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Contents

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Introduction

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Each CLOUT issue includes a table of contents on the first page that lists the full citations to 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 the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (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 through 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 UNCITRAL Model Law on Cross-Border Insolvency (MLCBI)

Case 1796: MLCBI 19; [20]
United Kingdom: England and Wales High Court of Justice, Chancery Division, Companies Court
Case No. CR-2017-005571
Sberbank of Russia v. Ante Ramljak [2018] EWHC 348 (Ch)
21 February 2018
Original in English

Abstract prepared by Irit Mevorach, National Correspondent

[**keywords**: *foreign main proceeding; recognition order; "final determination"; relief — provisional*]

Extraordinary Administration Proceedings in respect of "ADD" were commenced in Croatia and had been recognized under the Cross-Border Insolvency Regulations 2006 (enacting the Model Law on Cross-Border Insolvency in Great Britain; hereinafter the CBIR) as a foreign main proceeding (see CLOUT Case No. 1798), with the result that a stay was automatically granted. At an earlier stage of the litigation, a consent order was given by which "S" undertook not to continue with arbitration proceedings, previously commenced in London, or to take steps in any arbitration proceedings against "ADD" or its subsidiaries, until "final determination of the recognition application". The Court, therefore, dealt with the meaning of "final determination" and whether "S"'s undertaking had come to an end.

The applicant, "S", sought to lift the stay of arbitration proceedings and claimed that the undertaking had come to an end when the proceedings in Croatia had been recognized as a foreign main proceeding. The plaintiff, the Extraordinary Commissioner of "ADD", argued that because the possibility of an appeal still existed, the final determination of the recognition application had not yet occurred. The Court considered the argument that, pursuant to Article 19 MLCBI, it was possible to grant interim relief to foreign proceedings. Since the judgment on recognition of a foreign proceeding determined the recognition application, the possibility of an interim determination did not exist under the MLCBI or the CBIR. Nonetheless, the word "final" in "final determination" (as included in the parties' undertaking) must refer to a time when appeal of the recognition judgment was no longer a possibility. Thus, the Court concluded that the "S"'s undertaking had not yet come to an end.

Case 1797: MLCBI 6; [17]
United Kingdom: England and Wales High Court of Justice, Chancery Division, Companies Court
Case No. CR-2016-002375
Ivan Cherkasov, William Browder, Paul Wrench v. Nogotkov Kirill Olegovich, The Official Receiver of Dalnyaya Step LLC (In Liquidation) [2017] EWHC 3153 (Ch)
5 December 2017
Original in English

Abstract prepared by Irit Mevorach, National Correspondent

[**keywords**: *recognition of foreign proceeding; setting aside a recognition order; public policy; foreign representative — duty of disclosure*]

The English Court had to determine: (i) whether it should hear and give a judgment on the allegation that the foreign representative in Russian insolvency proceedings concerning "DSL" breached its duties of full and frank disclosure when the foreign representative applied for a recognition order under the Cross-Border Insolvency Regulations 2006 (enacting the Model Law in Great Britain; hereinafter the CBIR), even though this issue was no longer a live issue; (ii) if the matter of adequate

disclosure should be entertained, whether the duties of the foreign representative were indeed breached; and (iii) whether the recognition order that was previously granted should be set aside ab initio on the basis of material non-disclosure, or rather should be terminated at the foreign representative's request.

The Court held that although the parties agreed that the recognition order should no longer continue, it was not agreed whether it should be terminated now or declared to have never been valid. In addition, it was in the public interest for the Court to decide on the issue in view of the serious allegations of wrongdoing. The Court also observed that the foreign representative breached his full and frank disclosure duties when he applied for the recognition order. The Court was not fully informed about relevant material facts, including regarding the highly political nature of the case. It should have had the opportunity to determine whether recognition should be denied on the grounds that it would be manifestly contrary to public policy, pursuant to Article 6 of Schedule 1 to the CBIR (article 6 MLCBI). Thus, the recognition order was set aside ab initio.

Case 1798: MLCBI 2; [6]
United Kingdom: England and Wales High Court of Justice, Chancery Division, Companies Court
Case No. CR-2017-005571
Re Agrokor DD [2017] EWHC 2791 (Ch)
9 November 2017
Original in English

Abstract prepared by Irit Mevorach, National Correspondent

[**keywords**: *foreign proceeding; recognition; public policy; group of companies*]

The foreign representative of "ADD", a holding company incorporated and having its centre of main interests in Croatia, sought recognition in Great Britain of a Croatian "extraordinary administration proceedings" as a foreign proceeding under the Cross-Border Insolvency Regulations 2006 (enacting the Model Law in Great Britain; hereinafter the CBIR).

The extraordinary administration proceedings commenced in Croatia under the Law on Extraordinary Administration Proceeding in Companies of Systemic Importance for the Republic of Croatia (hereinafter the Extraordinary Administration Law), which was enacted specifically to facilitate the restructuring of "ADD" and its affiliates. "S", a creditor of "ADD", opposed recognition on the grounds that the proceeding was not a "foreign proceeding" pursuant to Article 2, Schedule 1 of the CBIR (Article 2 MLCBI) — it was not collective; it was not subject to supervision of a foreign Court; the Extraordinary Administration Law was not a law related to insolvency; and that law was not enacted for the purpose of reorganization. "S" also argued that it was not possible under the CBIR to seek recognition of a foreign proceeding regarding a single company forming part of a corporate group where the foreign proceeding was a group proceeding (opened against the company and all of its affiliates). Additionally, it was claimed that even if the proceeding was a foreign proceeding, recognition of that proceeding may not ensure fairness and protection of creditors' rights, and would thus be manifestly contrary to English legal public policy.

The Court dismissed "S"'s claims. It concluded that there was nothing in the CBIR that prevented recognition of a foreign proceeding in relation to a group member when the foreign proceeding involved a group of companies. Indeed, the MLCBI addresses single companies only, not groups. The proceeding should be recognized as foreign main proceeding. Adopting a wide approach, the Court concluded that the Extraordinary Administration Law was a law related to insolvency, notwithstanding that when a debtor invoked the law, insolvency or impending insolvency was proved by way of a presumption. It was also a proceeding supervised by a Court, through the extraordinary administrator, and it was collective, even though creditors of other affiliates may have claims against the company. The purpose of the Extraordinary

Administration Law was reorganization or liquidation, even though it might be that a proceeding under the law resulted in protecting the going concern business without a reorganization or a liquidation. The Court also observed that differences in the priorities of Croatian and English law with respect to reorganization or liquidation did not suffice to constitute a violation of public policy. The possibility that the pari passu principle might be overridden in a future settlement was also not a reason to deny recognition based on public policy. The Court emphasized, including by reference to the Guide to Enactment and Interpretation of the MLCBI, that the public policy exception must be construed narrowly.

Case 1799: MLCBI [18]; 19; [20; 21; 22]
Australia: Federal Court of Australia
Case No: NSD 696 of 2015
Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v. Rizzo-Bottiglieri-De Carlini Armatori SpA [2017] FCA 331
3 February 2017
Original in English

[**keywords**: *foreign representative; obligation to disclose; recognition; relief — provisional*]

The plaintiff, as debtor in possession, sought recognition in Australia under the Cross-Border Insolvency Act 2008 (enacting the Model Law on Cross-Border Insolvency in Australia) of a *concordato preventivo* granted on 11 February 2015 in Naples. Interim relief was ordered by the Australian Court on 17 June 2015 (under Article 19 MLCBI) to, inter alia, stay commencement and continuation of individual actions or legal proceedings against the debtor, pending a final hearing on recognition of the Italian proceeding as a foreign proceeding. On 28 April 2016, the Italian Court dismissed the proceeding, but that fact was not disclosed to the Australian Court at that time. In May 2016, the plaintiff commenced a second, distinct proceeding for a *concordato preventivo.* The termination of the first Italian proceeding did not become known to the Australian Court until late in 2016; in the meantime, the orders of 17 June 2015 remained in place.

Referring to the obligation of disclosure under Article 18 MLCBI, the Court found that the dismissal of April 2016 had the effect of terminating the foreign representatives' appointment and there was consequently no foreign proceeding that could be recognized or that could justify continuation of the stay order of 17 June 2015. The order terminating the operation of the 17 June orders should therefore be effective from 29 April 2016 (allowing an additional day for time differences). The Court also found that an application to amend the original application to refer to the second *concordato preventivo* should be dismissed on the basis that the Model Law did not contemplate that a later application for recognition of a new foreign proceeding was the same, or part of the same, matter as an earlier foreign proceeding that has terminated. A new application seeking recognition of the second proceeding was required.

Case 1800: MLCBI 2; 2(a) New Zealand: High Court
Case No. CIV 2016-404-140
Leeds v. Richards [2016] NZHC 2314
23 September 2016[1]
Original in English

Abstract prepared by Patricia Keeper, National Correspondent

[**keywords**: *foreign main proceeding; presumption of habitual residence; foreign non-main proceeding; establishment*]

The foreign representatives of a debtor adjudicated bankrupt in England on 19 December 2014 applied, with the sanction of the English Court, to the High Court of New Zealand to exercise its powers to require to the Official Assignee to obtain information from New Zealand solicitors. The Court accepted that the applicant was a foreign representative within the meaning of Article 2(d) of Schedule 1 of the Insolvency (Cross-border) Act 2006 ("ICBA") [Article 2 MLCBI] which enacted the Model Law in New Zealand.

However, believing that the insolvency proceedings in England would not be recognized as foreign proceedings in terms of the definition in the ICBA in Schedule 1, Article 2(a) [Article 2 (a) MLCBI], the foreign representatives relied upon other provisions of the ICBA which apply when the Model Law in Schedule 1 does not. The Court confirmed this approach was correct.

However, although technically obiter, the Court restated the approach to be taken by a New Zealand Court to decide whether to recognize a foreign proceeding under the Act. The foreign proceeding must meet the test for being either a "foreign main proceeding" or a "foreign non-main proceeding".[2] Recognition as a foreign main proceeding requires proof that a person's "centre of main interests" is located in the State where the asserted order was made. In the absence of proof to the contrary, for an individual debtor, this will be the place of the person's habitual residence. The Court confirmed the approach taken to this question of fact and the test as established in the decision in *Williams v. Simpson.*[3] Similarly, the alternative requirement (if the centre of main interest cannot be established) is that the foreign proceeding may be recognized as a foreign-non-main proceeding if at the relevant time, which is the time of the proceedings, the debtor has ("present tense") an "establishment" in the country of origin of the relevant insolvency proceeding.[4]

Case 1801: MLCBI 2; 2(a)
New Zealand: High Court
Case No. CIV 2014-404-3223
Batty (as trustee in bankruptcy of Reeves) v. Reeves [2015] NZHC 908
4 May 2015
Original in English

Abstract prepared by Patricia Keeper, National Correspondent

[**keywords**: *foreign main proceeding, presumption of habitual residence; foreign non-main proceeding, establishment*]

In August 2013, the foreign representative for the debtor had been appointed by an English Court to be the insolvency representative for the debtor's estate. The foreign representative had applied to the High Court in New Zealand for recognition of the proceedings commenced in England and for an order enabling the representative to gain access to the records of a bank account the debtor operated in New Zealand. It

[1] Reasons of the judgement were issued on 29 September 2016.
[2] Insolvency (Cross-border) Act 2006, Sch 1, Article 15(1).
[3] *Williams v. Simpson* [2011] 2 NZLR 380 (HC) (CLOUT Case No. 1220).
[4] Insolvency (Cross-border Act 2006, Sch 1, Article 16(3) and see also the definition of establishment in Article 2(f) and *Williams v. Simpson* [2011] 2 NZLR 380 (HC) at [50]–[66] (CLOUT Case No. 1220).

was believed the proceeds of sale of a property formerly owned by the debtor in England had been transferred to that account.

The Court accepted that the applicant was a foreign representative within the meaning of Article 2(a) of Schedule 1 of the Insolvency (Cross-border) Act 2006 ("ICBA") (Article 2 MLCBI) which enacted the Model Law in New Zealand. However, adopting the reasoning of the High Court in the earlier decision in *Williams v. Simpson*,[5] the Court found the proceedings in England did not fall within the definition of foreign proceedings in Article 2(a) of Schedule 1 of the ICBA [Article 2(a) MLCBI]. Specifically, the proceedings needed to be either foreign main proceedings or foreign non-main proceedings. The former required that the proceedings take place where the debtor had its centre of main interests. Following the approach in *Williams v. Simpson,* that is presumed to be their place of habitual residence, which requires the Court to undertake a broad factual inquiry.[6] Foreign non-main proceedings require consideration of whether the debtor has an establishment in England. In *Williams v. Simpson,* the Court emphasized that the definition of establishment in the Act, namely that the debtor is carrying out a non-transitory economic activity with human means and goods or services must be carried on presently, that is, at the time of the proceedings.[7] On the facts, the Court in the current case held that since it could not be contended that debtor had either a centre of main interests or an establishment in England, the Court did not have jurisdiction to assist under the Model Law as set out in Schedule 1 of the Act. However, the Court granted assistance under another provision of the ICBA that applied when Schedule 1 of the Act did not.

[5] *Williams v. Simpson* [2011] 2 NZLR 380(HC) (CLOUT Case No. 1220).
[6] *Williams v. Simpson* [2011] 2 NZLR 380(HC) at [41]-[49] (CLOUT Case No. 1220).
[7] *Williams v. Simpson* [2011] 2 NZLR 380(HC) at [50]-[66] (CLOUT Case No. 1220).