



General Assembly

Distr.: General
25 November 2024

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

UNCITRAL Model Law on Cross-Border Insolvency (MLCBI)

Case 2196: MLCBI 16(3); 21(1)(d); 21(1)(g); 22

Singapore: General Division of the High Court

Case No. Originating Application No. 116 of 2024

In the matter of Fullerton Capital Limited (in liquidation)

18 June 2024

Original in English

Published: [2024] SGHC 155

[**Keywords:** *centre of main interests (COMI) – determination; presumption – COMI; other interested persons – protection; relief – injunctive; relief – upon request*]

The debtor, incorporated and with the registered office in the British Virgin Islands (“BVI”), was placed in insolvent liquidation in the BVI (the BVI proceeding). The joint liquidators of the debtor applied to the Court for recognition of the BVI proceeding as a foreign main or non-main proceeding and of the joint liquidators as foreign representatives under the Third Schedule of the Insolvency, Restructuring and Dissolution Act enacting MLCBI in Singapore (the recognition). The joint liquidators sought, under article 21 (1) (d) and (g) of MLCBI, examination and disclosure orders with an injunctive effect against certain persons (the relief), including a former shareholder and director of the debtor who objected to the recognition and the relief sought against him (the “objecting party”).

The objecting party opposed the recognition inter alia on the ground that the BVI proceeding was not appropriately commenced. The Court disagreed. It was satisfied that the conditions of articles 2 (a) and (d), 4, 15 and 17 of MLCBI for granting the recognition were met. The Court confirmed that it was neither required nor desirable for a recognition court to delve into the merits of a foreign insolvency proceeding, including whether or not a foreign insolvency proceeding was properly commenced, because a recognition proceeding was a light-touch process¹ for which matters such as whether or not the debtor should have been put into insolvent liquidation in BVI were irrelevant, being matters for the BVI court to consider.

Having ascertained that the public policy exception was not invoked and did not apply in this case, the Court concluded that, pursuant to article 17 (1) of MLCBI, the recognition must be granted. The Court turned to the question on whether the BVI proceeding was to be recognized as a foreign main or non-main proceeding. The Court recalled that, under article 16 (3) of MLCBI, the debtor’s registered office was

¹ *In the matter of PT Garuda Indonesia (Persero) Tbk*, CLOUT 2191.



presumed to be the centre of its main interests (COMI), and that presumption operated as a starting point subject to displacement by evidence to the contrary.² With reference to the applicable case law, the Court recalled that, even though the relevant date for determining a debtor's COMI was the date the application for recognition was filed,³ the operations of the debtor "while it was alive and flourishing" should not be disregarded for determination of the debtor's COMI.⁴

The Court noted that, in ascertaining COMI, the focus was on determining the centre of gravity of factors that would be objectively ascertainable by third parties generally and creditors and potential creditors in particular, and such factors might include the location from which control and direction were administered, the location of creditors, the location of the debtor's operations and the governing law.⁵ While the objecting party argued that all those factors pointed away from the BVI, the Court found that some of those factors were disputed, while some others were not objectively ascertainable by third parties and none of them clearly tipped in favour of a particular location. Concluding that, under those circumstances, the article 16 (3) presumption would operate in favour of taking the location of the debtor's registered office as its COMI, the Court determined that the BVI proceeding qualified as a foreign main proceeding and had, under article 17 (2) (a) of MLCBI, to be recognized as such in Singapore. The Court noted that, given that determination, the alternative of recognizing the BVI proceeding as a foreign non-main proceeding no longer arose.

As regards the relief, the Court recalled that, in granting relief under article 21 of MLCBI, the court must be satisfied that the interests of creditors and other interested persons were adequately protected, and hence it must have regard to all relevant circumstances and strike a balance between the relief sought and the interests of the affected party, in particular by not making an order that was unreasonable, unnecessary or oppressive. The Court recalled that, pursuant to article 22 (2) of MLCBI, the court might subject relief granted under article 21 to conditions the court considered appropriate.

Having ascertained that the information, documents and examination sought concerned only the debtor's property, affairs, rights, obligations and liabilities, that they were reasonably required for the joint liquidators to discharge their duties and that there was reasonable basis for the joint liquidators to believe that the objecting party, as a former shareholder and director of the debtor, had such information and/or documents, the Court granted the relief. To address the objecting party's concerns that the relief would prejudice his interests as an "interested person" under article 22 (1) of MLCBI, in particular his defence in an ongoing legal proceeding between him and the debtor's creditor,⁶ the Court, agreeing with the objecting party that it was an "interested person" for the purposes of article 22 (1) of MLCBI, subjected the relief to the undertaking by the joint liquidators not to disclose to the creditor documents and information directly relevant to the creditor's claims against the objecting party in that other legal proceeding, which they obtained from the objecting party pursuant to the relief, save for documents and information already obtained in that proceeding. The Court granted liberty to the joint liquidators to apply for additional disclosures, making it clear that the Court was expected to be addressed on a specific set of information or documents with precise reasons why they would need to be disclosed and that the Court would hear the objecting party again before making any decision in respect of the concrete and defined situation present at that time.

Recalling the general principle that information obtained by a liquidator would be used only for the purposes of assisting the liquidator in discharge of its duties, the Court dismissed other arguments of the objecting party against granting the relief,

² *Re: Zetta Jet Pte Ltd and Others (Asia Aviation Holdings Pte Ltd, intervener)*, CLOUT 1816.

³ *Ibid.*

⁴ *Re Tantleff, Alan*, CLOUT 2069.

⁵ See footnotes above for *Re: Zetta Jet Pte Ltd and Others* and *Re Tantleff, Alan*.

⁶ The objecting party submitted that the joint liquidators had to disclose the information that they would obtain from him to the committee of creditors of which the creditor was the member.

namely that the joint liquidators acted in furtherance of the interest of the creditor because that creditor funded their actions and that, with the relief granted, the joint liquidators would have a “dry run” at cross-examining him prior to taking any legal action against him. The Court noted that the possibility of litigation against former directors of the debtor was not bar to an examination order, that it was orthodox for a liquidator to seek funding from creditors with a view to meeting costs and expenses associated with investigations into the affairs of a debtor and that the fact of creditor funding alone did not mean that a liquidator would fail to act properly and objectively.

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