

THE STANFORD BANK DECISIONS IN ENGLAND AND QUEBEC: ARE WE MOVING FURTHER AWAY FROM COMMON PRINCIPLES?

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Introduction

The recent decisions (one from England and two from Quebec) in the Stanford International Bank (“SIB”) matter cast doubt on the ability of international courts to develop a unified and cohesive approach to the interpretation of Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency (the “Model Law”). In the English decision in *Re. Stanford International Bank Limited, et al.* [2009] EWHC 1441 (Ch.) the court found that the Antiguan appointed liquidators of SIB were the proper foreign representatives to be given recognition and not the U.S. appointed Receiver over SIB (and others). In addition, it found that SIB’s centre of main interest (“COMI”) was Antigua. The two decisions of the Quebec court (*Re. Stanford International Bank Limited, et al.* (2009 QCCS 4109) and (2009 QCCS 4106)) reached the opposite conclusions, largely on the basis of the court’s view of the Liquidators’ conduct. Despite the fact that the Quebec decisions were based on a version of the Canadian Bankruptcy and Insolvency Act that did not yet enshrine the Model Law, having regard to the nature of a Liquidators’ office and principles of international law, it is unclear from the Quebec decisions whether the Liquidators’ impugned conduct justified disregarding the type of interpretive analysis laid out in the English decision.

These conflicting decisions strike a stark discord with the general principle as stated in Article 8 of the Model Law in the following terms:

“In the interpretation of this 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.”

Background – The Model Law

The preamble to the Model Law sets out its general purpose as follows:

“The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (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 maximisation of the value of the debtor’s assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.”

Article 15 of the Model Law provides that a “foreign representative” may apply to the domestic court for recognition of the foreign proceeding and the foreign proceeding shall be recognized if it meets the requirements set out in Article 17(1). Once recognised, the domestic court must then determine if the foreign proceeding is to be recognised as a “foreign main” proceeding or as a “foreign non-main” proceeding.

“Foreign main proceeding” is defined as, “... a foreign proceeding taking place in the State where the debtor has the centre of its main interests.” Article 16, paragraph 3 states that, “[i]n 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 debtor’s main interest.”

Article 17(2) states this clearly as follows:

“The foreign proceedings shall be recognised:

- (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
- (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.”

The following flows from recognition as a “foreign main” proceeding under Article 20:

- “(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; and
- (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.”

On the other hand, recognition as a “foreign non-main” proceeding leaves the degree of administration and protection of the domestic assets largely in the discretion of the domestic court. It contemplates such decisions being made on a case-by-case basis, as stated in paragraph 3 of Article 21,

“In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.”

In either case, the Model Law contemplates access to the domestic courts by the foreign representative to avoid acts detrimental to the creditors. Again, in the case of a “foreign non-main” proceeding the specific acts should be subject to the scrutiny of the court to determine whether the action in question relates to assets that should be administered in the domestic or foreign proceedings (Article 23).

Background to the Stanford Decisions

Without getting into the facts surrounding SIB’s downfall, below is a summary of the facts that led up to the English and Quebec decisions.

February 16, 2009 - The U.S. SEC files a complaint against Sir Allen Stanford, SIB and others, alleging (among other things) securities fraud and violations of securities laws. The U.S. District Court for the Northern District of Texas appointed Ralph Janvey (the “Receiver”) as worldwide receiver over the assets of the defendants.

February 19, 2009 - The Financial Services and Regulatory Commission of Antigua and Barbuda (the “FSRC”) appointed Messrs. Wastell and Hamilton-Smith as Receiver-Managers of SIB and its related trust company under the Antiguan International Business Corporations Act.

April 15, 2009 - On the petition of the FSRC, the Antiguan court made an order winding up SIB and appointing Messrs. Wastell and Hamilton-Smith as liquidators of SIB (the “Liquidators”).

The Stanford English Decision

Both the Receiver and the Liquidators then applied for recognition as foreign representatives under England's regulations that gave effect to the Model Law.

There were essentially two issues before the court:

- (a) Who (if either) was the appropriate applicant as foreign representative?
- (b) Which jurisdiction ought to be considered SIB's COMI?

A. Who Was the Foreign Representative

In respect of the first issue, the Law defines a "foreign representative" as,

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

"Foreign proceeding" is defined as,

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

It was argued before the court that the U.S. Receiver could not be a foreign representative as the U.S. proceeding could not be a foreign proceeding because,

- i. it was not a collective proceeding;
- ii. the Receiver was not appointed pursuant to a law relating to insolvency; and,
- iii. the Receiver was not appointed for the purpose of reorganisation or liquidation.

The court made reference to the terms of the order of the US District Court for the Northern District of Texas appointing the Receiver which stated, (among other things):

"The appointment of a temporary receiver for Defendants, for the benefit of investors, to marshal, conserve, protect, and hold funds and assets obtained by the Defendants and their agents, co-conspirators, and others involved in this scheme, wherever such assets may be found, or with the approval of the Court dispose of any wasting asset in accordance with the application and proposed Order provided herewith." (emphasis added)

The order itself recites that it is made because:

"It ... is both necessary and appropriate in order to prevent waste and dissipation of the assets of Defendants to the detriment of the investors" (emphasis added)

The court contrasted evidence adduced by U.S. experts Mr. Daniel Glosband (on behalf of the liquidators) and Professor Westbrook (on behalf of the Receiver). The court cited Mr. Glosband for the principle that,

"... there is no (or very little) statutory regulation of receivers; and that where receivers have been appointed over insolvent corporations as an alternative to bankruptcy (a practice that has been deprecated by some US courts) the appointment relies on "the ad hoc application of equitable principles" to those cases. If and when a distribution plan is approved by the court, it will be a plan approved pursuant to ad hoc principles of equity rather than under any law relating to insolvency."

Notwithstanding Professor Westbrook's evidence that such receivership orders can and often do result in pro rata distributions to creditors, the court concluded that it was bound to examine the specific terms of the order appointing the specific receiver rather than what was generally

possible with U.S. receivership orders. Ultimately the court made the following findings which led to the conclusion that the U.S. proceeding was not a “foreign proceeding”:

- i) The recited purpose of the order was to prevent dissipation and waste, not to liquidate or reorganise the debtors’ estates;
- ii) The detriment that the court was concerned to prevent was detriment to investors;
- iii) The underlying cause of action which led to the making of the order had nothing to do with insolvency and no allegation of insolvency featured in the SEC’s complaint. Indeed there is no evidence that any of the personal Defendants (i.e. Sir Allen, Mr. Davis or Ms. Pendergest-Holt) is in fact insolvent, yet the appointment of the Receiver over their assets must have the same foundation as his appointment over the assets of the corporate Defendants;
- iv) The powers conferred on and duties imposed on the Receiver were duties to gather in and preserve assets, not to liquidate or distribute them. (The order does not, at least on its face, confer any power on the Receiver to sell any of the Defendants’ assets of which he might take possession);
- v) In so far as the order mentions creditors who are not investors, they are mentioned only to allow claims to be compromised. The reference to distributions to creditors does not sanction actual distribution; it merely describes the reason why expenses are to be kept to a minimum;
- vi) The order does not preclude claims from being made against the Defendants outside the receivership if either they do not relate to the underlying causes of action on which the SEC’s application was based, or they are brought in the District Court for Northern Texas;
- vii) Under the order the Receiver has no power to distribute assets of the Defendants. It would need a further application to the court to enable him to do so;
- viii) The fact that some receiverships may be classified for some purposes as “insolvency proceedings” or be treated as acceptable alternatives to bankruptcy does not mean that this receivership satisfies the definition of foreign proceeding in the Cross-Border Insolvency Regulations 2006;
- ix) The general body of common law or equitable principles which bear on the appointment of a receiver and the conduct of a receivership is not “a law relating to insolvency” since it applies in many different situations many (if not most) of which have nothing to do with insolvency; and many of the principles leave a good deal to discretion.”

The court then turned its attention to whether the Antiguan Liquidators could be “foreign representatives”. It concluded that the Antiguan liquidation was a “foreign proceeding” for the purpose of the English law implementing Article 15. As such, the Liquidators were appointed pursuant to a law relating to insolvency and they were “foreign representatives” in respect of a “foreign proceeding”.

As a result, the Liquidators had standing. The Receiver did not.

B. Which Jurisdiction Was the COMI?

On the second issue before the court it considered whether, in determining the factors connecting SIB to a particular jurisdiction, one should look to all connecting factors in evidence at the hearing or only to those that would have been transparent and objectively ascertainable. This determination was particularly relevant in respect of SIB because (due to the nature of the allegations of fraud) the connecting factors that were objectively ascertainable by third parties might have differed wildly from those factors alleged to have been fraudulently concealed.

The court applied the following reasoning per Jacobs A-G in the European Court decision in *Re. Eurofood IFSC Ltd.* [2006] Ch. 508, interpreting a similar EC Regulation:

“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.

35 That could be so in particular in the case of a “letterbox” company not carrying out any business in the territory of the member state in which its registered office is situated.

36 By contrast, where a company carries on its business in the territory of the member state where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another member state is not enough to rebut the presumption laid down by the Regulation.”

In determining what is meant by “ascertainable” the court rejected the idea that it referred to ascertainability by a stakeholder having asked all of the right questions. Instead the court decided as follows:

“One important purpose of COMI is that it provides certainty and foreseeability for creditors of the company at the time they enter into a transaction. It would impose a quite unrealistic burden on them if every transaction had to be preceded by a set of inquiries before contract to establish where the underlying reality differed from the apparent facts.”

On this issue the court concluded that,

- i. the presumption that COMI coincides with the location of the company’s registered office was a true presumption; and,
- ii. the burden lies upon the party seeking to rebut it with connecting factors that were objectively ascertainable by third parties.

The court paused to contrast these conclusions with the law in the United States in the following terms:

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

66. Professor Westbrook, the Receiver’s expert on US law, explains in his first affidavit (§ 21) that:

“The United States jurisprudence has made it clear that the COMI lies in the jurisdiction [where] the most material “contacts” are to be found, especially management direction and control of assets.”

67. According to *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* these contacts can include the location of the debtor's headquarters, the location of those who actually manage the debtor, the location of the debtor's primary assets, the location of a majority of the debtor's creditors or of a majority of creditors who would be affected by the case and the jurisdiction whose law would apply to most disputes. However, none of these factors in the American jurisprudence is qualified by any requirement of ascertainability. In my judgment this is not the position taken by the ECJ in *Eurofood*."

Based on all of the above the court concluded as follows in respect of the second issue (COMI):

- "i) The relevant COMI is the COMI of SIB;
- ii) Since its registered office is in Antigua, it is presumed in the absence of proof to the contrary, that its COMI is in Antigua;
- iii) The burden of rebutting the presumption lies on the Receiver;
- iv) The presumption will only be rebutted by factors that are objective;
- v) But objective factors will not count unless they are also ascertainable by third parties;
- vi) What is ascertainable by third parties is what is in the public domain, and what they would learn in the ordinary course of business with the company."

The Stanford Quebec Decisions

Unlike the decision of the English court, the decisions of the Superior Court of Quebec were based on a version of the Canadian Bankruptcy and Insolvency Act that did not yet enshrine the Model Law, however, the Superior Court appeared to conduct little analysis under the concept of "real and substantial connection", which presaged the concept of COMI (albeit without the presumption of the debtor's registered office). Rather, the court simply dismissed the Liquidator's application on the basis of the liquidators' conduct and summarily accepted the Receiver as the "foreign representative" and that the real and substantial connection (or COMI in the parlance of the Model Law) was the U.S.

In order to appreciate the nature of the Liquidators' impugned conduct, one must start with an understanding of the general nature of a liquidators' office at common law. While statutory, liquidators in common law countries typically step into the shoes of the company's management. They are able to exercise control of the company, assert any of the company's rights and assume its duties. At the same time, the liquidators are officers of the court charged with the duty of liquidating the company's assets for the benefit of its stakeholders.

The Liquidators' initial appointment as "Receiver-Managers" under Antiguan law appeared to share these fundamental characteristics.

As such, it would not be unusual for a company's liquidators to consider foreign securities regulators (for example) as third parties with no rights over the company other than as required by law - in the same manner as the company itself might. They are typically able to exercise all of the company's rights. To whatever extent foreign regulators (or other third parties) have legal rights *vis a vis* the company, the liquidators would have an obligation to respect such rights only to the extent that the company would have had an obligation to do so. They are entitled (indeed required) to act in the best interest of the company and to the benefit of its estate, even if doing so is contrary to the interests of third parties (including third-party regulators), providing always that their actions are consistent with those of an officer of the court that appointed them.

Going through a chronology of events the court found that,

- i. on February 25, 2009, Quebec's securities commission (the "AMF") wrote to the Liquidators requesting information and documents regarding SIB's Montreal office;
- ii. on March 3, 2009, the Liquidators informed the AMF that the employees of SIB's Montreal office were terminated and someone was engaged to provide data recovery services in respect of electronic information at that office;
- iii. imaged copies of the electronic data were taken and a copy was sent to the Liquidators in Antigua;
- iv. the Liquidators then deleted the SIB servers in the Montreal office;
- v. in response to concerns by the Receiver, counsel to the Liquidators replied that,

"The information on the Bank's servers located in its Montreal premises has been imaged onto hard disks and have been preserved to the standards required in the criminal investigation matter. This was done by our client to make sure that this data would be securely maintained and that no one entering the Bank's Montreal premises could in any way tamper with said data or take a copy thereof or take a copy thereof without any right."

- vi. the Liquidators subsequently refused to send the AMF a list of investors on the basis that an order from the court in Antigua would probably be necessary.

On April 6, 2009, the Liquidators (who were only Receiver-Managers in Antigua at that point) successfully applied ex parte for an order before the Quebec Registrar seeking appointment of a foreign representative, the recognition of a foreign order, for judicial assistance and the appointment of an interim receiver.

The Liquidators were appointed as Liquidators by the Antiguan Court on April 15, 2009. Both the Antiguan Liquidators and the U.S. Receiver applied for recognition as a foreign representative.

At the hearing of both applications, the court considered that the Liquidators sought significant powers and that it had a wide discretion to grant or refuse the relief requested.

In addition to the court's negative view of the Liquidators' conduct, it was concerned that Antiguan law prevented the Liquidators from disclosing customer information without an order by the High Court of Antigua. Based on this the court stated as follows:

"[33] [translation] The Court notes that Antiguan Court show no deference for our regulatory authorities. However, SIB did in fact operate an office in Montreal."

As a result of the court's view of the Liquidators' conduct it concluded as follows:

"[61] [translation] Even if the liquidator's motion was well-founded on the merits, it does not deserve the confidence of the Court, an essential element enabling it to submit its motion, and this, because of the absence of good faith and of respect towards the Canadian public interest, represented by the Court and the regulatory authorities."

In a separate decision the Superior Court of Quebec then turned to the application of the Receiver seeking (among other things),

- i) to quash the ex parte order recognising the Liquidators;
- ii) to recognise the Receiver as the foreign representative; and
- iii) to appoint an interim receiver in Canada to assist the Receiver.

The Quebec court was charged with making the similar determinations previously made by the English court.

A. Who Was the Foreign Representative

The first issue the court considered was whether the Receiver could constitute a “foreign representative” as a representative of a “foreign proceeding”. Rather than conducting the type of analysis undertaken by the English court, the Quebec court reasoned that,

- i) when the Liquidators applied for (and were granted) Quebec recognition ex parte on April 6, 2009, they did so in their capacity as Receiver-Managers under the International Business Corporation Act of Antigua and Barbuda – as they had not yet been appointed as liquidators;
- ii) their powers as Receiver-Managers were more limited than those of the U.S. Receiver; and,
- iii) as a result, they were in no position to object to the appointment of the U.S. Receiver as a “foreign representative”.

The relevant parts of the definition of “foreign proceeding” in Canada’s Bankruptcy and Insolvency Act, even prior to the implementation of the Model Law in that country, are similar to the definition proposed in the Model Law and similar to the definition considered by the English court. Section 267 provided as follows,

“foreign proceeding” means a judicial or administrative proceeding commenced outside Canada in respect of a debtor, under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally” (emphasis added)

The court then summarily concluded as follows:

[9] [translation] Vantis’ position before Registrar Flamand conforms with case law which held that appointing receiverships pursuant to a securities law is equivalent to foreign proceedings relating to bankruptcy and insolvency and dealing with the collective interests of creditors generally.

[10] Janvey, under the terms of the order appointing him, had control over the property – the assets of the entire Stanford Group – had to ensure that all these assets be frozen, and was vested with all the powers of the company as he had to protect and recover the assets, and ensure the suspension of the rights of all creditors, his powers being of the nature of those exercised by a trustee in bankruptcy or a liquidator in insolvency and bankruptcy, interim receivership or restructuring.

[11] The order suspending all proceeding relating to creditors is a fine example of a power conferred to a trustee or a liquidator.

[12] The Court has no hesitation in concluding that these proceedings involving Janvey are proceedings instituted abroad which conform to the definition provided in Section 267.”

B. Which Jurisdiction Was the COMI?

The court then turned its attention to the jurisprudential concept of “real and substantial connection” under Canadian law, the precursor of the statutory concept of COMI.

As pointed out in the English case, the U.S. legislation uses “evidence” instead of “proof” which Lewison J. noted might explain the different presumptive tests that appear to be emerging in England and the U.S. Nevertheless, the Quebec Superior Court made no use of comparative law, whether pre-Model Law or post-Model Law, even though some effort to distinguish the English decision would have been helpful in the elaboration of common principles.

The decision of the Superior Court of Quebec appeared to conduct very little analysis of the concept of real and substantial connection in reaching the following conclusion:

[34] [translation] As such, the Court, to paraphrase the Supreme Court, is of the view that the “lifestyle” of this offshore bank is directly linked to the Stanford Group headquarters in Houston, and that SIB in Antigua is but a spoke in this affair.

[35] The Court is of the view that for *Ponzi* style frauds, the real and important connection is situated at the place of business of the nerve center or as one could call it, the center of the spider web of this fraud.

[36] The importance of the nerve center in Houston is beyond dispute. The most equitable solution is that the Court recognises the receivership and Janvey, the United States Receiver, as foreign representative.”

Conclusions

A. The English Decision

Three interesting points emerge from the English decision as to what should be the normative international standard for interpreting the Model Law:

- i. What should be the criteria for a “foreign proceeding”?
- ii. What ought to be the strength of the rebuttable presumption that the registered office is the COMI?
- iii. Should the rebuttable presumption be displaced by objectively ascertainable criteria, or all actual criteria even if they were not previously reasonably discoverable by stakeholders?

On the first question, the court made it clear that one can look to the actual powers and duties conferred on proposed foreign representatives. As such, it did not preclude U.S. receivers generally from recognition, but required clarity from the appointment order that the appointment was for a collective purpose to protect the interests of all stakeholders rather than an incident of private litigation by one stakeholder or group of stakeholders.

The fact that it might (or even likely would) transpire that the Receivership would evolve into a collective process akin to an insolvency proceeding, was clearly insufficient comfort for the court. Arguably, this problem could be fixed through creative drafting of the appointment order. Nevertheless the fundamental problem might remain as to the purpose of the interim protection – whether it is in aid of private litigation or a collective/insolvency proceeding.

In respect of points (ii) and (iii), different answers might emerge depending upon one’s view of the purpose of the COMI determination. The English/European approach seems to value the reasonable expectations of stakeholders and, as a corollary, a test that gives greater clarity in advance as to what the answer will be.

If stakeholders form a reasonable expectation that they are lending to or investing in a company that, if insolvent, will likely have its principal place of the insolvency administration in a certain jurisdiction, they might well adjust their conduct and price their credit/equity investments accordingly. While COMI is not necessarily determinative of the applicable law that will govern insolvency claims, it is unrealistic to think that a creditor/shareholder might not adjust their conduct based on clear knowledge that (if insolvent) the company’s COMI would be the People’s Republic of China vs. the U.S.

In the case of a fraud, the question to a stakeholder might be, would you rather the estate be principally administered in the jurisdiction where you thought the company principally operated or the jurisdiction where it later transpired that it had principally operated? The former might be a more just result as it would be consistent with their expectations at the time they transacted with the company.

If we reverse the alleged facts in the SIB matter, such that SIB was in fact principally operated/controlled from Antigua but it was only objectively ascertainable (i.e. victims were led to believe) that it principally operated/was controlled from the U.S., would it be more just for the COMI to be,

- i. Antigua, the place from which the alleged fraudster chose to operate; or,
- ii. the U.S., the place where stakeholders would have expected COMI to be?

The related issue is the extent to which the presumption (in favour of the location of the registered office) should be maintained or set aside. An analysis on the basis of the reasonable expectations of stakeholders could favour a protection of the presumption since a registered office is much easier for a counter-party to determine than its material contacts of which they might have no knowledge.

The preamble to the Model Law expressly cites “greater legal certainty for trade and investment” as one of its objectives. However, it also cites, “fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor”. Applying this second objective might lead one to different conclusions as to the most appropriate legal analysis. It might be more fair and efficient for COMI to be in the jurisdiction with (in fact) the most material contacts instead of the jurisdiction where stakeholders would have reasonably expected COMI to be, notwithstanding trade offs for legal certainty, predictability, and protection of reasonable expectations.

B. The Quebec Decisions

The Quebec decisions are troubling for several reasons.

- 1) The Liquidators’ conduct seems to have been impugned, apparently (based on the written decisions) without due consideration of the nature of their office, their obligations, or the international context in which they were operating.
- 2) The Receiver was recognised and a real and substantial connection was found with the U.S., apparently without adequate consideration of the type of reasoning and statutory construction set out in the English decision.

In the first instance, the decision is not clear as to what law of Canada the Liquidators had offended. It appears that they were bound by the order appointing them and were not in a position to cooperate with foreign regulatory authorities unless obligated to do so by the foreign (Canadian) law or required to do so by the Antiguan courts that had appointed them. From a liquidator’s perspective, they could be required to balance the interests of investors against those of creditors. It would come as no surprise that they might be reticent to freely cooperate with a foreign regulatory authority, particularly one that does not necessarily share that mandate and is charged with parochial investor protection only; again, unless clearly required to do so by (for example) a court order.

Among the reasons given for its refusal to recognise the Liquidators, the court cited that, “[59] [translation] [i]t (the Liquidators/Receiver-Managers) acted in Canada before even obtaining the necessary permission from the Court.” It is unclear from the decisions why the fact that the Liquidators acted in Canada prima facie required court approval. From a corporate perspective, if SIB controlled the Montreal office and the Liquidators controlled SIB, they would normally be entitled to do anything that SIB could have done without the need to obtain an order from Quebec courts (or the consent of the AMF).

In addition, the Quebec court appeared critical of the Liquidators’ failure to respect the terms of the U.S. receivership order. Among the reasons given for its refusal to recognise the Liquidators, the court cited,

- “[59] [translation] [t]he fact that Janvey (the Receiver) had already been appointed by the American Court as receiver of the debtors, the Respondents

and the entities related to them and that he had the power to control all their assets and this, wherever they were located...”

With respect, the fact that an order of a U.S. court purports to take control of Canadian assets of an Antiguan company, ought not to necessarily make it so. The Liquidators were bound by an order of the Antiguan courts that gave them the authority to act in the name of SIB. The decision cited no principle under which that authority was bound by U.S. order purporting to take extra territorial effect.

As for the court’s reasons for concluding that SIB’s real and substantial connection was the U.S., the majority appear to relate to the court’s holding that the Liquidators were hypocritical for having raised the issue when they (qua Receiver-Manager) had obtained recognition, yet they objected to the U.S. Receiver now seeking it. No reasons were given as to why the U.S. proceeding was one, “...under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally” (per the Canadian Bankruptcy and Insolvency Act, as it read at the time). One would have thought that the court had a duty to reason through this determination irrespective of the merits of consent or objections by other parties.

Even if the former order obtained by the Liquidators (when done as Receiver-Manager) was relevant to a determination of the U.S. Receiver’s status, there was no analysis done as to whether the Antiguan legislation that appointing the Receiver-Manager would or would not have qualified under the above definition of “foreign proceeding”. An Antiguan Receiver-Manager might well meet the requirement of an appointment made pursuant to a collective insolvency proceeding where the U.S. Receiver had not. The Quebec decision gave no analysis in this regard.

While perhaps imperfect and subject to academic scrutiny, the English decision creates a jurisprudential framework upon which international courts have an opportunity to (or not to) build a common set of principles upon which the Article 15 provisions of the Model Law can be interpreted. The Quebec court missed an opportunity to build upon that common body of judicial reasoning by either affirming or distinguishing the reasoning of the English court.

Postscript

A. The Quebec Decisions

The Liquidators applied to the Quebec Court of Appeal for leave to appeal and the Receiver brought a summary motion to dismiss the appeal. A judgment on both was issued on December 17, 2009.

On the first issue at first instance (whether the Receiver was appointed under a “foreign proceeding”), the appeal court concluded as follows:

- [29] The judge of first instance reached the conclusion that the U.S. receivership was a “foreign proceeding” after conducting a detailed analysis of the content and substance of the Receivership Order and of the powers vested in Janvey, as receiver, over the entities of the Stanford Group and their assets.
- [30] He also conducted a comparative analysis of the Antiguan and U.S. Receivership Order, concluding that the powers given to Janvey pursuant to the U.S. Receivership Order were much broader in scope than those given to H-S/W under the Antiguan Receivership Order which, in passing, H-S/W had asked Registrar Chantal Flamand (of the Quebec Superior Court, Bankruptcy Division) to recognise as a “foreign proceeding”.
- [31] In light of the foregoing, the Court is of the view that petitioners’ efforts to have this conclusion set aside shows no reasonable chance of success.”

The above appears to ignore the main issue, which is whether the proceeding in question meets the definition of a proceeding under a law relating to bankruptcy or insolvency. Presumably, a secured creditor’s privately appointed receiver (if given broad enough powers) would meet the above test, notwithstanding that they would represent the interests of one stakeholder only.

The Court of Appeal upheld the first instance decision on the second issue (real and substantial connection, or COMI in Model Law parlance) as well, concluding the following:

"[22] Auclair J. also came to the conclusion that SIB's real and substantial connection is with the United States and not Antigua. Again, this conclusion is supported by the evidence and, in the absence of any palpable and overriding error, is unassailable."

However, the Court of Appeal also stated as follows:

"[18] In his reasons, Auclair J. recognizes that Part XIII of the BIA exists in order to foster cooperation between jurisdictions. However, he concludes that this goal cannot set aside the discretion vested in the court by subsection 268(6) of the BIA; Part XIII seeks to protect the interests of Canadian creditors by facilitating cooperation amongst jurisdictions where it is in their interests, while affording Canadian courts the discretion to refuse cooperation where it is not.

[21] Furthermore, the question of what is or is not in the interests of the Canadian creditors is a question of fact within the exclusive purview of the trial judge. Faced with two competing insolvency regimes (Antigua and U.S.), Auclair J. came to the conclusion that it was the cooperation with the U.S. receivership that was in the best interests of the Canadian creditors of SIB. This conclusion is supported by the evidence and, as such, is unassailable." (emphasis added)

Leaving aside the issue of whether the U.S. proceeding was in fact an insolvency proceeding, it is difficult to accept that the language or purpose of provisions "to foster cooperation between jurisdictions" supports the view that either recognition or COMI determinations should be based on the best interests of parochial constituents.

B. English Decision

The English High Court of Justice, Chancery Division granted permission to the Receiver to appeal its decision of July 3, 2009 on the basis that, "... there were two conflicting decisions on the correct approach to COMI: both of them my own." That hearing took place between November 16th and 20th, 2009. According to the Liquidators' website, "The judgment of the Court of Appeal is presently expected during late December 2009 and a further notification will be issued when the judgment is received." As at January 26, 2010, the decision had not yet been issued.

C. U.S. Chapter 15 Recognition

The Liquidators had applied for Chapter 15 recognition in the U.S. The United States District Court for the Northern District of Texas scheduled the matter to be heard on January 21 and January 22, 2010, but an order was made on January 7, 2010 cancelling the hearing.

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This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

Notes to Editors

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