Re Stanford International Bank Ltd (In Receivership)
Re Stanford International Bank Ltd (In Receivership) [2010] EWCA Civ 137 [2010] WLR 941 25th February 2010
England and Wales
England and Wales Court of Appeal

Key Words
Applications without notice; cross-border insolvency; duty of disclosure; foreign proceedings; mutual assistance; recognition; Ponzi scheme.

Summary of Facts of the Case
Stanford International Bank, incorporated in Antigua and Barbuda, was alleged to be involved in a Ponzi scheme over which a receiver was appointed by a court in the United States. The facts of the case are complicated and there are a number of overlapping civil and criminal claims, but these are not pertinent to the questions relevant to this case note. The key issues here are the application of COMI by UK courts under the Model Law as implemented in the Cross-border Insolvency Regulations 2006 for recognition of foreign main proceedings in either Antigua or the United States and the resolution of these competing claims for recognition. The United States Department of Justice issued a letter of request to the United Kingdom for assistance by way of a restraint order over the assets of the bank in the jurisdiction. A restraint order was obtained in the UK on 7th April 2009. A winding up order was then made in Antigua on 15 April 2009 and liquidators were appointed. The Antiguan liquidators and US receiver then made competing applications to the English High Court under article 15 of the UNCITRAL Model Law (Article 2(i)) for recognition as a 'foreign main proceeding'.

Cooperation and/ or Coordination Issue
In terms of the cooperation or coordination issue, this is a question of jurisdictions competing for control in a cross-border insolvency. The ability to rely on recognition and enforcement is an important characteristic of an effective and efficient cross-border insolvency system as the choice of jurisdiction can have a significant impact on the rights and outcomes for creditors. The test for

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establishing jurisdiction therefore needs to be clear and certain in order to avoid an escalation of claims in which jurisdictions are vying for control.

This case is also interesting from a cooperation and coordination perspective due to its heavy application of the *Eurofood* case to the COMI test set out under the Cross-Border Insolvency Regulations 2006 (CBIR) in the UK, which is based on the UNCITRAL Model Law to establish which jurisdiction should be considered the foreign main proceedings, a recognition issue.

This reasoning has been challenged based on the contention that it would have been more appropriate to rely on United States cases that also rely on the COMI as set out under the US Bankruptcy Code Chapter 15 provisions on cross-border insolvency which is also based on the UNCITRAL Model Law (Ho 2011). The COMI tests under the EIR Recast and the Model Law do differ and as the CBIR implements the Model Law, it would arguably have been more relevant to apply cases that also rely on COMI as defined therein. Further it should be noted that the concept and purpose of COMI also differs between the Model Law and the EIR Recast, as noted by Look Chan Ho (400):

> 'Under the EC Insolvency Regulation, the COMI concept controls which jurisdiction may open insolvency proceedings; whereas under the Model Law, the COMI concept merely determines the nature of the foreign insolvency proceedings for recognition purposes.'

On an international cross-border level, this case might have introduced more confusion than clarity in relation to the establishment of COMI under legislation implementing the jurisdiction provisions under the UNCITRAL Model Law, though it is not an issue that has arisen significantly since then either.

(Look Chan Ho, 'Misunderstanding the Model Law: *Re Stanford International Bank*' (2011) July/August Butterworths Journal of International Banking and Financial Law 395).

Resolution

Lewison J of the English High Court held that the Antiguan proceeding qualified as a foreign main proceeding under the CBIR but that the US receivership did not. He denied the US jurisdiction on the basis of the application of the COMI test set out under the EIR – that the presumption that a debtor's COMI was in the state in which its registered office was located would only be rebutted by factors which were both objective and ascertainable by third parties. On appeal, the Court of Appeal found in favour of the Antiguan liquidators, agreeing with Lewison J that the US receivership was not to be considered a 'foreign proceeding' and that therefore the receiver was not a 'foreign representative' under the CBIR. In contrast, the Antiguan liquidation did qualify as a foreign proceeding and the COMI of Stanford was also in Antigua.

A thorough analysis was made by the court of the jurisdiction provisions of the UNCITRAL Model Law as implemented by the CBIR to establish which of the two proceedings should be considered the main insolvency proceedings. In so doing, in the main judgment written by the Chancellor, a number of European and English cases, including in particular *Eurofood*, were discussed to establish the COMI test, its presumption and criteria for rebutting that presumption of jurisdiction. Applying the Model Law test of COMI, the Chancellor first noted that the COMI of Stanford depends on the application of the presumptions to it, i.e. that the COMI is the place of registered office [para 30]. In explaining how the presumption could be rebutted, the Chancellor then cited *Eurofood* para 34:

> '…the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.' [para 42].

The Chancellor rejected the contention that Lewison J had applied the wrong test by elevating the ascertainability test into a pre-condition for reconsideration of the location of COMI as being different from the registered office under the CBIR/Model Law. The Chancellor found that ascertainability by third parties was conclusive and that Lewison J was correct in confining that ascertainability to those matters that are already in the public domain and what a typical third party could learn by dealing with the company, excluding those aspects that could only be ascertained by inquiry [para 56]. In finding that Lewison J used the correct test, the Chancellor found it was not open to the Court of Appeal to 'contradict the judge's conclusion on the same evidence as was before him.' [para 58]

Thus, the Chancellor concluded that: (1) the US receivership is not a foreign proceeding within the meaning of Article 2(i) of the UNCITRAL Model Law; (2) the Antiguan liquidation is a foreign proceeding is a foreign proceeding; (3) the presumption of COMI has not been rebutted (i.e. it is the place of registered office in Antigua); and (4) the Antiguan liquidation is the foreign main proceedings in this case.

Applicability to Preventive Restructuring

Member States can choose whether or not to include their preventive restructuring frameworks in Annex A of the EIR Recast. If the frameworks are not included, they may very fell fall to be considered under alternative jurisdiction rules depending on the jurisdiction in question. Given the exit of the UK from the European Union, recognition rules are likely to fall back on the CBIR should a European Member State seek recognition in that jurisdiction. Thus it is somewhat comforting that the UK courts have relied on the tests under EU law to establish COMI as it adds certainty to what would otherwise be a rather uncertain set of new circumstances in Europe.

Applicability of Existing Rules and Guidelines

The EIR Recast

Were such a case to be heard between EU Member States, the reasoning set out in this case would apply equally to the establishment of COMI as despite the fact that the case itself was heard under implementing provisions of the UNCITRAL Model Law, the UK court relied almost explicitly on the tests derived under the key COMI Case of forum determination, Eurofood. Thus, relying on Article 19 of the EIR Recast, recognition is automatic as long as COMI has been determined subsequent to Article 3(1) and the presumption of place of registered office has not been rebutted by factors that are objective and ascertainable to third parties, per *Eurofood*.

There may be the potential for a distinction to be made between initial recognition under the EIR Recast and continued co-operation and the format this takes, which comprises a part of the subject matter of the JCOERE Reports. In this context the obligation of co-operation might be equivocated to the common law treatment of judicial assistance in this case.

Guidelines and Recommendations

The rules and guidelines provided in the European context for assisting in cross-border insolvency and restructuring matters do not really help with regards to the establishment of jurisdiction, therefore it is sufficient to rely upon the Recitals and Articles of the EIR Recast in relation to the rules that would govern this case were it heard today.

That said, the AIL-III Global Principles does offer some guidance on this matter under Principle 13.1, which states that:

"For the purposes of these Global Principles the courts or other authorities of a state should have jurisdiction to open an insolvency case in respect of a debtor when either:

(i) the debtor's centre of main interests is situated within that state's territory; or

(ii) the debtor has an establishment within that state's territory".

In addition, Principle 13.3(I) provides that "For the purposes of these Global Principles: "Centre of main interests" means the place where the debtor conducts the administration of its interests on a regular basis, to be determined on the basis of objective factors which are known to or are readily ascertainable by third parties".