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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.

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

Case 1204: MLCBI 2(d); 16(3); 21
Canada: Superior Court of Justice, Ontario
Case No. CV-12-9719-00CL
Lightsquared LP (Re)
6 July 2012
Original in English
Published in English: 2012 ONSC 2994

[**Keywords**: *foreign representative; foreign main proceedings; presumption-centre of main interests (COMI)*]

The applicant applied under sections 45 and 49 [articles 2(d) and 21 MLCBI] of the Companies Creditors Arrangement Act (CCAA) (Part Four of CCAA enacts the Model Law in Canada) for recognition in Canada of the foreign proceedings, as well as recognition and enforcement of certain orders made by the court in the United States of America. Accepting that the applicant was a foreign representative for the purposes of the application, the court noted that since its status as such was subject to further consideration by the United States court, if, for whatever reason, that status was altered by that court, the issue would have to be reviewed by the Canadian court.

The United States proceedings concerned approximately 20 debtors, all but four of which had their head offices or headquarter locations in the United States; of those four, three were incorporated in Canada. The court noted the presumption that in the absence of evidence to the contrary, the centre of main interests of the debtor is its registered office (section 45(2) CCAA) [article 16(3) MLCBI], which in the case of the Canadian debtors was Canada. However, the applicant asserted that the debtors' centre of main interests was in New York.

The court observed that in circumstances where it was necessary to go beyond the section 45(2) [article 16(3) MLCBI] registered office presumption, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests. The factors are that the location is (a) one in which the debtor's principal assets or operations are found, (b) where management of the debtor takes place, and (c) readily ascertainable by creditors. While the court noted that in most cases, these factors will all point to a single jurisdiction as the centre of main interests, in some cases there may be conflicts among the factors. This would require a more careful review of the facts and that greater or less weight to be accorded to a given factor, depending on the circumstances of the particular case. In all cases, however, the review was designed to determine that the location of the proceeding, in fact, corresponded to where the debtor's true seat or principal place of business actually was, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.[1] The court also noted that since Part Four of the CCAA does not specifically take into account corporate groups it was necessary to

[1] The court noted that this approach provided an appropriate framework for the COMI (centre of main interests) analysis and was intended to be a refinement of the views expressed in *Re Massachusetts Elephant & Castle Group Inc.*, 2011 ONSC 4201; (2011) 81 C.B.R. (5th); CLOUT case No. 1206.

consider the centre of main interests issue on an entity-by-entity basis. Based on these three elements and the evidence presented, the court found that the centre of main interests of the debtor companies was in the United States and that the foreign proceedings were foreign main proceedings.

Case 1205: MLCBI 6; 21
Canada: Superior Court of Justice, Ontario (Commercial List)
Case No. CV-11-9514-00CL
Hartford Computer Hardware Inc. (Re)
15 February 2012
Original in English
Published in English: 2012 ONSC 964

[**Keywords**: *foreign proceedings; public policy; relief-provisional; relief-upon request*]

Following recognition in Canada under the Companies Creditors Arrangement Act (CCAA) (Part Four of the CCAA enacts the Model Law in Canada) of proceedings commenced in the United States of America as foreign main proceedings, the foreign representatives of the debtor company sought recognition in Canada of orders made by the United States court approving debtor-in-possession (DIP) financing, with a partial "roll-up" provision.[2] The court noted that the order had a provision that all cash collateral in the possession of the debtors as of the petition date or coming into their possession after that date was deemed to have been remitted to the pre-petition secured lender for purposes of the pre-petition revolving debt facility. Such an order would not be permissible in Canada in proceedings under the relevant Canadian legislation (CCAA, section 11.2) on the basis that a DIP charge may not secure a pre-petition obligation.

The court relied on evidence given by the court-appointed information officer that it was necessary for the debtors to continue using the cash collateral to avoid immediate and irreparable harm to themselves; that Canadian unsecured creditors would be treated no less favourably than United States unsecured creditors; that since a number of Canadian unsecured creditors were employees of the debtors, those creditors would benefit from certain priority claims which they would not be entitled to under Canadian insolvency proceedings; that the United States' order was supported by the unsecured creditors committee; that those parties who had opposed the application for the order in the United States had been given an opportunity to present their objections, and that recognition of the order would not be of material prejudice to the Canadian creditors.

In making its ruling, the court relied on section 49 CCAA [article 21 MLCBI], which allows the court to make any order it considers appropriate "provided the court is satisfied that it is necessary for the protection of the debtor company's

[2] DIP financing which includes a "roll-up" component typically involves a credit facility where the DIP lender makes fresh advances to the company post-application to fund its operations, and the revenues generated post-application are then used to pay down the pre-application debt owed to the DIP lender under its previous facility. The DIP lender's pre-application obligations will then be satisfied by post-application revenues, and the advances made under the DIP financing to fund current operations will be secured by a court-ordered priority charge over all of the debtor's assets.

property or interests of the creditors." The court also took account of section 61(2) CCAA [article 6 MLCBI] and whether recognition of the United States order would contravene public policy in Canada. It noted from paragraphs 86-89 of the Guide to Enactment of UNCITRAL Model Law on Cross Border Insolvency that the public policy exception should be interpreted restrictively and found that the order did not raise any public policy issues. The court granted the provisional relief sought.

Case 1206: MLCBI 16(3)
Canada: Superior Court of Justice, Ontario
Case No. CIV-11-9279-00CL
Massachusetts Elephant & Castle Group, Inc. (Re)
11 July 2011
Published in English: 2011 ONSC 4201; (2011) 81 C.B.R. (5th)

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

The applicant sought recognition of insolvency proceedings commenced in the United States of America as foreign main proceedings under sections 46-49 [articles 15-21 MLCBI] of the Companies Creditors Arrangement Act (CCAA) (Part Four of the CCAA enacts the Model Law in Canada). The applicant was the lead debtor of a group of companies, collectively known as the Chapter 11 debtors, incorporated in various jurisdictions in the United States and Canada.

The court noted that three of the debtor companies had their registered offices in Canada, which was relevant to the determination of the centre of main interests of those debtors pursuant to section 45(2) CCAA [article 16(3) MLCBI], that nearly one half of the operating locations and nearly 43 per cent of the employees of the debtors, as well as a substantial lender to the debtors, were in Canada. The applicant cited the relevance to the determination of the debtors' centre of main interests of numerous factors, asserting that all of the Chapter 11 debtors had their centre of main interests in the United States as that was the location of the head office and of management; the debtors functioned as a highly integrated North American business; virtually all information technology functions were provided out of the United States; and all decisions of the corporate group, as well as administrative, human resources and accounting/finance functions were made or carried out in the United States.

Where it was necessary to go beyond the registered office presumption, the court held that although a number of factors might be considered in determining a debtor's centre of main interests[3] and that some of those may be more or less important depending on the specific facts of the case, three factors are usually significant. These are: the location of the debtor's headquarters or head office, the location of the debtor's management and the location which a significant number of creditors' recognize as the centre of main interests. While other factors might also be relevant, the court took the view that they should perhaps be considered to be of secondary importance and only to the extent they related to or supported these three factors.

[3] The court referred to the ten or so factors listed in *Re Angiotech Pharmaceuticals Limited*, (2011) BCSC 115; CLOUT case No. 1207.

The court noted that the location of the debtor's headquarters or head office functions and the location of the debtor's management was in Boston. It also noted that a significant Canadian creditor did not oppose the relief sought by the applicant. On that basis, the court found that the debtors' centre of main interests was in the United States and recognized the foreign proceedings as foreign main proceedings.

Case 1207: MLCBI 16(3)
Canada: British Columbia Supreme Court [In Chambers]
Angiotech Pharmaceuticals Ltd. (Re)
28 January 2011
Original in English
Published in English: (2011) BCSC 115

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

In an application to grant an initial order under the Companies Creditors Arrangement Act (CCAA) (Part Four of the CCAA enacts the Model Law in Canada) that would allow the petitioners reasonable time to reorganize the affairs of the debtor company, the petitioners requested the judge to speak to the issue of centre of main interests of the debtor company in view of an application they intended to make in the United States for recognition of the Canadian proceedings as foreign main proceedings under Chapter 15 of the United States Bankruptcy Code, based on the debtor's centre of main interests in British Colombia. The petitioners presented evidence that the debtor company was a highly integrated international enterprise that was directed from [its] head office in Vancouver, Canada; that the reporting, corporate governance decisions, strategic and key operating decisions, human resource functions, primary research and development functions, information technology systems were all directed from Vancouver; that the company's CEO and senior management were based in Vancouver; and that all petitioners had assets in Canada.

Citing the cases of *Re Nortel Networks Corp*.[4] and *Re Fraser Papers Inc*.,[5] the judge pointed out that courts in Canada have found a number of factors to be relevant in determining centre of main interests. These are: (a) the location where corporate decisions are made; (b) the location of employee administrations, including human resource functions; (c) the location of the company's marketing and communication functions; (d) whether the enterprise is managed on a consolidated basis; (e) the extent of integration of an enterprise's international operations; (f) the centre of an enterprise's corporate, banking, strategic and management functions; (g) the existence of shared management within entities and in an organization; (h) the location where cash management and accounting functions are overseen; (i) the location where pricing decisions and new business development initiatives are created; and (j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

From these factors and the facts of the case as submitted in evidence, the judge agreed that the debtor's centre of main interests was in British Columbia, Canada.

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[4] 50 C.B.R. (5th) 77, (2009) O.J. No. 154 (S.C.J.).
[5] 56 C.B.R. (5th) 194, (2009) O.J. No. 2648 (S.C.J.).

Case 1208: MLCBI 6; 16(3)
United States: District Court Southern District of New York
Case No. 11 Civ. 7865 (LBS)
Re Millennium Global Emerging Credit Master Fund Limited
25 June 2012
Original in English

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

This was an appeal against an order granting recognition in the United States of America of insolvency proceedings commenced in Bermuda with respect to two offshore investment funds (the Funds) as foreign main proceedings on the basis that the Funds were incorporated in Bermuda and that as at the date of commencement of the foreign proceedings, the preponderance of evidence indicated that that was their centre of main interests.

The respondents appealed on the ground that the centre of main interests of the Funds was located in the United Kingdom because the Funds' investment manager, the portfolio manager, one of the prime brokers and a number of investors were located in the United Kingdom and much of the day-to-day management of the Funds' activities took place there. Also, they argued that contrary to section 1506 of the United States Bankruptcy Code [article 6 MLCBI], the lower court had violated United States public policy in failing to allow detailed questioning on certain arbitration proceedings involving the Funds. The lower court decision that the date for determination of centre of main interests was the date of commencement of the foreign proceedings and not the date of the application for recognition was not challenged.

On appeal, the court looked at the factors courts have considered in determining the debtor's centre of main interests, including: (a) the location of the debtor's headquarters; (b) the location of those who actually manage the debtor; (c) the location of the debtor's primary assets; (d) the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or (e) the jurisdiction whose law would apply to most disputes.[6] The court also noted that the expectations of the creditors and other interested third parties should be taken into consideration, that is, whether the debtor's centre of main interests is ascertainable to third parties.[7] The court noted that two of the three directors of the Funds resided in Bermuda, management calls were initiated in Bermuda, company records and accounts were maintained in Bermuda and Bermuda seems to have been the only place ascertainable by third parties as the centre of main interests of the Funds. Accordingly, the court found the preponderance of evidence supported the centre of main interests being in Bermuda. It also noted that that finding would have been true irrespective of whether the relevant date considered was the date of commencement of the foreign proceedings or the date of application for recognition, but did not consider whether the lower court was correct on the issue of timing.

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[6] *In re SPhinX*, 371 B.R. 10 (S.D.N.Y. 2007), CLOUT case No. 768.

[7] *In re Fairfield Sentry Ltd.*, 440 B.R. 60 (Bankr. S.D.N.Y. 2010); *Lavie v. Ran* (*In re Ran*), 607 F.3d 1017 (5th Cir. 2010), 1025; *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev 2009), CLOUT case No. 927.

Regarding the public policy exception, the court found that it was a narrow exception[8] that applied only to actions that violated "the most fundamental policies of the United States." The policy favouring openness in the courtroom was not a fundamental public policy and although public access to records and proceedings was strongly favoured, that right was not absolute and a court may exercise its discretion to deny access to documents. The court concluded that the lower court did not violate public policy and denied the appeal.

Case 1209: MLCBI 6; 7; 21
United States: Bankruptcy Court Southern District of New York
Case No. 11-11049 (ALG)
Re: Dr. Juergen Toft
22 July 2011
Original in English
Published in English: 453 B.R. 186 (2011)

[**Keywords**: *Assistance-additional; public policy; recognition; relief-upon request*]

The foreign representative applied for recognition in the United States of America of German insolvency proceedings against the debtor, who had refused to cooperate with the foreign representative, concealing assets and relocating to an unknown jurisdiction. In earlier proceedings in Germany, the foreign representative had been granted a "mail interception order" which allowed interception of the debtor's postal and electronic mail in Germany. That order had been recognized and enforced in England.

Based on sections 1521 and 1507 [articles 21 and 7 MLCBI] of Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States), the applicant requested ex parte relief recognizing and enforcing these orders so as to access the debtor's e-mail accounts stored on the servers of two Internet service providers located in the United States.

The court analysed the application of the public policy exception in section 1506 of Chapter 15 [article 6 MLCBI] in some detail[9] and observed that this was one of the rare cases which called for its application, finding that the relief sought exceeded the traditional limits on the powers of a trustee in bankruptcy under United States law, constituted relief that was banned by statute in the United States and might subject those who carried it out to criminal prosecution. The court also found that providing such relief without notice to the debtor would also be contrary to United States law.

The court denied the application for ex parte relief as being manifestly contrary to the public policy of the United States, without prejudice to the foreign representative's right to seek recognition of the German proceeding as a foreign

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[8] *In re Fairfield Sentry Ltd*, District Court Southern District of New York, No. 10 CIV 7311(GBN), 16 September 2011.

[9] The court cited *In re Ephedra Prods. Liability Litig.*, 349 B.R. 333 (S.D.N.Y. 2006), CLOUT case No. 765; the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, paras. 86-89; *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010), CLOUT case No. 1007; *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009), CLOUT case No. 1008; *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547 (E.D. Va. 2010), CLOUT case No. 1212.

proceeding after providing notice in accordance with the Bankruptcy Rules and without prejudice to the grant of other relief consistent with United States public policy.

Case 1210: MLCBI 2(a); 6
United States: Bankruptcy Court District of Delaware
Case No. 10-11711 (KG)
Re ABC Learning Centres Limited n/k/a ZYX Learning Centres Limited & ABC USA Holdings Pty Ltd.
16 December 2010
Original in English

[**Keywords**: *foreign proceeding; foreign main proceeding; presumption-centre of main interests (COMI); public policy*]

The applicant sought recognition of certain insolvency-related proceedings held in Australia as foreign main proceedings under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States of America). At the time of the application, the proceedings were voluntary administration proceedings, but as they were subsequently converted to liquidation proceedings, it was the liquidation proceedings for which recognition was sought. The application was opposed by the respondents on two grounds: first, that the liquidation proceedings in Australia were not of a collective nature and were not supervised by a foreign court as required under section 101(23) of the Bankruptcy Code [article 2(a) MLCBI]; and secondly, that the insolvency proceedings were in violation of United States public policy under section 1506 of the Bankruptcy Code [article 6 MLCBI] as recognition would provide an unfair advantage to some creditors over others.

Regarding the request for recognition of the insolvency proceedings, the court found that the Australian liquidation proceedings satisfied the various requirements of section 101(23) of the Bankruptcy Code [article 2 (a) MLCBI][10] — the Australian liquidation was a "proceeding" (the hallmark of a proceeding being a statutory framework that constrains a company's actions and regulates the final distribution of a company's assets); it was primarily administrative in nature and at times judicial in character; and that it was collective (the court noted that the liquidator had a duty to consider the rights of all creditors in distributing the debtor's property; that debts and claims rank equally and are to be paid pro rata under Australian law; that adequate notice was provided to creditors with respect to the Australian proceedings and the related creditor meetings; that creditors were provided with a right to review; that a large number of creditors were present at the second creditors meeting at which the liquidation proceedings commenced; that the decision to commence those proceedings was backed by the majority of creditors both in number and in amount of debt; and that a committee of inspection set up as required by Australian law represented a cross-section of creditors). The court also found that since the foreign court had significant involvement in the proceedings, they were proceedings "subject to control or supervision by a foreign court".

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[10] Citing *In re Betcorp Ltd*, 400 B.R. 266 (Bankr. D. Nev 2009), CLOUT case No. 927; *In re British American Insurance Co. Ltd*., 425 B.R. 884 (Bankr.S.D.Fla.2010), CLOUT case No. 1005.

The court found that the centre of main interests of the debtor was at the seat of its registration in Australia and recognized the proceeding as a foreign main proceeding. In reply to the public policy objection, the court found that the exception must be narrowly construed; and that the issue of unfair treatment of creditors could not arise as it was contrary to both United States and Australian law. The court noted a recent United States judgement in which the court had held that a "conflict between foreign law and United States law is a necessary prerequisite to the section 1506 analysis — for absent such conflict the comity and public policy exception questions become moot".[11]

Case 1211: MLCBI preamble; 6; 8; 20(1); 28
United States: Bankruptcy Court Southern District of New York
Case No. 10-10638 (JMP)
Re JSC BTA Bank
23 August 2010
Original in English

[**Keywords**: *international obligations; purpose-MLCBI; relief-automatic*]

A United States court granted recognition under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States of America) of foreign main proceedings with respect to the debtor bank in the Republic of Kazakhstan. A creditor attached property of the debtor in the Netherlands and in Switzerland and initiated an arbitration proceeding in Switzerland. The foreign representative of the debtor bank sought to prevent the arbitration going forward by bringing a motion for contempt of the Chapter 15 case for continuing the Swiss arbitration in violation of the automatic stay applicable on recognition of the Kazakh proceedings in the United States. The foreign representative acknowledged that the Chapter 15 automatic stay applied to property of a Chapter 15 debtor only to the extent that such property is located within the territorial jurisdiction of the United States, but argued that no territorial restriction applied to the stay of acts or actions against the debtor itself, including the prosecution of the arbitration proceedings.

While the court agreed with the foreign representative that the statutory language of sections 1520(a) [article 20(1) MLCBI] and 1528 [article 28, MLCBI] of Chapter 15 indicated that the automatic stay must have at least some extraterritorial effect, it was concerned that Chapter 15 should not become a vehicle for resolving the right to proceed in an appropriate foreign tribunal against a foreign business enterprise that might have only insignificant contacts with the United States. The court looked to the objective of Chapter 15, which was to foster orderly administration of cross-border restructuring, noting that the chapter created no estate and that a Chapter 15 debtor was defined by reference to the foreign proceeding, rather than to the worldwide estate created under United States law. With respect to section 1508 [article 8 MLCBI], the court observed that Chapter 15 was predicated on the concept of international coordination and cooperation and encouraged courts to look beyond the shores of the United States for interpretative guidance; the international

[11] *In re Qimonda AG Bankruptcy Litigation* 433 B.R. 547, 568; CLOUT case No. 1212. On interpretation of section 1506, the court also cited *In re Tri-Continental Exchange, Ltd.*, 349 B.R 627, CLOUT case No. 766; *In re Ephedra Prods. Liability Litig.*, 349 B.R. 333 (S.D.N.Y. 2006), CLOUT case No. 765.

origins of Chapter 15 was a dominant and consistent theme that underlined the specific provisions. The court determined that the stay might extend to the debtor as to proceedings in other jurisdictions for the purposes of protecting property of the debtor that was located within the territorial jurisdiction of the United States. The court denied the motion.

Case 1212: MLCBI 6; 22
United States: Bankruptcy Court Eastern District of Virginia
Case nos. 09-14766-RGM; 09-14766-SSM
Re Qimonda AG Bankr. Lit.
19 November 2009, 28 October 2011
Original in English
Published in English: 433 B.R. 547; 462 B.R. 165 (2011)

[**Keywords**: *creditors-protection; purpose; public policy recognition of foreign proceedings*]

The foreign representative of the debtor company successfully applied under Chapter 15 of the United States Bankruptcy Code for recognition in the United States of America of insolvency proceedings held in Germany. On recognition, certain provisions of the United States Bankruptcy Code apply automatically, but not section 365, which circumscribes the traditional power of the insolvency representative to reject certain contracts by giving the licensee of intellectual property a choice — either to treat the licensing contract as terminated by a rejection by the insolvency representative or to retain its rights under the licence so long as it continued to pay required royalty payments. However, a supplementary order by the Bankruptcy Court made section 365 applicable in the Chapter 15 proceeding. Under German insolvency law, contracts not fully performed are automatically unenforceable. The foreign representative advised the debtor's patent licensees that he would not perform the contracts and the licensees responded by asserting their rights under section 365. The foreign representative asked for modification of the supplementary order and the removal of section 365 from the list of applicable Bankruptcy Code provisions. The court restricted the application of section 365, so that where the foreign representative was exercising the debtor's rights under German law, the licensees would not be protected. The licensees appealed against the modified order. The District Court remanded the case to the Bankruptcy Court for more detailed examination of sections 1506 and 1522 of Chapter 15 [articles 6 and 22 MLCBI].

In remanding the case, the District Court observed that there was widespread agreement that section 1506 may only be used in narrow circumstances when fundamental policies of the United States were at risk.[12] Cases to date[13] had made it clear that three principles were relevant to the analysis of whether an action taken in a Chapter 15 proceeding was manifestly contrary to the public policy of the United States under section 1506 [article 6 MLCBI]:

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[12] *In re Gold & Honey, Ltd.*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009), CLOUT case No. 1008.

[13] *In re Ephedra Prods. Liability Litig*., 349 B.R. 333 (S.D.N.Y. 2006), CLOUT case No. 765; *In re Metcalfe & Mansfield Alt. Invs*., 421 B.R. 685 (Bankr. S.D.N.Y. 2010), CLOUT case No. 1007; *In re Gold & Honey, Ltd*, 410 B.R. 357 (Bankr. E.D.N.Y. 2009), CLOUT case No. 1008.

(1) The mere fact of conflict between foreign law and United States law, absent other considerations, was insufficient to support the invocation of the public policy exception; (2) Deference to a foreign proceeding should not be afforded in a Chapter 15 proceeding where the procedural fairness of the foreign proceeding was in doubt or could not be cured by the adoption of additional protections; and (3) An action should not be taken in a Chapter 15 proceeding where taking such action would frustrate a United States court's ability to administer that proceeding and/or would severely impinge upon a constitutional or statutory right, particularly if a party continued to enjoy the benefits of the Chapter 15 proceeding.

On remand, the Bankruptcy Court focused on two questions. Firstly, whether the licensees were "sufficiently protected" in accordance with section 1522 of Chapter 15 [article 22 MLCBI] if they were not afforded section 365 protection. The court found that section 1522 required the court to "tailor relief ... so as to balance the relief granted to the foreign representative and the interests of those affected by such relief." After balancing the interests of creditors and the debtor, the court found that denying section 365 protection would impose a significant burden on licensees that had already made significant investments in their technology and manufacturing infrastructure in reliance on the licenses they held from the debtor. Accordingly, section 365 should apply to the Chapter 15 proceeding in order to "sufficiently protect" the interests at stake.

Secondly, on the question of whether applying German insolvency law to deny patent licensees the protection of section 365 was "manifestly contrary" to the public policy of the United States, the court concluded that the public policy in favour of technological innovation was one of the most fundamental policies of the United States, and accordingly, the failure to protect was manifestly contrary to the public policy of the United States.

Case 1213: MLCBI 1(2)
United States: Bankruptcy Court District of New Jersey
Case No. 09-28427 (RTL)
Re Paul A. Steadman
3 September 2009
Original in English
Published in English: 410 B.R. 397 (2009)

[**Keywords**: *scope-MLCBI*]

The foreign representative of insolvency proceedings commenced in England with respect to a citizen of the United Kingdom applied for recognition of those proceedings in the United States of America under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States). The debtor objected to the application on the grounds that he was a permanent resident of the United States, and section 1501(c) (2) of Chapter 15 [article 1(2) MLCBI] provided that it does not apply to, inter alia, persons with permanent residence status in the United States. The foreign representative argued that the debtor's status was not permanent but conditional.

The court concluded that while his residency status might be conditional, the debtor was nevertheless a permanent resident within the class of persons intended by

Congress to be excluded from the application of Chapter 15 and it therefore did not apply to him. The application was denied.