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**CASE LAW ON UNCITRAL TEXTS (CLOUT)**

# Contents



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## Introduction

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). The purpose is to facilitate the uniform interpretation of these legal texts by reference to international norms, which are consistent with the international character of the texts, as opposed to strictly domestic legal concepts and tradition. More complete information about the features of the system and its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1/REV.1). CLOUT documents are available on the UNCITRAL website (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.

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## Cases relating to the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI)

### Case 1309: MLCBI 21(1)(e)

United States of America: United States Bankruptcy Court for the Southern District of Florida
Nos. 09-31881-EPK; 09-35888-EPK; 11-03118-EPK
*In re British American Insurance Co., Ltd.*
28 February 2013
Original in English
Published in English: 488 B.R. 205

Abstract prepared by Susan Block-Lieb, National Correspondent

[**Keywords**: *assistance — additional; interpretation — legislative history; procedural issues; relief — upon request*]

Following recognition of a foreign non-main proceeding pending in Saint Vincent and the Grenadines (SVG) under Chapter 15 of the United States of America's Bankruptcy Code (enacting the Model Law in the United States),[1] the debtor's foreign representative commenced litigation against the debtor's former directors and others seeking to recover on claims of breach of fiduciary duty in the United States bankruptcy court. The defendants sought to dismiss the complaint for lack of subject matter jurisdiction and requested the bankruptcy court to abstain from hearing the complaint under the United States federal permissive abstention provision applicable to certain proceedings pending before the bankruptcy court.

In an earlier unreported decision, the bankruptcy court had concluded that the complaint raised only non-core proceedings that did not arise either under the Bankruptcy Code or in a United States bankruptcy case; here, the court concluded, however, that it had subject matter jurisdiction over these non-core proceedings related to the pending Chapter 15 case, distinguishing and declining to follow an earlier decision of the United States district court for the Southern District of New York, *In re Fairfield Sentry Ltd.*, [CLOUT case no. 1316].[2] The bankruptcy court rejected the defendants' argument that section 1521(a)(5) of the United States Bankruptcy Code [article 21(1)(e) MLCBI] limits an assertion of bankruptcy jurisdiction over litigation like that here on the grounds that the cause of action exceeded the bankruptcy court's in rem territorial jurisdiction. First, the court held that its in rem jurisdiction over an ancillary Chapter 15 case was distinct from its subject matter jurisdiction over proceedings related to that case. Moreover, while an ancillary proceeding might well involve a bankruptcy court's in rem jurisdiction, the court noted several provisions that it thought exceeded the concept of in rem jurisdiction. For example, following recognition, a foreign representative is entitled to sue and be sued; even in the absence of recognition, a foreign representative enjoys a right of direct access. The court also noted that a debtor need not have any assets in the United States for recognition of a foreign proceeding to be proper under Chapter 15. In the alternative, the bankruptcy court held that the cause of action brought by the foreign representatives in this case was an intangible asset located in the United States and, thus, potentially a source of in rem jurisdiction.

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[1] *In re British American Insurance Co., Ltd.*, 425 B.R. 884 [CLOUT case no. 1005].
[2] 458 B.R. 665 (S.D.N.Y. 2011).

The bankruptcy court also declined to abstain under the federal permissive abstention provision. While some United States' courts have interpreted this provision to apply to proceedings arising under Chapter 15, or arising in or related to a Chapter 15 case, the bankruptcy court here construed the express language of this statute to apply only to proceedings in other sorts of cases commenced under United States bankruptcy law, such as Chapter 11. Recognizing that that interpretation meant that bankruptcy courts abstain in a Chapter 15 context, if at all, under the federal mandatory abstention provision, the court thought this interpretation of the statute most consistent with the purposes of Chapter 15. In dicta, the bankruptcy court noted that if the federal permissive abstention were to apply to the proceedings before it, the court would have abstained, because if it were to do so there would be little effect on either the administration of the Chapter 15 case or of the foreign non-main proceedings in the SVG court (even though this statement would seem to undercut the court's conclusion that the litigation in this case was related to the Chapter 15 case).

**Case 1310: MLCBI 2(d); 7; 21(1); 21(2); 22**
United States of America: United States Court of Appeals for the Fifth Circuit
Nos. 12-10542, 12-10689 and 12-10750
*In re Vitro S.A.B. de CV (Vitro S.A.B. de CV v. Ad Hoc Group of Vitro Noteholders)*
28 November 2012
Original in English
Published in English: 701 F.3d 1031

Abstract prepared by Susan Block-Lieb, National Correspondent

[**Keywords**: *assistance — additional; foreign representative — authorization; interpretation — legislative history; procedural issues; public policy; recognition — applicant for; relief — upon request*]

The foreign representatives in a Mexican reorganization proceeding sought recognition of that proceeding in the United States of America under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States). The bankruptcy court granted this request and, on appeal, a United States district court affirmed the recognition order.[3] The foreign representatives also sought from the bankruptcy court a stay of action by various creditors against non-debtor guarantors of the debtor's debt; following confirmation of the Mexican reorganization plan, the bankruptcy court ultimately denied the requested relief.[4] The parties appealed the district court's judgment recognizing the Mexican reorganization proceeding and the bankruptcy court's order denying enforcement of the Mexican reorganization plan; the court of appeals affirmed both orders.

On the question of the bankruptcy court's recognition of the Mexican proceeding, creditors holding notes guaranteed by the debtor's subsidiaries objected on the grounds that the foreign representatives had not been appointed by the Mexican court. Although the board of directors for the debtor had appointed the foreign representatives by vote, the bankruptcy court, district court and court of appeals agreed that foreign representatives need only be "authorized in a foreign proceeding" within the meaning of section 101(24) of the United States Bankruptcy

[3] 470 B.R. 408 (N. D. Tex, 2012).
[4] 473 B.R. 117 (Bankr. N. D. Tex, 2012).

Code [article 2(d) MLCBI], which they interpreted to refer more generally to an appointment in the context of a foreign proceeding. The court of appeals also noted that, in deliberating on the Model Law, UNCITRAL's insolvency working group had expressly rejected a requirement that a foreign representative be authorized expressly by statute or order of the court. Given the origins of Chapter 15 in the UNCITRAL Model Law, this contraindicated the United States' Congress's intent to require court appointment. The court found that the Mexican court had tacitly approved the foreign representatives' appointment when it declined to enjoin their conduct when requested by the noteholders. The court of appeals also concluded that the foreign representatives had the authority to administer the debtor's reorganization, as required by section 101(24). The court pointed in part to clear expression by UNCITRAL's insolvency working group to include foreign representatives of proceedings in which a debtor remained in possession, including those in which the debtor remained in possession under the supervision of a judicial or administrative authority, as well as to a similar definition in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation [para. 13(j)].

On the question of the enforcement motion, however, the court of appeals affirmed the bankruptcy court's denial of the foreign representatives' request for broad relief giving full force and effect to the Mexican court's order approving the reorganization plan, upholding the bankruptcy court's order under sections 1507, 1521 and 1522 of the Bankruptcy Code [articles 7, 21 and 22 MLCBI]. Before reaching the facts of the case, the court of appeals commented on the relationship between the ability of a bankruptcy court to grant "any appropriate relief" under section 1521 and the "additional assistance" permitted under section 1507. It adopted a three step analysis that looks, first, to consider the specific relief enumerated in section 1521, second, more generally at appropriate relief as that term was understood under former section 304 of the Bankruptcy Code and, finally, to the standard for additional assistance under section 1507. In then applying this analytic framework to the foreign representatives' request for relief, the court of appeals agreed with the bankruptcy court: (i) that sections 1521(a)(1)-(7) and (b) [article 21(1)(a)-(g) and (2)] do not provide for the discharge of obligations held by non-debtor guarantors, (ii) that section 1521's general grant of authority to provide "any appropriate relief" does not permit discharge of third party debt under prior case law; (iii) that, under the facts of this case, such relief would exceed the limits of section 1522; and, finally, that, (iv) although in theory a discharge of non-debtor obligations might be available under section 1507(b)(4) [no MLCBI equivalent], the debtor had not established grounds for such a discharge in this case, given the unqualified prohibition of such a discharge in the Fifth Circuit court of appeals and given the facts in this case, which had not established unusual circumstances sufficient to justify this extraordinary remedy. That the votes of insiders of the debtor were counted together with those of the noteholders only further complicated the issue, according to the court of appeals. The court of appeals also distinguished another United States decision[5] in which the discharge of third party debt in a Canadian plan of reorganization was enforced on the grounds that in that case there had been near unanimous approval of the Canadian plan by non-insider creditors of the debtor and that the release was less complete than that accomplished in the

[5] *In re Metcalfe & Mansfield Alternative Investment*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) [CLOUT case no. 1007].

Mexican reorganization in the *Vitro* case. Because the court of appeals held that the relief requested in *Vitro* was unwarranted under either section 1521 or 1507, it did not reach the question of whether the reorganization plan would be manifestly contrary to a fundamental public policy of the United States under section 1506 [article 6 MLCBI] of the Bankruptcy Code, which the bankruptcy court had found it was on the grounds that certain provisions of the plan were contrary to United States policies on the protection of third party claims in bankruptcy.[6]

**Case 1311: MLCBI 21(1)(g)**
United States of America: United States Bankruptcy Court for the Southern District of New York
Nos. 10-13913 and 11-02936
*In re Cozumel Caribe, S.A. de C.V. (CT Investment Management Co., LLC v. Cozumel Caribe, S.A. de C.V.)*
14 November 2012
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Published in English: 482 B.R. 96

Abstract prepared by Susan Block-Lieb, National Correspondent

[**Keywords**: *assistance; creditors' protection; foreign representative — authorization; interpretation — legislative history; procedural issues; relief — upon request*]

In the context of its Mexican reorganization proceeding, the debtor obtained an ex parte order (the "precautionary measures") barring its secured creditor and others from collecting against a cash management account in which its revenue and certain of the revenue of its affiliated corporations had been deposited. Although the debtor's secured creditor appealed neither the circumstances associated with the entry of the precautionary measure nor its breadth, it brought an independent proceeding before a Mexican court distinct from that in which the reorganization was pending; the independent proceeding was dismissed, but the question arose as to whether the precautionary measures extended to revenue that was not property of the debtor's and non-debtor affiliates' common business enterprises.

After the debtor's insolvency representative sought and obtained recognition of the Mexican reorganization proceeding in the United States of America, the secured creditor brought several actions in the United States, including an action in the bankruptcy court in which the debtor's Chapter 15 case was pending to seek a declaratory judgment that certain funds in the cash management account were not property of the debtor's estate and not subject to the automatic stay. The foreign representative sought a stay of this declaratory action under section 1521(a)(7) of the Bankruptcy Code [article 21(1)(g) MLCBI] based on international comity with the Mexican reorganization proceeding and the precautionary measures.

The bankruptcy court granted the foreign representative's request for a stay, but not because it had decided to extend comity to the precautionary measures entered in the Mexican proceeding. The court viewed the question of its comity as discretionary rather than mandatory under Chapter 15, expressly questioning United

[6] 473 B.R. 117.

States case law to the contrary, such as *In re Qimonda AG Bankr. Lit.*[7] Although the court in this case disagreed that entry of the Precautionary Measures on an ex parte basis necessarily violated due process, it identified other "questionable conduct" in which the debtor, its non-debtor affiliates and guarantors had engaged in litigation with the secured creditor. This conduct influenced the court's decision to subject its stay of the declaratory action to several conditions, including requiring the debtor and foreign representative (i) to bring an action in the Mexican court in which the reorganization proceeding was pending to seek clarification of the precautionary measures within 60 days, (ii) to promptly serve notice of that action on the secured creditor, and (iii) to advise the court within 180 days whether or not the Mexican court declined to hear and decide their action so that the bankruptcy court could decide whether to extend its stay beyond that period.

**Case 1312: MLCBI 6; 22**
United States of America: United States Bankruptcy Court for the Eastern District of Oklahoma
No. 11-80799
*In re Sivec SRL*
19 July 2012
Original in English
Published in English: 476 B.R. 310

Abstract prepared by Susan Block-Lieb, National Correspondent

[**Keywords**: *assistance; creditors' protection; foreign representative — authorization; interpretation — legislative history; procedural issues; relief — upon request*]

The debtor, an Italian corporation, produced specially manufactured parts for a corporation in the United States of America. By agreement, the United States buyer retained 10 per cent of the purchase price to cover potential warranty claims made within the warranty period. During the warranty period, the debtor sought relief in an insolvency proceeding under Italian law; the liquidator in the proceeding demanded return of the warranty sum retained, but the United States buyer refused, eventually bringing suit against the debtor for breach of contract in a United States district court. The Italian judicial receiver, who had succeeded to the rights of the Italian liquidator under the terms of an approved plan of reorganization, participated in the litigation pending in the district court for nearly a year, including asserting a counterclaim for return of the warranty retainage, until, several weeks before the jury trial in that case was scheduled to take place, it sought recognition under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States) and a stay of the pending district court action. The bankruptcy court recognized the foreign proceeding, but did not stay the district court action, instead lifting the automatic stay to permit the jury trial to proceed to judgment.

The jury found that the debtor had breached its warranty obligations to the United States buyer and that the United States buyer was obligated to return to the debtor a portion of the warranty sum retained. The buyer's right to set off its contract claim against the warranty retainerage had been reserved by the district court, however, based on the judicial receiver's claim that the United States bankruptcy court had

[7] [433 B.R. 547 (2009); 462 B.R.165 (2011) [CLOUT case no. 1212].

exclusive jurisdiction over this asset. After the jury verdict, but before the United States district court could rule on the propriety of set off, an e-mail entitled "Request for Comity" was ostensibly sent to the United States district court and bankruptcy court by an Italian judge with jurisdiction over the debtor's insolvency proceeding. Citing this request, the district court denied the buyer's request for setoff relief and remanded the warranty action to the United States bankruptcy court.

Following remand, the United States bankruptcy court considered whether its earlier stay of the setoff should be lifted, or whether it should defer to the Italian court for a determination of this issue in the Italian insolvency proceeding. Ruling that comity is a matter of discretion depending on sufficient protection of United States creditors' interests and United States public policy, and not a right, the bankruptcy court declined to defer to the Italian court. It indicated there were serious questions as to whether the e-mail had been initiated by the Italian court, believing that it had been prompted and drafted by the United States counsel for the debtor; it also questioned the veracity of this counsel's various representations. The bankruptcy court was unconvinced that the interests of the United States creditors would be protected in the Italian proceeding. Characterized as a debtor and not a creditor in that case, the buyer had never received notice of the Italian proceeding. While under United States law the buyer would hold a setoff right akin to a secured claim in the warranty sum retained, under Italian law its right of setoff would not give rise to a secured claim. The buyer's claim in the Italian proceeding would be paid at a subordinate priority rate due to its unsecured status and the "tardiness" of its assertion given the buyer's lack of notice. In declining to extend comity to the Italian court in this case, the bankruptcy court emphasized that its ruling was based on the facts of this particular case and not Italian bankruptcy law or the Italian bankruptcy system more generally.

**Case 1313: MLCBI 2(a); 2(e)**
United States of America: United States District Court for the Southern District of New York
Nos. 11-14668, 12 Civ. 257 (SAS)
*In re Ashapura Minechem Ltd.*
28 June 2012
Original in English
Published in English: 480 B.R.129

Abstract prepared by Susan Block-Lieb, National Correspondent

[**Keywords**: *foreign court; foreign main proceeding; court — competence; purpose-MLCBI; public policy; recognition*]

A creditor objected to recognition of insolvency proceedings under India's Sick Industrial Companies Act of 1985 (SICA) on the grounds (i) that that statute did not provide for "collective" proceedings as required by Chapter 15 of the Bankruptcy Code of the United States of America (enacting the Model Law in the United States), and (ii) that the debtor's "assets and affairs" were not subject to the control of a "court" under Chapter 15 both because India's Board for Industrial and Financial Reconstruction (BIFR) was not a "court" and because under SICA the debtor's affairs were controlled by the foreign representative and its board of directors. A United States district court affirmed the United States bankruptcy court

order granting recognition. While SICA did not provide a formal mechanism for creditor participation, it did provide for distributions to creditors generally; moreover, the bankruptcy court had heard testimony that creditors often sought and obtained the ability to participate in these proceedings and could appeal from a denial of such a request. The district court held that the BIFR was a "court" within the meaning of Chapter 15 (section 1502(3)) [article 2(e) MLCBI] because it was an administrative board exercising powers similar to a court, and that it held sufficient control over the debtor's assets and affairs because it could divest the insolvency representative and the debtor's board of directors of their control. Finally, the district court rejected the claim that recognition would manifestly violate public policy when arguments simply duplicated earlier arguments that the debtor's proceeding was not a collective proceeding.

**Case 1314: MLCBI 21(1)(e); 22**
United States of America: United States District Court for the Southern District of Florida
Nos. 11-cv-62671
*SNP Boat Services S.A. v. Hotel le St. James*
18 April 2012
Original in English
Published in English: 483 B.R. 776

Abstract prepared by Susan Block-Lieb, National Correspondent

[**Keywords**: *assistance; creditors' protection; foreign representative — authorization; interpretation — legislative history; procedural issues; relief — upon request*]

After a United States of America bankruptcy court had recognized a French proceeding as a foreign main proceeding under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States), the French foreign representative sought an order entrusting to him assets located in the United States. A Canadian judgment creditor, whose judgment had been domesticated in the United States, objected to the foreign representative's request on the grounds that it had been denied due process in the French proceedings. The creditor filed extensive requests for discovery, but the foreign representative declined to submit to the requests on the basis of a French blocking statute. The United States bankruptcy court found that the blocking statute was not binding in the United States and ordered extensive discovery to determine if the creditor's interests had been sufficiently protected in the French proceeding. When the foreign representative filed a motion for reconsideration and clarification of the United States bankruptcy court's order, the court dismissed the Chapter 15 proceedings to sanction the foreign representative for his dilatory conduct. On appeal, the United States district court affirmed in part and reversed in part.

The district court concluded that under the United States Supreme Court's decision in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the S. District of Iowa*,[8] the bankruptcy court had not abused its discretion in disregarding the French blocking statute and ordering representatives of the debtor to be deposed and the foreign representative to respond to other discovery requests.

[8] 482 U.S. 522 (1987).

The court nonetheless found that the breadth of the discovery request exceeded the bankruptcy court's authority. The district court rejected the foreign representative's argument that section 1522(a) [article 22(1) MLCBI] did not authorize the bankruptcy court to determine whether the interests of a foreign creditor were protected, distinguishing section 1521(a)(5) [article 21(1)(e) MLCBI], which it agreed only considered the interests of local creditors. However, the district court found that the bankruptcy court's discovery order was too broad in that it sought to determine specifically whether this creditor's interests were protected in this foreign proceeding, rather than assess whether creditors' interests generally were protected under the statute governing that type of proceeding. The district court also held that the bankruptcy court had exceeded its discretion by dismissing the Chapter 15 proceeding with prejudice without exploring how a lesser sanction might have produced compliance with the discovery order.

**Case 1315: MLCBI 17(4); 18(a); 20**
United States of America: United States Bankruptcy Court for the Southern District of New York
No. 09-15558
*In re Daewoo Logistics Corp*.
5 October 2011
Original in English
Published in English: 461 B.R. 175

Abstract prepared by Susan Block-Lieb, National Correspondent

[**Keywords**: *assistance; creditors' protection; foreign representative; procedural issues; relief — upon request*]

Following confirmation of a plan of rehabilitation in the South Korean court, the debtor sought assistance from a United States of America bankruptcy court regarding its vessel, which had been arrested in a maritime action pending in the United States. The United States bankruptcy court had previously recognized the Korean proceeding and, under sections 362 and 1520 of the United States Bankruptcy Code [article 20 MLCBI], had ordered the stay of creditors' collection and related actions. In considering the debtor's post-recognition request for the relief, the bankruptcy court learned that the Korean proceeding had been closed. The bankruptcy court held that continuation of the stay applicable as a consequence of recognition of the foreign proceedings would be inconsistent with the ancillary nature of a case under Chapter 15 of the Bankruptcy Code. In so ruling, the court noted that section 1517(d) of the Bankruptcy Code [article 17(4) MLCBI] permitted modification or termination of recognition if the grounds for recognition cease to exist and that section 1518(1) [article 18 (a) MLCBI] required a foreign representative to provide prompt notice of any changes in the foreign proceeding that would affect recognition or the relief granted following recognition. Despite these conclusions, the bankruptcy court did not hold that the arresting creditor was entitled to enforce its maritime lien, but instead thought the parties should seek a ruling from the Korean court as to whether the arrest of the vessel violated the rehabilitation order and could, moreover, litigate maritime issues before the United States district court.

**Case 1316: MLCBI 21(1)(e); 21(1)(g)**
United States of America: United States District Court for the Southern District of New York
Nos. 11 MC 224, 11 MC 230, 11 MC 231, 11 MC 235, 11 MC 236, 11 MC 237
*In re Fairfield Sentry Ltd*.
19 September 2011
Original in English
Published in English: 458 B.R. 665

Abstract prepared by Susan Block-Lieb, National Correspondent

[**Keywords**: *assistance; creditors' protection; foreign representative; procedural issues; relief — upon request*]

The debtors sold shares to foreign investors and invested these proceeds with "X" company. When that company collapsed, the debtors filed liquidation proceedings in the British Virgin Islands (BVI) and their liquidators commenced suits against known and unknown beneficial owners of the funds on common law theories, including for money had and received, unjust enrichment and constructive trust. After the United States of America's bankruptcy court recognized the debtors' BVI proceedings as foreign main proceedings under Chapter 15 of the United States Bankruptcy Code (enacting the Model Law in the United States), the liquidators commenced additional law suits in that court and removed to it many of the law suits that had been pending in state court. The defendants sought to dismiss or remand these suits on the grounds that the United States statute governing bankruptcy jurisdiction had not been satisfied, since the suits neither (i) arose under the Bankruptcy Code nor (ii) arose in or (iii) were related to a United States bankruptcy case. While the bankruptcy court ruled that it held subject matter jurisdiction over the lawsuits (452 B.R. 64), the district court reversed that decision.

The district court held that the suits did not "arise under" United States bankruptcy law because they alleged only common law theories of recovery. While brought in the context of a pending Chapter 15 case, Chapter 15 merely recognized a pending foreign proceeding and gave the foreign representatives standing to sue in United States courts, but did not otherwise grant subject matter jurisdiction or serve as the underlying basis for a law suit.

The district court also held that the suits did not "arise in" the debtors' Chapter 15 cases because the claims had been brought before the Chapter 15 case had been commenced and existed outside the context of this case. The mere fact that recovery on these suits would inure to the benefit of the foreign proceeding did not, thought the court, constitute a basis for bankruptcy jurisdiction in United States courts. Although the bankruptcy court had held that section 1521(a)(5) and (7) of the Bankruptcy Code [article 21(1)(e) and (g) MLCBI] justified an assertion of jurisdiction on the basis that the suits arose in a United States bankruptcy case, the district court thought those provisions constituted an insufficient basis for bankruptcy jurisdiction over the suits since the foreign representatives were admittedly not seeking to recover assets located within the territorial jurisdiction of the United States. While earlier cases had authorized foreign representatives to bring suit in reaction to a debtor's transfer of assets to the United States and outside the reach of the foreign court, here the "foreign representatives seek recovery of

foreign assets by challenging foreign transfers".[9] Because the Chapter 15 proceeding constituted a case ancillary to a foreign main proceeding, the district court held that the express scope of section 1521(a)(5) [article 21(1)(e) MLCBI] and thus of bankruptcy jurisdiction over proceedings "arising in" the Chapter 15 case was limited territorially to the assets of the debtor located within the United States.

As for jurisdiction "related to" the Chapter 15 case, the district court held that it need not address the issue, instead remanding the law suits to the bankruptcy court for consideration of whether the mandatory abstention provision applied to the cases.

**Case 1317: MLCBI 7; 21(1)(e); 21(2); 22**
United States of America: United States Bankruptcy Court for the Southern District of New York
No. 09-17318
*In re The International Banking Corporation B.S.C.*
23 November 2010
Original in English
Published in English: 439 B.R. 614
Abstract prepared by Susan Block-Lieb, National Correspondent

[**Keywords**: *assistance; creditors' protection; foreign representative — authorization; relief — upon request*]

The foreign representative of a Bahraini proceeding sought post-recognition assistance from the United States of America's bankruptcy court in which the debtor's Chapter 15 case was pending. The foreign representative sought an order from the bankruptcy court vacating pre-judgment attachment orders obtained by two creditors in state court and seeking turnover of funds currently under the control of that state's sheriff under the principles of comity reflected in Chapter 15 of the United States Bankruptcy Code (enacting the Model Law on the United States), sections 1521(a)(5), 1521(b) and 1507 [articles 21(1)(e), 21(2) and 7 MLCBI). Because the creditors had attached the funds before commencement of the Bahraini administration proceeding, the bankruptcy court found that they held valid liens under New York law, which law the foreign representative and both creditors agreed governed the validity of the creditors' rights. The foreign representative argued that the bankruptcy court's discretion regarding its request for turnover under section 1521(b) was limited to consideration of whether the interests of local United States creditors would be protected, but the bankruptcy court disagreed, citing broader general language in section 1522(a) and (b) [article 22 (1) and (2) MLCBI] regarding protection of all creditors' interests. In addition, the bankruptcy court viewed ancillary proceedings under Chapter 15 as providing secured creditors the same protections that they would enjoy in a plenary bankruptcy case. Because secured creditors' security interests may still be subject to avoidance, the bankruptcy court nonetheless directed the parties to consent to the jurisdiction of, and seek a ruling from, the Bahraini court as to whether the attachment orders were avoidable under Bahraini law. The bankruptcy court also suggested that if that foreign court declined to exercise jurisdiction, it would itself apply Bahraini law to rule on the voidability of the attachments.

[9] *In re Fairfield Sentry Ltd. Litigation*, 458 B.R. 665 at 677 (S.D.N.Y. 2011).

**Case 1318: MLCBI 16(3); 20(1)**
United States of America: United States Bankruptcy Court for the Central District of California
No. 10-bk-15473SB
*In re Jay Tien Chiang*
3 September 2010
Original in English
Published in English: 437 B.R. 397

Abstract prepared by Susan Block-Lieb, National Correspondent

[**Keywords**: *assistance; centre of main interests (COMI); centre of main interests (COMI) — determination; creditors' protection; foreign main proceeding; foreign representative — authorization; presumption — centre of main interests (COMI); recognition — application for; relief — automatic*]

The insolvency representative of proceedings in Canada sought recognition in the United States of America as a foreign main proceeding under Chapter 15 of the Bankruptcy Code (enacting the Model Law in the United States). The ostensible owner of an asset claimed by the insolvency representative in the Canadian insolvency case objected to recognition on the grounds that the centre of main interests (COMI) for this individual debtor was not in Canada or in any other country. The United States bankruptcy court granted the recognition request, holding that for every debtor there is one (but not more than one) country in which the debtor's COMI is located and that this debtor's COMI was located in Canada. Section 1516(c) of the of the Bankruptcy Code [article 16(3) MLCBI] presumes that an individual debtor's COMI is located at his habitual residence. Declining to consider factors applicable exclusively to the location of a corporate debtor's COMI, the bankruptcy court found no evidence to rebut the presumption of the debtor's COMI being located at his Canadian residence. As a result of recognition of this foreign main proceeding, an automatic stay arose under section 1520(a) of the United States Code [article 20(1) MLCBI], which the court held stayed the ostensible owner from dissipating or otherwise transferring assets claimed by the Canadian court as property of the debtor's estate.