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Contents

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Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on Court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.3). CLOUT documents are available on the UNCITRAL website: (https://uncitral.un.org/en/case_law).

Each CLOUT issue includes a table of contents on the first page that lists the full citation of each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The internet address (URL) of the full text of a decision in its original language is included in the heading to each case, along with the internet addresses, where available, of translations in official United Nations language(s) (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available on the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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

Case 1858: MLCBI 2; 15
Canada: Superior Court of Justice, Ontario
Case No. CV-19-624659-00CL
Re syncreon Group B.V.
9 October 2019
Published: *2019 ONSC 5774*
Original in English

[**Keywords**: *enterprise group; foreign proceeding; foreign proceeding – recognition; centre of main interests (COMI)*]

Two enterprise members (the "Scheme Companies") of the syncreon Group ("the Group") had commenced scheme of arrangement proceedings before the High Court of Justice of England and Wales (the "English Court"), under Part 26 of the UK Companies Act 2006 c. 46 (the "UK Companies Act"). A recognition order of the scheme proceedings was sought before the Ontario Superior Court of Justice (the "Canadian Court"), under Part IV of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as amended ("CCAA") which enacted relevant portions of the UNCITRAL Model Law on Cross-Border Insolvency (the "MLCBI"). The scheme of arrangement was a formal statutory procedure under the UK Companies Act that allowed a company to enter into a compromise or arrangement with its members or creditors, if approved by the requisite majority, and through which other restructuring solutions could be implemented. This was the first time a Canadian court had been asked to determine whether proceedings under Part 26 of the UK Companies Act could be recognized as "foreign proceedings" under Part IV of the CCAA.

The Group was comprised of over 60 legal entities with operations in over 20 different countries, including the UK and Canada. Due to significant liquidity issues faced by the Group, the Scheme Companies (syncreon B.V (Netherlands) and syncreon Automotive (UK)) commenced scheme of arrangement proceedings in the English Court in order to reduce the Group's overall funded debt, restructure its balance sheet and address its liquidity issues. The proposed schemes of arrangement also provided for releases in favour of certain Group entities, including of syncreon Canada from its guarantee of certain obligations of syncreon B.V.

An order recognizing the scheme proceedings was requested by the foreign representative, who was declared by the English Court to have been validly appointed by the Scheme Companies. Among other claims, the applicant sought a declaration that it was the "foreign representative" for the purposes of the recognition proceedings and recognition of the scheme proceedings as "foreign non-main proceedings" as defined in s. 45 of the CCAA.

Pursuant to s. 45(1) of the CCAA (article 2(a) MLCBI), a "foreign proceeding" is any "(…) judicial or administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization". The Canadian Court held that schemes of arrangement under the UK Companies Act met the criteria for a foreign proceeding in that they had a statutory nexus to insolvency legislation, in dealing with creditors' collective interests generally and permitting companies to impose a compromise upon their creditors and effect a restructuring. Moreover, the Scheme Companies were insolvent and had assets in Canada (i.e. funds being held on retainer by legal counsel), thus meeting the definition of a "debtor company" under s. 2 of the CCAA. In addition, because syncreon Canada had only guaranteed certain obligations of syncreon B.V, which had its centre of main interests in the Netherlands, the scheme of arrangement proceedings in the UK were recognized as "foreign non-main proceedings".

Case 1859: MLCBI 2; 16(3)
Singapore: High Court
Case No. HC/OS 773/2019
Re Rooftop Group International Pte Ltd and another (Triumphant Gold Limited and another, non-parties)
3 December 2019
Published: [2019] SGHC 280
Original in English

Abstract prepared by Sim Kwan Kiat, National Correspondent

[**Keywords**: *centre of main interests (COMI); foreign representative; assistance*]

The Applicants were a Singapore-incorporated debtor company that filed for Chapter 11 US Bankruptcy Code protection in the US and the foreign representative appointed in the US proceedings.

Pursuant to the Tenth Schedule of the Singapore Companies Act (enacting the MLCBI), the Applicants sought: (a) recognition of the US Chapter 11 proceeding as foreign main proceedings, or alternatively, as foreign non-main proceedings; (b) recognition of the foreign representative; and (c) an order to restrain a court application in Singapore by a creditor to enforce a share charge it held over shares in the debtor company.

The Court found that the debtor's centre of main interests (COMI) was in Singapore, where it was incorporated, a presumption that it held was not rebutted by factors supporting the US as COMI. The Court recognized the US Chapter 11 proceedings as foreign non-main proceedings, noting that the primary difference between assistance granted for foreign non-main rather than main proceedings was not one of scope, but rather that stays and other orders for non-main proceedings were granted at the discretion of the Court, rather than being automatic upon recognition, as in the case of foreign main proceedings.

The Court declined to restrain the creditor's application to enforce its share charge over shares in the debtor company based on Section 259 of Singapore Companies Act.

In the Court's view, Section 259 preserved the position in liquidation but did not provide any indication or guidance as to whether any similar prohibition should be part of the assistance given to a foreign insolvency representative under the MLCBI. The purpose of restraining the creditor's application would be to prevent any change in control of the debtor company. However, the assistance provided under the MLCBI was intended to ensure the orderly and equitable distribution of assets and to facilitate the process of restructuring, not to protect or preserve a party's position within the debtor company, or to prevent a different view being taken about the direction of the restructuring.

The Court also found that the MLCBI did not permit it to appoint another person to replace the foreign representative, as the appointment of the foreign representative was a matter to be determined by the foreign proceeding.

Case 1860: MLCBI Preamble; 2(a); 17(1)(a)
United Kingdom: High Court of Justice, Business and Property Courts of England and Wales, Insolvency and Companies List (ChD)
Case No. CR-2019-002136
In the Matter of the Cross-Border Insolvency Regulations 2006 and in the Matter of Sturgeon Central Asia Balanced Fund Ltd (in liquidation)
27 January 2020
Published: [2020] EWHC 123 (Ch)
Original in English

Abstract prepared by Irit Mevorach, National Correspondent

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

The applicant, a former director of a Bermudan registered investment fund (the "Company"), applied for a termination of an order previously granted by the High Court recognizing the Company's winding up proceedings in Bermuda as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006 (the "CBIR") (enacting the MLCBI in Great Britain) (see CLOUT case 1819).

In this review procedure, the Court had to determine whether the winding up proceedings in Bermuda could qualify as a foreign proceeding under article 2(a) MLCBI, considering that it was not questioned that the company was solvent at the time of the procedure. To do so, the Court traced the drafting history of this provision through the various documents produced by UNCITRAL in the course of and following the adoption of the MLCBI, notably the Working Group reports, Guides to Enactment (1997 and 2014, the 2014 Guide to Enactment and Interpretation being considered as an important tool to interpretation of the MLCBI), the Judicial Perspective and the Legislative Guide on Insolvency Law. Against that background, the Court concluded that it would be contrary to the purpose of the MLCBI to interpret foreign proceedings to include solvent foreign debtors. The words "for the purpose" in article 2(a) should be read as meaning for the purpose of insolvency or severe financial distress (see para. 116). Regarding suggestions that such restrictive interpretation of the text would require every receiving court to make an assessment of the insolvency status, the judge answered that the majority of cases would be obvious (see para. 122).

Therefore, the Court found that the winding up proceedings of the solvent company in Bermuda could not be recognized as a foreign proceeding in Great Britain and terminated the recognition order previously granted.

Case 1861: MLCBI 20; 21; 25; 27
United States: Bankruptcy Court for the Southern District of New York
Case No. 18-12104
In re Agrokor d.d.
24 October 2018
Published: 591 B.R. 163 (Bankr. S.D.N.Y. 2018)
Original in English

Abstract prepared by John Pottow, National Correspondent, and Allan Gropper

[**Keywords:** *assistance-additional; comity; creditors-protection; recognition*]

The Agrokor Group, composed of 77 Croatia-based entities, commenced a proceeding under the Law on the Extraordinary Administrative Proceedings in Companies of Systemic Importance for the Republic of Croatia. This was legislation adopted in Croatia to protect "the sustainability of operations of companies of systemic importance to the Republic of Croatia," applicable generally to all such companies and to members of a group that operated outside of Croatia if the group had a principal place of business in Croatia and existed under Croatian law. The proceeding resulted in a settlement agreement providing for a restructuring of the debt, including debt governed by New York law and unsecured debt governed by English law. That settlement agreement was approved by the requisite vote of creditors and the decision of the High Commercial Court on 26 October 2018.

The Bankruptcy Court for the Southern District of New York had previously recognized the Croatian Foreign Representative as the "foreign representative" of the companies and the Croatian proceedings as foreign main proceedings under Chapter 15 of the U.S. Bankruptcy Code, enacting in substance the MLCBI.

Thereafter, recognition and enforcement within the "territorial jurisdiction of the United States" was sought under Chapter 15 for the Croatian court order approving the settlement agreement. The U.S. court (the "Court") held that recognition and

enforcement was appropriate discretionary relief under the U.S. version of article 21 MLCBI and appropriate "additional assistance" under the U.S. version of article 7 MLCBI. To determine the matter, the Court mainly examined the appropriateness of extending comity to the foreign court approval of the settlement agreement. In its conclusion, the Court was satisfied that: (i) the creditors were fairly accorded due process; (ii) the settlement agreement reflected recognized principles embedded in insolvency laws generally and in the U.S. Bankruptcy Code; and (iii) creditors had indeed approved the settlement agreement. For these reasons, and absent any objections to the recognition of the settlement agreement, the Court extended comity to the Croatian court order.

In its decision, the Court also considered the effect of the *Gibbs* rule,[1] which was subject to challenge in the English courts but still good law there. Under the *Gibbs* rule, the English courts would presumably refuse to enforce the Agrokor settlement agreement in England with respect to non-consenting creditors holding English law governed debt (apparently about 64% of the group's debt). The Court found that it was an appropriate exercise of comity to decide that the settlement agreement should be enforced within the jurisdiction of the United States, notwithstanding the fact that its provisions could modify English law governed debt in the United States contrary to the position of the English courts. The U.S. court notably highlighted the incompatibility of the *Gibbs* rule with the principle of modified universalism embedded in the MLCBI and as consistently applied by courts in the US. The Court noted that English courts were free to follow the *Gibbs* rule but that it did not bind a US court, especially as: "Allowing creditors with claims governed by English law to recover a greater percentage of their claims than creditors with claims governed, for example, by New York law, would violate the fundamental principle of equality of distribution." The Court took note of a decision of the Singapore High Court, which also refused to follow the *Gibbs* rule (*Pacific Andes Resources Development Ltd.,* [2016] SGHC 210).

Case 1862: MLCBI 21; 22
United States: Bankruptcy Court, District of Delaware
Case No. 15-12048 (LSS)
In re Energy Coal S.P.A.
2 January 2018
Published:582 B.R. 619 (Bankr. D. Del. 2018)
Original in English

Abstract prepared by John Pottow, National Correspondent, and Allan Gropper

[**Keywords:** *comity, creditors-protection, foreign main proceeding, relief-injunctive, scope-MLCBI*]

After a U.S. bankruptcy court had recognized an Italian *Concordato Preventivo* proceeding as a foreign main proceeding under Chapter 15 of the U.S. Bankruptcy Code (enacting the MLCBI), the Italian foreign representative sought recognition of both a composition order and plan that had been entered by a Genova Bankruptcy Court (the "homologation order") and of a permanent injunction that would have the effect of preventing creditors from proceeding against the debtor company (the "Company") or its assets in the United States in a manner contrary to the plan. Any creditors would instead be required under these orders to file their claims under the restructuring plan in the foreign main proceeding in Italy. The foreign representative argued that such relief is among that enumerated in Section 1521(a)(7) of Chapter 15 (enacting article 21(1)(g) MLCBI), which authorizes the Court to grant any additional relief that may be available to a trustee (except for a few exceptions listed in Section 1521(a)(7)).

[1] See *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

Certain U.S. creditors who had been hired as independent contractors by the Company objected to the requested injunction on the basis that the forum-selection clause in their contracts with the Company provided that litigation must be filed in the state of Florida and that the contracts were governed by Florida law. Those creditors argued that therefore they should be excepted from the order's requirement of filing and liquidating their claims in Italy.

The Court noted that if a choice of law provision in a contract could override the comity afforded to foreign main proceedings, this could result in companies facing litigation in all fora identified in the debtor's contracts. This outcome was not be mandated by law, nor appropriate or sensible, according to the Court. The Court reasoned that just as foreign creditors are required by U.S. bankruptcy courts to file and litigate their claims in U.S. courts, U.S. creditors can likewise be expected to file and litigate their claims in a foreign main bankruptcy case, notwithstanding the terms of their contracts. On the particular facts of this case, the Court also found that the foreign representative had eventually agreed to allow the U.S. creditors to liquidate their claims in the United States, on the condition that they seek distribution in Italy, and that this procedure struck an appropriate balance between creditor and debtor interests. The relief requested was consistent with the public policy of the United States and would not cause hardship to the creditors that would not be outweighed by the benefits of granting the relief. The Court accordingly concluded that it was appropriate to recognize the homologation order and grant the injunction.

Case 1863: MLCBI 2(b); 16(3)
United States: Bankruptcy Court Southern District of New York
Case No. 17-10736 (MG)
In re Ocean Rig UDW Inc.
24 August 2017
Published: 570 B.R. 687 (2017)
Original in English

Abstract prepared by John Pottow, National Correspondent, and Allan Gropper

[**Keywords:** *Centre of main interests (COMI), centre of main interests (COMI)-movement of, centre of main interests (COMI) - bad faith, foreign main proceeding*]

Recognition of Cayman restructuring proceedings as foreign main or non-main proceeding was sought under Chapter 15 of the U.S. Bankruptcy Code (enacting the MLCBI). The debtor, a corporate group operating offshore oil drilling rigs, had migrated from the Republic of the Marshall Islands (the "RMI") to the Cayman Islands in April 2016, where it was registered on the date of the Chapter 15 petition. The debtor had taken steps to move its centre of main interests (COMI) to the Cayman Islands to make use of that State's statute and procedures permitting restructuring of financial debt, which had no analogue in the RMI. The Court had to determine whether the Cayman restructuring should be recognized as a foreign main or non-main proceeding, considering the recent shift of the debtor's COMI. The Court held that regardless of COMI, a foreign proceeding may not be recognized in the United States if the petition is brought in bad faith, which may be revealed by an inappropriate shift in COMI. As stated by the judge, "More than good intentions are required before a U.S. bankruptcy court can recognize a foreign proceeding as either a foreign main or foreign non-main proceeding."

In this case, the Court found that the debtor's registration in the Cayman Islands and additional factors clearly supported locating its COMI in the Cayman Islands at the time of the Chapter 15 petition. Among other things, the debtor conducted significant management operations and held board meetings in the Cayman Islands, a significant number of its officers resided and had bank accounts in the Cayman Islands, and a significant number of its books and records were held there. No evidence pointed towards the RMI as COMI, as operations were never conducted from there, nor did directors reside there or were meetings held in the RMI.

Regarding bad faith, the Court noted that the debtor's decision to change its COMI to the Cayman Islands to commence restructuring proceedings, which had not been possible in the RMI, had not been taken in bad faith. There was no evidence pointing to any insider exploitation, untoward manipulation and overt thwarting of third-party expectations that would support denying recognition.[2] The Court was satisfied that other requirements for recognition were met and accordingly found that it was appropriate to grant recognition of the restructuring proceedings in the Cayman Islands as a foreign main proceeding. [A subsequent appeal by a shareholder was dismissed.[3]]

Case 1864: MLCBI 17(2); 17(4); 20
United States: Bankruptcy Court for the Southern District of New York
Case No. 17-11888; 16-11794; 16-11791
In re Oi Brasil Holdings Coöperatief U.A.
4 December 2017
Published: 578 B.R. 169 (Bankr. S.D.N.Y. 2017)
Original in English

Abstract prepared by John Pottow, National Correspondent, and Allan Gropper

[**Keywords**: *centre of main interests (COMI); comity; enterprise group; foreign main proceeding; recognition-modification*]

A Brazilian telecommunication group of companies ("the Group") had initiated bankruptcy proceedings in Brazil and obtained recognition in the United States as foreign main proceedings under Chapter 15 of the U.S. Bankruptcy Code (enacting the MLCBI). The recognized Brazilian cases included a proceeding in Brazil filed by a special purpose finance subsidiary incorporated in the Netherlands. This company was later placed into competing insolvency proceedings in the Netherlands. The insolvency representative in charge of the proceeding in the Netherlands brought a petition before the U.S. Court for revocation of the prior recognition of the Brazilian case and recognition of the Dutch proceeding as a foreign main proceeding under Chapter 15. The Dutch foreign representative claimed that the Court should conduct a *de novo* examination of the competing claims of the two proceedings based on Section 1517(a) of the Bankruptcy Code (enacting article 17(1) MLCBI). The Court instead found that the standards in Section 1517(d) applied (article 17(4) MLCBI, on modification and termination of recognition), as that section provided the proper basis for deciding a request to terminate or modify a prior recognition order.

The Court concluded that the two prongs of Section 1517(d) had not been satisfied based on the evidence, namely, whether: (i) the basis for the previous recognition order was flawed, or (ii) there had been a material change since the order of recognition. Regarding the latter, the foreign representative's argument that the COMI had shifted was rejected by the Court as the actions relied on (for example, the conversion from Dutch suspension of payments to bankruptcy liquidation proceedings) were not deemed sufficiently significant or material given that there was little change to the economic reality. Furthermore, the Dutch entity played a limited role in the operations of the Group. Thus, the Court, in an exercise of discretion, determined that Brazil remained the appropriate COMI given that the Dutch finance subsidiary was a special purpose vehicle that only engaged in activities supporting the financing needs of the Brazilian "nerve centre''. The Brazilian case had been properly recognized as a foreign main proceeding, and there was no need to modify that order.[4]

In coming to its decision, the Court made reference to provisions of the then-draft UNCITRAL Model Law on Enterprise Group Insolvency (2019), in particular to its

[2] Quoting *In re Fairfield Sentry Ltd.,* 440 B.R. 60 (Bankr. S.D.N.Y. 2010), at 65–66.
[3] In *In re Ocean Rig Udw Inc.,* 585 B.R. 31 (S.D.N.Y. 2018).
[4] A motion for reconsideration was denied (see 582 B.R. 352, Bankr. S.D.N.Y. 2018).

definitions of “enterprise” and “enterprise group”, as well as to the objectives in its preamble and specific provisions on types of cooperation available.

Case 1865: MLCBI 1(1)
United States: Second Circuit Court of Appeals
Case No. 14-975-cv
Trikona Advisers Ltd. v. Chugh
18 January 2017
Published: 846 F.3d 22 (2d Cir. 2017)
Original in English

Abstract prepared by John Pottow, National Correspondent, and Allan Gropper

[**Keywords:** *international obligations, recognition, purpose-MLCBI, scope-MLCBI*]

An investment advisory company had brought an action in the United States seeking damages for alleged breach of fiduciary duty against a former director of a corporation that had been wound up by the Grand Court of the Cayman Islands. The first instance court held that the substance of the claims had previously been dismissed during the course of the winding up proceeding in the Cayman Islands, and that the advisory company was therefore precluded (by principles of res judicata) from asserting those claims again. The advisory company appealed against this judgement, arguing, among other things, that the lower court was prohibited from finding the Cayman Islands’ insolvency proceedings preclusive, because no petition for recognition of those proceedings had ever been brought under Chapter 15 of the U.S. Bankruptcy Code (enacting the MLCBI), and Chapter 15 is the exclusive manner for enforcing foreign insolvency orders.

The Court of Appeals rejected this argument. While acknowledging that a bankruptcy court in the United States must usually enter an order of recognition under Chapter 15 before a foreign representative may obtain relief in U.S. courts, Chapter 15 simply did not apply as this case fell outside the scope outlined in article 1(1) MLCBI. The Court noted that the MLCBI had a limited purpose to provide for the coordination of domestic and foreign insolvency proceedings and to allow foreign representatives to seek recognition of those proceedings as a means of requesting assistance in administering the foreign case. The action for breach of fiduciary duty was a distinct proceeding not brought by a foreign representative and thus fell outside the scope of a traditional Chapter 15 petition. Furthermore, the inapplicability of Chapter 15 in no way prevented the application of traditional principles of res judicata to a foreign judgment (insolvency-related or otherwise).