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CASE LAW ON UNCITRAL TEXTS (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.1). CLOUT documents are available on the UNCITRAL website: (http://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 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 UNCITRAL Model Law on Cross-Border Insolvency (MLCBI)

Case 787: MLCBI 15, 21

United Kingdom: High Court of Justice, Chancery Division, Bristol District Registry
[2207] B.P.I.R. 99
In re Rajapakse[1]
23 November 2006
Original in English

[**Keywords**: *foreign proceeding; foreign representative; recognition; recognition-formalities; relief-upon request*]

The debtors were a married couple and residents of the United States of America ("the United States") who commenced an insolvency proceeding ("foreign proceeding") at the end of 2003 in the United States. Subsequently, the United States court appointed an insolvency representative ("foreign representative") over their estate. The foreign representative identified several assets of the debtors located outside of the United States, including a residential property in England. In a dispute concerning that residential property, the United States court found that it was part of the insolvency estate. The foreign representative then applied to the English court under Arts. 15 and 21 CBIR[2] [corresponds with Arts. 15 and 21 MLCBI], seeking recognition of the foreign proceeding; recognition of the foreign representative's authority to deal with the residential property as part of the insolvency estate; recognition that the residential property in England formed part of the insolvency estate and that the foreign representative had authority to sell it and distribute the proceeds to creditors. The application was accompanied by evidence in support, sworn by the foreign representative, containing and enclosing information and documents required by the CBIR. The English court granted the application.[3]

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[1] Unreported court order.

[2] CBIR refers to the Cross-Border Insolvency Regulation 2006, which enacted the MLCBI into domestic law and which only applies in Great Britain; therefore, reference is not made to the United Kingdom of Great Britain and Northern Ireland.

[3] The registrar of the court published the following observations on procedural issues arising in the case for the information of practitioners, including:
1. There must be filed at court original certified copies of the decision commencing the foreign proceedings and appointing the foreign representative. Photocopies would not be acceptable. Any certificate from the foreign court provided pursuant to Art. 15 (2) (b) [MLCBI] should also be an original.
2. If a foreign court has made an order permitting the foreign representative to issue a recognition application or an Art. 21 [MLCBI] relief application, the affidavit filed by the foreign representative should state whether an appeal has been made against the foreign court's order. If no such appeal has been made, it should state the time limits with which an appeal may be made.
3. The Regulations do not require the court to approve the advertisement to be placed in the London Gazette and a newspaper pursuant to para. 26 (7) of Schedule 2 to the Regulations. The form of the advertisement is prescribed by Form ML8. This contains sections that will not be required in every case. Practitioners may seek the guidance of the court insofar as necessary as

Case 788: MLCBI 14, 15, 16 (3), 17, 20, 21
United States: U.S. Bankruptcy Court for the Southern District of New York
No. 05-60100 (BRL)
In re Lloyd (La Mutuelle du Mans Assurances IARD)[4]
7 December 2005
Original in English
Published in English:
2005 Bankr. LEXIS
Prepared by Benedikt Klauser

[**Keywords**: *centre of main interests (COMI); foreign main proceeding; foreign representative; notification; presumption-centre of main interests (COMI); recognition-application for; relief-automatic; relief-injunctive*]

The United Kingdom of Great Britain and Northern Ireland ("the United Kingdom") branch of a French insurer was the subject of an insolvency proceeding under the Companies Act of 1985 of Great Britain pursuant to which the United Kingdom court had approved a solvent Scheme of Arrangement in October 2005 ["foreign proceeding"]. The foreign proceeding was to expedite and conclude the winding up of a marine insurance account. The insolvency representative ["foreign representative"] applied for recognition and injunctive relief with the New York court in accordance with 11 U.S.C. §§ 1515, 1517 of the law enacting the MLCBI into United States law[5] [corresponds with Arts. 15, 17 MLCBI], in order to protect receivables and assets located within the United States.

In its application, the foreign representative sought for recognition of the foreign proceeding as a foreign main proceeding based on the statutory presumption in 11 U.S.C. § 1516 (c) [Art. 16 (3) MLCBI] that the debtor's centre of main interest was situated in the United Kingdom where the insolvent branch was registered and licensed to do business. Having ascertained that the notice requirements of 11 U.S.C. § 1514 [Art. 14 MLCBI] had been met, the court recognized the foreign proceeding as a foreign main proceeding, notwithstanding that the parent's place of incorporation was in France.

The court held that the applicant was entitled to full automatic relief under 11 U.S.C. § 1520 [Art. 20 MLCBI] and also granted injunctive relief pursuant to 11 U.S.C. § 1521 [Art. 21 MLCBI], enjoining creditors from moving against the debtor's assets or seeking payment in disregard of the foreign proceeding. Finally, the court authorized the foreign representative to operate the debtor's business and ordered that the United Kingdom court should have exclusive

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to the form of particular advertisements and should report any difficulties they encounter to the court and the Insolvency Service Policy Unit.
4. If the debtor does not have an address for service in England and Wales or if the debtor is an individual resident outside the jurisdiction, the court will expect a sealed copy of the application issued by the court together with any affidavit in support of it and any documents exhibited to the affidavit, to be served upon the debtor at his usual or last known address outside the jurisdiction pursuant to Schedule 2 paras. 21, 22 and 77 of the CBIR [service of the application, the manner in which service to be effected and service outside the jurisdiction].

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

[5] Chapter 15 of the United States Bankruptcy Code, "Chapter 15".

jurisdiction to rule on any claims or to settle any disputes related to the foreign proceeding.

Case 789: MLCBI 2 (b), 16 (3), 17, 17 (1) (a)-(b)
United States: U.S. Bankruptcy Court for the Southern District of New York
No. 07-12762 (REG)
In re Basis Yield Alpha Fund (Master)
16 January 2008
Original in English
Published in English:
381 B.R. 37; 49 Bankr. Ct. Dec. 89

[**Keywords**: *centre of main interests (COMI); foreign main proceeding; foreign non-main proceeding; presumption-centre of main interests (COMI); recognition-application for*]

The debtor was incorporated as an exempted limited liability company under section 193 of the Cayman Islands Companies Law (2004 Revision)[6] and maintained its registered office in that country. In August 2007, an insolvency proceeding ("foreign proceeding") commenced and insolvency representatives ("foreign representatives") were appointed. The foreign representatives then applied for recognition of the foreign proceeding as a foreign main or non-main proceeding under 11 U.S.C. § 1517 (a) (1) or (2) of the law enacting the MLCBI into United States law[7] [corresponds with Art. 17 (1) (a) or (b) MLCBI]. The application was silent as to (a) the nature or the extent of any business activity the debtor conducted in the Cayman Islands, (b) whether the debtor had any employees, managers or assets in the Cayman Islands and (c) the location from which the debtor's funds were actually managed. No objections were made to the application for recognition, so that the foreign representatives subsequently moved to have the recognition granted as *summary judgment*.[8] They argued that they were entitled to recognition, on the basis that the debtor's centre of main interests ("COMI") was located in the Cayman Islands following the presumption embodied in 11 U.S.C. § 1516 (c) [Art. 16 (3) MLCBI]. They further argued that if the other recognition requirements were met pursuant to 11 U.S.C. § 1517 [Art. 17 MLCBI], recognition had to be granted.

The court denied the application for summary judgment, as the lack of any objections to the application did not divest the court of the power to make its own determination as to whether the requirements of 11 U.S.C. § 1517 [Art. 17 MLCBI], in particular whether the foreign proceeding was a foreign main proceeding pursuant to 11 U.S.C. §§ 1517 (a) (1) and 1502 (4) [Arts. 17 (1) (a) and 2 (b) MLCBI], were met. In its findings, the court looked at the actual text

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[6] Section 193 of the Cayman Companies Law provides: "An exempted company shall not trade in the Islands with any person, firm or corporation except in furtherance of the business of the exempted company carried on outside the Islands."

[7] See supra note 5.

[8] A summary judgment is an expedited legal procedure, in which the court grants the application without hearings, relying on the submission by the applying party that there is no genuine issue as to any material fact and that the applying party is entitled to a judgment as a matter of law.

of 11 U.S.C. § 1517, its legislative history, in particular the Guide to Enactment to the MLCBI, case law (*SPhinX*,[9] *Bear Stearns*,[10] *Tri-Continental*[11]) and published views of commentators. The court further held that the presumption embodied in 11 U.S.C. § 1516 (c) [16 (3) MLCBI] did not preclude the court from considering the actual facts, especially when the foreign representatives had been silent as to certain issues and when the facts known made further inquiries appropriate. The court also emphasized that the presumption of 11 U.S.C. § 1516 (c) [Art. 16 (3) MLBI] posed the burden of proof on the foreign representatives. The court gave examples of allegations supporting an application for recognition, which would be satisfactory for the court to rely on the presumption of 11 U.S.C. § 1516 (c) [Art. 16 (3) MLCBI] in the absence of any objection. Those examples included that the debtor was headquartered in the foreign country [where the foreign proceeding was pending], had its assets primarily located there, writing business in the market of that country and the contracts affected by the foreign proceeding were written predominantly from the debtor's headquarters.

The foreign representative later applied for dismissal of the Chapter 15 case, which was granted without further legal discussion.

Case 790: MLCBI 2 (a)-(b), 6, 16 (3), 17 (4)
United States: U.S. Bankruptcy Court for the District of Colorado
No. 07-22719-MER
In re Klytie's Developments, Inc., Klytie's Developments, LLC
8 February 2008
Original in English
Published in English:
383 B.R. 773

[**Keywords**: *cooperation; creditors-protection; foreign main proceeding; public policy; purpose-MLCBI; recognition-decision*]

In 2005, an Israeli couple formed an investment company ("A") under the laws of Canada with the registered office in Canada. Shortly afterwards, A formed another company ("B") and registered it in the United States. Both companies were established for fraudulent purposes. In 2006, Canadian and United States regulatory authorities conducted investigations of the companies. In October 2006, both regulatory authorities initiated actions in their respective jurisdictions against the couple, the companies and the manager of B. In June 2007, several of the defrauded investors filed a complaint against the couple, the companies and the manager in the United States. In August 2007, a Canadian court appointed an insolvency representative ("foreign representative") for A, and included subsequently the couple and B in the proceeding ("foreign proceeding").

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[9] In particular the "array of factors" that the bankruptcy court had found probative regarding the determination of comi, in re SPhinX, 351 B.R. 103, 227 (Bankr. S.D.N.Y. 2006), ("SPhinX I"), see also CLOUT Case 768.

[10] In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007), see also CLOUT case 760.

[11] In re Tri-Continental, 349 B.R. 627 (Bankr. E.D. Cal. 2006), see also CLOUT Case 766.

In November 2007, the foreign representative applied for recognition of the foreign proceeding as a foreign main proceeding in the United States pursuant to 11 U.S.C. §§ 101 (23) and 1502 (4) [correspond with Arts. 2 (a) and (b) MLCBI] of the law enacting the MLCBI into United States law.[12] It argued that recognition as a foreign main proceeding was necessary to assist in its investigating and pursuing assets of A and its related entities in the United States.

Referring to the decision in *SPhinX*, [13] the court noted that the purpose of Chapter 15 was to facilitate cooperation between United States courts, trustees, examiners, debtors and debtors-in-possession and the courts and other competent authorities of foreign countries, to provide greater consistency in the law for trade and investment; and to promote fair and efficient administration of cross-border insolvencies while protecting the interest of all creditors and other interested parties, including the debtor.

In addition, the court noted that the case was complicated because it lacked clarity as to the identity of the debtor(s) in the foreign proceeding, as the Canadian court first included only A and subsequently also B. The court wondered whether for COMI purposes each of the entities should be evaluated separately, or whether there should be "a piercing of the corporate veil" analysis as to determine whether there were two separate and distinct entities. The court then noted that the recognition determination appeared to be a summary determination, for which no full and final adjudication of *alter ego* and corporate governance issues needed to be completed. The court found that there was a reasonable probability that both A and B were operated for fraudulent purposes. The court did not evaluate them as two separate entities, noting that Chapter 15 would allow the recognition determination to be modified or terminated in the future pursuant to 11 U.S.C. 1517 (d) [Art. 17 (4) MLCBI], if in the foreign proceeding a different conclusion was reached.

The court analysed where the centre of main interests (COMI) was located, in order to determine whether the foreign proceeding constituted a foreign main proceeding. It noted that the United States Bankruptcy Code[14] did not define COMI and that 11 U.S.C. § 1516 (c) [Art. 16 (3) MLCBI] established the presumption that the debtor's registered office was its COMI. The court looked at the decisions taken in *SPhinX*[15] and *Tri-Continental*,[16] quoting from the latter that the debtor's COMI was comparable to the concept of principal place of business. The court used the factors, identified by the court in *Bear Stearns*,[17] to determine that the COMI of both debtors was located in Canada. These factors were (i) location of those who manage the debtor; (ii) location of the debtor; (iii) location of principal assets; (iv) location of majority of creditors and (v) jurisdiction whose law applies to most disputes.

The court held that recognition would not violate the public policy of the United States pursuant to 11 U.S.C. § 1506 [Art. 6 MLCBI] as argued by objecting creditors. The court noted that the public policy exception was to be applied

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[12] See supra note 5.
[13] See supra note 9.
[14] The insolvency law of the United States.
[15] See supra note 9.
[16] See supra note 11.
[17] See supra note 10.

narrowly and should be invoked only when the most fundamental policies of the United States were at risk, referring to the legislative history of Chapter 15 and the decision in *Ephedra*.[18] The court rejected the argument that there would be a smaller distribution to local creditors because the foreign proceeding also included investors from Canada and Israel. The court was of the view that all wronged investors should receive an equal share in the assets accumulated in the foreign proceeding, regardless of nationality or locality. The court also rejected the argument that the costs of the foreign proceeding would lead to the diminution of the debtor's assets, resulting in a minimal distribution to investors.

Case 791: MLCBI 2 (a)-(f), 15, 15 (2) (c), 16 (3), 17, 17 (4)
United States: U.S. Bankruptcy Court for the District of Massachusetts
Nos. 07-17180-JBR and 07-17518-JBR
In re Tradex Swiss AG[19]
12 March 2008
Original in English
Published in English:
384 B.R. 34; 49 Bankr. Ct. Dec. 190

[**Keywords**: *centre of main interests (COMI); establishment; foreign court; foreign main proceeding; foreign non-main proceeding; presumption-centre of main interests (COMI); procedural issues; recognition-formalities*]

The debtor was an exchange trading company registered in Switzerland using an Internet-based trading platform. It maintained offices in Switzerland and in the United States. The manager of the United States office had the signing authority for the debtor's bank accounts. Over the years, the debtor's operations were transferred to the United States office. At the beginning of November 2007, the Swiss Federal Banking Commission ("SFBC") commenced an insolvency proceeding in Switzerland ("foreign proceeding") against the debtor and appointed two insolvency representatives ("foreign representatives"). An appeal was pending against the decision to initiate the foreign proceeding, but no stay had been ordered. Shortly after commencement, an involuntary insolvency proceeding was initiated against the debtor in the United States ("the United States proceeding").[20] Nearly three weeks later, the foreign insolvency representatives applied in the United States for recognition of the foreign proceeding as a foreign main proceeding under the law enacting the MLCBI into United States law[21] and for dismissal of the United States proceeding.

Creditors opposed the recognition, alleging that the foreign proceeding was not a foreign proceeding as defined in Chapter 15, because the debtor had no "establishment" in Switzerland as defined in 11 U.S.C. § 1502 (2) [corresponds with Art. 2 (f) MLCBI]. They further argued that the centre of main interests ["COMI"] was located in the United States and that the foreign proceeding should be

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[18] In re Ephedra Products Liability Litigation, 349 B.R. 333 (S.D.N.Y. 2006), see also CLOUT case 765.
[19] See supra note 4.
[20] The proceeding was commenced under Chapter 7 of the United States Bankruptcy Code.
[21] See supra note 5.

recognized, if at all, as a foreign non-main proceeding. The creditors wanted the United States proceeding to continue, alleging that it was in their best interests. In response, the foreign representatives sought the consolidation of the pending involuntary proceeding with the Chapter 15 proceeding, as it saw no need for the former to go forward.

In its analysis, the court first turned to the question whether the foreign proceeding was a foreign proceeding pursuant to 11 U.S.C. § 101 (23) [Art. 2 (a) MLCBI]. The court noted that the determination required a strict application of the definitional terms as set out in the United States Bankruptcy Code.[22] It further noted that the procedure was set out in 11 U.S.C. §§ 1504 and 1515 [Art. 15 MLCBI] and that the lack of a full translation of the foreign order was not enough to render the application invalid as alleged by the creditors pursuant to 11 U.S.C. § 1515 (b) (3) [Art 15 (2) (c) MLCBI]. It further noted that the foreign proceeding was an administrative proceeding in a foreign country under a law relating to insolvency or adjustment of debt pursuant to 11 U.S.C. § 101 (23) [Art. 2 (a) MLCBI], as it was unchallenged that the SFBC was an administrative agency with authority to regulate banks and brokers. In contrast to the creditors, the court viewed the SFBC as a "foreign court", as the definition under 11 U.S.C. § 1502 (3) [Art. 2 (e) MLCBI] included a judicial or other authority competent to control or supervise a foreign proceeding. Consequently, the court held that the foreign proceeding was a foreign proceeding pursuant to 11 U.S.C. § 101 (23) [Art. 2 (a) MLCBI] and that the foreign representatives were foreign representatives [pursuant to 11 U.S.C. § 101 (24), corresponding with Art. 2 (d) MLCBI].

The court noted that under Chapter 15, a foreign proceeding could be either a main or non-main proceeding or simply a foreign proceeding that was neither main nor non-main and not entitled to recognition under Chapter 15. According to the court, the distinction between the first two and the latter was that the latter lacked a debtor's establishment, which was any place of operations where the debtor carried out a non-transitory economic activity pursuant to 11 U.S.C. § 1502 (2) [Art. 2 (f) MLCBI].

The court analysed whether the foreign proceeding was a main or non-main proceeding pursuant to 11 U.S. C. §§ 1502 (4) or (5) [Arts. 2 (b) or (c) MLCBI], for which the location of the debtor's COMI was critical. The court noted that the Bankruptcy Code did not provide any definition of COMI, but that the decision in *Bear Stearns*[23] described the concept as similar to a principal place of business and referred to some of the factors important in determining COMI. The court noted that the creditors had submitted evidence which sought to rebut the presumption embodied in 11 U.S.C. § 1516 (c) [Art. 16 (3) MLCBI] that the debtor's COMI was located in Switzerland. That evidence included the location of the trading platform in Boston, the location of assets and a significant number of creditors in the United States, and the fact that signatory authority was held by the manager of the United States office. The court viewed the evidence of only the presence in Switzerland, the office in Switzerland and the Swiss owner of the debtor company, as insufficient to show that the principal place of business was in Switzerland. Consequently, the

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[22] See supra note 14.

[23] See supra note 10.

court held that the foreign representatives had not discharged the required burden of proof and it recognized the foreign proceeding as a foreign non-main proceeding.

The court did not dismiss the United States proceeding, seeing no impediment to continuing that proceeding in connection with the Chapter 15 case. It noted that 11 U.S.C. § 305 (b) permitted a foreign representative to seek dismissal or suspension of an involuntary proceeding, if the application under 11 U.S.C. § 1515 [Art. 15 MLCBI] for recognition had been granted and the purposes of Chapter 15 would be best served by it. The court took the view that dismissal was not warranted, as the purposes of Chapter 15 were best served by permitting the pending involuntary proceeding in United States to go forward. The court found that the insolvency representative appointed in that proceeding had already begun collecting assets and should continue the administration of the case, in particular, as the foreign proceeding was "in limbo".

Case 792: MLCBI 7, 9, 17, 21 (1) (g)
United States: U.S. District Court for the Southern District of New York
No. 06-11026 (SMB), 07 Civ. 11338 (LAK)[24]
In re Bancredit Cayman Limited (in Liquidation)
31 March 2008
Original in English

[**Keywords**: *additional assistance; comity; foreign representative-direct access; foreign main proceeding; procedural issues*]

The debtor was a Cayman Islands financial institution. In 2006, an insolvency proceeding ("foreign proceeding") commenced in the Cayman Islands, in which two insolvency representatives ("foreign representatives") were appointed. Subsequently, the foreign representatives applied for recognition in the United States under the law enacting the MLCBI into United States law,[25] in order to investigate the existence of assets in the United States and take steps necessary to realize the United States assets. In June 2007, the court granted recognition as a foreign main proceeding pursuant to 11 U.S.C. § 1517 [corresponds with Art. 17 MLCBI]. Two weeks later, the court authorized the foreign representatives in a supplemental order to, among other things, take discovery and file suit in the United States to the extent permitted by 11 U.S.C. § 1509 [corresponds with Art. 9 MLCBI]. In August 2007, the foreign representatives applied for clarification of the supplemental order, seeking assurance that they would receive the benefit of the extension of the statute of limitation provided in 11 U.S.C. § 108.[26]

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[24] At the time of publication of this batch, the decision had not been officially published. The decision of the lower court can be found under 2008 WL 2198272 (S.D.N.Y.), 2008 U.S. Dist. LEXIS 41456. Please see supra note 4 on unpublished opinions.

[25] See supra note 5.

[26] Section 108 states in pertinent part: "(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of – (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) two years after the order for relief."

The bankruptcy court denied the application, at least as procedural matter, as there was no case or controversy pending and thus no decision was required on the application of 11 U.S.C. § 108 proper. The bankruptcy court rejected the foreign representatives' argument that the rights of prospective defendants should not be considered, because the balancing factors of 11 U.S.C. § 1507 [Art. 7 MLCBI] would not require consideration of prospective third-party defendants. The bankruptcy court noted that the balancing factors addressed considerations of comity, but that the foreign representatives were not seeking comity, but asking the court to make United States law available to them. Further, that even if the foreign representatives were seeking comity, the bankruptcy court would still have to consider public policy and prejudice to United States citizens.

The foreign representatives appealed the decision. The district court affirmed the appealed orders. The court held that the bankruptcy court had jurisdiction only to the extent that the foreign representatives had commenced an ancillary case under 11 U.S.C. § 1509 (a) [Art. 9 MLCBI]. It noted that the foreign representatives were seeking an advisory opinion, which courts under United States courts could not give.

Case 793: MLCBI 2 (b), 17
United States: U.S. District Court for the Eastern District of California Sacramento Division
No. 07-23597-B-15
In re Three Estates Company, Ltd.[27]
31 March 2008
Original in English

[**Keywords**: *foreign main proceeding; procedural issues*]

The debtor, a publishing company, operated its business and had its centre of main interests (COMI) in Japan. The debtor owned property in California, which it had purchased for investment purposes. An insolvency proceeding ("foreign proceeding") for the debtor commenced in Japan and an insolvency representative ("foreign representative") was appointed in June 2006. The Japanese court directed the foreign representative to liquidate the debtor's real property located in California. As there were difficulties to realize the property in the absence of an order from a United States court, the foreign representative applied for recognition of the foreign proceeding as a foreign main proceeding under the law enacting the MLCBI into United States law[28] on May 2007. The court granted the application pursuant to 11 U.S.C. § 1517 [Art. 17 MLCBI], recognizing the foreign proceeding as a foreign main proceeding pursuant to 11 U.S.C. § 1502 (4) [Art. 2 (b) MLCBI].

Subsequently, the foreign representative applied for a final order to close the case, as the assets of the debtor located in the United States had been fully administered. In its application, the foreign representative cited provisions of United States law outside of Chapter 15 and references by way of analogy to cases under Chapter 11.[29]

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[27] See supra note 4.
[28] See supra note 5.
[29] The chapter of the United States Bankruptcy Code, which deals with reorganization of the

The court granted the application. In its findings, the court noted that there was little, if any, authority relating to the entry of a final order in Chapter 15 cases. It further found that the provisions of law cited by the foreign representative were not applicable in Chapter 15 cases. However, as assets located in the United States had been fully administered without dispute, the court found it appropriate to close the case.

Case 794: MLCBI 2 (b)-(c), (f), 9, 15, 16 (3), 17
United States: U.S. District Court for the Southern District of New York
Nos. 07-12383 and 07-12384
In re Bear Stearns
22 May 2008
Original in English
Published in English:
2008 WL 2198272 (S.D.N.Y.), 2008 U.S. Dist. LEXIS 41456, Bankr. L. Rep. (CCH) P81,258

[**Keywords**: *assistance; centre of main interests (COMI); court-direct access; comity; establishment; foreign main proceeding; foreign non-main proceeding; presumption-centre of main interests (COMI); purpose-MLCBI*]

The district court affirmed the decision of the bankruptcy court, denying the application for recognition of the insolvency proceeding in the Cayman Island ("foreign proceeding") [see CLOUT case 760].[30]

The court found that the bankruptcy court had correctly held that principles of comity did not figure in the recognition analysis of the law enacting the MLCBI into United States law,[31] because it required the application of objective criteria for recognition as either main or non-main proceeding pursuant to 11 U.S.C. §§ 1502 (4), 1502 (5), 1515, 1517 [correspond with Arts. 2 (b), 2 (c), 15, 17 MLCBI]. The court noted that those objective criteria reflected the legislative decisions of UNCITRAL and Congress[32] that a foreign proceeding should not be entitled to direct access to or assistance from the host country courts unless the debtor had a sufficient pre-application economic presence in the country of the foreign proceeding, the purpose of Chapter 15 and the MLCBI being to optimize disposition of international insolvency by facilitating that access [11 U.S.C. § 1509 corresponding with Art. 9 MLCBI]. In addition, the court stated that the language of Chapter 15 required a factual determination and that principles of comity only came into play with respect to the available relief after recognition. The court further noted that the decision in *SPhinX II* [33] should have reviewed the statutory requirements for a determination that a proceeding was not a non-main proceeding, as *SPhinX I*[34] granted recognition as a non-main proceeding without doing so. The court found that the bankruptcy court's interpretation of the COMI presumption

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debtor.

[30] See supra note 10.

[31] See supra note 5.

[32] The law-making organ of the United States.

[33] In re SPhinX, Ltd., 371 B.R. 10 (S.D.N.Y. 2007), ("SPhinX II"), see also CLOUT Case 768.

[34] See supra note 9.

with respect to 11 U.S.C. § 1516 (c) [Art. 16 (3) MLCBI] was correct. The court rejected the appellants' argument that the bankruptcy court's refusal to grant recognition and comity frustrated Chapter 15's goals and would turn the proceeding into a complex, cumbersome and time-consuming process contrary to its alleged intent and that the COMI should be conclusive if not opposed by a party. The court took the view that 11 U.S.C. § 1516 (c) [Art. 16 (3) MLCBI] created only a rebuttable evidentiary presumption and the foreign representative had to discharge the relevant burden of proof even if there was no opposition to that presumption. In support of its finding, the court quoted *Tri-Continental*,[35] the MLCBI's Guide to Enactment and the legislative history of Chapter 15, in particular that Congress had changed the relevant language of the MLCBI from "proof to the contrary" into "evidence to the contrary", in order to clarify that the ultimate burden was on the foreign representative. The court further found that the standard adopted by the bankruptcy court for the COMI determination, which took into account the decisions of the European Court of Justice in *Eurofood*[36] and of the United States bankruptcy court in *SPhinX*[37] listing criteria for that determination, was correct. The court concluded that the established facts supported the denial of recognition as a main proceeding and that the appellants had failed to allege facts supporting recognition as a non-main proceeding, i.e. that the debtor had an establishment in the Cayman Islands pursuant to 11 U.S.C. § 1502 (2) [Art. 2 (f) MLCBI].

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[35] See supra note 11.

[36] *Bondi v. Bank of America, N.A., (In re Eurofood IFSC Ltd.)*, Case 341/04, 2006 E.C.R. I-813 (E.C.J. May 2, 2006).

[37] See supra note 9.