Neutral Citation Number: [2019] EWHC 1215 (Ch)

Case No: CR-2019-002136

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006 AND IN THE MATTER OF STURGEON CENTRAL ASIA BALANCED FUND LTD (IN LIQUIDATION)

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 17/05/2019

Before:

MRS JUSTICE FALK

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Roy Bailey and Keiran Hutchison **Applicants**
(as foreign representatives of Sturgeon Central Asia Balanced Fund Ltd)

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Joseph Curl (instructed by **Clyde & Co LLP**) for the **Applicants**
Hearing date: 8th May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE FALK

Mrs Justice Falk:

1. This is an application by the provisional liquidators (the "Liquidators") of Sturgeon Central Asia Balanced Fund Ltd (the "Company"), seeking recognition in Great Britain of the Company's liquidation as a "foreign main proceeding" under the Cross-Border Insolvency Regulations 2006 ("CBIR"). The application first came before ICC Judge Burton on paper on 29 March 2019, who considered that the matter should be considered by a High Court judge because it gave rise to an important point of law.

2. The point is simply stated but rather less simply answered. The question is whether or not CBIR recognition must be granted to an indisputably solvent company that is subject to a court ordered winding up on just and equitable grounds, under a law based on the Companies Act 1948 (see now section 122(1)(g) of the Insolvency Act 1986).

3. I had the benefit of helpful submissions from Mr Curl, Counsel for the Liquidators, both orally and in the form of subsequent written submissions which addressed a number of questions that I had raised.

The factual background

4. The Company was incorporated under the laws of Bermuda in March 2007, to act as a closed-ended investment company. It was aimed at Japanese investors wishing to invest in Central Asia. It was listed on the Irish Stock Exchange, but its shares were apparently never traded on it. The Company had a Bermudian corporate company secretary and its administration was carried out there under a corporate services agreement. It had three directors at the time of its liquidation, one in Japan, one in the UK and one in Kazakhstan. A London based investment manager has management of the majority of its assets.

5. The Company has a small number of management shares with voting rights but no material economic rights. Its share capital principally comprises participating shares which are held on behalf of investors. Of a total of 7.6 million such shares (ignoring shares held in treasury), Capital Partners Securities Co. Ltd ("CPS"), a licensed Japanese securities company, is the nominee for over 7.2 million shares and holds most of the remainder in its own right.

6. Under the original bye-laws of the Company there was a provision allowing participating shareholders to pass a resolution in 2014 to wind it up from the end of 2015, subject to a deferral of up to two years. At the AGM in 2014 the management shareholder adopted amended bye-laws which had the effect that the participating shareholders lost their power to wind the Company up, without being given notice or permitted to vote. There was an alternative structure under which the Board could allow participating shares to be redeemed, but this was very restricted and under the proposed timetable it would take 40 years for shareholders to redeem in full, and on terms that involved a discount to net asset value.

7. CPS petitioned for the Company's winding up on just and equitable grounds, contending that there had been a serious breakdown in the basis on which the Company was set up and investors were being denied their rights. There was no suggestion that the Company was insolvent, and that remains the case.

8. At first instance relief was refused by the Chief Justice, but the Court of Appeal for Bermuda reversed this and ordered the Company to be wound up. Clarke JA concluded as follows:

> "What has happened here is that in 2014 the Participating Shareholder had its fundamental right to procure the winding up of the company by a Special Resolution at the 2014 AGM wrongly taken away from it and, in the absence of relief from the court, irretrievably lost…I would regard the fact that the Board and the Company both denied the Participating Shareholder the right and, at the same time, by amendment to the Bye-Laws, removed it as giving rise to 'a justifiable lack of confidence in the conduct and the management of the company's affairs'."

9. Winding up was ordered under section 161 of the Bermuda Companies Act 1981. This is based on section 222 of the Companies Act 1948. It provides for winding up by the court on a number of different bases, including insolvency:

> **"Circumstances in which company may be wound up by the Court**
>
> 161. In addition to any other provision in this or any other Act prescribing for the winding up of a company a company may be wound up by the Court if–
>
> …
>
> (e) the company is unable to pay its debts;
>
> …
>
> (g) the Court is of the opinion that it is just and equitable that the company should be wound up."

10. Permission to appeal to the Privy Council was refused, and the stay that had previously been imposed was lifted. The provisional liquidators were appointed by the Supreme Court of Bermuda on 22 January 2019, and the recognition application was made to this court on 25 March. The statement of affairs as at 22 January 2019 shows net assets of just under US $39 million. As already indicated, the majority of the assets are managed in England. I was informed by Mr Curl that although steps have been taken to terminate the investment management agreement, no acknowledgement or other response has been received from the English manager.

The CBIR and the Model Law

11. The CBIR gives force of law in Great Britain to the Model Law on Cross-Border Insolvency adopted in 1997 by the 30th session of the United Nations Commission on International Trade Law ("UNCITRAL"). The Model Law relevantly provides for the recognition of certain proceedings ("foreign proceedings") in relation to a person, referred to as "the debtor", in which a "foreign representative" has been appointed in a court of another jurisdiction. Where the proceeding is recognised as a "foreign main proceeding" the effects include, under Article 20, a stay on the commencement or continuation of actions or proceedings concerning the relevant entity, a stay of execution against its assets, and a suspension of the right to dispose of its assets.

12. The Model Law as applied in Great Britain by the CBIR is set out at Schedule 1 to those regulations. Regulation 2(2) CBIR provides as follows:

> "Without prejudice to any practice of the courts as to the matters which may be considered apart from this paragraph, the following documents may be considered in ascertaining the meaning or effect of any provision of the UNCITRAL Model Law as set out in Schedule 1 to these Regulations—
>
> (a) the UNCITRAL Model Law;
>
> (b) any documents of the United Nations Commission on International Trade Law and its working group relating to the preparation of the UNCITRAL Model Law; and
>
> (c) the Guide to Enactment of the UNCITRAL Model Law (UNCITRAL document A/CN.9/442) prepared at the request of the United Nations Commission on International Trade Law made in May 1997."

13. Article 8 of both the UNCITRAL Model Law and the version included in Schedule 1 to the CBIR, provides:

> "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."

14. The UNCITRAL Model Law includes the following preamble, which does not appear in Schedule 1:

> "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 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."

15. In reaching my conclusions, I have considered relevant parts of each of the documents identified by Mr Curl as falling within regulation 2(2). One potentially important aspect of this that is worth noting at this stage is that the version of the Guide to Enactment referred to in regulation 2(2)(c) is the original Guide dating from May 1997. This is now not readily available, although Counsel managed to find it because it is included as an Annex in a quite different guide, the UNCITRAL Legislative Guide on Insolvency Law, published in 2005. Instead, the version of the Guide to Enactment that appears under that description on the UNCITRAL website was

adopted in 2014. This more recent version was the version considered by Judge Burton, and it was commentary in that version of the Guide that caused her particular concern. In reaching my decision I have considered both versions. The written submissions that I requested following the hearing included a comparison between the two versions.

16. As will be apparent from the discussion that follows, and bearing in mind Article 8, I have considered not only case law in this jurisdiction but from other jurisdictions. UNCITRAL maintains a record of relevant case law on a system known as CLOUT (Case Law on UNCITRAL texts), to which the Guide to Enactment refers. Mr Curl informed me that the cases referred below all appear on that system.

17. Where I refer to an Article of the Model Law, unless otherwise specified I am referring to it in the form adopted in Schedule 1 to the CBIR.

The issue

18. The key issue for determination is whether the Bermudian winding up procedure under section 161(g) of the Bermudian Companies Acts is a "foreign main proceeding". This is defined in Article 2(g) of the Model Law as a "foreign proceeding taking place in the State where the debtor has the centre of its main interests". "Foreign proceeding" is defined in Article 2(i) as follows:

> "'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 reorganisation or liquidation."

The same definition appears in almost exactly the same terms in the UNCITRAL version of the Model Law at Article 2(a).

19. The issue which concerned Judge Burton was whether the process under which the Company is being wound up is a "foreign proceeding" in circumstances where it has not been doubted that the Company is solvent, and the winding up has been sought for reasons other than insolvency.

20. As already indicated, I understand that Judge Burton expressed concern about comments that appear in the 2014 version of the Guide to Enactment, and in particular paragraph 48 of the Guide, part of the commentary on the preamble to the UNCITRAL Model Law. This appears under the heading "Use of the term 'insolvency'", and it states as follows:

> "48. Acknowledging that different jurisdictions might have different notions of what falls within the term "insolvency proceedings", the Model Law does not define the term "insolvency". However, as used in the Model Law, the word "insolvency" refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. The reason is that the Model Law…covers proceedings concerning different types of debtors and, among those proceedings, deals with proceedings aimed at liquidating or reorganizing the debtor as a commercial entity. A judicial or administrative

> proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2 subparagraph (a) are not insolvency proceedings within the scope of the Model Law. Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a) of the Model Law only if the debtor is insolvent or in severe financial distress." (Emphasis supplied.)

21. The commentary on the definition of "foreign proceeding" in Article 2(a) of the UNCITRAL Model Law states as follows at paragraph 65:

> "65. The definitions of proceedings or persons emanating from foreign jurisdictions avoid the use of expressions that may have different technical meaning in different legal systems and instead describe their purpose or function. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition and to avoid unnecessary conflict with terminology used in the laws of the enacting State. As noted…above the expression "insolvency proceedings" may have a technical meaning in some legal systems, but is intended in subparagraph (a) to refer broadly to proceedings involving debtors that are in severe financial distress or insolvent." (Emphasis supplied.)

As Mr Curl points out, the wording is somewhat loose because there is in fact no reference to "insolvency proceedings" in the definition. The Guide goes on to state the following:

> "66. The attributes required for a foreign proceeding to fall within the scope of the Model Law include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding (article 2, subparagraph (a)). Whether a foreign proceeding possesses or possessed those elements would be determined at the time the application for recognition is considered.
>
> 67. As noted in subparagraph (e) of the preamble, the focus of the Model Law is upon severely financially distressed and insolvent debtors and the laws that prevent or address the financial distress of those debtors. As noted above…, these are debtors that would generally fall within the commencement criteria discussed in the Legislative Guide, being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets…"

22. Paragraph 73 of the 2014 guide specifically addresses the meaning of the words "Pursuant to a law relating to insolvency". It states as follows:

> "This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to

> insolvency. A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress." (Emphasis supplied.)

The Liquidator's case

23. The Liquidators' position is that the insolvency requirement in the definition of "foreign proceeding" relates only to the law under which the relevant proceeding was opened, rather than the status of the entity that is subject to that proceeding. They say that both the Model Law and the Guide to Enactment contemplate that recognition may be granted where the company in question is in fact solvent, and that for a law to be considered to be "relating to insolvency" the law must be considered as a whole. The words in the Model Law are clear and must be preferred to inconsistent commentary in the Guide to Enactment. Although the preamble does refer to dealing with cross-border insolvency and facilitating the rescue of "financially troubled businesses", there is no reference to "severe financial distress", which is a concept that appears only in the Guide and indeed could in principle cover entities there are in fact solvent. The reference in paragraph 73 is also to a "simple" proceeding. That might cover, for example, a straightforward dissolution without a winding up. The reference in the same paragraph to a proceeding which is "likely" not to be pursuant to a law relating to insolvency or severe financial distress is also not definitive.

24. The Liquidators also point to Article 31 of the Model Law, which provides as follows:

> "In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under British insolvency law, proof that the debtor is unable to pay its debts..."

25. This contemplates not only that a foreign main proceeding can be recognised where insolvency has not been demonstrated, but that it may be shown through evidence that the entity is in fact solvent. Mr Curl submitted that this would not be needed if insolvency was required. He suggested that the version in the UNCITRAL Model Law is possibly even more clear since the final words read "…proof that the debtor is insolvent".

26. The commentary on Article 31 in the 2014 Guide to Enactment explains at paragraphs 235 and 236 that in some jurisdictions proof that the debtor is insolvent is required for the commencement of insolvency proceedings, whereas in other jurisdictions insolvency proceedings may be commenced in circumstances that do not necessarily mean that the debtor is in fact insolvent, for example cessation of payments. Where insolvency is a condition for commencing insolvency proceedings, Article 31 establishes a rebuttable presumption. The Guide goes on to say at paragraph 237 that for national laws where proof of insolvency is not required, the presumption may be of little practical significance and the relevant State may decide not to enact it.

27. As discussed further below, the Liquidators also consider that their position is supported by case law and by other UNCITRAL documents, including the working group documents to which regard may be had under regulation 2(2)(b) of CBIR.

Other UNCITRAL documents

28. I was referred to a report, dated May 1994, of an UNCITRAL Colloquium on Cross-border insolvency, which proposed work on the topic. This refers to a widely shared view that there was a need to develop legal mechanisms to limit the extent to which, on a cross-border insolvency, disparities and conflicts between national laws created unnecessary obstacles, and proposed work on the topic of "access and recognition". This was followed by a report produced in April 1995 by a Judicial Colloquium. That report records a consensus for the development of provisions governing access and recognition. It refers at paragraph 19 to a view having been expressed that the provision should be limited to proceedings in which the debtor was actually insolvent, and at paragraph 20 to an alternative suggestion that focused instead on the nature of the proceeding, the test proposed being whether the proceeding was commenced pursuant to insolvency law, had the aim of collective communal benefit of creditors and was subject to external control.

29. The first Working Group report (relating to its 18th session) was produced in December 1995. In my view this is an important document. At paragraphs 28 to 32 there is quite a detailed discussion of the types of proceedings to be included. It reports wide support for limiting them to proceedings that are in some way officially sanctioned. It refers to a concern being expressed that recognition provisions should not place the recognising court in the position of having to determine *de novo* whether the proceeding in fact involved an insolvency, and to a suggestion for dealing with that by including a requirement that the debtor is subject to supervision of an independent party. It records another suggestion that a proceeding could be recognised as an insolvency proceeding if it was treated as such in the originating jurisdiction.

30. A later section of the report, from paragraph 94, considers preliminary draft provisions, including a definition of "foreign proceeding". The preliminary draft of this referred to a judicial or administrative proceeding "for the purpose of liquidating the assets of a debtor for distribution to its creditors or adjusting the debts of the debtor to its creditors" (paragraph 95). Paragraph 96 records that discussion of the draft indicated a widely held view that the concept should have three characteristics, namely that they should be an insolvency proceeding "in the broad sense", that it should be a collective proceeding in the sense that representation of the mass of creditors would be involved, and that it should be officially sanctioned. At paragraph 105, a revised draft is set out in the light of the Working Group discussion. This is in substance very close to the final version:

> "'Foreign proceeding' means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in a foreign country in which the debtor is subject to control or supervision by a competent person, body or authority, for the purpose of: (a) the reorganization of a debtor's affairs, or (b) liquidating the assets of a debtor."

31. The report goes on at paragraph 106 to note that this revised version represented measurable progress in the direction of a provision that could gain wide acceptance, and states that the fact that the provision now referred to the foreign insolvency proceeding as being pursuant to the insolvency law of the foreign country "…would permit the recognising court to avoid examining *de novo* whether the proceeding was an insolvency proceeding."

32. The next Working Group report, dated April 1996 (the 19th session), discusses a suggestion to define a general notion of "insolvency proceedings", but records that the prevailing view was that this was not necessary, and that the focus should be on the definition of "foreign proceeding" (paragraph 47). In relation to the definition of foreign proceeding, paragraph 48 notes support being expressed for the basic elements, including "insolvency in a broad sense covering liquidation and reorganisation". Paragraph 49 records that the words "a law relating to insolvency" were sufficiently broad to encompass insolvency rules irrespective of the type of statute.

33. After a further report in October 1996, the final report was produced in January 1997 (the 21st session). Paragraph 109 of this report refers to a suggestion that a definition of insolvency should be included in view of the fact that the term had a narrower connotation in some languages than the broad meaning given in the draft, and reports the Working Group's conclusion that this would not be feasible.

The original Guide to Enactment

34. The original (1997) version of the Guide to Enactment does not contain all the passages that troubled Judge Burton. The only reference to "severe financial distress" appears in paragraph 71, part of a discussion of Article 2. This is in virtually identical terms to paragraph 65 of the 2014 version, set out above at paragraph 21. The background to the changes can be found in a report of the 40th session of the Working Group in November 2011, which records the relevance of the preamble, in particular paragraph (e), and a suggestion that the existing reference to severe financial distress or insolvency should be emphasised to ensure clarity of scope. It also cross refers to the definition of insolvency proceedings in the Legislative Guide on Insolvency Law, which it suggests might be helpful. That defines insolvency proceedings as "collective proceedings, subject to court supervision, either for reorganisation or liquidation". It is worth noting that neither this nor a separate explanation of the concept of "reorganisation proceedings" in the Guide indicates that they are necessarily limited to companies that are in fact insolvent.

The case law

35. The concept of "foreign proceeding" in the CBIR was considered by both the High Court and Court of Appeal in *In Re Stanford International Bank Ltd* [2009] EWHC 1441 (Ch), [2009] BPIR 1157; [2010] EWCA Civ 137, [2011] Ch 33 (CA). That case related to an obviously insolvent bank ("SIB") incorporated in Antigua and Barbuda, which had been involved in a Ponzi scheme. There were rival proceedings. A US court had appointed a receiver of SIB's assets, and a court in Antigua had made a winding up order. Lewison J decided that the Antiguan liquidation should be recognised under the CBIR, but the US proceeding should not because it was not a "foreign proceeding". His decision was affirmed by the Court of Appeal.

36. The provision of Antiguan law under which the order had been made was section 300 of the International Business Corporations Act. This was a provision that permitted a court ordered dissolution, or liquidation and dissolution, for failure to meet regulatory requirements, such as failing to file returns. There is no reference to insolvency in that provision. The following section, section 301, permits the court to order liquidation and dissolution on various other grounds, including that it is just and equitable basis

to do so. Although it is fair to say that the main dispute was over the US procedure, there was a dispute over whether the liquidation was a foreign proceeding.

37. Lewison J expressed the view at paragraph 86 that the relevant part of the Act (Part IV) was "generally speaking, a law relating to insolvency", but recorded the argument that because the petition was founded on section 300 alone the test was not met. The Antiguan court had however not only recited that the conditions in section 300 had been met, but also that it had determined that it was just and equitable for SIB to be liquidated and dissolved (see Lewison J's judgment at paragraph 91). Lewison J found at paragraph 94 that the decision was not based on section 300 alone, but on the basis that having considered the evidence it was just and equitable that SIB be wound up. Lewison J noted that an "important part of the evidence was that SIB was insolvent", and that "at least one" of the reasons why liquidation was ordered was insolvency.

38. In relation to the US proceedings, the reasons given by Lewison J for concluding that they were not foreign proceedings included that their purpose was to prevent dissipation rather than to liquidate, that they were aimed at preventing detriment to investors, and that the underlying cause of action had nothing to do with insolvency (paragraph 84).

39. In the Court of Appeal, the leading judgment on this issue was given by the Chancellor, Sir Andrew Morritt. After referring to Lewison J's findings he said this at paragraph 15:

> "15. In my view Lewison J was right to conclude that the Antiguan liquidation was a foreign proceeding as defined. Part IV of the relevant Act provided for the winding up of corporations incorporated in Antigua for the purpose of carrying on an international trade or business on just and equitable grounds, which include insolvency, as well as infringements of regulatory requirements. The combination of that part of the Act and the order of the court made provision for the collection of all the assets of SIB and their application in satisfaction of all its obligations in the order of priority for which the law provided. That process was expressly subject to the supervision of the High Court of Antigua and Barbuda. Creditors and others were obliged to seek their remedy in the liquidation because individual proceedings were stayed or prohibited. The ultimate purpose of the process was the liquidation, in the sense of dissolution of SIB. Such a process satisfies all the conditions for the application of the definition because it is collective, judicial and pursuant to a law relating to insolvency."

I agree with Mr Curl that this is expressed in a way that does not refer to the actual insolvency of SIB as being a determining factor, and to that extent it differs from the manner in which Lewison J expressed his conclusion.

40. In relation to the US receivership, at paragraph 24 the Chancellor said this:

> "24. I would start with the phrase 'pursuant to a law relating to insolvency' for this governs all the other factors. It is contended that such law does not have to be statutory. I agree. It is submitted that it does not have to relate exclusively to insolvency. I agree with that submission in broad terms too. But the first step must be to identify the relevant law. The law of England and Wales relates to

> insolvency in the sense that it includes the Insolvency Act but unless the proceeding in question is taken under that Act (or some similar jurisdiction) it cannot sensibly be described as 'pursuant to a law relating to insolvency'. So it is necessary, in my view, to start by identifying the law, whether statutory or not, under or pursuant to which the relevant proceeding was brought and is being pursued. Having done so it is then necessary to consider whether that law relates to insolvency and whether the other factors to which the definition refers can be regarded as being brought about 'pursuant' to that law."

41. On the basis that the relevant US legal process related to the protection of investors and related matters, it was not a law relating to insolvency (paragraph 25). In the last part of paragraph 26 the Chancellor commented that the fact that an order might subsequently be made which could be recognised as an insolvency proceeding was immaterial until it was done. He added: "The principles of common law and equity do not 'relate to insolvency' unless and until they are activated for that purpose." In paragraph 28 he contrasted the Antiguan process, where the grounds for winding up under Part IV included the just and equitable ground "which, conventionally, includes insolvency", and stated that when a winding up order is made, that gives rise to a collective judicial scheme for liquidation or reorganisation.

42. *In Re Betcorp Ltd* (2009) 400 BR 266 was a decision of the U.S. Bankruptcy Court in the District of Nevada. It related to an Australian company which was subject to a members' voluntary winding up, and was therefore clearly solvent. Judge Bruce A Markell decided to recognise the winding up as a foreign proceeding under the US legislation that implements the UNCITRAL Model Law. In reaching that conclusion he considered the original version of the Guide to Enactment. He took an expansive approach to the terms "proceeding" and "judicial or administrative", relying on the existence of a statutory framework constraining the company's actions and regulating the final distribution of its assets, and allowing for court involvement, including where an entity is found to be insolvent during the course of winding up (pages 13 to 17). He also found that the proceeding was collective because it considered the rights and obligations of all creditors. In relation to the "law related to insolvency" requirement he found that this did not require the company either to be insolvent or to be contemplating using the provision to adjust debts. In reaching that conclusion he relied on the fact that the Australian Corporations Act regulates the whole of the corporate life cycle, and that several parts of the relevant Chapter, Chapter 5, contained provisions dealing with corporate insolvency (pages 18 to 19). Judge Markell also relied on the Australian legislature's own explanatory memorandum of the legislation adopting the UNCITRAL Model Law, which stated that it was intended that the law apply to Chapter 5.

43. *Re Chow Cho Poon (Private) Limited* [2011] NSWSC 300 was a decision of Barrett J in the Equity Division of the Supreme Court of New South Wales. It concerned the liquidation of a Singaporean company on just and equitable grounds. There had been no finding of insolvency. The application was made under a mutual assistance provision, but the Model Law had precedence, so it needed to be considered. Barrett J considered both *Stanford* and *Betcorp*. Having noted at paragraph 40 that his instinctive answer was that it was not a foreign proceeding because the winding up was not ordered for reasons of insolvency, he said the following:

> "47. The ground for winding up [in *Stanford*] was thus confined to regulatory misbehaviour. Insolvency was, in the particular case, a factor relevant to the court's discretion to make a winding up order. As the English Court of Appeal observed, however, the law allowing winding up on the regulatory ground was a law comprehending several grounds, including insolvency, so that it was correct to characterise it as a law relating to insolvency.
>
> 48. This approach to characterisation is consistent with that taken by the United States Bankruptcy Court for the District of Nevada in *Re Betcorp Ltd* …. It was there held that the members' voluntary winding up of an Australian company under the Corporations Act (Cth) was a 'foreign proceeding' for the purposes of the UNCITRAL Model Law as enacted in the United States…The situation was…one of positive determination by the directors that the company was not insolvent.
>
> 49. The United States court placed emphasis on the nature of the relevant legislation as a whole in deciding whether the administration was under 'a law relating to insolvency'…
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> [He then refers to another US decision.]
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> 51. These English and American decisions point to a clear basis on which the whole of the Singapore Companies Act or, at the least, the whole of its winding up provisions might be classified as 'a law relating to insolvency', even though the particular winding up was ordered on the just and equitable ground alone and, so far as this court has been told, without any finding (express or implied) of insolvency."

44. These cases were all considered by Judge Paul Matthews, sitting as a High Court judge, in *In re Agrokor dd* [2017] EWHC 2791 (Ch), [2018] Bus LR 64. Unlike this application, this was a heavily fought case with experienced leading counsel and juniors on each side. It related to a Croatian company which was in "extraordinary administration" under Croatian law. Under that law insolvency or pending insolvency was irrebuttably presumed against the holding company of the group, but this did not apply to other group companies who were also subject to the proceedings. Courts in Serbia and Montenegro had declined to recognise the proceedings on the basis that insolvency had not been shown in relation to all the companies concerned. Judge Matthews decided not to follow this approach and instead to follow *Stanford*, *Betcorp* and *Chow Cho Poon*, where "it was accepted that the law could be a law relating to insolvency if insolvency was one of the grounds on which a proceeding could be brought" (paragraph 73). However, he also relied on the insolvency of the holding company, saying in the same paragraph: "It is in fact the insolvency, actual or threatened, of one company which triggers the proceeding, and the law under which the proceeding is brought is accordingly in principle a law relating to insolvency". Earlier in the judgment at paragraph 63 there is a similar reference to insolvency being one of the grounds on which proceedings can be commenced, and he adds that the matter is "obviously all the clearer if insolvency can indeed be demonstrated".

Vienna Convention

45. One of the questions on which I requested written submissions was the potential relevance of the Vienna Convention on the law of treaties, and in particular Article 31 which provides for treaties to be interpreted in the light of their object and purpose, taking account not only of the preamble but also subsequent agreements between the parties and subsequent practice in the treaty's application. Whilst it seems unlikely that the Model Law can be described as a treaty (which is defined in terms of an international agreement between States governed by international law), I nonetheless thought that the approach to treaty interpretation might be enlightening given the international element and the potential role of the preamble to the UNCITRAL Model Law, and because the Vienna Convention requirement to take into account subsequent developments might be relevant in relation to the 2014 version of the Guide to Enactment.

46. Dealing with the last of these points first, Article 31(3) of the Convention refers to subsequent agreements between the parties, and to subsequent practice in the application of the treaty which establishes the agreement of the parties. Neither of these is an apt description of the 2014 version of the Guide, which is in the nature of a unilateral document published by UNCITRAL. This reinforces the view I had reached, based on the specific reference in regulation 2 of the CBIR to the 1997 version of Guide, that the later version must be approached with some circumspection.

47. As regards the preamble to the UNCITRAL version of the Model Law, I was referred to *Treaty Interpretation*, 2nd ed., by Richard Gardiner, which considers the relevance of preambles in the context of treaty interpretation. A point made in a number of places is that the preamble is an important source of guidance on the object and purpose of a treaty, which may shed light on the terms used, but caution is required and the whole text must be considered. The substantive provisions of the treaty will usually have greater clarity and precision (page 206, and more generally pages 211 to 222). In particular, there is support for the proposition that a preamble may not provide an independent source of meaning that contradicts the clear text of a treaty: page 219, referring to an award of the US-Iran Claims Tribunal, *USA, Federal Reserve Bank v Iran, Bank Markazi* Case A28 (2000-02) 36 Iran-US Claims Tribunal Reports 5, at 22, paragraph 58. I found this to be of some assistance in considering the relevance of the preamble to the UNCITRAL version of the Model Law.

Other texts

48. I also considered commentary on the issue before me in *Cross-Border Insolvency* by Richard Sheldon QC, 4th ed. at 3.31 to 3.35, which expresses some doubt about *Betcorp* and *Chow Cho Poon*, and a commentary on the Model Law by Look Chan Ho. The latter commentary suggests that a solvent liquidation that has nothing to do with insolvency or financial distress should not be within the CBIR, for reasons which include the potential relevance of the EC Insolvency Regulation and the difficulty of seeing a policy rationale for including a members' voluntary winding up.

The EC Regulation

49. Both versions of the Guide to Enactment refer to the EC Regulation on insolvency proceedings[1], and describe the Model Law as a complementary regime. I drew Counsel's attention to the judgment of David Richards J in *Re Arm Asset Backed Securities SA* [2013] EWHC 3351 (Ch), which considered a petition to wind up a company on just and equitable grounds in the context of the EC Regulation. It is interesting that in that case the judge raised the question of whether insolvency was required, noting that the position was not absolutely clear and that there was some indication that it was so confined despite the definition extending, so far as the UK was concerned, to include winding up by the court: paragraphs 23 and 24. In fact it was not necessary to resolve the issue of whether insolvency was required in that case, because the company was in fact insolvent (paragraph 33). The point therefore remains undecided in that context as well.

Discussion

50. It is clear from the preamble to the UNCITRAL Model Law that its focus is on cross-border insolvency. The objectives are clearly set out, including increased cooperation, greater certainty and fair and efficient administration of cross-border insolvencies. There is however a specific reference to "financially troubled businesses", a term which is not defined but may include businesses that are not necessarily insolvent.

51. It is also clear from the UNCITRAL documents referred to at paragraphs 28 to 33 above that there was a deliberate choice to focus on the question of whether the relevant proceeding was commenced pursuant to a law relating to insolvency, rather than using the concept of insolvency proceeding or even defining insolvency. The latter alternative was rejected as not being feasible. Concerns were expressed about different meanings of the term in different jurisdictions, but there was also emphasis on not putting the recognising court in the position of having to determine whether there was an insolvency. Against the background that the key aims of the Model Law included the development of streamlined procedures to allow the efficient administration of cross-border insolvencies, reducing the risk of time-consuming conflicts between processes in different jurisdictions, this is hardly surprising. This point is reflected in an UNCITRAL document entitled "Model Law on Cross-Border Insolvency: The Judicial Perspective" produced in 2012, which describes the "recognition" principle, being one of the principles behind the Model Law, as having the object of avoiding "lengthy and time-consuming processes by providing prompt resolution of applications for recognition", which "brings certainty to the process and enables the receiving court…to determine questions of relief in a timely fashion" (page 13).

52. The Working Group report from the 18th session also reflects a deliberate change in the definition of foreign proceeding from one which had the *purpose* of liquidating assets for distribution to creditors, to one undertaken pursuant to a law relating to insolvency (with the process subject to independent supervision), the latter being referred to as being an insolvency proceeding "in the broad sense". In my view that was an important change. It shows that the decision was taken to focus on the nature of the legal process rather than on the facts of the particular case, whether those facts

[1] Since replaced by the recast EU Regulation.

related to the financial position of the entity or to the particular motivation behind the procedure being undertaken in that case. The aim was to achieve recognition speedily, on a summary basis, without a detailed fact-finding exercise.

53. Even in the context of financially troubled businesses, it is clearly intended that a recognising court should be in a position to recognise a foreign proceeding where it does not know the precise extent of the entity's financial problems, and in particular does not know whether it is in fact insolvent. There could be a number of reasons for this. There may have been no finding about the entity's financial position in the foreign State at the time that recognition is sought, perhaps because it is too early in the process to have made such a finding or because the focus is on the proposed rescue of a "financially troubled" business (as clearly contemplated by the preamble). Alternatively there might be a finding of insolvency, but the concept of insolvency may be different between the two States. Further alternatives are that the entity may be apparently insolvent but subsequently turn out to be solvent, or that it may move from solvency to insolvency (or vice versa in each case). It cannot be the case that such situations are intended to be excluded.

54. Article 31 (the Article that provides for a rebuttable presumption of solvency for the purpose of commencing a proceeding under British insolvency law, see paragraph 24 above) is of some relevance here. Not only does it assume that a foreign proceeding can be recognised without a finding of insolvency, but in addition there is no suggestion in Article 31 that a subsequent displacement of the rebuttable presumption of insolvency renders the *recognition* invalid. The Guide does acknowledge that, if insolvency is in fact required for the commencement of an insolvency proceeding under the laws of the recognising State, then the recognising court is not required to be bound by the decision of the foreign court (paragraph 238 of the 2014 version and paragraph 197 of the original version), but that is clearly regarded as a question of local law.

55. Given that recognition is intended to be available in circumstances where insolvency has not been established as well as in cases where an entity is obviously insolvent, the fundamental question is whether those cases should be distinguished from a situation where there is uncontradicted evidence before the court that the entity is (at least currently) solvent, and/or where it is clear that the purpose, or principal purpose, for which liquidation is sought is not to realise assets for creditors – even though it will have that effect – but instead to distribute surplus assets to shareholders.

56. I have come to the conclusion that these factors should not have the result that a process that would otherwise fall within the definition of foreign proceeding falls outside it. In my view section 161 of the Bermuda Companies Act can fairly be described as a "law relating to insolvency". That section contemplates a court ordered winding up in various situations which include inability to pay debts, as well as just and equitable grounds. As noted by the Chancellor in *Stanford*, the concept of just and equitable grounds also conventionally includes insolvency. It is clearly right, based on *Stanford*, that a winding up on just and equitable grounds can qualify for recognition in circumstances where the entity is insolvent. Although the Chancellor did refer at paragraph 26 of the judgment to principles of law and equity as not relating to insolvency unless activated "for that purpose", I do not think that he was intending in that passage to detract from his careful summary at paragraph 15 (set out at paragraph 39 above), or to address his mind to the position of a solvent entity, which was not

relevant to that case. In my view it would be artificial, and quite wrong, to distinguish either between the different grounds on which winding up may be ordered under section 161, or between different reasons why a winding up might be ordered on just and equitable grounds. That would involve exactly the sort of factual enquiry during the recognition process which the Model Law is intended to avoid, and would be contrary to the natural meaning of the words used.

57. In reaching this conclusion I have also taken into account the entire definition of "foreign proceeding". The process must be "collective", generally understood to mean that it will deal with creditors generally. The process must be judicial or administrative in nature, the assets and affairs of the entity must be subject to control or supervision by a foreign court, and the process must be for the purpose of reorganisation or liquidation. Importantly, these parts of the test narrow down what might otherwise be regarded as a broad reference to "law relating to insolvency", and focus the definition on certain types of proceeding only. Whilst a court ordered winding up would clearly meet all these other aspects of the test, there will be other processes authorised by what might be regarded as a "law relating to insolvency" that would not. These other parts of the definition were all carefully chosen to capture the proceedings for which it was considered that recognition was appropriate, and are important elements of the definition in determining its proper scope.

58. I have also taken into account all the cases referred to above, including *Stanford* and *Agrokor* and (bearing in mind Article 8) *Chow Cho Poon* in particular, which also concerned winding up on just and equitable grounds. It is not necessary to decide in this application whether a members' voluntary winding up of the kind considered in *Betcorp* should necessarily be treated as a foreign proceeding.

59. I accept that there is wording in the 2014 version of the Guide to Enactment in particular, and to some extent in the original version, which appears to contradict my conclusion and indicate that the Model Law applies only to companies that are insolvent or in "severe financial distress". However, I agree with Mr Curl that this limitation is not reflected in the text of the Model Law. Whilst it is the case that the Model Law is aimed at entities that are insolvent or otherwise in financial distress, confining recognition under it to entities that are demonstrated to have these characteristics would conflict with the plain meaning of the words used. It is also wholly unclear how financial distress might be determined, or what the threshold is. Furthermore, it would run counter to the aim of allowing recognition on an efficient basis, because of the factual enquiry that would be required. Whilst in theory a line could be drawn between proceedings involving entities that are indisputably solvent and are being liquidated otherwise than for creditor-related reasons, and entities where solvency is at least in question or has not been established, that is not what the wording of the Model Law provides, and drawing such a distinction would still involve some form of factual enquiry, contrary to the aims behind the particular choice of definition.

60. A further point that I have considered is the consequences of recognition, briefly referred to in paragraph 11 above. It certainly does not seem inappropriate that the consequences of recognition of a proceeding under section 161 of the Bermuda Companies Act include stays of proceedings and execution. That appears not only to be the effect of the winding up order under the Bermuda Companies Act (sections 166 and 167(4)), but it also corresponds to the consequences of winding up under the

corresponding English law. Any particular concerns about the consequences of recognition can in any event be addressed under Article 20(6) of the Model Law, which permits the court to modify or terminate the stay and suspension on such terms as it thinks fit.

COMI and other requirements

61. In order to be recognised as a "foreign main proceeding", the court must also be satisfied that Bermuda is the Company's centre of main interests ("COMI"). Article 16(3) of the Model Law provides:

> "In the absence of proof to the contrary, the debtor's registered office…is presumed to be the centre of the debtor's main interests."

62. In *Stanford* the Court of Appeal held that the meaning of the expression should be approached in the same way as under the EC Regulation, following *In re Eurofood IFSC Ltd* [2006] Ch 508. This means that the presumption may only be rebutted using factors that are both objective and ascertainable by third parties.

63. In this case the Company's registered office is in Bermuda, so in the absence of proof to the contrary that is to be treated as its COMI. I am satisfied that there has been no proof to the contrary, and indeed it is hard to identify any other single jurisdiction that could be contended to be the COMI. Whilst aimed at Japanese investors, the Company's directors are based in various different jurisdictions, it has a London investment manager for the majority of its assets, the focus of its investment activity is Central Asia and it was listed on the Irish Stock Exchange. In these circumstances I have no doubt that its COMI should be treated as being in Bermuda, where its registered office is located and its corporate administration has been carried on.

64. I am also satisfied on the evidence before me that the other formal requirements in the CBIR, in particular those in Article 15 of the Model Law and Part 2 of Schedule 2 to the CBIR, have been met, and that recognition is otherwise required under Article 17.

Conclusion and citation

65. Accordingly, it is appropriate to grant recognition of the winding up proceeding in Bermuda as a foreign main proceeding.

66. For the purpose of paragraph 6 of the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, I confirm that, notwithstanding that the application for recognition was attended by one party only, this judgment may be cited in court on the basis that it establishes a new principle or extends the current law.