

# COMI: New Developments for Offshore Liquidators

National interests play a distinct part in application of the UNCITRAL model law on cross-border insolvency.

## The Model Law

Since the advent of the UNCITRAL model on cross-border insolvency, brought about principally for the purposes of trying to smooth out the liquidation proceedings for companies that operated on a multi-national basis, the road towards uniform application of its guiding principals has been rather bumpy. The underlying issue has been interpreting exactly how the principal issue of this model law would be applied. Most jurisdictions that adopted the UNCITRAL model have incorporated the terms of the model into their own laws, but in different forms.

For the United States, the UNCITRAL model is somewhat incorporated in chapter 15 of the Bankruptcy Code and deals principally with foreign proceedings and how they will be recognised. Key to how the application of the law plays out is the Centre of Main Interest (or COMI) debate and how this is interpreted, particularly when national interests start to play a part. It is well known that courts like to have some control over what happens to assets within their borders. Accordingly it should not be too much of a surprise that judges may find it difficult to reconcile the national interests served by retaining control over liquidators with a law which permits the recognition of liquidators appointed by foreign court over assets in its territory. One only has to look at the *Parmalat* proceedings in Italy and the UK to see how difficult it can be to reconcile competing issues.

## Initial Rulings on COMI

In the wider COMI debate for offshore companies, and for the purposes of the financial industry, a key "national interest" judgment was *Bear Stearns High Grade Structured Credit Strategies Master Fund Limited* (Bankr.S.D.N.Y 2007). In this particular case, which was somewhat vilified by the offshore legal fraternity, Judge Lifland noted that there was very little ground to grant recognition to a liquidator in the Cayman Islands. In order to show COMI, for a company or fund in any jurisdiction, evidence must be adduced to persuade the court, said Judge Lifland.

## Recognition of Cayman Regulators

In a more recent case, and on the basis of COMI, *Saad Investments Finance Company (No. 5) Limited* Case 09-13985, the United States Bankruptcy Court has granted recognition as a foreign main proceeding to the Cayman liquidators.

Looking at and distinguishing between the two applications, it is tempting to say that the different decisions are because of the way in which the liquidator approached the matter. In the former case of *Bear Stearns*, the liquidator appears to have considered that the granting of the recognition was all but a foregone conclusion and so must have been rather surprised when Judge Lifland differed in his opinion. His view was that it was not a rubber stamp exercise in the least and Judge Gerber in the *Basis Yield Alpha Fund (Master)* Bankr.S.D.N.Y. Case no. 07-12762 agreed wholeheartedly.

So, while it may be tempting to say that the more recent *Saad Investments* got it right and *Bear Stearns* and *Basis Yield Alpha* did not, it would probably be more accurate to say that all three cases applied exactly the same principals of section 1517 of the Bankruptcy Code. In *Saad Investments*, perhaps the distinguishing features were the facts, their presentation to the judge and that the liquidators did not take the issue of COMI for granted; their application for recognition as a foreign main proceeding was comprehensive and compelling.

## Positive Outcome for Offshore

It would be fair to say that this is a celebrated decision for practitioners of insolvency in the offshore jurisdictions as it is of great importance that, for many of the operations based out of the Cayman Islands and British Virgin Islands, the Bankruptcy Court will recognise the liquidators appointed out of those courts.

## About Ogier

Ogier is an award winning world leader in the provision of offshore legal and fiduciary services. Our integrated legal and fiduciary approach has proved a winning combination which enables us to secure awards for the quality of our services and our people.

The Group employs over 850 people and provides advice on all aspects of BVI, Cayman, Guernsey and Jersey law and fiduciary services through our international spread of offices that cover all time zones and key financial markets. Our network includes Bahrain, BVI, Cayman, Guernsey, Hong Kong, Ireland, Jersey, London, Shanghai and Tokyo.

# COMI: New Developments for Offshore Liquidators

## Contact details

### Hong Kong

James Bergstrom

+852 3656 6055

james.bergstrom@ogier.com

Marcus Leese

+852 3656 6046

marcus.leese@ogier.com

Nicholas Plowman

+852 3656 6014

nicholas.plowman@ogier.com

Nathan Powell

+852 3656 6054

nathan.powell@ogier.com

Fiduciary:

Aby Wong

+852 3656 6021

aby.wong@ogier.com

### Shanghai

Kristy Calvert

+86 21 6157 5190

kristy.calvert@ogier.com

### Tokyo

Skip Hashimoto

+81 (0) 3 6430 9500

skip.hashimoto@ogier.com

This client briefing has been prepared for clients and professional associates of the firm. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Ogier includes separate partnerships which advise on BVI, Cayman, Guernsey and Jersey law. For a full list of partners please visit our website.

Please check with the relevant contact listed above for specific details regarding the legal services we offer from each office as we do not always practice the law of the jurisdiction where our offices are located. Please note that the named contact may not be qualified to advise on all the laws practiced from that office.