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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 (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

Case 1000: MLCBI 17; 19
Republic of Korea: Seoul High Court
2008 RA 1524 Decision [Declaration of Bankruptcy]
2008 HAHAP 20 [The original verdict - Seoul Central District Court 2008 HAHAP 20 Decision]
28 August 2008
Original in Korean

Abstract prepared by Hae-Min Lee, National Correspondent

[**keywords**: *recognition*]

In 2008, a creditor applied for insolvency proceedings of the debtor to the Korean court. The debtor sought dismissal of the application claiming that he had already been discharged from all of his debts in a United States of America insolvency proceeding ("foreign proceeding"), which had been recognized as a foreign insolvency proceeding by the Korean court previously [see CLOUT 1000].

The court did not accept the debtor's contention, stating that, as there had not been any specific relief granted under the Debtor Rehabilitation and Bankruptcy Act (DRBA), § 636 [corresponds with MLCBI, art. 19], the recognition of the court [DRBA, § 632 - art. 17 MLCBI] alone did not prevent the opening of the Korean domestic proceeding [DRBA, § 636].[1]

Case 1001: MLCBI 6; 17; 20
Republic of Korea: Seoul Central District Court
2007 GOOKSEUNG 1
18 October 2007
Originally in Korean

Abstract prepared by Have-Min Lee, National Correspondent

[**keywords**: *foreign main proceeding*]

In 2006, a court in the Netherlands commenced insolvency proceedings ("foreign proceeding") with respect to the debtor, a corporation headquartered in the Netherlands, and appointed an insolvency representative ("foreign representative").

The foreign representative of the foreign proceeding applied to the Korean court for recognition of the foreign proceeding as a foreign main proceeding and for annulment of a related provisional attachment order. The court granted the application for recognition of the foreign proceeding as a foreign main proceeding pursuant to the Debtor Rehabilitation and Bankruptcy Act (DRBA), § 632, paragraph 1 [corresponds with MLCBI, arts. 6, 17] in 2007, noting that it fulfilled all the requisite conditions in accordance with DRBA, § 631, paragraph 1 and that the court did not find reasons to decline the application in accordance with § 632,

[1] See footnote 2.

paragraph 2.[2] As to the second issue, the court issued an order granting an annulment of the provisional attachment order pending in Korea as a relief pursuant to DRBA, § 636, paragraph 1 [MLCBI, art. 20][3] noting that the court did not find any reasons related to maintaining public order to decline the application in accordance with DRBA, § 636, paragraph 3 [MLCBI, art. 6].

Case 1002: MLCBI 15; 17(1); 2(a)
Republic of Korea: Seoul Central District Court
2006 GOOKSEUNG 1
22 January 2007
Original in Korean

Abstract prepared by Hae-Min Lee, National Correspondent

[**keywords**: *foreign proceeding, foreign representative*]

The debtor, a debtor-in-possession, applied to the court for the recognition of insolvency proceedings in the United States of America ("foreign proceeding") in 2006. The court dismissed the case based on two grounds.

First, the definition of a foreign proceeding in § 628, paragraph 1 of the Debtor Rehabilitation and Bankruptcy Act (DRBA) [corresponds with MLCBI, art. 2, para. (a)] is interpreted as a foreign proceeding that has been filed and that is pending, since the recognition process was a basis for aiding the foreign proceeding. However, the foreign proceeding had already been completed at the time of filing

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[2] DRBA, § 632: Order for recognition
(1) Upon receiving a petition for recognition of a foreign insolvency proceeding, the court shall issue and order granting or denying recognition within one month of the date on which the petition was filed.
(2) The court shall dismiss the petition in the event any of the following conditions are found
1. The petitioner has not prepaid fees;
2. The documents enumerated has not been properly authenticated; or
3. Recognizing the foreign bankruptcy proceeding is contrary to the public policy of the Republic of Korea.

[3] The automatic relief under the art. 20 MLCBI is not applicable, since § 636 DRBA requires the specific reliefs to be granted by the court in addition to the recognition under § 632. The § 636 stipulates that;
DRBA § 636: Relief that may be granted upon recognition
(1) At the time that the court recognizes the foreign insolvency proceeding or thereafter, the court may, *sua sponte* or at an interested party's request, grant the following types of relief in order to protect the debtor's business and assets or the creditors' interests:
1. Stay of a lawsuit involving the debtor's business and assets or of proceedings belonging to any administrative agency;
2. Stay or prohibition of compulsory execution, and auction for the exercise of security interests, provisional seizure, provisional disposition or preservation proceedings with respect to the debtor's business and assets;
3. Prohibition of the debtor's repayment or of the disposal of the assets of the debtor;
4. Appointment of an international insolvency trustee; and
5. Other relief necessary to preserve the debtor's business and assets and to protect the interests of the creditors.
(2) When the court enters the order referred to in the provisional of paragraph (1), it shall take into account the interests of creditors, the debtor and other interested party.
(3) If the petition for relief referred to in the provisions of paragraph (1) is contrary to the public policy of Korea, the court shall dismiss the petition.

the application for recognition. Second, only the insolvency representative of a foreign proceeding has standing to file an application for recognition of the foreign proceeding, according to the DRBA, § 631 [MLCBI, art. 15]. However, as the foreign proceeding had been closed, the debtor no longer remained in the position of the insolvency representative and therefore did not have standing to apply for recognition.

Case 1003: MLCBI 2(a); 2(b); 2(d); 16(3); 17(2)(a)
United Kingdom: Court of Appeal (Civil Division)
No. A3/2009/1565 & 1643
CAO No. 13091
In the Matter of Stanford International Bank Ltd.
29 April 2010
Original in English
Published in English: [2010] EWCA Civ. 137, [2010] B.P.I.R. 679

Abstract prepared by Ian Fletcher, National Correspondent

[**keywords**: *centre of main interests (COMI)-determination, foreign proceeding, foreign main proceeding, recognition, presumption-centre of main interests (COMI)*]

The matter came before the English courts in the form of a contest between two sets of office holders appointed in separate proceedings by the courts of two different States (Antigua and the United States of America), in relation to the same debtor ("company Y").

In its analysis, the first instance court looked first to company Y's public face, including how it represented itself in marketing materials, how it actually worked, and then to the MLCBI, including its purpose, the nature of the proceeding and the term "centre of main interests" ("COMI") [in MLCBI, art. 2, subpara. (b); art. 16, para. 3; art. 17, para. 2(a)], in order to decide which office holders to recognize as foreign representatives [pursuant to MLCBI, art. 2, subparagraph (d)] and which proceeding to recognize as the foreign main proceeding [pursuant to MLCBI, art. 2, subpara. (b)]. The outcome of the first instance court and the judge's reasons for recognition of one set of office holders, the Antiguan joint liquidators, and one foreign proceeding are described in CLOUT 923. The court of appeal affirmed the conclusions of the first instance-court.

Matters of particular significance in the leading judgement of the court of appeal include the following:

(a) To fall within the scope of the expression "foreign proceeding" [pursuant to MLCBI, art. 2, subpara. (a)], the proceeding in question needs to possess certain attributes which include having a basis in an insolvency-related law of the originating State; involvement of the creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as part of the purpose of the proceeding. The judicial conclusion, on the evidence presented, was that the United States receivership did not correspond to the requisite characteristics for this purpose (notably because it was not "collective" in the sense required, nor was it, at that stage, for the purpose of reorganization or liquidation), but that the Antiguan liquidation did do so.

(b) The concept of COMI is considered at length and in detail in the judgement. The court of appeal considered that although not defined anywhere in the MLCBI nor in the CBIR, the meaning to be ascribed to COMI was of vital importance to the proper working of the framework for international cooperation under the MLCBI, just as that same expression was of fundamental importance to the proper working of the European Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (the "EC Regulation on insolvency proceedings") (where it is also not provided with a formal and complete definition). In view of the close correlation between the words used and the purpose to which they are applied in both the MLCBI and EC Regulation on insolvency proceedings, the English judges should endeavour to maintain an equivalence in the interpretation of the expression "COMI" in the respective spheres of its application. The judge at first instance had therefore been correct in following the Eurofood4 judgement of the European Court of Justice ("ECJ") in his approach to determining the proper test to be applied for deciding whether the presumption that the COMI of a company is at the place of its registered office has been rebutted in any given case [see MLCBI, article 16, para. 3; the EC Regulation on insolvency proceedings, article 3, para. 1]. Moreover, the judge had been fully correct in concluding that the effect of the ECJ judgement in Eurofood is that the presumption can only be rebutted by factors which are both objective and ascertainable by third parties. Equally, the appellate court endorsed the approach followed by the lower court in confining the factors ascertainable by third parties to matters already in the public domain and what a typical third party would learn as a result of dealing with the company, thereby excluding from consideration any matters which such a party might have ascertained on enquiry, assuming that such enquiry had been met with an honest answer. The reason given by the leading judgement of the court of appeal for the exclusion of factors that might be discoverable on enquiry was that their inclusion would introduce into this area of the law a most undesirable element of uncertainty. It is also noteworthy that, in a case where fraud is being practiced in relation to the conduct of the company's business, the responses given on behalf of the company to any such enquiry may be deliberately designed to mislead.

Case 1004: MLCBI 2(a); 2(b); 2(d); 15; 16(3); 20(1)(a)
United Kingdom: High Court of Justice, Chancery Division
No. 7542/08
Re Namirei-Showa Co. Ltd.[5]
16 October 2008
Original in English
Abstract prepared by the Secretariat

[**keywords**: *foreign proceeding, foreign representative, presumption-centre of main interests (COMI), recognition, relief-automatic*]

Insolvency proceedings ("foreign proceeding") were commenced in Japan with respect to the debtor, a Japanese company in which an insolvency representative ("foreign representative") was appointed to carry out the administration of the debtor's business. The foreign representative applied to the English court for

[4] *Bondi v. Bank of America, N.A. (In re Eurofood IFSC Ltd.)*, Case 341/04, 2006 E.C.R. I-3813, 2006 ECJ Celex Lexis 777, 2006 WL 1142304 (E.C.J. May 2, 2006).

[5] Unreported court order.

recognition of the foreign proceeding as foreign main proceeding pursuant to the Cross-Border Insolvency Regulation 2006 ("CBIR"),[6] articles 15 and 2, subparagraph (g) [corresponds with MLCBI, arts. 15 and 2, subpara. (b) MLCBI] and for a declaration that a stay would automatically apply against all individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, pursuant to CBIR, article 20, paragraph 1(a) [MLCBI, art. 20, para. 1(a)].

In the application, the foreign representative included a certified copy of an extract from the Japanese companies register to show that the debtor had its registered office in Japan and that the foreign proceeding accordingly constituted a foreign main proceeding as defined in CBIR, article 2, subparagraph (g) [MLCBI, art. 2, subpara. (b)] according to the presumption in CBIR, article 16, paragraph 3 [MLCBI, art. 16, paragraph 3]. The foreign representative further stated that Japan was the place where the debtor conducted the administration of its interests on a regular basis. To satisfy the requirements of CBIR, article 2, subparagraphs (i) and (j) [MLCBI, arts. 2, subparagraphs (a) and (d)], the foreign representative included in the application the Japanese court order commencing the foreign proceedings and appointing him as foreign representative. The foreign representative further stated that he had also applied for recognition of the foreign proceeding to a court in the United States of America, but that he had no knowledge of any other proceeding. The English court made an order recognizing the foreign proceedings as a foreign main proceeding and made a declaration that there was an automatic stay of proceedings against the debtor, including but not limited to, two arbitrations that had been commenced against the debtor in London.

Case 1005: MLCBI 2 (b); 2(c); 2(f); 16(3); 20; 21; 30
United States: Bankruptcy Court for the Southern District of Florida
No. 09-31881-EPK, 09-35888-EPK
In re British American Insurance Company Limited
22 March 2010
Original in English
Published in English: 425 B.R. 884

Abstract prepared by Susan Block-Lieb

[**keywords**: *centre of main interests (COMI), foreign main proceeding-determination, foreign non-main proceeding-determination, foreign representative*]

The debtor was an insurance company chartered under the laws of the Bahamas, with branch operations in many other countries, including Saint Vincent and the Grenadines. Proceedings were commenced in both the Bahamas and Saint Vincent and the Grenadines ("SVG") ("foreign proceedings"), with insolvency representatives ("foreign representatives") appointed in both foreign proceedings. Both foreign representatives filed applications under Chapter 15 [corresponds with the MLCBI] with the court in Florida for recognition of the proceedings each as a foreign main proceeding or, in the alternative, as a foreign non-main proceeding,

[6] The CBIR enacted the MLCBI which only applies in Great Britain; therefore, reference is not made to the United Kingdom of Great Britain and Northern Ireland.

relief under 11 U.S.C. §§ 1520 and 1521 [MLCBI, arts. 20 and 21], following recognition, as well as coordination of multiple foreign proceedings under 11 U.S.C. § 1530 [MLCBI, art. 30].

In determining whether to recognize the foreign proceedings pursuant to Chapter 15, the court noted that Chapter 15 required the court to consider its international origin and the need for uniformity in the application of a law of international origins, and looked both to the Guide to Enactment of the MLCBI and the European Union Convention on Insolvency Proceedings,[7] on which the MLCBI concept of centre of main interests ("COMI") was in large part based.

The difficult issues of the case concerned whether the Bahamas proceeding constituted either a main or non-main proceeding pursuant to 11 U.S.C. §§ 1502(4) and (5) [MLCBI, art. 2, subpara. (b) and (c)]. The court relied on past case law decided under Chapter 15[8] to hold that courts look to a multiplicity of factors, none of which is exclusive and not all of which must be met. In determining the debtor's COMI, the court first looked to the timing of such a determination. Because the relevant statutory language regarding a debtor's COMI was phrased in the present and not the past tense, the court concluded that it should consider facts in existence on the date the Chapter 15 petition was filed. On that basis, the court concluded that the headquarters of a corporate entity was more than the location of its board of directors; it also contemplated consideration of the place where the primary management and administration of the business was conducted. Because the debtor's affairs were managed from a wholly owned subsidiary in Trinidad and Tobago, the court thought that the overwhelming evidence presented in the case showed that the debtor's headquarters was not in the Bahamas, and that the debtor's COMI was thus not located in the Bahamas.

The court considered the location of the debtor's primary assets and the majority of its creditors, and found neither location to be in the Bahamas. It also looked to the perceptions of third parties, since it agreed that the location of a debtor's COMI should be readily ascertainable by third parties. The court held that, taken alone, the debtor's formation and regulation in the Bahamas and foreign representative's actions, who effectively replaced the debtor's board of directors, did not constitute sufficient acts to establish the debtor's COMI in the Bahamas. It indicated, however, that there might be instances where a foreign representative remained in place for an extended period, and relocated all of the primary business activities of the debtor to his location (or brought business to a halt), thereby causing creditors and other parties to look to the judicial manager as the location of the debtor's business.

The court also found that the debtor had no establishment in the Bahamas pursuant to 11 U.S.C. § 1502(2), (5) [MLCBI, art. 2, subparas. (c), (f)] and, thus, declined to

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[7] The Convention never entered into force, but was revived in the form of a European Council regulation in May 1999, which was adopted by the Council on 29 May 2000 and came into effect on 31 May 2002.

[8] *In re Tri-Continental, Ltd.*, 349 B.R. 629 (Bankr.E.D. Cal. 2006), see also CLOUT case 766; *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), CLOUT case 760, *affirmed*, 389 B.R. 325 (2008), CLOUT case 794; *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009), see also CLOUT case 927; *In re Ran*, 390 B.R. 257 (Bankr. S.D. Tex. 2008), *affirmed, Lavie v. Ran*, 406 B.R. 277 (S.D. Tex 2009), see also CLOUT case 929.

recognize the Bahamas proceeding as a foreign non-main proceeding. It was undisputed that at the time of the filing of the Chapter 15 application, the debtor had no business operation in the Bahamas other than the foreign representative's activities pursuant to his appointment

The court viewed the SVG proceedings differently because evidence demonstrated that the debtor owned property in SVG, where it conducted business, retained employees at its SVG branch where it performed insurance business activity, maintained account in SVG relating to its insurance business in that country, and had existing policyholders in SVG. The court thought it clear the debtor had an establishment in SVG and was thus a foreign non-main proceeding. The court denied relief under section 1530 [MLCBI, art. 30], as it had only recognized one single foreign non-main proceeding.

Case 1006: MLCBI 21; 23
United States: Court of Appeals for the Fifth Circuit
No.: 09-60193
Fogerty v. Petroquest Resources, Inc. (In re Condor Insurance Limited)
17 March 2010
Original in English
Published in English: 601 F.3d 319, reversing, 411 B.R. 314 (S.D. Miss. 2009)

Abstract prepared by Susan Block-Lieb

[**keywords**: *insolvency representative-authorization; avoidance actions, applicable law, purpose-MLCBI*]

Following recognition under Chapter 15 [corresponds with the MLCBI] in the United States of America of insolvency proceedings under Nevis law against a Nevis insurance company ("foreign proceedings"), the foreign representatives of the Chapter 15 debtor brought an action under Nevis law to avoid allegedly fraudulent transfers made to another company. The defendant sought to dismiss the action on the grounds that 11 U.S.C. §§ 1521 and 1523 [MLCBI, arts. 21 and 23] did not authorize the foreign representatives of a foreign main or foreign non-main proceeding to commence avoidance actions, despite recognition of that proceeding, but rather permitted a foreign representative to bring such an action only following commencement of a liquidation or reorganization proceeding under United States law. The bankruptcy court dismissed the complaint, and the district court affirmed [see CLOUT 928]. The defendant appealed to the court of appeals, arguing that sections 1521 and 1523 [MLCBI, arts. 21 and 23] limited the powers of a foreign representative to bring an avoidance action under United States law only, but did not constrain powers under foreign avoidance laws.

On appeal, the court reversed the district court. Looking first to the plain language of sections 1521 and 1523 [MLCBI, arts. 21 and 23], the court found that those provisions only expressly precluded, in a Chapter 15, case specified avoidance actions under United States law. Because neither section precluded a foreign representative from bringing an avoidance action under foreign law, the court concluded that it did not necessarily follow that Congress[9] intended to deny the foreign representative powers of avoidance supplied by applicable foreign law.

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

Admitting that section 1523 [MLCBI, art. 23] denied the foreign representative the powers of avoidance created by the United States Bankruptcy Code absent a filing under Chapter 7 or 11 of the Code,[10] the court thought that it did not necessarily follow that Congress intended to deny the foreign representative powers of avoidance supplied by applicable foreign law. The court found further support for that position in the stated purpose and overall structure of Chapter 15.

The court also looked to the legislative history to construe the reach of those provisions. The legislative history indicated that section 1523 substantially followed MLCBI, article 23, but added language to fit it within the procedure under United States insolvency law. In construing the legislative history, the court further looked at reports of the sessions of the UNCITRAL Working Group on Insolvency Law relating to MLCBI, article 23. The court found that the Working Group specifically left open the question of which law the court should apply in such avoidance actions and that the silence existed in deference to the choice of law concerns raised by the United States in those Working Group sessions. The court viewed sections 1521(a) and 1523 [MLCBI, arts. 21(a) and 23] as carefully crafted to accommodate the position of the United States delegation.

Looking beyond the language of the statute and its legislative history, the court also looked to practical concerns. Absent its holding in the case, the foreign representatives in the foreign proceeding would have been unable to avoid the transactions at issue. Foreign insurance companies, like the debtor in the case, were ineligible for relief in a Chapter 7 or 11 proceeding under United States insolvency law. As a result, the ordinary course of action — a proceeding commenced by a foreign representative following recognition of the foreign proceeding — was not available in the case. The court thought it unlikely that Congress had unwittingly facilitated tactics permitting debtors to hide assets in the United States out of the reach of the foreign jurisdiction, given that some defendants may defy the jurisdictional reaches of the court in which the foreign proceeding was pending. As a result, the court concluded that Congress did not intend to restrict the powers of the United States court to apply the law of the country where the main proceeding pended, and thus that nothing in Chapter 15 precluded such a result.

The court also considered practice under former 11 U.S.C. § 304, which it described as the predecessor to Chapter 15 and a powerful indicator of congressional intent under current law since legislative history expressly remarked that case law under section 304 should apply unless contradicted by Chapter 15. In reviewing case law under former section 304, the court found that avoidance actions under foreign law were permitted when foreign law applied and would provide for such relief. Finally, the court of appeals read sections 1521 and 1523 [MLCBI, arts. 21 and 23] in light of Congress's intent to facilitate cooperation between United States courts and foreign courts regarding cross-border bankruptcy proceedings.

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[10] Chapter 7 of the United States Bankruptcy Code provides for liquidation. For Chapter 11 see footnote 7.

Case 1007: MLCBI 6; 7; 17
United States: Bankruptcy Court for the Southern District of New York
No. 09-16709 (MG)
In re Metcalfe & Mansfield Alternative Investments
5 January 2010
Original in English
Published in English: 421 B.R. 685

Abstract prepared by Susan Block-Lieb

[**keywords**: *centre of main interests (COMI), foreign main proceeding-determination, foreign representative, relief-upon request*]

Insolvency proceedings had been commenced in March 2008 against the debtors in order to effect a restructuring of all outstanding third-party (non-bank sponsored) asset backed commercial paper obligations of the debtors ("foreign proceedings"). The Ontario court ("foreign court") entered an Amended Sanction Order and Plan Implementation Order in June 2008, which was upheld on appeal in August 2008 and became effective in January 2009 (the "foreign orders"). The Plan approved by the foreign court had been approved by 96 per cent in number and value of all participating note holders. Interim cash distributions were transferred to note holders in January and May 2009, with final cash distributions authorized by the foreign court.

The court appointed and authorized an insolvency representative ("foreign representative") for the debtors, who filed applications to the court in the United States of America under Chapter 15 [corresponds with the MLCBI] for recognition of the foreign proceedings as foreign main proceedings ("foreign proceeding") pursuant to 11 U.S.C. § 1517 [MLCBI, art. 17] and an order enforcing the foreign orders in the United States in November 2009. No objection to the requested relief was filed.

The only issue requiring discussion was the question of the post-recognition relief sought by the foreign representative. The foreign orders included a very broad third-party non-debtor release and injunction, one broader than might have been allowed under United States law. The court considered 11 U.S.C. § 1507 [MLCBI, art. 7], which required courts to consider a list of factors in determining whether to grant additional assistance to a foreign representative following recognition of a foreign proceeding. While the court noted that recognition of a foreign proceeding turned solely on the objective criteria set forth in section 1517 [MLCBI, art. 17], and did not turn on the discretion of the court, post-recognition relief under section 1507 [MLCBI, art. 7], by contrast was largely discretionary and turned on subjective factors that embodied principles of comity, making reference to the decision in *In re Bear Stearns*.[11] The court noted that 11 U.S.C. § 1506 [MLCBI, art. 6] placed a limitation on recognition if doing so was manifestly contrary to the policy of the United States. Principles of comity did not, noted the court, require that the relief available in the United States and the foreign proceedings be identical. The court noted that the key determination required was whether the procedures used in Canada met the fundamental standards of fairness of the United

[11] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008). See also CLOUT Case 794.

States. Because the court viewed the foreign orders as fulfilling those fundamental standards of fairness, the court granted the foreign representatives' request for post-recognition relief.

Case 1008: MLCBI 2(a); 6
United States: Bankruptcy Court Eastern District of New York
No. 0970463 (AST) and 09-70464
In re Gold & Honey, Ltd. and In re Gold & Honey (1995) LP
21 August 2009
Original in English
Published in English: 410 B.R. 357

Abstract prepared by the Secretariat

[**keywords**: *foreign proceeding, public policy*]

In January 2009, the Israeli insolvency representatives ("foreign representatives") of insolvency proceedings in Israel ("foreign proceeding") applied to the court in New York for recognition under Chapter 15 of the United States Bankruptcy Code [corresponds with the MLCBI]. Previously the debtor had applied to the court in New York for a reorganization proceeding under Chapter 11 of the United States Bankruptcy Code.[12] The United States court had issued an order that all assets in the reorganization proceeding were subject to its jurisdiction. Notwithstanding that order, the Israeli Court ("foreign court") in which the foreign proceeding was pending determined that it had jurisdiction and could proceed to liquidate the assets in Israel despite the proceedings in the United States and the application of the world wide stay. The Chapter 15 application for recognition was then filed by the foreign representative in order to have assets located in the New York proceedings transferred to Israel for application in the foreign proceeding.

The United States court denied recognition finding: (a) that the foreign representatives had not met their burden of showing that the foreign proceeding was a collective proceeding pursuant to 11 U.S.C. § 101(23) [corresponds with MLCBI, art. 2, subpara. (a)], (b) that the debtor's assets and affairs were subject to the control or supervision of a foreign court pursuant to section 101(23) [MLCBI, art. 2, subpara. (a)], (c) that they had appointed in violation of the automatic stay and (d) that the threshold required to establish the public policy exception in 11 U.S.C. § 1506 [art. 6 MLCBI] had been met.

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[12] The United States Bankruptcy Code contains the insolvency law of the United States. Chapter 15 enacts the MLCBI and Chapter 11 regulates reorganization proceedings.