United Nations A/CN.9/SER.C/ABSTRACTS/224

General Assembly

Distr.: General
23 June 2023

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

Contents

V.23-12101 (E) 120723 130723

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 at: 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.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

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

1. Case 2063: MLCBI 2(a); 2(b); 17(2)(a); 21

Federal Court of Australia
Case No. QUD 45 of 2022
Kellow, in the matter of Advanced Building & Construction Limited (in liq) v. Advanced Building & Construction Limited (in liq) (No 2)
19 April 2022
Original in English
Published [2022] FCA 781
Available at: http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2022/781.html

Abstract prepared by Stewart Maiden KC, National Correspondent

[**Keywords:** *centre of main interests (COMI)-timing; foreign proceeding; foreign main proceeding; purpose-MLCBI*]

A New Zealand company had been placed first in administration by a secured creditor, and then into a voluntary liquidation proceeding, in New Zealand. The liquidators applied for recognition of the New Zealand liquidation proceeding as a foreign main proceeding in Australia, under article 17 of the UNCITRAL Model Law on Cross-Border Insolvency (the "MLCBI"), which has force in Australia pursuant to section 6 of Australia's Cross-border Insolvency Act 2008. Among other relief sought, the liquidators wished to publicly examine the directors of the company, who resided in Australia, in order to conduct proper investigations into the affairs of the company.

The Federal Court of Australia (the "Court") noted that the manner in which the company commenced its insolvency and the manner in which it was continuing caused some concern. Nevertheless, despite some slight reservation and with reference to the relevant United States of America case law,[1] the Court found that the New Zealand proceeding fell within the definition of a "foreign proceeding" under article 2(a) MLCBI, because: (a) it was an administrative proceeding for the purposes of liquidation; and (b) the liquidators conducting it were subject to the control or supervision of the courts.

The Court held that the liquidation was a "foreign main proceeding" within the meaning of article 2(b) and article 17(2)(a) MLCBI, because all relevant factors suggested that the company's centre of main interests (COMI) was in New Zealand: (a) its registered office was in New Zealand; (b) its operations were conducted in New Zealand; (c) its two main customers were New Zealand government departments for whom the company constructed social housing and teaching buildings; (d) its principal last known place of business at the time it went into voluntary administration was in New Zealand; (e) the email addresses of its creditors indicated that the creditors were generally located in New Zealand or had a presence there; and (f) although the directors of the company were residing in Australia, since the appointment of the liquidators in their capacity as administrators in 2020, they were in control of the company with the result that the company's controlling mind had remained located in New Zealand.

Noting that, for the case at hand, it was sufficient to proceed on the basis of the proposition that the COMI had to be established by reference to the state of affairs at the time the court was considering the application for recognition, the Court recalled an earlier concern about whether that proposition fully reflected the state of the law.

Finding that all other MLCBI requirements for recognition of a foreign proceeding and foreign representatives had been fulfilled and there were no public policy considerations preventing the recognition, the Court granted recognition of the New Zealand liquidation proceeding as foreign main proceeding and recognized the liquidators as foreign representatives entrusting them, under articles 21(1) (d) and (g)

[1] *Re ABC Learning Centres Limited (2010)* 445 BR 381, upheld on appeal *ABC Learning Centres Limited (In re)* 728 F (3d) 301 (3d Circuit, 27 August 2013), CLOUT case 1338.

of MLCBI, with: (a) the administration, realization and distribution of the defendant's assets located in Australia; (b) the power to examine witnesses, take evidence and obtain delivery of information; and (c) other powers normally available to a liquidator under Australian law. In addition, also under article 21 of MLCBI, the Court ordered a stay and suspension of the commencement, continuation or enforcement of all actions and proceedings against the company and the enforcement or execution of any judgment against it as well as a stay and suspension of any transfer, encumbrance or other disposal of the company's property, to the same extent as if such a stay or suspension arose under a liquidation of the company under the domestic law.

The Court waived the obligation to notify the company of the recognition decision because the company was already under control of the foreign representatives. It emphasized the need to notify those most affected by the recognition decision, i.e. the directors residing in Australia, in the same way by which the orders concerning the proceedings were notified to them – by pre-paid post and by electronic mail.

2. Case 2064: MLCBI 2(a); 2 (c); 6; 15; 17; 19; 22(1)

Philippines: Regional Trial Court, National Capital Judicial Region, Branch CX1 (111), Pasay City, Special Commercial Court
Case No. 21-01799-SP
Philippine Airlines, Inc.
22 October 2021[2]
Original in English

[**Keywords:** *creditors; creditors-protection; foreign non-main proceeding; notification; notification-obligation to disclose; notification-recipients; public policy; recognition-application for; relief-provisional*]

The debtor, incorporated and with its principal office in the Philippines, had commenced voluntary reorganization proceedings in the United States (the "US proceeding"). On 24 September 2021, the foreign representative filed an application for recognition of the US proceeding and for provisional relief in the Philippines pursuant to Rule 5 of the Financial Rehabilitation Rules of Procedure (the "FR Rules"), enacting the MLCBI in the Philippines.

Having established the urgent need to protect the assets of the debtor as well as the interests of the creditors in the Philippines and that there were prima facie elements showing that the recognition petition was meritorious, the court in the Philippines (the "Court") granted the petitioner's application for provisional relief on 5 October 2021, pursuant to Section 11, FR Rule 5 (enacting article 19 MLCBI).

Subsequently, the Court considered procedural and substantial requirements for granting recognition. In establishing that the US proceeding was a foreign proceeding, the Court confirmed that the voluntary petition for relief in the US was a judicial proceeding in the US pursuant to Chapter 11 of the US Bankruptcy Code and that assets and affairs of the debtor were subject to control or supervision by the UnitedStates court for the purpose of reorganization. In confirming that no ground existed to refuse recognition under the applicable rules on public policy, the Court established that the Philippine public policy on collective and realistic resolution and adjustment of competing claims and property rights as well as the safeguards for a timely, transparent, effective and efficient rehabilitation of debtors was achieved. In confirming that no other grounds existed to refuse recognition, the Court inter alia established that the protection of Philippine-based creditors, the convenience in pursuing their claims in the US proceeding, the just treatment of all creditors through resort to a unified reorganization proceedings and the extent that the US proceeding recognized the rights of creditors and other interested parties in a manner substantially in accordance with the manner prescribed in Rule 5 of the FR Rules, had been

[2] The Court noted that, considering that the petitioner's witnesses were non-resident foreign nationals and due to time constraints as well as existing travel restrictions brought about by the coronavirus disease (COVID-19) pandemic, the petitioner was allowed to present his witnesses through videoconference.

substantially established. Specifically, as related to establishing reciprocity, the Court considered factors, such as the enactment of MLCBI in both the Philippines and the United States, the absence in United States laws of a reciprocity requirement for extending recognition or granting relief to a foreign proceeding and a previous case when a United States court granted a relief to a Philippines proceeding.

After establishing that the petition adequately met all procedural and substantial requirements under Sections 5 and 8 FR Rule 5 (enacting articles 15 and 17 MLCBI), and no ground existed to refuse recognition under the rules on public policy and reciprocity in Section 4, FR Rule 5 (enacting article 6 MLCBI in part related to public policy), the Court: (a) recognized the US proceeding as a foreign non-main proceeding; (b) gave force and effect to that proceeding and any and all court orders issued or that might be issued by the United States court in connection with the US proceeding; and (c) recognized the petitioner as the foreign representative with the right to participate through counsel in any proceedings involving the debtor filed under FR Rules. This was done without affecting the right of Philippine creditors to commence or continue domestic proceedings under the FR Rules or the right to file or continue their claims in such proceedings. The Court directed the petitioner through counsel to comply with notification and publication requirements under Sections 10 and 12 of the FR Rules (Section 10 enacting article 18 MLCBI), in addition to responding to any query, claim or manifestation from any creditor, claimant or other interested persons concerning the US proceeding and notifying such creditor, claimant or other interested person of the pendency and status of the U.S. proceeding as well as relevant orders issued by the United States court.

3. Case 2065: MLCBI 1(2)

Romania: Bucharest Court, VII Civil Section
Case No. 3220/25.05.2018[3]
25 May 2018
Original in Romanian

Abstract prepared by Nicoleta Mirela Nastasie

[**Keywords:** *debtor; scope-MLCBI*]

The petitioner was an insurance company registered in New Zealand in respect of which the New Zealand High Court of Justice ordered the appointment of a provisional judicial liquidator, in order to administer an insolvency procedure. The provisional liquidator sought recognition in Romania of the New Zealand order as a foreign main proceeding, under chapter II of title III of Romanian Law No. 85/2014 (enacting MLCBI in Romania). The request for recognition was opposed on the basis that: (a) insurance companies were excluded from the recognition procedure under article 274 para. 2 of Law No. 85/2014 (enacting article 1(2) MLCBI); (b) there was no foreign insolvency proceeding in the sense of Law No. 85/2014 since there was no final decision of the New Zealand court to open an insolvency proceeding with respect to the debtor; and (c) the condition of reciprocity was not fulfilled.

The Bucharest court (the "Court") qualified the invoked arguments as substantive defences rather than procedural matters that would have rendered the substantive settlement of the case unnecessary. The Court, agreeing with (a) above, did not consider it necessary to address (b) and (c). For (a) above, the Court confirmed that the Romanian legal framework that regulated cross-border insolvency recognition and other relations with non-EU countries on insolvency matters did not apply to insolvency proceedings that were subject to a special insolvency regime under domestic law, such as for insolvencies of insurance companies. It did not agree with the petitioner's argument that those special insolvency regimes ought to regulate

[3] The appeal of this decision was unsuccessful. The Bucharest Court of Appeal-Civil Section VI confirmed the decision of the Court (civil decision no. 2269A, file no. 13682/3/2018, 15 November 2018).

cross-border recognition of insolvency proceedings with respect to excluded entities, such as insurance companies, headquartered in foreign countries.

4. Case 2066: MLCBI 2(b) (f); 16(3); Guide to Enactment and Interpretation

Romania: Bucharest Court, VII Civil Section
Case No. 8767/3/2019 (36638/3/2018)
6 June 2019
Original in Romanian

Abstract prepared by Nicoleta Mirela Nastasie

[**Keywords:** *centre of main interests (COMI); COMI-determination; establishment; interpretation; presumption-COMI*]

The debtor, a joint-stock company incorporated in Italy, with a branch in Romania, had commenced reorganization proceedings in Italy. In the meantime, a group of Romanian creditors requested the commencement in Romania of insolvency proceedings with respect to the debtor. The debtor objected. Noting from the outset that Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "EIR recast") applied to the case, the Bucharest court (the "Court") in order to decide which insolvency proceedings to open in Romania with respect to the debtor, had to ascertain the location of the centre of the debtor's main interests (the "COMI")[4] and whether the debtor had an "establishment"[5] in Romania. Among materials relied upon for such purpose,[6] the Court used MLCBI and its Guide to Enactment and Interpretation.

The Court established that the debtor's COMI was in Italy because the presumption of the location of COMI at the place of the registered office of the debtor was not rebutted. The Court stated that: (a) the presence of customers in Romania did not in itself establish COMI in that jurisdiction, having no relevance in comparison to the location of all the company's creditors, assets, and effective management; (b) although it was true that the debtor company had creditors in Romania, there was no evidence that the Romanian creditors represented most of creditors; (c) the creditors in Romania with claims resulting from labour relations, by the volume of all claims and responsibilities, was not a major factor establishing COMI; (d) the centre of operations in Romania was only a part of the activity of the company of an international character; and (e) the contracts concluded and steps taken in the execution of contractual obligations indicated that at least some of the Romanian contractors had the expectation that they were dealing with a company with a strong link to Italy. The Court ruled that the debtor's COMI was not located in Romania and that fact excluded the general jurisdiction of the Romanian courts to open the main insolvency proceeding with respect to the debtor in Romania.

Turning to the question of whether the debtor had an establishment in Romania, the Court noted that whether an economic activity was non-transitory depended on the duration, frequency, and nature of the activity. Noting that the interaction with external third parties was required to prove an establishment and that the activities of the corporate debtor must have a perceptible effect on the local market, the Court established that the debtor offered *"goods or services"* on the publicly known Romanian market and those activities were clearly of an economic nature and were carried out through persons designated as representatives by the debtor's management in Italy, and those persons regularly managed and conducted business operations with several Romanian creditors. The Court found that the debtor's business in Romania was not transitory because it had the character of a constant business activity corresponding to the nature and type of activity that the debtor carried out

[4] In the meaning of article 3(1) of the EIR recast, a concept also found in articles 2(b), 16(3) and 17(2)(a) MLCBI.
[5] In the meaning of article 2(10) of the EIR recast, a concept also found in article 2(f) MLBCI.
[6] The Court referred *inter alia* to *Eurofood IFSC Ltd (Re)* [2006] Ch 508 (ECJ); *Interedil Srl* [2011] EUECJ C-396/09, [2012] Bus LR 1582; and *Videology Ltd (Re)* [2018] EWHC 2186 (Ch) (16 August 2018), CLOUT case 1823 as well as to other MLCBI related case law.

internationally. Considering those facts, the Court concluded that the debtor had an establishment in Romania and dismissed the objection of inadmissibility of the applications for the opening of secondary insolvency proceedings against the debtor in Romania.

5. Case 2067: MLCBI 2; 17(1)(a)

Serbia: Commercial Court of Belgrade
Case No. St. 157/2017
Agrokor
28 August 2017
Original in Serbian

Abstract prepared by Marko Radović

[**Keywords**: *enterprise group; foreign proceeding; recognition*]

The Commercial Court of Belgrade (the "Court") considered a request for recognition of foreign main proceeding of extraordinary administration proceedings commenced in Croatia with respect to the debtor and its subsidiary companies (the Croatian proceeding).[7] The Court noted that the Law on the Extraordinary Administrative Proceedings in Companies of Systemic Importance for the Republic of Croatia[8] was applied in Croatia to the Croatian proceeding and that that law was different from the Bankruptcy Act of Croatia aimed at the collective settlement of creditors' claims by realizing assets and distributing them to creditors.

The Court applied the criteria for recognition of a foreign proceeding found in articles 174(2) and 183 of the Law on Bankruptcy of Serbia (enacting articles 2(a) and 17(1)(a) MLCBI respectively), namely that a proceeding in a foreign State must be: (a) a judicial or administrative proceeding pursuant to a law relating to insolvency; and (b) conducted with the aim of collective settlement of creditors through reorganization, bankruptcy, or liquidation. The Court found that the Croatian proceeding did not meet those criteria because: (a) the Croatian proceeding was carried out over the debtor's subsidiary companies that were not insolvent; and (b) the Croatian proceeding was not a proceeding aiming at the collective settlement of financial difficulties of the debtor since the goal of that proceeding was mainly to protect the national interests of the Republic of Croatia by ensuring sustainability of the debtor as a company of systematic importance for the Republic of Croatia.

In the light of the foregoing considerations, the Court dismissed the request for recognition of the Croatian proceeding.[9]

[7] See CLOUT cases 1798 and 1861 for United Kingdom of Great Britain and Northern Ireland and United States recognition of the Croatian proceeding related to the same debtor.

[8] Applicable to all companies of systemic importance to the Republic of Croatia 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 the Croatian law.

[9] The decision was upheld upon appeal (Belgrade Commercial Appellate Court, 25 October 2017, case No. Pvž. 396/2017).

6. Case 2068: MLCBI 2(a); 2(b); 6; 16(3); 17(2)(a); 21(1)(g); 22

Singapore: General Division of the High Court
Case No. 246, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267 and 268 of 2022
Re Rams Challenge Shipping Pte Ltd and other matters
15 September 2022
Published: [2022] SGHC 220
Original in English

Abstract prepared by Sim Kwan Kiat, National Correspondent

[**Keywords**: *centre of main interests (COMI); creditors-protection; presumption-COMI; public policy; recognition*]

A number of companies, incorporated in Singapore as a single purpose vehicle to own a vessel as part of the group business, were placed under corporate reorganization proceedings in Japan. Pursuant to Section 252 of the Insolvency, Restructuring and Dissolution Act ("Act 40 of 2018") enacting MLCBI in Singapore, the Japanese trustee applied in Singapore for recognition of the Japanese proceedings as foreign main proceedings under articles 2(b) (article 2(f) of the Singaporean enactment of MLCBI) and 17(2)(a) of MLCBI, as well as for recognition under article 21(1)(g) of MLCBI of certain orders made by the Japanese court. Such orders included orders confirming the reorganization plans for the companies and orders assessing the claims of two creditors against the companies.

The High Court (the "Court") determined that the requirements for recognition of the Japanese proceedings under article 17(1) of MLCBI were met and that the Japanese proceedings were foreign main proceedings under article 17(2)(a) MLCBI. The Court found that the companies, though incorporated in Singapore, had no employees, and were essentially run from Japan. They were one-vessel companies whose only commercial activity was in the form of charterparties negotiated and concluded on their behalf by their Japanese incorporated parent company with a major Japanese shipping company. As all their commercial activities were in Japan, the presumptive COMI of the companies was displaced in favour of Japan pursuant to article 16(3) MLCBI.

The Court then turned to the scope of the recognition to be granted. With reference to *Re Tantleff*, *Alan*[10] (see CLOUT case 2069), the Court confirmed that recognition under MLCBI went beyond recognition of the Japanese Proceedings and might extend to the recognition of the Japanese Orders. Noting a different nature of the Japanese Proceedings from the United States Chapter 11 proceedings dealt with in *Re Tantleff*, *Alan* and from the Singapore moratoria regime but also similarities of the Japanese Proceedings with the Singapore judicial management regime, the Court stated that for recognition of foreign orders, a strictly analogy or parallel with Singapore insolvency or restructuring regimes was not necessary. Nevertheless, the Court noted that the foreign order should not operate substantially outside what might properly be regarded as the proper purview of an insolvency or restructuring effort, though the modalities and detailed scope might differ amongst jurisdictions and would need to be examined on a case-by-case basis. While public policy considerations might come into play, in most instances, the main consideration would be the opportunity for creditors to participate or be heard in the process.

In granting relief under article 21(1)(g), the Court was satisfied that sufficient assurance was given of that the claims of the two creditors against the companies were represented by counsel and participated fully in the Japanese proceedings. The Court specified that any expatriation of funds would require leave of court.

[10] [2022] SGHC 147.

7. Case 2069: MLCBI 2; 17; 21; 22

Singapore: General Division of the High Court
Case No.: Originating Summons No. 203 of 2022
Re Tantleff, Alan
24 June 2022
Published: [2022] SGHC 147
Original in English

Abstract prepared by Sim Kwan Kiat, National Correspondent

[**Keywords**: *centre of main interests (COMI)-determination, creditors-protection, debtor, foreign proceeding, foreign main proceeding, foreign representative, foreign representative-authorization, interpretation, presumption-centre of main interests (COMI), recognition, relief-upon request scope-MLCBI, standing*]

The debtors (a publicly held real estate investment trust in Singapore (REIT), and two Singapore incorporated subsidiaries) commenced the Chapter 11 proceedings in the United States. Pursuant to s 252 of the Insolvency, Restructuring and Dissolution Act ("Act 40 of 2018") enacting MLCBI in Singapore, the applicant, the United States appointed liquidating trustee, applied for recognition in Singapore of (a) the United States Chapter 11 proceedings together with (b) the Chapter 11 Plan and Confirmation Order, including as regards dissolution of the Singapore Chapter 11 entities. With respect to (a), the applicant petitioned for recognition of the United States proceedings as foreign main proceedings or alternatively as foreign non-main proceedings under MLCBI or under common law. With respect to (b), the applicant requested recognition of the Plan and the Order as a "foreign proceeding" under article 2(a) of MLCBI (article 2(h) of the Singaporean enactment of MLCBI) or, alternatively, as a form of additional relief under article 21(1)(g) of MLCBI, or under common law.

The High Court (the "Court") established that no recognition under MLCBI could be granted with respect to REIT because the MLCBI, as enacted in Singapore, applied only to corporate entities[11] while REIT was a trust, not a "corporate entity", under applicable Singaporean law and, consequently, was not a "debtor" under the MLCBI as enacted in Singapore. Acknowledging that that approach deviated from the position of the United Kingdom court that ruled that the MLCBI could apply to business trusts [12], the Court recalled the 1997 and 2013 Guides to Enactment (and Interpretation) of the MLCBI and in that context also *Re Zetta Jet (No.2)* stating that "where the UNCITRAL 1997 Guide is silent, the court may consider the UNCITRAL 2013 Guide but the UNCITRAL 1997 Guide prevails in the event of conflict."[13] The Court found that neither Guide contained any mention that MLCBI was intended to apply to business trusts while, within the 2013 Guide (para. 57), it was provided that an enacting State retained the sovereignty to decide which entities to exclude from the scope of application of MLCBI. It appeared to the Court that Singapore decided to exclude business trusts from the scope of MLCBI.

Consequently, the Court applied the MLCBI recognition regime only to the two Singapore incorporated subsidiaries, noting that, where the MLCBI recognition regime applied, common law recognition would not be available. The Court was persuaded that the United States proceedings with respect to those entities were "foreign proceedings" and that the other requirements of article 17 of MLCBI for the recognition of those proceedings in Singapore were fulfilled. With reference to the requirements for the determination of the COMI,[14] the Court considered the location of the COMI of those two entities in order to decide whether their Chapter 11 proceedings should be recognized as foreign main or non-main proceedings.

[11] Unlike the MLCBI enacted in other jurisdictions, such as the United States, which appeared including a business trust within its scope.
[12] *Rubin & Anor v Eurofinance SA and others* [2010] 1 All ER (Comm) 81, at [40] and [42].
[13] *Zetta Jet Pte Ltd and Others (Re)* [2019] 4 SLR 1343 at [37], CLOUT case 1816 (*Zetta Jet* (No.2)).
[14] Ibid., at [29], [31], [76], [80], [83], [85]; and *Re Rooftop Group International Pte Ltd and another* [2020] 4 SLR 680, at [12] and [15].

Disagreeing with the United States case law[15] indicating that the location of ongoing foreign proceedings and the foreign representative's activities were relevant for determining the COMI,[16] the Court, having considered other factors,[17] established that the presumptive COMI at the place of registration[18] – Singapore – was displaced given that the operations, assets and larger creditors of the two Singapore incorporated subsidiaries were in the United States, and the United States law governed their various agreements. Accordingly, the Court recognized the United States proceedings with respect to those entities as foreign main proceedings within meaning of article 2(b) and pursuant to article 17(2)(a) of MLCBI.

The Court then considered whether the Chapter 11 Plan and Confirmation Order could be recognized as a "foreign proceeding" under article 2(a) of MLCBI (article 2(h) of the Singaporean enactment of MLCBI) or as a form of additional relief under article 21(1)(g) of MLCBI. The Court opted for the latter approach as more orthodox, supported by numerous cases. Nevertheless, in passing and while leaving the issue open for further determination, the Court noted that the Chapter 11 Plan and Confirmation Order could fall within the scope of "foreign proceedings" since it appeared that the United States court still retained some jurisdiction over the process under the Chapter 11 Plan, even after the Confirmation Order had been issued. In that context, the Court referred to the 2013 Guide (at para. 75), the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (at p. 8), the case law and other materials that, in the Court's view, supported the interpretation that a "foreign proceeding" under article 2(a) of MLCBI (article 2(h) of the Singaporean enactment of MLCBI) was not restricted to the approval of a plan but could extend to its implementation.

Although acknowledging that the MLCBI did not explicitly provide for the recognition and enforcement of foreign insolvency orders and judgments, the Court, with reference to the 2013 Guide (at paras. 189 and 191), found that the list of reliefs under article 21 was non-exhaustive and the court was not restricted unnecessarily in its ability to grant any type of relief that was required in the circumstances of the case, including by applying foreign law. Having surveyed the United States and United Kingdom positions as regards recognition and enforcement of foreign insolvency-related orders and judgments under MLCBI and noting the difference between them and also in the way article 21(1)(g) of MLCBI was enacted in those jurisdictions and in Singapore, the Court agreed to follow the United States approach, noting the supporting case law and similarities in the enactment of article 21(1)(g) in the United States and Singapore. Having ascertained, with reference to articles 21 and 22 of MLCBI and the 2013 Guide (at para. 196), that the interests of relevant parties were adequately protected, the Court granted recognition of the Chapter 11 Plan and the Confirmation Order under article 21(1)(g).

In addition, with reference to article 2(d) of MLCBI (article 2(i) of the Singaporean enactment of MLCBI) and the 2013 Guide (at para. 86), the Court recognized the applicant as the foreign representative, entrusting him with the administration and realization of all or any part of the property and assets of the Singapore Chapter 11 entities that were located in Singapore and to effectuate and/or implement the Chapter 11 Plan and the Confirmation Order, however only with respect to the Singapore Chapter 11 incorporated entities and on the condition that there should be no expropriation of funds or proceedings to be instituted without obtaining the leave of court. As regards REIT and the applicant's request for authorization to take all

[15] *Morning Mist Holdings Ltd v Krys (In re Fairfield Sentry Ltd)* 714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT case 1339, at [137]–[138]; *In re Oi Brasil Holdings Cooperatief* UA 578 BR 169 (Bankr SDNY, 2017), CLOUT case 1864, at [222] and [223]; *In re British American Isle of Venice (BVI), Lt*d 441, BR 713 (Bankr SD Fla, 2010), at [723].

[16] *Zetta Jet* (No.2), at paras. [101]–[103]. The Court also referred to the UNCITRAL Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (2021) that listed the most important five factors considered by the courts around the world in determining COMI, noting that the work done and activities of the foreign representatives were not among them.

[17] See footnote 12 above.

[18] *Zetta Jet* (No.2), at [29].

appropriate steps to wind down the Singapore Chapter 11 Entities, the Court noted that those issues, being outside the scope of MLCBI and with respect to which the applicant did not have the standing, should be made subject to a separate application, most probably under common law and with the involvement of the REIT's trustee.

8. Case 2070: MLCBI Preamble; 2(a); 2(b); 2(c); 2(f); 16(3); 17(2)(a); 23
United States of America: Bankruptcy Court, Southern District of New York
Case No. 22-10707 (MG)
In re Modern Land (China) Co.
22 July 2022
Original in English
Published *641 B.R. 768 (Bankr. S.D.N.Y. 2022)*

Abstract prepared by Allan Gropper and John Pottow, national correspondents

[**Keywords:** *centre of main interests (COMI); comity; creditors; establishment; foreign main proceeding; foreign non-main proceeding*]

Pursuant to Chapter 15 of the U.S. Bankruptcy Code (enacting MLCBI – hereinafter "the Code"), the foreign representative of a holding company registered in the Cayman Islands and that had issued New York law governed debt applied to the United States Bankruptcy Court (the "Court") for the recognition and implementation of a scheme of arrangement sanctioned by a court in the Cayman Islands that modified or discharged that debt (the "Cayman proceeding" and the "Cayman scheme"). The holding company owned numerous subsidiaries, many of which were incorporated in the Cayman Islands or the British Virgin Islands but whose business was mostly in China. The Court was requested to recognize the Cayman proceedings as foreign main proceedings, or in the alternative as foreign non-main proceedings, and to give effect to the Cayman scheme.

The Court refused to recognize the Cayman proceeding as a foreign non-main proceeding finding that the holding company did not have an "establishment" in the Cayman Islands, as required for recognition of a foreign non-main proceeding. The Court recalled in that context that, under article 23(2) MLCBI, when the foreign proceeding was a foreign non-main proceeding, "the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding." The Court was not persuaded that the debt restructured by the Cayman scheme was an asset located in the Cayman Islands. It referred to the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (para. 90) that stated that "the existence of debts […] would not in principle satisfy the definition of establishment". In addition, citing the relevant case law,[19] the Court found that there was insufficient evidence to support a finding of non-transitory economic activity of the debtor in the Cayman Islands because neither the Cayman proceeding nor the debtor's bookkeeping activities constituted non-transitory economic activity, and the debtor did not otherwise affect the local marketplace in the Cayman Islands. For those reasons, the Court ruled that recognition of the Cayman proceeding as a foreign non-main proceeding would be inconsistent with the stated goals of non-main proceedings and the goals of MLCBI.

Regarding recognition of the Cayman proceedings as foreign main proceeding, the Court first found that there was sufficient judicial involvement in the Cayman proceeding even though joint liquidators were not appointed. The Court then sought to determine the centre of main interests (COMI) of the debtor with reference to the specific scope of the Cayman proceeding. It started with the statutory presumption in Section 1516(c) of Chapter 15 of the Code (enacting article 16(3) MLCBI) that the COMI was the place of registration, in the instant case, the Cayman Islands. Recalling

[19] E.g. *Lavie v. Ran*, CLOUT case 929; *In re Creative Finance Ltd.*, CLOUT case 1624; and *In re Pirogova,* 612 B.R. 475, 484 (SDNY 2020) confirming on appeal *In re Pirogova*, 593 B.R. 402 (Bankr. S.D.N.Y. 2018), CLOUT case 2018.

the applicable case law,[20] the Court found that, in this case, the presumption was not rebutted; on the contrary, the following factors confirmed that the COMI of the debtor was in the Cayman Islands: (a) creditors' expectations based on presentations and activities of the debtor at the time of the issuance of the debt and afterwards (e.g. identification of the debtor itself as a Cayman-incorporated company in press-releases and in official memoranda, the location of the debtors' historical corporate counsel in the Cayman Islands, indication in the offering memoranda that, if needed, the debtor would initiate an insolvency proceeding in the Cayman Islands, and the location of the debtor's restructuring-related activities in the Cayman Islands); (b) active support of creditors to a scheme based on Cayman law once financial difficulties had begun, strong support from creditors to the existing proceedings in the Cayman Islands and the application of Cayman law, and no objection from their side to the recognition of the Cayman proceeding as a foreign main proceeding and of the Cayman scheme in the United States; (c) choice of law principles that supported a finding of COMI in the Caymans Islands (e.g. Cayman law would apply to most disputes over corporate actions that might arise in the Cayman proceeding, despite the debt subject of the Cayman scheme being governed by New York law); and (d) no COMI-shifting or evidence of attempts to deceive the Court or existing creditors by opening insolvency proceedings in the Cayman Islands.

The Court found that recognition of the Cayman proceeding as a foreign main proceeding would be consistent with the objectives of Chapter 15 of the Code (enacting the preamble of the MLCBI). It did not explicitly address other statutory requirements for granting recognition, finding them uncontroversial and satisfied by the uncontested facts.

In addition to recognizing the Cayman proceeding as a foreign main proceeding, the Court recognized and enforced the Cayman scheme. The Court held that debt governed by New York law could be discharged or otherwise modified in a foreign proceeding and that such discharge or modification would be recognized under Chapter 15 of the Code. The Court noted that recognition of a foreign discharge of debt governed by domestic law had been rejected in one MLCBI jurisdiction[21] and had been questioned in a recent opinion in a third jurisdiction.[22] The Court nevertheless held that, provided that the foreign court properly exercised jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court's procedures comported with broadly accepted due process principles, appropriate relief under Chapter 15 of the Code included enforcement of a foreign scheme or a plan that modified or discharged New York law governed debt.

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[20] E.g. *Morning Mist Holdings Ltd v Krys (In re Fairfield Sentry Ltd)* 714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT 1339 *affirming* 458 B.R. 665 (S.D.N.Y. 2011), CLOUT 1316 (second instance) *affirming* 440 B.R. 60 (Bankr. S.D.N.Y. 2010) (first instance), stating inter alia that a debtor's COMI should be determined based on the facts at or around the time the Chapter 15 petition is filed and setting out criteria for such determination; *ABC Learning Centres Limited (In re), affirmed* by 728 F.3d 301 (3d Cir. 2013), CLOUT case 1338, stating inter alia that the COMI presumption may be overcome particularly in the case of a "letter-box" company not carrying out any business; *In re Basis-Yield Alpha Fund* (*Master*), 381 B.R. 37, 51–54 (Bankr. SDNY 2008), stating that the court must make an independent determination of COMI; and *In re SphinX Ltd*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) and *Betcorp Ltd (In re) (in liquidation)* 400 B.R. 266 (Bankr. D. Nev. 2009), CLOUT 927, considering ascertainability of COMI by creditors.

[21] With reference to the discussion at length in *In re Agrokor* (591 B.R. 163, 169 (Bankr. SDNY 2018)), the Court noted that English and some commonwealth courts continued to apply the *Gibbs* rule, based on *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, which refused to recognize a discharge or modification of English law governed debt approved by a court outside of England.

[22] *In the Matter of Rare Earth Magnesieum Technology Group Holdings Limited*, [2022] HKCFI 1686.