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(CLOUT)

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.3). CLOUT documents are available on the UNCITRAL website: (https://uncitral.un.org/en/case_law).

Each CLOUT issue includes a table of contents on the first page that lists the full citation of 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 a decision in its original language is included in the heading to each case, along with the internet addresses, where available, of translations in official United Nations language(s) (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 on 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.

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 Model Law on Cross-Border Insolvency (MLCBI)

Case 2007: MLCBI 15; 19, 20; 21(3)
Chile: 18th Civil Court of Santiago
Case No. C-13296-2016
Elimco Soluciones Integrales
2 June 2017
Original in Spanish
Available at https://oficinajudicialvirtual.pjud.cl/home/index.php

[**Keywords**: *foreign main proceeding: recognition-application for; recognition-decision; relief upon request; cooperation*]

Abstract prepared by Juan Luis Goldenberg S.

A Spanish company, which was debtor-in-possession in a proceeding of a voluntary reorganization commenced in Spain, had a branch in Chile. The Spanish company jointly with its branch in Chile requested the 18th Civil Court of Santiago (the Court) that the reorganization proceeding be recognized as a foreign main proceeding. The application was accompanied by a request for relief under article 319 of Law No. 20.720 enacting MLCBI in Chile [corresponding to art. 19 MLCBI].

The Court recognized the proceeding in Spain as a foreign main proceeding given that all the criteria for such recognition under national law (art. 314, Law No. 20.720 [corresponding to art. 15 MLCBI]) had been met. It also granted the requested relief and the effects of recognition of a foreign main proceeding during the period the insolvency proceeding in Spain was ongoing. In addition, the Court appointed two local insolvency practitioners (*veedores*) as if the foreign proceeding had the nature of a local reorganization proceeding. It also ordered the *veedores* to manage or liquidate and distribute all or part of the debtor's assets in Chile, as appropriate, provided that the interests of creditors in Chile were adequately protected (art. 320.3, Law No. 20.720 [corresponding to art. 21(3) MLCBI]).

In relation to the case, which was one of the first cases considered by courts in Chile after the enactment of MLCBI in Chile, the court requested the Superintendence of Insolvency and Entrepreneurship (the Superintendence) to provide an opinion on the interpretation of the law enacting MLCBI, on two occasions (before and after granting recognition). Under article 337.2, Law No. 20.720 the Superintendence administratively interprets the laws, regulations and other rules that govern the audited parties, without prejudice to the jurisdictional powers that correspond to the competent courts.

The Superintendence, inter alia, advised that, in addition to the requirements in article 314 of Law No. 20.720 [corresponding to art. 15 MLCBI], foreign representatives should explain the specific purpose expected to be achieved by the recognition of the insolvency proceeding in Spain as a foreign main proceeding in Chile (whether it was for a coordinated liquidation or reorganization of a foreign debtor). In this case, the applicant indicated that the purpose of the recognition was the appointment of a local insolvency practitioner (*veedor*) to manage, jointly with the practitioner appointed in Spain, the assets located in Chile, respecting the *pari passu* principle that should apply among the creditors of the foreign debtor and the creditors of the local branch

Case 2008: MLCBI 15; 16(3); 17; 19(1); 19(1)(a); 19(1)(b)
Chile: 2nd Civil Court of La Serena
Case No. C-2660-2017
Gordon/Avendaño
21 August 2017
Original in Spanish

Abstract prepared by Juan Luis Goldenberg S.

[**Keywords**: *notification; foreign representative; foreign court; foreign proceedings: recognition application for; recognition-decision; relief-upon-request; centre of main interests (COMI) determination*]

An insolvency court in the United States of America (the "foreign court") initiated liquidation under Chapter 7 of the U.S. Bankruptcy Code against a debtor with real estate in Chile (the debtor). The insolvency representative requested the recognition of the US proceeding in Chile as a foreign main proceeding under Law No. 20.720 [enacting the MLCBI in Chile] with the only purpose of selling the debtor's local assets. The application was accompanied by a request for relief under article 318.1 (a) and (b) [corresponding to art. 19(1)(a) and (b) MLCBI].

The 2nd Civil Court of La Serena (the Court) granted recognition to the US proceeding as a foreign proceeding (art. 316 of Law No. 20.720 [corresponding to art. 17 MLCBI]) agreeing with the foreign representative that all conditions for such recognition had been met (art. 314 of Law No. 20.720 [corresponding to art. 15 MLCBI]). Firstly, the application for recognition had been presented by the foreign representative to the competent tribunal in Chile. Secondly, all required documents had been legalized. Thirdly, the application was accompanied by a declaration that indicated all insolvency proceedings of the debtor.

However, the Court did not consider necessary to specify whether the US proceeding was recognized as a foreign main proceeding or as a foreign non-main proceeding and, as a consequence, to analyse the location of the centre of the debtor's main interests (COMI) under article 315.3 of Law No. 20.720 [corresponding to art. 16(3) MLCBI]. The Court ordered a stay of execution against the debtor's assets located in Chile and entrusted those assets to the foreign representative. To overcome the Land Registrar's (*Conservador de Bienes Raíces*) refusal to effectuate the transfer of the real estate from the debtor to the foreign representative, the Court issued a supplementary order identifying the real estate in question.

After recognition, the Court also authorized the foreign representative to initiate the forced sale of that property over the objection of individuals who claimed that they had bought it prior to the initiation of the US proceeding and its recognition in Chile but could not register their ownership rights due to the Land Registrar's objections and the subsequent stay imposed by the Court. In dismissing that objection, the Court relied, among others, on claw back provisions of local insolvency law under article 130 of Law No. 20.720 that prohibit the debtor in liquidation to transfer its assets and that deprive of *bona fide* purchaser defence if acquisition of an insolvency debtor's property occurred during the suspect period. The sale of the property was eventually conducted by means of a public auction (*martillero concursal*).

Case 2009: MLCBI 15; 16(3); 17(1)(a); (b); (c); (d); 17(2)(a); 20
Chile: 2nd Civil Court of Santiago
Case No. C-8553-2020
Latam Airlines Group S.A./Technical Training Latam S.A.
4 June 2020
Original in Spanish
Available at https://oficinajudicialvirtual.pjud.cl/home/index.php

Abstract prepared by Juan Luis Goldenberg S.

[**Keywords**: *foreign representative; enterprise group*; *debtor; foreign main proceeding: request for recognition; recognition-decision; centre of main interests*

(COMI); presumption-centre of main interests (COMI); centre of main interests (COMI)-determination]

An enterprise group was authorized to act as foreign representative in a reorganization proceeding conducted in the United States America (Chapter 11, Title 1, United States Code), and filed an application in Chile for the United States proceeding to be recognized as a foreign main proceeding.

The 2nd Civil Court of Santiago (the Court) approved the application in accordance with article 314 of Act No. 20.720 [corresponding to art.15 of the MLCBI] and framed the decision of recognition of a foreign proceeding in terms of article 316(1)(a); (b); (c); (d); and (2)(a) of Act No. 20.720 [corresponding to art.17(1)(a); (b); (c); (d) and (2)(a) of the MLCBI].

Based on the requirement contained in article 316 of Act No. 20.720 [corresponding to art. 17(1)(d) of the MLCBI], the Court held that it was territorially competent, since the registered office of the enterprise group was in Chile. In relation to article 316(2)(a) of Act No. 20.720 [corresponding to art. 17(2)(a) of the MLCBI] and in the light of the evidence adduced, the Court held that the presumption that the registered office is the centre of main interests (COMI) may be met [corresponding to art. 16(3) of the MLCBI]. In this case, the Court held that the United States was the State where the debtor had its centre of main interests (COMI), having considered that the United States was the place where the group carried on a relevant portion of its business and where the reorganization was taking place. The Court also took into consideration other factors, including the fact that the group (a) held shares traded on the New York Stock Exchange and (b) had issued bonds on the international market to obtain financing in accordance with the laws of the United States.

The Court recognized the United States insolvency proceeding as a foreign main proceeding and granted the relief provided in article 319 of Act No. 20.720 [corresponding to art. 20 of the MLCBI].[1]

Case 2010: MLCBI 25; 26; 27
Chile: 2nd Civil Court of Santiago
Case No. C-8553-2020
Latam Airlines Group S.A./Technical Training Latam S.A.
20 August 2020
Original in Spanish:
Available at https://oficinajudicialvirtual.pjud.cl/home/index.php

Abstract prepared by Juan Luis Goldenberg S.

[**Keywords**: *foreign representative; enterprise group*; *debtor; foreign main proceeding; communication; cooperation; cooperation-forms of; coordination*]

Following the recognition in Chile of the United States proceeding concerning the enterprise group as a foreign main proceeding,[2] the Superintendencia de Insolvencia y Remprendimiento de Chile (Chilean Office of the Superintendent of Insolvency and Entrepreneurship) suggested in this case that a protocol be entered into for coordination and cooperation between courts, to ensure more effective coordination. The enterprise group members subsequently presented to the Court a draft protocol for joint cross-border cooperation and communication between the courts handling the insolvency proceedings involving the debtors, namely the 2nd Civil Court of Santiago (the Court) and courts in Colombia, the United States of America and the Cayman Islands (all relevant courts).

The Court took into consideration the draft protocol along with the suggestions made by the Office of the Superintendent of Insolvency and Entrepreneurship and sanctioned the cross-border protocol for cooperation and communication between the relevant courts. It also ordered the publication of the protocol in the Boletín Concursal

[1] CLOUT Case No. 2010.
[2] CLOUT Case No. 2009.

(insolvency register), pursuant to articles 299, 324, 325 and 326 of Act No. 20.720 [corresponding to para. (a) of the preamble and arts. 25 to 27 of the MLCBI]. The relevant courts approved the protocol and communicated it to the Court.

The approved protocol contained an annex with guides for coordination and cooperation between the relevant courts in matters of cross-border insolvency involving the enterprise group (adoption and interpretation, communication between courts, appearance before the court, joint hearings) and methods of communication between the relevant courts (scope and definitions, designation of the facilitator, commencement of the communication, arrangements for the communication, and communication between the initiating judge and the receiving judge). Pursuant to the protocol: (i) the foreign representative, the enterprise group members and the joint provisional liquidators (referring to the Cayman Islands proceeding) would submit written reports to the relevant courts when they deem it appropriate to give the court an update on the restructuring or on any of the proceedings; and (ii) the enterprise group members or their representatives would have to submit simultaneous monthly reports to the relevant courts on the full evolution of the insolvency proceedings.

The Court established that (a) the term "procedimientos paralelos" ("parallel proceedings") refers exclusively to proceedings in the relevant courts concerning the enterprise group; (b) the term should not be considered synonymous with the term "concurrent proceedings" used in Act No. 20.720, part 4 [corresponding to chapter V of the MLCBI]; and (c) it would not apply or contemplate any additional proceeding in respect of the enterprise group members in the absence of an additional decision from each of the relevant courts. The protocol did not regulate any substantive issue relating to the proceedings concerning the enterprise group members in any of the relevant courts.

Case 2011: MLCBI 15; 16(3); 17; 20; 21; 22
Colombia: Office of the Superintendent of Companies
Decision No. 400-000416 **(**File No. 39978)
Pacific Energy Production Corp.
10 June 2016
Original in Spanish
Available at https://observatoriofinancieroybursatil.uexternado.edu.co/wp-content/uploads/sites/7/2019/12/Auto-400-000416-del-10-de-junio-de-2016-.pdf

Abstract prepared by Diana Rivera Andrade

[**Keywords**: *centre of main interests (COMI)-determination; enterprise group; foreign main proceeding; presumption-centre of main interests (COMI), recognition-decision*]

An enterprise group, composed of a Canadian company and three of its subsidiaries in Colombia, filed an application to have an insolvency proceeding for debt restructuring conducted in Canada recognized in Colombia as a foreign main proceeding, pursuant to article 100 of Act No. 1116 of 2006 [corresponding to art. 15 of the MLCBI]. In the Canadian proceeding, the judge had designated a monitor for the restructuring process to supervise the financial and commercial affairs of the enterprise group.

In weighing the various factors relevant for the determination of centre of main interests (COMI) and in accordance with article 101 of Act No.1116 of 2006 [corresponding to art. 16 (3) of the MLCBI], the Superintendencia de Sociedades (Office of the Superintendent of Companies), the entity that acts and operates as insolvency judge in Colombia, examined (a) the *UNICTRAL Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency*; (b) the various factors set out in the MLCBI and in the *Guide* for its incorporation into domestic law and interpretation (reference to para. 147 of the Guide); and (c) the criteria developed by foreign jurisprudence. In this case, the relevant factors indicating that the head office of the parent establishment was in Canada were that it was the place where (a) the accounting books and records were kept; (b) the executive board made its decisions; (c) the interests were habitually administered; (d) the financing for the restructuring agreement originated; (e) the establishment that was the principal

debtor of the group's external debt was found; and (f) credit operations with financial entities and bond issues were effectuated. Accordingly, the Canadian proceeding concerning the enterprise group was recognized as a foreign main proceeding and the monitor was recognized as a foreign representative in Colombia.

Upon recognition of the Canadian proceeding as a foreign main proceeding, the Office of the Superintendent of Companies automatically activated the effects provided in article 105 of Act No.1116 of 2006 [corresponding to art. 20 of the MLCBI]. The Office further granted the relief contemplated in article 106 of Act No. 1116 of 2006 [corresponding to art. 21 of the MLCBI], comprising (a) protection of contracts that have not been fully executed; and (b) authorization of collateralization. The Office ordered the collateralization of non-real property assets, comprising all cash and cash equivalents contained in bank accounts, autonomous assets and collective portfolios of the enterprise group, to ensure minimum recovery for Colombian creditors if the restructuring procedure failed, as set out in article 107 of Act No.1116 of 2006 [corresponding to art. 22 of the MLCBI].

Case 2012: MLCBI 17; 20
Colombia: Office of the Superintendent of Companies
Decision No. 400-006724
Caso Urbe Construcciones y Obras Públicas S.L.
7 May 2014
Original in Spanish
Available at:
https://www.supersociedades.gov.co/delegatura_insolvencia/consulta_jurisprudencia/Jurisprudencia/2014-01-233042.pdf

Abstract prepared by Diana Rivera Andrade

[**Keywords**: *foreign court; foreign proceeding; foreign main proceeding; recognition-decision*]

The debtor with a local branch in Colombia was allowed to file a petition for insolvency in Spain. The foreign representative requested recognition of the Spanish proceeding in Colombia, without specifying whether the request was for it to be recognized as a foreign main proceeding or as a foreign non-main proceeding. The Superintendencia de Sociedades (Office of the Superintendent of Companies), the entity that acts and operates as insolvency judge in Colombia, applied the presumptions concerning recognition contemplated in article 16(3) of the MLCBI and found that other requirements contained in article 103 of Act No.1116 of 2006 [corresponding to art. 17 of the MLCBI] came into play for the recognition of the Spanish proceeding as a foreign main proceeding. Accordingly, the Spanish proceeding was recognized in Colombia as a foreign main proceeding.

Nonetheless, the Office ordered the judicial liquidation of the Spanish branch in accordance with Act No. 1116 of 2006, upon finding that the Spanish branch had not been carrying on business in Colombia for more than one year. The Spanish court was informed of the decision.

Case 2013: MLCBI 2; 17
Colombia: Superintendence of Companies
Auto No. 405-019656
Standford Trust Company Limited
22 November 2013
Original in Spanish

Available at: https://www.supersociedades.gov.co/delegatura_insolvencia/consulta_jurisprudencia/Jurisprudencia/2014-01-437915.pdf

[Keywords: *main foreign proceeding; recognition; acknowledgment-request for; recognition-decision*]

Abstract prepared by Diana Rivera Andrade

Antigua and Barbuda ordered the judicial liquidation of Stanford Trust Company, the parent company that owned the subsidiary established in Colombia, Stanford Comisionista de Bolsa S.A. The latter, after losing its recognition and registration as a stock market agent in Colombia, voluntarily submitted to a liquidation process in Colombia. The foreign representative of the Antigua and Barbuda proceeding (the foreign representative) requested the Superintendence of Companies (entity that acts and operates as an insolvency judge in Colombia) to recognize in Colombia the Antigua and Barbuda proceeding as a foreign main proceeding under Title III of Law No. 1116 of 2006 enacting MLCBI in Colombia [corresponds to chapter III of MLCBI] and to entrust the foreign representative with the administration and realization of local assets of the subsidiary under the liquidation proceeding of the parent company. The foreign representative also requested the suspension and no initiation of execution process against the debtor.

The Superintendence of Companies refused the recognition and relief requested invoking the principle of reciprocity, established in article 4.6, Law No. 116 of 2006. It was argued that, since Antigua and Barbuda did not enact MLCBI, another model of cross-border insolvency framework was in place in that jurisdiction, which made it impossible to recognize the proceeding commenced there as a foreign main proceeding in Colombia.

Case 2014: MLCBI 15; 16(3); 17(2)
Colombia: Superintendence of Companies
Case No. 2013-01-06855
Qbex Electronic Corporations Inc.
12 March 2013
Original in Spanish

Available in:
https://supersociedades.gov.co/delegatura_insolvencia/Paginas/default.aspx

Abstract prepared by Diana Rivera Andrade

[**Keywords:** *enterprise group; foreign proceeding: recognition; main foreign proceeding-resolution; centre of main interests (COMI); presumption-centre of main interests (COMI); recognition-modification*]

Qbex Electronics Corporations Inc., a company incorporated in the United States, together with its two subsidiaries incorporated in Colombia (the enterprise group) was the subject of a US Chapter 11 reorganization proceeding. As the debtor in possession in the US proceedings, it asked the Superintendence of Companies (entity that acts and operates as an insolvency judge in Colombia) to recognize this US proceeding as a foreign main proceeding in Colombia.

With reference to Law No. 1116 enacting MLCBI in Colombia, in particular article 100 [corresponding to art. 15 LMIT] and article 101 [corresponding art. 16 LMIT], the Superintendence of Companies did not doubt that the centre of Qbex Electronics Corporations Inc.'s main interests was in the United States, and thus the US proceeding with respect to that company should be recognized as a foreign main proceeding article 103 Law No. 1116 [corresponding art. 17(2)(a) LMIT].

The Superintendence of Companies noted, however, that the request for recognition was presented on behalf of the enterprise group that comprised two local subsidiaries. With reference to Colombian legislation that recognized the legal concept of "enterprise groups", the Superintendence of Companies found that it would be in the best interest of the debtors, their creditors and all other parties in interest involved, to consider the COMI of the enterprise group where the insolvency proceedings with respect of the three companies had already commenced (in the United States). That would ensure speed and efficiency, reduce transaction costs and promote the coordination of the insolvency processes involving different members of the same enterprise group. Accordingly, the Superintendency of Companies recognized the US

proceeding as a foreign main proceeding and refrained from commencing separate insolvency proceedings with respect to the two local subsidiaries.

After the US reorganization failed, the Superintendence terminated the recognition of the foreign main process and opened a liquidation process in Colombia, with respect to the two local subsidiaries, to protect Colombian creditors.

Case 2015: MLCBI 15; 16; 16(2)
Mexico: Supreme Court of Justice of the Nation, First Chamber
Case No. 2006429-2006430
Amparo en Revisión 577/2012
5 December 2012
Original: Spanish

Published in Gaceta del Semanario Judicial de la Federación, Book 6, May 2014, Volume 1, pages 551–552

Abstract prepared by Luis Manuel Mejan

[**Keywords**: *interpretation; presumption-authenticity; purpose-MLCBI*]

This case concerns issues of interpretation of article 16(2) of the MLCBI.

A trustee in an insolvency proceeding against an enterprise group debtor in the United States sought the recognition of the proceeding as a foreign main proceeding in Mexico. The court in Mexico granted recognition. The recognition order was appealed to the Supreme Court of Justice where issues were raised with respect to article 295 of the Insolvency Law in Mexico.

The first issue was whether article 295(2) of the Insolvency Law of Mexico [enacting art. 16(2) MLCBI] violated the right to be heard stated under article 14 of the Constitution of Mexico because it entitled the court to presume that the documents issued in support of an application for recognition were authentic, regardless of whether they had been legalized. It was argued that the result of relying on that presumption would be recognition of a foreign proceeding pursuant to article 292 of the Insolvency Law in Mexico [corresponding to art. 15 MLCBI], without taking into account that, during that stage, only the requesting party and the debtor were involved in the proceeding, while any other person that might have had an interest in the case were unable to challenge the authenticity of the documents before the recognition was granted.

The Supreme Court ruled that the Mexican insolvency law did not violate the right to be heard as the provision adapts to the nature and characteristics of each proceeding. Since in a cross-border insolvency case it is possible that after recognition more persons join the proceedings, nothing impedes the challenging of the authenticity of the documents at a later stage. Moreover, it is not necessary that every potentially interested individual is notified by the court before the recognition of a foreign main proceeding for two reasons. Firstly, it might be the case that at that stage the court does not possess the necessary information on all the potentially interested individuals. Secondly, such call would delay the proceedings unnecessarily, which would go against the purpose of the MLCBI and its incorporated provisions under Mexican insolvency law to expedite proceedings. Additionally, the Court reminded that the subject matter of a decision to recognize a foreign main proceeding only concerns the existence of a foreign main proceeding and a foreign representative and does not constitute a privative act against a person other than the requesting party or the debtor.

The second issue that the Supreme Court addressed concerned the nature of the presumption under the Mexican law. The Court, by means of systematic interpretation, found that the provision contained a natural presumption that could be rebutted. It argued that since only a *juris et de jure* presumption is absolute and must be established expressly by law, the presumption under the Mexican law falls beyond that scope. The Court also recalled that this presumption aims to reduce the need of

formalisms of legalization in cross-border insolvency cases given the need of efficient cooperation between States to preserve the insolvent company's value. Furthermore, the judge is not required to determine the authenticity of the submitted documents in all cases but must analyse them to determine if there are sufficient elements present that could lead to a presumption that the documents were issued by the competent foreign tribunal. Nevertheless, the Court recalled that a judge may, in case of doubt, request a formal legalization of the documents to determine their authenticity.

Case 2016: MLCBI 11; 15; 17; 18; 20; 25; 30
United States of America: Bankruptcy Court, Southern District of Florida
Case No. 09-1517-RAM, Chapter 15, Adv.No.20-1243-RAM-A
Volo Logistics LLC v. Varig Logistica S.A. (In re Varig Logistica S.A.)
29 October 2021
Original in English

Published in Lexis: 2021 Bankr. Lexis 2992*; 2021 WL 5045684

Abstract prepared by John Pottow and Allan Gropper, national correspondents

[**Keywords:** *comity; cooperation; debtor; foreign court; foreign main proceedings; foreign representative]*

Varig Logistica S.A. (the "debtor") was a Brazilian cargo airline that had been in liquidation proceedings in Brazil. The Brazilian proceedings also involved malfeasance claims (breach-of-fiduciary duty and veil-piercing) against certain entities allegedly in control of the debtor. While this litigation was pending in Brazil, the debtor's foreign representative petitioned for recognition in the United States of the Brazilian bankruptcy proceedings as a foreign main proceeding under Chapter 15 of the U.S. Bankruptcy Code (enacting MLCBI in the United States) in the U.S. Bankruptcy Court for the Southern District of Florida (the Court). The Court issued an order granting the debtor's foreign representative petition for recognition of the Brazilian reorganization proceeding as a foreign main proceeding.

Some of the defendants in the Brazilian malfeasance claims were private equity investment funds and their affiliates who indirectly owned and controlled the debtor for a period before and after the debtor filed its case in Brazil. They brought proceedings in the Court to enjoin the foreign representative from further prosecuting claims against them in Brazil on the ground that they had received a binding release from liability. They thus became plaintiffs in the US chapter 15 case seeking in effect an anti-suit injunction against the Brazilian proceedings. They also filed chapter 11 bankruptcy cases in a New York bankruptcy court.

In deciding a motion to dismiss their claims, the Court considered which court should determine whether the claims asserted in the Brazilian case were barred by the release: the Brazilian court; the Court; or the New York bankruptcy court, in the chapter 11 proceedings that the defendants had filed. The Court took into consideration the fact that the Brazilian court had refused to grant an anti-suit injunction against the US cases but had stated its view that "i) the Brazilian bankruptcy court has absolute and exclusive jurisdiction to hear and try the [Brazilian case]; ii) the adversary proceeding filed [in the U.S. Court] violates the absolute jurisdiction of the Brazilian bankruptcy court; and iii) the claims release should be determined by the Brazilian bankruptcy court as a matter of defense to the claims in the [Brazilian case]".

The Court analysed section 1501 of the U.S. Bankruptcy Code [enacting the MLCBI] that emphasizes the importance of cooperation between courts and section 1525(a) of the Bankruptcy Code that requires to "cooperate to the maximum extent possible with a foreign court". The Court cited *re Atlas Shipping A/S*[3] where it was stated, "Once a case is recognized as a foreign main proceeding, chapter 15 specifically contemplates that the court will exercise its discretion consistent with the principles of comity." In

[3] 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) reported in CLOUT case No. 1277.

addition, the Court cited *re Oi S.A.*,[4] "[i]t is simply not this Court's role to second guess the wisdom of the Brazilian courts or overrule their decisions, which would be fundamentally inconsistent with comity", and *re SNP Boat Serv.*[5] and *In re Rede*,[6] stating with respect to the public policy exception of Section 1506 that "it is not appropriate for this Court to superimpose requirements of U.S. law on a case in Brazil or to second-guess the findings of the foreign court."

In its ruling, the Court refused to issue the anti-suit injunction requested by the plaintiffs and stated that it would not determine the issue of release. It dismissed the proceedings. It stated, however, that it would not determine the jurisdiction of the New York chapter 11 bankruptcy court to determine these issues.

Case 2017: MLCBI 2; 6; 16(3); 17(1)
United States of America: Bankruptcy Court, Southern District of New York
Case No. 20-12192 (JLG)
In re Culligan Ltd.
2 July 2021
Original in English

Abstract prepared by John Pottow and Allan Gropper, national correspondents

[**Keywords:** *bad faith; centre of main interests-determination; centre of main interests (COMI)-timing; public policy; presumption (centre of main interests (COMI)*]

Joint liquidators of a Bermuda company applied for the recognition in the United States of a court-supervised liquidation proceeding pending before the Supreme Court of Bermuda. The recognition was sought under chapter 15 of the U.S. Bankruptcy Code (enacting the MLCBI in the United States). The recognition motion was specifically sanctioned by the Bermuda Court to ensure that the Bermuda liquidation and any order issuing from the Bermuda court were binding and enforceable in the United States to preclude minority shareholders of the debtor that had brought proceedings against the debtor in a commercial court in New York (the plaintiffs) from continuing those proceedings. The plaintiffs opposed the recognition motion.

There was no debate that the proceeding in Bermuda was a foreign proceeding and that the joint liquidators were foreign representatives within the meaning of Section 1517(a) of the Bankruptcy Code (enacting art. 17(1) MLCBI).

Because the debtor was registered in Bermuda, there was a presumption that the centre of its main interests (COMI) was in Bermuda, according to Section 1516(e) of the Bankruptcy Code (enacting art. 16(3) MLCBI). Several elements were put forward by the plaintiffs to rebut the presumption: (a) that before entering insolvency proceedings in Bermuda, the debtor, a holding company, did not have a place or business and did not conduct business from Bermuda, operating instead from the United States and Canada; and (b) that the debtor had cash deposits in an account in the United States and that most of the claims brought by the shareholders had been found by the New York court to be governed by New York law.

The Court disagreed, based among other things on the following grounds: (a) by established precedent in the United States,[7] COMI should be determined in principle as at the time of the filing of Chapter 15 petition and therefore the activities of the foreign representatives should be considered in determining the debtor's COMI, provided that there was no evidence that the COMI had been manipulated; and (b) the facts of the case did not support rebutting the presumption.[8] To the contrary, the Court

[4] 587 B.R. 253, 273 (Bankr. S.D.N.Y. 2018).
[5] 483 B.R. at 786.
[6] 515 B.R. at 100.
[7] *In re Ascot Fund Ltd.*, 603 B.R. 271, 282 (Bankr. S.D.N.Y. 2019).
[8] For a similar case, see *In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d Cir. 2013). See also *In re Fairfield Sentry Ltd.*, 458 B.R. 665, reported in CLOUT case No. 1316.

found that Bermuda law applied to the liquidation of the debtor and that the foreign representatives had been administering the liquidation from Bermuda effectively.

The Court was then faced with the question whether recognition would violate US public policy, as claimed by the plaintiffs, who argued that the debtor had filed for liquidation in Bermuda in bad faith, in order to put an end to the plaintiffs' proceedings in New York. The Court summarized that, in the United States, courts had generally found that bad faith did not arise to the point of a violation of public policy.[9] Although agreeing that the recognition motion was the litigation tactic of the foreign representatives, the Court found that, by itself, it did not reach the threshold of a US public policy breach. It stated that the public policy exception enshrined in Section 1506 of the Bankruptcy Code (enacting art. 6 MLCBI) was usually applicable only to the extent that the foreign tribunal's procedures and safeguards did not comport with US public policy. Since no party asserted that the proceedings in Bermuda themselves were, by their nature, contrary to US public policy, the Court dismissed the public policy argument, recognized the Bermuda proceeding as a foreign main proceeding and, in accordance with Chapter 15, entered an automatic stay precluding further action against the debtor's assets within the territory of the United States. It further held that it would be premature to decide whether to grant relief from the automatic stay, as requested by the plaintiffs, because such relief required notice and hearing, which had not yet properly been requested by the plaintiffs. Such relief could be sought in due course.

Case 2018: MLCBI 16(3); 17(2)(a); 17(2)(b)
United States of America: Bankruptcy Court, Southern District of New York
Case No. 18-10870 (SCC)
In re Pirogova
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[**Keywords:** *centre of main interests (COMI); centre of main interests (COMI)-determination; debtor – individual; establishment; foreign proceeding*]

A bank in the Russian Federation filed an application for the commencement of a personal bankruptcy proceeding against an individual debtor in the Russian Federation. The court in the Russian Federation accepted the application and after determining that a restructuring of the debt was not possible, initiated a procedure to liquidate the debtor's property under the supervision of an insolvency representative. Three years later, in 2018, the foreign representative of the liquidation proceeding in the Russian Federation sought recognition of that proceeding in the United States, the country where the debtor, now a US permanent resident, was residing, as a foreign proceeding under chapter 15 of the U.S. Bankruptcy Code (enacting the MLCBI).

The US court had then to assess whether the debtor had the centre of her main interests (COMI) or an establishment in the Russian Federation, to recognize the proceeding in the Russian Federation as a foreign main proceeding (Section 1517(b)(1) enacting art. 17(2)(a) MLCBI) or, alternatively, as a foreign non-main proceeding (Section 1517(b)(2) enacting art. 17(2) (b) MLCBI). In accordance with the US precedent,[10] the Court held that the COMI determination must be made as of the date of the opening of the US recognition proceeding, not as of the date of the commencement of the foreign insolvency proceeding.

Section 1516(c) (enacting art. 16(3) MLCBI) establishes a presumption that habitual residence in the case of an individual is presumed to be the debtor's COMI. The Court

[9] *In re Creative Fin. Ltd.*, 543 B.R. 498, reported in CLOUT case No. 1624.
[10] *Betcorp Limited* 400 B.R. 266,reported in CLOUT case No. 927. For an overview of timing with respect to the consideration of COMI and habitual residence, see also in the UNCITRAL Digest of Case Law on UNCITRAL Model Law on Cross-Border Insolvency, under article 17(2).

first held that the debtor was habitually resident in the United States and so engaged the presumption. In assessing the arguments put forward by the foreign representative to rebut such presumption, the Court recalled that courts usually consider "(1) the length of time spent in the location; (2) the occupational or familial ties to the area; and (3) the location of the individual's regular activities, jobs, assets, investments clubs, unions, and institutions of which he is a member".[11] Additional factors such as "the location of the debtor's primary assets, the location of the majority of the debtor's creditors and the jurisdiction whose law would apply to most disputes could be used by the court".[12] The evidence put forward included that the debtor had children, grandchildren, and friends in Moscow; maintained a current internal Russian passport; was, and had been, a long-term member of a Yacht Club in Moscow; continued to maintain insurance for a motor vehicle in the Russian Federation; and had assets in the Russian Federation and creditors who expected their claims to be adjudicated in the Russian insolvency proceedings, had been perpetuating a fraud, avoiding debts, and evading authorities in the Russian Federation and had thus a greater exposure in the Russian Federation than elsewhere. The Court weighed that evidence against the debtor's stated intention to leave the Russian Federation permanently in 2008 and never reside there again; the fact that the debtor had obtained permanent residence status in the United States in 2008; that the debtor had significant creditors also outside the Russian Federation and in fact been evicted from her apartment in the United States and another of her properties in the United States was subject to foreclosure; past business activities of the debtor in the Russian Federation were irrelevant because they predated the filing of the recognition petition in the United States; and the absence of direct evidence that she had a habitual residence in the Russian Federation at the time of the recognition petition date. The Court found that the evidence proffered was insufficient to provide a basis on which the Court could conclude that, as of the Chapter 15 petition date, the debtor's domicile or habitual residence was the Russian Federation or that she had manipulated her COMI in bad faith by fleeing the Russian Federation. Whether the debtor had acted improperly vis-à-vis the authorities and courts in the Russian Federation over her legal exposure there was a different issue than whether she had manipulated her circumstances in connection with the recognition petition in the United States.

The Court also found that the evidence was insufficient to find that the debtor had an establishment in the Russian Federation from which she conducted non-transitory economic activity. Even though she might have owned an apartment in Moscow, there was little evidence as to the conduct of such activity from that address. Moreover, the ability to participate in the insolvency proceedings of a company owned by the debtor (but currently in the late stages of insolvency) did not satisfy the requirement for "minimal management"; nor did the existence of the insolvency proceedings themselves constitute economic activity.

The Court declined to recognize the proceeding in the Russian Federation as either a main or non-main proceeding. The judgment was affirmed on appeal with a decision of the District Court that substantially followed the reasoning of the Bankruptcy Judge in first instance.[13]

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[11] *Lavie v. Ran*, 406 B.R. 277, 61 Collier Bankr. Cas. 2d (MB) 913, reported in CLOUT case No. 929.

[12] Ibid.

[13] United States District Court, Southern District of New York, 8 January 2020, 612 B.R. 475.