision.

24 On 11 August 2010, the liquidators filed a separate application in a court in Geneva for recognition in Switzerland of the Cayman Islands' liquidation pursuant to the *Swiss Private International Law Act of 1987*. That application is yet to be heard, but those proceedings have not been brought under the *Model Law*.

THESE PROCEEDINGS

25 The liquidators commenced these proceedings before me on 8 September 2010. Each of them filed a consent to act as a designated person pursuant to r 15A.5 of the *Federal Court (Corporations Rules) 2000* (Cth). I granted provisional relief pursuant to Art 19 of the *Model Law*, by giving the administration of all of the company's assets in Australia (excluding the external Territories) to the liquidators together with an Australian based registered liquidator, Mr Said Jahani of the liquidators' related firm in Sydney, Grant Thornton Accountants. I also made interim orders that had the effect of preventing proceedings being taken against Saad Investments' assets. I required the liquidators to serve the Commissioner with the proceedings in order that the Commissioner's position with respect to his rights under s 260-5 of the *Taxation Administration Act 1953* (Cth) might be preserved pending a final hearing. In the event, the Commissioner has not sought to pursue those rights, but has appeared and been joined as a party to these proceedings.

26 The Commissioner does not oppose the making of orders today that will recognise the Cayman Islands proceedings as a foreign main proceeding. However, the liquidators and the Commissioner have properly drawn attention to factors that need be weighed before such a determination is reached, including the issue of where Saad Investments has its centre of main interests.

27 Article 15 of the Model Law provides that a foreign representative, such as the liquidators here, may apply to the domestic court for recognition of a foreign proceeding in which the foreign representative has been appointed. The liquidators have satisfied the formal provisions of Art 15 so as to establish the jurisdiction of this Court to recognise the foreign proceeding. I am satisfied by the evidence of the proceedings in the Grand Court and the orders that it made, that the liquidators were properly appointed. The liquidators have also identified all foreign proceedings in respect of Saad Investments known to them.

ARTICLE 16(3) OF THE *MODEL LAW* – THE PRESUMPTION AS TO THE CENTRE OF THE DEBTOR'S MAIN INTERESTS

28 The *Model Law* has rationalised and systematised insolvent administrations in more than one jurisdiction, and represents an attempt to impose a universalist approach: see the comments of Professor Sarah Derrington: *International Commercial Litigation and Dispute Resolution*, edited by K E Lindgren, Ross Parsons Centre of Commercial, Corporate and Taxation Law, Publication Series, Sydney 2010, 272 at 273.

29 Importantly, Art 16 creates a number of presumptions, the critical one here being in Art 16(3), namely that in the absence of proof to the contrary, Saad Investments' registered office in the Cayman Islands is presumed to be its centre of main interests.

30 The expression, "the centre of the debtor's main interests", is not defined either in the *Model Law* or in the Act. That position was a deliberate legislative choice, as explained in the Explanatory Memorandum for the *Cross Border Insolvency Bill 2008*, circulated in the Senate by the Minister for Superannuation and Corporate Law. The Explanatory Memorandum pointed out, in Ch 1.7, that there was a considerable body of common law in overseas jurisdictions in relation to the concept of a centre of main interests. It expected that Australian Courts would be guided by that body of law in considering the definition of that expression in the context of the Bill. The Explanatory Memorandum also suggested that such an approach would ensure that Australian law would be in harmony with that in other jurisdictions.

31 Chapter 2 of the Explanatory Memorandum provided an article-by-article explanation of the *Model Law*. In Ch 2.37, the Explanatory Memorandum said that Art 16 established presumptions that allowed the court to expedite the evidentiary process, but at the same time,

did not prevent calling for, or assessing, other evidence in accordance with any applicable procedural law if the conclusions suggested by a presumption were called into question by the Court or an interested party. It said that Arts 15 and 16 provided a simple and expeditious structure to be used by a foreign representative to obtain recognition. That aim is expressly enunciated in Art 17(3).

32 The question of what is a COMI is, by no means, settled. The liquidators referred to the development of the concept in the Bankruptcy Courts of the United States of America under Ch 15 in its Bankruptcy Code of Title 11 of the United States Code (USC). In the leading decision of *In Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited (In Provisional Liquidation)* 389 BR 325 (SDNY 2008), District Judge Sweet considered whether a Cayman Islands-exempted company, such as Saad Investments, had its centre of main interests in the Cayman Islands or, in the United States. He explained that Cayman Islands' law allowed exempted companies to trade in that jurisdiction, provided that they sought further business outside the Cayman Islands and did not compete with local businesses.

33 The proceedings before District Judge Sweet were an appeal from a decision of Judge Lifland who had participated in the drafting of the adaption of the *Model Law* in Ch 15 of the *United States Bankruptcy Code*. Judge Lifland had held that the Cayman Islands' proceedings were not a foreign main proceeding because the insolvent debtor's centre of main interests was in the United States. He had found that a related company of the debtor, located in New York, was its investment manager and, in effect, ran the debtor's "back-office operation". Prior to the liquidation, virtually all of the debtor's liquid assets were located in New York. Judge Lifland concluded that the Cayman Islands' liquidation proceedings did not qualify even as foreign non-main proceedings under the adapted *Model Law*.

34 District Judge Sweet noted that Congress had enacted § 1516(c) in slightly different terms to its analogue in Art 16(3) of the *Model Law* that required "proof" to the contrary to defeat the presumed COMI. Instead, Congress had provided that "evidence" to the contrary was required for that purpose. He said that Ch 15 promoted predictability and reliability by establishing a simple, objective eligibility requirement for recognition. He said that the objective criteria for recognition in Ch 15 reflected the legislative decision by UNCITRAL and Congress that a foreign proceeding should not be entitled to obtain direct access to, or

assistance from, the host country courts, unless the debtor had a sufficient, pre-petition economic presence in the country of the foreign proceeding. He said that, if the debtor did not have its centre of main interests, or at least an establishment, in the country of the foreign proceedings, the local Bankruptcy Court should not grant recognition and was not authorised to use its power to effectuate the purposes of the foreign proceedings: *Bear Stearns* 389 BR at 333-334.

35 District Judge Sweet said that the rebuttable presumption in §1516 did not relieve a petitioner of its burden of proof or the risk of not being able to persuade the court of the facts. He said that the change of the word "proof" to "evidence" in the USC's adaption of Art 16(3) in the *Model Law*, was intended to clarify this issue. He also observed that courts could presume that a debtor's COMI is at the place of its registered office, but that this presumption may be rebutted by evidence to the contrary, even on an unopposed petition for recognition.

36 Both Judges Lifland and Sweet considered that the concept of the centre of main interests derived from the *European Union Convention on Insolvency Proceedings* (done at Brussels, November 23, 1995) that had been in the process of adoption when the *Model Law* was being drafted. The regulation adopting the European Convention explained that the centre of main interests meant "… the place where the debtor conducts the administration of his interests on a regular basis and is, therefore, ascertainable by third parties": see *Bear Stearns* 389 BR at 336. His Honor referred to the decision of the European Court of Justice in *Re Eurofood IFSC Limited* [2006] Ch 508, particularly at 542 [34]-[35] describing it as "more or less amount[ing] to another non-barking dog". District Judge Sweet noted that the European Court of Justice had held that the fact that a company's economic choices are or could be controlled by a parent company in another state was not enough to rebut the COMI presumption.

37 Subsequently, in *Re Betcorp Limited* 400 BR 266 (Bankruptcy District of Nevada, 2009) Bankruptcy Judge Bruce A. Markell elaborated on the development of the European Union regulation's concept of centre of main interests. He cited the *Report on the Convention on Insolvency Proceedings* by Miguel Virgos and Etienne Schmit. That report suggested that it was important that international jurisdiction be based on a place known to the debtor's potential creditors. It concluded that this would enable calculation of the legal risks that would have to be assumed in the case of insolvency.

38 Judge Markell made a comprehensive review of the previous United States decisions, including *Bear Stearns* 389 BR 325. He concluded that there District Judge Sweet had refused recognition because the debtor company existed in the Cayman Islands as merely a shell or letterbox: *Betcorp* 400 BR at 288. He considered that *Eurofood* [2006] Ch 508 and some English decisions confirmed the weight that may be given to a debtor's ascertainable principal place of business, in ascertaining the centre of the debtor's main interests, even when it is not located in the country in which the debtor is registered or incorporated: *Betcorp* 400 BR at 289, 291.

39 Judge Markell pointed out that giving consideration to a debtor's operational history increased the probability of competing main proceedings, and that probability would defeat the purpose of using the construct of a COMI. He said (*Betcorp* 400 BR at 291):

> "Requiring courts to give weight to the debtor's interests over the course of its operational history may destroy the uniformity and harmonisation that is the goal of employing the COMI inquiry.
>
> Moreover, it is important that the debtor's COMI be ascertainable by third parties. *Ran*'s [*In re Ran* 390 BR 257 at 274-275 (Bankr SD Tex 2008)] analysis correctly proceeds on the assumption that COMI is affected not only by what a debtor does, but by what the debtor is perceived as doing."

40 Judge Markell reasoned that an inquiry into the debtor's past interests could lead to a denial of recognition in a country where a debtor's interests were truly centred, merely because of past activities. He said that the result would frustrate two of the purposes of the COMI inquiry, namely first, it would decrease the effectiveness of the insolvency proceeding for which recognition was sought, and, secondly, it might lead to a sub-optimal distribution of the debtor's assets because non-recognition, where recognition is due, might forestall needed international co-operation: *Betcorp* 400 BR at 291.

41 The experience from the United States cases applying the adapted presumption of a COMI in § 1516(c) has not resulted in readily predictable outcomes. Judge Allan L Gropper, an eminent judge of the United States Bankruptcy Court, Southern District of New York, has written a paper: *Chapter 15 of the United States Bankruptcy Code*: Lindgren, op cit 149 at 154, that lamented:

> "The goal of the drafters of the Model Law and section 1516(c) of the United States Bankruptcy Code of simplifying the process of obtaining an initial order of

> recognition has not been met, as issues relating to the debtor's centre of main interests have been litigated repeatedly in Chapter 15 cases."

42 The European Court of Justice in *Eurofood* [2006] Ch 541-542 [29]-[37] considered the formulation of the test for ascertaining the COMI. The presumption in Art 16(3) of the *Model Law* is the same as had been in Art 3(1) of the European Regulation. The Court referred to a recital to the regulation that stated:

> "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

The Court continued (*Eurofood* [2006] Ch at 541-542 [33]-[34]):

> "33 That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.
>
> 34 It follows that, in determining the centre of the main interests of a debtor company, **the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect**." (emphasis added)

43 The European Court of Justice's approach was distilled by Lewison J who said that, for the presumption to be displaced, the Court had to be satisfied that the COMI is not in the State in which its registered office is located. His distillation was not contested in the appeal: *In Re Stanford International Bank Limited* [2010] 3 WLR 941 at 958 [30] per Sir Andrew Morritt C. The Chancellor (with whom on these points Arden LJ and Hughes LJ agreed at [107], [152] and [159]), did not try to reconcile the United States decisions with that of the European Court of Justice in *Eurofood* [2006] Ch 508. Morritt C said that, in any event, if there were a difference, the England and Wales Court of Appeal would follow the European Court of Justice: *Stanford* [2010] 3 WLR at 967 [54].

44 The Chancellor accepted that the derivation of the concept of the COMI in the *Model Law* had come from the definition in the preamble to the European Regulation quoted above and had been correctly elucidated in the Virgos/Schmidt report: *Stanford* [2010] 3 WLR at 966 [53]. He held that it had been conclusively established that the factors relevant to a rebuttal of the presumption must be both objective and ascertainable by third parties, being matters already in the public domain. Such matters would be what a typical third party would learn as a result of dealing with the debtor company, but would exclude matters that might only be ascertained on enquiry: *Stanford* [2010] 3 WLR 968-969 [56].

APPROPRIATE TEST FOR ASCERTAINING THE CENTRE OF MAIN INTERESTS

45 The interpretation of an international convention, even though it is given the force of domestic law, such as a *Model Law*, should be approached in accordance with the principles in the *Vienna Convention on the Law of Treaties 1969* done at Vienna on 23 May 1969 [1974] ATS 2. That is an authoritative statement of customary international law for the purposes of construing a convention: *Victrawl Pty Limited v Telstra Corporation* (1995) 183 CLR 595; *Strong Wise Limited v Esso Australia Resources Limited* (2010) 185 FCR 149 at 163 to 164 [46]-[47]. Article 32 of the Vienna Convention allows recourse to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion so as to confirm or determine meanings in cases of ambiguity, obscurity or unreasonableness, resulting from the application of Art 31. Of course, Art 31 provides for the primary rules of interpretation.

46 The purpose of a rebuttable presumption, such as that contained in Art 16(3), is to provide a ready means of dispensing with formal proof but to leave the way open for the Court to find that, on the evidence, the contrary is the case. The reason why the drafters of the *Model Law* adopted the device of providing for rebuttable presumptions in Art 16, clearly enough, was to assist in achieving the imperative requirement in Art 17(3).

47 International insolvencies give rise to a number of difficult problems for the various courts and jurisdictions in which a transnational debtor's assets are located. Lord Hoffman recognised in *Re HIH Insurance Limited* [2008] 1 WLR 852 at 861 [30], that the primary rule of private international law is the principle of modified universalism. He described this as the golden thread running through English cross-border insolvency law since the 18th Century.

He said that imposed a requirement, so far as it is consistent with justice and the public policy of the United Kingdom, for English courts to cooperate with the courts of the country of the principal liquidation to ensure that a company's assets were distributed to its creditors under a single scheme of distribution.

48 If the Court permitted recognition proceedings under the *Model Law* to descend into interminable debates as to where a company's centre of main interests might be, a situation could arise where the assets of the debtor were under the control of its insolvent principals or not otherwise administered consistently with the objectives of the *Model Law* while the debates raged. Often in insolvencies, there are suggestions of fraud and threats to the preservation of the assets in order that they might be available for a fair and equal distribution among the creditors wherever they may be. For this reason, speed and the resolution of who should be in control of the assets of the debtor, in a particular jurisdiction, and in all others in which the *Model Law* or an analogue is in force, are essential.

49 Given the importance to international commerce and, to third parties, of having an objective ascertainable basis upon which to commence and decide proceedings that will govern winding up an insolvency of a debtor under the *Model Law*, in my opinion, the approach adopted in *Eurofood* [2006] Ch 508 and *Stanford Bank* [2010] 3 WLR 941 should be followed here (and see too *Betcorp* 400 BR 260 and Art 8 of the *Model Law* itself). That approach leads to a more predictable and orderly international outcome than the less certain approach adopted by some of the Bankruptcy District Courts in the United States, perhaps because of the different wording of § 1516(c) of Ch 15 of that nation's Bankruptcy Code.

CONSIDERATION OF SAAD INVESTMENTS' COMI

50 The purpose of the presumption in Art 16(3) is to facilitate the decision of an application under the *Model Law* for recognition at the earliest possible time in accordance with Art 17(3). It will often be the case that the debtor's activities leading up to his, her or its insolvency, will have occurred in a variety of locations, and that more than one of these *might* be capable of being found to be the debtor's centre of main interests. The more complex the debtor's transnational dealings and the place or places from which the debtor engaged in them, the more difficult the task of the Court would be in untangling where the debtor's COMI is, were it not for the facultative presumption in Art 16(3).

51 That presumption is intended, in the absence of proof of its displacement, to avoid the Court having to spend, perhaps, years in trying to weigh the various transactions and commercial activities that the debtor undertook in various places throughout the world. There would be uncertainty, and indeed a great deal of potentially unnecessary distraction, created by that effort. Untangling the consequences of a cross-border insolvency in respect of a group of companies or a company that traded in many jurisdictions, is in itself, as experience has shown, a time-consuming and difficult exercise.

52 Delay in recognising a foreign main proceeding or foreign proceeding can prejudice the general body of creditors of a transnational insolvent. Experience of insolvencies over centuries has shown the reality of the threat that unscrupulous individual debtors, people associated with corporate debtors, and indeed ordinary creditors, may seek to deal with the assets of the debtor before the applicable insolvency law can ensure a fair and orderly administration of the insolvent's affairs. This threat is compounded in the case of a cross-border insolvency, particularly one involving many jurisdictions, where, previously, the administrations would occur according to a plethora of different domestic laws. In this context, it is obvious why the *Model Law* fixed on an easily ascertainable, prima facie position provided by the presumption in Art 16(3).

53 If, after reviewing all the evidence before the court, the proper conclusion is adverse to the presumption, then proof to the contrary will have been established. On the other hand, where the position is left uncertain, the *Model Law* authorises the court to proceed upon the deemed position, even if a more mature and thorough investigation eventually could determine it to be an erroneous, or indeed, fictitious, position. Of course, the court can revisit matters in the event provided in Art 17(4), namely that the original grounds for granting recognition were fully or partially lacking or had ceased to exist. Thus, if later investigation and collection of evidence were to show that where a court had applied the presumption of a COMI made by Art 16(3), and the actual COMI was elsewhere, that court could revisit the earlier order for recognition under 17(4). But it is not necessary to consider that circumstance here.

54 The application of averments or presumptions in domestic law of similar presumptions to those provided for in Art 16 is not a substitute for a consideration of the *Model Law* as an international convention. However, the discussion of the operation of

statutory evidentiary presumptions by Isaacs ACJ, Gavan Duffy and Starke JJ in *Gabriel v Ah Mook* (1924) 34 CLR 591 at 595 is instructive. The High Court considered the operation of a rebuttable averment. They said that if the proper conclusion were adverse to the averment, it would be because the proof was to the contrary. But if it appeared that merely some of the relevant facts were proved, and the person relying on the presumption was unable, for some reason, to complete them so as to enable the court or tribunal of fact to come to a conclusion one way or the other as to the averment, then the court or tribunal must act on the basis that the presumption was correct. They said this concerning the effect of a presumption provided by statute that an averment was to be taken as true in the absence of evidence to the contrary. The consequence in such a case was that the averment was taken to be proved, not disproved, where the evidence about its accuracy was left uncertain.

55 None of the three orders for recognition of the Cayman Islands proceedings as foreign main proceedings made by courts in England, the Bahamas and Jersey appear to have been the subject of a reasoned judgment. The fact that three courts in other jurisdictions acting under the *Model Law* have accepted the presumption in Art 16(3), is a factor that could also be taken into account in these proceedings. However, I need not, and do not, rely on that fact in this case to ground my decision.

56 I am of opinion that the operation of Art 16(3) is intended to provide a manner of proof, to the point of being prima facie evidence, of the matter the Article has presumed based on the place of incorporation of the debtor: see too *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159 at 174 [38] per McHugh, Gummow, Hayne and Heydon JJ.

57 In the present case, there were many commercial activities in which Saad Investments engaged in various jurisdictions in the world. Some had a closer connection than others with particular places, including, in particular, Switzerland. On the whole of the evidence, however, I am not satisfied that it has been proved that the presumption provided in Art 16(3) has been displaced.

CONCLUSION

58 For these reasons, I am satisfied that the proceedings in the Grand Court of the Cayman Islands should be recognised, first, as a foreign proceeding for the purposes of

Art 17(1) and, secondly, as a foreign main proceeding for the purposes of Art 17(2), because Saad Investments should be presumed to have its centre of main interest in that jurisdiction.

59 On the evidence currently before me I am satisfied that it follows that the liquidators must be recognised as foreign representatives for the purposes of Art 2(d) of the *Model Law*. I will make orders for the purposes of protecting the assets of the debtor, Saad Investments, within Australia under Art 21 r (1) in the form that I will pronounce, giving to the liquidators, in their capacity as foreign representatives, similar powers that a liquidator would have were he or she appointed under the *Corporations Act 2001*.

I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 9 November 2010