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Contents

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INTRODUCTION

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

Case 754: MLCBI 1, 21
United States: U.S. Bankruptcy Court Western District of Washington at Tacoma
No. 06-40043
In re: Petition of Ho Seok Lee as Court-Appointed Manager of Young Chang Co., Ltd.
10 August 2006
Original in English
Published in English: 348 B.R. 799; 2006 Bankr. LEXIS 2018; 56 Collier Bankr. Cas. 2d (MB 1267); 46 Bankr. Ct. Dec 261

[**keywords**: *cooperation; procedural issues; relief-injunctive; purpose-MLCBI*]

The court entered an order granting recognition of the debtor's Korean insolvency proceeding as a foreign main proceeding pursuant to the law enacting the UNCITRAL Model Law on Cross-Border Insolvency [MLCBI] into United States of America ["United States"] law [chapter 15 of the United States Bankruptcy Code] and ordered that any right to transfer, encumber or otherwise dispose of assets of the debtor of any party other than the foreign representative was suspended. Shortly after the recognition order, a Korean company purchased the debtor and agreed to pay the creditors according to the Korean plan of reorganization by mid-June. The Korean court had since closed the debtor's Korean case.

Before the request of recognition in the United States and shortly after the debtor commenced the insolvency proceeding in Korea, a secured creditor had commenced proceedings in a United States county court to recover the accounts receivable that one of the debtor's subsidiaries owed to the debtor. This creditor did not appear at the hearing on the recognition. The debtor then sought an order to injunct the law suit pending in the state court. The secured creditor opposed the application arguing that the debtor was required to file an adversary proceeding to request an injunction under chapter 15 rather than rely, as it had, on a less formal motion for such relief.

The court granted the debtor's application for an injunction. It argued it was undisputed that injunctive relief was available under the chapter 15, 11 U.S.C. § 1521 [corresponds with Art. 21 MLCBI]. Further, it noted that the secured creditor's argument would be contrary to the legislative history of chapter 15. In addition, the court stated that the secured creditor's argument would create a different procedure for seeking an injunction under chapter 15 depending on when the petition was recognized: once recognition was granted, an adversary proceeding would be required but before recognition an application would suffice. The court held that it would not be cost effective to keep the chapter 15 case open merely to keep the stay in place when a procedure to grant an injunction and close the case was available. The court concluded that its decision was consistent with the intended purpose of chapter 15 according to 11 U.S.C. § 1501 [Art. 1 MLCBI], which was to provide effective mechanisms for dealing with cross-border insolvency and facilitating cooperation between domestic courts and courts of foreign countries.

Case 755: MLCBI 2 (f), 7, 15, 17 (2)(b), 21 (3), 22 (1)
United States: U.S. Bankruptcy Court Southern District of New York
No. 06-13061 (REG)
In re: Europäische Rückversicherungsgesellschaft in Zürich (European Reinsurance Company of Zurich)[1]
22 January 2007
Original in English
Published in English

[**keywords**: *additional assistance; creditors-protection of*]

The debtor was a company organized under the laws of Switzerland, which maintained a registered office in Switzerland. It was further registered as a foreign company in the United Kingdom of Great Britain and Northern Ireland ["United Kingdom"] and kept an office there. The debtor commenced the English insolvency proceeding to obtain court approval of a scheme of arrangement, which determined payment to the debtor's creditors. The insolvency representative ("foreign representative") appointed in the English proceeding applied to the United States court for recognition of the English proceeding as a foreign non-main proceeding and for an injunction and related relief under chapter 15.

The foreign representative brought forward the following arguments in favour of recognition:

(a) The case was properly commenced under the MLCBI, as it complied with the requirements of 11 U.S.C. § 1515 [Art. 15 MLCBI]:

(i) The petitioner was a foreign representative pursuant to 11 U.S.C. § 101 (24) [Art. 2 (d) MLCBI], as it was authorized by the English court order to represent the debtor in a case under the MLCBI in the United States.

(ii) The English proceeding constituted a foreign proceeding pursuant to 11 U.S.C. § 101 (23) [Art. 2 (a) MLCBI], as it was a collective judicial proceeding under which the assets and affairs of the debtor were subject to supervision of the English court for the purpose of administering the valuation and adjustment of creditors' claims under English law.

(iii) The requirements of 11 U.S.C. § 1515 (b)(1) [Art. 15 (2)(a) MLCBI] were satisfied: the petition was accompanied by a certified copy of the court order authorizing the petitioner to act as the debtor's foreign representative.

(iv) The requirements of 11 U.S.C. § 1515 (2)(c) [Art. 15 (3) MLCBI] were satisfied: the application was accompanied by a statement identifying the English proceeding as the only foreign proceeding known to the foreign representative.

(b) The English proceeding constituted a foreign non-main proceeding: it was pending where the debtor had an establishment in the United Kingdom according to 11 U.S.C. § 1517 (b) [Art. 17 (2)(b) MLCBI]. The debtor carried out a portion of its business as a non-transitory economic activity from its office

[1] This order has not been published in the United States official reports and thus may not possess precedential effect.

registered in England and had, thus, an establishment pursuant to the definition in 11 U.S.C. § 1502 (2) [Art. 2 (f) MLCBI].

(c) The petitioner was entitled to relief upon recognition pursuant to 11 U.S.C. § 1521 (c) [Art. 21 (3) MLCBI]: the relief is related to assets that should be administered in the foreign non-main proceeding.

(d) The requirements of 11 U.S.C. § 1522 (b) [Art. 22 (1) MLCBI] were satisfied: the relief would channel all claims of creditors against the debtor into one collective proceeding and protect the interests of creditors, whose claims would be treated in a non-discriminatory manner.

(e) The petitioner was entitled to additional assistance of the court under 11.U.S.C. § 1507 [corresponds with Art. 7 MLCBI, but enacted into United States law with some additional requirements].

The court followed the foreign representative's arguments and granted the application for recognition and for the injunction and related relief.

Case 756: MLCBI 2 (b) [(a)(d)], 6, 9, 14 (3), 15 (2)(a)(c), 16 (3), 17 (2)(a), 19 (1)(a)(c), 20, 21 (1)(e), (2)
United States: U.S. Bankruptcy Court Southern District of New York
No. 06-13077 (RDD)
In re: North American Steamships Ltd.[2]
25 January 2007
Original in English
Published in English

[**keywords**: *public policy; purpose-MLCBI*]

The debtor, a Canadian company, commenced an insolvency proceeding under Canadian law and an insolvency representative ("foreign representative") was appointed in that proceeding. Two weeks prior to commencement, two different creditors obtained court orders in the United States of America against the debtor for attachment or garnishment of the debtor's property in the court's district. Shortly afterwards, an electronic payment payable to the foreign representative was attached and paid into a blocked account in the United States of America. Subsequently, the foreign representative filed for recognition of the Canadian proceeding as a foreign main proceeding under chapter 15, for relief upon recognition pursuant to 11 U.S.C. §§ 1520, 1521 (a)(5) [Arts. 20, 21 (1)(e) and 21 (2) MLCBI] and for certain provisional injunctive relief pending entry of the recognition order pursuant to 11 U.S.C. § 1519 (a)(1)(3) [Art. 19 (1)(a)(c) MLCBI]. The foreign representative doubted whether 11 U.S.C. § 1514 (c) [Art. 14 (3) MLCBI] was applicable in the context of an ancillary case under chapter 15, but requested, nevertheless, the waiver of the notice requirements of 11 U.S.C. § 1514 (c) [Art. 14 (3) MLCBI].

The foreign representative argued that:

(a) The Canadian proceeding constituted a collective judicial proceeding, including an interim proceeding, under law relating to insolvency in which the

[2] This order has not been published in the United States official reports and thus may not possess precedential effect.

assets and affairs of the debtor were subject to control or supervision by a foreign court, for the purposes of restructuring or liquidation, and thus was a foreign proceeding according to 11 U.S.C. § 101 (23) [Art. 2 (a) MLCBI].

(b) The Canadian proceeding was a foreign main proceeding pursuant to 11 U.S.C. §§ 1502 (4), 1517 (b)(2) [Arts. 2 (b) and 17 (2)(a) MLCBI]: the debtor had its registered office and principal place of business in Canada, which could thus be presumed to be the debtor's centre of main interests ("COMI") pursuant to 11 U.S.C. § 1516 (c) [Art. 16 (3) MLCBI]; all of the debtor's business records and most of its corporate officers were at the place of its registered office.

(c) It was a "foreign representative" pursuant to 11 U.S.C. § 101 (24) [Art. 2 (d)]: it was duly appointed under Canadian insolvency law to administer the debtor's insolvency proceeding.

(d) The case was properly commenced:

(i) It had applied for recognition of the foreign proceeding directly to the court pursuant to 11 U.S.C. § 1509 [Art. 9 MLCBI].

(ii) The petition contained the information required under 11 U.S.C. § 1515 [Art. 15 MLCBI]:

(1) a certified copy of the application for commencement of the Canadian proceeding;

(2) a certified copy of the Certificate appointing the foreign representative; and

(3) the foreign representative's statement in support of the petition and recognition application, which, among other things, included a statement that the foreign representative was not aware of any other foreign proceeding pending with respect to the debtor 11 U.S.C. §§ 1515 (b)(1), 1515 (2)(c) [Art. 15 (2)(a) and (c) MLCBI].

(e) There were no public policy grounds to deny recognition under 11 U.S.C. § 1506 [Art. 6]: the legislative history demanded a narrow construction that only applied to the "most fundamental policies of the United States".

(f) Provisional relief was necessary to best ensure an economical, expeditious and equitable administration of the debtor's estate: otherwise creditors would seek to attach and garnish the debtor's accounts receivables which were paid through banks located in the United States, as this had happened before. If the provisional relief was not granted the bankruptcy estate of the debtor in the Canadian proceeding would be irreparably harmed by the collection and enforcement actions of particular creditors.

The court granted the provisional relief, as requested, noting that the requested relief was not contrary to the public policy of the United States, but rather consistent with the stated purposes of the MLCBI, as well as a waiver of the notice requirement specified in 11 U.S.C. § 1514 (c) [Art. 14 (3) MLCBI], without commenting on its applicability in ancillary cases. The court also granted the petition for recognition.

Case 757: MLCBI 15, 17, 19
United States: U.S. Bankruptcy Court Southern District of Indiana New Albany Division
No. 07-90171-BHL-15
In re: Daymonex Limited[3]
07 February 2007
Original in English
Published in English

[**keywords**: *foreign representative; relief-provisional*]

The debtor was a Canadian company, which applied to a Canadian court for commencement of an insolvency proceeding under Canadian law in January 2007. Immediately after the application, the Canadian court appointed company "A" as interim insolvency representative for the debtor. In February 2007, the sole director and officer of the debtor applied in the United States for recognition of the Canadian proceeding as a foreign main proceeding pursuant to 11 U.S.C. §§ 1515, 1517 [Arts. 15 and 17 MLCBI] and relief under 11 U.S.C. §§ 1520, 1521 [Arts. 20 and 21 MCLBI]. In addition, it applied for provisional relief pursuant to 11 U.S.C. § 1519 [Art. 19 MLCBI].

A creditor objected to the application for provisional relief under 11 U.S.C. § 1519 [Art. 19 MLCBI], arguing that the director had not been appointed by the Canadian court as the foreign representative. The director argued that it had been appointed by the debtor's board of directors; he also argued that he was better suited to act as the debtor's representative due to the limited nature of the court order appointing the insolvency representative.

The court noted that there was insufficient evidence to conclude that the director and not the insolvency representative or some other person was the foreign representative of the Canadian proceeding, without prejudging the question as to whether the petitioner was in fact the foreign representative of the Canadian proceeding for the purposes of the director's petition for recognition. The court held that the relief available under 11 U.S.C. § 1519 [Art. 19 MLCBI] must be requested by the foreign representative and, thus, denied the application for provisional relief. The director later supplied the court with additional information and the court recognized the Canadian proceeding as a foreign main proceeding according to 11 U.S.C. § 1517 [Art. 17 MLCBI].

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[3] This order has not been published in the United States official reports and thus may not possess precedential effect.

Case 758: MLCBI 2 (b), 9, 10, 15, 17, 20, 21 (1)(g), (2)
United States: U.S. Bankruptcy Court Southern District of New York
No. 07-10327 (RDD)
In re: Amerindo Internet Growth Ltd.[4]
06 March 2007
Original in English
Published in English

[**keywords**: *immunity-jurisdiction; comity*]

A Cayman court granted the debtor, a Cayman corporation with its registered office in the Cayman Islands, an insolvency order and appointed two insolvency representatives ("foreign representatives") for the proceeding. The books and records of the debtor were maintained and stored in the Cayman Islands. The court order authorized the foreign representatives to do any acts or things jointly and severally considered by them to be necessary or desirable in connection with the insolvency proceeding, including taking possession of all property or assets. One United States company, which acted as the debtor's prime broker, held funds of the debtor in United States accounts, which were frozen. This company was unwilling to release the funds without a court order. Consequently, the foreign representatives sought recognition of the Cayman proceeding as a foreign main proceeding pursuant to 11 U.S.C. § 1517 [Art. 17 MLCBI] and relief pursuant to 11 U.S.C. §§ 1520, 1521 (a) [Arts. 20 and 21 (1) MLCBI], including the court's assistance in identifying, realizing and properly administering the assets of the debtor. The foreign representative indicated that upon recognition they would seek an order authorizing and directing the United States company to turn over the debtor's assets in its possession pursuant to 11 U.S.C. § 1521 (a)(7) [Art. 21 (1)(g) MLCBI].

The court granted the recognition and relief as requested. It noted that the relief granted was necessary and appropriate, in the interests of the public and international comity, and consistent with the public policy of the United States. The court held that the request was properly made pursuant to 11 U.S.C. §§ 1509, 1515 [Arts. 9 and 15 MLCBI]. The court noted that the Cayman proceeding was commenced in the country of the debtor's centre of main interests ("COMI") and consequently, the Cayman proceeding was a foreign main proceeding pursuant to Art. 11 U.S.C. § 1502 (4) [2 (b) MLCBI] and entitled to recognition as such pursuant to Art. 11 U.S.C. § 1517 (b)(1) [17 (2)(a) MLCBI]. Further, the court held that the foreign representatives and the debtor were entitled to relief provided under 11 U.S.C. §§ 1520, 1521 (a)(b) [Arts. 20, 21 (1) and (2) MLCBI]. In addition, the court noted that no action taken by the foreign representatives or the debtor in connection with the foreign proceeding, the recognition order or the request for recognition under chapter 15 should constitute a waiver of the immunity afforded such persons pursuant to 11 U.S.C. § 1510 [Art. 10 MLCBI].

[4] This order has not been published in the United States official reports and thus may not possess precedential effect.

Case 759: MLCBI 2 (f), 17 (1), (2)(a)(b), 21, 22 (1)
United States: U.S. Bankruptcy Court District of South Carolina
No. 07-02356-JC
In re: Spencer Partners Limited[5]
29 May 2007
Original in English
Published in English

[**keywords**: *foreign main proceeding-determination; foreign non-main proceeding determination; relief-injunction*]

The debtor commenced an insolvency proceeding in the Isle of Man, where it had its registered office. The Isle of Man court appointed an insolvency representative ("foreign representative") who then sought recognition of the Isle of Man proceeding as a foreign main proceeding under chapter 15 in a United States court and relief under 11 U.S.C. §§ 1520, 1521 [Arts. 20 and 21 MLCBI].

One creditor, relying on the arguments from the decisions in SPHinX (In re: SPHinX, Ltd. et al., 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), *affd.* 371 B.R. 10 (S.D.N.Y. 2007)) and Tri-Continental (In re: Tri-Continental Exchange Ltd., 349 B.R. 627 (Bankr. E.D. Cal. 2006)), opposed the petition on the grounds that the Isle of Man proceeding was not a foreign main, but a non-main proceeding pursuant to 11 U.S.C. § 1517 (b)(2) [Art. 17 (2)(b)], and that certain relief requested was too broad and not in the best interests of creditors located in the United States pursuant to 11 U.S.C. § 1522 (a) [Art. 22 (1) MLCBI].

The court noted that the issue of whether the Isle of Man proceeding was pending in the country where the debtor had its centre of main interests, ("COMI") 11 U.S.C. § 1517 (b)(1) [Art. 17 (2)(a) MLCBI], was not to be determined at that time. Nevertheless, it recognized that the debtor had an establishment in the Isle of Man pursuant to 11 U.S.C. § 1502 (2) [Art. 2 (f) MLCBI] and thus recognized the Isle of Man proceeding as a foreign proceeding pursuant to 11 U.S.C. § 1517 (a) [Art. 17 (1) MLCBI], deferring the decision of whether it was a main or non-main proceeding to a later time. In addition, the court held that the foreign representative was entitled to the relief set forth in 11 U.S.C. § 1521 [Art. 21 MLCBI], but subject to specified limitations with respect to duration and scope to give the parties time to resolve pending issues.

[5] This order has not been published in the United States official reports and thus may not possess precedential effect.

Case 760: MLCBI 2, 8, 15, 16 (3), 17 (b), 20, 21, 25-27, 29
United States: U.S. Bankruptcy Court for the Southern District of New York
Nos. 07-12383 & 07-1234 (BRL)
In re: Bear Stearns
30 August 2007
Original in English
Published in English: 374 B.R. 122; 2007 Bankr. LEXIS 2949; Bankr. L. Rep. (CCH) P81,010; 48 Bankr. Ct. Dec. 216

[**keywords**: *presumption-centre of main interests (COMI); coordination; cooperation; foreign main proceeding-determination; interpretation-international origin*]

The joint insolvency representatives ("the foreign representatives") of two debtors in a position factually similar to each other in Cayman Island insolvency proceedings, applied for recognition as foreign main proceedings pursuant to 11 U.S.C. §§ 1515, 1517 [Arts. 15 and 17 MLCBI] and related relief pursuant to 11 U.S.C. §§ 1520, 1521 [Arts. 20 and 21 MLCBI]. In the alternative, they applied for recognition as non-main proceedings pursuant to 11 U.S.C. § 1502 (5) [Art. 2 (c) MLCBI] and sought relief under 11 U.S.C. § 1521 [Art. 21 MLCBI]. No objections were filed.

In its reasoning, the court first noted that it had to make an independent determination as to whether the foreign proceedings met the definitional requirements of 11 U.S.C. §§ 1502, 1517 [Arts. 2 and 17 MLCBI]. The court stated that though the MLCBI accorded substantial discretion and flexibility, the process of recognition was a simple single step process, incorporating the definitions in 11 U.S.C. § 1502 [Art. 2 MLBCI] for recognition as either a main or non-main proceeding or non-recognition. The court regarded this distinction as absolutely vital, as there were substantial eligibility distinctions and consequences involved. In this regard, the court departed from the reasoning in the bankruptcy court's decision in SPHinX. The court then discussed the requirements of a foreign main proceeding and examined the presumption of 11 U.S.C. § 1516 (c) [Art. 16 (3) MLCBI] that the debtor's registered office is the centre of its main interests. Referring to the legislative history, the court clarified that this presumption should only be applied in cases without any serious controversy, permitting and encouraging fast action in clear cases, and that the burden of proof was on the foreign representative. The court then examined the type of evidence that was needed to rebut the presumption, as chapter 15 included no details. As 11 U.S.C. § 1508 [Art. 8 MLCBI] directed the interpretation to be made in accordance with its international origin and the need to promote uniformity in its application, the court looked to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency ["the Guide to Enactment"], which referred to the concept of "COMI" in the European Union Convention on Insolvency Proceedings, [now the European Council (EC) Regulation No. 1346/2000 on insolvency proceedings]. The European Court of Justice noted that the "COMI" presumption might be rebutted "particular[ly] in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated" (In re: Eurofood IFSC Ltd., 2006 E.C.R. I-3813, p. 35). The Guide to Enactment explicitly allowed further examination if the presumption was called into question by the court or an interested party. The court held that the foreign representatives themselves provided

the evidence to the contrary: there were no employees or managers in the Cayman Islands; the investment manager for the Funds was located in New York; the Administrator running the back-office operations of the Funds was in the United States along with the Funds' books and records; and prior to the commencement of the foreign proceedings, all of the Funds' liquid assets were located outside the Cayman Islands companies. The court also noted that the investor registries and accounts receivable were located outside the Cayman Islands and that no counterparties to master repurchase and swap agreements were based in the Cayman Islands. Additionally, there was the possibility that prepetition transactions conducted in the United States might be avoidable under United States law.

The court then examined whether the Cayman proceedings constituted foreign non-main proceedings according to 11 U.S.C. § 1502 (5) [Art. 2 (c) MLCBI] on the basis of an establishment in the Cayman Islands. The court noted that the debtors did not conduct any (pertinent) non-transitory economic activity in the Cayman Islands nor did they have any funds on deposit there before the Cayman Islands' insolvency proceedings were commenced.

The court denied recognition under chapter 15, on the basis that the foreign proceedings were not pending in a country where the debtors had their "COMI" or where they had an establishment. The court noted that the petitioners were, nevertheless, not left remediless upon non-recognition. It referred to 11 U.S.C. § 1529 [Art. 29 MLCBI], which mandated cooperation among and coordination of foreign and domestic proceedings taking place concurrently concerning the same debtor pursuant to 11 U.S.C. §§ 1525-1527 [Arts. 25-27 MLCBI].[6]

Case 761: MLCBI 6, 9, 17
United States: U.S. Bankruptcy Appellate Panel of the Ninth Circuit
Nos. HI-07-1006-DKS, 06-00376, 06-90059
In re Katsumi Iida
26 September 2007
Original in English
Published in English: 2007 WL 3086034 (9th Cir. BAP (Hawaii)), 07 Cal. Daily Op. Serv. 12, 476

[**keywords**: *comity; foreign representative-authorization to; public policy*]

The debtor was a citizen and resident of Japan, having its principal United States assets in Hawaii. In August 2004, it was declared insolvent in Japan and an insolvency representative ("foreign representative") appointed. The foreign representative then took certain actions regarding the debtor's assets located in Hawaii, including removing the debtor as sole shareholder, director and officer of two of its Hawaiian corporations. In April 2006, the debtor filed a complaint in a Hawaiian state court against the foreign representative arguing that the foreign representative had lacked the requisite authority under United States law for those actions, because it had not applied for a bankruptcy court order of recognition.[7] In

[6] The decision has been appealed at the time of publication of this abstract. The decision of the appellate court will be published in a subsequent abstract when available.

[7] The complaint was filed by not only by the debtor Katsumi Iida, but also by Masaaki Iida who had also been removed by the Foreign Representative as director of one of the debtor's corporation. For a better understanding, reference is made here only to Katsumi Iida, the debtor.

June 2006, the foreign representative requested recognition of the foreign proceeding as a foreign main proceeding pursuant to 11 U.S.C. § 1517 [Art. 17 MLCBI] and relief under the MLCBI. The debtor opposed recognition on the grounds that it would violate public policy pursuant to 11 U.S.C. § 1506 [Art. 6 MLCBI]. The foreign representative argued that recognition would not validate any of its previous actions, but would enable it to remove the state court action to the bankruptcy court. The bankruptcy court granted the request. Subsequently the state court action was removed to the bankruptcy court, which rejected the debtor's complaint. The debtor then appealed.

On appeal, the appellate body had to decide whether the foreign representative had been under any obligation to obtain an order from a United States court before exercising control over property owned by the debtor in the United States. In its analysis, the appellate body emphasized that principles of comity or accommodation of foreign proceedings had provided the method by which foreign insolvency proceedings had been recognized in American jurisprudence, and that chapter 15 had not altered that approach. It then noted that 11 U.S.C. § 1509 [Art. 9 MLCBI] granted the foreign representative a right of direct access to the courts. It was further noted that 11 U.S.C. § 1509 (f) [no corresponding provision in the MLCBI] permitted a foreign representative to sue to collect or recover a claim that was the property of the debtor without obtaining prior permission from a bankruptcy court. It was also observed that the need for judicial assistance for the foreign representative only arose when the debtor had filed the state court action, at which point the foreign representative sought assistance under chapter 15. The debtor's public policy argument was rejected on the ground that the exception in 11 U.S.C. § 1506 [Art. 6 MLCBI] was narrow and, by virtue of the qualifier "manifestly", limited only to the most fundamental policies of the United States, which the debtor had not shown to be violated by recognition of the Japanese insolvency proceeding. The appealed decision was affirmed.