

The International Scene

By R. Adam Swick and Laura Taveras

A Modern Land for the Model Law

“[T]he [recognition] process should not end up bogged down in frivolous disputes over recognition when there is little real cause to question the legitimacy of the proceeding. Thusly are compromises crafted, and invariably are they thrust on the courts.”

— Hon. Leif M. Clark (ret.)¹



R. Adam Swick
Akerman LLP
New York and
Austin, Texas



Laura Taveras
Akerman LLP; Dallas

Adam Swick is an attorney with Akerman LLP's Bankruptcy Practice Group in New York and Austin, Texas. He is a 2020 ABI "40 Under 40" honoree and Communications Manager for ABI's International Committee. Laura Taveras is an associate in the firm's Dallas office.

Hon. Martin Glenn's recent opinion in *In re Modern Land (China) Co. Ltd.* created greater flexibility in the approach to determining a debtor's "center of main interests" (COMI).² In this case, the debtor, a Cayman Islands-exempt entity, held its assets, management and business exclusively in China.³ The debtor negotiated a court-supervised restructuring scheme in the Cayman Islands.⁴ The court found that the Cayman Islands was the debtor's COMI and recognized the Cayman-based restructuring as a foreign main proceeding.⁵

The Decision

The court began its analysis with the legal principles employed by most U.S. courts when making COMI determinations. In doing so, the court adhered to the Second Circuit's ruling in *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*⁶ and noted the following: (1) a debtor's COMI is determined as of the filing date of the chapter 15 petition;⁷ (2) § 1516 of the Bankruptcy Code establishes an easily rebuttable presumption that the location of a debtor's registered office is the debtor's COMI;⁸ (3) courts consider several factors to determine a debtor's COMI when the presumption is overcome, including the location of the debtor's headquarters, managers, assets and creditors; (4) these factors should not be applied "mechanically";⁹ and (5) a debtor's COMI should be "ascertainable to interested third parties."¹⁰

The *Modern Land* court found *In re Suntech Power Holdings Co. Ltd.* particularly important.¹¹ In *Suntech*, the debtor was also a Cayman-exempt entity that primarily conducted its business in

China.¹² The *Suntech* debtor sought to restructure in the Cayman Islands and had a Cayman court appoint joint provisional liquidators (JPLs) to act on behalf of and restructure the debtor.¹³ The court found the COMI in the Cayman Islands at the date of the chapter 15 petition as a result of the JPL's activity, while acknowledging that the COMI had previously been in China.¹⁴

With the *Suntech* case in mind, the *Modern Land* court framed the case's ultimate issue: "So, the question is whether the absence of court-supervised fiduciaries, such as JPLs, requires a different result in finding [the] COMI in the Cayman Islands in this case given that no JPLs were appointed."¹⁵ The court's answer: "While this would be an easier case if JPLs had been appointed, the Court concludes that the Cayman court's supervision of the Debtor's Scheme Proceeding, in light of other factors present here, is enough for the Court to conclude that the Debtor's COMI ... was in the Cayman Islands."¹⁶ The *Modern Land* court provided several reasons for its holding, but two points are particularly important.

Flexibility Is Critical

Chapter 15 contemplates recognition as "a very simple procedure [that is] meant to be fast and inexpensive."¹⁷ If a debtor's insolvency proceeding is pending in its COMI based on an objective determination, then a court is required to grant recognition of that proceeding as a foreign main proceeding.¹⁸

However, the term "COMI" is not defined in chapter 15. The *Modern Land* court noted that "[t]he absence of a statutory definition for a term that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation."¹⁹ In other words, the lack of this definition allows courts some flexibility in light of the stated goals of chapter 15, such as providing fair procedures, maximizing debtor assets and facilitating the rescue of financially troubled businesses.²⁰ As the court stated in *SPhinX*:

1 Judge Leif M. Clark, "'Center of Main Interests' Finally Becomes the Center of Main Interest in the Case Law," 43:14 Tex. Int' L J. Forum 17 (2008).

2 641 B.R. 768 (Bankr. S.D.N.Y. July 22, 2022).

3 *Id.*

4 *Id.*

5 *Id.*

6 714 F.3d 127, 138 (2d Cir. 2013).

7 *Modern Land*, 641 B.R. at 782.

8 *Id.*

9 *Id.* These factors are set forth in *In re SPhinX Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), and are commonly referred to as the "SPhinX factors."

10 *Modern Land*, 641 B.R. at 788.

11 520 B.R. 399 (Bankr. S.D.N.Y. 2014).

12 *Modern Land*, 641 B.R. at 783.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 Prof. Jay Lawrence Westbrook, "Chapter 15 at Last," 79 Am. Bank. L.J. 713, 722 (2005); 11 U.S.C. § 1515.

18 *In re Millard*, 501 B.R. 644, 653-54 (Bankr. S.D.N.Y. 2013); *In re Chiang*, 437 B.R. 397, 403 (Bankr. C.D. Cal. 2010).

19 *Modern Land*, 641 B.R. at 781 (citing *Fairfield Sentry*, 714, F.3d 127, 138 (2d Cir. 2013)).

20 See 11 U.S.C. § 1501.

[T]he flexibility inherent in chapter 15 strongly suggests ... that the Court should not apply such [COMI] factors mechanically. Instead, they should be viewed in light of chapter 15's emphasis on protecting the reasonable interests of parties-in-interest pursuant to fair procedures and the maximization of the debtor's value.²¹

Denying recognition of the Cayman Islands as *Modern Land*'s foreign main proceeding would have certainly diverged from the stated goals of chapter 15 and resulted in an overall disaster for the parties involved. The debtor's consensual scheme would have morphed into a liquidation in an effort to then obtain a chapter 15 at a later date.²² The court found that this process would have wasted the debtor's resources as opposed to maximizing the value of the debtor's assets and facilitating the rescue of a financially troubled business.²³ Denying recognition would also have undermined the pivotal role of the Cayman Islands' judicial proceedings, considering that the Cayman Islands have well-established insolvency laws with fair procedures.

Creditor Consent Matters

Courts have cited *Bear Stearns* for years for the proposition that courts should not grant recognition as a rubber-stamp exercise if there are no objections.²⁴ While the lack of objections might not necessarily mean that recognition should be automatic, it certainly provides proof of creditor expectations and where third parties ascertain a debtor's COMI to be. As explained in *SPhinX*, "because their money is ultimately at stake, one generally should defer ... to the creditors' acquiescence in or support of a proposed COMI."²⁵

In *Modern Land*, the court noted that recognition aligned with creditors' expectations because Cayman law governed the relevant loan agreements.²⁶ Moreover, "[n]ot one scheme creditor objected to the Debtor's COMI being located in the Cayman Islands," and the overwhelming majority of creditors voted for the scheme.²⁷ Consequently, the court held that "[i]n this case, definitive creditor expectations and overwhelming creditor support solidify a finding of [a] COMI in the Cayman Islands."²⁸

Main, but Not Nonmain

Although the court recognized the scheme proceeding as a foreign main proceeding, the court explained in the alternative that the proceeding did not qualify as a foreign nonmain proceeding. Courts recognize a nonmain proceeding if "the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending."²⁹ Section 1502(2), in turn, defines "establishment" as "any place of operations where a debtor carries out a non-transitory business activity."

On the one hand, recognizing a proceeding as a main proceeding while also stating that it would not qualify as a nonmain proceeding is interesting, since the drafters of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (Model Law) clearly intended for a main proceeding to have more of an economic connection to a jurisdiction than a nonmain proceeding, which is why much broader relief is available to a foreign main proceeding.³⁰ On the other hand, courts have already imposed limitations on main proceedings that do not exist for nonmain proceedings. The Second Circuit has ruled that § 1520(a)(2), which provides for relief automatically available upon recognition of a foreign *main* proceeding, mandates the use of § 363 to sell an interest in property "to the same extent as" in a chapter 7 or 11.³¹ No similar mandate exists for nonmain proceedings.

COMI Determinations and the Model Law

Modern Land is a welcome progression of U.S. case law regarding determining COMIs that highlights creativity in dealing with the ever-evolving universe of cross-border insolvencies. It provides a great example of how powerful universalism can be under the Model Law. Of course, there would be no *Modern Land* opinion discussing the limits of flexibility and creditor consent in the context of an offshore exempt entity with operations in China without the Second Circuit's opinion in *Fairfield*, which held that a foreign debtor's COMI is determined at the date of the chapter 15 petition.³²

This holding is critical because many drafters of the Model Law,³³ as well as courts in several foreign jurisdictions,³⁴ believe that a debtor's COMI should be determined at the date of the foreign proceeding, not the date of the recognition application. The argument for this interpretation is that the date of the foreign proceeding "provides a test that can be applied with certainty to all insolvency proceedings" (*i.e.*, all third parties know the debtor's main proceeding will be located where it is registered or, if its principal place of business is elsewhere when it files for bankruptcy, in that jurisdiction).³⁵

As Prof. Jay L. Westbrook of the University of Texas School of Law once stated, "Predictability is always in tension with correctness of result ... so we may expect that a balance between predictability and flexibility must be drawn with regard to COMI."³⁶ Although determining a COMI at

30 See "Chapter 15 at Last," *supra* n.17 ("Chapter 15 changes that by permitting some limited cooperation with nonmain bankruptcies, but most of its focus is on foreign main proceedings."); Prof. Jay Lawrence Westbrook, "Locating the Eye of the Financial Storm," 32 *Brooklyn J. of Int'l Law* 1019, 1027 (2007) ("[T]he suggestion that Chapter 15 makes little real distinction between main and non-main proceedings ... [w]ith respect, that suggestion is clearly incorrect on the face of the statute.")

31 *In re Fairfield Sentry Ltd.*, 768 F.3d 239, 245 (2d Cir. 2014).

32 *Id.*

33 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, ¶ 134, available at uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/judicial-perspective-2013-e.pdf (hereinafter, the "Judicial Perspective"; unless otherwise specified, all links in this article were last visited on Sept. 22, 2022); *Guide to Enactment*, ¶ 159.

34 For the U.K., see *In the Matter of Videology Ltd. v. In the Matter of Cross-Border Insolvency Regulations*, 2006 [2018] EWHC 2186 (Ch); *In re Stanford Int'l Bank. Ltd.*, [2010] 3 WLR 941. But see Charlotte Moller, Helena Clark & Harry Rudkin, "Clarity on Cross-Border Conundrum," *Reed Smith LLP Global Restructuring Watch* (April 5, 2019), available at globalrestructuringwatch.com/2019/04/clarity-on-cross-border-conundrum. For Japan, see *think3*, Tokyo High Court, Case No. (Ra) 1757 of 2012, chapter 3-2, p. 6; Tokyo District Court, Case Nos. (shou) 3 and 5 of 2011, chapter 3, issue 2-1, pp. 12-14. These decisions are both cited (albeit very inconsistently) at uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcibi_digest_e.pdf.

35 *The Judicial Perspective*, *supra* n.33 at ¶ 134.

36 *Id.*

21 *SPhinX*, 351 B.R. at 117; *supra* n.9.

22 See *Modern Land*, 641 B.R. at 787.

23 *Id.*

24 *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 374 B.R. 122, 126-27 (Bankr. S.D.N.Y. 2007).

25 *SPhinX*, 351 B.R. at 117.

26 *Modern Land*, 641 B.R. at 788.

27 *Id.* at *789-90.

28 *Id.* at 790.

29 11 U.S.C. § 1517(b)(2).

continued on page 68

The International Scene: A Modern Land for the Model Law

from page 19

the date of the foreign proceeding may theoretically provide more predictability, it sacrifices flexibility. For example, the standard eliminates the possibility for the result achieved in *Modern Land*, where creditors and the debtor were able to cooperate and achieve the best possible outcome for everyone after the original foreign insolvency proceeding was filed.

Flexibility and creditor support are key for successfully navigating cross-border insolvencies, especially with offshore jurisdictions such as the Cayman Islands, Bermuda and the British Virgin Islands. Entities incorporate in these jurisdictions with exempted status to ensure that they have access to well-established legal systems that are equipped to handle specialized businesses. While these entities are incorporated in offshore jurisdictions, many have no real actual business in their place of incorporation. However, these entities are generally required to liquidate in their jurisdiction of incorporation.³⁷

Based on their very nature, an offshore debtors' COMI will often shift prior to the date of the recognition application for very valid reasons. Justice Aedit Abdullah adopted the U.S. test for COMI determinations in Singapore.³⁸ In a recent article, he explained that a "shift or transfer of [a] COMI is not a bad thing; where substantial connections exist that point to that COMI being the appropriate forum for restructuring

or insolvency, even if the shifts occurred after the date of the foreign insolvency application."³⁹ Indeed, the *Modern Land* court specifically held that the debtor's "status as an exempted company does not jeopardize its COMI in the Cayman Islands," explaining in the alternative that "[w]hile exempted companies are prohibited from *trading* in the Cayman Islands, except in furtherance of their business outside the Cayman Islands, they may still be *managed* from there."⁴⁰

Conclusion

In 2007, Prof. Westbrook noted that "a journey of a thousand miles begins with one step" and explained that "[w]e are several miles into our thousand-mile endeavor to unify and improve one important aspect of globalization," the cross-border insolvency.⁴¹ Likewise, in 2008, Judge Clark encouraged parties to compromise and courts to not get bogged down in technicalities. Let's just hope that Judge Clark's prediction from 14 years ago comes true and that "common sense will tend to prevail over technicalities" and many more courts will err on the side of flexibility over predictability, especially when creditors consent.⁴² **abi**

³⁷ *Modern Land*, 641 B.R. at 790.

³⁸ See *In re Zetta Jet Pte Ltd.* [2018] SGHC 16, [19] (Sing.).

³⁹ Justice Aedit Abdullah, "Celebrating and Reflecting on 25 Years of the Model Law on Cross Border Insolvency: the Newbie's Take — Singapore and the Model Law," available at www.iiglobal.org/file.cfm/46/docs/panel%203.%20abdullah%20singapore%20and%20the%20model%20law.pdf.

⁴⁰ *Modern Land*, 641 B.R. at 791 (quoting *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 705 Bankr. S.D.N.Y. 2017)).

⁴¹ See "Locating the Eye of the Financial Storm," *supra* n.30 at 1040.

⁴² "Center of Main Interests," *supra* n.1.

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