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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.1). CLOUT documents are available on the UNCITRAL website: (http://www.uncitral.org/clout/showSearchDocument.do).

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.

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Cases relating to the UNCITRAL Model Law on Cross-Border Insolvency

Case 921: MLCBI 2 (a), [2 (b)], 2 (d), 15 (2), 16 (3), 17 (1), 21 (1)
Australia: Federal Court of Australia — New South Wales District Registry
No. NSD 210 of 2009
Hur v. Samsun Logix Corporation
17 April 2009
Original in English
Published in English:
[2009] FCA 372

[keywords: centre of main interests (COMI), foreign main proceeding-determination, foreign representative, presumption-centre of main interests (COMI), relief-upon request]

The debtor is a company incorporated in South Korea, carrying on the business of providing, amongst other things, ocean freight forwarding services. Insolvency proceedings ("foreign proceedings") commenced with respect to the debtor in South Korea and an insolvency representative ("foreign representative") was appointed by the Korean court (the "foreign court"). A few days after the commencement, the foreign representative applied for recognition of the foreign proceeding pursuant to the law enacting the MLCBI in Australia.[1]

In granting the application, the court examined the requirements of Art. 17 (1) MLCBI. The court was satisfied that the foreign proceeding was a foreign proceeding pursuant to Art. 2 (a) MLCBI. Notwithstanding some uncertainty as to the meaning of "collective" judicial proceeding, the court was of the view that what was important to the current application was that the foreign proceeding was a proceeding relating to insolvency in which the assets and affairs of the debtor were subject to the supervision of the foreign court for the purpose of the reorganization of the debtor. The court was satisfied that the foreign representative was a foreign representative within the meaning of Art. 2 (d) MLCBI, as he was appointed by the foreign court. The court was also satisfied that the requirements of Art. 15 (2) MLCBI were met, as the application was accompanied by a certified copy of the decision of the foreign court commencing the foreign proceeding and appointing the foreign representative.

The court recognized the foreign proceeding as foreign main proceeding [Art. 2 (b) MLCBI], because it was taking place in the State where the debtor had the centre of its main interests pursuant to Art. 16 (3) MLCBI. In that regard, the court noted that there was sufficient evidence in the affidavit accompanying the application of the foreign representative that the debtor's registered office was in South Korea. The court made orders under Art. 21 (1) MLCBI. Applications for recognition of the Korean proceedings were pending in the USA, Singapore, Belgium; the proceedings had already been recognized in Great Britain.

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[1] Cross-Border Insolvency Act 2008. Since Schedule 1 of the Act sets out the full text of MLCBI, the Court refers directly to the articles of the Model Law.

Case 922: MLCBI 2 (a), 2 (b), 2 (d), 16 (3), 17 (2)(a), 21 (1)
Australia: Federal Court of Australia — New South Wales District Registry
No. NSD 1285 of 2009
Tucker, In the matter of Aero Inventory (UK) Limited (No. 2)
10 December 2009
Original in English
Published in English:
[2009] FCA 1481

[keywords: centre of main interests (COMI), foreign main proceeding-determination, foreign representative, presumption-centre of main interests (COMI), relief-upon request, purpose-MLCBI]

The insolvency representatives ("foreign representatives") of an insolvency proceeding ("foreign proceeding") in the United Kingdom of Great Britain and Northern Ireland applied for recognition of the foreign proceeding under the law enacting the MLCBI in Australia.[2]

The court recognized the foreign proceeding as a foreign proceeding and a foreign main proceeding pursuant to Art. 2 (a) and (b) MLCBI. Pursuant to Art. 21 MLCBI, the court stayed the enforcement of certain liens and pledges over the debtor's property, the enforcement of charges over the debtor's property and the repossession or recovery of property used by or in the possession of the debtor. Pursuant to Art. 21 (e) MLCBI, the court entrusted the administration and realization of all of the debtor's assets located in Australia to the foreign representatives.

In its decision, the court examined whether the foreign representatives were foreign representatives pursuant to Art. 2 (d) MLCBI and whether the foreign proceeding was a foreign proceeding pursuant to Art. 2 (a) MLCBI. In its analysis, the court had regard to the scope and extent of administration proceedings under the Insolvency Act 1986 of the United Kingdom and compared it to administration under the Australian Corporations Act 2001.[3] The court noted the Explanatory Memorandum to the *Cross-Border Insolvency Bill 2008 (Cth)*, which stated that the term "insolvency proceeding" in the definition of foreign proceeding in Art. 2 (a) of the MLCBI focused on the purpose of those proceedings in order to avoid inadvertently narrowing the possible range of foreign proceedings that might obtain recognition; it was intended to refer broadly to proceedings involving companies in severe financial distress. The court also quoted the Corporate Law Economic Reform Program's Proposals for Reform: Paper No. 8 headed "Cross-Border Insolvency — Promoting international cooperation and coordination", which stated that in the Australian Corporations Act context, the scope of the MLCBI would extend to liquidations arising from insolvency, reconstructions and reorganizations under Part 5.1 and voluntary administrations under Part 5.3A.

The court also referred to its decision a few days earlier granting provisional relief under Art. 19 MLCBI.[4] In that decision, the court had decided that the centre of the debtor's main interests was the United Kingdom and that the foreign proceeding should thus be recognized as a main proceeding pursuant to

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[2] See supra note 1.
[3] See supra note 2.
[4] *Tucker, in the matter of Aero Inventory (UK) Ltd. v. Aero Inventory (UK) Ltd.* [2009] FCA 1354.

Arts. 17 (2)(a), 16 (3) MLCBI. The court further noted that Art. 21 (1) MLCBI empowered the court to grant any appropriate relief and was not confined to the forms of relief described in the lettered paragraphs (a) to (g) of Art. 21. Thus the court considered it appropriate to grant the foreign representatives the same protections with respect to charges, liens and pledges and leased property as the insolvency representative of an Australian company, to promote consistency and to give effect to the objectives set out in the preamble to the Model Law.

Case 923: MLCBI 2 (a), 2 (b), 2 (d), 16 (3), 17 (2)(a)
United Kingdom: High Court of Justice, Chancery Division
Case Nos. 13338 and 13959 of 2009
In the matter of Stanford International Bank Limited, et al.
3 July 2009
Original in English
Published in English:
[2009] EWHC 1441 (Ch)

[keywords: foreign proceeding-determination, foreign representative, presumption-centre of main interests (COMI)]

In February 2009, the United States Securities Exchange Commission filed a complaint against the owner of a group of companies ("Mr. X"), and companies belonging to Mr. X, including company "Y", alleging among other things, securities fraud. On the same day, a United States of America court appointed a receiver over the assets of the group of companies belonging to Mr. X, including company Y and of the owner himself. Mr. X was a national of both the United States and Antigua and Barbuda and company Y was incorporated and had its registered office in Antigua and Barbuda. In April 2009, the Antiguan court made a winding-up order and appointed two liquidators for company Y. Both, the United States receiver and the Antigua and Barbuda liquidators applied for recognition before the High Court of Justice ("the court") under the CBIR.[5] Each of them claimed that the proceedings in which they had been respectively appointed were "foreign main proceedings" pursuant to the CBIR.

First, the court looked to company Y's public face, including how it represented itself in marketing materials, how it actually worked, and then to the MLCBI, including its purpose, the nature of the proceeding and the term "centre of main interests" ("COMI") [in Arts. 2 (b), 16 (3), 17 (2)(a) MLCBI].

1. "Foreign proceeding"

The court analyzed the meaning of the term "foreign proceeding" in the MLCBI and referred to the Guide to Enactment to the MLCBI and the United States decision in *Re Betcorp*.[6] It further looked at the *travaux preparatoires* of the MLCBI and to the French text to clarify what the meaning of the requirement that the proceeding must be "pursuant to a law relating to insolvency".

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[5] The Cross-Border Insolvency Regulation 2006 ("CBIR") enacted the MLCBI which only applies in Great Britain; therefore, reference is not made to the United Kingdom of Great Britain and Northern Ireland.

[6] In *re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev.2009). See CLOUT case No. 927.

The court considered whether the equitable receivership under common law constituted a foreign proceeding pursuant to Art. 2 (a) MLCBI. The receiver's authority derived from the terms of the court order appointing him. Having regard to the powers and duties that had been conferred or imposed on the receiver in that order, the court found that the receivership was not a "foreign proceeding" pursuant to the CBIR. The court noted that since the purpose of that order was that the receiver should gather in and preserve assets in order to prevent dissipation and waste, not to liquidate or reorganize the debtors' estate, the underlying cause of action leading to the order was not related to insolvency. Moreover, the receivership was not a bankruptcy under the United States Bankruptcy Code.[7] The court further stated that the fact that some receiverships might be classified for some purposes as "insolvency proceedings" or be treated as acceptable alternatives to insolvency did not mean that the receivership before it satisfied the definition of foreign proceeding in the CBIR. The court further held that the receiver was not a "foreign representative" pursuant to Art. 2 (d) MLCBI at that time, even if the receivership was a "foreign proceeding", as the receiver had not been authorized to administer the liquidation or reorganization of company Y.

The court then considered whether the Antiguan liquidation was a foreign proceeding pursuant to the CBIR. The court noted as common ground that the Antiguan liquidation was a collective proceeding and that the liquidators were appointed to liquidate the assets of company Y. The court rejected the receiver's argument that the liquidators were not appointed pursuant to a law relating to insolvency, as part IV of the International Business Corporations Act (Cap 222 of the Laws of Antigua and Barbuda) was, generally speaking, a law relating to insolvency. It further noted that the Antiguan court order was based on the conclusion that company Y was insolvent and could not be reorganized through receivership. Thus the court held that the liquidators were appointed pursuant to a law relating to insolvency and that they were entitled to be recognized as foreign representatives of a foreign proceeding pursuant to Art. 2 (d) MLCBI.

2. COMI

In analyzing the use of the term COMI in the MLCBI, the court concluded that it would bear the same meaning as in the EC Regulation on insolvency proceedings,[8] as it corresponded to the formulation in the EC Regulation. In considering the term COMI, the court examined several cases decided under the EC Regulation. It referred, in particular, to the *Eurofood*[9] decision of the European Court of Justice that COMI must be identified by reference to criteria that are both objective and ascertainable by third parties to ensure legal certainty and foreseeability. Furthermore, the presumption as to registered office can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. The court noted that simply looking where head office functions were actually carried out, without considering whether

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[7] The insolvency law of the United States.

[8] The European Council Regulation (EC) No. 1346/2000 of 29 May 2000 in insolvency proceedings.

[9] *Bondi v. Bank of America, N.A. (In re Eurofood IFSC Ltd.)*, Case 341/04, 2006 E.C.R. I-3813, 2006 ECJ Celex Lexis 777, 2006 WL 1142304 (E.C.J. May 2, 2006).

the location of those functions was ascertainable by third parties was the wrong test. As to ascertainability, the court was of the view that that it encompassed what was in the public domain and what a typical third party could learn as a result of dealing with the company.

The court referred to the United States decision *re Tri-Continental Exchange Ltd*.[10] that the burden of proof to rebut the presumption [in Art. 16 (3) MLCBI] lies with the person asserting that the particular proceedings were "main proceedings", not on the person opposing that contention. The court observed that the factors established in the decision *re Bear Stearns*[11] to determine the COMI, including the location of the debtor's headquarters, the location of those who actually manage the debtor, the location of the debtor's primary assets, the location of a majority of the debtor's creditors or a majority of creditors who would be affected by the case and the jurisdiction whose law would apply to most disputes, were not qualified by any requirement of ascertainability. Accordingly, that decision does not reflect the decision in *Eurofood*.

The receiver argued that in the case of fraud, the court should investigate not the COMI of the company itself, but rather of the fraudsters. The court rejected that argument as the decision in *Eurofood* confirmed that each debtor constituted a distinct legal entity that was subject to its own court jurisdiction and because a fraud was unlikely to be ascertainable by third parties.

The court held that the relevant COMI was the COMI of company Y and that its COMI was presumed, in the absence of proof to the contrary pursuant to Article 16 (3) MLCBI, to be in Antigua, since its registered office was there. It further held that the burden of rebutting the presumption lay on the receiver and that the presumption could only be rebutted by objective factors that were ascertainable by third parties.

3. Main or non-main proceedings

The court determined that the Antiguan proceeding was a foreign main proceeding pursuant to Art. 2 (b) MLCBI and that the liquidators were entitled to recognition as foreign representatives pursuant to Art. 2 (d) MLCBI. In its determination, the court applied the principles in determining the COMI of a company that it had laid out before. It stated the facts that the public face of company Y was that of an Antiguan company, including that it was not a letterbox company, having its physical headquarters in Antigua, indicating through its marketing material its presence in Antigua, sending cheques from depositors to Antigua and providing private banking facilities from Antigua. The court viewed the receiver's arguments as insufficient to rebut the presumption, reinforced as it was by other objective facts ascertainable to third parties. In particular, it found the location of the principal fraudsters, the manner in which board meetings took place and the fact that the real management was carried out by employees in the United States, as not ascertainable by third parties. Further, the court did not view the nationality of the directors nor the outsourcing of some functions, such as management carried out by other companies

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[10] In *re Tri-Continental Exchange Ltd*., 349 B.R. 629 (Bankr. E.D. Cal.2006), see also CLOUT Case no. 766.

[11] In *re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), see also CLOUT case no. 794.

under contractual arrangement with company Y, as having an impact on the COMI. Nor did it view the fact that company Y's assets were located outside Antigua significant in terms of its COMI, as the assets were mostly not located in the United States and as company Y's business was the world-wide investment of funds.

4. Recognition of the receivers under common law

The court then examined whether the receiver could obtain recognition under common law, as the CBIR itself recognized that it did not apply to a wide variety of companies. The court noted that common law should supplement the CBIR and that if it was established as in the case at hand that a liquidator had been properly appointed in the place of incorporation of a company with the power and duty to collect assets on behalf of all creditors, then except for exceptional circumstances, the liquidator should continue its job without outside interference from others, in order to promote the general policy of universalism that there should be one collective proceeding in which all creditors were entitled to participate, irrespective of where they were located. The court held that the receiver should not be recognized in so far as its appointment dealt with the assets of company Y, but should be recognized for Mr. X and his other companies, as his connection with the United States was substantial. One of those companies had its registered office in Antigua, but unlike company Y, had the main part of its employees in the United States, where it also carried out its business and maintained its brokerage accounts. The other companies belonging to Mr. X were incorporated in the United States and the court viewed their substantial connection with the United States as plain.

Case 924: MLCBI 2 (a), 2 (b), 2 (d), 6, 16 (3)
USA: U.S. District Court for the Eastern District of Virginia
No. 07-51040-SCS
In re Jonathan A. Loy
18 December 2007
Original in English
Published in English:
380 B.R. 154
Abstract prepared by Susan Block-Lieb

[keywords: centre of main interests (COMI), foreign main proceeding-determination, foreign representative, presumption-centre of main interests (COMI), public policy]

The insolvency representative (the "foreign representative") of an English insolvency proceeding ("foreign proceeding") sought recognition of the foreign proceeding as "foreign main proceeding" under the law enacting the MLCBI in the United States of America.[12] The debtor, a British citizen, left England with his wife and relocated to Hampton in the United States, where he owned real property (the "Hampton Property"). Before filing a petition for recognition, the foreign representative applied for a *lis pendens*[13] against the Hampton Property in the

[12] Chapter 15 of the United States Bankruptcy Code, "Chapter 15".

[13] A *lis pendens* is a written notice that a lawsuit has been filed which concerns the title to real property or some interest in that real property. The *lis pendens* (or notice of pending action) is filed with the clerk of the court, certified that it has been filed, and then recorded with the county recorder.

circuit court, seeking to sell the Hampton Property to satisfy the debtor's debts in the foreign proceeding. The debtor objected to the application for recognition on the grounds that the application for a *lis pendens* had been done improperly, and that under the doctrine of "unclean hands", the foreign representative should be prevented from obtaining any relief relating to the Hampton Property, including recognition of the foreign proceeding under Chapter 15. The bankruptcy court concluded that the foreign representative was a "foreign representative" according to 11 U.S.C. § 101(24) [corresponds to Article 2 (d) MLCBI] and that the foreign proceeding was a "foreign proceeding" as defined in 11 U.S.C. § 101(23) [Art. 2 (a) MLCBI]. The court further found that the debtor's "centre of main interests" ("COMI") pursuant to Art. 16 (3) MLCBI was the United Kingdom of Great Britain and Northern Ireland and that the foreign proceeding constituted a foreign main proceeding pursuant to 11 U.S.C. § 1502(4) [Art. 2 (b) MLCBI] based on the fact that the debtor and his wife were only temporary residents of the United States and were required to return to the United Kingdom by the end of the year in which the recognition hearing was conducted. The court also viewed as significant the fact that almost all of the debtor's creditors were located in the United Kingdom and that English law governed the foreign proceeding pending against the debtor. While admitting that the debtor owned property in the United Kingdom, France and the United States, the court viewed the presence of the Hampton Property in the United States as insufficient to overcome the weight of the other factors. In its determination of COMI, the court had regard to the factors listed in the decisions of *Bear Stearns*[14] and *SpHinX*.[15]

As for the debtor's argument regarding the impropriety of the application for *a lis pendens* preceding recognition of the foreign proceeding, the bankruptcy court agreed with the decision in *Iida v. Kitahara*[16] that a foreign representative must first pass through the bankruptcy court and receive Chapter 15 recognition of his foreign judgment prior to requesting comity or cooperation in a court in the United States. Nonetheless, the court did not view the application for a *lis pendens* as implicating the comity or cooperation of the circuit court. It described a *lis pendens* as a mechanism to provide notification to the world that pending litigation involving a particular piece of property exists, and that any interest acquired in that property is subject to the outcome of that pending litigation. As a result, it did not view the filing of the application for a *lis pendens* as impeding the foreign representative's ability to obtain recognition of the foreign proceeding. The court also declined to deny recognition on the basis of the foreign representative's "unclean hands," because it viewed generalized equitable considerations as outside the scope of a recognition determination, the grounds for which are set by clear statutory mandate. In that regard, the court did not find anything that would require it to invoke the public policy exception under 11 U.S.C. § 1506 [Art. 6 MLCBI]. Alternatively, the bankruptcy court also declined to enjoin the debtor from filing claims relating to the Hampton Property. Because a pre-filing injunction would constitute a drastic remedy, and because the foreign representative had not demonstrated any of the pre-filing conduct viewed by prior courts as relevant to such an injunction, the court

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[14] See supra note 11.

[15] In *re SpHinX*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), see also CLOUT 768.

[16] *Iida v. Kitahara* (In *re Iida*), 377 B.R. 243, 257 (Bankr. 9th Cir. 2007), see also CLOUT 761.

declined to enjoin the debtor from litigation or to direct the debtor only to litigate with the foreign representative in the confines of the bankruptcy court.

Case 925: MLCBI 2 (b), 2 (c), 2 (d), 15, 16 (1), 16 (3), 17
USA: U.S. District Court for the Southern District of New York
No. 07-13765 (SMB)
In re Oversight and Control Commission of Avánzit, S.A.
18 April 2008
Original in English
Published in English:
385 B.R. 525, 59 Collier Bankr. Cas. 2d 879, 49 Bankr. Ct. Dec. 260
Abstract prepared by Susan Block-Lieb

[keywords: centre of main interests (COMI), foreign main proceeding-determination, foreign non-main proceeding, foreign representative, presumption-centre of main interests (COMI), purpose-MLCBI]

The Spanish insolvency representative ("foreign representative") sought recognition under the law enacting the MLCBI in the United States of America[17] of a Spanish insolvency proceeding, a *suspensión de pagos* ("foreign proceeding"). A business partner of the debtor opposed the application for recognition on the grounds that the foreign proceeding was no longer a "foreign proceeding" capable of recognition, as the *convenio*, plan of repayment, reached in the foreign proceeding, had been approved by the Spanish court (the "foreign court"). Comparing a debtor bound to a court-approved *convenio* to a debtor-in-possession bound to a confirmed plan of reorganization under Chapter 11 of the United States Bankruptcy Code,[18] the court found that sufficient jurisdiction remained over the debtor's affairs, although under Spanish law the foreign representative was not authorized to interfere in the debtor's operations absent default under the terms of the *convenio*. However, as the debtor was required to make payments under the *convenio* for two years and as failure to comply with the terms of the *convenio* rendered the debtor subject to liquidation in the foreign court, the court thought a "foreign proceeding" sufficient to justify recognition under Chapter 15 still existed. The court noted that the word "pending" as used in 11 U.S.C. §§ 1502(4) and 1502(5) [corresponds to Arts. 2 (b) and (c)] meant "taking place" [as used in the MLCBI]. The court thought that the policy purposes of Chapter 15 would be thwarted if "foreign proceeding" was interpreted to cut off the possibility of recognition at a time when cooperation, certainty, fairness, asset values and financial relief were most needed, simply because the debtor successfully prosecuted its reorganization case.

Once the court concluded that a "foreign proceeding" still existed, it concluded that Spain was the location of the debtor's "centre of main interests" [pursuant to Art. 16 (3) MLCBI] and that the foreign proceeding was, thus, a "foreign main proceeding." The debtor was a company organized under the laws of Spain, its registered address was in Spain, and it leased a large office building in Madrid for the management of its business. The court held that the foreign representative met the definition of a "foreign representative" and hence "a person or body" pursuant to 11 U.S.C. § 101(24) [Art. 2 (d) MLCBI], as it was created under the *convenio*

[17] See supra note 12.
[18] See supra note 7.

approved by the foreign court for the stated purpose of protecting the interests of the creditors and assuring the debtor's compliance with its payment obligations. The court noted that neither the United States Bankruptcy Code nor the MLCBI define "body", but that the context suggested that it would include an artificial person created by a legal authority as that foreign representative. The court concluded that the other requirements, referring to 11 U.S.C. §§ 1515, 1517 and 1516(a) [Arts. 15, 17 and 16 (1) MLCBI], for recognition had been satisfied by the application.

Case 926: MLCBI 2 (b), 19, 21
USA: U.S. District Court for the Central District of California
No. LA08-17043SB, LA08-17049SB, LA08-17054SB
In re Pro-Fit International Limited
30 June 2008
Original in English
Published in English:
391 B.R. 850
Abstract prepared by Susan Block-Lieb

[keywords: creditors-protection of, foreign main proceeding-determination, interpretation-international origin, relief-provisional]

The joint foreign representatives of the debtor filed a petition for recognition of the United Kingdom of Great Britain and Northern Ireland administration ("foreign proceeding") of three related companies (collectively, "the debtor"), as a foreign main proceeding pursuant to § 1502(4) of the law enacting the MLCBI in the United States[19] [corresponds to Art. 2 (b) MLCBI], and sought provisional relief under 11 U.S.C. § 1519 [Art. 19 MLCBI] pending the hearing of that application. A creditor objected on procedural grounds to the request, arguing that provisional relief could not be granted unless the joint foreign representatives met the standards for obtaining a preliminary injunction: proof of a likelihood of success on the merits and possibility of irreparable harm or demonstration of substantial questions as to the merits and that the balance of hardships tipped sharply in their favor. Moreover, procedural rules normally applicable in federal courts require allegations pertaining to a preliminary injunction or temporary restraining order to be detailed and specific.

The court declined to import these requirements into the provisional remedies granted pursuant to 11 U.S.C. § 1519 [Art. 19 MLCBI]. Because the joint foreign representatives requested only that the automatic stay found in 11 U.S.C. § 362 of the United States law apply to the debtor and its assets pending the hearing on recognition, and not an injunction or stay of execution, the court thought it inappropriate to apply all of the requirements associated with obtaining an injunction.

In its analysis, the court had regard to the interpretation of Chapter 15 according to 11 U.S.C. § 1508, but found that the matters before the court did not implicate provisions from the MLCBI, but from provisions that the United States legislator had specially added in adopting the MLCBI in the United States. The court noted

[19] See supra note 12.

that even on a narrower reading of 11 U.S.C. § 1521(e)[20] [Article 21 MLCBI, but no corresponding paragraph in the MLCBI], the adoption of 11 U.S.C. § 362 for a Chapter 15 case was not in the nature of issuing an injunction that required an adversary proceeding and referred to the case of *Ho Seok Lee*.[21]

Case 927: MLCBI 2 (a), 2 (b), 2 (e), 8, 15, 16 (3)
USA: U.S. Bankruptcy Court for the District of Nevada
No. BK-S-08-21594 BAM
In re Betcorp Limited (In Liquidation)
9 February 2009
Original in English
Published in English:
400 B.R. 266
Abstract prepared by Susan Block-Lieb

[key words: centre of main interests (COMI), foreign main proceeding-determination, foreign representative, interpretation-international origin, presumption-centre of main interests (COMI), purpose-MLCBI]

Effectively put out of business by the United States Unlawful Internet Gambling Enforcement Act, Pub. L. No. 109-347, 120 Stat. 1884 (codified at 31 U.S.C. §§ 5361 – 67), the debtor, an Australian company, began voluntary winding-up proceedings ("foreign proceedings") in Australia, in which insolvency representatives were appointed ("foreign representatives"). In 2008, the foreign representatives sought recognition under the law enacting the MLCBI in the United States.[22] A United States company opposed recognition on several grounds. Earlier in 2008, it had sued the debtor in a court in Nevada for patent infringement. The foreign representatives' request for recognition of the foreign proceeding followed on failed negotiations with that United States company as to whether their patent infringement claim would be resolved by the litigation pending in the Nevada court or in the foreign proceeding.

In addressing the request for recognition, the court first assessed whether the foreign proceeding was a "foreign proceeding" within the meaning of 11 U.S.C. § 101(23) [corresponds to Art. 2 (a) MLCBI]. Although the United States company argued that the foreign proceeding was not a "foreign proceeding" because there was no lawsuit or legal proceeding in Australia in which a judge or other judicial officer directly supervised the foreign representatives' actions, the bankruptcy court rejected the notion that the foreign proceeding amounted to no more than a unilateral cessation of business followed by a private and unregulated settling of accounts. Noting that Chapter 15 incorporates the MLCBI and that in its interpretation regard should be had to its international origin pursuant to 11 U.S.C. § 1508 [Art. 8 MLCBI], the court looked to the MLCBI's Guide to Enactment, as well as to the plain language of 11 U.S.C. § 101(23) [Art. 2 (a) MLCBI], to find that the term "foreign proceeding" depended upon the existence of seven factors, which it addressed in turn:

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[20] 11 U.S.C. § 1521 states that "[t]he standards, procedures, and limitations applicable to an injunction shall apply to relief under paragraphs (1), (2), (3) and (6) of subsection (a)."
[21] In *re Ho Seok Lee*, 348 B.R. 799 (Bankr. W. D. Wash. 2006), see also CLOUT 754.
[22] See supra note 12.

(i) *There is a "proceeding"* — The United States company argued that the voluntary winding-up proceeding could not be considered a "proceeding" without a petition or application filed with a court. In rejecting this argument, the court looked to the EC Regulation on insolvency proceedings,[23] and found that United States insolvency law similarly defines "proceedings" broadly to include acts and formalities set down in law so that courts, merchants and creditors could know them in advance. It concluded that the Australian Corporations Act, which governs voluntary winding-up proceedings, as well as a multitude of other procedures used to end a corporation's existence, constituted a "proceeding" within the meaning of 11 U.S.C. § 101(23) [Art. 2 (a) MLCBI].

(ii) *That the foreign proceeding has a judicial or administrative character* — Reviewing Australian law in some detail, the court concluded that an Australian voluntary winding-up proceeding was, generally, a procedure with an administrative character, although under articulated circumstances the proceeding may temporarily become more appropriately characterized as judicial.

(iii) *It is a collective proceeding* — Defining a "collective proceeding" as one that considered the rights and obligation of all creditors, the court concluded that Australian voluntary winding-up proceedings were collective. To reach this conclusion the court looked both to Australian case law and legal treatises discussing Australian law.

(iv) *Located in a foreign country* — The court had found this requirement satisfied as the first meeting of creditors and investors of the debtor had been held in Australia and conducted under the auspices of Australian law.

(v) *Authorized or conducted under law related to insolvency or adjustment of debt* — The court found this criterion satisfied based on the fact that the Australian Corporations Act "regulates the whole of the life-cycle of an Australian corporation" and the fact that the Australian Parliament had found that this law qualified under the MLCBI when adopting implementing legislation of its own.

(vi) *Foreign court's control or supervision of debtor's assets and affairs* — The court found the term "foreign court" defined broadly in 11 U.S.C. § 1502(3) [Art. 2 (e) MLCBI] as "a judicial or other authority competent to control or supervise" a foreign proceeding. The court found that the foreign representatives controlled the debtor's voluntary winding-up proceeding and the Australian Securities and Investments Commission ("ASIC"), controlled the foreign representatives. Alternatively, the court found that since voluntary winding-up proceedings were subject to judicial supervision in the event the foreign representatives or any creditor requested the court to determine any question arising in the winding-up of a company, that was sufficient to satisfy this requirement.

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[23] See supra note 8.

(vii) *Reorganization or liquidation purpose of the proceeding* — Looking at Australian case law, the court found that a winding-up proceeding clearly seeks to accomplish the liquidation of a company; it concluded that this factor had been satisfied.

The court next addressed whether this "foreign proceeding" met the three requirements for recognition found under 11 U.S.C. § 1517 [Art. 17 MLCBI]:

(i) *The "foreign proceeding" is a "foreign main proceeding" or a "foreign non-main proceeding" within the meaning of section 1502 [Art. 2 MLCBI]* — The court noted that 11 U.S.C. § 1502(4) [Art. 2 (b) MLCBI] defined a "foreign main proceeding" as a "foreign proceeding pending in the country where the debtor has the centre of its main interests." While the United States Bankruptcy Code[24] does not specifically define "centre of main interests" ("COMI"), 11 U.S.C. 1516(c) [Art. 16 (3) MLCBI] provides that, "in the absence of evidence to the contrary, the debtor's registered office … is presumed to be the COMI." In this case, the debtor's registered office was at all times in Australia, but because the United States company had in good faith introduced evidence questioning this fact, the court concluded that it could not rely solely on the presumption and must consider all the evidence. After reviewing both case law decided under Chapter 15 (*Basis Yield Alpha*,[25] *Bear Stearns*,[26] *SpHinX*[27] and *Tradex*[28]) and case law decided under the EC Regulation on Insolvency[29] (*Eurofood*;[30] *BRAC Budget Rent-A-Car*;[31] *Collins & Aikman*[32]), the court found that the cases analyzing COMI demonstrated that courts do not apply any rigid formula or consistently find one factor dispositive; instead, courts analyze a variety of factors to discern objectively, where a debtor had its principle place of business. Reviewing United States case law, it also concluded that the determination of the debtor's COMI should consider the facts in existence at the time of the filing of the application for recognition and not just the debtor's operational history. In this regard, the court thought virtually all the evidence pointed toward the conclusion that the debtor's COMI was in Australia. The only relevant factor to the contrary — the location of the debtor's creditors — did not overcome the fact that 91.4 per cent of the debtor's shareholders resided in Australia, that 67.2 per cent of its shares were held by Australian residents, and that all but five of its directors resided in Australia (and none in the United States).

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[24] See supra note 7.

[25] In *re Basis Yield Alpha Fund (Master)*, 381 B.R. 37 (Bankr. S.D.N.Y. 2008), see also CLOUT 789.

[26] See supra note 11.

[27] See supra note 15.

[28] In *re Tradex Swiss AG*, 384 B.R. 34 (Bankr. D. Mass. 2008), see also CLOUT 791.

[29] See supra note 8.

[30] See supra note 9.

[31] In *re BRAC Budget Rent-a-Car Int'l Inc*., [223] EWHC 128 (Ch), 2003 WL 117146 (Eng.).

[32] *Collins & Aikman Corp Group*, [2005] EWHC (Ch) 1754, P 38, 2005 WL 4829623 (Eng.).

(ii) *The "foreign representative" applying for recognition was a person or body* — The court concluded that the foreign representative was a person.

(iii) *The application met the requirements of 11 U.S. § 1515 [Art. 15 MLCBI]* — Again, based on the evidence before it, the court concluded that (a) the foreign representative had filed an application for recognition of the foreign proceeding in which he had been appointed, (b) that the foreign representative had established that the foreign proceeding existed and that he had been appointed as foreign representative in that proceeding by presenting his own affidavit and a certificate from the ASIC as to his appointment pursuant to Australian law, and (c) a declaration from the foreign representative that the voluntary winding-up proceeding was the only foreign proceeding with regard to the debtor.

Case 928: MLCBI 21, 23
USA: U.S. District Court for the Southern District of Mississippi
In re Condor Insurance Limited
No.1:08CV639-LG-RHW
9 February 2009
Original in English
Published in English:
411 B.R. 314
Abstract prepared by Susan Block-Lieb

[keywords: avoidance actions, purpose-MLCBI]

Following recognition under the law enacting the MLCBI in the United States of America[33] of an insolvency proceeding in the Federation of Saint Kitts and Nevis ("foreign proceeding") with respect to a Nevis insurance company, the insolvency representatives ("foreign representatives") commenced an action in the bankruptcy court to avoid, under Nevis law, allegedly fraudulent transfers made to another company. That company sought to dismiss the action on the grounds that 11 U.S.C. §§ 1521 and 1523 [correspond to Arts. 21 and 23 MLCBI] do not authorize the foreign representatives to commence avoidance actions, despite recognition of foreign proceedings, but rather permit a foreign representative to bring such an action only following commencement of an insolvency proceeding under United States law. The bankruptcy court dismissed the action.[34] The foreign representatives appealed, arguing that 11 U.S.C. §§ 1521 and 1523 [Arts. 21 and 23 MLCBI] limit the powers of a foreign representative to bring an avoidance action under United States law only, but do not constrain powers under foreign avoidance laws.

On appeal, the district court affirmed the decision of the bankruptcy court. The court noted that the purpose of Chapter 15 is to promote cooperation between the United States courts and courts in foreign countries during multinational insolvency proceedings and to promote greater legal certainty for trade and investment pursuant to 11 U.S.C. § 1501(a)[(1) and(b)] [Preamble, paragraphs (a) and (b)]. Although it

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[33] See supra note 12.
[34] In *re Condor Insurance Limited*, 2008 WL 2858943 (Bankr. S.D. Miss. 2008).

agreed that the plain language of 11 U.S.C. §§ 1521 and 1523 [Arts. 21 and 23 MLCBI] only expressly precluded in a Chapter 15 case specified avoidance actions under United States law, the court also looked to the legislative history to reach its decision. The legislative history indicates that 11 U.S.C. § 1523 substantially follows Art. 23 MLCBI, but adds language to fit it within the procedure under United States insolvency law. Specifically, the limitation [in section 1523] reflects concerns raised by the United States delegation during UNCITRAL debates that a simple grant of standing to bring avoidance actions neglects to address very difficult choice of law and forum issues. Based on this legislative history, the district court concluded that 11 U.S.C. § 1523 was intended to exclude all avoidance powers, "under either United States or foreign law." Since the foreign representatives had not commenced a case under Chapter 7 or 11 of the United States Bankruptcy Code,[35] the district court affirmed the order of the bankruptcy court.

Case 929: MLCBI 2 (b), 2 (c), 2 (f), 8, 16 (3), 17 (1)(a), 17 (1)(b), 17 (1)(c)
USA: U.S. District Court for the Southern District of Texas
No. H-08-1961
Lavie v. Ran
30 March 2009
Original in English
Published in English:
406 B.R. 277, 61 Collier Bankr. Cas. 2d (MB) 913
Abstract prepared by Susan Block-Lieb

[keywords: centre of main interests (COMI), foreign main proceeding-determination, foreign representative, interpretation-international origin, presumption-centre of main interests (COMI), establishment, purpose-MLCBI]

The debtor had been the Chief Executive Officer of an Israeli company. After that company encountered financial difficulties, the debtor left Israel in 1997 and located in Texas. Involuntary insolvency proceedings ("foreign proceedings") were commenced against the debtor in Israel in 1997. The Israeli court declared the debtor insolvent, appointed an insolvency representative of his estate ("foreign representative"), and ordered the liquidation of the debtor's estate. Nearly a decade after the debtor and his family emigrated to the United States of America and more than seven years after having been appointed to the debtor's case, the foreign representative applied in the United States bankruptcy court in 2006 for recognition of the foreign proceeding as either foreign main or non-main proceeding under the law enacting the MLCBI into United States law.[36] The bankruptcy court denied the application[37] and the foreign representative appealed to the district court, which remanded the case for further factual findings.[38] On remand, the bankruptcy court again declined to recognize the foreign proceeding as either a foreign main or

[35] See supra note 7.
[36] See supra note 12.
[37] The decision is not unpublished.
[38] *Lavie v. Ran*, 384 B.R. 469 (S.D. Tex. 2008).

foreign non-main proceeding.[39] The foreign representative again appealed. The district court affirmed the bankruptcy court's refusal of recognition.

In its analysis, the court focused on whether the foreign proceeding constituted a main or non-main proceeding, as the requirements for recognition of a foreign proceeding in 11 U.S.C. § 1517(a) [corresponds to Art. 17 (1)(a)-(c) MLCBI] were undisputedly met. The court noted that a foreign proceeding must be classified as either a foreign main or non-main proceeding in order to be recognized and for relief to be afforded under Chapter 15 in accordance with 11 U.S.C. § 1517 (a) [Art. 17 (1)(a)-(c) MLCBI].

The court further noted that United States courts have construed the concept of "centre of main interests" ("COMI") which is central to the finding of a "foreign main proceeding" pursuant to 11 U.S.C. § 1502(4) [Art. 2 (b) MLCBI], primarily in the context of corporate debtors. The court also noted that neither Chapter 15 nor the MLCBI define COMI explicitly, but provide a rebuttable presumption for COMI [in 11 U.S.C. § 1516(c) and Art. 16 (3) MLCBI respectively]. The court then considered relevant factors such as the location of the debtor's primary assets, the location of the majority of the debtor's creditors that would be affected by the case, and the law of jurisdiction that would apply to resolve most disputes. The court noted that unique to the interpretation of Chapter 15, the court should consider its international origin, and the need to promote an application of Chapter 15 that was consistent with the application of similar statutes adopted by foreign jurisdictions according to 11 U.S.C. § 1508 [Art. 8 MLCBI]. Due to this paucity of case law under United States law, the district court next considered decisions of European courts construing a nearly identical COMI standard under the EC Regulation,[40] which view an individual debtor's COMI as his or her habitual or permanent residence; the court noted that these courts look at whether the debtor intends to stay in the location permanently, and in considering this issue look at the length of time spent in the location and the debtor's occupational or familial ties to the area. Quoting *SpHinX*,[41] the court further noted that a foreign court's determination that its jurisdiction was the debtor's COMI was not binding on a United States court, but that Chapter 15 required the United States' court to make an independent finding at the time the application for recognition is filed in the United States court. In rejecting the contention that the debtor's COMI was Israel, the district court noted that the debtor (i) left Israel nearly a decade before the foreign representative sought recognition of the foreign proceeding, (ii) established employment and residence in Texas, (iii) maintained his finances exclusively in Texas, and indicated no intention to return to Israel, which the court found credible in light of testimony that return could be dangerous for the debtor or his family members.

As for the concept of an "establishment" in Israel pursuant to 11 U.S.C. § 1502(2) [Art. 2 (f) MLCBI], necessary to a finding that the foreign proceeding was a "foreign non-main proceeding" pursuant to 11 U.S.C. § 1502(5) [Art. 2 (c) MLCBI], the court found that the debtor had no "place of operations" or "economic activity" within Israel, rejecting the foreign representative's argument that the foreign proceeding itself constituted such activity. That the proceeding was conducted

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[39] *Lavie v. Ran*, 390 B.R. 257 (S.D. Tex. 2008).

[40] See supra note 8.

[41] See supra note 15.

involuntarily and in the debtor's absence were factors emphasized by the court in reaching this conclusion. In the case of an individual debtor, the court thought that "presumably a place of business would align with either a secondary residence or possibly a place of employment," or some other sort of voluntary activity. Since the debtor possessed neither in Israel, and engaged in no voluntary, non-transitory activity in Israel, the court found no "establishment" there.

In its conclusion, the court recognized that there was some level of unfairness in a debtor's avoidance, or attempted avoidance, of his debts via relocation, but that a prompt application for recognition might avoid a similar result in future cases.