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Insolvency Law

Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI)

Note by the Secretariat

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I. Interpretation and application of concepts relating to centre of main interests (*continued*)

D. Recognition (*continued*)

2. Main and non-main proceedings

1. Article 17 of the Model Law provides that a foreign proceeding within the meaning of paragraph (a) of article 2 shall be recognized as either a foreign main proceeding or a foreign non-main proceeding.

2. In the case of *In the matter of Yuval Ran*, the United States appellate court observed that a foreign proceeding must be classified as either a foreign main or foreign non-main proceeding in order to be recognized and for relief to be afforded under Chapter 15. If the foreign proceeding is neither, the court said, then it is simply ineligible for recognition.[1] Paragraph 2 of article 17 of the Model Law provides only for recognition of those two types of proceeding; proceedings commenced on the basis of presence of assets is not eligible for recognition, although presence of assets may be a sufficient basis for commencing a local proceeding after recognition of a foreign main proceeding.[2]

(a) Issues for consideration

3. The United States proposal notes that a court must have jurisdiction in order to proceed and render determinations in regard to issues before it. Two questions are raised in that regard:

(a) Whether a court should be satisfied that a proceeding under the Model Law is a foreign main proceeding or a foreign non-main proceeding, as a pre-condition for recognition; and

(b) The procedure to be should be established to make that determination clear and definitive and whether that procedure should establish a menu of options so that it can be harmonized to the extent feasible.[3]

3. Location of COMI — article 16 presumption

4. Article 16 of the Model Law establishes a presumption upon which the court is entitled to rely in determining COMI. Paragraph 3 provides that, in the absence of proof to the contrary, the debtor's registered office (or habitual residence in the case of an individual) is presumed to be the centre of its main interests. Paragraph 122 of the Guide to Enactment makes it clear that article 16 establishes presumptions that allow the court to expedite the evidentiary process; at the same time they do not prevent, in accordance with the applicable procedural law, a court calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party.

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[1] *In the matter of Yuval Ran* (2010), p. 6.

[2] See article 28. The effects of that proceeding would be limited to the assets of the debtor located in the commencing State.

[3] A/CN.9/WG.V/WP.93/Add.2, para. 67.

(a) Rebutting the presumption and burden of proof

5. A number of cases have raised issues concerning the location of the COMI of the debtor and the interpretation of the presumption in article 16. Particular concerns relate to rebuttal of the presumption and the factors that would be relevant in that regard, especially in the case of a company debtor. Given that the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation) uses a similar concept of COMI, cases decided under that Regulation with respect to COMI may be relevant, pursuant to article 8, to interpretation of the Model Law. The Guide to Enactment notes that the notion of COMI corresponds to the formulation in article 3 of the convention that was the precursor to the EC Regulation and acknowledges the desirability of "building on the emerging harmonization as regards the notion of 'main' proceeding."[4] The Working Group will recall that although the concepts in the two texts are similar, they serve a different purpose. The determination of COMI under the EC Regulation relates to the jurisdiction in which main proceedings should be commenced. The determination of COMI under the Model Law relates to the effects of recognition, principal amongst those being the relief available to assist the foreign proceeding.

(i) Decisions in the European Union

6. In the leading case under the EC Regulation, *Eurofood*, the European Court of Justice (ECJ) held that the COMI of *Eurofood* was in Ireland because the presumption as to registered office had not been rebutted. The ECJ held 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 ... 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".[5]

7. In considering the presumption, the ECJ suggested that it could be rebutted in the case of a "letterbox company" which did not carry out any business in the territory of the State in which its registered office was situated. In contrast, it took the view that "the mere fact" that a parent company made economic choices (for example, for tax reasons) as to where the registered office of a subsidiary might be situated, would not be enough to rebut the presumption.[6]

8. *Eurofood* places significant weight on the need for predictability in determining the centre of main interests of a debtor.

9. A number of other decisions under the EC Regulation are set forth in A/CN.9/WG.V/WP.93/Add.2, paras. 13-34.

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[4] See A/52/17, para. 153 which indicates that "… the interpretation of the term in the context of the Convention would be useful also in the context of the Model Provisions." It should be noted that the EC Regulation does not define COMI, but provides, in recital 13, that the term should correspond to "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." See also Guide to Enactment, paras. 18 and 30.

[5] *Eurofood*, para. 34.

[6] Id.

(ii) Decisions under the Model Law

10. In *Bear Stearns*, the United States court gave further consideration to the question of determination of the centre of main interests of a debtor. The application for recognition involved a company registered in the Cayman Islands which had been placed into provisional liquidation in that jurisdiction.

11. Noting that in Chapter 15 the word "proof" in article 16 had been replaced with the word "evidence", the judge referred to the legislative history, which explained that the change was to make it clearer, using United States terminology, that the ultimate burden was on the foreign representative.

12. The judge went on to say that:

> "The presumption that the place of the registered office is also the centre of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy."[7]

That approach permitted and encouraged fast action in cases where speed was essential, while leaving the debtor's true "centre" open to dispute in cases where the facts were more doubtful. The judge added that the "presumption was not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat".[8]

13. On appeal, the appellate court affirmed the lower court's decision that the burden of displacing the presumption lay on the foreign representative and that the court had a duty, independently, to determine whether that had been done, irrespective of whether party opposition was or was not present.[9]

14. In *Stanford International Bank*, the English court noted that United States jurisprudence was not qualified by a requirement that creditors be able to ascertain the COMI of the company, in contrast to the EC Regulation, which provided that COMI was the place where the debtor conducted the administration of its interests on a regular basis and was "therefore ascertainable by third parties". The court found that since the registered office of Stanford International Bank was in Antigua, the burden of rebutting the presumption fell on the United States receiver and would only be rebutted by factors that were objective. Those factors would not count unless they were also ascertainable by third parties, were in the public domain and were what third parties would learn in the ordinary course of business with the company.[10] It followed, the court said, that the burden of proof as to the COMI was never on the party opposing "main proceeding" status and that such an opponent had only a burden of adducing some evidence inconsistent with the registered office being the COMI.

15. On appeal, the appellate court upheld the decision of the lower court. Having considered both the EU and the United States cases on COMI, the presiding judge expressed the view that the same expression used in different documents may bear different meanings because of their respective contexts. However, he could see nothing in those respective contexts (i.e. EU and United States) to require different

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[7] HR Rep No. 31, 109th Cong, 1st session 1516 (2005).

[8] *Bear Stearns*, p. 128.

[9] *Bear Stearns* (on appeal).

[10] *Stanford International Bank*, para. 62.

meanings to be given: in both cases the phrase was used to identify the proceedings which should take priority over similar proceedings in other jurisdictions. In both cases, the judge indicated, the concern was that persons dealing with the debtor should be able to know before insolvency intervened which system of law should govern the eventual insolvency of their counterparty.

> "It would be absurd if the COMI of a company with its registered office in say, Spain, which is being wound up both there and in the United States should differ according to whether the court in England was applying UNCITRAL on an application by the United States liquidators for recognition as a foreign main proceeding or the EC Regulation in deciding whether the court in England may entertain a petition to wind up the Spanish company [in England]."[11]

16. Slightly different approaches were taken by the other appellate judges in *Stanford International Bank* with respect to the relevance of ascertainability by third parties. The observations made might be seen as suggesting that a court is required to judge objectively, on the evidence before it, where the centre of main interests of the debtor lies, as opposed to making that finding based on evidence of what was actually ascertainable by creditors and other interested parties who dealt with the debtor during the course of its trading life.

17. In *Fairfield Sentry*, recognition in the United States of proceedings before the court in the British Virgin Islands (BVI) was sought. The debtors were incorporated and maintained their registered offices in BVI, but having ceased doing business some months before the BVI proceeding commenced, their activities had been conducted only in connection with the winding up of their business. The court found that although their business was international, the most feasible administrative "nerve centre" for the debtor had for some time been in the BVI. The court cited the recent decision in *Hertz Corp. v Friend*, in which the United States Supreme Court held that "the phrase 'principal place of business' under United States law refers to the place where a corporation's high level officers direct, control, and coordinate the corporation's activities, i.e., its 'nerve centre', which will typically be found at its corporate headquarters. [..] in practice it should normally be the place where the corporation maintains its headquarters — provided that the headquarters is the actual centre of direction, control, and coordination, i.e., the 'nerve centre', and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have travelled there for the occasion). If the record reveals attempts at manipulation — for example, that the alleged 'nerve centre' is nothing more than a mail drop box, a bare office with a computer, or the location of an annual executive retreat — the courts should instead take as the 'nerve centre' the place of actual direction, control, and coordination, in the absence of such manipulation."[12]

18. The *Fairfield Sentry* court also noted the finding in *British American Insurance*, that where, by necessity and good faith, a foreign representative relocated all of the primary business activities of the debtor to his location (or brought business to a halt), thereby causing other parties to look to that foreign

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[11] *Stanford International Bank* (on appeal), para. 54.

[12] *Hertz, Corp.*, pp. 1192-1195.

representative as the location of the debtor business, the debtor's COMI may become lodged with the foreign representative. That fact, together with the location of the registered office, supported the location of the COMI of the debtor as being in the BVI.[13]

(b) Factors relevant to determination of COMI

(i) Identifying the factors — company debtors

19. Various factors have been identified as relevant to determining the COMI of a debtor and to rebutting the presumption in article 16. In *Betcorp*, although the centre of main interests of the debtor was not in dispute, the judge offered some thoughts on the subject. He concluded that "... a commonality of cases analysing debtors' [centre of main interests] demonstrates that courts do not apply any rigid formula or consistently find one factor dispositive; instead they analyse a variety of factors to discern, objectively, where a particular debtor has its principal place of business."[14]

20. Many factors have been considered by the courts with respect to determining the COMI of company debtors. They are not described in exactly the same way in each of the cases, but may be grouped under the following general descriptions, which are not intended to provide an exhaustive list:

(a) The location of the debtor's headquarters[15] or head office functions[16] or "nerve centre";[17]

(b) The location of a debtor's management or those who actually managed the debtor[18] or of the operational management of the debtor;[19]

(c) The location of the debtor's main assets and/or creditors[20] or the location of the majority of creditors who would be affected by the case;[21]

(d) The site of the controlling law[22] or of the law governing the main contracts of the company;[23]

(e) The jurisdiction whose law would apply to most disputes;[24]

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[13] *Fairfield Sentry*, pp. 5-8; *British American Insurance*, p. 914.
[14] *Betcorp*, p. 290.
[15] *Tradex Swiss*; *Stanford International Bank*; *MPOTEC*.
[16] *ENERGOTECH*, *MPOTEC*, *Hellas*.
[17] *Hertz Corp. v Friend*; In the case of the Bankruptcy of Stanford International Bank, 11 September 2009, Superior Court, District of Montreal, Quebec, decision on the application of the SEC receiver, para. 35; *Fairfield Sentry*.
[18] *Tradex Swiss*; *Stanford International Bank*.
[19] *Eurotunnel*, *British American Insurance*.
[20] *Tradex Swiss*; *Ernst & Young*, *Eurotunnel*, *British American Insurance.*
[21] *Stanford International Bank.*
[22] *Tradex Swiss*.
[23] *MPOTEC.*
[24] *Stanford International Bank*, *Ernst & Young*, *British American Insurance.*

(f) The location from which financing was organized[25] or authorized[26] or the location of the debtor's primary bank;[27]

(g) The location from which administration of the debtor was organized;[28]

(h) The location from which contracts (for supply) were organized;[29]

(i) The location from which purchasing policy, staff, accounts payable and computers systems were managed[30] or cash management system was run;[31]

(j) The location in which commercial policy was determined;[32]

(k) The location of employees;[33]

(l) The location from which reorganization of the debtor was being conducted;[34]

(m) The location which creditors recognized as being the centre of the company's operations;[35]

(n) The location in which the debtor was subject to supervision or regulation;[36] and

(o) The location in which and whose law governed the preparation and audit of accounts.[37]

(ii) Identifying the factors — individual debtors

21. Determination of the COMI of an individual debtor has not been the subject of many cases. In *In the matter of Yuval Ran*, the appellate court noted that the factors relevant to determining the COMI of an individual debtor might be somewhat different to those relevant to the COMI of a company debtor. The appellate court referred to *In re Loy*,[38] in which the court had noted that factors such as (a) the location of a debtor's primary assets; (b) the location of the majority of the debtor's creditors; and (c) the jurisdiction whose law would apply to most disputes, might be used to determine an individual debtor's COMI when there was a serious dispute. In other words, the *Ran* court said, the *Loy* court considered factors which are normally applied to the determination of a corporate debtor's COMI in order to determine the disputed COMI of an individual debtor. The court found that the receiver's evidence, while sufficient to rebut the presumption that Ran's COMI was in the United States, was nevertheless insufficient to prove by a preponderance of the

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[25] *Daisy Tek*.
[26] *MPOTEC*.
[27] *MPOTEC*, *Hellas*.
[28] *Eurofoods*; *Daisy Tek*.
[29] *Daisy Tek*.
[30] *MPOTEC*.
[31] *Ernst & Young*.
[32] *MPOTEC*.
[33] *Eurotunnel*.
[34] *Eurotunnel*; *Ernst & Young*, *Hellas*.
[35] *Ernst & Young*.
[36] *Eurofood*.
[37] *Eurofood*.
[38] 380 B.R. 154, at 162 (Bankr. E.D. Va. 2007), [CLOUT case no. 924].

evidence that Ran's centre of main interests was in Israel. The appellate court also disagreed with the operational history approach, noting that the language of the relevant provisions was clearly couched in the present tense and did not involve looking back at past events.[39] The appellate court also found that it was important that the debtor's COMI be ascertainable by third parties.

(c) Impact of fraud

(i) Cases involving fraud

22. A question that arose in the case of *Ernst & Young* was the extent to which fraud might affect the determination of COMI, where the place of registration was merely a pretext and no actual business was carried out there. The case involved two related companies, one of which was registered in Colorado in the United States and the other in Canada, that were part of a fraudulent scheme managed from Canada. The Canadian court appointed a receiver to both companies.

23. The United States court recognized the Canadian receivership as a foreign main proceeding on the basis that, taking into account the location of those managing the debtors, the COMI of both companies was in Canada. The court looked at the location of the debtors, but found that it was not critical as there was no real business being operated by either entity. The court also looked to a third factor, the location of the assets of the debtors. Although one of the debtor entities had funds in a bank account in Colorado, those funds were regularly transferred to the debtor in Canada and the court concluded that the majority of assets were thus in the name of or ultimately controlled by the debtor entity in Canada. With respect to a further two factors, location of the majority of the debtors' creditors and the jurisdiction whose law would apply to most disputes, the court found that they were not critical to the COMI determination. The investors defrauded by the debtors' principals and their entities were citizens of several countries, including Canada, the United States and Israel and with respect to applicable law, jurisdiction lay equally in Canada and the United States.[40]

24. In *Stanford International Bank*, it was argued that where it was alleged the company in question was used as a vehicle for fraud, the court should not investigate the COMI of the company itself, but rather the COMI of the fraudsters organizing the fraud. The lower court said that by its very nature the existence of a fraud behind the scenes was unlikely to be ascertainable by third parties, the whole point being that the fraud was to be kept secret for as long as possible. The court also indicated that the approach of looking at the location of the fraudsters would prove difficult if all of them did not have their COMI in the same State.[41]

25. In the Canadian case concerning Stanford International Bank (not determined under legislation enacting the Model Law), the court considered that for Ponzi style frauds, the real and important connection was "the place of business of the nerve centre or as one could call it, the centre of the spider web of this fraud", which was

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[39] *In the matter of Yuval Ran* (2010), pp. 10-12.

[40] *Ernst & Young*, pp. 778-781.

[41] *Stanford International Bank*, para. 69.

held to be the Stanford Group headquarters in Houston, Texas rather than in Antigua.[42]

(d) Time relevant to determining COMI

26. A number of cases arising under both the Model Law and the EC Regulation have involved a debtor moving from one jurisdiction to another in close proximity to the commencement of insolvency proceedings. The Model Law does not address this possibility or make any mention of timing with respect to the determination of COMI. It has been suggested, for example, that the determination should be made with reference to the debtor's operational history and not merely by assessing where the COMI lay on the date of the application for commencement of insolvency proceedings or on the date of the application for recognition of those proceedings.

(i) Cases under the Model Law

27. In *Gookseung I*, the Korean court declined to recognize proceedings that had taken place in the United States in the previous year, noting that at the time of the application for recognition those proceedings had already been completed and the applicant, who had formerly been a debtor in possession, no longer qualified as a foreign representative.

28. In *Yuval Ran*, the United States lower court found that in order for the Israeli proceedings to be entitled to recognition as a foreign main proceeding, evidence had to show that, at the time recognition was sought, the debtor's COMI was located in Israel. In so doing, it rejected the operational approach that looked at the history of the debtor's connection with Israel. While the debtor had had substantial interests in Israel in the past, at the time of the Chapter 15 application, he effectively had no interests in Israel. That decision was affirmed on appeal.

29. In the case of *Schefenacker*, an automotive supply group which consisted of a German holding company with subsidiaries in various jurisdictions, such as England, United States, Australia and Germany, was in financial trouble and moved its COMI to England as the first step in its restructuring process and in order to take advantage of English insolvency law and enter into a company voluntary arrangement. The holding company's place of incorporation and COMI was successfully moved to England through the use of German law. Main proceedings for the purposes of the Regulations were then commenced in England and recognised across Europe. Those objecting to the application for recognition in the United States focussed on the operating history of the subsidiaries and did not consider that the debtor was a duly organized holding company incorporated in England and Wales, with its operating centre in the United Kingdom. The United States court found that the COMI of the debtor was in the United Kingdom and recognized the proceedings as foreign proceedings. It did not decide whether they were main or non-main proceedings, on the basis that the relief sought could be granted in either case.

30. In *Betcorp*, the United States court took the view that rejecting the operational approach was correct; if COMI were to be assessed on that basis, there was an

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[42] In the case of the Bankruptcy of Stanford International Bank, 11 September 2009, Superior Court, District of Montreal, Quebec, decision on the application of the SEC receiver, paras. 32-36.

increased likelihood of conflicting COMI determinations, as courts may tend to attach greater importance to activities in their own countries or may simply weigh the evidence differently. The court also noted the importance of COMI being ascertainable by third parties, suggesting that if the debtor's main interests were in a particular country and third parties observed that situation, it should be irrelevant that the debtor's interests were previously centred in a different country.[43] The court concurred with the decision of the lower court in *Yuval Ran* that the correct time was when the Chapter 15 case commenced. It observed that that was consistent with English cases interpreting the EU Regulation, which seemed to select a time linked to the commencement or service of the relevant insolvency proceeding.[44]

31. In *British American Insurance*, the United States court relied on past case law under Chapter 15 in determining COMI, deciding that the court must look to a multiplicity of factors, none of which was exclusive and not all of which must be met. The court first looked to the timing of the determination and concluded that it should consider the facts in existence on the date the Chapter 15 application was filed.[45] The court held that that approach should also be followed in determining whether the debtor had an establishment in a particular place.[46]

32. In *Fairfield Sentry*, the United States court took the view that "even courts that had recently relegated the COMI focus to the time of the application for recognition, including *Yuval Ran*, *Betcorp* and *British American Insurance*, would likely support a totality of circumstances approach where appropriate". The jurisprudence emerging from these courts, the judge said, did not preclude looking into a broader temporal COMI assessment where there may have been an opportunistic shift to establish COMI (i.e. insider exploitation, untoward manipulation, overt thwarting of third party expectations). The court found that there had been no opportunistic shifting of COMI or any biased activity or motivation to distort factors to establish COMI in the BVI; in the period between the cessation of business and the commencement of insolvency proceedings in BVI, the administrative nerve centre had existed in BVI and that was where the COMI was located.[47]

(ii) Cases under the EC Regulation

33. In several cases under the EC Regulation, the question of transfer of COMI has arisen. In *Shierson v Vlieland-Boddy*, it was held that the location of the debtor's COMI should be decided at the time when the court was asked to commence insolvency proceedings against the debtor. That could be the date of the hearing of the insolvency proceedings, but could be an earlier date such as the date on which a creditor sought injunctive relief against the debtor.

34. In *Re Staubitz-Schreiber*, a case involving personal insolvency, the debtor tried to move her COMI from Germany to Spain after an application to commence insolvency proceedings had been made in Germany, but before the court determined whether or not to commence that proceeding. The ECJ held that the debtor's COMI remained in Germany because it was in Germany at the time the application for

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[43] *Betcorp*, p. 291.
[44] Id., 292.
[45] *British American Insurance*, p. 906.
[46] Id., p. 915.
[47] *Fairfield Sentry*, p. 8.

commencement of insolvency proceedings was made, regardless of any subsequent attempt to move it to another Member State before the proceedings commenced.

35. Moving the jurisdiction of incorporation may not be sufficient to transfer a company's COMI, unless sufficient evidence can be advanced to rebut the presumption in article 16. In the case of *Hans Brochier*, a German construction company tried to move its registered office to England to take advantage of English insolvency law, but an English court held that its COMI remained in Germany.

36. In the case of *Hellas Telecommunications (Luxembourg) II SCA*, the company argued successfully that it had moved its COMI from Luxembourg to England, where it wished to restructure. The English court held that it had to consider COMI as at the date of the hearing, some three months after the COMI had been moved. It also held that it was satisfied the COMI had moved to England, based on the objective and ascertainable facts on which the company had relied, namely that its head office and principal operating address were now in London; the company's creditors were notified of its change of address around that time and an announcement was made by way of a press release that its activities were shifting to England; it opened a bank account in London and all payments were made into and from that bank account, although there still remained a bank account in Luxembourg to deal with minor miscellaneous payments; it had registered under the Companies Act in England, although its registered office remained in Luxembourg and it may remain liable to pay tax in Luxembourg; and negotiations between the company and its creditors have taken place in London.[48]

(e) Issues for consideration on COMI

37. The Working Group may wish to consider whether a review of the cases discussed above suggests that further elaboration of the following issues would be desirable:

(a) Where the onus of proof lies in rebutting the registered office presumption;

(b) The evidence necessary to overcome the presumption that debtor's COMI is its registered office;

(c) The relevance of ascertainability by third parties to a determination of centre of main interests under the Model Law;

(d) Whether a list of indicative factors might be developed to assist in the determination of COMI and if so, the factors that might be included in that list;

(e) Whether the incidence of fraud has an impact on the factors to be considered in determining COMI; and

(f) Whether the time period in which a company maintains its COMI in a jurisdiction should be a factor in determining the COMI of a debtor. In particular, it may wish to consider whether the COMI of a debtor should be determined as at the date on which the company was actually transacting business and conducting business operations prior to insolvency or thereafter when the company is insolvent

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[48] *Hellas*, para. 4.

and under the direction of a liquidator or at the date of the application for recognition.

4. Establishment

(a) Establishment of a company debtor

38. Establishment is defined in paragraph (f) of article 2 of the Model Law. The Guide to Enactment provides no further clarification, except to note in paragraph 75 that the definition was inspired by article 2, subparagraph (h) of the European Union Convention on Insolvency Proceedings. The Virgos Schmit Report[49] on that Convention provides some further explanation of "establishment":

> "Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional. The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an "establishment". A certain stability is required. The negative formula ("non-transitory") aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor."[50]

39. In *Bear Stearns*, the court considered the alternative of recognizing the Cayman Islands proceedings as non-main proceedings. The court took the view that to do so, there must be an "establishment" in the Cayman Islands for the conduct of non-transitory economic activity, i.e., a local place of business. Here the bar was rather high, the court said, especially in view of the statutory prohibition against "exempted companies" engaging in business in the Cayman Islands except in furtherance of their business carried on outside of the Cayman Islands. The court found that there was no (pertinent) non-transitory economic activity conducted locally in the Cayman Islands; only those activities necessary to the debtor's offshore "business". Additionally, the only funds on deposit had migrated there after the Cayman Islands proceedings were initiated.

40. On appeal, the appellate court affirmed the decision of the lower court and further, made it clear that auditing activities carried out in preparation of incorporation documents did not constitute "operations" or "economic activity" for the purposes of satisfying the definition of "establishment", nor did investigations carried out by the provisional liquidators into whether antecedent transactions could be avoided.[51]

41. In *British American Insurance*, the court cited *Bear Stearns* on the requirement for a "seat for local business activity", concluding that the terms "economic activity" and "operations" required a showing of a local effect on the marketplace,

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[49] M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, prepared prior to the Convention being opened for signature on 23 November 2005. Although the Convention never entered into force, the Report has generally been accepted as an aid to interpretation of the various terms used in the Convention, especially "centre of main interests". Available online at http://global.abi.org/articles/virgos-schmit-report-convention-insolvency-proceedings-now-re.

[50] Id. para. 7.1.

[51] *Bear Stearns* (on appeal), p. 339.

more than mere incorporation and record-keeping and more than just the maintenance of property. The court held that the debtor did not have an establishment in the Bahamas where it had no business operation other than the insolvency representative's activities pursuant to his appointment, which included retaining counsel and accountants, investigating assets and liabilities and reporting to the Bahamian courts. The court also referred to *Lavie v Ran*, where the court found that insolvency proceedings did not satisfy the requirement for economic activity.[52]

(b) Establishment of an individual debtor

42. In *In the matter of Yuval Ran*, the appellate court considered the issue of establishment from the point of view of the individual debtor. The appellate court found that the relevant time to consider whether the debtor had an establishment in Israel was the time the application for recognition was made. Noting the source of the definition of establishment in the Model Law, the court said that "equating a corporation's principal place of business to an individual debtor's primary or habitual residence, a place of business could conceivably align with the debtor having a secondary residence or possibly a place of employment in the country where the receiver claims that he has an establishment".[53] The court found that that was not the case, nor did the debtor carry out any non-transitory economic activity there, even if there was evidence of previous economic activity. The receiver argued that the presence of debts and the insolvency proceedings in Israel constituted an "establishment" for the purposes of recognition. The court took the view that an insolvency proceeding was by definition a transitory action and to permit such an action to constitute the basis for finding non-transitory economic activity, would be inappropriate because it would go against the plain meaning of the statute. The court concluded that the existence of insolvency proceedings and debts in Israel would not qualify the Israeli proceedings for recognition as non-main proceedings.[54]

(c) Issues for consideration

43. The Working Group may wish to consider whether further explanation or clarification of the term "establishment" would be desirable.

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[52] *British American Insurance*, pp. 914-915.

[53] *In the Matter of Yuval Ran* (2010), p. 16.

[54] Id., pp. 17-18.

Annex

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