

# insolvency & restructuring

## Focus: Cross-border insolvency and the *Betcorp* decision

27 February 2009

**In brief:** On 9 February 2009, in *In re Betcorp Limited (In Liquidation)*, the US Bankruptcy Court handed down judgment in favour of an Australian liquidator in a cross-border insolvency proceeding under Chapter 15 of the US Bankruptcy Code. This is the first time an Australian voluntary winding up has been recognised in the US, or anywhere else, as a 'foreign main proceeding'. Partner Michael Quinlan ([view CV](#)) and Lawyer Pouyan Afshar report.

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## How does it affect you?

- The decision will aid US courts' understanding of the Australian insolvency regime in future applications by providing what is a correct analysis of the operation of the *Corporations Act 2001* (Cth).
- It will, therefore, be easier for Australian insolvency practitioners to approach US courts to have their proceedings recognised under Chapters 11 and 15 of the US Bankruptcy Code.

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## Background

At its incorporation in 1998, Betcorp operated only in Australia but later expanded its operations, which included the provision of gambling services, to the US. In time, the US operations became central to Betcorp's operation. This central business of Betcorp was effectively scuttled, however, with the passage of the *Unlawful Internet Gambling Enforcement Act (2006 – USC)*, which prohibited online gambling in the US. Immediately after the passage of this legislation, the company halted its operations in the US and ceased all its operations shortly thereafter. At a meeting in September 2007, shareholders voted overwhelmingly to put the company into voluntary winding up.

After Betcorp had ceased operations, the liquidators received a complaint from an American company, 1st Technology, claiming that Betcorp had infringed one of its patents. 1st Technology ultimately filed proceedings against Betcorp in the US District Court. In response, Betcorp's liquidator applied to the US Bankruptcy Court to have the Australian winding up process recognised as a foreign main proceeding. A successful application of this kind would have required 1st Technology to approach an Australian court in respect of the patent infringement claim.

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## The decision

Judge Markell of the US Bankruptcy Court (the **court**) was asked to address two main questions in his judgment: first, whether the voluntary winding up process could be recognised as a 'foreign proceeding'; and second, whether it was capable of being recognised as a 'foreign main proceeding'. The central issues the court discussed when deciding both these questions in favour of the Australian liquidator were:

- whether the voluntary winding up process under Part 5 of the *Corporations Act 2001* (Cth) (the **Act**) constituted a 'proceeding' for the purposes of Chapter 15 of the US Bankruptcy Code (the **Code**); and
- whether Australia was the location of Betcorp's centre of main interests (**COMI**).

1st Investment argued that voluntary winding up under Part 5 of the Act did not constitute a 'proceeding' under Chapter 15, because it did not involve the making of an application to a court. His Honour acknowledged that the term 'proceeding' is used in the US in respect of an application or claim brought before a court. However, having considered the purposes of Chapter 15 and also the UNCITRAL Model Law (upon which Chapter 15 is based), he concluded that a broader definition of 'proceeding' is warranted in an application of this kind. He examined the machinery in Part 5 of the Act in some detail and concluded – in our view, rightly – that the voluntary winding up procedure constituted a 'proceeding' for the purposes of Chapter 15.

In coming to this conclusion, the court focused on the administrative nature of the voluntary winding up process under the Act. It said that while there is no requirement that the liquidator approach a court during the winding up process, there is always an avenue for doing so. We think this reasoning could apply equally to processes under the voluntary administration regime in Part 5 of the Act, meaning that a process under the voluntary administration regime could also be recognised as a 'proceeding' under Chapter 15.

A foreign proceeding is recognised as a 'foreign main proceeding' if its location correlates with the location of the debtor's COMI. In [previous publications](#), we have discussed the most important authorities relating to the concept of COMI. Central to it is the presumption that the place of the debtor's registered office is also the location of the debtor's COMI. This presumption only operates in the absence of evidence suggesting that the debtor's COMI is located somewhere else. If such evidence exists, a court is required to exercise its discretion by balancing the weight of the competing evidence.

In this case, the court found some evidence that suggested Betcorp's COMI may have been located somewhere other than Australia: namely, that its main creditors were in the UK or the US. As a result, the court noted, the presumption no longer applied in determining the location of Betcorp's COMI. This approach is consistent with appellate authorities in the US on how the presumption operates.

Notwithstanding, there was ample evidence to suggest that Betcorp's COMI was, indeed, located in Australia. The evidence included that:

- Betcorp's headquarters were in Australia;
- Betcorp's management was, by and large, conducted from Australia;
- most of Betcorp's assets were in Australia; and
- the laws of Australia applied to the company and its operations.

On the basis of this evidence, the court held that Australia was the location of Betcorp's COMI at the time the application was made and that the voluntary liquidation process could be recognised as a 'foreign main proceeding'.

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## Media coverage

There has been some coverage of this judgment in the Australian media. We note that in at least one article we have reviewed, there are references to the recent *Cross-Border Insolvency Act 2008* (Cth) and, seemingly, a suggestion that the application in this case was made under it. For the purposes of clarification, we note that this application was made under the Code, not the Australian legislation. The Code (as well as other Model Law-inspired cross-border insolvency laws) does not require that reciprocal laws be enacted in the jurisdiction where the foreign proceeding originates. This is important, because the right choice of laws is vital to the success of any such application. Please see our [previous publication](#) on the Australian legislation.

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## Conclusion

As a result of the *Betcorp* decision, Australian insolvency practitioners should feel more confident when applying to American courts to gain protection for their Australian insolvency proceedings. We will continue to monitor applications brought under Chapter 15 and under the corresponding Australian legislation.

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