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Contents

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Introduction

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Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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

Case 1214: MLCBI 8; 17(2)(a); 16(3); 25; 26
Australia: Federal Court of Australia
Case no. QUD 216 of 2012
Re: Gainsford, in the matter of Tannenbaum vs Tannenbaum
24 August 2012
Original in English
Reported in English: [2012] FCA 904

[**Keywords**: *recognition*; *establishment*; *presumption-habitual residence*]

The debtor's trustees sought recognition in Australia of insolvency proceedings commenced in South Africa and various forms of relief.

Regarding recognition, the court considered what would constitute the debtor's habitual residence for the purposes of the Cross-Border Insolvency Act (enacting the Model Law in Australia), sections 17(2)(a) and 16(3) [articles 17(2)(a) and 16(3) MLCBI], noting the decision in *Williams v Simpson*[1] and the interpretation of that term as used in the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. The court found that the debtor's habitual residence was in Australia; the fact that he retained his South African citizenship and had not made any steps towards enrolment onto the Australian electoral roll was not determinative. Since the debtor was not a habitual resident of South Africa and had neither a place of operations nor carried out transitory economic activity with human means and goods and services in South Africa, the foreign proceedings could not be recognized as either main or non-main proceedings.

The court noted that since the Model Law as enacted in Australia was expressly not intended to limit the jurisdiction of the court to otherwise extend assistance to the courts of other nations [articles 8, 25 and 26], the court was able to grant the relief sought under other law, notwithstanding its inability to recognize the foreign proceedings under the Model Law.

[1] [2011] 2 NZLR 380; CLOUT case no. 1220.

Case 1215: MLCBI 25
Australia: Federal Court of Australia
Case no. NSD 2102 of 2011
Parbery; in the matter of Lehman Brothers Australia Limited (in liq)
15 December 2011
Original in English
Published in English: [2011] FCA 1449

[**Keywords**: *comity*; *communication*]

The liquidators of Lehman Brothers Australia Limited (LBA) applied, ex parte, to the court requesting it to communicate directly in accordance with the Cross-Border Insolvency Act 2008 (enacting the Model Law in Australia) with the judge dealing with the insolvencies of the Lehman Brothers Group of Companies in the United States. The request was based on a concern that a decision by the United States court in those insolvencies would have a bearing on the ability of the liquidators of LBA to carry out their statutory responsibilities to collect and realize the assets of LBA for the benefit of creditors and it was thought by the liquidators of LBA that such communication might assist in resolving conflicting orders of courts in England and the United States as to which of various competing creditors had priority to certain securities.

The court considered the history of the various proceedings in the English[2] and United States[3] courts on the question of priority over the collateral and in particular the steps that had been taken to establish a protocol for communication between the English and United States courts and that fact that communications had taken place. The court took the view that whether or not article 25 of the Model Law was wide enough to permit assistance to be sought from the United States judge in the manner requested by the liquidators, it should not be sought at the present time on the basis, inter alia, that: it might pre-empt the United States court's decision on certain matters, impinging on the principle of comity which is based on common courtesy and mutual respect and be seen by the United States judge as an unwarranted interference; the application had been made ex parte and all concerned parties had not been heard; and cooperation between the Australian court and any foreign court would generally occur within a framework or protocol that had previously been approved by the court, and was known to the parties in the particular proceeding.

Nevertheless, the court observed that the authorities to which it had referred[4] indicate that inter-court communications in cross-border insolvencies should be encouraged so long as it can be done without going beyond the principle of comity. The judge indicated it may be appropriate to communicate with the United States judge to inform him of the present application and to ask whether a protocol for future communications might be established, so long as the necessary parties were consulted about the terms of any communication that might take place. A draft letter to be sent to the United States court was appended to the judgement.

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[2] *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] 3 WLR 521.

[3] *Lehman Brothers Special Financing Inc v BNY Corporate Trustee Services Limited* (United States Bankruptcy Court, Southern District of New York, Case No 08-13555, Adversary Proceeding No 09-01242, 25 January 2010).

[4] Including the *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases*, published by the American Law Institute.

Case 1216: MLCBI 10; 11; 15; 21; 22; 29
Australia: Federal Magistrates Court of Australia
Case no. SYG 324 of 2010
Bank of Western Australia v David Stewart Henderson (No. 3)
2 November 2011
Original in English
Published in English: [2011] FMCA 840

[**Keywords**: *court-competence*; *recognition*; *recognition-application for*; *cooperation*]

The respondent was a property developer in Australia and New Zealand and at the time of the application was facing insolvency proceedings in New Zealand. The applicant, a creditor of the respondent, sought commencement of insolvency proceedings against the respondent in Australia. The respondent opposed the application on the grounds, inter alia, that since insolvency proceedings were already taking place against him in New Zealand, the New Zealand assignee would have ability, through use of the Cross-Border Insolvency Act 2008 (CBIA) (enacting the Model Law in Australia), to gather and distribute the respondent's property (including property in Australia) amongst the creditors. However, no application under the CBIA had been made in Australia and the New Zealand representative had not objected to the making of the order sought in Australia. Section 29 of the Australian Bankruptcy Act 1966 would also enable the New Zealand representative to gather in the property of the debtor in Australia in aid of the administration of the New Zealand proceedings.

The court considered the application of the Model Law in some detail, in particular whether it would have any effect where recognition was not being sought. The court noted that, in any event, the applicant, as a creditor, was not a party that could seek recognition under the Model Law and that it was not the competent court for the purpose of performing functions under the Model Law, not being the court designated under the equivalent of article 10 MLCBI. The court concluded that the Model Law was not intended to introduce automatic recognition and that it did not restrict a local court or creditors from commencing or concluding a local insolvency proceeding. Moreover, it was noted that cooperation under chapter IV of the Model Law did not require recognition in order to be effective. The court granted the order sought by the applicant.

Case 1217: MLCBI 6; 19(1); 19(4); 21(1)
Australia: Federal Court of Australia
Case no. NSD 885 of 2011
Lawrence vs Northern Crest Investment Limited (in liq)
19 June 2011
Original in English
Published in English: [2011] FCA 672

[**Keywords**: *relief-provisional*; *foreign proceeding*]

The foreign representative of the debtor, a New Zealand registered company listed on the Australian securities exchange and subject to liquidation proceedings in New Zealand, applied under article 19 [Article 19 MLCBI] of Schedule 1 to the Cross-Border Insolvency Act 2008 (CBIA) (enacting the Model Law in Australia)

for relief of a provisional nature pending determination of an application for recognition of the foreign proceedings.

The grounds for the application were, inter alia, that the directors of the debtor, who were resident in Australia, refused to give the foreign representative access to books and records of the debtor company on the basis that the New Zealand liquidator had no powers in Australia and they were thus not required to provide him with any information or otherwise to cooperate with him. The foreign representative also argued that the directors continued to dispose of certain assets of the company at no value and had entered into "voidable transactions" in relation to its assets.

Based on the evidence presented, the court granted provisional relief in accordance with article 19(1)(a) and (b) and article 21(1)(c) and (d) [article 21(1)(c) and (d) MLCBI] of Schedule 1 to the CBIA. The court noted that, as required by article 19(4) of Schedule 1 to the CBIA [article 19(4) MLCBI], there was no suggestion in this case that the granting of such interim relief would interfere with the administration of the foreign main proceedings and that none of the orders sought would be contrary to the public policy of Australia.

The proceedings were subsequently recognized as foreign main proceedings.[5]

Case 1218: MLCBI 2(a); 19; 20; 21; 25; 26; 27
Australia: Supreme Court of New South Wales
Case no. 2011/54718
Re Chow Cho Poon (Private Limited)
15 April 2011
Original in English
Reported in English: [2011] NSWSC 300

[**Keywords**: *cooperation*; *foreign proceeding*]

The case concerned an application under the Corporations Act 2001 for recognition of various orders made in Singapore with respect to winding-up proceedings commenced by order of the High Court of Singapore. Although no recognition of the foreign proceedings was sought under the Cross-Border Insolvency Act 2008 (CBIA) (enacting the Model Law in Australia), the court considered whether the relief sought should be provided under the CBIA or the Corporations Act, concluding that it could be granted under the latter.

In the course of its deliberations, the court noted that application of article 25 MLCBI required the requesting representative to be a foreign representative, which required, in turn, that the foreign proceeding satisfy the definition in article 2(a). While the winding-up ordered by the Singaporean court was a judicial proceeding involving control or supervision by the court, it was questionable whether it was a proceeding "pursuant to a law relating to insolvency". While the order had been made on the basis that it was just and equitable to wind the company up, the evidence did not disclose that the company was insolvent. The court considered the decisions in *Re Stanford International Bank Ltd*,[6] *Re Betcorp Ltd*[7] and *Re ABC*

[5] *Lawrence and McCullagh v Northern Crest Investments Ltd (in liq)* [2011] FCA 925.
[6] [2009] EWHC 1441 (Ch), CLOUT case no. 923.
[7] 40 B.R. 266 (Bankr. D. Nevada, 2009); CLOUT case no. 927.

Learning Centres Ltd,[8] and concluded that those decisions pointed to a clear basis on which winding-up provisions might be classified as "a law relating to insolvency", even though the particular winding-up was ordered on the just and equitable ground alone and without any finding, express or implied, of insolvency. The court noted that in none of the above cases was any separate attention given to whether the company subject to the winding-up could be described as a "debtor", a term used but not defined in the Model Law. The court observed that each court was apparently content to work on the basis that an entity subject to a "foreign proceeding" was, for that reason, within the relevant "debtor" concept.

The court also considered articles 25-27 MLCBI and whether the court "cooperates with" a foreign court simply by deploying its own jurisdiction in support of orders made by the foreign court, without a request by, or the knowledge of, that court and whether ordering the relief sought by the foreign representative would constitute "cooperating with" the foreign representative. The court observed that it was not possible to think that one court could "cooperate with" another court without that other being aware, noting that the instances of cooperation included in article 27 appeared to contemplate action by one court either at the other's request or in accordance with some plan subscribed to by both. With respect to the foreign representative, the court considered the principal avenue available to a person seeking to protect assets or interests in the local jurisdiction was to seek recognition of the foreign proceedings and obtain the relief available under articles 19, 20 and 21 MLCBI. Article 25 did not provide a means of circumventing those articles. The court found that although the application satisfied certain requirements of the Model Law, it did not activate the duty under article 25 to cooperate with either the foreign court or the foreign representative.

Case 1219: MLCBI 16(3); 17(3)
Australia: Federal Court of Australia
Case no. NSD 1168 of 2010
Ackers v Saad Investments Company Limited (in official liquidation)
22 October 2010
Original in English
Reported in English: [2010] FCA 1221

[**Keywords**: *presumption-centre of main interests (COMI)*]

The foreign representatives of the debtor company applied for recognition in Australia of the debtor company's insolvency proceedings in the Cayman Islands. In reaching its decision that the proceedings should be recognized as foreign main proceedings, the court reviewed the existing jurisprudence on the interpretation of article 16(3) MLCBI[9] and on interpretation of "centre of main interests" in *Re Eurofood IFSC Ltd*[10] under the EC Insolvency Regulation. It was of the view that the presumption is a facilitative device, enabling the court to make findings to the

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[8] CLOUT case no. 1210.

[9] *In Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited (In Provisional Liquidation)* 389 BR 325 (SDNY 2008), CLOUT case nos. 760, 794; *In Re Stanford International Bank Limited* [2010] EWCA Civ 137; [2010] 3 WLR 94, CLOUT case no. 1003; *Re Betcorp Limited*, 400 BR 266, (Bankr. D. Nevada, 2009), CLOUT case no. 927.

[10] [2006] Ch 508.

point of being prima facie evidence. Its purpose is to provide a means for dispensing with formal proof while leaving open the possibility that the court may make a contrary finding depending on the evidence and must be understood as a shorthand device to assist courts to determine foreign proceeding recognition applications at the earliest possible time in accordance with article 17(3) MLCBI.

The court concluded that in determining the centre of main interests of a debtor company, the presumption in favour of the registered office of the debtor may 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 the registered office is deemed to reflect by operation of the presumption.

Case 1220: MLCBI 2; 19; 21
New Zealand: High Court of New Zealand
Case no. CIV 2010-419-1174
Steven Williams vs Alan Geraint Simpson
19, 22 and 29 September 2010, 12 October 2010
Original in English
Published in English: [2010] NZHC 1631

[**Keywords**: *purpose-MLCBI*; *relief-provisional*; *foreign main proceeding*; *presumption-habitual residence*; *foreign non-main proceeding*; *establishment*]

The applicant sought recognition in New Zealand of English insolvency proceedings against the debtor and interim relief, on a without notice basis, concerning assets believed to be in the debtor's possession in New Zealand.

The court found that article 19 [article 19 MLCBI] of Schedule 1 to the Insolvency (Cross-Border) Act 2006 (ICBA) (enacting the Model Law in New Zealand) extended to enabling the search for and seizure of assets believed to be in the possession of the debtor but concealed, on the basis that "it would be odd if the ability to grant such relief extended only to property known to exist and readily locatable". Based on the evidence presented the court was satisfied that there was reason to believe that the debtor was concealing certain assets and granted the request for (a) a search warrant to search specified premises for certain assets, (b) an order suspending the debtor's ability to deal with any of his property located in New Zealand, (c) an order authorizing the official assignee to conduct an examination of the debtor to obtain information on oath or affirmation about assets that may be available for distribution through the applicant.

Following the examination of the debtor, a second application for interim relief was brought, seeking examination of certain persons to enable the determination of issues of ownership raised by the debtor during the examination. The court noted that article 19(1) only applied in situations where relief of a provisional nature was "urgently needed to protect the assets of the debtor or interests of the creditors." Since all known assets of the debtor had been seized and the question of ownership of assets would only be relevant after the court had determined whether to recognize the English proceedings as foreign proceedings, the court concluded that examination of those persons did not satisfy article 19(1) and declined to grant the relief sought.

A third application for interim relief on a without notice basis sought extension of the search warrant to recover further assets believed to be concealed by the debtor. The court based its ruling on whether there was a "reason to believe" that relevant property was concealed in any place as set out in *R v Williams*,[11] that test requiring "an objective and credible basis for thinking that a search will turn up the items named in the warrant". The court was satisfied that that test had been met and granted the request for a search warrant for specific locations on the debtor's premises.

On the application for recognition, the court was satisfied that the English proceedings were foreign proceedings and the applicant was a foreign representative within the meaning of article 2, schedule 1 of the ICBA [article 2 MLCBI].

On the issue of whether the foreign proceedings were main or non-main proceedings, the court noted that pursuant to article 16(3) of Schedule 1 of the ICBA [article 16(3) MLCBI], the centre of main interests of an individual debtor was presumed to be their place of habitual residence. The court noted that the inquiry into "habitual residence" was a broad factual one that took into account "settled purpose, the actual and intended length of stay in a State, the purpose of the stay, the strength of ties to the State and any other State (both in the past and currently), the degree of assimilation into the State (including living and schooling arrangements), and cultural, social and economic integration".[12] Although the debtor had carried on business in England, sometimes lived in England, and held both United Kingdom and New Zealand passports, the court found that the evidence adduced was insufficient to rebut the presumption. Importantly, the petitioners in the English proceedings had asserted that the respondent's centre of main interests was "not within a Member State and therefore the EC Regulation on Insolvency Proceedings does not apply". The debtor's centre of main interests was thus held to be in New Zealand.

As to whether the debtor could be said to have an establishment in England, the court considered a number of decisions and authorities,[13] noting the inherent difficulty of identifying whether an individual debtor had an establishment and in the present case of applying the notion of establishment to a retired professional, who had been unemployed for some 12 years and was drawing a private pension. The court observed that while it was possible in England to present an insolvency petition against a person having carried on business in England and Wales, the present tense in article 16(3) of Schedule 1 of the ICBA [article 16(3) MLCBI] required the debtor to be presently carrying out a non-transitory economic activity with human means and goods or services. The debtor was, however, in the process of winding down his business activities in England. The court found that the debtor did not have an establishment in England and dismissed the application for

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[11] [2007] 3 NZLR 207 (CA).

[12] *Basingstoke v Groot* [2007] NZFLR 363 (CA); the court also looked at the use of that term in the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

[13] UNCITRAL Guide to Enactment of the Model Law; M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996 available from http://aei.pitt.edu/952 (last visited 31 October 2012); *Re Ran* 607 F.3d 1017 (5h Cir. 2010); *Bear Stearns* 374 BR 122 (Bankr. SDNY 2007) CLOUT case no. 760 affirmed by 389 B.R. 325 (SDNY. 2008) CLOUT case no. 794.

recognition. However, the court was able to grant assistance under other provisions that applied when the ICBA did not.

Case 1221: MLCBI 17(1); 17(2); 22
New Zealand: High Court of New Zealand
Case no. CIV 2009-404-006704
Sin-Jong Jeong vs TPC Korea Company Ltd
15 October 2009
Original in English

[**Keywords**: *foreign main proceedings*; *creditors-protection*]

The foreign representative of the debtor company, which was subject to rehabilitation proceedings in the Seoul District Court in Korea, applied for, inter alia, recognition of those proceedings in New Zealand as foreign main proceedings.

The court found that the proceedings qualified as foreign proceedings in accordance with article 17(1) [article 17(1) MLCBI] of Schedule 1 to the Insolvency (Cross-Border) Act 2006 (ICBA) (enacting the Model Law in New Zealand) and that because the evidence showed the centre of main interests of the debtor company to be in Korea, those proceedings were foreign main proceedings in accordance with the article 17(2) [article 17(2) MLCBI] of Schedule 1 to the ICBA.

The court noted that there may be creditor interest in New Zealand in the debtor, although there appeared to be no outstanding matters involving those creditors. Nevertheless, since the application had been made without notice to creditors, and in view of the New Zealand High Court Rule (24.59) [based upon article 22 MLCBI], the court granted leave to the creditors to apply, within a period of three days of service of the order, to set aside the order recognizing the proceedings as foreign main proceedings.