CROSS BORDER INSOLVENCY

ASPECTS OF THE UNCTRAL MODEL LAW

by
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The UNCTRAL Model Law

The United Nations Commission on International Trade Law ("UNCTRAL") adopted the Model Law on Cross Border Insolvency on 30 May 1997. The Model Law aims to secure cooperation among the courts of different countries, rights of access into one country for insolvency administrators duly installed under the law of another and recognition of foreign insolvency proceedings by participating states.[2] It offers a legislative template that may be adopted in whole or in part at the discretion of individual states. Indeed, participating states may exclude from the application of the Model Law entities such as banks and insurance companies, which for public policy reasons may dictate special insolvency procedures.[3] To date, the Model Law has been adopted by Eritrea, Japan, Mexico, Poland, Romania, South Africa, Serbia, Montenegro, Canada and United States[4], with many others (including the United Kingdom, Australia and New Zealand) expected to follow soon. The Australian government plans to introduce the Model Law under its Corporate Law Economic Reform Program (CLERP 8).

The Model Law deals with collective judicial or administrative proceedings based on insolvency-related law of a foreign state, where the assets and affairs of the debtor are subject to control or supervision by a foreign court for reorganisation or liquidation ("foreign proceedings"). Proceedings in the state of the debtor's "centre of main interests" (COMI) are "foreign main proceedings". In the absence of proof to the contrary, the COMI is presumed to be the state of an individual debtor's habitual residence or a corporate debtor's registered office. Other foreign proceedings that take place in a state where the

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[1] A Judge of the Supreme Court of New South Wales. I acknowledge the significant contribution of my research assistant, Kelly Ngo, in the preparation of this paper.

[2] Barrett, R I, 'Some themes in Australian banking and finance law – 1984 to 2003 and beyond' (2003) 31 ABLR 391 at 405.

[3] For example, the *Banking Act* 1959 (Cth) (ss 11F, 13A(3)), the *Insurance Act* 1973 (Cth) (s116) and the *Life Insurance Act* 1995 (Cth) (ss 180-188); and see "Protected industries" below.

[4] The Model Law has been enacted as the new Chapter 15 of the United States Bankruptcy Code by the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* which becomes effective in late October 2005 (i.e. 180 days from enactment on 20 April 2005).

debtor has an "establishment" (i.e. a place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services) are "foreign non-main proceedings". The Model Law applies where assistance is sought locally in a participating state in connection with a foreign proceeding and vice versa; where there are concurrent insolvency proceedings in respect of the same debtor both locally and in a foreign state, and where a foreign representative or foreign creditor has an interest in commencing or participating in a local insolvency proceeding.

A "foreign representative" (i.e. person or body authorised to administer, or act as a representative of, the foreign proceedings) may apply directly to commence insolvency proceedings in a court of the participating state, without subjecting the debtor's foreign assets or affairs to its jurisdiction for any other purpose. The foreign representative may also apply for recognition of foreign proceedings. The court will presume that the representative has been duly appointed and that documents submitted in support of the application for recognition are authentic. It must determine the application at the earliest possible time. Pending the outcome of the application, the court may grant interim relief unless the relief would interfere with the administration of a foreign main proceeding. Recognition activates the presumption that the debtor is insolvent.

In respect of foreign main proceedings, there is an automatic stay on the commencement or continuation of individual proceedings in any other jurisdiction concerning the debtor's assets, rights, obligations or liabilities. Execution against the debtor's assets is also stayed and the right to transfer, encumber or otherwise dispose of any assets is suspended. The stay does not bar the right to commence, continue or participate in local proceedings to the extent necessary to preserve claims against the debtor. In contrast, relief in respect of a non-main proceeding may only concern those assets that, according to local law, should be administered in that proceeding. Relief for both types of proceedings include staying of proceedings, suspending of rights to dispose of assets, providing for the examination of witnesses, the taking of evidence and the delivery of information concerning the debtor, and entrusting the administration or realisation of the debtor's assets in the participating state to the foreign representative (or a person designated by the court), who must adequately protect the interests of local creditors. The foreign representative then has the same rights as local creditors to initiate and participate in insolvency proceedings

and cannot be ranked lower than local unsecured creditors. Subject to the local law of the participating state, the foreign representative may intervene in any proceedings in which the debtor is a party.

The Model Law mandates cooperation and direct communication between a local court and foreign courts or foreign representatives. The means of cooperation may include: the appointment of a person to act as directed by the court; communication of information by any means considered appropriate by the court; coordination of the administration and supervision of the debtor's assets and affairs; approval or implementation by courts concerning the coordination of proceedings; and coordination of concurrent proceedings regarding the same debtor.

Upon recognition of a foreign main proceeding, a proceeding under local law of the participating state is permitted only if the debtor has assets in the state. The effect of the local proceedings is limited to those assets and to the extent necessary to cooperate with foreign courts or the foreign representative in providing relief that relates to assets which should be administered in the foreign main proceedings. Where foreign proceedings and a local proceeding are concurrent, the court must cooperate with foreign proceeding to the maximum extent possible and must grant relief that is consistent with the foreign proceedings. Where a local proceeding is commenced after recognition of a foreign proceeding or after an application has been filed for recognition, the court may review and modify or terminate any relief granted to the foreign proceeding to ensure consistency with the local proceeding. If the foreign proceeding is a main proceeding, the mandatory stay does not apply where foreign and local proceedings are concurrent or where the local proceedings commenced after recognition or the filing of an application for recognition of the foreign proceeding. Where there are multiple foreign proceedings, any relief granted to a representative of a foreign non-main proceeding must be consistent with the foreign main proceeding.

The European Regulation on Insolvency Proceedings

The Council of the European Union promulgated this regulation (No 1346/2000) with effect from 31 May 2002. It is in force within the European Union except Denmark. The regulation applies to collective insolvency proceedings involving the partial or total divestment of a debtor and appointment

of a liquidator. It adopts principles closely corresponding with those in the Model Law.

According to the regulation, the court of the member state in which the centre of a debtor's main interests is situated will have jurisdiction to entertain (or "open") "main" insolvency proceedings, which are governed by the law of that member state (*lex concursus*). The proceedings will have universal scope by EU-wide recognition without further formality. This is aimed at encompassing all the debtor's assets, save where the regulation provides otherwise. "Secondary" winding up proceedings may be entertained in other member states where the debtor has an "establishment".[5] Such secondary proceedings may be initiated by the liquidator in the main proceedings or any other person or authority empowered to request the opening of winding up proceedings within the member state, and are limited to the assets in the member state. The liquidator in the main proceedings may exercise in another member state all the powers conferred on him by the law of the state in which the proceedings were opened, but must also observe the local laws. Creditors habitually resident, domiciled or having a registered office in a member state other than the state that opened main insolvency proceedings, may lodge claims in the main insolvency proceedings.

Creditors based outside the EU are governed by the law of the member state in which the main proceedings occur. A member state may refuse to recognise foreign insolvency proceedings where recognition would be manifestly contrary to its domestic public policy.

Like the Model Law, the regulation provides a rebuttable presumption that the place of the registered office of the company is its COMI. The preamble to the regulation states that the COMI should correspond to the place where the debtor conducts the administration of its interest on a regular basis and is therefore ascertainable by third parties.

[5] "Establishment" is defined as a place of operations through which the debtor carries on a non-transitory economic activity with human means and goods. It must be noted that the definition of "establishment" under the Model Law extends to "services" (as well as "goods").

Lessons from the European Regulation

Litigation concerning the regulation shows the practicalities of concepts such as the COMI enshrined in the Model Law. COMI determines which national law applies to administration, but is not defined under the Model Law or the regulation.

The case law on the European regulation to date identifies a number of factors relevant to determining a debtor's COMI:

(a) The address of the registered office is not of itself significant[6], but merely a starting point.

(b) Relevant considerations include third parties' views as to where the company is 'run out of' and what they have been led to understand[7]. The most important third parties here are the prospective creditors[8] and, in the case of a trading company, the most important potential creditors are likely to be financiers and trade suppliers and it will be important to assess where the majority of creditors by value would consider the debtor's main interests to be[9].

(c) The COMI must have some element permanence.[10]

(d) Where the "day to day administration" is conducted[11] and any "management strategy plan" formulated[12] are relevant matters, as are the location of the "head office" functions[13], where (and by whom) 'corporate identity and branding" is organised[14], the nationality and location of the directors[15], and the location of board meetings[16] (with the Italian court in Eurofood/Parmalat seeing as material the distinction between executive and non-executive directors and the nationality of directors executing significant documents).

(e) Another relevant consideration is the amount of time spent by officers or employees of other entities (or in other jurisdictions) on the management of

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[6] *Geveran* at 223; *Re Ci4NET.COM Inc & Ors* (EWHC (ChD), Langan J, 2 June 2002) (hereinafter "*Ci4NET.COM*") at [20].
[7] *Re Eurofood IFSC Limited* (IEHC, Kelly J, 23 March 2004) (hereinafter "*Eurofood (IEHC)*") at 27.
[8] *Geveran Trading Corporation Limited v Skjevesland* [2003] BCC 209 (hereinafter *Geveran*) at 223.
[9] *Re Daiseytek-ISA Ltd & Ors* [2003] BCC 562 (hereinafter *Daiseytek-ISA*) at 566.
[10] *Ci4NET.COM* at [26].
[11] *Geveran* at 223; *Eurofood (IEHC)* at 2, 26.
[12] *Daiseytek-ISA* at 565 (para 13.8).
[13] *Enron Directo SA* (EWHC (ChD), Lightman J, 4 July 2002); *Re Energy Group Overseas BV and Energy Group Holdings BV* (EWHC (ChD), Lewison J, 20 November 2003) in (2004) *Insolvency Intelligence* 17 at p30 (hereinafter "*Energy Group*").
[14] *Daiseytek-ISA* at 565 (para 13.7).
[15] *Ci4NET.COM* at [29], [33]; *Energy Group* at p30.
[16] *Eurofood (IEHC)* at 2; *Energy Group* at p30.

the company[17]. In the case of an asset holding company, it is not the location of the assets which is determinative, but where management takes place[18].

(f) The location of shareholders is not, of itself, significant (as all subsidiaries would automatically share the COMI of their parent)[19].

(g) Attention may be paid to where the "finance function is operated from"[20]. Centralisation of group borrowing in a head office department may support a finding of COMI in that jurisdiction. Other relevant considerations related to finance include:

  (i) where the principal creditors are based[21] which may indicate where the "finance function is operated from"[22];

  (ii) the presence of guarantees from a parent or related company in another jurisdiction;

  (iii) onward provision of borrowing from a subsidiary to its parent may support a finding that the company is simply a "branch" or "conduit" of the parent[23];

  (iv) the operation and location of bank accounts through which business is transacted[24];

  (v) the accounting laws and principles governing the company's financial information and the location of its books of account;

  (vi) whether financial information was subject to review and approval by another entity in a different jurisdiction[25]; and

  (vii) restrictions on the company's (or its directors') authority, for example requirements that commitments in excess of a relatively low threshold require prior authorisation by a parent in a different jurisdiction[26].

(h) Matters of relevance in relation to the company's employees include:

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[17] *Daiseytek-ISA* at 565 (para 13.7); see *Crisscross Telecommunications* (EWHC, May 2003) (hereinafter "*Crisscross*").
[18] *Norse Irish Ferries v Cenargo Navigation Limited* (20 February 2003) (hereinafter *Norse*).
[19] The presence of a subsidiary within a particular jurisdiction does not automatically constitute an "establishment" in respect of the parent: *Telia AB v Hilcourt (Docklands) Ltd* [2003] BCC 856.
[20] *Daiseytek-ISA* at 563, 565-566.
[21] *Energy Group* at pp29-30.
[22] *Daiseytek-ISA* at 565.
[23] The Italian Court in Eurofood/Parmalat, found that parent guarantees and institutional investors' knowledge that proceeds of bond issues would benefit the parent justified a finding that third parties recognised the parent as the "true economic and legal entity" with which they were negotiating.
[24] *Crisscross; Daiseytek-ISA* at 565.
[25] *Daiseytek-ISA* at 565.
[26] *Daiseytek-ISA* at 565.

(i) the location of most employees[27];

(ii) the governing law of their employment contracts[28]; and

(iii) whether the recruitment of senior employees was subject to consultation with a parent[29].

(i) Attention may be paid to the jurisdiction from which the company's technology and support functions are operated[30].

(j) Relevant matters related to contracts include:

(i) the governing law usually adopted in contracts[31] entered into in the course of the company's business (such as for telecommunication services)[32];

(ii) the jurisdiction where (and party by whom) such contracts are usually negotiated[33];

(iii) where communications and negotiations with a principal creditor took place[34];

(iv) procedures for the administration of contracts (e.g. whether invoices are sent to a separate company or jurisdiction)[35]; and

(v) whether any contracts were guaranteed by a holding company in another jurisdiction[36].

(k) Relevant factors concerning the regulatory, fiscal and licensing regimes governing the company[37] include:

(i) the jurisdiction in which income tax is paid on trading operations (and, if appropriate, any specific taxation implications associated with management and operation in a particular jurisdiction); and

(ii) whether any conditions attached to licensing or regulation required, for example: records and/or accounts to be kept in a particular jurisdiction or made available to that jurisdiction's authorities; trading

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[27] *Re BRAC Rent-A-Car International Inc* [2003] 2 All ER 201 (hereinafter *BRAC)* at 203.
[28] *BRAC* at 203.
[29] *Daiseytek-ISA* at 565.
[30] *Daiseytek-ISA* at 565.
[31] *BRAC* at 203.
[32] *BRAC* at 203.
[33] *Crisscross*; *Daiseytek-ISA* at 565.
[34] *Ci4net.com* at [26]-[27], [33].
[35] *Crisscross*.
[36] *Daiseytek-ISA* at 564.
[37] *Eurofood (IEHC)* at 2.

to be carried on within a specific area; or that any change of control be notified to the authorities[38].

Where the COMI is in the EU, the regulation allows insolvency proceedings in respect of companies incorporated outside the European Union[39].

Determining "COMI" may be particularly complex in the context of a corporate group. Fortunately, all the companies in *Crisscross Telecommunications* were found to have their COMIs in the same jurisdiction, enabling a "group order" to be made. This will not always be the case.

European cases on the determination of COMI

Member states of the European Union are the source of a growing jurisprudence on the matter of determining COMI. Given that the same COMI concept is employed in the UNCTRAL Model Law, it is instructive to look at some of the European cases.

1. *Re Eurofoods IFSC Ltd (No 1)* [2004] BCC 383 (Irish High Court); *Re Eurofoods IFSC Limited* [2005] ILPr 2 (Irish Supreme Court); *Bondi v Bank of America N.A. & Ors* [2004] ECR 0 (European Court of Justice):

Eurofood was an Irish incorporated subsidiary of the Italian company Parmalat. An impasse developed between the Irish and Italian courts, with each purporting to entertain main proceedings on the basis that the Eurofood's COMI was within its jurisdiction. The Irish court considered that the appointment of a provisional liquidator in Ireland as the opening of proceedings, which would relate back to the time of filing of the petition on the making of the winding up order.

Before the liquidation was completed by the Irish court, the Italian (Parma) court (*Re The Insolvency of Eurofood IFSC Limited* [2004] ILPr 14) found that Eurofood was merely a financial division of the Parmalat parent company with its main operating office in Italy. The Parma court placed emphasis on the fact that Eurofood was a wholly owned subsidiary of an Italian parent; the Italian directors performed executory functions whereas the Irish directors were non-executive directors, and that third parties would be aware that Eurofood's activities were aimed solely at realising the interests of the Italian

[38] However, Italian court in Eurofood/Parmalat considered that substantial administration was more important than compliance with formalities. The Irish company was a "mere conduit" through which Parmalat had financed itself and had been incorporated abroad purely for tax reasons.
[39] *BRAC*; *Norse*.

parent company and that Eurofood was merely a shell company with no independent existence.[40] Moreover, the three transactions of Eurofood was for the benefit of subsidiaries of Parmalat; the two major transactions of Eurofood were managed by the Italian directors and the documents in that regard were signed by an Italian director, all its borrowings were guaranteed by Parmalat; board meetings were held by telephone when the Italian directors did not travel to Ireland; and Eurofood had no premises or employees in Ireland; compliance with Irish regulation was an observance of form for tax purposes. The Parma court thus appointed an extraordinary administrator on the basis that provisional liquidation in Ireland was not a 'main proceeding' in accordance with the Regulation[41], and no main proceedings had yet been opened.

The High Court of Ireland (Kelly J) had to determine whether the presentation of a petition for the winding up of Eurofood and the appointment of a provisional liquidator by that court brought about the opening of main insolvency proceedings under Article 3. The petitioning creditor and noteholders argued that the Italian court failed to honour the provisions of Article 16; that the Irish court should as a matter of public policy refuse to honour the order of the Italian court pursuant to Article 26 as it had excluded the creditors of Eurofood from the hearing; and that any objections to the Irish court's jurisdiction should be heard by that court accordingly. The extraordinary administrator submitted that the petition presented to the Irish court sought no relief in the terms of the Regulation and that the court itself made no declaration or order of any kind in respect of it – specifically, there was no decision by the court *opening* insolvency proceedings either in express or in implicit terms. Kelly J held that the presentation of the petition for the winding up and appointment of a provisional liquidator had effectively opened main insolvency proceedings in Ireland:

> The definition of "liquidator" in Article 2 (b) and annexe (c) with reference to Ireland includes a provisional liquidator. Thus, having regard to the very wording of the Regulation, it is in my view beyond argument that for the purposes of the Regulation a decision of the Irish High Court appointing a provisional liquidator is a judgment in relation to the opening of insolvency proceedings within the meaning of Article 3.1. ....
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> Of course an order appointing a provisional liquidator is not a final judgment but that does not matter having regard to the definition contained in Article 2 (f) of the Regulation.

Kelly J held also that the COMI of Eurofood was in Ireland. Starting from the presumption that the centre of main interests is the place of the

[40] Judgment No 20/04 of Parma's civil and criminal courts of 19 and 20 February 2004.
[41] (albeit that a provisional liquidator is listed within the definition of liquidator in Annexe C)

registered office of the company (i.e. Ireland), he took into account the subjective perception of the Eurofood creditors that the COMI was in Ireland; that all board meetings (except one) were held in Ireland, including meetings which approved the two major transactions, for which the Italian directors travelled to Ireland; that financial information was compiled and accounts prepared in accordance with Irish law, all administrative functions were carried out in Ireland; Eurofood strictly complied with requirements that it be resident in Ireland for tax purposes, all transactions were governed by Irish law; that it would be contrary to the need to respect corporate identity to ignore the separate existence of companies such as Eurofood.

While the Irish Court focussed on how and where the actual day to day and formal business interests of Eurofood were administered, the Italian court adopted a more purposive approach and a different interpretation of "debtor's interests". As neither Irish nor Italian court ceded jurisdiction to the other, the Irish Supreme Court referred the matter to the European Court of Justice for a determination as to which court opened main proceedings first. The ECJ has yet to determine the matter.

There was no domestic law in either Italy or Ireland that particular creditors should be given actual notice of an application to commence insolvency proceedings. If the public policy arguments of the Irish court are correct, it would be necessary to consider, when commencing main proceedings in a particular member state, whether the commencement of those proceedings is consistent with any domestic requirements in other member states (including any applicable notice requirements) and it seems inconsistent with the objectives of the Regulation.

2. *Re Daiseytek-ISA Ltd* [2003] BCC 562 (EWHC) & 984 (Court of Appeal of Versailles):

The English High Court decided that the COMI for the English, French and German companies was in the UK and placed the companies into administration as main proceedings. In due recognition of the English main proceedings, later decisions of the French and German lower courts, which concluded that the relevant company's COMI was in France and Germany respectively, were overturned on appeal.

In determining the location of the COMI of the non-UK companies, the English court considered the scale and importance of the interests administered

in one company graded against those administered in the other. It found that the majority of the administration of the French and German companies was conducted from England. All senior employees of the companies were recruited in consultation with the English parent. Although the companies had bank accounts in their countries of incorporation, the finance function was operated throughout England, the businesses were funded through an English bank and the financial information of the companies was compiled in accordance with English accounting principles. The French and German companies relied on financial support from the English holding company and their major expenditures required the sanction of the holding company. All information technology and support was supplied from England. All major European customers were serviced out of England and contracts with those customers were negotiated and entered into by the English holding company. 70% of the purchasers were under contracts negotiated and dealt with from England. The English holding company controlled the corporate identity and branding of the non-UK companies and set their day-to-day business strategy, The English CEO spent approximately 30% of his time managing the German companies and 40% of his time on the French company. The court also found that the majority of potential creditors by value (which was regarded as the most relevant criterion) knew that Bradford was where more important functions of the German companies were carried out. Importantly, the English court held that most important third parties in an insolvency are the potential creditors, and in the case of a trading company the most important potential creditors are likely to be its financiers and trade suppliers.

The Versailles Court of Appeal confirmed the jurisdiction of the English court to open main insolvency proceedings as the English Court had found sufficient evidence that the COMI was in England and ruled that it had jurisdiction to open insolvency proceedings by the administration order *before* the French court. The French Court held further that the proceedings were opened without violation of the right to a fair trial even if the French subsidiary was not, in fact, a party duly served in the English proceedings; and that the judgment of the English court was effective in France without further formality (i.e. without publication at the relevant Corporate Registry that is required under French law).

3. *Geveran Trading Company Limited v Skjevesland* [2003] BCC 209:

A bankruptcy petition based on an unpaid judgment debt was granted by the Norwegian court. The court held that proceedings are opened when the court considers whether or not to make a bankruptcy order (ie at the hearing itself and not when the petition was filed). It further provided that an English company's registered office is typically the address of its accountants, and evidence of where the true head office is situated will enable an applicant to rebut the presumption that the COMI of a company is the place of its registered office. Registrar Jacques in English High Court held:

> It is the need for third parties to ascertain the centre of a debtor's main interests that is paramount, because, if there are to be insolvency proceedings, the creditors need to know where to go to contact the debtor. ... That is typically in English cases, the office of the company's accountants or auditors or sometimes one of its directors. Quite often it is not the place where the business is being conducted. (at 223)

4. *Enron Directo SA* (EWHC (ChD), Lightman J, 4 July 2002):

Enron Directo was a Spanish incorporated Enron company trading in Spain and with Spanish employees. It was successfully argued that, because the head office functions were carried out in London, the COMI was in England. The English court made an administration order as a main proceeding.

5. *Crisscross Telecommunications* (EWHC, May 2003):

The English High Court made administration orders in respect of a pan-European group of telecommunication companies which were registered in various EU jurisdictions and Switzerland and had assets and creditors in their respective jurisdictions. The court was satisfied that each company's COMI was in England as the companies effectively formed one business and the management of the business was directed from the UK. Specifically, the court noted that board decisions were predominantly taken in England; management, administrative, accounting and other functions for each company were carried out almost exclusively by employees contracted to one of the English registered companies working from its premises in London; although local suppliers contracted with the companies in their local jurisdictions and were invoiced by those companies, those contracts were generally made following meetings or discussions with the English employees and those suppliers were instructed to send their bills to the London premises for payment; the vast majority of customers contracted with one of the English companies and these contracts were governed by English law; and the majority of business was transacted through bank accounts held in London.

6. *Re Ci4NET.COM Inc & Ors* (EWHC (ChD), Langan J, 2 June 2002):

There were two debtor companies - Ci4net.com Inc which was incorporated in the State of Delaware and DBP Holdings Limited is incorporated in Jersey. It was undisputed that the COMI of both debtors was in England while they were trading. The question arose as to whether there was a change in the COMI after the companies ceased to trade. Langan J was conscious of the need to discourage 'forum shopping'[42], and noted that the place of the registered office was but one of the considerations in determining each debtor's COMI.[43] He held that the respective COMIs must have some element of permanence[44]. In finding that the COMI of both companies was in England, Langan J also took into account where communications and negotiations with the principal creditor took place[45] and the residence of the directors[46].

7. *BRAC Rent-a-car International Inc* [2003] 2 All ER 201:

The company was incorporated in Delaware, but had a petition presented against it in England for the appointment of an administrator. The company had carried on business on a regular basis in the EU such that the company and its products were associated with a particular EU state (the United Kingdom)[47]. Specifically, the evidence disclosed that the company had never traded from its registered office in the US; its operations were conducted almost exclusively in the United Kingdom where all its employees were based save for a small number working from a Swiss branch office; its contracts were governed by English law. Hence, Lloyd J held the US company's COMI was in the United Kingdom, rather than in the US. Lloyd J held that the COMI is not necessarily the same as a company's 'seat' for the purpose of determining domicile for what was formerly the Brussels Convention, namely the place where its central management and control actually abide. He also noted that whilst a company can have more than one seat, it could only have one COMI.

Based on purposive and literal interpretations, Lloyd J decided that the regulation could extend to recognise insolvency proceedings concerning

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[42] *Ci4NET.COM* [18].
[43] *Ci4NET.COM* at [20].
[44] *Ci4NET.COM* at [26].
[45] *Ci4NET.COM* at [26]-[27], [33].
[46] *Ci4NET.COM* at [29], [33].
[47] The evidence disclosed that although the company's registered office was in the US, it had not traded from that address and indeed had never traded anywhere within the US. Its operations were conducted almost exclusively in the UK where all its employees were based save for a small number working from a Swiss branch office. Its contracts were governed by English law.

companies incorporated outside the European Union, by the location of its COMI being within the EU.

> Turning to purposive interpretation, it seems to me that a reading of the regulation which limited it (as regards legal persons) to debtors who are incorporated in any of the member states would prevent the regulation from achieving some of the purposes which are described in the recitals and would leave it open to avoidance, providing an incentive for artificial operations as regards the status of debtors comparable to those which, according to recital (4), it is part of the purpose of the regulation or avoid. It would allow those who use corporate bodies to arrange that, although their business, assets and operations as based in a member state, the relation corporate body is incorporated outside the Community, so that the provisions of the regulation would not apply to it or its assets. That would be inconsistent with the aim described in recital (3), and such an incentive for manipulation would be at least as inconsistent with the objective of the regulation as the examples of forum shopping among member states mentioned in recital (4). This is particularly the case since the regulation contains no provisions dealing with affiliated companies or groups of companies, so that each debtor must be considered separately. (at 207)
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> ... according to a literal reading of the regulation, the only test for the application of the regulation in relation to a given debtor is whether the centre of the debtor's main interests is in a relevant member state, and not where the debtor which is a legal person is incorporated.

In reaching his conclusion on a purposive interpretation, Lloyd J took account of certain of the recitals to the Regulation and of the Report on the Convention on Insolvency Proceedings by Professor Miguel Virgos and Etienne Schmit (EU Council Document 6500/96, DRS 8 (CFC)).

8. Re Energy Group Overseas BV and Energy Group Holdings BV (EWHC (ChD), Lewison J, 20 November 2003):

An application for administration orders was made to the English court in respect of two companies formed and having their registered offices in The Netherlands. The court made the orders, being satisfied that the COMIs were in England. From formation in 1997 until 2002, each company had had Dutch service providers as directors and secretary and its head office at the service provider's address. Following the contract of the group of which they formed part, the companies had, from 2002, English resident directors, although the Dutch secretary remained to satisfy statutory requirements. Apart from the Dutch tax authorities, all creditors were in England. The court was satisfied that, from 2002, the head office function had been in England, so that the COMI was in England.

9. Automold GmbH (Cologne Amtsgericht, 23 January 2004):

Where an English administration order had been made on the basis that the COMI of the company was in England, the German court declined to open main proceedings, but permitted the debtor's application for secondary

proceedings for Eigenverwaltung (self-administration). Importantly, the court concluded that the self-administration proceedings came within the regulation's definition of 'winding-up proceedings' because the German administrator's task is to supervise the estate, which is one of the tasks of a liquidator under the Regulation; and the outcome of self-administration is not necessarily the restructuring of the debtor, but could lead to its winding-up.

Protected industries

Certain industries and fields of business are traditionally seen as involving particular national interest considerations. In Australia, defence industries, broadcasting and television, insurance and banking have long occupied special places in the context of foreign investment law and policy. Prudential considerations are reflected in provisions related to insurance and banking. Sections 116 and 116A of the *Insurance Act* 1973 (Cth) provide that in the winding up of an insurance business, the insurer's assets in Australia must not be applied in the discharge of its liabilities other than its liabilities in Australia, unless it has no liabilities in Australia.[48]

The Banking Act provisions (ss 11F and 13A) were the result of the *Financial Section Reform (Amendments and Transitional Provisions) Act* 1998. The relevant extract from the parliamentary Second Reading Speeches follows.

> The package of amendments to the Banking Act 1959 will:....
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> - strengthen and clarify depositor protection powers;
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> ....
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> Depositor preference is manifest both in depositor priority on winding-up and in APRA's duty to exercise its powers within division 2 of the Banking Act in the interests of depositors. These are existing, longstanding provisions in the act. While depositor preference can mean disadvantage for other creditors, APRA's intervention powers, particularly the proposed new early intervention powers, also lessen the risks faced by such other creditors, both by reducing the likelihood of insolvency and by reducing the likelihood of insolvency and by increasing the options for resolution in the event of insolvency.

CLERP 8 foreshadows that the Commonwealth will seek the views of the States and Territories on the exclusion of further types of entities under special insolvency frameworks, such as corporations whose business involves the provision of essential services.[49]

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[48] For the implications of this kind of legislation in a case of concurrent insolvency administrations in different countries in the absence of the Model Law, see *Re HIH Casualty & General Insurance Ltd* (2005) 215 ALR 562; *Re HIH Casualty & General Insurance Ltd* [2005] NSWSC 536.

[49] Corporate Law Economic Reform Program Proposals for Reform: Paper No 8 (CLERP 8), *Cross-border Insolvency: Promoting International Cooperation and Coordination*, 2002, p26: http://www.treasury.gov.au/documents/448/RTF/CLERP8.rtf (accessed 11 July 2005).

In Chapter 15 of the US Bankruptcy Code, by which the US adopted the Model Law, s.1501 expressly excludes application of the Model Law to domestic entities including railways, domestic insurance companies, banks, savings and loan associations, building and loan associations, credit unions and other institutions within s.3(h) of the Federal Deposit Insurance Act, as well as foreign organisations of a similar kind engaged in business in the US: s109(b)(1)-(3).

The Guide to Enactment of the Model Law states (para 61):

> Banks or insurance companies are mentioned as examples of entities that the enacting State might decide to exclude from the scope of the Model Law. The reason for the exclusion would typically be that the insolvency of such entities give rise to the particular need to protect vital interests of a large number of individuals, or that the insolvency of those entities usually requires particularly prompt and circumspect action (for instance to avoid massive withdrawals of deposits). For those reasons, the insolvency of such types of entities is in many States administered under a special regulatory regime.