IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE	§	
	§	
Stanford International Bank, Ltd.	§	Case No.: 3-09-CV-0721-N
	§	
Debtor in a Foreign Proceeding	§	

THE RECEIVER'S MEMORANDUM BRIEF
CONCERNING THE U.K. COURT'S COMI DECISION

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A U.S. court is not bound by the center of main interest ("COMI") determination of a foreign court, but instead is to make its own COMI determination in ruling on a Chapter 15 motion for recognition.[1] Nonetheless, given that the U.K. Court recently issued a judgment on the COMI of Stanford International Bank Ltd. ("SIBL"), the Receiver considers it appropriate to advise the Court of his position regarding that judgment and explain why he believes this Court should not follow the U.K. Court's reasoning and conclusion. The U.K. Court incorrectly concluded that the center of main interest of SIBL was Antigua. The U.K. Court reached its decision by disregarding highly relevant evidence — some of it publicly available, some of it hidden by Stanford's fraud — demonstrating that SIBL's COMI was in the United States. The Receiver has been granted leave to appeal (a U.K. requirement).[2]

The U.K. decision should not be followed for these reasons:[3]

- Neither the Cross-Border Regulations nor Chapter 15 contain language supporting application of the "objective and ascertainable" evidence standard, especially in a case such as this. The U.K. Court obtained this standard from a decision of the European Court of Justice, Case C-341/04, *In re Eurofood IFSC Ltd.,* 2006 E.C.R. 1-508; but that case involved a different statute, the European Union Insolvency

[1] See authorities cited in section 1, p. 3 *infra*.

[2] The U.K. judgment, although not stayed pending appeal, does not have immediate effect due to two separate orders freezing the SIBL funds located in the UK. One freeze order was issued by a U.K. civil court at the request of the SEC. The other was issued by a U.K. criminal court at the request of the Serious Fraud Office, part of the U.K. government, which was acting pursuant to a request by the U.S. Department of Justice under the Mutual Legal Assistance Treaty between the U.S. and the UK. The Antiguan Liquidators have agreed to give counsel for the Receiver advance notice of any motion to modify or lift either freeze, and to give an additional 72 hours advance notice if the Antiguan Liquidators succeed in obtaining a modification or lifting of either freeze order.

[3] The U.K. Court also ruled, incorrectly, that the U.S. Receivership does not arise under a "law related to insolvency" and therefore the Receivership does not constitute a "foreign proceeding" and the Receiver does not qualify as a "foreign representative" under the Cross-Border Regulations. These grounds for The U.K. Court's judgment are not addressed in this brief because they do not concern issues presented by the Antiguan Liquidators' Chapter 15 filing. The Receiver does intend, though, to seek leave to address these grounds in a later filing in the main *SEC v. Stanford* case. The U.K. Court based its rulings on misconceptions regarding this Court's Receivership Order and U.S. receivership law. A clarifying order from this Court making clear that the ultimate object of this Receivership is liquidation and distribution to creditors (not just to investors) would, the Receiver believes, help inform the U.K. appellate court on these issues.

Proceedings Regulation (the "EU Regulation"), which expressly incorporates the ascertainability standard.[4] Moreover, *Eurofood* arose out of a subsidiary's simple business failure. It did not involve fraud of any kind, much less the kind of mass-deception present here.

- It is improper for a court to look only to publicly available "objective and ascertainable" evidence when much of the debtor's activity was purposely obscured by fraud and much of the information that was publicly available was inherently misleading. The U.K. Court was incorrect to accept the Antiguan Liquidators' argument that it should not "look behind the curtain to see who was pulling the levers"[5] in determining COMI. Where the levers were and who was pulling them are among the most important issues in a COMI analysis. And Chapter 15 says nothing about a curtain behind which the court should not look for pertinent information.

- This was the very first contested proceeding under the U.K. Cross Border Regulations (2006) (the "Cross-Border Regulations"). Yet, the U.K. Court disregarded the substantial body of Chapter 15 case law concerning COMI, even though Chapter 15 of the U.S. Bankruptcy Code and the Cross Border Regulations are virtually identically (both derive from the UNCITRAL Model Law).

- There is ample evidence unquestionably meeting the "objective and ascertainable" standard that compels a finding that SIBL's COMI lies in the U.S. and not Antigua. The U.K. Court was wrong to disregard that evidence on the ground that SIBL had "chosen" to outsource its business functions.

- U.S. law is clear that, notwithstanding the § 1516(3) presumption, the burden of proof remains at all times with the movant. The U.K. Court effectively relieved SIBL of its burden of proof. Even if it was correct under U.K. law in doing so, that is another reason for this Court not to follow the U.K. decision.

1. This Court is not bound by the U.K. Court's COMI determination.

A foreign court's COMI determination does not bind a U.S. court or prevent it from arriving at a contrary result. Indeed, Chapter 15 requires that a U.S. court make its own COMI decision. *See In re Ran*, 390 B.R. 257, 267 (Bankr. S.D. Tex. 2008), *aff'd sub nom. Lavie v. Ran*, ___ B.R. __, 2009 WL 890387 (S.D. Tex. 2009) ("Chapter 15 does not provide for

[4] The Cross-Border Regulations and the EU Regulation are not statutes, as that term is used in European countries. For ease of reference, however, they will be referred to as statutes herein.

[5] This was a metaphor that the Antiguan Liquidators' counsel used multiple times during oral argument to the U.K. Court.

recognition of an insolvency proceeding based on a foreign court's determination that it has jurisdiction as the location of the debtor's center of main interests. . . . Instead, Chapter 15 requires the U.S. court to make an independent evaluation of the location of the debtor's center of main interests at the time a petition for recognition is presented."); *In re SPhinX, Ltd.*, 351 B.R. 103, 120 n.22 (Bankr. S.D.N.Y. 2006) ("[N]otwithstanding the respect that this Court has for the Cayman Court, even if the Cayman Court had made such a determination it would not be binding on this Court.").

2. The U.K. Court based its decision on a ruling of the European Court of Justice construing, not the Cross Border Regulations (or Model Law on which they are based), but the EU Regulation.

The U.K. Court held that, in all cases, only publicly available information can be considered in determining a debtor's COMI. The Cross Border Regulations do not contain any textual support for this limitation. The U.K. Court instead went beyond the language of the Cross-Border Regulations to import an "objective and ascertainable" evidence limitation from the ECJ's decision in *Eurofood*. *Eurofood*, however, construed not the Cross-Border Regulations or some other version of the Model Law, but the very-differently worded EU Regulation, which contains express language supporting that standard.

The issue in *Eurofood* was whether the COMI of the debtor, an Irish-chartered company, was in Ireland or Italy, where its parent company was chartered and did business. There was no suggestion that the Irish subsidiary had been involved in fraud. It simply had become insolvent due to business factors. The basic ruling of the case is that the normal control exerted by a parent company over a subsidiary is insufficient to rebut the presumption in the EU Regulation that a debtor's COMI is in the jurisdiction in which its registered office is located (*i.e.*, in which the debtor is incorporated).

In arriving at this conclusion, the ECJ stated that the statutory presumption can only be rebutted by "factors that are both objective and ascertainable by third parties." *Eurofood,* at § 33. It obtained this standard in part from Recital 13 of the EU Regulation, which states:

> The 'centre of main' interests 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*.

2000 J.O. (L160)2 (emphasis added). Although the drafters of the Model Law knew of this language in the EU Regulation when they were drafting the Model Law, they chose not to include it.

Because the EU Regulation and the Model Law incorporate similar concepts, the case law construing the EU Regulation *may*, in *some* cases, provide useful insight regarding the application of those concepts. However, nothing in either the Model Law or the *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* suggests that decisions of the ECJ regarding the meaning of the EU Regulation will be binding regarding the meaning of the Model Law. Yet the U.K. Court went so far down that path as to treat a decision of the ECJ construing the EU Regulation in the context of a normal business failure as binding regarding the proper construction and application of the Cross-Border Regulations (i.e., the Model Law) in a mass-fraud case.

The U.K. Court cited the following paragraph from the *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment* as support for this.

> A foreign proceeding is deemed to be the "main" proceeding if it has been commenced in the State where "the debtor has the centre of its main interests." *This corresponds to the formulation in article 3 of the European Union Convention on Insolvency Proceedings, thus building on the emerging harmonization as regards the notion of a "main" proceeding*. The determination that a foreign proceeding is a "main" proceeding may affect the nature of the relief accorded to the foreign representative.

Model Law Guide to Enactment, at ¶ 31 (emphasis added). The references to a "correspond[ing]" formulation in the EU Regulation and "emerging harmonization" cannot be read to mean that the two statutes are identical in meaning and application. Among other things, there are pertinent language differences between the two statutes that must be taken into account. As already discussed, the EU Regulation expressly incorporates the "ascertainability" concept, whereas the Model Law does not.

In addition, the EU Regulation has a significantly different scope and purpose than the Model Law. The EU Regulation is intended to sort out cross-border insolvency issues among a group of states that have entered into a political union, complete with a supra-national parliament and judiciary. For example, a U.S. or Canadian bankruptcy trustee could not move for recognition under the EU Reg. The Model Law is very different. The courts of a country that has adopted the Model Law must consider motions for recognition of foreign proceedings from all other countries in the world. Given this significant difference, it stands to reason that the recognition concepts in the two regimes should be interpreted differently for some purposes.

3. The U.K. Court disregarded the more substantial — and more apt — body of U.S. Chapter 15 case law construing virtually the same statute (i.e., the Model Law).

Chapter 15 and the Cross-Border Regulations both derive from the Model Act, yet the U.K. Court completely disregarded the substantial body of U.S. case law construing the Model Law COMI provisions. The U.K. Court sought to justify its disregard of U.S. case law by pointing to a one-word difference between the two countries' respective COMI presumption provisions.

The pertinent U.K. provision, art. 16.3 (identical to Model Law art. 16(3)), reads:

> 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 the debtor's main interests.

Section 1516(c) of Chapter 15 reads :

> In the absence of *evidence* to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

According to the U.K. Court, "[t]his change of language of the enactment . . . may well explain why the jurisprudence of the American courts has diverged from that of the ECJ." U.K. Judgment at ¶ 65. In other words, the U.K. Court mistakenly assumed that Congress substituted "evidence" for "proof" so as to give § 1516(c) a substantively different meaning than the original provision in the Model Law. From the context, it appears the U.K. Court assumed that rebuttal by "evidence" is a lesser burden than rebuttal by "proof."

The legislative histories of the Model Law and of Chapter 15 do not bear out the U.K. Court's basis for distinguishing U.S. COMI cases. The *Model Law Guide to Enactment* indicates that the drafters of the Model Law used the words "evidence" and "proof" interchangeably. Whereas art. 16(3) of the Model Law uses the term "proof," paragraph 122 of the *Guide*, which explains that provision, uses the term "evidence." Paragraph 122 of the *Guide* states,

> 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, calling for or assessing other *evidence* if the conclusion suggested by the presumption is called into question by the court or an interested party. (emphasis added)

Further, the Congressional record indicates that "proof" was changed to "evidence," not to change the substantive meaning of the Model Law, but to comport with U.S. terminology so as to avoid confusion and make the provision clearer to U.S. readers.

> *Sec. 1516, Presumptions concerning recognition*. This section follows article 16 of the Model Law with **minor changes**. Although sections 1515 and 1516 are designed to make recognition as simple and expedient as possible, the court may hear proof on any element stated. The ultimate burden as to each element is on the foreign representative, although the court is entitled to shift the burden to the extent indicated in section 1516. **The word "proof" in subsection (3) has been changed to "evidence" to make it clearer using United States terminology**

> **that the ultimate burden is on the foreign representative.** . . . **The presumption that the place of the registered office [*i.e.*, place of incorporation] is also the center of the debtor's main interest is included for speed and convenience of proof where there is no serious controversy.**

Bankr. Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 2005 U.S.C.C.A.N. (119 Stat.) 175 (emphasis added). As the Court knows from its own experience, while "evidence" and "proof" are generally synonymous, we in the U.S. tend to use "evidence." For example, we do not have "Rules of Proof"; we have "Rules of Evidence." We don't introduce "proof"; we introduce "evidence." We don't compile a "proof record"; we compile an "evidentiary record."

This Court should not follow the U.K. Court's COMI conclusion because the U.K. Court chose not to follow pertinent U.S. case law concerning how COMI should be analyzed. The Receiver believes the U.K. Court's basis for distinguishing the U.S. cases was incorrect, but regardless of whether it was or was not, the point remains that the U.K. judgment represents, according to the U.K. Court, a departure from U.S. law.

4. It was improper for the U.K. Court to look only to publicly available "objective and ascertainable" evidence when the reality of SIBL's activities was purposely obscured by fraud and the information that was publicly available was inherently misleading.

The U.K. Court extended the *Eurofood* ruling far beyond the facts of that case. Eurofood was a company that happened to fail due to business reasons. It was not an instrument of fraud controlled by persons from outside its jurisdiction of incorporation. There is no reason to believe the ECJ would have arrived at the same result if that had been the case.

And even if it can be argued that the "objective and ascertainable" standard is appropriate in some cases, it is clearly inappropriate for cases involving Ponzi schemes and other large-scale frauds, in which the true state of the debtor's affairs was inherently *un*ascertainable. The

Eurofood decision did not address such a case and does not require such an anomalous construction.

Here, it was impossible for SIBL's potential creditors to gain a true understanding of SIBL's activities because Stanford and those assisting him purposely obscured reality. Creditors' efforts to foresee risk and obtain legal certainty in their dealings with SIBL were overwhelmingly defeated by fraud. In such circumstances, it makes no sense to ignore the fact that SIBL was one of numerous Stanford Entities that were used to perpetrate a massive fraud directed from the U.S.

Moreover, the term "ascertainable" implies the discoverability of a *meaningful* fact, one that gives insight into the reality of a situation.[6] The "objective and ascertainable" "facts" that the U.K. Court pointed to provided no such insight because they themselves were misleading. They were the smokescreen that allowed the Ponzi scheme to thrive. For example, the impressive (rented) Antiguan bank building conveyed a sense of financial strength when there was none. The so-called audits by the Antiguan auditor C.A.S. Hewlett conveyed a sense of safety when in fact Hewlett merely took the word of U.S. management for the value of more than 90% of SIBL's assets, no doubt incentivized to do so by his receipt of £15,000 to £20,000 per month from a Swiss bank account *over and above his audit fees*. Representations that SIBL was closely regulated by the FSRC were meant to reassure investors when in fact the head of the FSRC, who was under Allen Stanford's influence and has recently been indicted for taking bribes from him, made sure that SIBL received clean regulatory reviews despite the FSRC having no detailed asset records in Antigua to review.

[6] According to Webster's Third New International Dictionary (1993), "ascertain" means to "determine . . . with certainty."

5. This Court should not import a new requirement into Chapter 15 that is not present in the clear language of the statute.

Chapter 15 (like the Cross-Border Regulations) says nothing about limiting the COMI analysis to information that was "publicly available" or "objective and ascertainable." This Court should not imply a restriction on the kind of evidence it can consider when the pertinent statute does not require such a restriction.

> The most important factor in statutory construction is the text of the statute.
>
> In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.

Andrepont v. Murphy Exploration & Prod. Co., 566 F.3d 415, 421-22 (5th Cir. 2009) (*quoting Estate of Cowart v. Nickless Drilling Co.,* 505 U.S. 469, 475 (1992)).

> There is no better or more authoritative expression of congressional intent than the statutory text: "[I]n all statutory construction cases, we begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). And where "the statutory language is unambiguous and the statutory scheme is coherent and consistent," the language of the statute is usually where we end.

Med. Ctr. Pharmacy v. Mukasey, 536 F.3d 383, 394 (5th Cir. 2008). "Courts should confine themselves to the construction of a statute as it is written and not attempt to supply omissions or otherwise amend or change the law under the guise of construction." *U.S. v. Graham*, 305 F.3d 1094, 1102 (10th Cir. 2002) (*quoting Christner v. Poudre Valley Co-op. Ass'n*, 235 F.2d 946, 950 (10th Cir. 1956)). "To supply omissions transcends the judicial function" and constitutes "not a construction of a statute, but, in effect, an enlargement of it by the court." *Iselin v. United States,* 270 U.S. 245, 251 (1926) (Brandeis, J.)

The Receiver is mindful of the admonition in § 1508 that:

> [i]n interpreting . . . [chapter 15], the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.

However, this provision requires an interpretation that hews closely to the language of the statute and avoids unnecessary non-textual glosses, which is what the U.K. Court's "publicly available information" restriction is. Differences in construction among the various jurisdictions are most likely to develop when courts stray from the clear language of a model law.

A number of U.S. cases discuss the *Eurofood* "objective and ascertainable" ruling, some with apparent approval. No U.S. case, however, has applied that restriction to limit consideration of evidence establishing the true seat of a fraud scheme, as the U.K. Court did in its judgment. *See, e.g., In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006) (In determining that fraudulent insurance companies' COMI was in St. Vincent, court took into account that the fraud was launched and then managed from St. Vincent.); *In re Ernst & Young, Inc.*, 383 B.R. 773, 780 (Bankr. D. Colo. 2008) (In determining that Canada was the COMI of related fraudulent investor funds, the court took into account that the fraud-feasors "directed the operations of [the funds] from Canada" and that "the creation of both [funds] was part of a fraudulent scheme.").

Indeed, no European Court of Justice case has applied the "objective and ascertainable" restriction to ignore evidence regarding the operational base of a fraud scheme.

6. The U.K. Court improperly disregarded "objective and ascertainable" evidence establishing that SIBL's COMI lies in the U.S. and not Antigua.

Even if the "objective and ascertainable" standard were applicable in fraud cases such as this (and it logically cannot be), the Receiver submitted ample evidence meeting that standard to establish that SIBL's COMI was in the U.S. It was widely known that SIBL looked to other Stanford entities in the U.S. for the performance of its principal business functions such as

investment and marketing.[7] The U.K. Court acknowledged this evidence but nonetheless chose to disregard it, saying —

> . . . I do not consider that management carried out by other companies under contractual arrangements with SIBL changes SIBL's COMI. It has chosen to manage its affairs by outsourcing some functions to others.

Judgment ¶ 98(v).

The real answer to this statement is that SIBL did not "choose" anything; it and numerous other Stanford-owned entities were completely the instruments of Allen Stanford's fraud. But putting that aside, the mere fact that there were inter-company contracts does not negate the abundant objective and ascertainable evidence that clearly establishes that SIBL's head office functions were conducted from the U.S. and not from Antigua. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*., 374 B.R. 122, 130 (Bankr. S.D.N.Y. 2007) is directly contrary to the U.K. Court's reasoning. In that case, the court denied "main proceeding" recognition to a Cayman liquidation proceeding even though the debtor was incorporated in the Caymans. It did so because the company's investment and other back-office functions were conducted *by contract* from the U.S.

In addition, the Receiver has just learned of — and will be submitting to the court — additional highly relevant evidence to the effect that SIBL CDs were marketed to investors on the basis of SIBL's close ties to the U.S. Affidavits and documents just filed in a proposed Northern District class action styled *Troice et al, v. Willis of Colorado, Inc., et al*, recite or discuss the following representations made to prospective investors:

- **"Stanford International Bank Ltd., based on Antigua, West Indies, belongs to our Group, Stanford Financial Group, which is a totally American company based in Houston, Texas."**

[7] Indeed, the vast majority of investors had no contact with SIBL and instead dealt exclusively with their Stanford broker who, for more than 40% of investors, was located in the U.S. *See* Karyl Van Tassel dec. at ¶ 37, Doc. 21-20, p.17 of 33 (filed 06/09/2009).

- **SIBL was represented to be safe because it was insured by insolvency and fidelity policies issued by American insurance companies (Great American Insurance Company and General Star Indemnity Co.), which policies were managed by a subsidiary of Sedgwick James of Houston, one of the "main insurance brokers in the world."**

- **A series of annual letters from a U.S. insurance broker reassured investors that "[i]n order to qualify for the above coverages, the Bank underwent a stringent Risk Management review conducted by an outside audit firm. We have found that all our dealings with the Bank have been conducted in a professional and satisfactory manner."**

According to the complaint, some investors were surprised to learn that their investment was not with a U.S. company. This is evidence that was not available to the U.K. Court.

7. That the U.K. Court relieved SIBL of its burden of proof is another reason why this Court should not follow the U.K. judgment.

The U.K. Court relieved SIBL of its burdens of proof and persuasion. That is clear from the following excerpt from the judgment:

> In the present case the applications have been supported by written evidence; but none of that evidence has been tested by cross-examination. How, then, is the court to resolve any disputed question of fact? The answer, I think, is that the court should apply the same test as it applies in deciding questions of jurisdiction under the Judgments Regulation: viz. *that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that the company's COMI is not in the state in which its registered office is located.*

In other words, the U.K. Court did not require proof that SIBL's COMI is in Antigua, but instead required proof that its COMI is not in Antigua.

Whether or not this approach was correct under U.K. law, it is clear that it is incorrect under U.S. law. Notwithstanding the COMI presumption contained in § 1516(c), the burden of persuasion always remains with the movant, as does the burden of proof where there is evidence calling the presumption into question (as there is here). *In re Tri-Cont'l Exch.,* 349 B.R. at 635 ("In effect, the registered office (or place of incorporation) is evidence that is probative of, and that may in the absence of other evidence be accepted as a proxy for, 'center of main interests.'

The registered office, however, does not otherwise have special evidentiary value and does not shift the risk of nonpersuasion, *i.e.*, the burden of proof, away from the foreign representative seeking recognition as a main proceeding."); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 53 (Bankr. S.D.N.Y. 2008)("Section 1516(c) merely creates a rebuttable presumption and does not shift the burden of proof in supporting a petition for recognition."); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 335 (Bankr. S.D.N.Y. 2008) ("Such a rebuttable presumption at no time relieves a petitioner of its burden of proof/risk of non-persuasion.").

This is another reason the Court should not follow the U.K. judgment.

CONCLUSION

For the above reasons, this Court should not follow the U.K. Court's COMI analysis or ruling in deciding the Antiguan Liquidators' Chapter 15 motion.

Dated: July 9, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 9, 2009 I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served the Court-appointed Examiner, all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Kevin M. Sadler
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