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Case 2006: MLCBI 2; 6; 17; 20; 21(1); 21(2); 22 - *United Kingdom: Scottish Outer House of Court of Session, Case No. P439/21, In the Matter of Chang Chin Fen v. Cosco Shipping (Quidong) Offshore Ltd (24 September 2021)* 13

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.

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

Case 1997: MLCBI 2(a), (b), (d); 16(3); 17; 21(1)(e)
Australia: Federal Court, New South Wales District Registry, General Division
Case No. NSD 683 of 2010
Katayama v. Japan Airlines Corporation
30 June 2010
Original in English

Published: [2010] FCA 794

Abstract prepared by Stewart Maiden, National Correspondent

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

This case concerned the recognition in Australia of reorganization proceedings in Japan under section 6 of the Australia Cross-Border Insolvency Act 2008 (enacting the MLCBI). The plaintiffs had been appointed by the Tokyo District Court as trustees of the debtor companies.

The Court determined, for the purposes of granting recognition under article 17 of the MLCBI, that the plaintiffs were foreign representatives of foreign main proceedings within the meaning of articles 2 and 16 (3) of the MLCBI.

In determining that the plaintiffs were foreign representatives, the Court considered the fact that under the laws of Japan, the trustee assumed control over the debtor, and had authority and power to give instructions on its behalf, to administer the reorganization of its assets, and to apply for recognition of the Japan proceeding.

In determining that the Japan proceeding was a foreign proceeding, the Court considered the fact that the Japan proceeding was a collective judicial proceeding that affected all of the creditors and assets of the debtors.

In determining that the Japan proceeding was a foreign main proceeding, the Court considered that the corporate headquarters of the debtors were in Tokyo; that each of the debtors was a corporation organized and existing under the laws of Japan; that the debtors were principally controlled by, and their decision-making was made from, the debtors' principal place of business in Japan; that the majority of the debtors' employees were resident in Japan; that the majority of the debtors' assets and creditors were located in Japan; and that the debtors' administrative functions, including accounting, financial reporting, budgeting and cash management, were conducted in Japan.

The Court ordered that the administration and realization of the debtors' assets located in Australia be entrusted to the plaintiffs.

Case 1998: MLCBI 18; 21; 22(3)
Australia: Federal Court
Cases No. NSD 1197 of 2015 and NSD 1198 of 2015
Yakushiji v. Daiichi Chuo Kisen Kaisha (No. 2)
17 October 2016
Original in English

Published: [2016] FCA 1277

Abstract prepared by Stewart Maiden, National Correspondent

[**Keywords**: *foreign representative-duty to inform; recognition-termination; relief-termination; substantial change*]

This case follows the recognition by the Australian court of civil rehabilitation proceedings commenced in Japan in respect of two shipping companies as foreign main proceedings and relief granted under MLCBI.[1]

[1] *Yakushiji v. Daiichi Chuo Kisen Kaisha* [2015] FCA 1170, reported in CLOUT case No. 1620.

Subsequently, the Australian Court was informally notified that, following acceptance of the rehabilitation plan by the Japanese court, both foreign proceedings had been terminated and, consequently the Japanese insolvency officers, who had previously been designated as the foreign representatives of the two companies, resigned and then retired. Accordingly, they no longer had authority to bring the notice of "substantial change" to the attention of the Court, as contemplated in article 18 MLCBI. The Court accepted that, where the foreign representative(s), to whom the obligation under article 18 MLCBI applied, were no longer in place, it was appropriate for the companies to advise the Court, as was done in that case.

Since the rehabilitation plan had been accepted by the court in Japan and the plan was being implemented by the two companies, the companies applied informally for lifting the automatic relief arising from the recognition of the foreign main proceeding and additional relief granted under article 21 MLCBI. At the hearing before the Court, discussion arose as to why the application was brought informally and by whom exactly it should be brought. Given that the information about the substantive change was brought to the Court's attention by the companies themselves, coupled with the fact that the foreign representatives retired, the Court considered that in those circumstances, the companies were best placed to make the application and so treated the application. Noting that the application was made informally, the Court, while dispensing with the need for any further documentation to be provide by the parties, noted that in future applications of that kind, the usual course should be to approach the Court by way of interlocutory application.

The Court, with reference to paragraph 168 of the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, agreed that termination of the rehabilitation proceedings in Japan were "substantial changes" in the meaning of article 18 MLCBI, and the purpose of that provision in MLCBI was to allow the court to modify or terminate the consequences of recognition. Having considered international case law on the issue[2] and verified that the interests of creditors would be adequately protected, as required under article 22 MLCBI, the Court terminated the recognition order and relief noting that they could not last beyond the end of the foreign proceeding. Those orders were made effective from the date of the recognition rather than the date of termination of the foreign proceeding.[3]

Case 1999: MLCBI 2(d), (e); 16(3); 21
Greece: Court of First Instance of Piraeus [Polimeles Protodikeio Peiraios], Division for Maritime Disputes
Case No. 1798/2020
14 January 2020
Original in Greek

Available at: https://www.protodikeio-peir.gr/?p=3107

[**Keywords**: *assets of the debtor; centre of main interests (COMI)-determination; collective proceeding; foreign court; foreign main proceeding; foreign representative; foreign representative-authorization; interpretation – international origin; presumption-centre of main interests; recognition-application for; relief – upon request*]

An insolvency representative appointed by the court in the Russian Federation in the liquidation proceeding concerning a shipping company registered in the Russian Federation with some assets in Greece (the "debtor") applied pursuant to Law 3858/2010 enacting the MLCBI in Greece following the same numbering for recognition of that proceeding in Greece as a foreign main proceeding and for relief under article 21 MLCBI.

[2] *In re Daewoo Logistics Corporation* 461 B.R. 175 (Bankr. S.D.N.Y. 2011), reported in CLOUT case No. 1315.

[3] Compare with the approach taken e.g., in *Board of Directors of Rizzo-Bottiglieri-De-Carlini Armatori SpA v Rizzo Bottiglieri-De-Carlini Armatori SpA* [2017] FCA 331, reported in CLOUT case No. 1799.

The Court adjourned the application to enable the applicant to submit additional evidence. In particular, the Court recalled that courts in Greece had made several orders with respect to the debtor's assets and operations in Greece after the liquidation proceeding commenced in the Russian Federation. In some of those instances, those orders had been made upon application or actions of the debtor itself, rather than an insolvent representative as would be required under insolvency law of the Russian Federation if the debtor was indeed in liquidation. For that reason, the Court requested further evidence from the applicant that would demonstrate that the court in the Russian Federation exercised control or supervision over the liquidation proceeding with respect to the debtor and that the applicant had been authorized in that liquidation proceeding to administer the liquidation of the debtor's assets or affairs or to act as a representative of the proceeding, as required under article 2(d) MLCBI.

In addition, after consulting foreign case law on article 16 (3) of MLCBI (presumption of COMI),[4] the Court requested the applicant to submit additional documentation, including the articles of association of the debtor and the registration documents of the ships owned by it, in order to ascertain whether the proceeding in the Russian Federation was taking place in the centre of the debtor's main interests and was thus eligible for recognition as a foreign main proceeding.

Case 2000: MLCBI 6; 9; 15(1); 15(2)
Greece: Court of First Instance of Piraeus [Polimeles Protodikeio Peiraios], Division for Maritime Disputes
Case No. 3821/2020
11 December 2020
Original in Greek

Available at: https://www.protodikeio-peir.gr/?p=4428

[**Keywords**: *enterprise group; public policy; recognition-application for*]

Following the commencement by an enterprise group of bankruptcy proceedings pursuant to Chapter 11 of the United States Bankruptcy Code and confirmation by the United States court of the joint plan of reorganization of that group, a member of the group with an office in Greece (the "applicant") filed an application for recognition of the United States proceeding in Greece as a foreign main proceeding. The recognition was sought in accordance with Law 3858/2010 enacting the MLCBI in Greece (following the same numbering) or, alternatively, under articles 780 and 905 (para. 4) of the Code of Civil Procedure of Greece (the "CCP").

The Court noted that recognition would have to be refused, under both Law 3858/2010 and the CCP, on the basis of the public policy exception. Referring to the domestic law principle of "one legal person, one property, one bankruptcy". the Court considered that was not possible to declare the whole enterprise group bankrupt or file a joint petition for bankruptcy of all enterprise group members, since recognition was sought with respect to an enterprise group that did not possess separate legal personality. The Court noted that, in the absence of that obstacle and with reference to articles 9 and 15(1) MLCBI as enacted in Law 3858/2010, the applicant would have been expected to submit a certified copy of the judgment or a certificate of the foreign court or any other proof of the appointment of the applicant as the foreign representative even in the debtor-in-possession situation, which the applicant failed to do.

[4] *Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd (In re)* 389 B.R. 325 (S.D.N.Y. 2008), reported in CLOUT case No. 794 (appeal) *affirming* 374 B.R. 122 (Bankr S.D.N.Y. 2007), reported in CLOUT case No. 760 (first instance); *British American Ins. Co. Ltd (In re)* 425 B.R. 884 (Bankr. S.D. Fla. 2010), reported in CLOUT case No. 1005; and *Eurofood IFSC Ltd (Re)* [2006] Ch 508 (ECJ).

Case 2001: MLCBI 17(2)(a); 20; 21
Uganda: High Court of Uganda at Kampala (Civil Division)
Case No. 041 of 2016
In the matter of Spencon Services Limited (in receivership)
18 August 2017
Original in English

Abstract prepared by Winnie Tarinyeba

[**Keywords**: *foreign main proceeding; foreign representative; recognition-decision; recognition – limited*]

The debtor, Spencon Services Limited, had commenced voluntary administration in Kenya, with administrators having been appointed there (the "administrators"). The debtor was established also in Uganda, under the name Spencon Services Limited in Uganda ("SSLU"). At the time of the request for recognition of the Kenyan foreign proceedings and of the Kenyan foreign representatives in Uganda pursuant to Insolvency Act (2011) (Part IX) enacting the MLCBI in Uganda, SSLU was in receivership in Uganda and receivers had been appointed by the High Court of Uganda at the request of secured creditors (the "receivers"). The receivers and the administrators applied jointly to the High Court of Uganda (the High Court) to obtain recognition of the Kenyan foreign proceedings and of the Kenyan foreign representatives in Uganda, and to obtain a consent order from the High Court regarding the specific roles to be played respectively by the administrators and the receivers to avoid conflict in the performance of their rights and duties.

The High Court recognized the Kenyan proceedings as the foreign main proceeding, pursuant to section 237 of Insolvency Act (2011), enacting article 17 (2) (a) MLCBI. It also recognized the administrators as the foreign representatives of the debtor in the foreign main proceeding, to the condition that such recognition shall not in any way affect the powers and functions of the receivers appointed in Uganda. The scope of the resulting automatic stay was narrowed down by excluding actions and proceedings by the secured creditors or the receivers in respect of any matter connected to SSLU.

The High Court consented to the delineation of rights and duties between the receivers and the foreign representatives in order to avoid conflict in the performance of their respective duties and for purposes of expressly providing for the specific role of the administrators. The receivers retained control and supervision over SSLU's assets and affairs and were requested to submit regular reports on the progress of the receivership to the foreign representatives. The foreign representatives were to provide support and input to, and to coordinate with, the receivers for the duration of the receivership in regard to the management of the assets and affairs of SSLU. Costs and remuneration of the foreign representatives were not to be paid out of the assets of SSLU.

Case 2002: MLCBI 2(a), (d); 7; 15(1); 17; 25; 26; 27
United Arab Emirates: The Dubai International Financial Centre Courts, Court of First Instance
Case No. CFI 085/2021
Salem Mohammed Ballama Altamimi & others v. Emirates NBD Bank PJSC, HSBC Bank Middle East Limited, ICICI Bank UK Plc and others
18 February 2022
Original in English

Published: [2021] DIFC CFI 085

[**Keywords**: *assistance-additional; cooperation; coordination; debtor-individual; foreign proceeding; foreign main proceeding; foreign representative; recognition*]

On 27 July 2021, the Abu Dhabi Court (the Court) ordered the commencement of restructuring with respect to an individual (the debtor). The 29 joined litigants (corporate entities and an individual) were brought into that proceeding on the basis that their funds were inextricably intertwined with those of the debtor. The Court

appointed the trustees to carry out the functions related to the proceeding, including making an inventory of the assets, preparing a list of creditors, developing a restructuring plan and reporting back to the Court. The Court ordered a stay of proceedings against the debtor and the joined litigants and their assets.

The trustees applied to the Dubai International Financial Centre (DIFC) Court (the "DIFC Court") for recognition of the Abu Dhabi proceedings either as a foreign main proceeding or a foreign non-main proceeding under Schedule 4 of the DIFC Insolvency Law No. 1 of 2021 enacting the MLCBI in DIFC, and for imposition of a stay of proceedings against the debtor and joined litigants in that jurisdiction under the same Schedule or, alternatively, under other provisions of DIFC law.

The DIFC Court agreed that the Abu Dhabi proceeding was a foreign proceeding within the meaning of article 2 (a) MLCBI since it appeared to the DIFC Court that the assets and the affairs of the debtor and the joined litigants were subject to the supervision of the Abu Dhabi Court in an interim proceeding pursuant to a law relating to insolvency for the purposes of reorganization even if no further orders had yet been made by the Abu Dhabi Court in relation to restructuring or liquidation. That conclusion was reached regardless of appearance to the DIFC Court that the assets and the actual management and control of the business affairs of the debtor and the joined litigants were remained with them.

However, the DIFC Court refused recognition of the Abu Dhabi proceeding either as a main proceeding or as a non-main proceeding and imposition of a stay for the following reasons: (a) the trustees were not the "foreign representatives" in the meaning of article 2 (d) MLCBI; (b) the individual with respect to which the Abu Dhabi proceeding was opened was the only debtor since the joined litigants were not classified as debtors in that proceeding and could not be so classified when recognition of that proceeding was sought in DIFC; (c) Schedule 4 of the DIFC Insolvency Law No. 1 of 2021 enacting the MLCBI in DIFC applied only to foreign companies, not individuals, and was thus not applicable in this case since there was no relevant corporate debtor to which it could apply; and (d) application for a stay based on other grounds, whether under some other statutory provision or case management powers, was objectionable for various reasons, including because there was no good reason for a stay when no reorganization or liquidation had as yet commenced.

In finding that the trustees were not the foreign representatives, the DIFC Court explained that: (a) no order had been made yet by the DIFC Court for any reorganization or liquidation of the debtor; (b) the functions of the trustees were only to complete preparatory work, i.e., to put forward proposals for restructuring for the approval by the creditors and by the Court on the basis of information gathered by the trustees concerning the assets and liabilities of the debtor; and (c) if the Court eventually ordered liquidation, there would never be a reorganization. The DIFC Court noted that it did not reach that conclusion "with enthusiasm" since it might be said that the preparatory work for a reorganization was part of such a reorganization but that conclusion was of lesser significance since, even if the request had been brought by a foreign representative, there were other more fundamental issues, in particular the absence of jurisdiction to recognize the Abu Dhabi proceeding, on which the DIFC Court relied to refuse recognition and imposition of a stay.

For the same reasons, the DIFC Court refused imposition of a stay as additional assistance under other laws (article 7 MLCBI) and under provisions requiring cooperation with foreign courts and foreign representatives (chapter IV MLCBI). The Court acknowledged that it did have power to impose a stay under those provisions independently of recognition of the foreign proceeding; however, the Court was of the view that this "would result in achieving by the back door, what was not permitted by the front." For the same and other reasons, it considered objectionable to invoke other provisions of the domestic law and case management powers for imposition of a stay.

For the same reasons, the Court did not consider it necessary to ask for greater evidence to ascertain whether the centre of the debtor's or each of the joined litigant's main interests (COMI) or their establishment was in Abu Dhabi, noting that the result

would be the same regardless of whether the issue of stay, if it had arisen for decision, would fall for decision under article 20 or 21 MLCBI. The Court opined that in practice the distinction between automatic stay under article 20 (1) MLCBI and discretionary stay under article 21 was limited in its effect because of other provisions in article 20 MLCBI as enacted in DIFC to be read together with other provisions of the domestic insolvency law. In the Court's view, the effect of the "automatic" stay under article 20 was effectively to put the burden of proof upon the party resisting a stay whereas the burden may rest upon the party seeking a stay under article 21.

As regards the joined litigants, since they were not the debtor, the Court considered the location of their COMI or establishment irrelevant for the case but if it were relevant, then the location of each Joined Litigant's COMI or establishment would have to be considered separately. The Court referred to a number of international authorities as regards the criteria for ascertainment of the centre of the debtor's main interests (para. 31 of the judgment) and confirmed that the prima facie presumption that the place of incorporation or registered office represents the COMI would apply unless there was evidence to rebut it.

Case 2003: MLCBI 2(c), (f); 6; 16(3); 17; 20
United Kingdom: High Court of Justice Business and Property Courts of England and Wales, Chancery Division
Case No. BR-2020-000410
In the Matter of Li Shu Chung (also known as Ken Li Shu Chung)
10 December 2021
Original in English

Published: [2021] EWHC 3346 (Ch), 2021 WL 05867475

Abstract prepared by Irit Mevorach, National Correspondent

[**Keywords**: *centre of main interests (COMI)-determination; centre of main interests (COMI)-movement of; centre of main interests (COMI)-timing; debtor-individual; establishment; foreign main proceeding; presumption-centre of main interests (COMI); recognition*]

The joint trustees of the bankruptcy estate of Mr Li Shu Chung ("Mr Li" or "the debtor") applied in England under Schedule I of the Cross-Border Insolvency Regulations 2006 (the "CBIR"), enacting the MLCBI in Great Britain for recognition of bankruptcy proceedings made in the High Court of the Hong Kong Special Administrative Region on 11 October 2019 concerning Mr Li.

Mr Li was a businessman with various businesses and dealings in Hong Kong, sharing his time between England and Hong Kong. He had been involved between 2009 and 2018 in a series of actions against his family and various family companies that culminated with the bankruptcy proceedings launched in Hong Kong against him. As he was residing in England at the time of the recognition request, he objected the request by claiming that he did not have the centre of his main interests (COMI), or an establishment in Hong Kong.

The determination of the debtor's COMI was thoroughly discussed by the English court. It was noted that there was clear authority that courts should apply the same test under the MLCBI as applicable under Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the "EIR recast"). Under the EIR recast, the COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties, with special consideration given to the perception of creditors regarding the COMI location. In addition, the EIR recast contemplates that the habitual residence of an individual debtor may not be considered as the COMI when the major parts of the debtor's assets are located in another jurisdiction.

As for the relevant date for assessing the location of COMI, the Court followed the "commencement approach" (i.e. the date of issue or commencement of the relevant foreign proceedings as opposed to the date of the filing of the recognition

application).[5] The Court also noted earlier case law where debtors claimed to have shifted their COMI.[6] Such change is possible and does not have to be advertised but it should be reasonably or sufficiently ascertainable by creditors and should be objectively viewed as leading to a change in the administration of the debtor's interests. The change should be based on substance rather than illusion and had the necessary element of permanence.

Many documents were provided by both the debtor and the joint trustees to the English court in respect of the habitual residence of the debtor and the location of his COMI, resulting from the various businesses and property owned or leased by the debtor in Hong Kong and in England and its litigation strategy that had led to frequent changes of addresses in both jurisdictions. After considering those factual elements, the Court concluded that at the date of the Hong Kong Bankruptcy Order, the debtor's habitual residence was in England, which allowed the Court to presume that his COMI was in England, according to article 16(3) of the MLCBI as enacted in the CBIR.

The Court, however, agreed with the findings of the trustees that the presumption should be rebutted. First, the declaration of the debtor regarding his change of COMI could not be trusted, considering the various changes of narrative he had used in his attempt to avoid being served notice of the Hong Kong proceedings in Hong Kong and in England. In addition, the debtor could not prove that he had any business or financial interests in England. To the contrary, it was clear that most of his assets had remained in Hong Kong, and he continued to pay taxes there, which led one of the main creditors, the Inland Revenue of Hong Kong, to believe that the debtor was still residing in Hong Kong. Accordingly, the Court accepted the arguments provided by the trustees that the administration of the debtor's interests with the necessary elements of permanence required to constitute a COMI was still in Hong Kong at the time of the bankruptcy application in Hong Kong. The Court took the view that a reasonable creditor would not have believed that the debtor had changed his COMI from Hong Kong to England either permanently or as a matter of substance.

The Court also considered, in case its conclusion on COMI was incorrect, whether the debtor had an establishment (as defined in article 2(f) MLCBI) in Hong Kong, as a basis for recognizing the proceedings as foreign non-main proceedings. The Court was prepared to consider Mr Li's regular conduct of civil litigation proceedings in Hong Kong as non-transitory economic activity conducted by human means and goods. Yet, the Court found that the trustees could not show that the litigation was conducted from a "place of operations" in Hong Kong ("(i) a place where things happen and (ii) sufficient things (iii) of sufficient quality happen there").

Having considered paragraphs 150–151 of the 2013 Guide to Enactment and Interpretation of MLCBI, the Court was satisfied that there were no public policy grounds for rejecting the recognition application. The Court did not find any obvious fault in the reasoning of the Court in Hong Kong and noted that Mr Li had been duly served and informed of the proceedings in Hong Kong and submitted to the jurisdiction of the Hong Kong court. Accordingly, the Court recognized the Hong Kong proceedings as a foreign main proceeding.

[5] *In the matter of Videology Limited,* [2018] EWHC 2186 (Ch), reported in CLOUT case No. 1823.

[6] For example, *In the Matter of Stanford International Bank Ltd*. [2010] EWCA Civ. 137, [2010] B.P.I.R. 679, reported in CLOUT case No. 1003.

Case 2004: MLCBI 1(2); 2; 6; 15; 16(1); 16(3); 17; 20
United Kingdom: High Court of Justice, Business and Property Courts of England and Wales, Chancery Division
Case No. CR-2021-000321
In the Matter of PJSC Bank Finance and Credit (in liquidation)
29 April 2021[7]
Original in English

Published: [2021] EWHC 1100 (Ch)

Abstract prepared by Irit Mevorach, National Correspondent

[**Keywords**: *centre of main interests (COMI)-determination; collective proceeding; foreign court; foreign proceeding; foreign representative; presumption-foreign representative; recognition-application for; standing; scope-MLCBI*]

The High Court of Justice (the "Court") addressed an application under Schedule I of the Cross-Border Insolvency Regulations 2006 (the "CBIR"), enacting the MLCBI in Great Britain for recognition as "foreign main proceeding" of a liquidation proceeding of PJSC Bank Finance and Credit (the "Bank") opened in Ukraine. The Deposit Guarantee Fund of Ukraine ("DGF") commenced the liquidation proceeding against the Bank in December 2015 after the National Bank of Ukraine ("NBU") had revoked its license. The DGF and Ms. Groshova to whom powers were delegated by the DGF (the "applicants") applied for recognition of the liquidation proceeding pursuant to article 17 MLCBI.

At the outset, the Court was satisfied that the debtor was not a "third country credit institution" (per the Credit Institutions (Reorganisation and Winding Up) Regulations 2004) and thus not excluded from the scope of the CBIR by article 1(2)(i).

The Court then considered if the Bank's liquidation met the definition of "foreign proceeding" in article 2(a) MLCBI. In this regard, first, the Court was satisfied that the Ukrainian proceeding was "collective", considering that "all of the Bank's creditors are entitled to claim in the liquidation and that their claims are met from available assets, according to the statutory order of priorities". Second, the collective proceeding must be "judicial or administrative" where "the assets and affairs of the debtor are subject to control or supervision by a foreign court". The Court concluded that the DGF should be considered a "foreign court" under the provision. Revisiting the judgment in *Re Sanko Steamship Co Ltd*[8] and drawing on the 1997 Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, the Court noted that the notion of a "foreign court" covers the supervision by a non-judicial administrative body. Albeit accountable to parliament, parts of government and the NBU, the DGF is an independent body and vested with extensive managerial and supervisory powers, free from intervention by government or the NBU, and the control exercised by the DGF is subject to only limited court review. Third, the Court was satisfied that the proceeding was commenced "pursuant to a law related to insolvency". Although not part of the insolvency law, the Law of Ukraine on Banks and Banking Activity and the relevant provisions of the DGF Law provide for insolvency procedures of insolvent banks. Fourth, the Court noted that all the Bank's assets and affairs were under the control of DGF for the purposes of administering the Bank's liquidation, and therefore the requirement in the definition that it should be proceedings in which "the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation" was also satisfied.

The Court further considered the applicants' standing as a "foreign representative" under article 2 (j) of the CBIR (enacting article 2(d) MLCBI). The DGF's position as liquidator arises from statute upon receipt of the NBU's decision to revoke a bank's

[7] The court noted that the hearing was held remotely via Microsoft Teams on 11 March 2021 because of the COVID-19 pandemic and the judgment was handed down to the parties via email at 3.45 p.m. on 29 April 2021.

[8] *Re Sanko Steamship Co Ltd,* [2015] EWHC 1031 (Ch), 16 April 2015.

license and commence liquidation proceedings. Under DGF Law, the DGF may then appoint an authorized person to exercise managerial and supervisory authority, excluding certain powers enumerated in the law. Since the DGF and Ms. Groshova shared some but not all of the liquidator's powers, the Court concluded that both met the definition of "foreign representative" and could seek recognition of the liquidation.

Applying the presumption in article 16(3) MLCBI, the Court found that the centre of main interests (COMI) of the debtor was in Ukraine because: (a) the Bank's registered office address was in Kyiv; (b) its primary administrative office address, although at a different street address from the registered office, was also in Kyiv; and (c) all the debtor's regional branches and departments were in Ukraine. The Court also found that the procedural requirements of article 15 had been satisfied and no public policy considerations pursuant to article 6 MLCBI prevented the recognition of the liquidation proceeding. Accordingly, the proceeding was recognized as a foreign main proceeding under article 17(2)(a) MLCBI.

Case 2005: MLCBI 15(1); 20; 21; 22
United Kingdom: England and Wales High Court of Justice, Chancery Division, Companies Court
Case No. 3933 of 2010
Cosco Bulk Carrier Co Ltd v. Armada Shipping SA & another
11 February 2011
Original in English

Published: [2011] EWHC 216 (Ch), [2011] BPIR 626, [2011] ArbLR 5

[**Keywords**: *foreign main proceeding; relief-automatic; relief-modification; relief-upon request*]

Cosco Bulk Carrier Co Ltd ("Cosco") chartered a vessel to Armada ("the debtor"), a company established in Switzerland, that in turn sub-chartered the vessel to STX Pan Ocean Co Ltd ("STX"). Both the charter and the sub-charter contained London arbitration clauses and provided that any dispute arising thereunder should be governed by English law. A dispute arose between Cosco and Armada as to which of them was entitled to sub-hire due from STX under the sub-chapter and, if it was to be shared, in what proportion. Issues underlying that dispute became the subject of two separate arbitrations, the first between Cosco and STX and the second between STX and Armada, both initiated after a bankruptcy order in relation to Armada was made in Switzerland and an insolvency representative was appointed.

The insolvency representative obtained the recognition of the Swiss proceeding in Great Britain as a foreign main proceeding (the "recognition order") pursuant to Schedule 1 of the Cross-Border Insolvency Regulations 2006 (the "CBIR"), enacting the MLCBI in Great Britain. A dispute arose, affecting all three parties, how and before which tribunal or tribunals should the issues in the underlying dispute be resolved. Cosco's case was that the underlying dispute should be resolved in the first arbitration with Armada permitted and, if necessary, encouraged to participate by the insolvency representative. The insolvency representative's case was that there was good reason, in terms of saving cost and time, why the underlying dispute should be resolved in Switzerland in the first instance by the insolvency representative itself and, if necessary, on appeal to the appropriate Swiss bankruptcy court.

That dispute was brought before the Court through cross-applications: (1) Cosco applied to the Court for an order confirming that the first arbitration had not been stayed as the result of the recognition order, or alternatively for an order lifting the stay in respect of that arbitration; and (2) the insolvency representative applied for an order confirming that the first arbitration had been stayed by the recognition order or alternatively that a stay of the first arbitration should be now imposed. As regards the second arbitration, with the debtor as the party, the Court noted that it appeared "(and for good reason) to have been common ground that the recognition order, without more, achieved an automatic stay of the second arbitration".

Without considering it necessary, convenient or appropriate to determine any underlying issues, the court focused on whether the first arbitration, to which the debtor was not party, but which involved competing claims by Armada and Cosco in relation to a single asset, should also be stayed. The parties accepted that the Court had a discretion under MLCBI, as incorporated into English law by CBIR, whether or not to stay the first arbitration going forward. For that reason, the Court did not consider it necessary or convenient to decide whether the recognition order stayed the first arbitration. It approached the matter as one of broad discretion, the question being which route for the resolution of the underlying dispute would best serve the interest of justice. The Court relied on long-standing domestic case law empowering the Court to permit proceedings which would otherwise be stayed to continue, noting that in doing so, the Court is given "a free hand to do what is right and fair according to the circumstances of each case".[9]

The Court concluded that the balance of fairness, convenience and justice strongly favoured arbitration, in particular because most underlying issues were subject to English shipping law, which the parties agreed to resolve through London arbitration. It was satisfied that the arbitration would properly protect the interests of the debtor, its creditors and other interested persons within the meaning of article 22(1) MLCBI. The Court acknowledged, however, that the arbitral process in the first arbitration might not be capable of adaptation to admit all three parties to the underlying dispute in a single arbitration, and that an outcome to the issues involved in the underlying dispute might give rise to a priority issue as between Cosco and the insolvency representative or creditors of the debtor which the arbitration process would be ill-suited to resolve. For those reasons, the Court: (a) allowed the debtor to apply for further relief under article 22(3) MLCBI in the event that the debtor was unable to be effectively joined into the first arbitration; and (b) stayed, under article 21(1)(b) MLCBI, of enforcement or execution of any arbitral award, until, after such an award had become final, the debtor had the opportunity to restore the matter to the Court in the event that any aspect of the interests of the debtor's creditors or the insolvency representative were not addressed by the arbitrators, or upon appeal.

Case 2006: MLCBI 2; 6; 17; 20; 21(1); 21(2); 22
United Kingdom: Scottish Outer House of the Court of Session
Case No. P439/21
In the Matter of Chang Chin Fen v. Cosco Shipping (Quidong) Offshore Ltd
24 September 2021
Original in English

Published: [2021] CSOH 94; [2021] CSOH 95

[**Keywords**: *creditors – protection; foreign proceeding; foreign main proceeding; foreign non-main proceeding; recognition-application for; relief-modification*]

The Court had before it two related petitions for recognition under Schedule 1 of the Cross-Border Insolvency Regulations 2006 (the "CBIR"), enacting the MLCBI in Great Britain, of the Singapore High Court's orders granting moratoria. The moratoria were in relation to restructuring by means of schemes of arrangement in Singapore of two members of the same enterprise group, Prosafe SE ("Prosafe") and ProSafe Rigs Pte Ltd ("PRPL"). The petitioner emphasized that what was sought was recognition of the moratoria which were separate and independent from the schemes since no scheme had been sanctioned by the Singapore Court and there was no scheme that could be recognized under the MLCBI. The relief sought was a stay of any actions or proceedings with respect to ProSafe and PRLP and their assets, rights, obligations or liabilities. The petitions were mutatis mutandis identical except that the one with

[9] See *Re Grosvenor Metal Co Ltd* [1950] Ch 63, at para. 65, see also *Re Suidair International Airways Ltd* [1951] Ch 165; *Re Redman (Builders) Ltd* [1964] 1 WLR 541; *Re Aro Co Ltd* [1980] Ch 196 at para. 209 (CA) and most recently *Bourne v. Charit-Email Technology Partnership* LLP [2010] 1 BCLC 210 at para. 212–213.

respect to Prosafe sought recognition as a foreign non-main proceeding while the other with respect to PRPL sought recognition as a foreign main proceeding.

The petitions were opposed by Cosco, a creditor of Prosafe and PRPL, on the main ground that Cosco did not consent to the schemes, did not submit to the jurisdiction of the Singapore Court, and the liabilities of Prosafe and PRLP to Cosco being governed by English law, thus stand outside the collective insolvency process of which the moratoria were an integral part.

The Court first found that the recognition of the orders of the Singapore court granting the moratoria were straightforward because the requirements of article 17 (1) MLCBI for recognition were met and recognition would not be manifestly contrary to public policy under article 6 MLCBI. The Court then considered the effect of that recognition, and in particular the relief sought, and in that context, the scope of recognition under MLCBI and the relationship between recognition and the rule in *Gibbs*. It agreed that the stay upon recognition of a foreign proceeding under MLCBI was not intended to prevent persons whose claims were not subject to that proceeding from pursuing that claims against the debtor and that it would be wrong to use provisions of MLCBI to circumvent the English law rights of the English creditors.[10] Agreeing that the moratoria were an integral part of the schemes and the purpose of the schemes was to bind dissenting creditors, such as Cosco, the Court refused to grant the relief sought with respect to Cosco.

For completeness, it considered whether, in any event, the test for granting the relief sought in the petitions was met. It noted that, before granting the relief, the Court would have to be satisfied that: (1) the relief was appropriate (article 21 (1) MLCBI); (2) the relief was necessary to protect the assets of the debtor or the interests of the creditors (article 21 (1)); (3) as applicable only to a foreign non-main proceeding, the relief sought related to assets that under the law of the enacting State, should be administered in the foreign non-main proceeding (article 21 (3) MLCBI); and (4) the interests of the creditors and other interested persons, including the debtor, were adequately protected (article 22 (1) MLCBI). The Court concluded that that test was not met with respect to Cosco, in particular because the relief would deprive Cosco of the benefits and protection of English law, and would not be necessary for protection of interests of other creditors since Cosco's claims fell outside the schemes. The Court was ready to grant recognition and the relief sought in respect of creditors other than Cosco but since that was not what the petitioner wanted, the petitions were refused.

[10] *Nordic Trustee*, and *OJSC International Bank of Azerbaijan*, reported in CLOUT case No. 1822.