United Nations A/CN.9/SER.C/ABSTRACTS/141

General Assembly

Distr.: General
31 January 2014

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.14-00571 (E) 170214 180214

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: (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 web-site by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

The abstracts are prepared by National Correspondents designated by their Governments, or by individual contributors; exceptionally they might be prepared by the UNCITRAL Secretariat itself. It should be noted that neither the National Correspondents nor anyone else directly or indirectly involved in the operation of the system assumes any responsibility for any error or omission or other deficiency.

———————

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

Case 1331: MLCBI 21(1)(d)

Australia: Federal Court of Australia
Case No. QUD 688 of 2013
Crumpler (as liquidator and joint representative) of Global Tradewaves Ltd. (a company registered in the British Virgin Islands) v. Global Tradewaves Ltd. (in liquidation); in the matter of Global Tradewaves Ltd. (in liquidation)
28 October 2013
Original in English
Published in English: [2013] FCA 1127

[**Keywords**: *relief — upon request; relief — modification*]

The foreign representative appointed to insolvency proceedings concerning the debtor in the British Virgin Islands (BVI) sought recognition of those proceedings in Australia as foreign main proceedings under the Cross-Border Insolvency Act 2008 (enacting the Model Law in Australia) and requested the examination of R concerning the affairs of the debtor and the production by him of related books, records and other documents in his possession or control. The registered office of the debtor was in the BVI and that was its centre of main interests; there was no evidence of business being carried on in Australia or of there being creditors in Australia. No other proceedings in relation to R had been commenced, although the court noted that proceedings might shortly be commenced in Dubai. The court recognized the proceedings as foreign main proceedings. As to the relief sought, the court held that the source of its authority to order the examination of witnesses concerning a company's "assets, rights, obligations or liabilities" and the production to the court on such an examination of "information" concerning those subjects could be found, inter alia, in article 21(1)(d) of the Model Law. As to whether that power should be exercised in this case, the court held that the evidence produced suggested R was resident in Australia and that he was a person likely to have intimate knowledge of the affairs of the debtor. The court went on to say that it was not necessary to consider whether R was a director or even a shadow director of the debtor company because the power under article 21(1) extended to "witnesses". Observing that the orders sought appeared to be logical, reasonable and necessary steps in the insolvency proceedings of the debtor, the court reserved the costs of the examination to be determined in the main proceeding and as liberty to apply for additional orders following the examination.

Case 1332: MLCBI 6; 13(2); 21; 22(1)
Australia: Federal Court of Australia
Case No. NSD 1168 of 2010
Ackers v. Saad Investments Company Limited; in the matter of Saad Investments Company Limited (in official liquidation)
30 July 2013
Original in English
Published in English: [2013] FCA 738
See also CLOUT case no. 1219

[**Keywords**: *creditors — protection; public policy; relief — modification*]

In October 2010, the Australian court recognized proceedings commenced in the Cayman Islands with respect to the debtor as foreign main proceedings under the Cross-Border Insolvency Act 2008 (enacting the Model Law in Australia).[1] Pursuant to article 21 of the Model Law, the court had ordered that no proceedings could be taken against the debtor or its assets without leave of the court or consent of the foreign representatives and the representatives were entrusted with administration, realization and distribution of all of the debtor's assets located in Australia.

In the present case, the Commissioner sought a modification of the 2010 orders to prevent the foreign representatives from remitting to the Cayman Islands some $7 million realized from the sale of Australian assets so that the Commissioner could receive from those proceeds a distribution of no more than he would be entitled to receive as his pari passu entitlement under Australian law. The Commissioner claimed that his interests as a creditor were not "adequately protected" within the meaning of article 22(1) of the Model Law because his claim, as a foreign tax claim, would not be admitted in the Cayman Islands proceeding. The court noted that the Model Law expressly accepted that the local forum could exclude the participation of taxation and social security claims by foreign sovereigns in any local distribution of the insolvent's estate [article 13, paragraph 2 MLCBI]. Nevertheless, the court went on to say, there was nothing in the Model Law to suggest that domestic legislation should be construed to deny or diminish the rights of the local sovereign power to collect its taxation or social security claims from an insolvent debtor's estate before that estate was remitted to the debtor's centre of main interests for distribution to creditors under that jurisdiction's law. The court concluded that article 22(1) MLCBI gave the court of the forum jurisdiction to make orders enabling taxation and penalty liabilities to be paid from the debtor's assets before removal of those assets to the debtor's centre of main interests or elsewhere at the direction of the foreign representative.

For those reasons, the court indicated it was not necessary to consider the Commissioner's argument under article 6 of the Model Law that it would be contrary to Australian public policy to allow the 2010 orders to operate without modification or termination. Without deciding the issue, the court did observe, however, that because it was fundamental to any society that its government be able to require its citizens and others who operate a business or reside within that society, to pay taxation so as to maintain the State, there was considerable force in the Commissioner's argument based on article 6. The court ordered modification of the 2010 orders to permit the Commissioner to exercise, within a reasonable time,

[1] CLOUT case No. 1219.

such rights as he may have to recover from the Australian assets up to the pari passu amount he would be entitled to receive as a dividend if he could prove his claim for the tax debts as an unsecured creditor in the Cayman Islands liquidation.

An argument by the foreign representatives that the Commissioner, by lodging a claim, had submitted to the jurisdiction of the Cayman Islands and was thus prevented from seeking to modify the 2010 orders, was rejected. Having discussed relevant cases, including *Rubin*,[2] the court said that the evidence did not support the Commissioner ever having submitted to the jurisdiction of the Cayman Islands because the foreign representatives had not called for proofs of debt in order to make a distribution, the debts that the Commissioner sought to establish were not admissible under the law of the Cayman Islands, he was not a creditor with any claim under that law and the Commissioner had only submitted a proof of debt to obtain information or attend a meeting of creditors.

Case 1333: MLCBI 19; 20; 21(1)(e)
Australia: Federal Court of Australia
Case No. NSD 1178 of 2013
Yu v. STX Pan Ocean Co. Ltd. (South Korea), in the matter of STX Pan Ocean Co. Ltd. (receivers appointed in South Korea)
11 July 2013
Original in English
Published in English: [2013] FCA 680

[**Keywords**: *relief — automatic; relief — provisional; relief — upon request*]

The representative of a Korean shipping company subject to reorganization proceedings in Korea applied for recognition of those proceedings in Australia under the Cross-Border Insolvency Act 2008 (enacting the Model Law in Australia) and for various additional orders, based on the possibility that ships owned by the debtor might be arrested as they passed through Australian waters. Interim orders had been sought and made under articles 19 and 21 of the Model Law prior to recognition of the foreign proceeding (the court deciding the recognition application noted that although orders had been sought and made under both articles 19 and 21, orders under article 21 were not available prior to recognition of the foreign proceeding). The interim orders included (i) that no charge on the property of the debtor could be enforced; if the property was subject to a lien or charge and the lien or charge holder was in possession of the property, they could continue to possess the property, but could not sell or otherwise enforce the lien or pledge; and (ii) no proceeding with respect to property of the debtor could be commenced or continued, including an enforcement process.

The court recognized the foreign proceedings as foreign main proceedings. With respect to the additional relief sought, the court noted that while relief of that kind went beyond the automatic stay available upon recognition under article 20 MLCBI, it was within what was contemplated by article 21(1)(e) MLCBI. It must be assessed, however, in light of the facts that (i) the debtor had no permanent assets in Australia to which such an order might apply, and (ii) such assets as might be subject to the order were ships. The court noted that article 20 (2) of the Model Law as enacted in Australia preserved the operation of local insolvency law, which

[2] See Rubin & Anor vs. Eurofinance S.A. (CLOUT case No.1270).

provided that a person could not commence or proceed with an action against a company in insolvency or in relation to its property or with an enforcement process against such property without leave of the court (Corporations Act, section 417B). There was no basis for extinguishing or modifying any recourse to that section. Moreover, nothing in that section affected a secured creditor's right to realize or otherwise deal with its security under section 471C, which would cover an action in rem to enforce a maritime lien. The court ordered that any application for arrest of any vessel in Australia owned or chartered by the debtor should be made to a judge of the court and full disclosure of the recognition of the foreign proceedings and the terms of this judgement should be drawn to the attention of the judge at the time any such application was made.

Case 1334: MLCBI 16(3); 21; 25; 27
Canada: Supreme Court of British Columbia
Case No. S126501
Re: Digital Domain Media Group, Inc.
9 November 2012
Original in English
Published in English: 2012 BCSC 1565

[**Keywords**: *centre of main interests — determination; cooperation — forms of; foreign main proceeding; relief — upon request*]

The foreign representatives of insolvency proceedings taking place in the United States of America sought recognition of those proceedings in Canada as foreign main proceedings and related relief. The debtor company was a corporate group consisting of fourteen members, thirteen of which were incorporated in the United States and the fourteenth member was registered in Canada. The court noted that the centre of main interests (COMI) of the thirteen companies was their place of registration under 45(2) of the Companies' Creditors Arrangement Act (CCAA) (enacting the Model Law in Canada) [article 16(3), MLCBI]. The issue before court was whether the COMI of the fourteenth company was in Canada or the United States.

Referring to a number of Canadian cases that had considered the factors relevant for determination of COMI,[3] the court found that the COMI was in the United States because the corporate group was very integrated with its nerve centre in the United States; that was the location readily ascertainable to creditors; the principal assets of the group that generated over 90 per cent of the group's revenue were managed and operated in the United States; the entire management of the corporate group including operational, strategic, legal decision-making, marketing, cash management functions took place in the United States; all the directors and senior management of the various companies in the corporate group and the general counsel for all the debtors were all in the United States; and the company's personnel were required to report directly to the group's headquarters in the United States. The court recognized the United States proceedings as a foreign proceedings and granted various ancillary relief which included appointing an information

[3] *Angiotech Pharmaceutical In (Re), 2011 BCSC 115, Massachusetts Elephant & Castle Group (Re)*, 2011 ONSC 4201, *Lightsquared LP (Re)*, 2012 ONSC 2994, *Allied Systems Holdings, Inc. (Re)*, 2012 ONSC 4343.

officer in accordance with section 52(1) and (3) CCAA [articles 25 and 27 MLBCI] and a stay of proceedings [article 21(1) MLCBI].

Case 1335: MLCBI 2(a); 16(3); 17(1)(a)
Japan: Tokyo District Court
Case No. (ra) 1757 of 2012
think3 Inc.
2 November 2012
Original in Japanese[4]

[**Keywords**: *centre of main interests — determination; centre of main interests — timing; foreign main proceeding*]

The debtor, which was the successor of various companies originally established in Italy and the United States of America, was incorporated in the United States, with a branch office in Italy and subsidiaries in six countries, including Italy and Japan. Insolvency proceedings commenced in Italy in April, 2011, followed by Chapter 11 proceedings in the United States in May 2011. On 1 August 2011, recognition of the Italian proceedings was sought in the United States under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States). On 11 August 2011, recognition of the United States proceedings was sought in Japan under the Act on the Recognition and Assistance for Foreign Insolvency Proceedings (enacting the Model Law in Japan) and granted the same day, together with certain relief. In October 2011 recognition of the Italian proceedings was also sought in Japan, on the basis that the debtor's principal place of business in accordance with article 2(1)(ii) of the Japanese Act[5] was in Italy, not the United States. The District Court affirmed the decision of the High Court that the debtor's principal place of business was the United States and dismissed the appeal seeking revocation of the order recognizing the United States' proceeding.

The issues considered by the court included the time by reference to which the centre of main interests (COMI) should be determined and the factors to be considered in determining the location of COMI.

With respect to timing, the court took the view that the determination should be made by reference to the time at which the very first insolvency proceedings concerning the debtor was filed or when those proceedings commenced. In reaching that view, the court looked to judicial precedents and to the discussion in UNCITRAL's Working Group V. The court at first instance said that if the time of the application for recognition was taken to be the relevant date, it would lead to there being a different date in every country and a consequent lack of unification. Moreover, there was a risk that applications for recognition would be filed at a time chosen arbitrarily. Problems would also arise, the court said, when two or more applications for recognition were filed at different times. Choosing the time at which the foreign proceeding commenced provided a fixed date. Although not

---

[4] Unofficial English translation on file with the UNCITRAL Secretariat; see www.insol.org/page/304/japan.

[5] Article 2(1)(ii) defines "foreign main proceedings" as those taking place where the debtor has its principal place of business (which may be interpreted as "substantive headquarters" and should be regarded as having, substantively, the same meaning as COMI in the Model Law) [issue 2-2, para. 2] and contains no presumption as to place of registration.

present in the case before it, the court acknowledged that special circumstances requiring careful consideration might arise where there was a lengthy period of time between commencement of the foreign proceeding and the application for recognition or movement of the debtor's COMI in close proximity to the commencement of that foreign proceeding.

With respect to the factors to be considered, the court at first instance looked to the EU Insolvency Regulation and the work being undertaken by UNCITRAL to revise the Guide to Enactment of the Model Law, noting with respect to the latter that no agreement had yet been reached as to whether to identify several key factors out of all the factors noted. The court found that it was appropriate to take into consideration all of the various factors that had been raised by different courts around the world, and that factors such as the location of the head office functions, the key assets, the actual place of business of the debtor, the debtor's business management and whether that location was perceivable to creditors might be considered more intensively. Having considered the complex facts of the debtor's history (i.e. prior to the commencement of the United States' proceeding, but not after) in the light of the various factors to be taken into account, the court concluded that the debtor's principal place of business was the United States. The decision and the reasoning of the lower court were affirmed on appeal.

Case 1336: MLCBI 16(3); 21
United States of America: Court of Appeals for the Second Circuit
Case No. 13-612
In re Barnet
11 December 2013
Original in English
Reported in English: 737 F.3d 238 (2d Cir. 2013)

[**Keywords**: *recognition — applicant for*]

The foreign representatives of insolvency proceedings concerning a company incorporated in Australia applied for recognition of those proceedings as foreign main proceedings in the United States of America under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States). As part of an investigation of the affairs of the debtor, a lawsuit was commenced in Australia against certain affiliates of D. D objected to the application for recognition. Recognition was granted by the bankruptcy court and, subsequently, certain orders were made for the discovery of documents, including from D. On appeal, the court held that recognition could not be granted as the debtor was not eligible under Chapter 15. The appeal court reasoned that section 109(a) of the Bankruptcy Code, which provides that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title" applied to cases brought under Chapter 15. Since the foreign representatives had made no attempt to establish that the debtor had a domicile, place of business or property in the United States, the debtor was not an eligible debtor and recognition thus should not have been granted.

Case 1337: MLCBI 6; 21(1); 22(1)
United States of America: Court of Appeals for the Fourth Circuit
Case No. 12-1802
In re Qimonda (Jaffe v. Samsung Electronics Co., Ltd.)
3 December 2013
Original in English
Published in English: 737 F.3d 14 (2013)
See also CLOUT case No. 1212

[**Keywords**: *public policy; creditors — protection; relief — on application*]

On remand from an earlier appeal,[6] the bankruptcy court had refused to grant relief to the foreign representative because the requested discretionary relief would have impinged upon statutory protections accorded to licensees under United States bankruptcy law, thereby undermining a fundamental United States public policy of promoting technological innovation. The court also held that, even absent those public policy considerations, the relief requested by the foreign representative should be denied because allowing the representative to cancel the debtor's licenses unilaterally would be "manifestly contrary to the public policy of the United States" under section 1506 of the United States Bankruptcy Code (enacting the Model Law in the United States) [article 6, MLCBI].

On direct appeal, the Fourth Circuit concluded that the bankruptcy court properly (i) recognized that the request for discretionary relief under section 1521(a) [article 21(1) MLCBI] required it to consider "the interests of the creditors and other interested entities, including the debtor" under section 1522(a) [article 22(1), MLCBI], and (ii) construed section 1522(a) to require a balancing of the affected interests. Because section 1522 requires the court to consider a range of interests that are "often antagonistic," the court of appeals agreed that this analysis is best accomplished "by balancing the respective interests based on the relative harms and benefits in light of the circumstances presented." In reaching this conclusion, the Fourth Circuit joined the Fifth Circuit in rejecting the notion that the public policy exception in section 1506 [article 6, MLCBI], foreclosed reliance on a balancing test in section 1522. It also upheld the lower court's balancing of the interests of the debtor and its licensees, finding that application of section 365(n) of the United States Bankruptcy Code was necessary to assure protection of the licensees' interests in the debtor's United States patents given the numerous cross-license agreements at issue. Because the court of appeals affirmed the bankruptcy court's decision based on section 1522(a)'s balancing of interests standard, it did not expressly address the lower court's alternative holding under section 1506 that depriving United States patent licensees of the protections afforded by section 365(n) would be "manifestly contrary to the public policy of the United States."

[6] CLOUT case No. 1212.

Case 1338: MLCBI 6; 20
United States of America: Court of Appeals for the Third Circuit
Case No. 12-2808
In re ABC Learning Centres Limited n/k/a ZYX Learning Centres Limited; ABC USA Holdings Pty Ltd.
27 August 2013
Original in English
Published in English: 728 F.3d 301 (3d Cir. 2013)
See also CLOUT case no. 1210

[**Keywords**: *collective proceeding; public policy; recognition; relief — automatic*]

This was an appeal against a decision of the District Court of Delaware upholding a decision of the Bankruptcy Court of Delaware to recognize liquidation proceedings commenced in Australia as a foreign main proceeding under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States). The appellant argued that since the liquidation was being conducted in parallel with a receivership (which represented only the interests of secured creditors) and since the debtor's assets were fully secured, there would be no value for distribution in the liquidation. On that basis, it was maintained, only the receivership would benefit from recognition, but since it was not a collective proceeding, it would be contrary to United States public policy to accord it recognition.

The court said that Chapter 15 made no exception to recognition when a debtor's assets were fully secured. Subject to the public policy exception, recognition must be ordered when a court finds that the requisite criteria are met. The court reviewed the case law interpreting the public policy exception in Chapter 15 [article 6, MLCBI] and found that notwithstanding that the treatment of security interests accorded under Australian insolvency law (secured creditors being allowed to realize the full value of their debts and then tender the excess to the company) was different to that accorded in the United States, the approach was simply a different means of reaching the same goal. Accordingly, recognition of the Australian liquidation proceeding did not manifestly contravene United States public policy.

It was also argued that since the debtor's assets in the United States were fully secured, they were not property of the debtor, who only held a bare legal title to them, and thus not subject to the automatic stay applicable on recognition under Chapter 15. The court found that since the debtor retained an equitable interest in its encumbered property, it was "property of the debtor" and thus subject to the stay. That equitable interest included the right to surplus proceeds from the sale of the encumbered assets and the right of redemption under the Australian Corporations Act (to redeem the security interest on payment to the secured creditor of its estimated value).

Case 1339: MLCBI 6; 16(3); 17(1)(a)
United States of America: United States Court of Appeals for the Second Circuit
Case No. 11-4376
In re Fairfield Sentry Ltd.
16 April 2013
Original in English
Reported in English: 714 F.2d 127 (2d Cir. 2013)
See also CLOUT case No. 1316

[**Keywords**: *centre of main interests — determination; centre of main interests — timing; public policy*]

The appeal court affirmed a judgement of the District Court for the Southern District of New York that had affirmed an order of the Bankruptcy Court for the Southern District of New York[7] that since the debtor's centre of main interests was in the British Virgin Islands (BVI), the foreign proceedings commenced in the BVI should be recognized in the United States as a foreign main proceeding. The appeal court considered two issues — the relevant time period for determining the centre of main interests and the principles and factors to be considered. The relevant time period, the court found, is the time of the application for recognition under Chapter 15 of the Bankruptcy Code (enacting the Model Law in the United States), subject to an inquiry as to whether the process has been manipulated by the debtor in bad faith. In doing that, the court may look at the time period between the initiation of the foreign proceeding and the application under Chapter 15, but the suggestion that the centre of main interests (COMI) determination could only be made by reference to the debtor's operational history was rejected. The factors that the court may consider in analysing the debtor's COMI are not limited and may include the debtor's liquidation activities and administrative functions. On the contention that the public policy exception of section 1506 [article 6 MLCBI] should have been applied to deny recognition because of the confidentiality of the BVI proceedings, the court said that the appellant could not establish that unfettered public access to court records was so fundamental in the United States as to fall within one of the exceptional circumstances contemplated by section 1506. Rather public access was a qualified right and recognition of the BVI proceeding was therefore not manifestly contrary to United States public policy.

---

[7] CLOUT case No. 1316.