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Bob Wessels

International Insolvency Law

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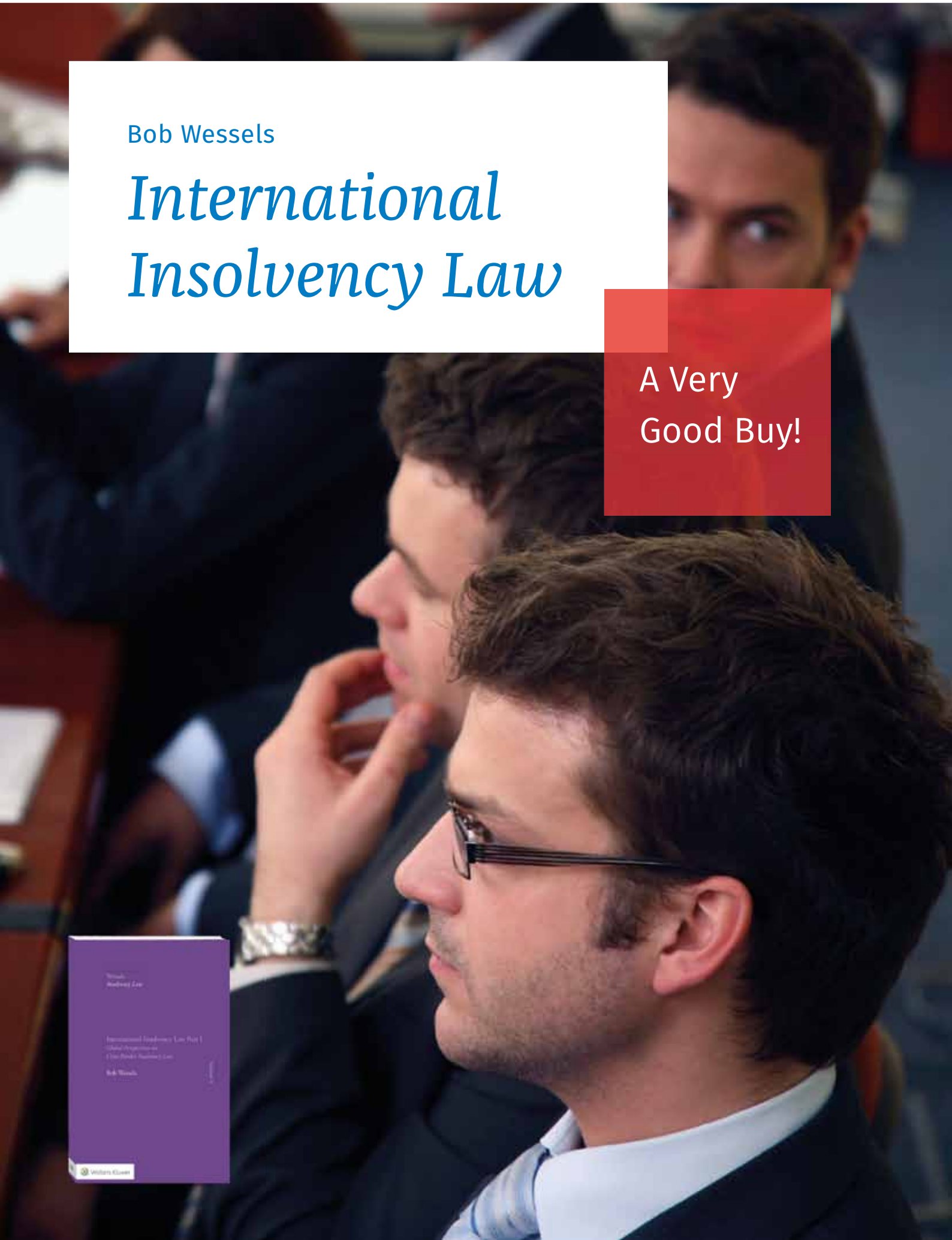


Wessels International Insolvency Law Part I. Global Perspectives on Cross-Border Insolvency Law, 4th ed., 2015, is known as an authoritive and practical guide on the law of international insolvency. It covers a huge and vast increasing body of legislative rules, case law, scholarly literature and other available sources.

Part II will be International Insolvency Law: Part II European Insolvency Law, foreseen for publication in 2017. Both will form the fourth edition of its original version.Wessels International Insolvency Law aims to be a first port of call on any question on international insolvency law for specialists (such as practitioners, judges and scholars), but also for those who are rather new to the subject, including legislators and students.

On the 3rd edition of 2012: A 'magnificent book' (Hon. Judge Bufford, Los Angeles), a 'marvellous work' (prof. Jessica Schmidt, University of Bayreuth), written by one of the best specialists in the world (François Mélin, Vice-président du Tribunal de grande instance d'Amiens). This is a work that serious insolvency academics, judges or practitioners cannot afford to do without (prof. Paul Omar, Nottingham Law School and prof. Heinz Vallender, University of Cologne: 'Am "Wessels" kommt niemand vorbei').

UPDATED

International Insolvency Law Part I contains three themes.

Chapter I starts with a detailed account of topics which nearly always emerge from cross-border insolvency cases and continues the debate on principles and new dogmatic and pragmatic approaches to issues and disputes on international insolvency law, including several remarkable court decisions. Regional conventions (in Latin-America, the Nordic European countries, the OHADA Treaty in Central Africa) have been explained and several of the 'soft law' sources have been described. These include best practice rules from organizations such as INSOL International and UNCITRAL's Legislative Guide on Insolvency Law, including its recommendations for the treatment of corporate groups, and the use of Protocols or cross-border insolvency agreements.

In Chapter II the status of international insolvency law in the Netherlands has been updated. Despite the EU Insolvency Regulation being applicable to intra-community cases since May 2002, Articles 203-205 of the Dutch Bankruptcy Act remain relevant for cross-border cases with third-(non-EU)countries as will the general application by courts in the Netherlands of private international law, as demonstrated in cross-border legal disputes related to the insolvent Russian corporate giant Yukos Oil having shares in a company, incorporated in the Netherlands, which holds large assets in several countries.

In Chapter III in this fourth edition the main topic is the UNCITRAL Model Law on Cross-Border Insolvency of 1997 and the considerations to weigh when a State is in the process of enacting it. The analyses of the Model Law has been broadened and deepened with a short analysis of some fifty USA and UK cases, and a selection of the ever growing literature, mainly from sources in the USA and the UK.
The text of Wessels International Insolvency Law Part I, 4th ed., 2015, is completed by a refreshed Bibliography and a set set of comprehensive appendices containing the most recent texts of hard and soft law. The law is stated as per August 1, 2015.

Obviously, International Insolvency law Part II European Insolvency Law provides an extensive treatment of the Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast), which shall enter into force 26 June 2017.

"In this fourth edition I have done my utmost to provide the publication of choice for each insolvency practitioner, especially by including commentaries on over 100 court cases. A comprehensive overview of soft law sources should assist insolvency practitioners with useful insights and practical tools in running effectively their cross-border practice."

Wessels International Insolvency Law Part I, 4th. edition, offers not only aims to be a first port of call on any question on international insolvency law for specialists (such as practitioners, judges and scholars), but also for those who are relatively new to the subject, including legislators and students. Guidance is offered on all concepts and complexities in international practice. The book:

- Offers a comprehensive and critical statement on current and controversial matters
- Takes into account legislative developments, such as enactment of the Model Law with references to the EU Insolvency Regulation
- Identifies key issues likely to arise in application of these legislative texts
- Delivers clarity and rigorous analysis of procedural or substantive rules
- Includes expert interpretation of legal principles and concepts
- Allows practitioners to anticipate problems and solutions when advising corporate clients
- Considers all relevant case law, including cases such as ABC Learning Centres, Barnet, Cozumel Caribe, Fairfield Sentry, Kekhman, Kemsley, Lehman Brothers, Madoff, New Cap, Nortel Network, Qimonda, Rubin, Octaviar, Saad, Singularis and Suntech Power
- Contains an extensive bibliography and a comprehensive selection of all the relevant hard law and soft law texts

About the author

Professor Dr. Bob Wessels (1949; PhD in Civil Law: Amsterdam 1988) was Professor of International Insolvency Law in Leiden (2007-2014) and of Civil and Commercial Law, Vrije University, Amsterdam (1988-2008). He is External Scientific Fellow Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, an independent (international) legal counsel and arbitrator, acted as consultant to the IMF and the World Bank. He is an advisor to the European Commission in matters of restructuring and insolvency law. In international practice he has advised with legal opinions or acted as an expert witness in European or international insolvency related questions in Dutch courts as well as in courts in Austria, Belgium, Greece, Ireland, Poland, Sweden, Switzerland, UK and USA.
Since 1999 he is the single author of: Wessels Insolventierecht (Wessels Insolvency Law), a 10 Volume series. In the 4th edition, since 2013 seven volumes have been published. He has had visiting professorships in Frankfurt, Pretoria, USA (St. John's University, New York) and Latvia (Riga Graduate School of Law).
He furthermore is: Deputy Justice at the Court of Appeal in The Hague (since 1987); Member of the Joint Board of Appeal of the three European Supervisory Authorities (ESAs; ESMA, EBA and EIOPA respectively), Mediator of INSOL International College of Mediation (IICM), past Chairman and Honorary Member of the Netherlands Association for Comparative and International Insolvency Law (NACIIL), past Chairman of the Academic Forum of INSOL Europe and Emeritus Director of the Board of the International Insolvency Institute (III). He is Member of the American Law Institute and the European Law Institute and Fellow of the American College of Bankruptcy and Honorary Member of INSOL Europe.

Table of Contents

Contents

Contents

Contents

Sample Pages

Sample Pages

appointment take over the functions of the board) mean that the requirements of having an 'establishment' are met?, see Coleman/Guyder (2008), 23.

In Betcorp, the determination of an 'establishment' is presented as a question of weighing the facts. In Betcorp, judge Markell relied, in the absence of expert evidence, on reproduction of statutes and other aids to interpretation to determine the status of a 'voluntary liquidation', commenced under Australian law, including the use of explanatory memoranda which accompanies draft legislation and is prepared to assist Parliament in order to understand the purpose and structure of the legislation under consideration in that case. The court found this voluntary liquidation to be an administrative proceeding falling within the scope of the Model Law. The aim of the voluntary liquidation is to realize assets for the benefit of all creditors, the requisite aspect of a 'collective' proceeding was held to be present. On 'collective' proceeding, see para. 10236. One of the queries is whether the term 'non-transitory' is referable to the duration of a relevant economic activity or to the specific location at which the activity is carried on, see Fairfield Sentry (p. 8/9). See for a critical analysis of 'establishment' Wofford (2009).

[10236d] In section 1502(4) the definition of 'foreign main proceeding' includes a reference to 'the center of its main interests.' Although a more usual wording was suggested by several North-American commentators, the decision to follow Model Law language – as in several other places – was taken because it was felt 'more important to have a uniform worldwide phrase (at least in English) for such a central point', see Westbrook (2002a), 19.

The definition of 'trustee' for the applicability of Chapter 15 includes, as well as a trustee, the debtor in possession and the debtor under Chapter 9 (section 1502(6)). Because the United States under certain circumstances asserts insolvency jurisdiction over property outside its territorial limits, in section 1502(8) wording has been added expressing a definition of 'within the territorial jurisdiction of the United States'. It aims to locate – when used with reference to (in)tangible property – those assets within the territorial jurisdiction of the US and is designed as a limiting phrase and seen as useful where the Model Law and Chapter 15 intend to refer only to property within the territory of the enacting State.

Section 1502(7) provides its own definition of 'recognition' ('the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter'). It has been added merely to simplify the drafting of various other sections of chapter 15.

[10236d-01] These two questions (in short: debtor eligibility in the U.S.; 'collectivity' of the foreign proceeding) were on the table in the case: In re Sovereign Assets Ltd., Case No. 14-13009 (Bankr. S.D.N.Y. December 17, 2014), which relates to Sovereign Assets Ltd. (SAL), a real estate firm based in Israel.

Sample Pages

General provisions nr. 10236d-01

It was unable to service its debt obligations and was placed into Israeli liquidation proceedings. Two administrators filed for recognition under Chapter 15 at the US Bankruptcy Court for the Southern District of New York, which entered an order granting recognition of SAL's liquidation proceeding in Israel under section 1517(a)1 and allowed the administrators to pursue SAL's assets in the United States. For two reasons the court's decision is interesting as it discusses (i) the Second Circuit's test for determining the debtor's COMI under section 1502(4), including the debtor's eligibility requirements under section 109(a), and (ii) the 'collective' nature of liquidation proceedings under Israeli bankruptcy law.

Regarding (i) the COMI requirement under section 1502(4) the facts were that SAL was a shell company, which had no ongoing business in Israel, other than being formed in Israel and once issuing bonds to raise money there. The court decided that SAL's Israeli liquidation proceeding is a foreign main proceeding within the meaning of section 1502(4) as it had been located in Israel at all relevant times, it was organized under the laws of Israel, SAL was listed as a public company, it had its office in Israel and its exclusive place of raising funds was located in Israel. SAL was managed and operated in Israel before its liquidation, many of its known creditors were located in Israel. Relying on its prior decision in In re Suntech Power Holdings Company Ltd., the court concluded that even if SAL had no functioning office in Israel as of the commencement of its liquidation proceeding, courts have held that the sites of the debtor's liquidation activities may alone be considered as part of the COMI analysis. In the case at hand, the court observed that the petioning liquidators have been operating SAL's liquidation activities in Israel, including conducting interviews of SAL's former employees and board members searching for assets and opening a bank account, and therefore the court was satisfied the COMI requirement under section 1502(4) was met. In addition, the court found that the petitioners satisfied the eligibility requirements under section 109(a) as the debtor has property in the United States in the form of shares in its US subsidiaries, at least one of which is a Delaware corporation and under Delaware law, the location of ownership of the capital stock of Delaware corporations is regarded as being in Delaware, regardless of where the certificates or the owner are located, so the equity in SAL's US subsidiaries may be considered property of SAL in the United States, meeting the requirements under Section 109(a). The court further found that SAL's potential causes of action against certain third parties, which may be asserted in the United States in the future, may constitute property for purposes of section 109 under its prior decision in In re Octaviar Admin. Pty Ltd., 511 B.R. 361, 369-70 (Bankr. S.D.N.Y. 2014).

As to (ii), the court found that SAL's Israeli liquidation proceeding is 'collective' in nature, where it had been described by the as a proceeding for '... collecting and liquidating of SAL's assets and to pay claims of creditors pursuant to the rules of Israeli law.' The court continues to observe that

Sample Pages

UNCITRAL: Model Law on Cross-Border Insolvency and other materials nr. 10236d-02

Bankruptcy Law in Israel meets the United States' fundamental standards of fairness. According to the court SAL's proceeding '... accords with the course of civilized jurisprudence', that all relief under Chapter 15 is subject to the limits in section 1506, but that its public policy exception is drafted in narrow terms and the key determination under section 1506 is '... whether the procedures used in the foreign jurisdiction meet our fundamental standards of fairness', including public notice of the commencement of the SAL's liquidation proceeding and the opportunity to object before the hearing in Israel, whilst under Chapter 11 all parties in interest in a Chapter 15 case enjoy full due process rights to complain about the ongoing conduct of the proceedings, if they so desire and, as a result, the public policy exception under section 1506.

For further comment on the definitions in section 1502 see Lee (2002), 181ff; Hollander/Graham, in: Pannen (2007), 711ff; Clark (2008), § 4[2]; Bufford (2009), 83ff.

[10236d-02] Several peculiarities may be connected to proceedings from abroad, which may lead to the question whether such a proceeding is a 'foreign main proceeding' under Chapter 15. In re ABC Learning Centres Ltd., 728 F.3d 301 (3d Cir. 2013) is such a case. ABC Learning Centres Ltd. ('ABC') was a publicly-traded Australian company that provided child care and educational services in Australia, the United States, and other countries through 38 subsidiaries, including a U.S. company referred to as 'ABC Delaware'. In 2010 ABC Delaware is confronted with a $47 million verdict from the Arizona court for a claim re breach of contract against ABC Delaware. ABC Delaware had also sued a party in Nevada, seeking $30 million in damages. In November 2008, ABC's directors entered into a voluntary administration in Australia. The appointed administrators then are to determine whether ABC could be restructured or whether it had to be liquidated. However, entering into administration violated ABC's loan agreements with its secured creditors, who had a lien on all of ABC's assets, and who commenced in Australia a receivership process and appointed a receiver based on the commencement of the voluntary administration. In June 2010, ABC's directors voted to enter liquidation proceedings and appointed administrators to wind up the company. Thereafter, the liquidation proceeding and the receivership continued in parallel with the liquidators granting the receiver permission to manage and operate ABC. In May 2010, the administrators petitioned the Bankruptcy Court for the District of Delaware for recognition of the Australian insolvency proceedings under Chapter 15. The court found the liquidation was a foreign main proceeding that met the recognition requirements and did not manifestly contravene U.S. public policy. Consequently, it ordered recognition and a stay of actions against ABC and ABC's property within the United States' jurisdiction. RCS, its financier, appealed these rulings to the Third Circuit Court of Appeals, with several claims including the argument that the liquidation

proceeding operating parallel to a receivership could be granted Chapter 15, but that only the receivership benefits from the Chapter 15 recognition, so that only the receivership was effectively granted recognition and since the receivership is not a 'collective' proceeding and only benefits the secured creditor the receivership should not be recognized as a foreign proceeding. The court is not convinced by this argument and held that '... Chapter 15 makes no exception when a debtor's assets are fully leveraged' and that recognition must be ordered when a court finds the requisite criteria are met subject only to the public policy exception of section 1506. The court then rejected the contention that since the receivership – a non-collective proceeding – would gain all the benefits of the ordered relief, that the Australian proceeding should not be recognized and the stay should not be upheld. In commentaries this broad interpretation of foreign proceeding has been welcomed, see LaChance, ABI Journal November 2013, 50ff; Zerjal, ICR 2014, 37ff. The court also examined the public policy exception in the Model Law and determined that the public policy exception requires nothing more than that the foreign proceeding affords substantive and procedural due process protections. Based on this reasoning, the court of Appeals affirmed the lower court's rulings and confirmed the recognition and stay orders.

The same approach has been taken towards an insolvency proceeding from India, see Armada v. Shah (In re Ashapura Minechem Ltd.), 2012 WL 2478467 (S.D.N.Y. June 28, 2012), recognising a proceeding governed by a statute, called the Sick Industrial Companies Act ('SICA'), which after it had been severely criticised by Indian legal scholars had been repealed in 2003. The court granted recognition of the SICA proceeding as a foreign main proceeding. Thus, the District court's judgment against Ashapura was stayed pursuant to section 1520(a). A creditor (Armada) appealed these rulings to the District Court as it found that the Indian SICA proceeding should not have been recognized, the proceeding not being collective in nature, nor were Ashapura's affairs, as well as assets, subject to the control or supervision of the Board of Industrial and Financial Reconstruction ('Board'). The District Court, however, rejected these arguments and affirmed the Bankruptcy court's decision. It considers that while SICA does not per se provide for unsecured creditor participation, such participation is left to the Board's discretion, so the District Court found that, in practice, unsecured creditors may participate in SICA proceedings by making an application to implead themselves as parties in interest, and in fact several unsecured creditors indeed participated in Ashapura's SICA proceeding. In addition, the court observes that US courts apply a '... low legal standard for supervision over a debtor's affairs', and a foreign court '... need not direct the day-to-day operations of a debtor to meet that standard'. The District Court found evidence in the records which established the requisite supervision, such as the application by the Board of a set of guidelines to impose on a 'sick' company in order to regulate against fraudulent and preferential transfers and grants the BIFR authority to suspend

Sample Pages

the operation of contracts, settlements, and awards. The District Court also found that these provisions addressed a debtor's affairs and held that Ashapura met its low burden of proving that the BIFR has supervision or control over Ashapura's affairs.

[10236d-03] To conclude, I would like to mention Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.2d 127 (2d Cir. 2013). Fairfield Sentry was organized as an International Business Company under the laws of the of the British Virgin Islands. It was, until Bernard Madoff's arrest in 2008 the largest of the so-called Madoff 'feeder funds', investing over 95% of its assets (or over $7 billion) in Bernard L. Madoff Investment Securities LLC. Under its Memorandum of Association, Fairfield Sentry administered its business interests from the BVI, where its registered office, registered agent, registered secretary, and corporate documents were located. Fairfield Sentry's board of directors, with members living in New York, Oslo, and Geneva, oversaw Fairfield Sentry's management, with day-to-day operations handled by an investment manager in New York. When Madoff was arrested in 2008, Fairfield Sentry's independent directors suspended redemptions, held 44 board meetings by telephone initiated from the BVI, sent correspondence on BVI letterhead to Fairfield Sentry's shareholders regarding the Madoff scandal, and formed a litigation committee with the authority to consider, commence, and settle litigation to be taken by or against Sentry. Additionally, shortly after the discovery of the Madoff fraud, the board of representatives of the Fairfield Sentry's New York-based investment managers resigned, and Fairfield Sentry's contracts with that investment manager were severed in 2009. In May 2009, Morning Mist, a shareholder in Fairfield Sentry, filed a derivative action in New York, claiming that Fairfield Sentry's directors, management, and service providers breached duties owned to Fairfield Sentry. On July 21, 2009, on application of ten Fairfield Sentry shareholders, the High Court of Justice of the Eastern Caribbean Supreme Court entered an order commencing Fairfield Sentry's liquidation proceedings under BVI's Insolvency Act of 2003, appointed liquidators, including Kenneth Krys, and granted those liquidators custody and control of Fairfield Sentry's assets. Almost a year later, on June 14, 2010, the liquidator filed a petition to the United States Bankruptcy Court for the Southern District of New York for recognition of the BVI liquidation proceedings. The bankruptcy court granted the liquidators' petition and determined that in order to determine Fairfield Sentry's COMI for purposes of sections 1502(4) and 1517(b)(1)), that the relevant period of activity was between December 2008, when Fairfield Sentry ceased operations, and June 2012, when the Chapter 15 Petition was filed. The court then determined that Fairfield Sentry's COMI was in the BVI and that the BVI liquidation was a foreign main proceeding under Chapter 15. As a result, Morning Mists' derivative litigation was stayed. Morning Mist appealed the bankruptcy court's order to the federal district court, which affirmed the bankruptcy

Sample Pages

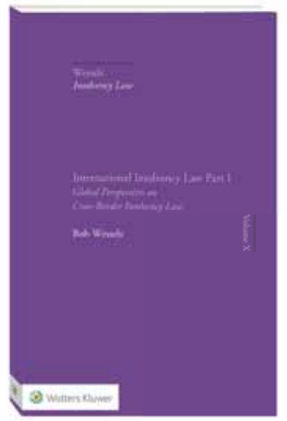
court's decision. The federal district court held that the bankruptcy court properly considered Fairfield Sentry's COMI as of the filing of the Chapter 15 petition, including its administration activities (not its activities over its 18 year operational history). Morning Mist also argued that the BVI proceeding should not be recognized because it was a sealed proceeding and thus manifestly contrary to the US public policy under section 1506). The federal district court held that in the United States the right to access court records is not absolute and that the BVI proceeding was not manifestly contrary to public policy. Morning Mist appealed the decision to the Second Circuit Court of Appeals, where the issues considered were (i) whether the BVI liquidation qualifies as a foreign main or non-main proceeding, and (ii) whether the lower courts should have applied the public policy exception available under section 1506, because the BVI liquidation was 'cloaked in secrecy'. For this latter issue, see para. 10307. With respect to the first issue (i), the relevant time period for determining the proper COMI, the court held that the relevant time is at or around the time of the filing of the Chapter 15 petition and not the Chapter 15 debtor's entire operational history or the time of the filing of the applicable foreign proceeding, subject to an inquiry into whether the process has been manipulated, i.e., the court stated that to '... offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition,' focusing on the present tense construction of section 1517(b), and that any relevant activities, including liquidation activities and administrative functions performed by a liquidator in the foreign proceeding can be considered in the COMI analysis.

For comments on this case: Zerjal, ICR 2013, 194ff.; Reid/Swick, ABI Journal July 2013, 54ff.; Moss, in: 26 Insolvency Intelligence 2013, Issue 8, 7ff.; McCarthy, ICR 2013, 375ff; Park, IILR 2/2014, 111ff.

It should be noted that Coleman/Johnson (2014) submit the introduction of a new standard, which is the date of the most recent economic activity, presented as a more appropriate time for COMI detemination. This standard – so the authors – is less susceptible to manipulation by the debter, ensuring that the resulting enquiry looks to true economic activity, thereby aligning better to the component of 'ascertainability by third parties'. A COMI standard being '... the most recent significant business transaction' (excluding investment or real estate transactions in as far as they are unconnected to the debtor's business) is according to the authors in conformity with the statutory language of section 1517(b)(1) of the U.S. Bankruptcy Code and is consistent with the Model Law's (and Chapter 15's) policy goals.

[10236e] Article 2 of Schedule 1. Article 2 of Schedule 1 of the Cross-Border Insolvency Regulations 2006 includes thirteen definitions, which closely follow the wording of Article 2 of the Model Law, albeit in alphabetical order. Typically, for the purposes of jurisdictions within Great Britain definitions are

Bibliographic Details



International Insolvency Law Part I
Global Perspectives on Cross-Border Insolvency Law

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