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Contents

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Introduction

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Cases relating to the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI)

Case 1815: MLCBI 6; 8; 15; 17(4); 21(1)
Singapore: High Court of the Republic of Singapore
Re: Zetta Jet Pte Ltd and Others
24 January 2018
[2018] SGHC 16
Original in English

Abstract prepared by Aedit Abdullah J., Judge

[**keywords**: *recognition-limited; public policy*]

Zetta Jet Pte Ltd ("Zetta Jet Singapore"), incorporated in Singapore, owns Zetta Jet USA, Inc ("Zetta Jet USA"), established in California, United States of America. On 15 September 2017, Zetta Jet Singapore and Zetta Jet USA ("the Zetta Entities") commenced Chapter 11 proceedings in the United States Bankruptcy Court. On 18 September 2017, Asia Aviation Holdings Pte Ltd (AAH), one of the shareholders of Zetta Jet Singapore, obtained from the High Court of Singapore an injunction order to enjoin Zetta Jet Singapore and its other shareholders from carrying out further steps in and relating to the United States bankruptcy proceedings.

Despite such injunction order, the proceedings in the United States of America continued and were converted to Chapter 7 proceedings. They culminated in authorization being granted by the United States Bankruptcy Court to an appointed Chapter 7 Trustee to commence recognition proceedings in Singapore. AAH intervened in the application, opposing such recognition on the basis that the United States proceedings had been carried in violation of a Singaporean court order. The High Court granted limited recognition to the Trustee only for the purposes of applying to set aside or appeal the Singapore injunction.

In so deciding, the High Court considered that Singapore's enactment of the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI") under the Tenth Schedule of the Companies Act ("the Singapore Model Law") varied some of the language used in the provisions of the MLCBI. In particular, under Article 6 MLCBI, the court can only deny recognition if recognition is "manifestly contrary" to public policy. The Singapore Model Law omits the word "manifestly", allowing Singapore courts to deny recognition of a foreign proceeding if recognition is "contrary" to public policy, without it being manifestly so.

The reason for the omission of the word "manifestly" does not appear in the records of the Parliamentary debates or any preparatory materials to the Singapore Model Law. The High Court concluded, however, that as the omission was deliberate, the standard of exclusion on public policy grounds in Singapore is lower than that in jurisdictions where this provision of the MLCBI has been enacted unmodified.

In the present case, recognizing the Chapter 7 Trustee despite his breach of the Singapore injunction undermined the administration of justice. But completely denying recognition of the Chapter 7 Trustee would render it impossible for the Zetta Entities to set aside the Singapore injunction, since the Zetta Entities were in liquidation in the United States. Based on principles of justice and fairness, the court granted limited recognition to the Chapter 7 Trustee, only for the purposes of applying to set aside or appeal the Singapore injunction. Such limited recognition was made bearing in mind Article 8 of Singapore Model Law, which provides for the need to have regard to the international basis of the MLCBI and the promotion of uniformity in its application. The Court stated that the limited nature of the recognition conferred may be characterized as either a form of modification of recognition under Article 17(4) MLCBI or, given that the applicant has included something similar in its submissions, as a manner of relief under Article 21(1) MLCBI.

Case 1816: MLCBI 2(b); 16(3)
Singapore: High Court of the Republic of Singapore
Re: Zetta Jet Pte Ltd and Others (Asia Aviation Holdings Pte Ltd, intervener)
4 March 2019
[2019] SGHC 53
Original in English

Abstract prepared by Aedit Abdullah J., Judge

[**keywords**: *recognition; centre of main interests (COMI) – determination; centre of main interests (COMI) – timing; presumption – centre of main interests*]

This case is the continuation of a previous case decided by the High Court of Singapore, where the public policy exception of Article 6 of the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI"), as enacted in Singapore under the Tenth Schedule of the Companies Act ("the Singapore Model Law"), had been invoked to allow limited recognition in Singapore of the Chapter 7 Trustee appointed in the United States for the Zetta entities (CLOUT case 1815). In the present case, the Trustee was seeking to be fully recognized as a foreign representative for Zetta Jet Singapore (the "debtor") and obtain a stay of proceedings in Singapore under Articles 20(1) and 20(2) MLCBI together with other reliefs.

The main issue before the Court was the determination of the relevant date for assessing the COMI of the debtor, as provided under Article 2.2(f) of the Singapore Model Law [Article 2(b) MLCBI read in conjunction with Article 16(3) MLCBI]. To do so, the Court conducted a comparative survey that summarized the various approaches taken to the MLCBI by foreign jurisdictions that have enacted the MLCBI. The Court concluded that the date of the filing of the recognition application was the relevant date for the determination of COMI. This conclusion was supported by the following arguments:

(a) Article 2(b) MLCBI uses the present tense ("where the debtor has the centre of its main interests"), therefore stressing the importance of evaluating the situation at the time the application for recognition is made;

(b) Commercial practice may allow a debtor to choose the appropriate forum to seek reorganization. Postponing the determination of COMI until the time the recognition application is made would allow for purported changes in COMI, subject to conditions preventing the abuse of COMI shifts.

The second issue decided was the factors to be considered in determining the COMI. The Court took note of Article 16(3) MLCBI, which establishes a presumption that the COMI is in the place where the debtor's office is registered. The Court emphasized the different approaches adopted in various jurisdictions that have enacted the MLCBI. The Court concluded that the usual rule generally requiring that rebuttal of a legal presumption was to be made out on the balance of probabilities did not apply in case of Article 16 MLCBI. Reference in that article to the "absence of proof to the contrary" allowed for the presumption to operate as a starting point and rebutted if factual evidence shows that the COMI was located elsewhere.

In addition, the Court emphasized that, for Singapore courts, the interpretation of the Singapore Model Law should notably allow the creditors to be able to predict when an insolvency proceeding might subsequently be granted recognition as a "foreign main proceeding". Accordingly, objectively ascertainable factors would help the court in determining the COMI location. Relevant factors in this case were the place where the central management and direction of the debtor were located, the place indicated by the corporate representations as the place of the debtor's operation, and the place where the debtor's creditors were located. The Court concluded on that basis that the COMI of the debtor was in the United States of America rather than in Singapore. The United States proceedings were thus granted recognition as a foreign main proceeding.

Case 1817: MLCBI 2; 14; 15; 17; 20; 21
Australia: Federal Court of Australia
Case No. VID 770 of 2018
King, in the matter of Zetta Jet Pte Ltd
12 September 2018
[2018] FCA 1932
Original in English

[**keywords**: *foreign proceeding; foreign representative; foreign non-main proceeding; recognition; recognition-timing; relief*]

Recognition was sought under the Cross-Border Insolvency Act 2008 (enacting the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI") in Australia) of a United States Chapter 7 insolvency proceeding converted from a United States Chapter 11 proceeding (the US proceeding) as a foreign non-main proceeding.

The Court found that the plaintiff was the foreign representative in the meaning of Article 2(d) MLCBI, the US proceeding was the foreign proceeding in the meaning of Article 2(a) MLCBI and that the other requirements of Article 17(1) MLCBI for recognition of the US proceeding as the foreign proceeding were satisfied. The court then considered whether the US proceeding should be recognized as a foreign main proceeding or a foreign non-main proceeding under Article 17(2) MLCBI. In that context, the Court examined which time point to use for determining the location of the centre of debtor's main interests (COMI) or the debtor's establishment: (a) when the foreign proceeding was opened; (b) when the recognition proceeding was filed with the Court; or (c) when the Court was called on to make the decision on recognition. The Court opted for option (a), arguing that, as the case in question showed, the debtor might be engaged in no activities at all if the alternative approaches were followed.

Finding that the initially filed United States Chapter 11 proceeding was opened at the time when the defendant had an establishment in the United States, the Court recognized the US proceeding as a non-main foreign proceeding, noting that despite the subsequent conversion of the proceeding from the Chapter 11 proceeding to the Chapter 7 proceeding, it remained the same foreign proceeding. The Court granted relief under Article 21 MLCBI in the form of a stay of individual proceedings against the defendant's property, a stay of any execution against the defendant's assets and a suspension of any rights to transfer, encumber or otherwise dispose of any of the defendant's property. The Court also entrusted the plaintiff with the administration and realization of the defendant's property in Australia including the power to appoint a local representative and assume the same powers as he would have had if he were a locally appointed liquidator. The Court also granted an interim injunction under Article 21 MLCBI with respect to a property held by a third party (see also CLOUT case 1818).

Case 1818: MLCBI 11; 19; 21; 23; 28
Australia: Federal Court of Australia
Case Nos. VID 1157 of 2018, VID 770 of 2018
King (Trustee), in the matter of Zetta Jet Pte Ltd v. Linkage Access Limited
11 December 2018
[2018] FCA 1979
Original in English

[**keywords**: *avoidance action; debtor; foreign representative; standing*]

The plaintiffs sought a transfer of property from the defendants back to one of the plaintiffs, a Singaporean entity subject to a Chapter 7 insolvency proceedings in the United States (the US proceeding), alleging that the property had been bought by misappropriated funds of that plaintiff. The defendants sought to dismiss the proceeding summarily on the ground that voidable transaction provisions which the plaintiffs invoked in their statement of claims did not apply to a foreign company such as the Singaporean entity that was not registered and did not do business in Australia.

In response, the plaintiffs, referring to the earlier recognition of the US proceeding in Australia (CLOUT case 1817), argued that Article 23 MLCBI provided a substantive remedy to the foreign representative, Article 11 MLCBI authorized the foreign representative to commence the proceeding in question and MLCBI prevailed over the voidable transaction provisions in the event of any inconsistency. The overall effect of the plaintiffs' arguments was that "transaction of a company" in the applicable voidable transaction provisions should be read as "transaction of the debtor", which would allow a foreign company debtor such as the Singaporean entity to avail itself of those provisions.

The Court disagreed on the basis that Article 23 MLCBI was merely a procedural standing rule and did not alter the substantive law of Australia, under which the transactions that the plaintiffs sought to impugn could not be transactions of the company in the meaning of the applicable voidable transaction provisions. Concluding that the plaintiffs did not have any reasonable prospects of prosecuting the proceeding, the Court summarily dismissed the proceeding.

Case 1819: MLCBI Preamble; 2; 15; 16(3); 17; 31
United Kingdom: England and Wales High Court of Justice, Chancery Division, Companies Court
Case No. CR-2019-002136
In the matter of Sturgeon Central Asia Balanced Fund Ltd (in liquidation)
17 May 2019
[2019] EWHC 1215 (Ch)
Original in English

Abstract prepared by Irit Mevorach, National Correspondent

[**keywords**: *foreign proceeding; recognition; presumption-insolvency; scope-MLCBI*]

The provisional liquidators of a company incorporated under the laws of Bermuda (the "Company") sought recognition of the Company's liquidation in Bermuda as foreign main proceeding under the Cross-Border Insolvency Regulations 2006 (CBIR) (enacting the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI") in Great Britain). The Court of Appeal of Bermuda had ordered the Company, which was indisputably solvent at the time of the order, to be wound up on just and equitable grounds under the Bermuda Companies Act 1981. The Court had to determine whether the winding up proceedings in Bermuda could qualify as a foreign main proceeding under Article 2 MLCBI.

The Court noted that the Guide to Enactment and Interpretation of the MLCBI [in para. 48] explains that the term insolvency in the MLCBI refers to "various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent". However, the MLCBI's preamble refers to "financially troubled businesses", which may include businesses that are not necessarily solvent. Furthermore, the intention was to focus on proceedings commenced pursuant to a law relating to insolvency, rather than on defining insolvency. A recognizing court should not be required to investigate the insolvency of the entity. The Court considered that it would be wholly unclear how financial distress might be determined, or what the threshold was. Furthermore, it would run counter to the aim of allowing recognition on an efficient basis because of the factual enquiry that would be required during the recognition process which the MLCBI was intended to avoid. For that reason, the Court found that the winding up proceedings in Bermuda could be recognized as a foreign proceeding in Great Britain.

The Court then examined whether criteria for recognition of that foreign proceeding as a foreign main proceeding were met. The Court was satisfied that Bermuda, as the place where the Company had its registered office, was the Company's centre of main interests (COMI) as there has been no proof to the contrary. The Court found that other formal requirements for recognition were also met and accordingly granted recognition of the winding up proceedings in Bermuda as a foreign main proceeding.

Case 1820: MLCBI 20; 21
United Kingdom: England and Wales High Court of Justice, Chancery Division, Companies Court
Case No. CR-2019-001425
H&C S Holdings Pte. Ltd v. Glencore International AG
25 March 2019
[2019] EWHC 1459 (Ch)
Original in English

Abstract prepared by Irit Mevorach, National Correspondent

[**keywords**: *foreign main proceeding; recognition; relief-modification*]

Recognition was sought under the Cross-Border Insolvency Regulations 2006 (CBIR) (enacting the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI") in Great Britain) of insolvency proceedings (a "scheme of arrangement") within the jurisdiction of the Republic of Singapore, as foreign main proceeding.

The purpose of the application for recognition was to benefit from the automatic stay that ensues from recognition as foreign main proceeding under the MLCBI, in particular regarding arbitration proceedings between the debtor and the respondent in England. The respondent did not oppose recognition but sought modification of the stay to permit the arbitrations to continue, considering that the arbitration proceedings had concluded except for the issuing of the decision and determining arbitration costs, and that further arbitration costs would be incurred if the issuing of an award was stayed.

The High Court found that the criteria for granting recognition to the foreign proceeding as foreign main proceedings was met. The Court further imposed a stay in line with paragraph 43 of Schedule B to the Insolvency Act 1986, to ensure that the aim of the foreign proceedings (the scheme of arrangement) can be achieved. It subjected the stay to certain modifications permitting the award in the primary arbitration. The Court found that it was right and fair to modify the stay to enable the award to be issued but not to be enforced while the insolvency process is extant.

Case 1821: MLCBI 17; 20(1); 21(1)
United Kingdom: England and Wales High Court of Justice, Chancery Division, Companies Court
Case No. CR-2017-003973
In the matter of OJSC International Bank of Azerbaijan
6 June 2017
[2017] EWHC 2075 (Ch)
Original in English

Abstract prepared by Irit Mevorach, National Correspondent

[**keywords**: *foreign main proceeding; foreign representative; recognition; relief-automatic; relief-modification*]

Recognition was sought under the Cross-Border Insolvency Regulations 2006 (CBIR) (enacting the MLCBI in Great Britain) of the restructuring procedure underway in Azerbaijan as a foreign main proceeding under Article 17, Schedule 1 of CBIR corresponding to Article 17 MLCBI. The restructuring procedure in question was a debtor in possession rescue procedure.

The Court found that the requirements for recognition of the restructuring procedure as a foreign main proceeding were satisfied and no public policy exception applied. It therefore granted recognition. As far as relief was concerned, the Court found that the relief under Article 20(1) of Schedule 1 of CBIR corresponding to Article 20(1) MLCBI, including a suspension of the right to transfer or otherwise dispose of any assets of the debtor, flew automatically from the recognition of a foreign main proceeding but would be inappropriate in this case where the intention was to rescue the debtor as a going concern and enable it to continue trading. It therefore decided

by virtue of Article 21(1) of Schedule 1 CBIR corresponding to Article 21(1) MLCBI to disapply the automatic relief under Article 20(1) and grant under Article 21(1) a moratorium, which applies to an English law administration and enables the debtor to continue trading.

Case 1822: MLCBI 20; 21
United Kingdom: Court of Appeal, Civil Division
Case No. A2/2018/0084
Gunel Bakhshiyeva (In Her Capacity as the Foreign Representative of the OJSC International Bank of Azerbaijan) v. Sberbank of Russia, Franklin Global Trust – Franklin Emerging Market Debt Opportunities Fund, Franklin Emerging Market Debt Opportunities Fund Plc, Franklin Templeton Frontier Emerging Markets Debt Fund, Franklin Templeton Emerging Market Debt Opportunities (Master) Fund, Ltd, Franklin Templeton Series II Funds, Franklin Emerging Market Debt Institutional Fund
18 December 2018
[2018] EWCA Civ 2802
Original in English

Abstract prepared by Irit Mevorach, National Correspondent

[**keywords**: *foreign main proceeding; recognition; relief*]

The case concerned the voluntary restructuring procedure with respect to OJSC International Bank of Azerbaijan ("OJSC"), which was recognized as a foreign main proceeding in 2017 under Article 17, Schedule 1 of the Cross-Border Insolvency Regulations 2006 (CBIR) (enacting the Model Law on Cross-Border Insolvency ("MLCBI") in Great Britain) (CLOUT case 1821). At that time, the High Court granted the moratorium under Article 21(1) of Schedule 1 CBIR corresponding to Article 21(1) MLCBI.

The foreign representative applied to the High Court to extend the existing moratorium for an indefinite period beyond the termination of the restructuring proceeding to prevent creditors with English law-governed claims from pursuing their claims in England. The High Court denied the request holding that, pursuant to the rule in *Gibbs*, a debt can only be compromised in the jurisdiction of its governing law ([2018] EWHC 59 (Ch)). The foreign representative appealed.

The Court of Appeal upheld the High Court decision and disposed the appeal. It noted the criticism of *Gibbs*, which has been described by commentators as outdated, parochial, and contrary to modified universalism which forms part of English law and underpins the MLCBI. Nevertheless, the Court held that the MLCBI was clearly limited to procedural aspects of cross-border insolvency, noting a strong support to this approach in existing case law, notably the Supreme Court decision in *Rubin* (CLOUT case 1270). The MLCBI also does not include rules on choice of law. Thus, creditors' substantive rights cannot be overridden by invoking Article 21 MLCBI. Rather, Article 21 MLCBI is procedural in nature and mainly aims to provide a temporary breathing space.

The Court further noted that the test of necessity in Article 21(1) MLCBI was not satisfied. It also noted that it would be anomalous if a stay granted before the termination of the foreign proceeding were permitted to remain in force indefinitely. Had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

Case 1823: MLCBI 16(3); 17; 20; 21
United Kingdom: England and Wales High Court of Justice, Chancery Division, Companies Court
Case No. CR-2018-003870
In the matter of Videology Limited
16 August 2018
[2018] EWHC 2186 (Ch)
Original in English

Abstract prepared by Irit Mevorach, National Correspondent

[**keywords**: *foreign proceeding; centre of main interests (COMI); foreign main proceeding; foreign non-main proceeding; relief-injunctive*]

Recognition and relief were sought under the Cross-Border Insolvency Regulations 2006 (enacting the UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI") in Great Britain) regarding Chapter 11 proceedings commenced in the United States in relation to Videology Inc ("Inc"), a company incorporated in the United States and its wholly-owned subsidiary, Videology Ltd ("the company"), a company incorporated in the United Kingdom.

The High Court held that the centre of main interests (COMI) of Inc was indeed in the United States. It therefore recognized the Chapter 11 proceeding in relation to Inc as foreign main proceeding and made an order for a modified regime providing for a stay of individual actions, proceedings and execution against it. However, the court rejected the argument that the COMI of the company was also in the United States. Instead, the court found that the presumption that the place of incorporation of the company (the United Kingdom) is the COMI was not rebutted. The company's main assets were in the United Kingdom, it conducted the majority of its business in the United Kingdom using local employees and its contracts referred to English law and jurisdiction, factors that were ascertainable to its creditors. Additionally, a loan agreement in relation to the company stated that its COMI is in England.

Thus, the court held that the company's COMI was the United Kingdom and rejected the application to recognize the Chapter 11 proceeding regarding this company as foreign main proceedings. However, the court concluded that the connections with the United States justified recognition of the proceeding as foreign non-main proceeding, on the basis of the presence of an establishment. The court also granted discretionary relief in relation to this proceeding pursuant to Article 21 MLCBI, protecting the company from creditors' claims and entrusting the realization and distribution of the company's assets to the supervision of the United States court in the Chapter 11 process. The court noted that in the circumstances, it will be in the benefit of the creditors if a coordinated sale is pursued in the United States through the Chapter 11 process, which provides adequate protection to the interests of the company's creditors.