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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.

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.

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

Case 2155: MLCBI 21
Republic of Korea: Supreme Court
Case No. 2009 Ma 1600
25 March 2010
Original in Korean

Abstract prepared by Young-Seok Kim

[**Keywords**: *public policy; recognition; relief*]

The debtor's reorganization proceeding had been commenced in the United States of America before the Republic of Korea enacted the MLCBI in 2006. That proceeding had subsequently been recognized in the Republic of Korea under the Debtor Rehabilitation and Bankruptcy Act (DRBA) (enacting the MLCBI). After recognition, the Hight Court of Seoul had allowed a domestic insolvency proceeding commenced by a creditor against the debtor to proceed over the debtor's objection.[1] This case is the debtor's appeal of that Hight Court's decision. The appellant argued that, since the debtor had been discharged from all its debts in the United States proceeding, which was recognized in the Republic of Korea, the request for repayment of bonds held by the creditor was invalid even if no specific relief to that effect was sought and granted upon recognition of the United States proceeding.

The Supreme Court dismissed the appeal and affirmed the High Court's decision, noting the distinction between recognition of a foreign proceeding, which was governed by the DRBA, and recognition and enforcement of a foreign judgment, which were governed by the Civil Procedure Act. The Supreme Court noted that, according to the High Court, recognition of a foreign proceeding was aimed at obtaining a relief for the foreign proceeding, particularly to secure domestic assets required for implementing the insolvency order issued by a foreign court, and it is thus purely procedural in nature. On the contrary, recognition and enforcement of a foreign judgment may alter or discharge creditors' substantive rights by recognizing or enforcing a foreign judgment that releases a debtor from its liabilities.

The Supreme Court held that, although the High Court misunderstood those underlying legal principles by stating that the effect of the United States discharge order would have been recognized in the Republic of Korea under the DRBA if, upon recognition of the United States proceedings, such a specific relief was granted under the DRBA, § 636 (enacting article 21 MLCBI), that misunderstanding did not affect the outcome of this case. The Supreme Court ruled that the United States discharge judgment could not be recognized in the Republic of Korea and could not prevent the creditor to pursue a claim in the Republic of Korea. In support of its ruling, the court explained that accepting the discharge order would violate the Republic of Korea's good customs and social orders, pursuant to article 217, paragraph 3 of the Civil Procedure Act, by substantially and unfairly infringing upon the right of the creditor that expected to be paid through domestic proceedings in the Republic of Korea because the insolvency law of the Republic of Korea was based on territorialism when the United States insolvency proceedings were opened.

[1] CLOUT case 1000.

Case 2156: MLCBI preamble; 2(a); 8; 17; 20; 31; Guide to Enactment (1997); Guide to Enactment and Interpretation (2013); UNCITRAL Legislative Guide on Insolvency Law; Judicial Perspective

Singapore: Court of Appeal
Case No. 23 of 2022 (Civil Appeal)
Ascentra Holdings Inc (in official liquidation) v SPGK Pte Ltd
18 October 2023
Published: [2023] SGCA 32
Original in English

Abstract prepared by Sim Kwan Kiat, National Correspondent

[**Keywords**: *collective proceeding; foreign proceeding; interpretation-international origin; interpretation-legislative history; presumption-insolvency; relief; scope-MLCBI*]

Ascentra Holdings Inc, the first appellant, was placed in voluntary liquidation in the Cayman Islands. It was determined to be solvent when the liquidation was commenced, which was under the Cayman legislation's specific provisions relating to the dissolution of solvent companies. The second and third appellants were the liquidators of the first appellant.

The appeal arose from the decision of the Singapore High Court not to grant recognition to the Cayman liquidation on the basis that a voluntary liquidation did not qualify as a "foreign proceeding" under article 2 (a) MLCBI and its enactment in Singapore with some variation in article 2 (h) of the Third Schedule of the Insolvency, Restructuring and Dissolution Act (IRDA). The High Court, relying on MLCBI, its legislative history, Guides to Enactment (and Interpretation),[2] the relevant case law, in particular *Sturgeon*,[3] and academic commentaries, as well as the Singaporean enactment of MLCBI and its legislative history found that MLCBI and the Singaporean enactment of MLCBI should be interpreted as applying only to companies that were insolvent or in severe financial distress. The High Court held that, since the Cayman liquidation was commenced with respect to a solvent company under provisions of the Cayman legislation that did not and could not apply to a company that was insolvent or in severe financial distress, it was not a "foreign proceeding".

The Singapore Court of Appeal (the "Court"), referring to the same sources and also to the "*UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective*" (2022),[4] disagreed with the narrow approach adopted by the High Court, noting that the weight of the authorities in other jurisdictions, such as *Betcorp*,[5] favoured the broad approach, i.e. interpretation that enabled the recognition under MLCBI of proceedings concerning also solvent companies. The Court considered that point of significance because, in the Court's view, there was nothing in either the MLCBI or

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[2] According to the Singaporean case law, "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". See *Re Tantleff, Alan*, CLOUT case 2069; *Zetta Jet Pte Ltd and Others (Re)*, CLOUT case 1816.

[3] *Re Sturgeon Central Asia Balanced Fund Ltd (in liquidation) (No 2)* [2020] EWHC 123 (Ch), CLOUT case 1860.

[4] United Nations publication, Sales No. 23.V.I.

[5] *Re Betcorp Limited (in liquidation)* 400 BR 266, CLOUT case 927. The other cases cited were *In re ABC Learning Centres Ltd* 445 BR 318 CLOUT case 1210, United Kingdom (*Re Stanford International Bank Ltd and others* [2009] EWHC 1441 (Ch) CLOUT case 923, *Re Agrokor DD and in the matter of the Cross-Border Insolvency Regulations 2006* [2017] All ER (D) 83, CLOUT case 1798), Australia (*Re Chow Cho Poon (Private) Ltd* (2011) 80 NSWLR 507 (SC, NSW), CLOUT case 1218) and New Zealand (*ANZ National Bank Ltd v Sheahan and Lock* [2013] 1 NZLR 674, CLOUT case 1937).The Court addressed in detail the significance of the inclusion in article 2 (h) of the Singaporean enactment of MLCBI of the words "or adjustment of debt", not found in article 2 (a) of the MLCBI but found, for example, in the United States enactment of MLCBI. This and other aspects arising from deviations to MLCBI introduced upon its enactment in Singapore are not covered in this abstract.

its Singaporean enactment of MLCBI that expressly defined the recognition regime by reference to the solvency status of the company in question. Instead, the recognition regime was drafted in terms that accord recognition to foreign proceedings by reference to a number of defining characteristics of those proceedings, including the laws under which they were being conducted. Confining the recognition regime to insolvent and/or severely financially distressed companies to the exclusion of solvent companies was considered by the Court somewhat counter-intuitive for two related reasons: first, if that was the intention, it would have been far easier and clearer to achieve that intention by making the solvency status of the company a necessary criterion; and second, the choice of the words "law relating to" seemed deliberate and their purport was broad especially when seen in the light of the fact that in many legislative regimes, laws relating to insolvency would frequently include or overlap with laws relating to the dissolution of companies that might not be insolvent.

While accepting an argument in the contestation that the MLCBI, as originally contemplated by its drafters, was undeniably intended to be focused primarily on companies that are either insolvent or in severe financial distress, the Court disagreed that what followed therefrom was that the intent of the MLCBI was to exclude from its scope solvent companies and that it would be contrary to the underlying purpose of the MLCBI to grant recognition of foreign proceedings concerning companies which were neither insolvent nor in severe financial distress. Among others, the Court considered that the presumption of insolvency upon recognition established by article 31 MLCBI would be largely superfluous should insolvency be required for granting recognition.

The Court was of the view that there were good reasons to follow the broad approach as a matter of principle and practicality. The Court noted, inter alia, that imposing a requirement of insolvency would make the recognition procedure more complex requiring that in contested cases, evidence be adduced not only as to the financial status of the company but conceivably as to foreign law. The Court agreed that a light threshold should instead be imposed for recognition, which could be tempered by granting recognition or relief subject to the imposition of appropriate conditions. The Court also noted that solvent and insolvent regimes were seldom mutually exclusive and the transition between those two regimes needed to be facilitated.

The Court considered that concerns that the broad approach would open up too widely the scope for recognition proceedings and protection, could be effectively managed: first, the other requirements of MLCBI for recognition of a foreign proceeding ought to be still satisfied; and secondly, the relief provisions in the MLCBI would permit a court to exercise control by granting recognition subject to conditions, including recognizing a foreign main proceeding while lifting or modifying a stay of proceedings automatically imposed under article 20 of MLCBI.

The Court then assessed the collective nature of the Cayman liquidation with reference to the relevant case law.[6] It was contested that the Cayman liquidation being a voluntary liquidation of a solvent company fulfilled that requirement of article 2 (a) of MLCBI. The Court did not agree that solvent liquidation could not be collective proceedings for the purpose of the MLCBI. The Court was satisfied that interests of all creditors were considered in the Cayman proceeding, including by the appointed liquidators.

Lastly, consistent with its earlier position on a related matter (see above), the Court did not agree with the contestation that the word "liquidation" in article 2 (a) of MLCBI was limited to insolvent liquidation. The Court noted that, although the UNCITRAL Legislative Guide on Insolvency Law[7] explained the term "liquidation" with reference to insolvent liquidation, that explanation did not deal specifically with

[6] Singapore: *United Securities Sdn Bhd (in receivership and liquidation) and another v. United Overseas Bank Ltd*, CLOUT case 1938; United States: *In re Betcorp Limited (In Liquidation)*, CLOUT case 927.

[7] United Nations publication, Sales No. E.05.V.10, part one: II. Mechanisms for resolving a debtor's financial difficulties, para. 35.

the MLCBI, let alone stated that the word "liquidation" in article 2 (a) of MLCBI was intended to refer only to insolvent liquidations. The Court confirmed that the Cayman proceeding had been commenced for the purpose of liquidation.

Having found that all other requirements for recognition of the Cayman proceeding as a foreign main proceeding in Singapore under article 17 of the Singaporean enactment of MLCBI (enacting article 17 MLCBI with the addition of provisions on jurisdiction) were fulfilled, the Court pronounced that it had jurisdiction and was obliged to grant recognition.

Case 2157: MLCBI Preamble; 2(d); 17(1)(b); 22(1); Guide to Enactment; Guide to Enactment and Interpretation
Singapore: General Division of the High Court
Case No. 400, 402 and 403 of 2023
Re Genesis Asia Pacific Pte Ltd
31 August 2023
Published: [2023] SGHC 240
Original in English

Abstract prepared by Sim Kwan Kiat, National Correspondent

[**Keywords**: *creditors-protection; foreign proceeding; foreign representative*]

Three companies had applied to the Singapore High Court (the "Court") under the MLCBI (enacted in Singapore through the Third Schedule of the Insolvency, Restructuring and Dissolution Act (IRDA)) for among others: (a) recognition of their respective proceedings under Chapter 11 of the United States Bankruptcy Code either as foreign main proceedings, or alternatively as foreign non-main proceeding; and (b) for recognition of the appointment of one of them as the "foreign representative" of each of the applicant companies, within the meaning of article 2 (i) of the Singaporean enactment of MLCBI (article 2 (d) of MLCBI).

The Court, having granted recognition as foreign main proceedings in respect of two applicants and as foreign non-main proceedings in respect of the third applicant, considered further whether: (a) a corporate entity such as the third applicant should be recognized as a "foreign representative" under MLCBI; and (b) whether a debtor such as the third applicant could be its own "foreign representative" for the purposes of MLCBI.

As regards (a), the Court noted that the definition of "foreign representative" in MLCBI referred to a "person or a body" and that the word "persons" was used elsewhere in MLCBI to refer to what ought to be corporate entities.[8] While recalling that only individuals could be appointed as insolvency representatives in Singapore, the Court held that it was not a reason by itself to refuse recognition of the appointment by a foreign court of a corporate entity as a foreign representative under the MLCBI. The Court noted that the case law[9] supported that the definition of "foreign representative" under MLCBI was sufficiently broad to include corporate entities, and the Court agreed to follow that interpretation. While highlighting challenges arising from recognizing corporate entities as foreign representatives, such as that they were not readily held accountable for a misconduct since their responsibility and punishment might be diffused through their governance structure, the Court concluded that those challenges could be addressed through close monitoring and readiness to intervene by the court, according to the circumstances of each case. The Court held that those challenges did not appear to be a general reason to reject a corporate entity as a recognized foreign representative.

As regards (b), i.e. whether a debtor could be its own "foreign representative" for the purposes of MLCBI, the Court explained that the issue arose because of potential

[8] E.g. paragraph (c) of the Preamble, article 22(1) MLCBI and para. 86 of the 2013 Guide read together with article 2 (d) of MLCBI.

[9] The Court referred to the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (2021). United Nations publication, Sales No. V.20-06293, para. 39 under article 2.

conflict between interests of a debtor and its duties as a foreign representative to act in the interest of the creditors, including across jurisdictions. The Court found that, while the 1997 Guide was silent on the matter, the 2013 Guide in paragraph 86 expressly stated that the definition of "foreign representative" was sufficiently broad to include debtors who remain in possession of business after the commencement of insolvency proceedings.[10] The Court noted case law supporting that position and that there was no requirement that the foreign representative should satisfy a disinterested test or be free from conflict of interest.[11] The Court thus concluded that, for the purposes of MLCBI, there was no apparent policy against the recognition of a foreign company as its own foreign representative. While there might be some conflict of interest in a debtor being its own foreign representative, the MLCBI did not prevent such a result.

The Court thus granted recognition of the appointment of the third applicant as the foreign representative of each of the applicant companies, subject to its reporting to the court on the progress of its restructuring activities and developments that have affected, or have a real prospect of affecting, the interests of the creditors in Singapore. The Court concluded that such a reporting arrangement balanced the need for international cooperation between courts involved in cases of cross-border insolvency against the risk of a conflict between the foreign representative's interests as the debtor and its duty to act in its creditors' interests.

Case 2158: MLCBI 2(a); 2(d); 6; 16(1); 16(3); 17
Singapore: General Division of the High Court
Case No. 697 of 2023
Re Thresh, Charles and another (British Steamship Protection and Indemnity Association Ltd and another, non-parties)
30 November 2023
Published: [2023] SGHC 337
Original in English

Abstract prepared by Sim Kwan Kiat, National Correspondent

[**Keywords**: *centre of main interests (COMI)-determination; foreign proceeding; foreign representative; public policy*]

An insurer company, incorporated and licensed in Bermuda, was being wound up in Bermuda pursuant to a petition by the Bermuda Monetary Authority (BMA) for long running non-compliances with various statutory requirements governing insurance companies under Bermudan law. The joint provisional liquidators appointed by the Supreme Court of Bermuda under the winding-up order applied to the Singapore High Court (the "Court") under the MLCBI for recognition of the Bermudan proceeding. Two companies, the sole shareholder and the manager of the company (the non-parties) owned and/or controlled by a citizen and resident of Singapore opposed the application for several grounds, including that: (a) the proceedings in Bermuda were not insolvency proceedings under article 2(a) of the MLCBI (article 2(h) of the Singaporean enactment of MLCBI); (b) recognition would be contrary to public policy under article 6 MLCBI; (c) Bermuda was neither the centre of main interests (COMI) nor had an establishment of the company; and (d) the joint provisional liquidators lacked standing.

As regards ground (a) above, the Court noted that, under article 16(1) MLCBI, a certificate received from the Supreme Court of Bermuda providing that its winding-up order would be considered a foreign proceeding in the meaning of article 2(a) MLCBI only gave rise to a presumption which can be rebutted and that it was for the

[10] According to the Singaporean case law, "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". See *Re Tantleff, Alan*, CLOUT case 2069; *Zetta Jet Pte Ltd and Others (Re)*, CLOUT case 1816.

[11] United States Bankruptcy Court, Southern District of New York, *In re: Sergey Petrovich Poymanov, Debtor in a Foreign Proceeding* (2017) 571 BR 24 (31 July 2017), para. 35.

Court to determine whether article 2(a) of MLCBI was satisfied. Applying *Ascentra Holdings*, [12] the Court found that the Bermudan winding-up order was eligible for recognition, provided other requirements for recognition were met, since it was issued under a law containing provisions on insolvency. The Court acknowledged that the evidence before it clearly demonstrated that the company was not insolvent or in any form of financial distress but was being wound up for statutory non-compliances but under *Ascentra Holdings* ascertaining the insolvency or financial distress of the company was not necessary.

Applying *Ascentra Holdings*, the Court found that the Bermudan proceeding was collective in nature since the BMA commenced the proceeding not just for its benefit but presumably as part of its duties and mandate to protect the public interest by ensuring that licensed insurers that failed to adhere to statutory and regulatory requirements should cease their business and be wound up. The winding-up would enable the applicants as professional liquidators to evaluate the company's financial affairs. The non-parties' complaint of the lack of notice to, or participation by, the creditors thus far was found irrelevant as far as that element of article 2(a) of MLCBI was concerned.

The Court recalled that, under article 17 of the MLCBI, the Court ought to recognize the proceeding and the winding-up order if the requirements of that article were satisfied but that was qualified by article 6 of MLCBI, which provides that the court might refuse recognition if such recognition would be contrary to the public policy of the recognizing State. The Court noted that neither the MLCBI nor its enactment in Singapore defined "public policy". The Court recalled the omission of the word "manifestly" from article 6 in the Singaporean enactment of MLCBI and that the relevant case law indicated that that omission suggested that the public policy exception in Singapore could be invoked for reasons less stringent than those concerning matters of fundamental importance for Singapore. [13]

Nevertheless, the Court noted that invoking a public policy exception remained an exceptional measure in Singapore and that the burden was on the party requesting that measure to identify the precise public policy engaged, with reference to a constitutionally authoritative source (such as legislation, statements made by cabinet ministers, and judicial decisions), and how it had been (or would be) violated. The Court found that the non-parties failed to do that and that the facts did not demonstrate a breach of any public policy as alleged by the non-parties. The Court considered that any allegations by the non-parties that the applicants had caused unnecessary costs or had otherwise misconducted themselves should properly be brought before the Supreme Court of Bermuda since the applicants were appointed by the Supreme Court of Bermuda and subject to its supervision.

With reference to the presumption of COMI in article 16(3), the Court noted that the company had no longer a registered office, permanent representative, auditor, corporate secretary or employees in Bermuda. Neither was there evidence that it had assets in Bermuda, its only bank account there having closed some time ago. The non-parties alleged that the company's business, creditors and customers were located elsewhere but were unable to show that there was another jurisdiction that was the company's COMI based on objectively ascertainable and permanent factors. In the absence of other credible evidence, the Court found that the most important factor was that the company had run an insurance business which was licensed in Bermuda and regulated by the BMA. The centre of gravity of its commercial activity [14] was therefore Bermuda. Further, the company's statutory books and records, including its minute books and share register, were in Bermuda, and its last known business address was in Bermuda. In the circumstances, the Court found that Bermuda was the company's COMI, and the proceeding ought therefore to be recognized under article 17 (2) of MLCBI as a "foreign main proceeding".

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[12] *Ascentra Holdings Inc (in official liquidation) v SPGK Pte Ltd,* CLOUT case 2156.

[13] *Re: Zetta Jet Pte Ltd and Others*, CLOUT case 1815.

[14] *Re: Tantleff, Alan*, CLOUT case 2069.

As regards non-parties allegations that the applicants lacked standing to bring the application because their appointment as permanent liquidators had not been confirmed to date, the Court found that there was no suggestion that the applicants' powers to bring the application for recognition of the winding-up order was affected by that fact. The Court found the applicants "foreign representatives" within the meaning of article 2 (d) of MLCBI.

Having ascertained that all requirements for the recognition of the foreign proceedings were met, the Court allowed the application.

Case 2159: MLCBI 2; 8; 15; 17; 20(2); 20(4); 21
United Kingdom of Great Britain and Northern Ireland: High Court of Justice, Chancery Division
Case No. BR-2022-000548
Re Cimolai SpA and Re Luigi Cimolai Holding SpA
19 April 2023
Original in English
Published: [2023] EWHC 923 (Ch)

Abstract prepared by Irit Mevorach, National Correspondent, and Valeria Manfredonia

[**Keywords**: *interpretation; relief; relief-automatic; relief-injunctive*]

This case deals with the effects of recognition of foreign reorganization proceedings under the Cross-Border Insolvency Regulations 2006 (CBIR), which enacts the MLCBI in the United Kingdom.

A parent company and its subsidiary, both registered in Italy, initiated *concordato* proceedings under article 44(1) of Royal Decree Number 267 of 1942 ("Crisis Code") in Italy. The foreign representative sought recognition of the Italian proceedings in England under the CBIR, as foreign main proceedings and, in addition to automatic relief under article 20 of MLCBI, discretionary relief under article 21 MLCBI to prevent commencement of insolvency proceedings in England, considering that automatic consequences of recognition under article 20 CBIR (art. 20(4) MLCBI) would not by themselves prevent the commencement of insolvency proceedings in England.

The recognition was not opposed, but an interested party, a creditor litigating a claim against the debtors in the Commercial Court in England (the "opposing creditor") maintained that the automatic stay under article 20 of MLCBI as a consequence of recognition of the Italian proceedings as foreign main proceedings should be lifted immediately to allow it to proceed with litigation of its claim. It opposed a request of the debtors to lift that stay two months later. It argued that the court had no jurisdiction to grant such a stay, either by varying the automatic stay under article 20 of MLCBI or granting a stay under article 21 of MLCBI, because: (a) the opposing creditor did not submit to the jurisdiction of the Italian court and hence, according to the common law rule in *Gibbs*, [15] its claim could not be extinguished by the Italian proceedings; (b) there was no basis to grant a stay in circumstances when the *concordato* proposals themselves required litigation of the claim in the Commercial Court; and (c) there was no application for a case management stay and in any event such a stay would be inappropriate because the claim was in the Commercial Court, and it was therefore a matter for the Commercial Court, and there were in any event no grounds for such a stay.

The Court considered the recognition requirements prescribed in article 17 of Schedule 1 of the CBIR (enacting art. 17 MLCBI), noting that recognition was mandatory if those requirements were satisfied. The Court confirmed the eligibility of the Italian proceedings for recognition. This determination was supported by the

[15] For an application of this rule, see *Nordic Trustee*, and *OJSC International Bank of Azerbaijan*, CLOUT case 1822.

type of the Italian proceedings commenced under article 44(1) of the Crisis Code, which was a central part of Italian insolvency law, in particular: (a) that they were collective proceedings; (b) whose purpose was to enable the debtors to restructure their liabilities and resume trading as a going concern; and (c) although the companies' management remains in control of day-to-day operations, the companies had to file reports to the court at least monthly and might be required to seek approval of the court and appointed judicial commissioner regarding certain actions.

The Court also noted the relevance of the recognition of the Italian proceedings as foreign main proceedings by the United States Bankruptcy Court earlier, since the CBIR encourage the court to have regard to the international origin of the MLCBI "and to the need to promote uniformity in its application and the observance of good faith" (art. 8 MLCBI).

The Court found that the Italian proceedings were foreign main proceedings, pursuant to the centre of main interests (COMI) test, because the registered office, the head office and other connecting factors were in Italy.

The Court thus recognized the Italian proceedings as foreign main proceedings. The Court held that, in addition to an automatic stay upon recognition of the foreign main proceeding, interests of the debtors and creditors would be adequately protected by imposing a stay on the commencement of insolvency proceedings in England pursuant to article 21 CBIR (art. 21 MCLBI). The Court confirmed that it had a discretion to impose such a stay. The Court, however, emphasized that any interested party could apply to lift or vary that stay.

Regarding the position of the opposing creditor, the court noted that, pursuant to the restructuring plan, the opposing creditor was permitted to pursue its claims in England against the debtors before being able to receive any distribution under the restructuring. The only question was whether a breathing space of two months should be given to the debtors before that litigation recommenced, and the court found, by reference to earlier case law, that this was a matter within its discretion.[16] On the basis that no permanent stay is sought, which could indeed conflict with earlier case law and the *Gibbs* rule, and given the genuine reason for the request of the stay not to disrupt the process in Italy and no evidence of potential prejudice from the limited stay to the opposing creditor, the Court decided to grant the two-month stay.

Case 2160: MLCBI 6; 17; 18; 21(1)(d); 21(1)(g)
United Kingdom: High Court of Justice, Chancery Division
Case No. BR-2022-000408
Luc A. Despins (as Foreign Representative of Ho Wan Kwok) v Ho Wan Kwok v Harcus Parker Limited, Dawn State Limited, Ace Decade Holdings Limited
20 January 2023
Original in English
Published: EWHC 74 (Ch), 2023

Abstract prepared by Irit Mevorach, National Correspondent, and Valeria Manfredonia

[**Keywords**: *creditors-protection; debtor-individual; foreign proceeding; foreign representative; public policy; relief; relief-upon request*]

This case deals with the effects of a recognition of foreign reorganization proceedings under the Cross-Border Insolvency Regulations 2006 (CBIR), which enacts MLCBI in the United Kingdom.

The respondent petitioned for commencement of insolvency proceedings pursuant to Chapter 11 of the United States Bankruptcy Code, leading to the appointment of the foreign representative (the "applicant") as trustee. The applicant then sought recognition of the United States proceedings in the United Kingdom under the CBIR

[16] *Re OGX Petróleo E Gás S.A.*, CLOUT case 1622; *In the Matter of Chang Chin Fen v. Cosco Shipping (Quidong) Offshore Ltd*, CLOUT case 2006.

as foreign main proceedings. The recognition was not opposed but a requested disclosure order pursuant to article 21(1)(d) and (g) MLCBI and Sections 311, 312 and 366 of the UK Insolvency Act 1986 was disputed as it could allegedly infringe privileged rights of interested parties. The documents requested to be disclosed were related to litigation involving the respondent before the High Court in England (the English proceedings) that could potentially greatly impact the insolvency estate.

The Court confirmed that the eligibility of the United States Chapter 11 proceedings for recognition was supported by multiple materials, the recognition application was unopposed and requirements of article 17 of Schedule 1 of the CBIR (enacting art. 17 MLCBI) for recognition to be granted were met.

The Court was also satisfied that the applicant was the foreign representative under MLCBI despite the presence of an appeal against its appointment. The Court noted that the appeal was against the identity of the foreign representative and not the office, and there was no stay pending that appeal. The Court relied on MLCBI case law from another jurisdiction in its conclusion that nothing in MLCBI required the decision commencing the foreign proceeding to be final or non-appealable[17] and should the commencement order be reversed on appeal, the applicant would be under a duty to inform the Court promptly (article 18 MLCBI), and the recognition order could be revisited by the Court (article 17 (4) MLCBI).

The Court dismissed the possibility of invoking a public policy exception under article 6 of the CBIR (enacting art. 6 MLCBI) because of the applicant's firm's supposed significant relationship with a third State. The Court noted that the argument failed in the United States proceedings, and that in the present application, there was no specific allegation that the applicant was acting in the interests of that third State rather than fulfilling its duties. The concern seemed to be based on the firm having offices in the third State and taking instructions from companies established in that third State, which was not enough to establish that it was contrary to public policy to recognize the foreign proceedings.

Since the respondent's place of habitual residence was in the United States, the Court found that the United States proceedings were to be recognized as foreign main proceedings and it would be appropriate to carve out the English proceedings from the resulting automatic stay under article 20 MLCBI (article 20 (2) MLCBI).

The Court further considered whether to exercise its discretion under article 21 (1) (d) and (g) MLCBI to order the disclosure of the documents requested by the foreign representative in relation to the English proceedings. The Court's decision to exercise discretion in favour of requiring disclosure of the concerned documents was primarily grounded in: (a) the provisions of the domestic law according to which an insolvency representative was expected to take possession of all books, papers and other records which related to the insolvency estate or affairs of the debtor and which belonged to the debtor or were in the debtor's possession or control (including any which would be privileged from disclosure in any proceedings); (b) the provisions of the domestic law that envisaged the corresponding obligations of the debtor and third persons to provide those records and relevant information to the insolvency representative; and (c) the necessity to protect the assets of the debtor and the interests of creditors since there was not dispute that the respondents' interest in the English proceedings had vested in the applicant, and the English proceedings might represent a very substantial asset of the respondent. Alternatively, participation by the applicant in the English proceedings without full knowledge of the underlying documents risked the interests of creditors since it would expose the respondent's estate to a risk of adverse costs.

The Court noted that the documents in question were subject to privilege, either sole privilege of one of interested parties or joint privilege of the respondent and interested parties. The interested parties argued that such privilege could be asserted against the applicant, including where the privilege was shared since the applicant was not the holder of the respondent's privilege. The Court accepted that any materials subject to

[17] *In re: Gerova Financial Group, Ltd*, CLOUT case 1275.

the sole privilege of any interested party were to be excluded from the disclosure order. As regards materials subject to joint privilege, the Court established that they were within the respondent's possession or control even if there were other parties entitled to assert privilege over them. The Court acknowledged that the applicant did not enjoy the same rights as the respondent in relation to those materials since the privilege was not property of the debtor that automatically vested in the insolvency representative. However, given that the applicant simply wished to review the documents to decide what to do in relation to the English proceedings and had no intention of waiving privilege in the documents being sought, the Court held that the existence of the privilege was not a bar to granting the relief sought. The Court ultimately determined that the benefits of disclosure outweighed those concerns and some other concerns over confidentiality raised in the Court. Thus, the Court decided to grant the relief sought subject to certain safeguards, such as the applicant's undertaking to return to the Court should the applicant wished to waive the privilege. It concluded that the protections offered by the applicant and the value to the estate of obtaining sight of the documents outweighed the risk of improper use of the material.

Case 2161: MLCBI 2(a); 17; Guide to Enactment and Interpretation
United States of America: Bankruptcy Court, Southern District of New York
Case No. 22-11347 (DSJ)
In re Global Cord Blood Corp.
5 December 2022
Original in English

Abstract prepared by Allan Gropper and John Pottow, national correspondents, and Olya Antle

[**Keywords**: *assistance; creditors; foreign proceeding*]

Three Joint Provisional Liquidators ("JPLs"), appointed by the Grand Court of the Cayman Islands under the Cayman Companies Act in a matter relating to Global Cord Blood Corp., a Cayman Islands exempted company (the "Company"), petitioned the United States Bankruptcy Court for recognition under Chapter 15 of the United States Bankruptcy Code (enacting the MLCBI) of what they asserted was a foreign main proceeding pending before the Grand Court.

The Liquidators were appointed, in the words of the United States Bankruptcy Court, "to investigate and, if appropriate, seek to recover misappropriated funds, and/or to take other action as may be appropriate based on the findings of their investigation." Two objectors (a group of former directors of the Company and another entity with an interest in the Company) opposed the application for recognition arguing that recognition was not appropriate because the Cayman proceeding was not a "foreign proceeding" as that term is defined in section 101(23) of the United States Bankruptcy Code (enacting article 2 (a) MLCBI), and accordingly, not eligible for recognition under section 1517 of the United States Bankruptcy Code (enacting article 17 MLCBI).

The Court denied recognition. It held that the term "foreign proceeding" was to be construed broadly to help ensure that other States using varied approaches in addressing insolvencies would receive the assistance of the United States courts.[18] Nevertheless, the Court recalled that the existence of a foreign proceeding in the United States was ascertained on the basis of seven cumulative factors, namely: (a) the existence of a proceeding; (b) that is either judicial or administrative; (c) that is collective in nature; (d) that is in a foreign country; (e) that is authorized or conducted under a law related to insolvency or the adjustment of debt; (f) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (g) which proceeding is for the purpose of reorganization or liquidation.[19]

[18] Citing *In re Oi Brasil Holdings Coöperatief U.A.*, CLOUT case 1864.
[19] Citing *In re Betcorp Limited (In Liquidation)*, CLOUT case 927. The United States enactment of the MLCBI includes "adjustment of debt" in its description of a qualifying law.

The Court held that a foreign representative requesting recognition of a foreign proceeding should meet the burden of proof on each of those seven factors in order to obtain recognition.[20]

In the present case, the opponents of recognition contended that the Cayman proceedings did not satisfy points (c), (e) and (g). After considering the evidence provided by the parties, the Court concluded that the liquidators had established point (e), as the Cayman Companies Act was a law relating to insolvency or the adjustment of debt since it contained provisions on insolvency or adjustment of debt, but that the JPLs had failed to establish elements (c) and (g).

As to the "collective proceeding" element, the JPLs argued that the proceedings were collective because they aimed at benefiting the Company as a whole, in particular by recovering funds allegedly dissipated or improperly transferred by some of the Company's directors. The Court noted, however, that all relevant case law had unequivocally and at length required a focus on and involvement of "creditors" as the main definitional hallmark of "collective" action within the meaning of section 101(23) of the United States Bankruptcy Code.[21] At the time of the Court's decision, however, the Cayman proceeding did not seek to identify creditors, quantify or classify the Company's debts, or determine a scheme of distribution to creditors on account of those debts. The Court thus concluded that the JPLs were not engaged in a "collective" action as contemplated by the United States Bankruptcy Code.

As to the purpose of the proceeding, the Court found that the Cayman proceeding was not "for the purpose of reorganization or liquidation." Rather, the JPLs were granted powers for the purpose of preserving the Company's assets and investigating and reporting on the Company's affairs, to avoid the need for liquidation. The Court also referred to the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (para. 77) that stated that "proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganize the insolvency estate" would be excluded from the definition of a "foreign proceeding".

The Court concluded that if the Cayman proceeding shifted to an active liquidation process in future, it might be entitled to Chapter 15 recognition, but that it was not so entitled at present.

Case 2162: MLCBI 2(f); 6; 17(2)
United States of America: Bankruptcy Court, Western District of Oklahoma
Case No. 22-10039 (JDL)
In re Shimmin
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Original in English
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Abstract prepared by Allan Gropper and John Pottow, national correspondents and Olya Antle

[**Keywords**: *foreign proceeding; foreign main proceeding; foreign non-main proceeding; recognition; centre of main interests (COMI); establishment; presumption-authenticity; presumption-centre of main interests (COMI)*]

The debtor, a company organized and existing under the laws of the Isle of Man had commenced a liquidation proceeding pursuant to the Isle of Man Companies Act. The liquidator, appointed by an act of the board of directors of the debtor and a vote of creditors, filed a petition before the United States Bankruptcy Court for the Western District of Oklahoma (the "Court") requesting that the Court recognize the liquidation proceeding as a foreign main proceeding or, alternatively, as a foreign non-main proceeding, under Chapter 15 of the United States Bankruptcy Code (enacting the

[20] Citing *In re Ashapura Minechem Ltd.*, CLOUT case 1313.
[21] Ibid.

MLCBI). An interpleader action was pending in the same district, and two creditors claiming interests in the interpleaded funds opposed recognition.

The Court found that the liquidator had clearly shown that there was a "foreign proceeding" and that the liquidator was a "foreign representative". The Court, however, questioned whether the statutory requirement for recognition under § 1517(a)(1) of the United States Bankruptcy Code (enacting article 17(2) MLCBI) was satisfied, i.e. that the proceeding was either a "foreign main proceeding" or "foreign non main proceeding."

In deciding whether the proceeding was a "foreign main proceeding", the Court had to determine whether the debtor had centre of its main interests (COMI) in the Isle of Man. The Court recalled that, in the absence of evidence to the contrary, the debtor's registered office was presumed to be the COMI (§ 1516(c), enacting art. 16(3) MLCBI). The Court noted that there was no dispute that the debtor's registered office was in the Isle of Man, and thus there was a presumption that its COMI was in the Isle of Man. However, the Court also recalled that the COMI presumption was rebuttable where other factors suggested that the true COMI of a debtor lied elsewhere. The Court recalled that the absence of objections to a COMI designation was not binding; the Court must make an independent determination of COMI.[22] The Court applied the following five factors, known as the "SphinX Factors"[23], in making such determination, noting that those factors should not be applied mechanically but rather "in light of Chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and maximization of the debtor's value".[24]

As to the first SphinX factor, the location of the debtor's headquarters, the Court acknowledged that the debtor was registered in the Isle of Man. However, the Court noted that the address of the debtor was the same as a worldwide corporate service company, which tended to indicate that the address was more a "letterbox" than a place of real business. In addition, the Court noted that directors of the company, while residing in the Isle of Man, were also employees of that corporate service company. That finding was found relevant also to the second of the SphinX factors, the location of those who actually managed the debtor, and indicated to the Court that directors did not independently manage or exercise control over the debtor. As to the third and fourth SphinX factors, the location of the debtor's primary assets and creditors, the Court found that there was no evidence that any asset of the debtor potentially available for making a distribution to creditors or the majority of its creditors were located on the Isle of Man. Finally, with respect to the fifth SphinX factor, the jurisdiction whose law would apply to most disputes, the Court concluded that there was no evidence of the law applicable to "most" disputes.

The Court concluded that the SphinX Factors weighed against a finding that the debtor's COMI was in the Isle of Man. The Court thus refused recognition of the foreign proceeding as foreign main proceeding.

The Court considered whether the foreign proceeding could alternatively be recognized as a "foreign non-main proceeding" pursuant to § 1517(b)(2) of the United States Bankruptcy Code (enacting article 17(2)(b) MLCBI). The Court recalled several factors that would be relevant in that determination, including the economic impact of the debtor's operations on the local market, more than mere incorporation and record-keeping and more than just the maintenance of property, a "minimum level of organization" for a period of time and the objective appearance to creditors whether the debtor had a local presence. It also recalled that the burden of proof was on the party seeking recognition of a foreign non-main proceeding to prove, by a preponderance of the evidence, that the debtor had an establishment in the jurisdiction where the foreign insolvency proceeding was pending. The Court found that the failure of the liquidator to produce evidence that the debtor had sufficiently engaged

[22] Citing *In re Basis Yield Alpha Fund (Master)*, CLOUT case 789.

[23] *In re SphinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), aff'd. 371 B.R. 10 (S.D.N.Y. 2007), CLOUT case 768.

[24] Quoting *In re Fairfield Sentry Ltd.,* CLOUT case 1339.

the local economy in the Isle of Man to constitute an “establishment” precluded recognition of the foreign proceeding as foreign non-main proceedings.

For those reasons, the Court found that the foreign proceeding was not to be accorded recognition either as a main or non-main proceeding, and the petition for recognition was thus denied.