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Contents

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Introduction

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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 (MLCBI)

Case 1269: MLCBI 16(3)
Canada: Ontario Superior Court of Justice
Case no. CV-12-9767-00CL
Cinram International Inc., Re
26 June 2012
Original in English
Published in English: 2012 ONSC 3767; 91 CBR (5th) 46

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

The debtor group of companies was a replicator and distributor of CDs and DVDs with an operational footprint across North America and Europe. Several Canadian incorporated entities of the group commenced insolvency proceedings in Canada and sought extensive relief to enable them to put in place various restructuring measures, as well as authorization for one of the debtor entities to act as foreign representative to pursue recognition of the Canadian proceedings in the United States of America as foreign main proceedings under Chapter 15 of the Bankruptcy Code (enacting the Model Law in the United States). In addition to the Canadian incorporated entities, the group included entities incorporated in the United States and Europe, although the latter were not to form part of the proceedings. The parties in the Canadian proceedings contended that the centre of main interests (COMI) of the relevant group debtors was Canada, providing extensive evidence in support of that claim.

The Canadian court commenced the proceedings and granted the relief sought. With respect to the issue of centre of main interests, the court outlined in its order the evidence provided by the Canadian debtors, noting that it was doing so for informational purposes only. The facts listed by the court included: that the enterprise group was managed on a consolidated basis out of the corporate headquarters in Canada, where corporate-level decision-making and corporate administrative functions were centralized and that key contracts, pricing decisions, meetings of the board of directors, cash management functions, corporate accounting, treasury, financial reporting, financial planning, tax planning and compliance, insurance procurement services and internal audits, information technology, marketing, and real estate services, capital expenditure decisions, new business development initiatives and research and development functions were centralized or took place in Canada. The court said it clearly recognized that it was the function of the receiving court — in this case, the United States Bankruptcy Court for the District of Delaware — to make the determination on the location of the centre of main interests and to determine whether the Canadian proceeding was a “foreign main proceeding” for the purposes of Chapter 15.

Case 1270: MLCBI 8; 21; 25; 27
United Kingdom: The Supreme Court
Rubin & Anor vs Eurofinance SA
24 October 2012
Original in English
Published in English: [2012] UKSC 46 (on appeal from [2010] EWCA Civ 895; [2011] EWCA Civ 971)

[**keywords**: *relief-upon request*, *cooperation*, *cooperation-forms of*]

The foreign representatives of the debtor company sought recognition in England under the Cross-Border Insolvency Regulations 2006 (CBIR) (enacting the Model Law in Great Britain) of insolvency proceedings commenced in the United States of America. The foreign representatives also sought to enforce a judgement issued by the United States Bankruptcy Court against third parties for a payment due to the creditors of the debtor company. The third parties sought to resist the recognition and the enforcement of the judgement in the United Kingdom on the grounds that since they had not appeared in the New York proceedings, the Bankruptcy Court did not have jurisdiction over them and, in accordance with English rules of private international law, the judgement, which they argued was in personam, could not be enforced against them in the United Kingdom.

With respect to a question of whether the debtor in the insolvency proceedings, a business trust under United States law, was a debtor that could be recognized under the Model Law, the court at first instance said that although such a debtor was not a separate legal entity under English law, having regard to the international origins of the Model Law as required by article 8, it would be perverse to give the word "debtor" any other meaning than that given to it by the foreign court in the foreign proceeding. The court also said that, although the debtor was not a legal entity known to English law, it was satisfied the Model Law could work in practice for such a debtor. The court also found that the proceedings leading to the judgement in question were an integral part of the United States insolvency proceedings, the foreign representatives being authorized, as part of those insolvency proceedings, to pursue claims for the benefit of the insolvency estate with a view to distributing the proceeds amongst the creditors. As such, it was not necessary for the judgement proceedings to independently satisfy the elements of the definition of "foreign proceedings" of the Model Law.

The court at first instance recognized the foreign proceedings, but dismissed the application for enforcement on the ground that the judgment was in personam; a fundamental principle of English private international law was that a judgement of a foreign court was not enforceable unless the defendant was present in the jurisdiction, or had in some way submitted to the jurisdiction, of the foreign court. Moreover, the court said, there was nothing in the CBIR, articles 21(e) and 25 [articles 21(e) and 25 MLCBI], that justified the enforcement of such judgments in insolvency proceedings as a form of cooperation within the meaning of those provisions.

On appeal, the Court of Appeal confirmed that the United States judgement proceedings were an integral part of the insolvency proceeding and central to the collective nature of insolvency. Allowing the appeal, the court held that although the judgement of the New York court had the indicia of judgements in personam, they

were nonetheless judgements "in and for the purposes of the collective enforcement regime of the insolvency proceedings" and as such were governed by the private international law relating to bankruptcy and not subject to the ordinary private international law rules that would prevent enforcement of these judgements because the defendants were not subject to the jurisdiction of the foreign court. Whilst observing that cooperation to the maximum extent possible under article 27 MLCBI would surely include enforcement, especially since enforcement was available under common law, the court reached no conclusion on that point.

On a further appeal, the Supreme Court addressed the principal issue of whether the recognition and enforcement of judgements given in the course of insolvency proceedings (e.g. transaction avoidance proceedings) were subject to the traditional common law rules governing the recognition of in personam and in rem judgements, or whether different rules applied to insolvency judgements. The court found that different rules did not apply and that the CBIR did not provide for recognition and enforcement of foreign judgements against third parties. In regard to the latter, the court said that it would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 MLCBI were concerned with procedural matters and while there was no doubt they should be given a purposive interpretation and be widely construed in the light of the objects of the Model Law, the court said there was nothing to suggest that they applied to the recognition and enforcement of foreign judgments against third parties.[1] The court went on to observe that the Model Law was not designed to provide for the reciprocal enforcement of judgments.[2]

Case 1271: MLCBI 21(1)(d); 21(1)(g)
United Kingdom: High Court of Justice (Chancery Division)
Cases no. 6583 and 6576 of 2010
In re Chesterfield United Inc and in re Partridge Management Group SA
1 February 2012
Original in English
Published in English: [2012] EWHC 244 (Ch)

[**keywords**: *relief-upon request*]

The joint liquidators of two companies incorporated in the British Virgin Islands, who had been recognized as foreign representatives under the Cross-Border Insolvency Regulations 2006 (CBIR) (enacting the Model Law in Great Britain) sought an order, pursuant to article 21, subparagraphs 1(d) and (g) CBIR [article 21(1)(d) and (g) MLCBI], for the production of various documents by Deutsche Bank AG. The documents related to several transactions which the two companies had entered into in 2008 and which had given rise to certain obligations contingent upon the financial performance of a particular bank. The entry into administration of the bank's English subsidiary in 2008 had constituted a credit event for the purposes of the transactions and the companies had lost all the money they had invested. The foreign representatives of the two companies sought production of certain documents in order to understand why those transactions had been entered into by the companies — how the companies might have expected to

[1] Para. 143.
[2] Para. 144.

benefit from the transactions, what their purpose and objectives were in entering into the transactions and how they expected to repay the loans from the bank involved in the transactions if there was movement in the market in the "wrong" direction (as had transpired). Unless they were able to obtain the documents and fully understand the transactions, the foreign representatives indicated it would be difficult if not impossible for them to discharge their statutory functions effectively.

The English court said that article 21, subparagraph 1(d) MLCBI was intended to set a common minimum standard so that a foreign representative was able to seek relief under that subparagraph regardless of whether a locally appointed insolvency representative would be entitled to that relief under local law. If the local law in fact provided for additional relief, a foreign representative could seek that relief under article 21, subparagraph 1(g) MLCBI.[3] The court went on to say that for that reason, the precise scope of subparagraph 1(d) was not important for the present case, and it did not matter if that subparagraph was narrower than subparagraph 1(g); the foreign representatives could rely on subparagraph 1(g) to obtain the relief they sought under section 236 of the Insolvency Act 1986 (which provided for the production of books, papers or other records relating to the relevant company or the promotion, formation, business, dealings, affairs or property of the company). The court said the opening words of article 21, paragraph 1, concerning the court's power to grant relief "where necessary to protect the assets of the debtor or the interests of creditors" did not curtail the court's ability to grant relief under section 236, as the proper case in which to grant relief under that section was one where the officeholder "reasonably required" to see the documents requested in order to carry out her functions. The fact that it might be inconvenient to the addressee of the order to produce the required documents or the fact that it might cause a lot of work or make the addressee vulnerable to future claims did not make it unreasonable. Moreover, the court ruled, an order to produce the requested documents was, in the words of article 21, paragraph 1, MLCBI, "necessary to protect the assets of the debtor or the interests of the creditors". The court granted the request and also made orders with respect to the costs of production and confidentiality of the documents.

Case 1272: MLCBI 2(a)
United Kingdom: High Court of Justice (Chancery Division, Companies Court)
Claim no. 0842138
Re New Paragon Investments Ltd
25 November 2011
Original in English
Published in English: [2012] BCC 371

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

Liquidators of a Hong Kong company applied for recognition in England of a creditor's voluntary winding up under the Hong Kong Companies Ordinance. An objection to the application was made on the basis that the voluntary winding up was not a foreign proceeding for the purposes of the Cross Border Insolvency Regulations 2006 (CBIR) (enacting the Model Law in Great Britain). Referring to the resolution of the directors' meeting, the resolution of the shareholders and the "Statement of Voluntary Winding Up in Case of Inability to Continue Business", the

[3] The court cited the Guide to Enactment of the Model Law, para. 154.

definition of foreign proceeding in article 2(i) CBIR [article 2(a) MLCBI] and paragraph 24 of the Guide to Enactment of the Model Law, the Registrar took the view that a "foreign proceeding" included an extra-judicial proceeding or an administrative proceeding provided it related to liquidation and the foreing proceeding should therefore be recognized.

Case 1273: MLCBI 20; 21(1)(g)
United Kingdom: High Court of Justice (Chancery Division)
Case no. 8471 of 2010
Atlas Bulk Shipping A/S v Navios International Inc.
13 April 2011
Original in English
Published in English: [2011] EWHC (Ch) 878

[**keywords**: *relief-automatic*; *relief upon request*]

The commencement of Danish insolvency proceedings against the debtor had constituted an event of default under various agreements (governed by English law) that the debtor had entered into with X, which had entitled the latter to terminate the agreements. The associated losses or gains were to be calculated in accordance with a mechanism incorporated in the agreements. After calculating the losses and gains on the agreements, a balance was owing to X on some contracts and to the debtor on others. X did not pay the sum owing to the debtor, claiming that it was entitled to exercise certain set-off rights. The Danish liquidators commenced proceedings in England to recover the sums owed to the debtor under the agreements and to obtain recognition of the foreign proceedings. Under both Danish and English insolvency law, the types of set-off claimed could not succeed. However, the set-offs were used by way of a defence to the commercial claims brought in the English commercial court by the debtor and there was no English insolvency.

Recognition as a foreign main proceeding was granted in England under the Cross Border Insolvency Regulations 2006 (CBIR) (enacting the Model Law in Great Britain). The court held that the automatic stay applicable under article 20 CBIR [article 20 MLCBI] would apply to X's counterclaim against the debtor and that at least from the date of the recognition order, X would not be entitled to seek to enforce any set-off of the type in question. However, the foreign representatives did not rely on article 20, but sought an order under article 21 of the CBIR [article 21 MLCBI] to prevent X from relying on the set-off rights as a defence after the effective date of the application for commencement of the Danish proceeding. The English court said article 21 was broader in its application than article 20, allowing the court to exercise its discretion to stay or suspend proceedings to the extent they had not been stayed or suspended under article 20, provided all the relevant interests were taken into account. The court noted that the words "upon recognition" at the beginning of article 21 defined the date from which relief should be afforded, but said that those words were not necessarily determinative of the date by reference to which rights were to be identified. The court observed that recognition of foreign insolvency proceedings appears to have been intended to have, in the recognizing State, the same effect as if the insolvency proceedings had been opened in the recognizing State (subject to identified exceptions). Although that interpretation might introduce a measure of complication that would not be present if the date of recognition was taken as the "bright line" for all purposes, the court said it was

nevertheless consistent with the underlying policy of the Model Law.[4] Moreover, the court observed, taking the date of recognition rather than the date of the commencement of the foreign proceeding as the date for determining those rights might encourage creditors to try to minimize the amount they owed to the estate by every possible means before an order for recognition could be made.

The court held that under article 21, subparagraph 1(g), CBIR [article 21(1)(g) MLCBI] it had the power to restrain or undo the purported exercise of the set-off rights after commencement of the Danish insolvency proceedings. As required by article 21, the court was satisfied that the relief was necessary to protect the assets of the debtor and the interests of creditors, since the set-off would operate contrary to the general principle of pari passu recognized under the laws of both Denmark and England and exercised its discretion under article 21 to order that relief.

Case 1274: MLCBI 16(3); 17
United States of America: United States Bankruptcy Court for the Southern District of New York
Case no. 12-13570
In re Paul Zeital Kemsley
22 March 2013
Original in English
Published in English: 489 B.R. 346 (Bankr. S.D.N.Y. 2013)

[**keywords**: *presumption-habitual residence*; *centre of main interests (COMI)-timing*; *establishment*]

This application for recognition in the United States of America of the personal insolvency proceeding the debtor had commenced in London was contested by a major creditor who had sued the debtor in the United States and sought to avoid the stay that would arise automatically on recognition of the English proceedings under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States). The creditor argued that as the debtor's centre of main interests (COMI) was in the United States, the proceeding did not qualify as a foreign main proceeding for the purposes of Chapter 15.

The United States court said that a critical factor in determining the debtor's COMI in this case would be the date by reference to which COMI was to be analysed. The court agreed with the reasoning in *Millennium Global*[5] and *Gerova*[6] that the relevant date for determining COMI should be the date of the commencement of the foreign proceeding for which recognition was sought, given that the recognition proceeding was ancillary in nature to the foreign proceeding and that choosing the date of the recognition application might lead to a risk of forum shopping between the commencement of the foreign proceeding and the recognition application.

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[4] Citing the Guide to Enactment of the Model Law, para. 20(b).
[5] *In re Millennium Global Emerging Credit master Fund Limited et al*, 458 BR 63 (Bankr. S.D.N.Y. Aug 2011) and 474 BR 88 (S.D.N.Y. 2012) [CLOUT case no. 1208].
[6] See CLOUT case no. 1275.

As to the factors relevant to determining COMI, the court noted the factors cited in *SphinX*[7] and *Loy*,[8] which included the location of primary assets, the majority of creditors, the jurisdiction whose law would apply to most disputes, as well as other observable criteria that might include where the debtor lived and worked, where children were enrolled in school, possible club memberships or affiliations with religious organizations and other recognized ties to a community that are indicative of residential status. The weight to be given to any of these factors would depend on the relative importance of that factor to the debtor and the debtor's personal circumstances. The court found that it was a difficult case in which to apply the recognition principle as the debtor had chosen to live as an habitual resident for a number of years in various locations in the United States (with and without his family at different times), had sold his home in the United Kingdom before his move to the United States and had evinced different motives as to where he wanted to reside and the reasons for his choices at different times. The court found that although unusual, such a pattern was sufficient to shift the debtor's COMI to the United States. At the time the English proceeding commenced, the court found the debtor was an habitual resident of Los Angeles, as he was living there with his family and his children went to school there, his proximity to his children being a critical factor for the debtor. Although his circumstances had now changed and he wanted to return to the United Kingdom to be reunited with his children, the court said that those changed circumstances had no direct bearing on the COMI analysis as they were not in existence at the time of commencement of the foreign proceeding by reference to which COMI should be determined. Moreover, the fact that the debtor sporadically went to London and used a friend's office there in an informal business connection with a United Kingdom company was insufficient to prove the existence of an establishment in the United Kingdom.

The United States court declined to recognize the English proceeding on the basis that the debtor had neither a centre of main interests nor an establishment in London at the time he applied to commence the English proceeding.

Case 1275: MLCBI 1; 6; 7; 15; 17; 18
United States of America: United States Bankruptcy Court for the Southern District of New York
Case no. 12-13641
In re: Gerova Financial Group, Ltd
22 October 2012
Original in English
Published in English: 482 B.R. 86 (Bankr. S.D.N.Y. 2012)

[keywords: *additional assistance; purpose — MLCBI; public policy*; *recognition*; *foreign representative-duty to inform*; *centre of main interests (COMI)-timing*]

The liquidators of several companies registered in Bermuda sought recognition in the United States of America of Bermudan insolvency proceedings concerning those companies as foreign main proceedings under Chapter 15 of the Bankruptcy Code (enacting the Model Law in the United States). An appeal against commencement of

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[7] *In re SPhinX*, 351 B.R.103 (Bankr. S.D.N.Y. 2006) and 371 B.R. 10 (S.D.N.Y. 2007) [CLOUT case no. 768].

[8] *In re Jonathan A. Loy*, 380 B. R. 154 (Bankr. E.D. Va. 2007) [CLOUT case no. 924].

those proceedings was pending in Bermuda at the time of the application for recognition. The application for recognition was opposed by several creditors on the basis that (a) the relief sought was unnecessary, was opposed by a significant number of the debtor's creditors and thus not merited from a cost-benefit perspective; and (b) the commencement order was subject to an appeal. Moreover, because the commencement order had been made on the basis of an application by only one creditor and the debtor had been given the option of paying that creditor to avoid the involuntary insolvency, the application was argued to be manifestly contrary to the public policy of the United States.

The United States court found the debtor's centre of main interests (COMI) to be in Bermuda and recognized the proceeding as a foreign main proceeding. As to the operative date for analysing COMI, the court noted the decision in *Millenium Global*[9] and observed that in the instant case the date of the commencement of the foreign proceeding and the date of the application for recognition would lead to the same result, the only activities of Gerova at the latter date being the liquidation activities in Bermuda. As to the necessity of the recognition application, the court found there was no authority to support its denial on the basis that most of the creditors did not support the liquidation and further, that it was for the Bermudan court to decide whether the proceedings should be commenced and not for the recognizing court to second-guess that issue. The court observed that the purposes of Chapter 15, including promoting cooperation with foreign courts (section 1501(a)(1) [article 1 MLCBI]), would not be served by making a recognition order conditioned upon re-examination of the need for the insolvency proceedings. Furthermore, nothing in section 1507 of Chapter 15 [article 7 MLCBI] conditioned recognition on a cost-benefit analysis or approval by a majority of a foreign debtor's creditors. As to the issue of the appeal, the court concluded that there was nothing in the language of sections 1515 or 1517 of chapter 15 [articles 15 and 17 MLCBI] that required the decision commencing the foreign proceeding to be final or non-appellable. Moreover, the court found that the order of the Bermudan court was sufficient to enable the liquidators to take up their duties and, if reversed on appeal, the liquidators would be required under section 1518 [article 18 MLCBI] to notify the court accordingly.

On the public policy issue, the court reviewed various authorities,[10] noting that the exception in section 1506 of Chapter 15 [article 6 MLCBI] should be narrowly construed and invoked in only exceptional circumstances concerning matters of fundamental importance. While noting that an involuntary case could not be commenced in the United States by a single creditor, nevertheless the court was of the view that a policy allowing such a basis for commencement would not violate a matter of fundamental importance in the United States and it was well-accepted that a foreign nation's insolvency law need not mirror that of the United States for its proceedings to be recognized under Chapter 15. Moreover, the court said, the law of other States, such as England, whose proceedings were regularly recognized in the United States, also permitted commencement on the basis of an application from a single creditor. Additionally, a debtor's post-application payment was not prohibited

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[9] *In re Millennium Global Emerging Credit master Fund Limited et al*, 458 BR 63 (Bankr. S.D.N.Y. Aug 2011) and 474 BR 88 (S.D.N.Y. 2012) [CLOUT case no. 1208].

[10] *In re Ephedra Prods. Liab. Litig*., 349 B.R. 333 (SDNY 2006) [CLOUT case no. 765]; *In re Juergen Toft*, 435 B.R. 186 (Bankr. SDNY 2011) [CLOUT case no. 1209].

in the United States even if the procedure for subsequently dealing with the petition might differ from that of Bermuda. Therefore, there were no grounds for finding a violation of fundamental United States policy.

Case 1276: MLCBI 2(b); 2(c); 2(f); 8; 16(3); 17
United States of America: United States Court of Appeals for the Fifth Circuit
Case no. 09-20288
In re Ran
27 May 2010
Original in English
Published in English: 607 F. 3d 1017

[**keywords**: *centre of main interests (COMI)*; *foreign main proceedings — determination*; *presumption — centre of main interests (COMI)*; *establishment*]

The Court of Appeal affirmed the decision of the District Court in Lavie v Ran 406 B.R. (S.D. Tex. 2009)[11] denying the application for recognition of the Israeli proceeding. The court found that the United States of America was the debtor's habitual residence and thus his presumptive centre of main interests (COMI). The court further found that the evidence offered by the Israeli receiver to overcome that presumption and establish that the debtor's COMI was in Israel had failed to do so. Accordingly, the Israeli proceeding was not a foreign main proceeding. As to whether the debtor had an establishment in Israel, the court found that he did not and in response to the suggestion that the insolvency proceeding might itself constitute the basis for finding the debtor had an establishment in Israel, the court said that such a proceeding was by definition a transitory action and thus outside the meaning of "establishment".

Case 1277: MLCBI 20; 21
United States of America: United States Bankruptcy Court for the Southern District of New York
Case no. 09-10314
In re: Atlas Shipping A/S
27 April 2009
Original in English
Published in English: 404 B. R. 726 (Bankr. S.D.N.Y. 2009)

[**keywords**: *comity*, *relief upon request*]

In December 2008, insolvency proceedings concerning an international shipping company based in Denmark, commenced in Denmark. Certain maritime attachments had been obtained by foreign creditors, both before and after commencement of the insolvency proceedings, on funds the debtor held in New York banks. Under Danish law, all such attachments lapse on the commencement of insolvency proceedings and no further attachments may be levied against the debtor's assets. The foreign representatives applied in the United States of America for recognition of the Danish proceedings as foreign proceedings under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States) and for additional relief, namely that the attachments be vacated. Opposing the request for relief,

[11] See CLOUT case no. 929.

creditors argued that such relief could not be granted under Chapter 15, but only where local proceedings had commenced under Chapter 7 or 11.

The United States court noted that, in deciding whether to grant a foreign representative post-recognition relief additional to that automatically available under section 1520 of Chapter 15 [article 20 MLCBI], the court was to be generally guided by principles of comity and cooperation with foreign courts. The logical reason for that, the court noted, was that "deference to foreign insolvency proceedings will often facilitate the distribution of the debtor's assets in an equitable, orderly, efficient and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." The court found that dissolving the attachments was consistent with granting comity to the Danish proceedings, both under the provisions applicable before the commencement of Chapter 15 and under Chapter 15. More specifically, the court found that the type of relief sought fell within the terms of sections 1521 (a)(5) and 1521 (b) of Chapter 15 [article 21, subparagraph 1 (e) and paragraph 2 MLCBI], allowing the foreign representative to collect property in the United States and distribute it in a foreign case. The court recognized the proceedings as foreign proceedings and ordered that all the attachments be vacated and the garnished funds turned over to the insolvency representatives for administration in the Danish proceedings.