

Finding the Centre: COMI in a Multi-Jurisdictional World

By Peter Tarn

The facts behind Mr. Justice Lewison's recent judgment in *Stanford (STANFORD INTERNATIONAL BANK LIMITED [2009] EWHC 1441 (Ch))* have no direct connection with either the British Virgin or Cayman Islands but lawyers there do have particular reason to note the more general principles around the seemingly vexed but important issue of COMI in the context of multi-jurisdictional insolvency.

While many take advice on the detailed nuances of Cayman and BVI insolvency laws they can often be accused of ignoring the elephant in the room. The elephant is this, what role will international conflicts rules allow the insolvency law of these centres to take? Despite their small physical size the importance of these islands cannot be overestimated. Asset values move (occasionally even up) and those who quote them all have agendas but it does not seem unreasonable to accept that over \$1.75 trillion of assets and over 40% of the world's offshore companies are present in those two jurisdictions so the question is far from academic. It also has a relevance to what some would see as the bigger issue raging around the use of offshore centres. Despite admission to the OECD White List of both Cayman and BVI earlier this year general background noise about their harmful impact continues and anyone pointing to the beneficial effects of their legal systems is likely to be drowned out. That is especially true if those beneficial effects come from an area such as insolvency law which will never catch the attention of the media and disappointingly rarely the attention of international regulatory bodies. This is regrettable as the insolvency regimes of each jurisdiction are both sophisticated and predictable and as such have a positive role to play in international trade and finance.

The decision itself concerns the insolvency of Stanford International Bank and competition for recognition under the UK Cross Border Insolvency Regulations of 2006. Given that those regulations are derived from the UNITRAL model law on cross border insolvency its importance is not necessarily restricted to the UK and the Stanford decision marks a pretty abrupt halt to any tendency to treat the place of a registered office of a company as a technical nuisance in determining the "center of main interest" ("COMI") of an insolvent company and where followed has the capacity to take the registered office back to the central role that was arguably intended by legislators and, importantly, assumed by counterparties.

For present purposes the key provision which was examined was:

“In the absence of proof to the contrary, the debtor’s registered office....is presumed to be the centre of the debtor’s main interest.”¹

The judgment in Stanford clearly attempts to draw a line in the sand as far as the judicial tendency to reduce this presumption to merely one factor amongst others.² The judgment reinforces that the burden of proof in rebutting the presumption lies on those seeking to do so and explicitly imposes two criteria for any factors which are used to rebut the presumption and strongly suggests a third. The explicit criteria are:

- (i) the presumption will only be rebutted by factors that are objective
- (ii) objective factors will count only if they are ascertainable by a third party either because they are in the public domain or because they would be learnt in the ordinary course of transacting with the company.

Although not formulated by the judge in the same way there is also clearly in his mind a third requirement that evidence in rebutting the place of the registered office as being the COMI must be specific as to the alternative state it points to rather than merely as to the fact that the company carried on business in multiple other places around the world.

In applying his own test Mr. Justice Lewison held that nationality of directors had no bearing on the question. As importantly he refused to answer the question he posed himself as to where telephone board meetings took place. He did not address the question because the answer, for him, failed to meet the test of being ascertainable by third parties. The logic is unassailable up to this point but it also needs to be acknowledged that he clearly states that in his opinion the operation in Antigua (the place of the registered office) of Stanford International Bank was not a “mere letterbox”.

Taking those three tests together the strength of the presumption that the place of the registered office is also the COMI becomes far stronger than expected. Clearly there will be cases where courts will hold (and rightly so) that the COMI is elsewhere but for a global business or even one which is carried on in a handful of countries the role of the registered office again becomes central. Mr. Justice Lewison was clear both on the fact of divergence from American jurisprudence that “...except where there is no contrary evidence the registered office does not have any special evidentiary value” and the reasons for that divergence.

¹ the omitted words relate to individuals as opposed to companies

² Re Ci4net.com Inc [2005] BCC277 should no longer be followed in this regard

Clearly some analysts will view this as opening the door to some evil. Any display of enthusiasm from commentators within jurisdictions such as Cayman or BVI will presumably increase such tendencies but why? This is not about tax and the imperatives which drive metropolitan countries to regard “offshore” entities as somehow pretending to be something they are not have no relevance. Maybe there are places of incorporation which might tempt a judge to look at undeveloped insolvency law and shy away from allowing those courts to gain control over global insolvency proceedings but those places are emphatically not BVI and Cayman; each have the legal systems and insolvency professionals to deal with the issues. The judgment increases the chances that they will have the opportunity to demonstrate this.

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If you have any questions about these cases please contact our Banking & Finance Head Peter Tarn (peter.tarn@harneys.com).

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