

Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency



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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Digest of Case Law
on the UNCITRAL
Model Law on
Cross-Border Insolvency



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Introduction to the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency

THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

1. The Model Law on Cross-Border Insolvency (MLCBI), adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State in which the insolvency proceeding is taking place. In principle, the proceeding pending in the debtor's centre of main interests (COMI) is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs.

2. The MLCBI respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency. Those solutions include:

(a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State,¹ thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

(b) Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;

(c) Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

(d) Permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

(e) Authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;

(f) Providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State;

(g) Establishing rules for coordination of relief granted in the enacting State to assist two or more insolvency proceedings that may take place in foreign States regarding the same debtor.

3. The text of the MLCBI focuses on four key elements identified, through studies and consultations conducted in the early 1990s prior to the negotiation of the MLCBI, as being the areas upon which international agreement might be possible:¹

(a) Access to local courts for representatives of foreign insolvency proceedings and for creditors and authorization for representatives of local proceedings to seek assistance elsewhere;

(b) Recognition of certain orders issued by foreign courts;

(c) Relief to assist foreign proceedings;

(d) Cooperation among the courts of States in which the debtor's assets are located and coordination of concurrent proceedings.

4. The MLCBI takes into account the results of other international efforts, including the negotiations leading to the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EIR), the European Convention on Certain International Aspects of Bankruptcy (1990),² the Montevideo treaties on international commercial law (1889 and 1940), the Convention regarding Bankruptcy between Nordic States (1933) and the Convention on Private International Law (Bustamante Code) (1928).³ Since some terms are common to the MLCBI and the EIR and the jurisprudence interpreting those terms in the context of the EIR may thus be relevant to interpretation of the MLCBI, it is included in the Digest as appropriate.⁴

5. UNCITRAL considered that the MLCBI would be a more effective tool if it was accompanied by background and explanatory information. While such information would primarily be directed to executive branches of Governments and legislators preparing the necessary legislative revisions, it would also provide useful insight to those charged with interpretation and application of the MLCBI, such as judges, and other users of the text, such as practitioners and academics. Such information might also assist States in considering which, if any, of the provisions should be adapted to address particular national circumstances. The *Guide to Enactment* (GE) was prepared by the secretariat pursuant to the request made by UNCITRAL at the close of its thirtieth session,

in 1997. It was based on the deliberations and decisions of the Commission at that thirtieth session, when the MLCBI was adopted, as well as on considerations of Working Group V (Insolvency Law), which conducted the preparatory work.

6. Over time, the interpretation of the concept of COMI in article 16 of the MLCBI resulted in uncertainty and unpredictability that led to a proposal to UNCITRAL in 2010⁵ to provide more information and guidance on the concept in the GE. The revisions were based on the deliberations of Working Group V (Insolvency Law)⁶ at its thirty-ninth (2010), fortieth (2011), forty-first (2012), forty-second (2012) and forty-third (2013) sessions, as well as the deliberations of the Commission at its forty-sixth session (2013), and were adopted by the Commission as the *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (GEI) on 18 July 2013.

7. As at 30 September 2020, the MLCBI has been adopted in 48 States for a total of 51 jurisdictions. Those enacting States have different economies and levels of development and represent all legal traditions.⁷ The number of academic works dedicated to the MLCBI grows constantly,⁸ as does the amount of related case law available from various sources. The contribution of the MLCBI to the goal of unification of international trade law is significant.

PROMOTING UNIFORM INTERPRETATION OF UNCITRAL INSTRUMENTS: CLOUT AND DIGESTS OF CASE LAW

8. In accordance with its mandate,⁹ UNCITRAL has undertaken the preparation of the tools necessary for a thorough understanding of the instruments it develops and for their uniform interpretation.

9. UNCITRAL has established a reporting system for case law on UNCITRAL texts (CLOUT).¹⁰ CLOUT was established to assist judges, arbitrators, lawyers and parties to business transactions by making available decisions of courts and arbitral tribunals interpreting UNCITRAL texts and, in so doing, to further the uniform interpretation and application of those texts. CLOUT covers case law related to conventions and model laws prepared by UNCITRAL and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention).¹¹

10. A network of national correspondents, appointed by the Governments of States that are party to the New York Convention or at least one of the United Nations conventions emanating from the work of UNCITRAL or have enacted at least one of the UNCITRAL model laws, monitors the relevant judicial decisions in the respective countries and reports them to the UNCITRAL secretariat in the form of an abstract. Voluntary contributors can also prepare abstracts for the attention of the secretariat, which may publish them, in agreement with the national correspondents. The secretariat edits and indexes the abstracts received and publishes them in the CLOUT series. The network of

national correspondents ensures coverage of a large number of domestic jurisdictions. The availability of CLOUT in the six official languages of the United Nations greatly enhances the dissemination of the information. These two elements are essential to promote uniformity of interpretation on the widest possible scale.

11. In the light of the large number of cases collected in CLOUT on certain UNCITRAL texts, in particular the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (the CISG),¹² the Commission requested a tool specifically designed to present selected information on the interpretation of the CISG in a clear, concise and objective manner.¹³ A second request concerned the UNCITRAL Model Law on International Commercial Arbitration.¹⁴ The digests prepared in response to those requests serve to assist in the dissemination of information on the texts covered, further promoting their adoption as well as their uniform interpretation and assisting judges, arbitrators, practitioners, academics and government officials to use the case law relating to those texts more efficiently. The digests do not constitute an independent authority on the interpretation to be given to individual provisions of those texts, but rather serve as reference tools for identifying relevant case law on interpretation and summarizing those decisions for dissemination.

12. The growing number of cases collected in CLOUT interpreting the MLCBI led the Commission to agree that a digest should be prepared on that text to provide wider and more ready access to those cases, including those referred to in other UNCITRAL texts relating to insolvency (primarily, the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, adopted in 2011 (updated 2013) (the JP), and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, adopted in 2009 (the Practice Guide)) and to draw attention to emerging trends in the interpretation of the MLCBI.¹⁵ The goal of uniform interpretation of the MLCBI has been assisted by CLOUT, and it is expected that this Digest will further support that goal. As highlighted by article 8 of the MLCBI, in the interpretation of the MLCBI, “regard is to be had to its international origin”, and the Digest is aimed at promoting uniformity in the application of the MLCBI by encouraging judges to consider how the MLCBI has been applied by courts in jurisdictions where it has been enacted.

13. As noted in the JP,¹⁶ some differences in approach to the interpretation of the terms of the MLCBI (or any adaptation of its language) may arise from the way in which judges from different legal traditions approach their respective tasks. Although general propositions are fraught with difficulty, the greater codification of law in some jurisdictions may tend to focus more attention on the text of the MLCBI than would be the case in other jurisdictions without the same degree of codification or in which many superior courts have an inherent jurisdiction to determine legal questions in a manner that is not contrary to any statute or regulation or have the authority to develop particular aspects of the law for which there is no codified rule.

14. The Digest presents the information in a format based on chapters corresponding to chapters of the MLCBI. Each chapter contains a synopsis of the relevant case law for each article, highlighting common views and reporting any divergent approach. This Digest was prepared using the full text of the decisions cited in the CLOUT abstracts.

15. When enacting the MLCBI, States have in certain instances made modifications to certain provisions, despite recommendation to make as few changes as possible when incorporating the text into their legal system. To the extent possible, the Digest indicates those instances where a diverging interpretation of a specific provision originates from a modification made to the MLCBI provision by the enacting legislation.

16. It might be noted that the majority of cases involving applications for recognition under the MLCBI are straightforward and do not give rise to issues of interpretation of the articles of the text. These cases are not included in the Digest, although some have been reported in CLOUT as examples of applications under the MLCBI.¹⁷ The Digest does not refer to every case that has considered the MLCBI, instead limiting itself to those cases that give rise to issues of interpretation of the articles of the MLCBI.

ACKNOWLEDGEMENT OF CONTRIBUTIONS

17. The Digest is the result of cooperation between national correspondents, the UNCITRAL secretariat and delegates to UNCITRAL Working Group V (Insolvency Law). Special acknowledgement is made of the contribution by Jenny Clift, former Secretary of Working Group V, who prepared the initial draft of this Digest, with the assistance of members of the Working Group and other experts, including INSOL International, which responded to an invitation to contribute that was extended to stakeholders who attend sessions of UNCITRAL and its Working Group V.

18. For questions or comments on the Digest, please contact the secretariat of UNCITRAL (International Trade Law Division, Office of Legal Affairs, United Nations, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria, uncitral@un.org).

REFERENCE MATERIALS

References to cases

19. References to specific cases are included throughout the present text. For ease of reading the footnotes, the titles of cases that are often cited have been shortened, but the full title and citation is included in the case list in the annex. For example, the United States of America case with respect to the debtor “Bear Stearns High-Grade Structured Credit Strategies Master Fund” is referred to as “Bear Stearns”, followed by the appropriate case citation. References to page or paragraph numbers in association with the cases included are references to the relevant portion of the version

of the judgment cited in the case list in the annex. Paragraph numbers, whether of a judgment or an UNCITRAL document, are indicated by the use of square brackets ([para. 74]). Page numbers are indicated as numbers with no brackets or parentheses. For example, “389 B.R. 325, 330” indicates page 330 of a judgment commencing on page 325. Cases on the MLCBI included in the Digest that are reported in the UNCITRAL system of case law on UNCITRAL texts (CLOUT) include a CLOUT reference number in the case citation; abstracts of those cases published in the system are available in the six official languages of the United Nations at <https://uncitral.un.org>.

References to texts

20. The Digest includes references to several texts dealing with cross-border insolvency. Subparagraphs (a)–(e) below refer to texts developed by UNCITRAL, while subparagraphs (g)–(i) refer to texts developed by other institutions that, as noted in the GEI,¹⁸ are relevant to both the development and interpretation of that text:

(a) “Guide to Enactment” (GE) (1997): Guide to Enactment of the UNCITRAL MLCBI;

(b) “Guide to Enactment and Interpretation” (GEI): Guide to Enactment and Interpretation of the UNCITRAL MLCBI, as revised and adopted by the Commission on 18 July 2013;

(c) “Legislative Guide”: UNCITRAL Legislative Guide on Insolvency Law (2004), including parts three (2010) and four (2013, as amended in 2019);

(d) “Practice Guide”: UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);

(e) “Judicial Perspective” (JP): UNCITRAL MLCBI: The Judicial Perspective (updated 2013);

(f) “EIR”: European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings;¹⁹

(g) “EIR recast”: Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast);²⁰

(h) “European Convention”: Convention on Insolvency Proceedings of the European Union (1995);²¹

(i) “Virgos-Schmit Report”: M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996.²²

References to institutions

21. References to the ECJ are references to the Court of Justice of the European Union.

References to the GE and GEI

22. The introduction to each article of the MLCBI contains references to the relevant section of the GEI and the JP. Where there is an equivalent paragraph of the earlier GE, it is indicated in the footnotes.

Notes

¹ A detailed explanation of those key elements of the MLCBI is included in the *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations publication, 2014) (GEI) [paras. 24–45].

² *European Treaty Series*, No. 136.

³ League of Nations, *Treaty Series*, vol. LXXXVI, No. 1950.

⁴ See GEI [paras. 81–84].

⁵ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)* [para. 259].

⁶ At the beginning of 2002, the name of the Working Group changed from “Working Group on Insolvency Law” to “Working Group V (Insolvency Law)”. For ease of reference, the current name of the Working Group, i.e., “Working Group V (Insolvency Law)”, is used throughout the Digest.

⁷ Information on jurisdictions having enacted legislation based on the MLCBI is provided on the UNCITRAL website at <https://uncitral.un.org>.

⁸ Every year, UNCITRAL prepares a bibliography of recent writings related to its work, available on its website at <https://uncitral.un.org>.

⁹ UNCITRAL should be active, inter alia, in “[...] promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade [and] collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade; [...]”: General Assembly resolution 2205 (XXI) of 17 December 1966, available on the UNCITRAL website at <https://uncitral.un.org>. For details concerning the mandate for the progressive development of the law of international trade, see also the report of the Secretary-General contained in document A/6396 (*Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 88, document A/6396, reproduced in *UNCITRAL Yearbook*, vol. I: 1968–1970, part one, chap. II, sect. B); the report of the Sixth Committee of the General Assembly at its twenty-first session on the relevant agenda item (*Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 88, document A/6594, reproduced in *UNCITRAL Yearbook*, vol. I: 1968–1970, part one, chap. II, sect. D); and the relevant summary records of the proceedings of the Sixth Committee, which are contained in the *Official Records of the General Assembly, Twenty-first Session, Sixth Committee, 947th–955th meetings and of which excerpts are reproduced in the UNCITRAL Yearbook*, vol. I: 1968–1970, part one, chap. II, sect. C.

¹⁰ *Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17)* [paras. 98–109]. CLOUT reports are published as United Nations documents A/CN.9/SER.C/ABSTRACTS/1 to A/CN.9/SER.C/ABSTRACTS/XX. The CLOUT reports are also available on the UNCITRAL website at <https://uncitral.un.org>.

¹¹ United Nations, *Treaty Series*, vol. 330, No. 4739.

¹² *Ibid.*, vol. 1489, No. 25567.

¹³ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)* [paras. 390–395].

¹⁴ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)* [paras. 87–91].

¹⁵ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)* [para. 156].

¹⁶ JP [para. 19].

¹⁷ See, for example, *Australia*: Hur v Samsun Logix Corporation [2009] FCA 372, CLOUT 921. England: European Insurance Agency AS, High Court (Ch), case No. 6-BS30434 (7 September 2006), CLOUT 769; Namirei Showa Co. Ltd., High Ct (Ch) 16 October 2008, 7542/08, CLOUT 1004; Rajapakse [2007] B.P.I.R. 99 (28 November 2006), CLOUT 787. *Japan*: Lehman Brothers Asia Holdings Ltd, Tokyo District Court, 1 of 2007 (1 June 2009); 2 of 2007, Lehman Brothers Asia Capital Company; 3 of 2007, Lehman Brothers Commercial Corporation Asia Ltd; 4 of 2007, Lehman Brothers Securities Asia Ltd. (30 September 2009), CLOUT 1479. *Mexico*: Proceedings No. 29/2001, Re Jacobo Xacur Eljure, Felipe Xacur Eljure and Jose Maria Xacur Eljure, Mexico City Federal District Court, 19 December 2002, CLOUT 693. *New Zealand*: Jeong v TPC Korea Company Ltd [2009] NZHC 1431, CLOUT 1221. *United States*: Amerindo Internet Growth Limited, case No. 07-10327 (Bankr. S.D.N.Y. Mar. 6, 2007), CLOUT 758; North American Steamships Ltd, case No. 06-13077, Bankr. S.D.N.Y. Jan. 25, 2006, CLOUT 756; Thow, case No. 05-30432 (Bankr. W.D. Wash, Nov. 10, 2005), CLOUT 762; TriGem Computer Inc., case No. 07-11482 (Bankr. C.D. Cal, Dec. 7, 2005), CLOUT 764.

¹⁸ GEI [paras. 10–11, 141]; the JP also notes the relevance of those texts to interpretation of certain concepts used in the MLCBI, particularly “COMI” and “establishment”.

¹⁹ *Official Journal of the European Communities*, L 160, vol. 43, 30 June 2000, 1.

²⁰ *Official Journal of the European Union*, L 141, vol. 58, 5 June 2015, 19.

²¹ For information of the history of the Convention and its relevance to the MLCBI, see the JP [paras. 94–95]; see also the report of the European Union Parliament of 23 April 1999 on the Convention on Insolvency Proceedings of the European Union (1995) available at www.europarl.europa.eu (accessed on 30 September 2020).

²² In anticipation of ratification the European Convention by all European Union member States, this explanatory report was prepared to provide guidance on various concepts in the draft Convention, in particular COMI. Notwithstanding the demise of the Convention, the report has been accepted generally as an aid to interpretation of the concept of COMI that was subsequently used in EIR. For further information on the history see the JP [paras. 94–95]. The report is available from <https://globalinsolvency.com/resource-article/virgos-schmit-report-convention-insolvency-proceedings-now-regulation-insolvency> (accessed on 30 September 2019).

Preamble

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment;
- (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on the preamble are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 136–139]. See also summary records of that session (*UNCITRAL Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/422 [paras. 19–23]; A/CN.9/433 [paras. 22–28]; A/CN.9/435 [para. 100];
 - (b) GE (1997): A/CN.9/436 [paras. 37–38]; A/CN.9/442 [paras. 54–56];
 - (c) GEI (2013): A/CN.9/738 [paras. 14–16]; A/CN.9/742 [para. 23]; A/CN.9/766 [paras. 21–25].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 52].

INTRODUCTION

1. The GEI [paras. 46–52]¹ explains that the preamble provides both a succinct statement of the policy objectives of the MLCBI, as well as orientation for users of the MLCBI and useful information with respect to its interpretation; it is not intended to create substantive rights.

CASE LAW ON THE PREAMBLE

2. Not all enactments based on the MLCBI have adopted

the preamble, but where it has been included, courts typically refer to its provisions as providing guidance on the principles underlying the MLCBI and forming the basis of the substantive articles.² One such principle is the ancillary nature of recognition proceedings,³ which is clear from the purpose of the MLCBI to maximize assistance to the foreign court conducting the main proceeding. As such, a court in that State tasked with addressing an application for recognition acts as an adjunct or arm of a foreign bankruptcy court where the main proceedings are conducted.⁴ Some courts have specifically suggested that recognizing the foreign proceedings in question would support the goals of the MLCBI as enumerated in the preamble.⁵

3. It has also been said that when a statute includes an explicitly stated purpose, it should be interpreted consistently with that purpose, even if another canon of statutory construction might seem to point in a different direction.⁶ The general objective of cooperation between courts should not be construed, it is suggested, as implying restrictions on a local court's ability to commence proceedings, as requiring the unilateral acceptance of a foreign court's ruling or for the exclusivity of one court's ruling – rather it calls for certainty, fairness, efficiency and facility.⁷ Those qualities are underlined by article 22, which courts have referred to as giving effect to the preamble by implementing fair, efficient and cooperative procedures designed to maximize the value of the debtor's assets for distribution.⁸

4. One action said to be inconsistent with the goals of the MLCBI as reflected in the preamble was dismissal of a local proceeding following recognition of a foreign main proceeding.⁹ Courts have also indicated that a diversity of outcomes with respect to the time by reference to which a COMI determination is to be made would not promote the goals of the preamble.¹⁰ Those goals would also be

frustrated, it has been suggested if, for example, the term “foreign proceeding” was to be interpreted in a manner that cut off assistance at a time when cooperation, certainty, fairness, protection of asset values and financial relief were most needed.¹¹ To take that approach, the court said, would be inimical to the goals the MLCBI advances.¹²

5. One court has also referred to the preamble as possibly being relevant to interpretation of the MLCBI in the light of article 31 of the Vienna Convention on the Law of Treaties (1969) (the Vienna Convention)¹³, notwithstanding it was unlikely the MLCBI could be described as a treaty. The court

indicated that the approach to treaty interpretation might be enlightening to interpretation of the MLCBI given the international element and the potential role of the preamble to the MLCBI, and because the Vienna Convention requirement to take into account subsequent developments might be relevant in relation to the GEI.¹⁴

6. It has been emphasized that the MLCBI does not attempt to unify the insolvency law of different States. It does not address issues such as choice of law, conflict of laws, attachment, set-off, recoupment or similar property rights, leaving such decisions to the discretion of courts.¹⁵

Notes

¹ GE [paras. 54–56].

² For example, the United States Bankruptcy Code (11 U.S.C. sect. 1501 (a) (1)–(5)) (enacting the preamble, MLCBI) – inclusion of the stated purpose of the legislation is unique to Ch. 15 of the Code; see *SPhinX, Ltd.* 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), affirmed, 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768.

³ The United States Bankruptcy Code (11 U.S.C. 1504) enacting art. 4 of the MLCBI, makes it clear that an application for recognition under that chapter of the Code is ancillary to the foreign proceeding pending elsewhere.

⁴ *United States: ABC Learning Centres Limited* 728 F.3d 301, 306 (3d Cir. 2013), CLOUT 1338; *Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd)* 601 F.3d 319, 329 (5th Cir. 2010), CLOUT 1006.

⁵ *United States: Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd)* 610 F.3d 319, 324 (5th Cir. 2010), CLOUT 1006 – court said reference to the stated purpose (as reflected in the preamble) and structure of Ch. 15 reflects its international origin and suggests that art. 21, subpara. 1 (g), does not exclude avoidance actions under foreign law; *Octaviar Administration Pty Ltd.* 511 B.R. 361, 374–375 (Bankr. S.D.N.Y. 2014), CLOUT 1483; *Daebio Int'l Shipping Co., Ltd.* 543 B.R. 47, 54 (Bankr. S.D.N.Y. 2015), CLOUT 1626 – court said it was consistent with the purpose of Ch. 15 under subpara. (a) of the preamble to cooperate with foreign courts and to give effect to the law of the Republic of Korea and a stay order.

⁶ *United States: RHTC Liquidating Co.* 424 B.R. 714, 724 (Bankr. W.D.Pa. 2010) – court refused to dismiss plenary proceedings commenced by certain creditors, notwithstanding the recognition given to foreign representatives, following a detailed analysis of the case by reference to the preamble.

⁷ *Australia: Bank of Western Australia v Henderson (No. 3)* [2011] FMCA 840 [14], CLOUT 1216; *Tucker, in the matter of Aero Inventory (UK) Limited (No. 2)* [2009] FCA 1481, CLOUT 922; see para. 6 of discussion below on art. 2, subpara. (a), and para. 2 of the discussion below on art. 22.

⁸ *United States: SPhinX, Ltd.*, 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006) affirmed on appeal 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768; *Australia: Akers v Saad Investments* [2013] FCA 738 [38], CLOUT 1219 affirmed on appeal [2014] FCAFC 57, CLOUT 1332.

⁹ *United States: RHTC Liquidating Co.*, 424 B.R. 714, 724–729 (Bankr. W.D. Pa. 2010) – where a proceeding in Canada was recognized as foreign main proceeding, a motion to dismiss the local United States case was denied on the basis that the stated purposes of the cross-border legislation (reflecting the preamble of the MLCBI), were not best served by dismissal.

¹⁰ *Australia: Kapila, Re Edelsten* [2014] FCA 1112 [para. 38], CLOUT 1475. *Japan: Think3, case No. (ra) 1757 of 2012 (appeal)*, Tokyo High Court, ch. 3, 2 (1), CLOUT 1335; see discussion on timing under art. 17, para. 2.

¹¹ *United States: Oversight & Control Commission of Avanzit, S.A.* 385 B.R. 525, 534 (Bankr. S.D.N.Y. 2008), CLOUT 925 – this was in response to a creditor arguing that because the reorganization plan had been confirmed, the proceeding no longer satisfied the definition of “foreign proceeding”.

¹² *Ibid.*, 536.

¹³ United Nations, *Treaty Series*, vol. 1155, No. 18232.

¹⁴ *England: In the matter of Sturgeon Central Asia Balanced Fund Ltd (in liq)* [2019] EWHC 1215 (Ch) [paras. 45–47], CLOUT 1819. On the relevance of the Vienna Convention to interpretation and application of the MLCBI, see also discussion below under case law on article 8.

¹⁵ *United States: Sivec SRL*, 476 B.R. 310, 323 (Bankr. E.D. Okla. 2012), CLOUT 1312.

Chapter I. General provisions

Article 1. Scope of application

1. This Law applies where:
 - (a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or
 - (b) Assistance is sought in a foreign State in connection with a proceeding under [*identify laws of the enacting State relating to insolvency*]; or
 - (c) A foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] in respect of the same debtor are taking place concurrently; or
 - (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [*identify laws of the enacting State relating to insolvency*].
2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 1 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 141–150]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/422 [paras. 24–33]; A/CN.9/433 [paras. 29–32]; A/CN.9/435 [paras. 102–106, 179];
 - (b) GE (1997): A/CN.9/436 [paras. 39–42]; A/CN.9/442 [paras. 57–66];
 - (c) GEI (2013): A/CN.9/742 [para. 24]; A/CN.9/763 [para. 22]; A/CN.9/766 [para. 26].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 61].

INTRODUCTION

1. The GEI [paras. 53–61]¹ explains that article 1, paragraph 1, outlines the types of issue that may arise in cases of cross-border insolvency and for which the MLCBI provides solutions. “Assistance” is intended to cover various situations dealt with in the MLCBI, in which a court

or an insolvency representative in one State may make a request, directed to a court or insolvency representative in another State, for assistance within the scope of the MLCBI. The MLCBI specifies some of the types of assistance available, e.g., articles 19, 21 and 27. The GEI [paras. 55–60] discusses the rationale of article 1, paragraph 2, which encourages an enacting State to expressly indicate the types of entity that it may wish to exclude from the scope of the MLCBI. In many States, the insolvency of the types of entity cited are typically administered under a special regulatory regime because of the need to protect vital interests of a large number of individuals or because of a need for particularly prompt and circumspect action. The GEI [para. 61]² also discusses application of the MLCBI to natural persons.

CASE LAW ON ARTICLE 1

2. Several cases suggest that the MLCBI does not apply until assistance has been actively sought or a foreign representative has instigated recognition of foreign proceedings.³ Courts have indicated that until that time, action could be brought locally to protect a party’s interests⁴ as there was nothing express or implied in the MLCBI that required the court not to deal with a foreign debtor’s assets located in the receiving court’s jurisdiction unless and until the MLCBI had been triggered.

ARTICLE 1, PARAGRAPH 1

3. Reported cases have not dealt with issues of interpretation of paragraph 1.

ARTICLE 1, PARAGRAPH 2

4. Enacting legislation includes a variety of exclusions from application of the MLCBI, including specially regulated entities such as banking, credit and insurance

institutions;⁵ financial and investment institutions; commodity exchange members; clearing houses; certain licensed financial service providers; consumers;⁶ and stock and commodity brokers.

Notes

¹ GE [paras. 57–66].

² GE [para. 66].

³ *Australia*: Chow Cho Poon (Private Limited) [2011] NSWSC 300 [64], CLOUT 1218; *United States*: Trikona Advisers, Ltd. v Chugh, 846 F.3d 22 (2d Cir. 2017) – appeal court said the MLCBI was not of general application and that the instant non-bankruptcy action was unconnected to any foreign or United States bankruptcy proceeding. Even assuming, arguendo, that the wind-up proceeding was the type of case that Ch. 15 would ordinarily cover, it did not apply when a court in the United States simply gave preclusive effect to factual findings from an otherwise unrelated foreign liquidation proceeding, as was the case here.

⁴ *Australia*: Winter v Winter and Ors [2010] FamCA 933 [paras. 208, 210–211]; *Bank of Western Australia v Henderson* (No. 3) [2011] FMCA 840 [para. 15], CLOUT 1216 – receiving court noted that since assistance was not being sought by the foreign representative, the foreign court or by foreign creditors and it was not seeking assistance from the foreign court, the case came within the ambit of the MLCBI only because concurrent proceedings existed. *United States*: United States v J.A. Jones Constr. Group, LLC 333 B.R. 637, 638 (E.D.N.Y. 2005), CLOUT 763; see also *Paul Andrus v Digital Fairway Corp.*, Civil Action No. 3: 08-CV-119-O (N.D. Tex. June 26, 2009).

⁵ United States Bankruptcy Code (11 U.S.C.), Ch. 15 permits foreign banks and insurance companies to seek recognition and relief, even though they would not be eligible to commence insolvency proceedings under United States insolvency law – for example, *Tri-Continental Exchange, Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006), CLOUT 766; *British-American Insurance Co., Ltd.*, 425 B.R. 884 (Bankr. S.D.Fla. 2010), CLOUT 1005; *Irish Bank Resolution Corporation Limited*, 538 B.R. 692, 697 (D. Del 2015), CLOUT 1628 – United States Bankruptcy Code, sect. 1501 (c) (1), excludes a foreign bank that has a branch or agency in the United States. The court found that the corporation no longer had branches at the time of the application for recognition, which was the relevant time period for consideration (following *Morning Mist Holdings Ltd. v Krys* (*In re Fairfield Sentry Ltd.*), 714 F.3d 127, 133 (5th Cir. Apr. 16, 2013), CLOUT 1339).

⁶ United States Bankruptcy Code (11 U.S.C.), Ch. 15 excludes ordinary consumers who are either citizens or permanent residents of the United States – see *Steadman*, 410 B.R. 397, 403 (Bankr. D.N.J. 2009), CLOUT 1213, where recognition was denied in the United States to the United Kingdom of Great Britain and Northern Ireland receiver of a United Kingdom debtor who had married an American and held a United States resident alien card with conditional permanent residence.

Article 2. Definitions

For the purposes of this Law:

- (a) “Foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- (b) “Foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- (c) “Foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;
- (d) “Foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;
- (e) “Foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;
- (f) “Establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 2 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)) [paras. 152–158]. See also summary records of that session (Yearbook, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/419 [paras. 95–117]; A/CN.9/422 [paras. 34–65]; A/CN.9/433 [paras. 33–41, 147]; A/CN.9/435 [paras. 108–113];
 - (b) GE (1997): A/CN.9/436 [paras. 43–45]; A/CN.9/442 [paras. 67–75];
 - (c) GEI (2013): A/CN.9/738 [paras. 17–19]; A/CN.9/742 [paras. 25–36, 58]; A/CN.9/763 [paras. 23–25]; A/CN.9/766 [paras. 27–28].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 90].

INTRODUCTION

1. The GEI [paras. 62–90]¹ and the JP contain considerable explanatory material on the various definitions included in article 2. For ease of reference, a brief overview is given below for each subparagraph, with cross references to the relevant paragraphs of those explanatory texts.

CASE LAW ON ARTICLE 2

ARTICLE 2, SUBPARAGRAPH (a):
FOREIGN PROCEEDING

- (a) “Foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
2. The GEI [paras. 62–80]² explains that in order for a foreign proceeding to be eligible for recognition under the MLCBI it must satisfy all of the elements of the definition in subparagraph (a). These are: a judicial or administrative proceeding with its basis in insolvency-related law of the enacting State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding. Subparagraph (a) is also discussed in the JP [paras. 32, 59–61, 70–92].
 3. Although discussed separately below, courts have confirmed that the characteristics of the subparagraph are cumulative and should be considered as a whole.³ The inquiry to be made is factual in nature and, in view of article 8, the elements should be interpreted and applied in the light of their international origins.⁴

Collective judicial or administrative proceeding

Judicial or administrative proceeding

4. The first requirement is that the foreign proceedings be either judicial or administrative in nature. Several courts have discussed this requirement and suggested that only one of those characteristics is required, even if some proceedings have both judicial and administrative elements.⁵ As to what constitutes a “proceeding”, few courts have considered that question in the context of insolvency. One court that did suggested that in the context of corporate insolvencies, the hallmark of a “proceeding” was “a statutory framework that constrains a company’s actions and that regulates the final distribution of a company’s assets”.⁶

Collective proceeding

5. The GEI [paras. 69–72] and the JP [paras. 71–78] discuss what is intended by the requirement that the insolvency proceeding be “collective”. The GEI indicates that the notion of a “collective” insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the MLCBI be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State,⁷ or as a tool for gathering up assets in a winding up or conservation proceeding that does not also include provision for addressing the claims of creditors. The MLCBI may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the MLCBI. If a proceeding is collective it must also satisfy the other elements of the definition, including that it be for the purpose of liquidation or reorganization.

6. The GEI [para. 70] also indicates that in evaluating whether a given proceeding is collective for the purpose of the MLCBI, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors.⁸ However, a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors’ rights is unaffected by it. An example would be insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law.

7. Courts have identified “collective” proceedings as having various characteristics, including:

(a) Imposition of an orderly regime⁹ that affects the rights and obligations of all creditors¹⁰ and all of the assets

of the debtor.¹¹ A proceeding would “affect” all creditors if it realized assets for the general benefit of all creditors.¹² The rights and obligations of all creditors must be taken into account,¹³ not just those of the petitioning creditor;¹⁴

(b) All creditors need not receive a share of the distribution – by addressing potential distribution to other creditors, a foreign representative could acknowledge their overall duty to creditors in general.¹⁵ Where assets are distributed, it should be in accordance with statutory priorities.¹⁶ The fact that a debtor’s assets might be entirely leveraged, leaving nothing for distribution to creditors, would not affect the collective nature of the proceeding;¹⁷

(c) Interested parties should not be able to individually enhance their position by exploiting some fortuitous circumstance which may yield an unfair advantage;¹⁸

(d) Creditor participation must be a reality;¹⁹ this requirement might be satisfied where, notwithstanding that the governing law did not provide for creditor participation, it could be shown that, in practice, unsecured creditors did have a voice and could object to any scheme that was put before the administrative authority to be confirmed or sanctioned;²⁰

(e) Creditors should also have the opportunity to seek appellate review of the proceeding;²¹

(f) Adequate notice should be provided to creditors, including general unsecured creditors, under the applicable foreign law²²

Receiverships

8. Specific questions have arisen in several cases as to whether a receivership can be considered a collective proceeding. Courts have suggested the need to look at the terms of the specific receivership; the fact that some may be classified as insolvency proceedings did not mean that all receiverships would be collective proceedings for the purposes of the MLCBI.²³ In several cases, a foreign receivership was held not to be an insolvency or collective proceeding on the basis that it did not require the receivers to consider the rights and obligations of all creditors (and was thus not “collective”) and was designed primarily to allow a certain party to collect its debts²⁴ or followed regulatory intervention “to prevent a massive ongoing fraud” to prevent detriment to investors and did not include authority to liquidate and distribute assets to satisfy creditor claims.²⁵ In another case concerning one of the same debtors, the court expressed the view that the receivership was collective because it had been instituted at the request of the regulator for the benefit of all of the investor-victims and creditors of the debtor entities.²⁶

9. One court recognized a foreign receivership as amounting to a foreign proceeding relying, under article 16, paragraph 1, on the foreign court’s declaration that the receiver was the foreign representative of a foreign proceeding and was specifically authorized to seek recognition in the receiving State.²⁷

Pursuant to a law relating to insolvency²⁸

10. The GEI [para. 73] explains that the MLCBI includes the requirement that the foreign proceeding be “pursuant to a law relating to insolvency” to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g., company law), but that nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained²⁹ and irrespective of whether the law that contained the rules related exclusively to insolvency.³⁰ The GEI explains that a simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress for the purposes of article 2, subparagraph (a). One court has adopted this view.³¹ Another court has indicated that the fact that a foreign court may subsequently make orders which bring into force a process that can be recognized as an insolvency proceeding is immaterial unless and until it does so (see article 18). The principles of the common law and equity, the court said, do not “relate to insolvency” unless and until they are activated for that purpose.³² The JP [paras. 79–83] also discusses this requirement.

11. A scheme of arrangement was found to be a proceeding pursuant to a law relating to insolvency, where insolvency was interpreted in the recognizing State to include a company that was “reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring.”³³ A liquidation commenced in the originating State on just and equitable grounds against an insolvent debtor based upon regulatory misbehaviour was found to be pursuant to a law relating to insolvency;³⁴ “just and equitable grounds” under the relevant legislation included insolvency, as well as infringements of regulatory requirements. Another court also found that a law might be one “relating to insolvency” where it dealt with winding up on grounds that included insolvency, even though, in a particular case, the winding up proceeded on a ground that was not itself apparently concerned with the insolvency of the company (i.e., that it was just and equitable to wind up the company) and without any finding (express or implied) of insolvency.³⁵ The relevance of article 31 of the MLCBI to this issue has also been noted, the court observing that that article assumed a foreign proceeding could be recognized without a finding of insolvency and there was no suggestion in article 31 that a subsequent displacement of the rebuttable presumption of insolvency made the recognition invalid.³⁶ In another case, the court decided that the mere fact that a subsidiary or affiliate company or companies not subject to any threat of insolvency on its own may be joined in the same foreign proceeding as a holding or other group company

subject to such a threat did not mean that the proceeding was not brought under a law relating to insolvency.³⁷

In which the assets and affairs of the debtor are subject to control or supervision by a foreign court

12. The GEI [para. 74] notes that the MLCBI specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. The GEI indicates that although it is intended that the control or supervision required under article 2, subparagraph (a), should be formal in nature, it may be potential rather than actual. The JP [paras. 84–90] also discusses this requirement.

13. Courts have indicated that control or supervision may be exercised not only directly by the court, but also indirectly by an insolvency representative where, for example, the insolvency representative itself is subject to control or supervision by the court or other regulatory authority.³⁸ The GEI [para. 74] suggests that mere supervision of an insolvency representative by a licensing authority would not be sufficient.

14. Courts have indicated that the requirement for control and supervision can be met in a variety of situations in which the courts do not direct the day-to-day operations of the debtor,³⁹ including where liquidators can proceed with their duties largely without court involvement; where the relevant law gives the court various control and supervisory roles with respect to liquidation proceedings;⁴⁰ where the court may ultimately become involved because the debtor is found to be insolvent and the nature of the proceeding has to change;⁴¹ and where the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor in possession.⁴² Cases involving judicial management by a court on regulatory grounds, for example pursuant to insurance regulations, and judicial winding-up on just and equitable grounds,⁴³ have been found to satisfy this requirement of article 2.⁴⁴ It has also been suggested that if it could be concluded that overall a proceeding was subject to the control and supervision of the court, it was irrelevant that the Government of the originating State also had powers in relation to the proceeding.⁴⁵ In a case concerning the insolvency of an insurance company, the recognizing court found that the body with oversight of the insurance industry was a body competent to control or supervise the assets and affairs of the debtor.⁴⁶

15. Courts have confirmed that both the assets and affairs of the debtor must be subject to control to meet the definition.⁴⁷

16. The GEI [para. 75] notes that proceedings in which the court exercises control or supervision at a late stage of the insolvency process or in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so, should not be

excluded. An example of the latter might be a case where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceeding nevertheless remains open or pending and the court retains jurisdiction (e.g., to settle any dispute over the interpretation of the plan or to oversee the debtor's performance pursuant to the plan) until implementation is completed.⁴⁸

For the purposes of liquidation or reorganization

17. The GEI [para. 77] indicates that some types of proceeding that may satisfy certain elements of the definition of foreign proceeding may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. They may take various forms, as indicated in the GEI, including proceedings that are designed to prevent dissipation and waste, or to prevent detriment to investors, rather than to liquidate or reorganize the insolvency estate; or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization or are limited to doing no more than preserving assets. The GEI [para. 78] indicates some of the types of procedure that might not be eligible for recognition. The JP [paras. 91–92] also discusses this requirement of subparagraph (a).

18. Courts have confirmed that proceedings designed to prevent dissipation and waste, or to prevent detriment to investors, rather than to liquidate or reorganize the insolvency estate,⁴⁹ proceedings in which the foreign representative does not have the authority to liquidate and distribute assets to satisfy creditor claims⁵⁰ and proceedings designed to allow a certain party to collect its debts,⁵¹ do not satisfy this requirement of article 2.

19. In considering this requirement, it has been suggested that it may be appropriate for the court to take account of circumstances arising after the application for recognition is made, as contemplated by article 18, subparagraph (a). If, for example, the foreign court makes further orders after that time and the foreign proceeding then becomes one for the purposes of liquidation or reorganization, that fact should be taken into account by the court considering the application for recognition.⁵²

20. In a case where recognition was sought for proceedings relating to the insolvency of a branch entity, it was argued that those proceedings could not be for the purposes of liquidation or reorganization of the debtor as a whole, as the branch insolvency did not have a comprehensive impact resulting in overall reorganization of the debtor. In rejecting that argument, the court said that article 21, paragraph 3, recognized that the scope of non-main proceedings might be less than all-encompassing and that the scope of the foreign proceeding was to be considered in fashioning appropriate relief.⁵³

ARTICLE 2, SUBPARAGRAPH (b): FOREIGN MAIN PROCEEDING

(b) “Foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

21. The GEI [paras. 81–84]⁵⁴ discusses the origin of the term and the reference to COMI. It notes the relevance of COMI to the EIR and includes material from the Virgos-Schmit Report in relation to its interpretation.⁵⁵ The meaning of COMI is discussed in detail below in the context of articles 16, paragraph 3 and 17. It is also discussed in the JP [paras. 62, 67–69].

22. Cases considering the definition of “foreign main proceeding” have also looked at the meaning of the words “taking place in the State”. One court has indicated that that phrase refers to the location of the foreign case (*situs*), not the stage of the proceeding (*status*).⁵⁶

ARTICLE 2, SUBPARAGRAPHS (c) AND (f): FOREIGN NON-MAIN PROCEEDING⁵⁷ AND ESTABLISHMENT

(c) “Foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(f) “Establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

23. In an early decision under legislation enacting the MLCBI,⁵⁷ the court recognized a foreign proceeding as a non-main proceeding because, notwithstanding that the debtor did not have an establishment in the originating State, no other proceedings were pending and the debtor had to be wound up. The court noted that no negative consequences would appear to result from that course of action and there was no objection to that course of action.⁵⁸ Subsequent cases have distinguished that case and emphasized the requirement under article 17, paragraph 2 to decide, when recognizing a foreign proceeding, whether it is either a main *or* a non-main proceeding (emphasis added);⁵⁹ if it is neither a main nor a non-main proceeding, recognition should be denied.⁶⁰ On that basis, a proceeding that failed to qualify as a main proceeding would not automatically be a non-main proceeding; for recognition as a non-main proceeding, it would have to meet the requirements of the definition in subparagraphs (c) and (f).

24. The GEI [art. 2, para. (c) [para. 85], and art. 2, para. (f) [paras. 88–90]]⁶¹ explains the origin of the concept of “establishment” in article 2, paragraph (h), of the European Convention, the precursor of the EIR. That concept was revised in the EIR recast to add a time requirement.⁶² The concept is also discussed in the JP [para. (c) [para. 64] and para. (f) [paras. 136–143]].

25. Under the EIR, the question of whether or not the debtor has an establishment in a particular State is to be determined, according to ECJ, in the same way as the location of a debtor's COMI, i.e., on the basis of objective factors that are ascertainable by third parties.⁶³ The GEI [para. 90] notes that under the MLCBI the inquiry as to whether the debtor has an establishment is a purely factual one and will thus turn on the specific evidence adduced; unlike "foreign main proceeding" there is no presumption to assist with that inquiry. In a case decided under the MLCBI, the court emphasized that the definition of "establishment" must be read as a whole, not broken down into discrete elements as each element coloured the others.⁶⁴

Interpretation of words and phrases

"Place of operations" and "economic activity"

26. The Virgos-Schmit Report on the European Convention [para. 7.1] provides some further explanation of the terms "place of operations" and "economic activity":⁶⁵

Place of operations means a place from which economic activities are exercised on the market (i.e., externally), whether the said activities are commercial, industrial or professional.

The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an "establishment". A certain stability is required. The negative formula ("non-transitory") aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor.

27. Interpretation by courts⁶⁶ of those paragraphs from the Virgos-Schmit Report suggests that the following two elements are required to satisfy the definition of establishment or show the existence of an establishment:

(a) Some activity external to the company itself, and which is apparent to the outside world; internal activities which do not operate on the market are insufficient;

(b) That there be somewhere that amounts to a *place* (emphasis in original) of operations or shows the existence of an establishment; operations by themselves not linked to some sort of location are insufficient. Thus, a collection of "roving salesmen" without connection to a location from which such activities could be said to be conducted, was found to be insufficient. In a case decided under the MLCBI, the court said what was envisaged was a fixed place of business.⁶⁷

28. In a case decided under the EIR, the court said that "economic activity" did not imply external market activity – the parent of the local subsidiary was already subject to insolvency proceedings in another jurisdiction and external market activities were inconsistent with the

generality of companies in liquidation, which by definition did not engage in external market activities. That was not to say, the court went on to indicate, that the activities did not have to be outward in the sense of enabling the existence of its establishment to be ascertained by third parties on the basis of objective factors.⁶⁸

29. In a case decided under the MLCBI, the court said the terms "operations" and "economic activity" required that a local effect on the marketplace had to be shown.⁶⁹

*"Human means" and "goods"*⁷⁰

30. The ECJ has observed⁷¹ that the fact the definition in the EIR links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organization and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an "establishment". Other cases decided under the EIR indicate that the reference to "human means" is not limited to employees of the debtor, but could include people employed by another group company⁷² or independent contractors⁷³ on the basis that they are all human instruments through which economic activity can be conducted.⁷⁴ It has been suggested that the words "goods" can be interpreted more widely than "chattels" and would be better rendered as "assets", so that land and money would qualify.⁷⁵

"Non-transitory activity"

31. The GEI [para. 90] suggests that there is a legal issue as to whether the term "non-transitory" in the MLCBI refers to the duration of a relevant economic activity or to the specific location at which the activity is carried out. Several courts have equated non-transitory economic activity under the MLCBI with the debtor having, where it is a legal entity (see below for natural persons), a local place of business or a "seat for local business activity",⁷⁶ which consists in dealings with third parties and not acts of internal administration.⁷⁷

32. In a case decided under the EIR, the court said that the concept of "non-transitory" was intended to encapsulate such things as "the frequency of the activity, whether it was planned or accidental or uncertain in its occurrence, the nature of the activity and the length of time of the activity itself".⁷⁸

33. Activities carried out in a particular location but considered by some courts to be insufficient to establish conduct by the debtor of non-transitory activity in that location for the purposes of the MLCBI, either alone in various combinations, have included:⁷⁹

- (a) The fact of incorporation and record-keeping;
- (b) Retention of counsel and accountants;
- (c) The maintenance of property;
- (d) The conduct of auditing activities;
- (e) The preparation of incorporation papers;

(f) The conduct of investigations by the provisional liquidators into whether antecedent transactions could be avoided and reporting to the court;

(g) The conduct or pendency of insolvency and similar types of proceeding;

(h) The activities of judicial managers conducted pursuant to their appointment.

Establishment – natural persons

34. The difficulties inherent in identifying an establishment for a natural person debtor are recognized in the GEI [para. 61],⁸⁰ which suggests that an enacting State might wish to exclude from the scope of application of the MLCBI insolvencies that relate to natural persons residing in an enacting State, whose debts had been incurred predominantly for personal or household purposes (as opposed to commercial or business purposes) or those that relate to non-traders.⁸¹ It has been suggested by one court that those observations reflect the fact that UNCITRAL is primarily concerned with trade and the need, for economic reasons, to provide workable mechanisms to resolve cross-border insolvencies involving trading entities with assets or liabilities in different States.⁸²

35. With respect to natural persons, courts have considered whether the same test of establishment as applicable to a legal entity should or could apply or whether it should be some lesser test. The mere presence of assets in a given location has been held, by itself, not to constitute a place of operation. Equating a corporation's principal place of business to an individual debtor's primary or habitual residence, the court said a place of business could conceivably align with the debtor having a secondary residence or possibly a place of employment in the country where the foreign representative claimed the debtor had an establishment.⁸³

36. Where the debtor had carried on a business in the originating State and could thus be subject to its insolvency law on the basis that the debtor was still in the process of winding up business activities there, the receiving court held that was not a reason for finding the debtor had an establishment in the originating State, i.e., a place of operations from which "a non-transitory economic activity with human means and goods or services" was carried out, as required by article 16, paragraph 3.⁸⁴

ARTICLE 2, SUBPARAGRAPH (d): FOREIGN REPRESENTATIVE

(d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

37. The GEI [para. 86] notes that article 2, subparagraph (d), recognizes that the foreign representative may be a person authorized in the foreign proceedings either to administer

those proceedings, which the GEI suggests would include seeking recognition, relief and cooperation in another jurisdiction, or for the purposes of representing those proceedings. The JP [paras. 32–38] also discusses this requirement. Since the MLCBI does not specify that the foreign representative must be authorized *by the foreign court* (emphasis added), the GEI [para. 86] notes that the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court.⁸⁵ The GEI [paras. 71, 74, 86]⁸⁶ also indicates that the definition would include debtors who remain in possession after the commencement of insolvency proceedings, as well as interim appointments [paras. 79–80]. Article 16, paragraph 1, enables the court to presume the facts indicated in the documents provided under article 15, paragraph 1, which includes those concerning the appointment of the foreign representative (see article 15).

38. Courts have indicated that the focus is upon the authorization being provided "in the context of" or "in the course of" the proceeding, rather than upon the body providing the authorization, which might include the court, the law or even appointment by the debtor itself,⁸⁷ such as an appointment made by the board of directors of the debtor.⁸⁸ The disjunctive in subparagraph (d), that the person be authorized to administer *or* to represent (emphasis added) has also been noted.⁸⁹ It has also been observed that provided the foreign representative is appointed and authorized, there is no requirement in article 2, subparagraph (d), for them to satisfy a disinterested test or to be free of conflict of interest.⁹⁰

39. While the MLCBI does not define the words "person" or "body", courts have found that a foreign representative might be a firm of accountants, if otherwise qualified, on the basis that a firm can constitute a "person" as required by subparagraph (d),⁹¹ and a "body" has been interpreted as meaning "an artificial person created by a legal authority" (citing Black's law dictionary).⁹² The GEI [para. 86] indicates that the fact of appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the MLCBI.

40. Where the first arm of the definition is relied upon, the foreign representative must have the power to administer the reorganization or liquidation of the debtor's assets or affairs at the time of the application for recognition.⁹³ In one case, a receiver was found not to be a "foreign representative" as defined, because no authorization had been provided, at that stage of the receiver's appointment, to administer a liquidation or reorganization of the debtor company.⁹⁴ Where a foreign representative does not have those powers at the time of the application for recognition, but is subsequently granted those powers, article 18 could be relevant.

ARTICLE 2, SUBPARAGRAPH (e): FOREIGN COURT

(e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

41. The GEI [para. 87]⁹⁵ notes that no distinction is drawn, in the definition of “foreign court”, between reorganization and liquidation proceedings controlled or supervised by a judicial or by an administrative body. That approach was taken to ensure that those legal systems in which control or supervision was undertaken by non-judicial authorities would still fall within the definition of “foreign proceeding”. This definition is also discussed in the JP [para. 84].

42. The following entities have been found by the courts of one State to satisfy the definition:

(a) An administrative agency authorized to function as an administrative tribunal under certain legislation and to exercise powers similar to a court and oversee the possible rehabilitation of debtors under its authority, to regulate fraudulent and preferential transfers and to suspend the operation of contracts, settlements and awards, where parties could appeal adverse decisions of the agency to the courts;⁹⁶

(b) A banking commission that controlled and supervised the liquidation of entities performing banking or securities brokers functions, including acting as a bankruptcy court for the reorganization and liquidation of those entities, where appeals from decisions of the commission could be taken to the court.⁹⁷

OTHER ISSUES

Use of the term “debtor”⁹⁸

43. The MLCBI does not define the term “debtor” as it is not an element of the recognition regime; the MLCBI provides only for recognition of the foreign proceeding at the request of the foreign representative. Nevertheless, there have been cases in which the court has considered whether or not the entity subject to the foreign proceeding is a debtor for the purposes of the law to be applied by the receiving court.

44. In one case, the court decided that a debtor that qualified as such under the law of the originating State would qualify for recognition even though it was not a debtor under the law of the receiving State.⁹⁹ In another case, the court said that as to whether the company was a debtor, no separate attention

had been given to that requirement in other cases and the expression was not defined in the MLCBI. Each of the courts whose decisions on recognition applications were considered had, the court said, apparently been content to work on the basis that an entity subject to a foreign proceeding was, for that reason alone, within the relevant “debtor” concept.¹⁰⁰

Enterprise groups¹⁰¹

45. The MLCBI addresses itself to multiple proceedings concerning a single debtor. It does not address multiple proceedings affecting different members of an enterprise group or the enterprise group as a single entity. Nevertheless, it has found wide application in situations where there are multiple debtors that might be members of an enterprise group where each of those individual entities had their COMI or an establishment in the originating State.

46. In a case involving foreign special administration proceedings, the receiving court suggested that while enterprise group aspects of the foreign law governing that proceeding were novel, the recognition applications dealing with nine separate entities that each had their COMI in the foreign State did not push the boundaries of cross-border insolvency law.¹⁰² In another case where a group included entities from different States that had operated as integrated entities to some extent, the receiving court considered the various connections between the group members and the States and found that none of those indicated a place of operations from which market-facing activities were conducted, and there was therefore no establishment for certain members of the group in the originating State.¹⁰³ In a case where the applicant for recognition treated different group members as one, the receiving court found that it was essential to observe the separate legal personalities of those members and to treat each entity on its own, unless there was sufficient reason shown to deal with them as one (which in this case there was not).¹⁰⁴ In the context of foreign proceedings concerning a company and controlled affiliates, the receiving court found there was nothing in the legislation enacting the MLCBI in that State that would prevent recognition of those proceedings being sought with respect to a particular individual debtor.¹⁰⁵

Notes

¹ GE [paras. 67–75].

² GE [paras. 23–25, 67–71].

³ *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 23], CLOUT 1003.

⁴ *United States*: Betcorp Limited 400 B.R. 266, 276 (Bankr. D.Nev. 2009), CLOUT 927.

⁵ *Australia*: Raithatha v Ariel Industries PLC [2012] FCA 1526 [paras. 31–33] – in reaching its conclusion that the creditor’s voluntary liquidation in England was a foreign proceeding, the court considered the powers of the liquidator under the relevant legislation and of the court. The court also said that the judicial or administrative proceeding requirements could not be divorced from the additional requirement that the proceeding be “pursuant to a law relating to insolvency”. *England*: New Paragon Investments Limited [2012] BCC 371 [para. 7], CLOUT 1272 – court found that “foreign proceeding” included an extrajudicial or administrative proceeding provided it related to liquidation. *United States*: Betcorp Limited 400 B.R. 266, 280–281 (Bankr. D. Nev. 2009), CLOUT 927 – administrative aspects of the proceeding (a voluntary winding up) included sending notice of the liquidation and requesting proofs of debt payments to creditors. In the absence of creditor objection, the court said the entire voluntary winding up may be a purely administrative proceeding. Where the actions of the liquidator were reviewed by the court, the process became judicial; if there were insufficient funds, the winding up would have to be converted to a form of administration requiring more judicial involvement; ABC Learning Centres Limited 728 F.3d 301, 308 (3d Cir. 2013), CLOUT 1338.

⁶ *United States*: Irish Bank Resolution Corporation (IBRC) Limited, 538 B.R. 692, 697 (D. Del 2015), CLOUT 1628 *citing* Betcorp Limited 400 B.R. 266, 278 (Bankr. D. Nev. 2009), CLOUT 927 – court found a winding up directed by the IBRC was a proceeding, the majority of tasks undertaken by the special liquidator and the Minister of Finance were administrative in nature, any creditor could seek a ruling of the High Court with respect to any question arising in the proceeding, and it was collective in nature because it adopted the same distribution scheme the Companies Act applied to any other corporation; Manley Toys Limited, 580 B.R. 632, 638 (Bankr. D. N. J. 2018); see also discussion below under art. 20, para. 1.

⁷ E.g., *United States*: Betcorp Limited 400 B.R. 266, 281 (Bankr. D. Nev. 2009), CLOUT 927.

⁸ E.g., *United States*: British American Isle of Venice, Ltd. 441 B.R. 713, 719 (Bankr. S.D. Fla. 2010); British-American Insurance Co., Ltd. 425 B.R. 884, 902 (Bankr. S.D. Fla. 2010), CLOUT 1005 – court analysed relevant provisions of the foreign law and the evidence of the foreign representatives as to interpretation and operation of that law; Poymanov, 580 B.R. 55 (Bankr. S.D.N.Y. 2017).

⁹ *England*: Larsen v Navios International Inc. [2011] EWHC 878 (Ch) [para. 23 (j)], CLOUT 1273. *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 903 (Bankr. S.D. Fla. 2010).

¹⁰ Reference is made in some cases to the preamble of the MLCBI (see discussion above), in particular subpara. (c), which provides “Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor”. For example: *Australia*: Tucker, in the matter of Aero Inventory (UK) Limited (No. 2) [2009] FCA 1481, CLOUT 922: an administration of a United Kingdom company was held to be a foreign main proceeding because it affected creditors collectively and not only the private rights and obligations of the immediate parties to the administration; *New Zealand*: Downey v Holland [2015] NZHC 595 [para. 19], CLOUT 1480 – court referred to “all of the debtor’s known creditors”; *United States*: ABC Learning Centers, 728 F.3d 301, 308 (3d Cir. 2013), CLOUT 1338; Manley Toys Limited, 580 B.R. 632, 640 (Bankr. D. N. J. 2018).

¹¹ *Australia*: Katayama v Japan Airlines Corporation [2010] FCA 794 [para. 24].

¹² *United States*: Betcorp Limited 400 B.R. 266, 281 (Bankr. D. Nev. 2009), CLOUT 927; Gold & Honey, Ltd. 410 B.R. 357, 370 (Bankr. E.D.N.Y. 2009), CLOUT 1008.

¹³ *Ibid.*, *United States*: Betcorp; ABC Learning Centres Limited 728 F.3d 301, 309–310 (3d Cir. 2013), CLOUT 1338.

¹⁴ *United States*: Gold & Honey, Ltd. 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009), CLOUT 1008.

¹⁵ *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 903 (Bankr. S.D. Fla. 2010), CLOUT 1005 – the focus of the case was insurance policyholders which had priority over unsecured creditors under the applicable law, but the court noted that unsecured creditors were considered and had a right to be heard in the proceedings; Ashapura Minechem Ltd. 480 B.R. 129, 137 (S.D.N.Y. 2012), CLOUT 1313 – court said that to be for the general benefit of creditors, a proceeding need not ensure that all creditors received a share of the distribution.

¹⁶ *United States*: Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009), CLOUT 1008.

¹⁷ *United States*: ABC Learning Centres Limited 728 F.3d 301, 308, 310 (3d Cir. 2013), CLOUT 1338 – court said there was no exception to recognition based on the debt to value ratio at the time of insolvency.

¹⁸ *England*: Larsen v Navios International Inc. [2011] EWHC 878 (Ch) [para. 23 (j)], CLOUT 1273.

¹⁹ *England*: Stanford International Bank Limited [2010] EWCA 137 (Civ), CLOUT 1003. *United States*: British-American Insurance Co. Ltd. 425 B.R. 884, 902 (Bankr. S.D. Fla. 2010) – the proceeding was found to be “collective”, even though creditor participation was limited and subordinated to the interests of policyholders. In deciding whether a proceeding was collective, the court said it was appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding. Review of the relevant provisions of the Bahamian law relating to judicial management referred to the interests of creditors other than insurance policyholders; British American Isle of Venice, Ltd., 441 B.R. 713, 718–719 (Bankr. S.D. Fla. 2010); ABC Learning Centres Limited 728 F.3d 301 (3d Cir. 2013), CLOUT 1338.

²⁰ *United States*: Ashapura Minechem Ltd. 480 B.R. 129, 140 (S.D.N.Y. 2012), CLOUT 1313.

²¹ *Ibid.*, 141–142.

²² *United States*: British American Isle of Venice, Ltd. 441 B.R. 713, 719 (Bankr. S.D. Fla. 2010); British-American Insurance Co., Ltd. 425 B.R. 884, 903 (Bankr. S.D. Fla. 2010), CLOUT 1005 – court considered the issue of notice and found that notwithstanding the relevant law had no requirement for notice to be given to general unsecured creditors of the appointment of the foreign representative or of actions brought before the court, they would receive notice of the commencement of the winding up phase and could be heard.

²³ *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 20], CLOUT 1003 – court of appeal said that what was important were the powers and duties that had been conferred on the receiver pursuant to their appointment.

²⁴ *United States*: Gold & Honey, Ltd. 410 B.R. 357, 370 (Bankr. E.D.N.Y. 2009), CLOUT 1008; Betcorp Limited 400 B.R. 266, 281 (Bankr. D. Nev. 2009), CLOUT 927; ABC Learning Centres Limited 728 F.3d 301, 308 (3d Cir. 2013), CLOUT 1338 – court held that a liquidation, operating in parallel to a receivership that only represented secured creditors’ interests, was a collective proceeding because the liquidator must distribute assets on a pro-rata basis to creditors of the same priority, even though the receivership that had control of substantially all of the debtor’s assets was not itself a collective proceeding.

²⁵ *England*: Stanford International Bank Limited [2010] EWCA 137 (Civ) [paras. 25–29], CLOUT 1003.

²⁶ *United States*: Stanford International Bank Limited, Civil Action No. 3:09-CV-0721-N (N.D. Tex., July 30, 2012), p. 17, footnote 20.

²⁷ *United States*: Innua Can., Ltd., case No. 09-16362 (Bankr. D.N.J. Apr. 15, 2009), p. 4.

²⁸ The United States equivalent of art. 2, subpara. (a) (United States Bankruptcy Code (11 U.S.C. sect. 101 (23)), adds the words “or adjustment of debt”, making clear that the United States does not require insolvency as a prerequisite. This makes Ch. 15 available to debtors who are in financial distress and may need to reorganize: Millard 501 BR 644, 648–650 (Bankr. S.D.N.Y. 2013) – debtor in a foreign insolvency proceeding need not be insolvent in order to take advantage of Ch. 15 recognition. The court said that it would be inappropriate for it to look behind the judgment of the foreign court to assess the debtors’ insolvency and whether they qualified for relief under the foreign law.

²⁹ E.g., *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 24], CLOUT 1003 – court of appeal observed that the law did not have to be statutory nor did it have to relate exclusively to insolvency. The court said that it was necessary to first identify the law under or pursuant to which the foreign proceeding was brought and was being pursued, then to consider whether that law related to insolvency and whether the other factors to which the definition in art. 2, subpara. (a), referred could be regarded as being brought about “pursuant” to that law.

³⁰ E.g., *United States*: Betcorp Limited 400 B.R. 266, 282 (Bankr. D. Nev. 2009), CLOUT 927 – voluntary liquidation under law of Australia was held to be pursuant to a law relating to insolvency because the nature of the relevant legislation, when considered as a whole, was a law that regulated the whole life cycle of a corporation in Australia, including its insolvency. The court said this element of the definition required neither insolvency nor contemplation that the debts would be adjusted.

³¹ *England*: Sturgeon Central Asia Balanced Fund [2019] EWHC 1215, CLOUT 1819 and [2020] EWHC 123. The court first granted and then rescinded recognition of a “just and equitable” winding up of a solvent company under the Bermuda Companies Act 1981.

³² *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [paras. 25–26], CLOUT 1003.

³³ *Canada*: Syncreon Group B.V., 2019 ONSC 5774 [para. 28]. This is the first decision in Canada recognizing a scheme of arrangement under Part 26 of the United Kingdom Companies Act 2006 c.46 as a foreign proceeding under sect. 45 of the Companies’ Creditors Arrangement Act 1985, enacting the MLCBI in Canada.

³⁴ *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 15], CLOUT 1003 – appeal court noted that one of the reasons for the foreign court’s decision was an important piece of the evidence that the debtor was insolvent and could not be reorganized via the receivership.

³⁵ *Australia*: Chow Cho Poon (Private) Limited [2011] NSWSC 300 [para. 51], CLOUT 1218; *Raithatha v Ariel Industries PLC* [2012] FCA 1526 [para. 41].

³⁶ *England*: Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [paras. 54–55], CLOUT 1819.

³⁷ *England*: Agrokor DD [2017] EWHC 2791 (Ch) [para. 73], CLOUT 1798 – court went on to say that it was in fact insolvency, actual or threatened, of one company that triggered the proceeding and the law under which the proceeding was brought was, accordingly, in principle a law relating to insolvency for that purpose.

³⁸ *United States*: Betcorp Limited 400 B.R. 266, 283–284 (Bankr. D.Nev. 2009), CLOUT 927 – court supervision of the liquidators was found to be sufficient to qualify as a foreign court supervising or controlling the proceeding, even though the control was indirect.

³⁹ *United States*: Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 531 (Bankr. S.D.N.Y. 2008), CLOUT 925; *Ashapura Minechem Ltd.* 480 B.R. 129, 143 (S.D.N.Y. 2012), CLOUT 1313.

⁴⁰ *United States*: Betcorp Limited 400 B.R. 266, 283–284 (Bankr. D. Nev. 2009), CLOUT 927 – a voluntary liquidation proceeding in Australia was found to be subject to supervision by a judicial authority based on three factors: (a) the ability of liquidators and creditors in a voluntary liquidation to seek court determination of any question arising in the liquidation; (b) the general supervisory jurisdiction of courts in Australia or regulatory authorities over the actions of liquidators; and (c) the ability of any person “aggrieved by any act, omission or decision” of a liquidator to appeal to a court in Australia, which could “confirm, reverse or modify the act or decision or remedy the omission, as the case may be”.

⁴¹ *Ibid.*, *United States*: Betcorp, 279 – the court cited the example of a company initiating a voluntary winding up during which it is found to be insolvent, requiring the liquidator to convert to another type of administration that would likely lead to court involvement.

⁴² *GE* [para. 24], *GEI* [para. 71]; *United States*: *Ashapura Minechem Ltd.* 480 B.R. 129, 138 (S.D.N.Y. 2012), CLOUT 1313 – leaving the foreign representative and the board of directors in control of its business and operations was found not to be inconsistent with supervision by a foreign court; see also *Oversight & Control Commission of Avanzit, S.A.* 385 B.R. 525, 533–534 (Bankr. S.D.N.Y. 2008), CLOUT 925; *OAS S.A.* 533 B.R. 83, 96–98 (Bankr. S.D.N.Y. 2015), CLOUT 1629.

⁴³ *Australia*: Chow Cho Poon (Private) Limited [2011] NSWSC 300 [para. 40], CLOUT 1218.

⁴⁴ *United States*: *British-American Insurance Co., Ltd.* 425 B.R. 884, 905 (Bankr. S.D.Fla. 2010), CLOUT 1005 – judicial management imposed by a Bahamian court pursuant to that nation’s insurance regulations was found to qualify as “supervision” by a court or administrative body.

⁴⁵ *England*: Agrokor DD [2017] EWHC 2791 (Ch) [para. 92], CLOUT 1798 – where the proceedings (“extraordinary administration proceedings”) were brought under special legislation passed to address the insolvency of a group of companies that was one of the largest privately owned businesses in Croatia.

⁴⁶ *United States*: *ENNIA Caribe Holdings N.V.*, 594 B.R. 631, 639–640 (Bankr. S.D.N.Y. 2018).

⁴⁷ *United States*: *Gold & Honey, Ltd.* 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009), CLOUT 1008; *Ashapura Minechem Ltd.* 480 B.R. 129, 143 (S.D.N.Y. 2012), CLOUT 1313 – control of assets and affairs was evidenced by the fact that the Indian authority in question could suspend operation of contracts, settlements and awards and impose a set of guidelines on conduct that regulated against fraudulent and preferential transfers; *Oversight & Control Commission of Avanzit, S.A.* 385 B.R. 525, 534 (Bankr. S.D.N.Y. 2008), CLOUT 925 – court said the mere fact that a commission was granted authority from a court in Spain to recover a set-off from an arbitration proceeding for distribution to creditors “plainly demonstrate[d] that the [court] maintains control of [both the debtor’s] assets and affairs”.

⁴⁸ *Ibid.*, *United States*: *Oversight* 535 – court said it may be that the court’s level of control or supervision is reduced, but does not entirely cease.

⁴⁹ *England*: Stanford International Bank Limited [2010] EWCA 137 (Civ) [paras. 25–29], CLOUT 1003.

⁵⁰ *Ibid.*, quoting first instance judge [2009] EWHC 1441 (Ch) [para. 84] – appeal court said the question to be considered was what powers and duties had been conferred or imposed on the receiver by the order commencing the receivership in question.

⁵¹ *United States*: *Gold & Honey, Ltd.* 410 B.R. 357, 370 (Bankr. E.D.N.Y. 2009), CLOUT 1008.

⁵² *United States*: *British-American Insurance Co., Ltd.* 425 B.R. 884, 906 (Bankr. S.D.Fla. 2010), CLOUT 1005 – at the time of the application, no order directing reorganization or liquidation had been made, pending a report by the person appointed as judicial manager. At that stage, the court said, the proceeding would not have been a foreign proceeding. Following provision of the report, the foreign court ordered reorganization. The recognizing court said taking those additional facts into account was consistent with the nature of the recognition process contemplated in arts. 18, subpara. (a), and 17, para. 4, which allowed the court to adjust its ruling based on circumstances arising after recognition.

⁵³ *United States*: *British-American Insurance Co., Ltd.* 425 B.R. 884, 908 (Bankr. S.D.Fla. 2010), CLOUT 1005 – court said Ch. 15 of the United States Bankruptcy Code (11 U.S.C.) envisaged a combination of a main proceeding and any number of non-main. To require each of those proceedings, main and non-main, to be able to result in a global reorganization or liquidation of the debtor, was not consistent with the structure of the legislation.

⁵⁴ GE [paras. 72, 75].

⁵⁵ See above, Introduction, para. 4.

⁵⁶ *United States*: Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 535–538 (Bankr. S.D.N.Y. 2008), CLOUT 925 – court noted that while the word “pending” was used in the United States legislation rather than the words “taking place”, presumably the same meaning as “taking place” was intended; a proceeding would be pending until the court issued an order dismissing or closing it. Where the foreign court had already approved a reorganization plan, the court found that the proceeding was still “pending” for the purposes of the MLCBI, observing that the goals of the MLCBI “would be frustrated if ‘foreign proceeding’ was interpreted in a manner that cut off assistance at a time when cooperation, certainty, fairness, asset values and financial relief were most needed, simply because the debtor successfully prosecuted its reorganization case.”

⁵⁷ It might be noted that sect. 45 (1) of the Companies’ Creditors Arrangement Act 1985 of Canada defines a “foreign non-main proceeding” as a foreign proceeding, other than a foreign main proceeding.

⁵⁸ *United States*: SphinX, Ltd. 351 B.R. 103 (Bankr. S.D.N.Y. 2006), CLOUT 768 – the non-main determination was not appealed and although the appeal court concluded that recognition of a non-main proceeding was a pragmatic choice, it did not consider the statutory requirements for recognition of such proceedings. The case was discussed and distinguished in *Bear Stearns* 374 B.R. 122, 126–127 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794.

⁵⁹ See discussion below under art. 17 on the absence of objection to recognition.

⁶⁰ E.g., *United States*: *Bear Stearns* 374 B.R. 122, 126–127 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794; compare *Schefenacker plc.* case No. 07-11482 (June 14, 2007), unreported, CLOUT 767, in which the United States court granted recognition without deciding whether the foreign proceeding was a main or non-main proceeding because the foreign proceeding clearly qualified as one or the other and the relief sought would be granted in both a main and a non-main proceeding. See also the discussion below under art. 17, para. 2.

⁶¹ *Ibid.*, *United States*: *Bear Stearns*, referencing Daniel M. Glosband, “SphinX Chapter 15 Opinion Misses the Mark”, 25 AM. BANKR. INST. J. 44 (Dec./Jan.2007) at 45 “foreign proceedings are eligible for recognition only if they meet the definitional requirements of either a foreign main proceeding or a non-main proceeding” and at 85 “If the foreign proceeding is not pending in a country where the debtor has its [centre of main interests] or where it has an establishment, then the foreign proceeding is simply not eligible for recognition under Chapter 15” – the court in *Bear Stearns* said recognition must be coded as either main or non-main. See also *New Zealand*: *Williams v Simpson* (No. 5) [2010] NZHC 1786 [2011] NZLR 380 (12 October 2010) [para. 26], CLOUT 1220 – if the requirements are not met and the foreign proceeding is neither main nor non-main, there is no jurisdiction to grant recognition under article 17.

⁶² GE [para. 73].

⁶³ EIR recast, art. 2 (10) provides: “ ‘Establishment’ means ‘any place of operations where a debtor carries out or has carried out in the three-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.’ ”

⁶⁴ *EIR*: *Interdil, Srl v Fallimento Interdil, Srl* [2011] EUECJ C-396/09 [2012] Bus LR 1582.

⁶⁵ *England*: *Videology Limited* [2018] EWHC 2186 (Ch) [para. 79], CLOUT 1823.

⁶⁶ GEI [para. 89].

⁶⁷ *EIR*: *Office Metro Limited* [2012] EWHC 1191 (Ch) [para. 16].

⁶⁸ *England*: *Videology Limited* [2018] EWHC 2186 (Ch) [para. 79], CLOUT 1823.

⁶⁹ *EIR*: *Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2012] EWHC 1413 (Ch) [paras. 22–23].

⁷⁰ *United States*: *British-American Insurance Co., Ltd.* 425 B.R. 884, 915 (Bankr. S.D.Fla. 2010), CLOUT 1005 – court went on to say that that showing requires “more than mere incorporation and record keeping and more than just the maintenance of property”, *cited* in *Creative Finance Ltd.* 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

⁷¹ Several enactments of the MLCBI incorporate changes to the definition of “establishment”, for example, the United States definition of “establishment” does not expressly require the non-transitory activity to be carried on with human means or goods and services as it omits the words “with human means and goods or services”: Bankruptcy Code 11 U.S.C. sect. 1502 (2); Romania defines establishment to mean “any place of operations where the debtor carries out a non-transitory economic activity or an independent profession with human means and goods”: Law No. 637 of 7 December 2002 on regulating private international law relations in the field of insolvency, art. 3 (p) (unofficial English translation on file with the UNCITRAL secretariat); Uganda defines establishment to mean “any place of operations where the debtor carries out a permanent economic activity”: Insolvency Act, 2011, sect. 226 (1).

⁷² *EIR*: *Interdil, Srl v Fallimento Interdil, Srl* [2011] EUECJ C-396/09 [2012] Bus LR 1582 [para. 62].

⁷³ *EIR*: *BenQ Mobile GmbH & Co.* Docket No. 1503 IE 4371/06 Munich (Feb. 5, 2007); *Office Metro Limited* [2012] EWHC 1191 (Ch) [para. 18].

⁷⁴ *EIR*: *Office Metro Limited* [2012] EWHC 1191 (Ch) [para. 18].

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* [para. 19].

⁷⁷ *United States*: *Bear Stearns* 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794 – court referred to the origin of this definition in the EIR, which rejected the presence of assets as a sufficient basis for taking local jurisdiction; in the case in question, the purely administrative functions of a hedge fund that took place in the State in which the proceedings had commenced were insufficient to constitute an establishment; *British-American Insurance Co., Ltd.* 425 B.R. 884, 914 (Bankr. S.D.Fla. 2010), CLOUT 1005.

⁷⁸ *England*: *Videology Limited* [2018] EWHC 2186 (Ch) [para. 79], CLOUT 1823.

⁷⁹ *EIR*: *Office Metro Limited* [2012] EWHC 1191 (Ch) [para. 33].

⁸⁰ *United States*: *Bear Stearns* 389 B.R. 325, 338–339 (S.D.N.Y. 2008), CLOUT 794; *Lavie v Ran* 607 F.3d 1017, 1027 (5th Cir. 2010) and *British-American Insurance Co., Ltd.* 425 B.R. 884, 915 (Bankr. S.D.Fla. 2010), CLOUT 1005 – courts in these cases said that bankruptcy proceedings are intentionally temporary and transitory, they could not be viewed as an industrial or professional activity and while they did pertain to economic matters, they did not comport with the traditional notion of economic activity in the marketplace; followed in *Creative Finance Ltd.* 543 B.R. 498, 521 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

⁸¹ GE [para. 66].

⁸² See exclusions made under art. 1, para. 2, above.

⁸³ *New Zealand: Williams v Simpson* (No. 5) [2010] NZHC 1786 [2011] NZLR 380 [para. 61], (12 October 2010), CLOUT 1220.

⁸⁴ *Australia: Kapila, Re Edelsten* [2014] FCA 1112 [56–57], CLOUT 1475 – court said that the debtor was a transnational insolvent with multifarious litigation and entrepreneurial activities spread over numerous jurisdictions and that his ambulatory behaviour made it difficult to identify his habitual residence, if he had one. His COMI was found to be in Australia, but the court said that his recent business dealings in the United States were sufficient, at least, to constitute an establishment and the proceedings were recognized as foreign non-main proceedings. *United States: Lavie v Ran (In re Ran)* 607 F.3d 1017, 1027 (5th Cir. 2010) [para. 12]; *Kemsley* 489 B.R. 346 (Bankr. S.D.N.Y. 2013), CLOUT 1274 – court said the debtor’s employment was far too loose an arrangement to meet the statutory requirement – he did not have an employment agreement or a regular schedule for using an office in London; it was more in the nature of an informal arrangement between friends and the money received was in the form of an advance rather than compensation for actual work performed; see also *Pirogova*, 593 B.R. 402 (Bankr. S.D.N.Y. 2018).

⁸⁵ *New Zealand: Williams v Simpson* (No. 5) [2010] NZHC 1786 [2011] NZLR 380 [para. 65] (12 October 2010), CLOUT 1220.

⁸⁶ In drafting the definition, the Working Group expressly rejected the requirement that a foreign representative be “[specifically] authorized by statute or other order of court (administrative body) to act in connection with a foreign proceeding.” Report of UNCITRAL Working Group V (Insolvency Law) on the work of its eighteenth session (A/CN.9/419), para. 111. That definition was rejected because of concerns that “the expressions would be unfamiliar and might have the unintended effect of being unduly restrictive, since the list would inevitably be incomplete.” *Ibid.*, para. 112. The Working Group also declined to include the word “specifically” because “it would be unusual for a State to appoint an insolvency representative specifically to act abroad.” *Ibid.*, para. 113.

⁸⁷ GE [para. 24].

⁸⁸ *United States: Vitro S.A.B. de C.V.* 701 F.3d 1031, 1047 (5th Cir. 2013), CLOUT 1310 – 5th Circuit said that while “authorized in a foreign proceeding” was compatible with appointment by a foreign court, it was hardly necessary. The court went on to say that it was equally compatible with being appointed “in the context of” or “during” or “in the course of” a foreign proceeding. Courts have looked at what the foreign representative is authorized to do under the foreign law: the trustee in proceedings in Japan who assumes control over the relevant debtor and has the authority and power to give instructions on behalf of the debtor and to administer the reorganization of the debtor’s assets; *Australia: Katayama v Japan Airlines Corporation* [2010] FCA 794 [para. 23]; an administrator in a *sauvegarde* proceeding in France: *United States: SNP Boat Service S.A. v Hotel Le St. James* 483 B.R. 776, 779 (S.D. Fla. 2012), CLOUT 1314; an “oversight commissioner” appointed by the supervising court in a proceeding in Spain to represent and protect the interests of creditors and assure the debtor’s compliance with its payments obligations under a plan, where that person was also authorized by the court to pursue and recover certain funds for the benefit of the debtor’s creditors and distribution under law of Spain and to be the foreign representative of the debtor and pursue foreign recognition of those proceedings: *United States: Oversight & Control Commission of Avanzit, S.A.* 385 B.R. 525, 540 (Bankr. S.D.N.Y. 2008), CLOUT 925; an administration in England where the foreign representatives were appointed by the court: *Australia: Tucker, in the matter of Aero Inventory (United Kingdom) Limited v Aero Inventory (United Kingdom) Limited* (No. 2) [2009] FCA 1481 [paras. 15–19, 23], CLOUT 922; and a *concurso* in Mexico where the debtor is allowed to appoint its own foreign representative: *United States: Compania Mexicana de Aviacion S.A. de C.V.*, case No. 10-14182 (Bankr. S.D.N.Y. 8 November 2010) – court ruled that the debtor company from Mexico could authorize a person to act as its foreign representative because under the law of Mexico the debtor essentially acted as a debtor-in-possession and managed its own affairs; and *Cozumel Caribe, S.A. de C.V.* 482 B.R. 96 (Bankr. S.D.N.Y. 2012), CLOUT 1311.

⁸⁹ *United States: OAS S.A.* 533 B.R. 83, 93, 98 (Bankr. S.D.N.Y. 2015), CLOUT 1629 – court noted that “debtor-in-possession” was not defined in the MLCBI, but the GEI suggested it included a debtor that retains “some measure of control over its assets” although under court supervision, and was further explained in the Practice Guide, Terms and Explanations, para. 13 (*j*).; *Cell C Proprietary Ltd.*, 571 B.R. 542 (Bankr. S.D.N.Y. 2017) quoting *Vitro S.A.B. de C.V.* 701 F.3d 1031, 1046, 1049 (5th Cir. 2013), CLOUT 1310 – court said that because a debtor-in-possession was able to administer its own reorganization, it was thus able to appoint a foreign representative.

⁹⁰ *Ibid.*, *United States: OAS* 98–99 – court observed that while those words were not explained in the MLCBI, the GEI [para. 86] provided more information. The court also noted that article 2, subpara. (*d*), provided a disjunctive test – the foreign representative had to be authorized to administer the proceeding or to act as its representative; *Grand Prix Associates, Inc.* case No. 09-16545 (Bankr. D.N.J. June 26, 2009) – person was appointed as the foreign representative of the business entities in question; *Innua Canada Ltd.* case No. 09-16362 (Bankr. D.N.J. Apr 15, 2009) – receivership order stated the foreign representative had the capacity for cross-border recognition purposes.

⁹¹ *United States: Poymanov*, 580 B.R. 55 (Bankr. S.D.N.Y. 2017) – court said applicant had not demonstrated foreign representative had acted in bad faith or had any conflict of interest; *OAS S.A.* 533 B.R. 83, 98 (Bankr. S.D.N.Y. 2015), CLOUT 1629.

⁹² *United States: Petition of Ernst & Young, Inc.*, 383 B.R. 773, 777 (Bankr. D.Colo. 2008), CLOUT 790; *Grand Prix Assocs.* case No. 09-16545 (Bankr. D.N.J. May 18, 2009), 6 – the United States Bankruptcy Code, 11 USC 101 (41), defines a “person” to include an “individual, partnership or corporation”.

⁹³ *United States: Oversight & Control Commission of Avanzit, S.A.* 385 B.R. 525, 540 (Bankr. S.D.N.Y. 2008), CLOUT 925; *Innua Can., Ltd.*, case No. 09-16362 (Bankr. D.N.J. Apr. 15, 2009); *Grand Prix Assocs.*, case No. 09-16545 (Bankr. D.N.J. June 26, 2009), p. 6.

⁹⁴ *United States: OAS S.A.* 533 B.R. 83, 98 (Bankr. S.D.N.Y. 2015), CLOUT 1629; see above – art. 2, subpara. (*a*), *For the purposes of liquidation or reorganization.*

⁹⁵ *England: Stanford International Bank Limited* [2010] EWCA Civ. 1441 [para. 29], CLOUT 1003; *United States: Loy*, 448 B.R. 420, 432–433 (Bankr. E.D. Va. 2011) – an order of the foreign court affirming that the foreign representative did have the power to dispose of property once held by the debtor was considered by the receiving court to clarify the grant of powers to the foreign representative and to delineate the starting point for recognition. Without that vesting of power, the court said, it was unclear whether the foreign representative would have been a foreign representative for the purposes of making an application for recognition.

⁹⁶ GE [para. 74].

⁹⁷ *United States: Ashapura Minechem Ltd.* 480 B.R. 129, 143 (S.D.N.Y. 2012), CLOUT 1313.

⁹⁸ *United States: Tradex Swiss AG*, 384 B.R. 34, 42 (Bankr. D. Mass. 2008), CLOUT 791.

⁹⁹ United States Bankruptcy Code, 11 U.S.C. sect. 1502 (1) defines “debtor” as “an entity that is the subject of a foreign proceeding”. In *Drawbridge Special Opportunities Fund LP v Barnet*, 737 F.3d 238, CLOUT 1336, the appeal court (Second Circuit) said that the provision

defining eligibility for the purposes of the Bankruptcy Code must be satisfied before a court could grant recognition of a foreign proceeding under Ch. 15 and that under sect. 109 (a) of the Bankruptcy Code only a person that has a domicile, residence, place or business or property in the United States could be a debtor under the Code. In an oral ruling in *Bemarmara Consulting A.S.*, case No. 13-13037 (KG) (Bankr. D.Del. Dec. 17, 2013) given shortly after appeal court's decision in *Drawbridge*, the court apparently disagreed with the appeal court's (Second Circuit) decision. On a subsequent second application for recognition of the same foreign proceeding in *Drawbridge*, the court held (*Octaviar Administration Pty Ltd.* 511 B.R. 361, 372–73 (Bankr. S.D.N.Y. 2014), CLOUT 1483) that the debtor satisfied those requirements, having demonstrated that it had property in the United States in the form of claims or causes of action and a retainer to secure representation by a United States law firm; see also *Berau Capital Resources Pte. Ltd.* 540 B.R. 80, 82 (Bankr. S.D.N.Y. 2015), CLOUT 1627 – attorney retainer satisfied the eligibility requirement, in addition debtor was an obligor on over \$450 million of United States dollar-denominated debt, subject to New York choice of law and forum selection clauses, which was also held to satisfy the eligibility requirement established in *Barnet*. A number of subsequent United States cases have found that various forms of retainer paid by the debtor satisfied this requirement: *B.C.I. Finances Pty Ltd.* 583 B.R. 288 (Bankr. S.D.N.Y. 2018), *Cell C Proprietary Ltd.*, 571 B.R. 542 (Bankr. S.D.N.Y. 2017), *Mood Media Corp.*, 569 B.R. 556 (Bankr. S.D.N.Y. 2017). See also *Canada: Syncreon Group B.V., Re*, 2019 ONSC 5774 [para. 17] – court found debtor companies met the definition of “debtor company” under s. 2 of the Companies' Creditors Arrangement Act because, inter alia, a “company” included any incorporated company having assets in Canada and the companies had assets in Canada in the form of funds being held on retainer by their legal counsel, which satisfied the requirement of “having assets in Canada”.

¹⁰⁰ *England: Rubin v Eurofinance SA* [2009] EWHC 2129 (Ch) [para. 39] affirmed by [2012] UKSC 46, CLOUT 1270 – rejecting the argument that the words used in the MLCBI should be given their ordinary domestic meanings, the lower court said, noting the importance of art. 8, that it would be perverse to give the word “debtor” in the context of the definition of “foreign proceeding” any other meaning than that given to it by the foreign court in the foreign proceeding. The court went on to consider [para. 41] how the MLCBI would work where the debtor was a legal entity not known under local law.

¹⁰¹ *Australia: Chow Cho Poon (Private) Limited* [2011] NSWSC 300 [para. 40], CLOUT 1218.

¹⁰² The UNCITRAL Model Law on Enterprise Group Insolvency and Guide to Enactment (2019) provides solutions for enterprise group insolvency, including a recognition regime for enterprise group insolvency that draws upon the MLCBI.

¹⁰³ *United States: Agrokor d.d.*, 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018).

¹⁰⁴ *United States: Mood Media Corp.*, 569 B.R. 556, 562–3 (Bankr. S.D.N.Y. 2017) – the evidence showed that the companies as a whole operated as an integrated enterprise to a degree, and that management, financial management, cash management, accounting, treasury, internal audit, legal, risk management, human resources and procurement functions were shared to some extent and that while the companies in the United States paid management fees to the parent company in Canada for services that were provided, transacted for the procurement of professional and administrative services in Canada, were subject to oversight by the directors of the parent company in Canada, were guarantors of debt obligations that were issued in Canada, paid intercompany obligations to the parent company in Canada, and that parent company could employ people who provided services of various kinds to the companies in the United States, the court found none of that sufficed to show that the United States companies maintained a place of operations in Canada from which market-facing activities were conducted; *Suntech Power Holdings Co. Ltd.*, 520 B.R. 399, 415–416 (Bankr. S.D.N.Y. 2014) – court found that the place of business in the United States of the subsidiary of a debtor from China was not the debtor's place of business or assets.

¹⁰⁵ *Singapore: Zetta Jet Pte Ltd and Others* [2018] SGHC 16 at [para. 19], CLOUT 1815.

¹⁰⁶ *England: Agrokor DD* [2017] EWHC 2791 (Ch) [para. 54], CLOUT 1798.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 3 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 159–162]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/422 [paras. 66–67]; A/CN.9/433 [paras. 42–43]; A/CN.9/435 [paras. 114–117];
 - (b) GE (1997): A/CN.9/436 [para. 46]; A/CN.9/442 [paras. 76–78];
 - (c) GEI (2013): A/CN.9/763 [para. 26]; A/CN.9/766 [para. 29].

Notes

¹ GE [paras. 76–78].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 93].

INTRODUCTION

1. The GEI [paras. 91–93]¹ explains the principle of supremacy of international obligations of the enacting State over internal law, a principle modelled on similar provisions of other texts prepared by UNCITRAL. The GEI suggests how this provision might be enacted to avoid the legislation implementing the MLCBI having an inadvertent and excessive effect.

CASE LAW ON ARTICLE 3

2. Reported cases have not dealt with issues of interpretation and application of article 3.

Article 4. [Competent court or authority]^a

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

^a A State where certain functions relating to insolvency proceedings have been conferred upon Government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in the State governing the authority of [*insert the title of the Government-appointed person or body*].

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 4 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 163–166]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/419 [para. 69]; A/CN.9/422 [paras. 68–69]; A/CN.9/433 [paras. 44–45]; A/CN.9/435 [paras. 118–122];
 - (b) GE (1997): A/CN.9/436 [paras. 47–50]; A/CN.9/442 [paras. 79–83].

Notes

¹ GE [paras. 79–83].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 98].

INTRODUCTION

1. The GEI [paras. 94–98]¹ notes the value of article 4 in increasing the transparency and ease of use of the insolvency legislation enacting the MLCBI for the benefit of, in particular, foreign representatives and foreign courts.

CASE LAW ON ARTICLE 4

2. Reported cases have not dealt with issues of interpretation of article 4.

Article 5. Authorization of
 [insert the title of the person or body administering reorganization
 or liquidation under the law of the enacting State]
to act in a foreign State

A [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] is authorized to act in a foreign State on behalf of a proceeding under [identify laws of the enacting State relating to insolvency], as permitted by the applicable foreign law.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 5 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 167–169]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/419 [paras. 36–39]; A/CN.9/422 [paras. 70–74]; A/CN.9/433 [paras. 46–49]; A/CN.9/435 [paras. 123–124];
 - (b) GE (1997): A/CN.9/436 [paras. 51–52]; A/CN.9/442 [paras. 84–85];
 - (c) GEI (2013): A/CN.9/763 [para. 26]; A/CN.9/766 [para. 30].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 100].

INTRODUCTION¹

1. The GEI [paras. 99–100]² explains that the intent of article 5 is to equip insolvency representatives or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings. The article makes it clear that the scope of the power exercised abroad by the insolvency representative would depend on the foreign law and courts.

CASE LAW ON ARTICLE 5

2. One case reported concerned authorization of the liquidator to search for assets abroad for the purposes of freezing and repatriation.³ Authorization was provided by an instruction from the supervising administrative authority, delegating the ability to act abroad to the insolvency representative.

Notes

¹ United States Bankruptcy Code, 11 U.S.C. sect. 1505 (enacting art. 5 of the MLCBI), provides that the authorization to act in another State may be provided by the court.

² GE [paras. 84–85].

³ *Chile: Onix Capital SA cited in Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law on Cross-Border Insolvency*, Fourth Edition, vol. 1, Globe Law and Business, 2017, p. 136.

Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 6 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 170–173]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/419 [para. 40]; A/CN.9/422 [paras. 84–85]; A/CN.9/433 [paras. 156–160]; A/CN.9/435 [paras. 125–128];
 - (b) GE (1997): A/CN.9/436 [para. 53]; A/CN.9/442 [paras. 86–89];
 - (c) GEI (2013): A/CN.9/715 [paras. 26–30]; A/CN.9/738 [para. 32].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 104].

INTRODUCTION

1. The GEI [paras. 101–104]¹ notes that because the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 6. However, it goes on to note that the concept, which is standard in a number of UNCITRAL texts,² has been interpreted narrowly and applied only in exceptional circumstances on a consistent basis in courts around the world. The purpose of the word “manifestly”,³ used in many other international legal texts as a qualifier of the expression “public policy”, is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State. The public policy exception is also discussed in the JP [paras. 48–54].

CASE LAW ON ARTICLE 6

2. Decisions in a number of cases reinforce the notion that the use of the word “manifestly” reflects the intent of the drafters of the MLCBI that article 6 should only be invoked in exceptional circumstances concerning matters of fundamental importance for the enacting State,⁴ and that

the public policy exception should be construed narrowly or restrictively,⁵ consistent with international standards. It has been suggested that the word “manifestly” means something more than mere contrariness or incompatibility; where there is any doubt or confusion as to whether something is contrary to or incompatible with public policy, there cannot be anything “manifestly” contrary to that policy.

3. Article 26 of the EIR⁶ also contains a public policy exception along the lines of article 6. Decisions interpreting article 26 also stress that the exception is only available in exceptional cases.⁷ The ECJ has held that recognition of insolvency proceedings commenced in another European Union member State may only be refused where the decision to commence was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoyed.⁸

4. Since article 6 deals with all of the provisions of the MLCBI, not just with the question of recognition, any application to take action under a specific provision of the MLCBI may require the court to consider whether the action in question would be contrary to the public policy of the enacting State.⁹ However, sparing application of article 6 suggests that the exception could be applied only if another specific provision of the MLCBI did not govern the dispute in question.¹⁰ An example cited was that discretionary relief could only be granted under article 21 if the protections established under article 22 were met.

5. Courts have indicated that the parties objecting to an action to be taken under the MLCBI should identify the fundamental policies that would allegedly be violated by the action.¹¹

6. Three principles have been identified in the case law of one State to guide courts in analysing whether an action taken in a recognition proceeding is manifestly contrary to the public policy of that State under the equivalent of article 6 of the MLCBI:¹²

(a) The mere fact of a conflict between foreign law and local law, absent other considerations, is insufficient to support the invocation of the public policy exception;

(b) Deference to a foreign proceeding should not be afforded in a recognition proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections;

(c) An action should not be taken in a recognition proceeding where taking that action would frustrate the ability of the courts to administer the recognition

proceeding and/or impinge severely on a local constitutional or statutory right, particularly if a party continues to enjoy the benefits of the recognition proceeding.

7. The public policy exception has been argued, almost as a matter of course, in many applications for recognition. However, it has been found to apply in very few situations, as indicated in the following examples:

(a) Recognition was denied on the basis of article 6 in a case where the foreign proceeding seeking recognition had been pursued by a creditor in violation of the automatic stay applicable in prior insolvency proceedings commenced in the receiving State, in spite of the creditor having been made aware of the possible consequences of pursuing the foreign proceeding;¹³

(b) Relief sought was denied on the public policy ground in several circumstances, including:

(i) Where the relief sought (*ex parte*) was contrary to the law of the receiving State – the request was to enforce a mail interception order issued in the foreign insolvency proceedings which would involve monitoring and intercepting the debtor’s postal and electronic traffic on servers in the receiving State;¹⁴

(ii) Where the relief sought by the foreign representative (rejection of intellectual property licences in the receiving State under the applicable foreign law) would result in creditors in the receiving State being insufficiently protected as required by article 22, paragraph 1, because they would not have available to them the protections available to licensees under the law of the receiving State, thereby undermining the fundamental public policy of that State of promoting technological innovation.¹⁵

8. Application of the public policy exception has been rejected in a number of circumstances, including where:

(a) A party was deprived of a jury trial in the originating State (when they would be entitled to such a trial in the receiving State) in circumstances in which the procedures of the originating State were nevertheless found to afford substantive procedural and due process protections and were otherwise fair and impartial;¹⁶

(b) There was no unfettered access to court records in the originating State;¹⁷

(c) Creditors in the receiving State were required to share with creditors in the foreign proceeding when they would not have been required to so share in a proceeding in the receiving State;¹⁸

(d) The foreign proceeding was commenced on a basis that was not available under the law of the receiving State;¹⁹

(e) Review of a default judgment in the originating State could be sought without the posting of a bond;²⁰

(f) The relief sought was different to that available or was not permissible in the receiving State;²¹

(g) The relief requested was to stay a creditor from proceeding against funds in the receiving State pending a determination, in the foreign court where insolvency

proceedings were pending, of the debtor’s and non-debtor affiliates’ rights against those funds. The receiving court ordered the stay but conditioned it on the parties proceeding promptly to determine the issues in the foreign court;²²

(h) The foreign representative had taken directly conflicting positions in the originating and receiving States, without disclosure. Continued recognition was found not to be contrary to the public policy of the receiving State;²³

(i) There was an alleged conflict of interest (i.e., competing fiduciary roles) on the part of the foreign insolvency representative that could have been raised in the appointing State, but the objecting creditor had failed to do so;²⁴

(j) The foreign insolvency prioritized secured creditors differently to the law of the receiving State, which was characterized by the receiving court as another way of achieving similar goals, rather than manifestly contravening public policy;²⁵

(k) Various elements of the foreign insolvency law were argued to be manifestly contrary to public policy; for example, substantive consolidation was ordered *ex parte* in the foreign proceeding without procedural and substantive fairness to certain creditors or due process and judges were able to hold *ex parte* meetings with different parties to the proceedings;²⁶

(l) If required by the terms of the MLCBI and the national enacting law, funds held in the receiving State could be remitted to the originating State, without payment of outstanding taxes in the receiving State;²⁷

(m) It was argued that creditors had not received notice of the foreign proceeding, recognition would result in a stay that would permit the debtor to avoid complying with other court orders and prevent creditors from pursuing fraudulent transfer claims in the originating jurisdiction and the liquidators in the foreign proceeding were not independent as they were funded by creditors or insiders;²⁸

(n) Because the receiving court limited questioning during the recognition hearing about an arbitration on the basis that it was not relevant to the question before the court, it was argued it had violated the public policy favouring openness and transparency in court.²⁹

Public policy: full and frank disclosure and bad faith
(*see also article 17*)

9. Application of the public policy exception has been argued in several cases involving bad faith or failure on the part of the foreign representative to fully and frankly disclose pertinent facts to the receiving court. It has been held that notwithstanding a finding of bad faith on the part of the debtors, it was inappropriate to invoke article 6 as there was no precedent for applying the exception on the sole ground of misbehaviour. The court in that case went on to say that although it was offended by the conduct of the debtors, the question of recognition, on the facts of the case before it, turned on compliance with the requirements of article 17.³⁰ In another case, the applicant for recognition did

not disclose facts relating to the decision by the Government of the receiving State not to assist in criminal proceedings in the originating State against certain parties on the basis that to do so would be likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the receiving

State. The court found that it should have been told that public policy issues might be engaged as the result of the highly political nature of the case and dismissed the recognition order *ab initio*.³¹

Notes

¹ GE [paras. 86–89].

² E.g., the 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, article 36 (1) (b) (ii), pp. 183–185, available at <https://uncitral.un.org>.

³ It might be noted that some jurisdictions, such as Chile, Serbia and Singapore, have omitted the word “manifestly” when enacting art. 6 of the MLCBI, leading to a potentially different standard of exclusion than that applicable under the MLCBI. With respect to Singapore, see *Re: Zetta Jet Pte Ltd and Others* [2018] SGHC 16 [paras. 22–23], 24 January 2018, CLOUT 1815; in Poland, the formulation of art. 6 provides that recognition of a ruling opening foreign proceedings cannot contravene basic principles of the legal order of Poland, although it is suggested the aim is the same as art. 6: Bankruptcy Law, 1 January 2016 (art. 392 (2)).

⁴ *United States*: Millard 501 B.R. 644, 651–652 (Bankr. S.D.N.Y. 2013); *Lavie v Ran* 607 F.3d 1017, 1021 (5th Cir. 2010); *Iida v Kitahara (In re Iida)* 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007), CLOUT 761; *Ephedra Prods. Liab. Litig.* 349 B.R. 333, 336 (S.D.N.Y. 2006), CLOUT 765.

⁵ *Canada*: Hartford Computer Hardware Inc. 2012 ONSC 964 [paras. 17–18], CLOUT 1205. *United States*: Legislative history to Bankruptcy Code (11 U.S.C.), Ch. 15 indicates this interpretation: H.R. Rep 109–31 pt. 1, 109th Cong. 1st Sess. at 109 (2005) reprinted in U.S.C.C.A.N. 88, 172; see also *Ephedra Prods. Liab. Litig.* 349 B.R. 333, 336 (S.D.N.Y. 2006), CLOUT 765; *Tri-Continental Exchange, Ltd.* 349 B.R. 627, 638–9 (Bankr. E.D. Cal. 2006), CLOUT 766; *Iida v Kitahara (In re Iida)* 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007), CLOUT 761; *Metcalfe & Mansfield Alternative Invs.* 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010), CLOUT 1007; *Toft* 453 B.R. 186, 193 (Bankr. S.D.N.Y. 2011), CLOUT 1209; *Vitro S.A.B. de C.V.* 701 F.3d 1031, 1069–70 (5th Cir. 2013), CLOUT 1310; *Morning Mist Holdings Ltd. v Kryz (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 139 (2d Cir. Apr. 16, 2013), CLOUT 1339; *Sino-Forest Corporation* 510 BR 655, 665 (Bankr. S.D.N.Y., 2013) following *Metcalfe & Mansfield Alternative Invs.* 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010), CLOUT 1007 and *distinguishing Vitro S.A.B. de C.V.* 701 F.3d 1031, 1069–70 (5th Cir. 2013), CLOUT 1310 on protection of third-party releases.

⁶ *England*: *Agrokor DD* [2017] EWHC 2791 (Ch) [para. 109], CLOUT 1798.

⁷ Article 33 of the recast EIR, which provides “Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgement handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.”

⁸ *EIR*: *MG Probud Gdynia sp. z o. o.*, C-444/07 [2010] ECR 00.

⁹ *EIR*: *Eurofood IFSC Ltd (Re)* [2006] Ch 508 (ECJ) [paras. 61–67].

¹⁰ *England*: *Pan Ocean Co. Ltd* [2014] EWHC 2124 (Ch) [para. 104], CLOUT 1482.

¹¹ *United States*: *Toft* 453 B.R. 186, 195–196 (Bankr. S.D.N.Y. 2011), CLOUT 1209 – court indicated that it was not an issue of fashioning relief in a manner that sufficiently protected all interested parties, but rather one where the relief sought (a mail interception order) would directly contravene United States law and public policies.

¹² *United States*: *Iida v Kitahara (In re Iida)* 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007), CLOUT 761 – debtors failed to articulate any fundamental policy that would be offended by recognition.

¹³ *United States*: *Toft* 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011), CLOUT 1209; *ABC Learning Centre Limited* 728 F.3d 301, 309–311 (3d Cir. 2013), CLOUT 1338; *Manley Toys Limited*, 580 B.R. 632, 650 (Bankr. D. N. J 2018) (noting the laws of Hong Kong, China, on fraudulent transfers are not the same as those of the United States).

¹⁴ *United States*: *Gold & Honey, Ltd.* 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009), CLOUT 1008 – debtor’s assets were seized in proceedings in Israel, undermining the United States court’s ability to conduct the earlier commenced United States insolvency proceedings, hindering that court’s ability to carry out two of the most fundamental policies and purposes of the automatic stay – namely, preventing one creditor from obtaining an advantage over other creditors and providing for the efficient and orderly distribution of a debtor’s assets to all creditors in accordance with their relative priorities. See also *Singapore*: *Re: Zetta Jet Pte Ltd and Others* [2018] SGHC 16, CLOUT 1815 where a moratorium issued in Singapore enjoining further action in the United States Ch. 11 proceedings was not observed. The Singapore court said that at the very least it would interpret the public policy bar in Singapore (noting that the legislation enacting the MLCBI omits the word “manifestly”) as requiring denial of an application for recognition by foreign insolvency representatives enjoined by a Singapore court. Although the court said it would be rare in such circumstances not to refuse recognition, it accorded recognition for the limited purpose of applying to set aside or appeal the Singapore injunction, characterizing that recognition as a form of modification under article 17 (4) or as a manner of relief under article 21 (1).

¹⁵ *United States*: *Toft* 453 B.R. 186, 196 (Bankr. S.D.N.Y. 2011), CLOUT 1209 – the court held that such powers would exceed the traditional limits on the powers of a trustee under United States law, constitute relief that was banned by statute in the United States and might subject anyone who carried it out to criminal prosecution. The mail interception order issued in the insolvency proceedings in Germany had been recognized and enforced in England on the basis that (a) the relief granted in Germany did not violate public policy of the United Kingdom because, under local law, the court could enter a mail redirection order similar to the one entered in Germany, and (b) there should be no concern about lack of procedural fairness in granting ex parte relief, because the debtor had been able to oppose the mail interception order in the proceeding in Germany, and his challenge had been rejected by the court in Germany [Order by the High Court of England and Wales, 16 February 2011].

¹⁶ *United States*: *Jaffé v Samsung Electronics Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013), CLOUT 1337.

¹⁷ *United States*: Ephedra Prods. Liab. Litig. 349 B.R. 333 (S.D.N.Y. 2006), CLOUT 765.

¹⁸ *United States*: Morning Mist Holdings Ltd. v Kryss (*In re* Fairfield Sentry Ltd.) 714 F.3d 127, 140 (2d Cir. Apr. 16, 2013), CLOUT 1339 – the court found that the principle of public access to court documents, because it was not absolute and could easily give way to privacy interests or other considerations, was not so fundamental as to fall within the exception of art. 6.

¹⁹ *United States*: Petition of Ernst & Young, Inc., 383 B.R. 773 (Bankr. D.Colo. 2008), CLOUT 790 – the court said all investor creditors should share in the assets accumulated in the foreign proceeding, regardless of nationality or locale; objecting parties also argued that the costs of the foreign proceeding would deplete the assets of the debtor to such an extent that distributions would be minimal and that that also was contrary to public policy. The court observed costs were a reality, whether the procedure was foreign or local.

²⁰ *United States*: Gerova Financial Group, Ltd. 482 B.R. 86, 95 (Bankr. S.D.N.Y. 2012), CLOUT 1275 – the foreign law allowed an application by a single creditor, whereas the law of the receiving State required the support of 3 or more creditors when there were more than 12 creditors in total.

²¹ *United States*: Millard 501 BR 644, 650–51 (Bankr. S.D.N.Y. 2013) – it was argued that because the foreign proceeding had been commenced to insulate assets from legitimate claims (a foreign tax claim that was unenforceable in the originating State) and to obtain an unbonded stay, providing assistance to that proceeding was manifestly contrary to public policy.

²² *Canada*: Hartford Computer Hardware (2012) ONSC 964, CLOUT 1205 – the debtor-in-possession facility order made in the originating State, part of which involved a partial “roll up”, would not be permissible in primary proceedings in the receiving State. *United States*: Metcalfe & Mansfield Alternative Invs. 421 B.R. 685, 695–697 (Bankr. S.D.N.Y. 2010), CLOUT 1007 – the court said the relief granted in the foreign proceeding and the relief available in a United States proceeding need not be identical. If that were to be a requirement, the court said, the public policy exception in article 6 would be unnecessary. The issue was whether effect should be given in the United States to third-party releases confirmed in a plan implementation order in Canada. The court held that the order in Canada did not violate United States public policy and should be recognized, even if a similar release might arguably be unenforceable in a United States proceeding.

²³ *United States*: Cozumel Caribe, S.A. de C.V. 482 B.R. 96, 112–113 (Bankr. S.D.N.Y. 2012), CLOUT 1311.

²⁴ *United States*: Cozumel Caribe, S.A. de C.V. 508 B.R. 330, 337 (Bankr. S.D.N.Y. 2014) – receiving court said that serious questions had been raised about the conduct of the foreign representative and the principals of the debtor, but that it was not the court’s role to sit in review of the rulings and conduct of the foreign court proceedings. The court noted that there may be extreme circumstances in which dismissal of a recognition case was justified as an appropriate sanction for misconduct.

²⁵ *United States*: British American Isle of Venice, Ltd. 441 B.R. 713, 718 (Bankr. S.D.Fla. 2010).

²⁶ *United States*: ABC Learning Centres Limited 728 F.3d 301, 310–311 (3d Cir. 2013), CLOUT 1338 – laws in Australia allowed secured creditors to realize the full value of their debts and tender any excess to the liquidators, as opposed to the position in the United States where secured creditors must generally turn over assets and seek distribution from the estate. The court said that rather than recognition being contrary to public policy, refusing recognition and allowing the objecting creditor to use courts in the United States to circumvent the liquidation proceedings in Australia would undermine the core bankruptcy policies of ordered proceedings and equal treatment; see also *England*: Agrokor DD [2017] EWHC 2791 (Ch) [para. 131], CLOUT 1798 where the court noted the priorities under the law of Croatia were different than those applicable under the law of England.

²⁷ *United States*: OAS S.A. 533 BR 83, 104–105 (Bankr. S.D.N.Y. 2015), CLOUT 1629 – court considered the issues in some detail in the light of the actual facts of the case and what had transpired in the foreign proceedings, as well as the provisions of United States law and applicable exceptions. It was satisfied that due process was met because the ex parte proceedings and orders (including the consolidation order) were subject to ex post review. The court quoted United States case law and the GEI [30] to the effect that “differences in insolvency schemes do not themselves justify a finding that enforcing one State’s laws would violate the public policy of another State.”; *Irish Bank Resolution Corporation Limited* 538 B.R. 692, 698 (D. Del 2015), CLOUT 1628 – court disagreed with the contention that the foreign proceeding was contrary to public policy because it discriminated against the United States creditors and deprived them of due process and other constitutional rights in favour of benefiting the Government of Ireland. Court found the provisions objected to were parallel to provisions adopted by the United States in response to the global financial crisis.

²⁸ *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 144–148], CLOUT 1332.

²⁹ *United States*: Manley Toys Limited, 580 B.R. 632 (Bankr. D. N. J 2018).

³⁰ *United States*: Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88, 95 (S.D.N.Y. 2012), CLOUT 1208.

³¹ *United States*: Creative Finance Ltd., 543 B.R. 498, 515–516 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

³² *England*: Ivan Cherkasov, William Browder, Paul Wrench v Nogotkov Kirill Olegovich, The Official Receiver of Dalnyaya Step LLC (in liq) [2017] EWHC 3153 (Ch) [para. 89], CLOUT 1797 – it might be noted that the parties had agreed the recognition order should no longer continue, but it was not agreed whether it should be terminated or declared to have never been valid. With respect to disclosure, the court said [para. 64] that when seeking recognition, full and frank disclosure must be made to the court in relation to the consequences of recognition on third parties who are not before the court, including from intended future applications enabled by recognition.

Article 7. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State] to provide additional assistance to a foreign representative under other laws of this State.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 7 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [para. 175]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
GE (1997): A/CN.9/442 [para. 90].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 105].

INTRODUCTION¹

1. The GEI [para. 105]² explains that it is not the purpose of the MLCBI to displace the provisions of national law to the extent they provide assistance additional to or different from the type of assistance dealt with in the MLCBI.

Article 7 is intended to clarify that point. The discussion under article 21 addresses the relationship between the two articles.

CASE LAW ON ARTICLE 7

2. Courts have considered the types of relief available under the MLCBI and the differences between article 21 and article 7. It has been suggested that “additional relief” under article 7 must be read as being different from “any appropriate relief” available under article 21, paragraph 1: when the requested relief is available under article 21, either generally as “any appropriate relief” or under one of the specific heads listed in the subparagraphs of article 21, paragraph 1, the court does not need to look to article 7, but when the requested relief is not available under article 21, either specifically or generally, article 7 functions as a “catch all” that provides for forms of relief “more extraordinary” than those permitted under either the specific or the general provisions of article 21.³ It is suggested that this framework would prevent courts from subjecting relief under article 7 to the same limitations as relief under article 21 and would avoid “all-encompassing applications” of article 7.⁴ Article 7 has been relied upon in one State to support recognition and enforcement of plans approved by foreign courts.⁵

Notes

¹ The United States Bankruptcy Code, 11 U.S.C. sect. 1507, enacting art. 7 of the MLCBI, directs that additional assistance be consistent with principles of comity. United States cases focusing on comity are not reported here.

² GE [para. 90].

³ *United States: Atlas Shipping A/S* 404 B.R. 726, 741 (Bankr. S.D.N.Y. 2009), CLOUT 1277; *Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd.)* 601 F.3d 319, 325 (5th Cir. 2010), CLOUT 1006; *Vitro S.A.B. de C.V.* 701 F.3d 1031, 1054-1057 (5th Cir. 2013), CLOUT 1310.

⁴ *United States: Vitro S.A.B. de C.V.* 701 F.3d 1031, 1057 (5th Cir. 2013), CLOUT 1310 – applying this framework to the facts before it, the court affirmed the denial of the foreign representative’s request to enforce an order confirming a reorganization plan from Mexico that novated and in effect released the obligations of subsidiaries of the debtor from Mexico that had guaranteed notes issued by the debtor but had not themselves filed in bankruptcy. The court first determined that art. 21 did not specifically provide for discharging the obligations of non-debtor guarantors. Next, it determined that the general grant of relief in art. 21, para. 1, also did not provide the requested relief because non-consensual, non-debtor releases through a bankruptcy proceeding were “generally not available” under United States law and were “explicitly prohibited” in the Fifth Circuit. Turning to art. 7, the court noted that non-consensual, non-debtor releases were sometimes available in Circuits other than the Fifth, and therefore held that such relief was not precluded under art. 7. The court found, however, that the debtor had failed to provide evidence of the existence of extraordinary circumstances sufficient to establish a case for non-debtor releases under the law of those Circuits that allowed such releases. The court concluded that the Bankruptcy Court had not abused its discretion in denying relief under art. 7. Compare recognition of third-party releases in *Metcalf & Mansfield Alternative Invs.*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010), CLOUT 1007; *Sino-Forest Corp.* 501 B.R. 655 (Bankr. S.D.N.Y. 2013); and *Avanti Communications Group PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018) – these cases have relied upon the extended provisions of art. 7 of the United States Bankruptcy Code (11 U.S.C. sect. 1507).

⁵ *United States: Agrokor d.d.*, 591 B.R. 163 (Bankr. S.D.N.Y. 2018) referring to *Rede Energia S.A.*, 515 B.R. 69, 90 (Bankr. S.D.N.Y. 2014), CLOUT 1630; see also *CGG S.A.*, 579 B.R. 716 (Bankr. S.D.N.Y. 2017); *Cell C Proprietary Ltd.*, 571 B.R. 542 (Bankr. S.D.N.Y. 2017).

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 8 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [para. 174]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) GE (1997): A/CN.9/442 [paras. 91–92];
 - (b) GEI (2013): A/CN.9/715 [paras. 23–25]; A/CN.9/742 [paras. 37–38]; A/CN.9/763 [para. 26]; A/CN.9/766 [para. 30].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 107].

INTRODUCTION

1. The GEI [paras. 106–107]¹ notes that a provision such as article 8 has been included in several UNCITRAL texts² to promote the idea of harmonized interpretation. This is aided by the system of case law on UNCITRAL texts (CLOUT), a system for collecting and disseminating information on court decisions and arbitral awards relating to the conventions and model laws emanating from the work of the Commission. The purpose of the system is to promote international awareness of the legal texts formulated by the Commission and to facilitate their uniform interpretation and application. The system is available at https://uncitral.un.org/en/case_law.³

CASE LAW ON ARTICLE 8

2. Courts have noted that the international origins of the MLCBI and the concept of international cooperation and coordination on which it is based encourage courts to look beyond their own jurisdictions to foreign interpretations of the MLCBI and other extrinsic materials for interpretative guidance, especially where provisions of the MLCBI are unclear or ambiguous.⁴ However, not all States enacting legislation based on the MLCBI have included article 8, as drafted in the MLCBI, in that legislation.⁵
3. In those States that have enacted article 8, the sources most commonly referred to by the courts are the guides to

enactment of the MLCBI as tools for legislators, judges, practitioners, academics and other users of the MLCBI. Under some laws enacting the MLCBI, courts are obliged to treat the guides to enactment as persuasive;⁶ in other States, courts are entitled to look to the guides and other extrinsic materials, but may not be obliged to do so, notwithstanding, as observed by one court, that the Commission and the General Assembly recommend that “it be given due consideration as appropriate by [...] judges”.⁷ Some courts referring to the guides have noted the usefulness of the explanations provided and the recitation of the relevant history.⁸

4. Various courts have noted: the statutory intent to conform national law with international law that is explicit in article 8;⁹ the importance of consulting international sources to the extent they help carry out the legislator’s purpose of achieving international uniformity in cross-border insolvency proceedings;¹⁰ and the need to consider the international origin of the legislation and to promote an application of that legislation that is consistent with the application of similar statutes adopted by foreign jurisdictions.¹¹

5. In terms of the extrinsic sources that may be considered, courts have looked to:

- (a) The GEI¹² and the GE;¹³
- (b) The JP;¹⁴
- (c) The Legislative Guide;¹⁵
- (d) The Practice Guide;¹⁶
- (e) Reports of the UNCITRAL/INSOL/World Bank Multinational Judicial Colloquiums;¹⁷
- (f) The EIR, where it uses terms the same as used in the MLCBI e.g., “COMI” and “establishment”;¹⁸
- (g) The Virgos-Schmit Report, which although prepared for the purpose of the earlier European Convention, provides material relevant to interpretation of the EIR;¹⁹
- (h) Foreign interpretations and judicial precedents on the MLCBI;²⁰
- (i) Documents relating to preparation of the MLCBI originating from UNCITRAL (e.g., Commission reports) or its Working Group (e.g., working papers and working group reports);²¹
- (j) Working papers of UNCITRAL Working Group V (Insolvency Law);²²
- (k) Explanatory memorandums prepared by some enacting States for submission of draft legislation to legislative bodies;²³
- (l) Scholarly writing on the MLCBI.²⁴

6. It has been suggested by several courts that the Vienna Convention on the Law of Treaties (1969) was an authoritative statement of customary international law for the purposes of construing the MLCBI and that article 32 of that Convention allowed recourse to supplementary means of

interpretation, including preparatory work of the international instrument and the circumstances of its conclusion to confirm or determine meanings in cases of ambiguity, obscurity or unreasonableness.²⁵

Notes

¹ GE [paras. 91–92].

² E.g., the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), art. 7 (1) – see the Digest of Case Law on the CISG for cases interpreting art. 7; the UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, art. 2A (adopted 2006) – see the 2012 Digest of Case Law on the Model Law on International Commercial Arbitration; and the UNCITRAL Model Law on Electronic Commerce (1996), art. 3 (1).

³ The system is available in all six official languages of the United Nations and is explained in document A/CN.9/SER.C/GUIDE/1/Rev.3, which is also available at https://uncitral.un.org/en/case_law.

⁴ The United States Bankruptcy Code, 11 U.S.C. sect. 1508, enacting art. 8 of the MLCBI, directs the bankruptcy court to “consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions”: *O’Sullivan v Loy* 432 B.R. 551, 560 (E.D. Va. 2010); *JSC BTA Bank* 434 BR 334, 340 (Bankr. S.D.N.Y. 2010), CLOUT 1211; *Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd.)* 601 F.3d 319, 321–322 (5th Cir. 2010), CLOUT 1006; *Morning Mist Holdings Ltd. v Krys (In re Fairfield Sentry Ltd.)* 714 F.3d 127, 136 (2d Cir. Apr. 16, 2013), CLOUT 1339; *OAS S.A.* 533 BR 83, 92 (Bankr. S.D.N.Y. 2015), CLOUT 1629; *Elpida Memory, Inc.*, case No. 12-10947 (Bankr. D. Del. Nov. 16, 2012), p.5 – court suggested that despite local requirements to interpret statutes according to their plain meaning, in the case of legislation enacting the MLCBI, it was arguable that plain meaning should be subservient to legislative history or more general principles of comity.

⁵ E.g., Canada, the Dominican Republic, Poland, the Philippines, the Republic of Korea and Uganda.

⁶ *United States: Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006), CLOUT 765; *Lee*, 472 B.R. 156, 180 (Bankr. D. Mass. 2012) *citing* *Tri-Continental Exchange, Ltd.*, 349 B.R. 627, 633 (Bankr. E.D. Cal. 2006), CLOUT 766 – “Congress [...] focused the attention of United States courts to various international sources when construing Chapter 15, which sources Congress described as ‘persuasive’” (*citing* H.R. Rep 109–31 pt. 1, 109th Cong. 1st Sess. at 109–110 (2005)). According to the court in *Tri-Continental Exchange, Ltd.*, one of the sources that a United States court is obliged to treat as persuasive is the guide to enactment of the MLCBI; *compare* *Basis Yield Alpha Fund (Master)* 381 B.R. 37, 51, CLOUT 789, in which the court said that a United States court at least *may* look to, if it is not also *obliged* to treat as persuasive, the guides to enactment, *citing* *Bear Stearns*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007), CLOUT 760, in which the court said a United States court “may look to” the guides as persuasive.

⁷ *Australia: Kapila, Re Edelsten* [2014] FCA 1112 [para. 36], CLOUT 1475 referring to the decision of the Commission at its 973rd meeting, 18 July 2013, *Official Records of the General Assembly, Sixty-eighth session, Supplement No. 17 (A/68/17)* [para. 198].

⁸ *Ibid.*, *Australia: Kapila*.

⁹ *United States: Lavie v Ran (Ran)*, 607 F.3d 1017, 1020 (5th Cir. 2010); *Betcorp Limited*, 400 B.R. 266, 283 (FN23) (Bankr. D.Nev. 2009), CLOUT 927 – pointing to a problem with the use and interpretation of “foreign court” in the definitions applicable to Ch. 15, the court said that deviating from accepted methods of statutory interpretation was justified by the international context of the case and the directives of Congress to construe Ch. 15 so that it was consistent with international understandings – that an administrative authority should be considered a court.

¹⁰ *Singapore: Re: Zetta Jet Pte Ltd and Others* [2018] SGHC 16 [para. 34], CLOUT 1815 – court said granting limited recognition to the foreign proceedings only for the purposes of enabling the foreign representative to apply to set aside or appeal an injunction granted in Singapore, or matters directly related to such applications, such as extensions of time, was consonant with the philosophy and objective of the Singapore statute and the Singapore Model Law, “including the need to have regard to the international basis of the MLCBI and the promotion of uniformity as required by art. 8.” *United States: Morning Mist Holdings Ltd. v Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 136 (2d Cir. Apr. 16, 2013), CLOUT 1339. See also *Australia: Kapila, Re Edelsten* [2014] FCA 1112 [para. 38], CLOUT 1475. *Japan: Think3*, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 2 (1), CLOUT 1335 noting that diversity of outcomes with respect to the date at which COMI is determined does not promote uniformity of interpretation (see discussion on timing under art. 17, para. 2).

¹¹ *England: Rubin & Anor v Eurofinance SA and 3 Ors* [2009] EWHC 2129 [paras. 39–40], affirmed [2012] UKSC 46, CLOUT 1270 – lower court said it was unrealistic to give words used in the MLCBI their ordinary domestic meaning (in this case “debtor” in art. 2, subpara. (a)). Regard had to be had to its international origin and the word should have the meaning that is given to it by the foreign court in the foreign proceeding. *United States: Oversight & Control Commission of Avanzit, S.A.*, 385 B.R. 525 (Bankr. S.D.N.Y. 2008), CLOUT 925; *Betcorp Limited*, 400 B.R. 266, 276 (Bankr. D. Nev. 2009), CLOUT 927; *Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319, 321 (5th Cir. 2010), CLOUT 1006; *AJW Offshore, Ltd.*, 488 B.R. 551 (Bankr. E.D.N.Y. 2013); *OAS S.A.* 533 BR 83, 91–92 (Bankr. S.D.N.Y. 2015), CLOUT 1629.

¹² E.g., *Australia: Kapila, Re Edelsten* [2014] FCA 1112 [para. 36], CLOUT 1475 referring to GEI [para. 159] on timing and [para. 69] referring to GEI [para. 181]; *Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 [para. 41], CLOUT 1332. *England: Sturgeon Central Asia Balanced Fund Limited* [2019] EWHC 1215 (Ch) [para. 15] CLOUT 1819. *United States: OAS S.A.*, 533 B.R. 83 (Bankr. S.D.N.Y. 2015), CLOUT 1629 – 95 referring to GEI [para. 71], [para. 74], 98 referring to GEI [para. 86], 103 referring to GEI [para. 104].

¹³ E.g., *Australia: Bank of Western Australia v Henderson (No. 3)* [2011] FMCA 840, CLOUT 1216 [para. 16] referring to GE [paras. 3, 20, 42]; *Raithatha v Ariel Industries PLC* [2012] FCA 1526 at [paras. 35–36] referring to GE [paras. 23–25] on “foreign proceeding”; *Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57, CLOUT 1332 [para. 125], referring to GE [para. 157] on art. 22; *England: Rubin v Eurofinance SA* [2009] EWHC 2129 [para. 64] referring to GE [paras. 15, 16, 20, 28] on arts. 25–27 [2010] EWCA Civ 895 [para. 53] referring to the preamble [paras. 13–14, 19–20] and [2012] UKSC 46, CLOUT 1270 [para. 28] referring to GE [para. 20 (b)], [para. 138] referring to GE [paras. 154, 156]; *Stanford International Bank* [2010] EWCA Civ 137, CLOUT 1003 [para. 6] referring to GE [para. 71] on insolvency

proceedings [para. 9] referring to GE [para. 23] on foreign proceedings [para. 37] referring to GE [para. 31] on main proceedings and [para. 72] on the European Convention; *Chesterfield United Inc.* [2012] EWHC 244 (Ch), CLOUT 1271 [para. 11] referring to GE [para. 154] on art. 21, para. 1; *Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), CLOUT 1482 [para. 6] referring to GE [para. 24] on “foreign proceeding” [para. 67] referring to GE [paras. 145–146] and [para. 155] on arts. 20, 21, also [paras. 88, 90] – court noted that the 1999 published version was the one referred to in regulation 2 of the CBIR, but also that the relevant passages were essentially repeated in the version published in 2014; *Agrokor DD* [2017] EWHC 2791 (Ch) [paras. 44, 55, 79, 94, 110], CLOUT 1798; *Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802 [paras. 34–37], CLOUT 1822; *Sturgeon Central Asia Balanced Fund Ltd (in liq)* [2019] EWHC 1215 (Ch) [paras. 15, 34], CLOUT 1819; *United States*: The House Report contemplates the courts looking to the GE and reports cited therein to aid the courts in achieving uniform interpretation of Ch. 15: H.R. Rep. No. 109–31, pt. 1 at 109–110 (2005) reprinted in 2005 USCCAN 88, 172–173. Cases include: *Tri-Continental Exchange, Ltd.*, 349 B.R. 627, 638 (Bankr. E.D. Cal. 2006), CLOUT 766 referring to GE [para. 88] on art. 6, and [paras. 161–163] on art. 22; *Ephedra Prods. Liab. Litig.*) 349 B.R. 333, 336 (S.D.N.Y. 2006), CLOUT 765 referring to art. 6 on public policy; *Bear Stearns*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007), CLOUT 760, affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794, on COMI; *Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 51 (Bankr. S.D.N.Y. 2008), CLOUT 789 referring to GE [para. 122] on art. 16; *Oversight & Control Commission of Avanzit, S.A.*, 385 B.R. 525, 533 (Bankr. S.D.N.Y. 2008), CLOUT 925, referring to GE [para. 24] on proceedings eligible for recognition; *Betcorp Limited*, 400 B.R. 266 (Bankr. D. Nev. 2009) CLOUT 927, at 276, referring to GE [para. 23], 286 to GE [para. 31] and [para. 72] on the origin of COMI; *British-American Insurance Co., Ltd.*, 425 B.R. 884 (Bankr. S.D.Fla. 2010), CLOUT 1005, 902 referring to GE [para. 23] on “foreign proceeding”, 909 referring to GE [para. 31] on origin of COMI, 910 referring to GE [para. 130] on changed circumstances; *Lee*, 472 B.R. 156, 181 (Bankr. D. Mass. 2012) referring to GE [paras. 161–163] on art. 22; *Elpida Memory, Inc.*, case No. 12-10947 (CSS). (Bankr. D. Del. Nov. 16, 2012), pp. 13, 16 referring to GE [para. 143] on art. 20; *Cozumel Caribe, S.A. de C.V.*, 482 B.R. 96, 109 (Bankr. S.D.N.Y. 2012), CLOUT 1311 referring to GE [para. 93] on art. 9; *Morning Mist Holdings Ltd. v Kryz (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT 1339, at 136 referring to GE [paras. 31, 72] on COMI (court concluded that international sources were of limited use in solving the question of whether a United States court should determine a debtor’s COMI as of the time of the filing of the petition initiating the ancillary proceeding, or in some other way) and 139 referring to GE [para. 89] on art. 6.

¹⁴ E.g., *Australia*: *Kapila, Re Edelsten* [2014] FCA 1112 [para. 36], CLOUT 1475; *Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 [paras. 41, 68], CLOUT 1332; *King, in the matter of Zetta Jet Pte Ltd* [2018] FCA 1932 [paras. 38–39], CLOUT 1817; *England*: *Agrokor DD* [2017] EWHC 2791 (Ch) [paras. 46–47], CLOUT 1798. *United States*: *Ashapura Minechem Ltd.*, 480 B.R. 129, 137 (S.D.N.Y. 2012), CLOUT 1313; *Cozumel Caribe, S.A. de C.V.*, 482 B.R. 96, 110 (footnote 10) (Bankr. S.D.N.Y. 2012), CLOUT 1311.

¹⁵ E.g., *England*: *Rubin v Eurofinance SA* [2012] UKSC 46, CLOUT 1270 [para. 96] quoting Legislative Guide part two, chap. II [paras. 150–151]; *Agrokor DD* [2017] EWHC 2791 (Ch) [paras. 45, 100], CLOUT 1798; *New Zealand*: *Kim and Yu v STX Pan Ocean Co. Limited* [2014] NZHC 845, CLOUT 1481 at [para. 17], referring to the Legislative Guide Glossary [para. 12 (b)] “assets of the debtor” for the purposes of art. 20, para. 1, of the MLCBI.

¹⁶ E.g., *Australia*: *Kapila, Re Edelsten (No. 2)* [2016] FCA 1269 [para. 47]; *United States*: *OAS S.A.*, 533 BR 83, 95 (Bankr. S.D.N.Y. 2015), CLOUT 1629, referring to terms and explanations: “debtor in possession” (reproducing the terms and explanations of the Legislative Guide Glossary).

¹⁷ E.g., *England*: *Rubin v Eurofinance SA* [2009] EWHC 2129 [para. 70], affirmed by [2012] UKSC 46, CLOUT 1270 – referring to the importance of granting the courts flexibility and discretion in cooperating with foreign courts or foreign representatives as emphasized at the second such colloquium, *New Orleans 1997* (the report is available at <https://uncitral.un.org/en/colloquia/insolvency>); *Sturgeon Central Asia Balanced Fund Ltd (in liq)* [2019] EWHC 1215 (Ch) [para. 28], CLOUT 1819 and [2020] EWHC 123 [paras. 59–89].

¹⁸ E.g., *England*: *Stanford International Bank Limited* [2009] EWHC 1441 (Ch) [para. 46] (affirmed [2010] EWCA Civ 137, CLOUT 1003) – noting that framers of the MLCBI envisaged the interpretation of COMI in the EIR (which would necessarily take into account recital (13)) would be equally applicable to COMI in the MLCBI; *United States*: *Betcorp Limited* 400 B.R. 266 (Bankr. D. Nev. 2009), CLOUT 927, at 277 on “proceeding” as used in international insolvency law and at 286 on COMI.

¹⁹ E.g., *New Zealand*: *Williams v Simpson (No. 5)* [2010] NZHC 1786 [2011] NZLR 380 [para. 52], (12 October 2010), CLOUT 1220. *United States*: *Jay Tien Chiang* 437 B.R. 397, 403 (Bankr. C.D. Cal. 2010), CLOUT 1318; *Betcorp Limited* 400 B.R. 266, 286 (Bankr. D. Nev. 2009), CLOUT 927.

²⁰ E.g., *Australia*: *Bank of Western Australia v Henderson (No. 3)* [2011] FMCA 840 [paras. 25–32], CLOUT 1216; *Gainsford, in the matter of Tannenbaum v Tannenbaum* [2012] FCA 904 [para. 36], CLOUT 1214 – court said that the Parliament had chosen to adopt for Australia a model developed under United Nations auspices for the purposes of multilateral adoption suggested, and regard to the Explanatory Memorandum confirmed, that Parliament’s intention both with respect to the interpretation of the expression “COMI” and of the MLCBI generally was that they would be interpreted in harmony with international legal norms and with meanings given to that expression and that law in other adopting countries; *Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 [para. 69], CLOUT 1332 – in the lower courts (*Ackers v Saad Investments Co Ltd.* [2013] FCA 738 [paras. 34, 35], *Ackers v Saad Investments Co Ltd* [2010] FCA 1221 [para. 55]) reference was made to the fact that three courts in other jurisdictions (including England) had accepted the presumption in art. 16, para. 3, that the Cayman Islands proceedings were the main proceedings, which was “a factor that could also be taken into account in these proceedings”, but was not relied upon to ground the courts’ decisions.

England: *Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch) [paras. 72–74], [paras. 95–101], [paras. 106–107], CLOUT 1482; *Stanford International Bank Limited* [2010] EWCA Civ 137 [paras. 43–47], CLOUT 1003.

Japan: *Think3*, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court (2 November 2012), CLOUT 1335 – court indicated that for interpretation of the law enacting the MLCBI in Japan, judicial precedents and interpretations of foreign countries and discussions in UNCTRAL should be used as references. The court also emphasized the desirability of avoiding inconsistent judgments in different countries.

New Zealand: *Williams v Simpson (No. 5)* [2010] NZHC 1786 [2011] NZLR 380 (12 October 2010), CLOUT 1220 examining cases decided in the United Kingdom and the United States on “non-main” proceeding.

United States: *O’Sullivan v Loy* 432 BR 551, 560 (E.D. Va. 2010) – court said if a textual provision of Ch.15 was unclear or ambiguous, the court could then consider the MLCBI and foreign interpretations of it as part of its interpretive task. In doing so, the court could consider how foreign jurisdictions have interpreted language in the MLCBI that was similar to that of Ch.15; see also *International Banking Corporation B.S.C.* 439 B.R. 614, 624 (Bankr. S.D.N.Y. 2010), CLOUT 1317.

²¹ E.g., *Australia*: Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840 [para. 19], CLOUT 1216; Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 37], CLOUT 1214; Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [para. 48], CLOUT 1332 on access of foreign creditors and treatment of revenue creditors; Kapila, Re Edelsten (No. 2) [2016] FCA 1269 [para. 47].

England: Re: Pan Ocean Co Ltd [2014] EWHC 2124 (Ch), CLOUT 1482 [paras. 82–85] referring to A/CN.9/WG.V/WP.42 [para. 6], A/CN.9/419 [paras. 46–59], A/CN.9/433 and A/CN.9/435; Stanford International Bank Limited [2010] EWCA Civ 137, CLOUT 1003 [paras. 37, 53] referring to A/52/17 [para. 153]; Agrokor DD [2017] EWHC 2791 (Ch) [para. 46], CLOUT 1798; Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [paras. 29–33], CLOUT 1819.

New Zealand: Williams v Simpson (No. 1) [2011] NZHC 1631 (17 September 2010) [para. 35].

United States: Bear Stearns 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794; Betcorp Limited 400 B.R. 266 (Bankr. D. Nev. 2009), CLOUT 927 referring to A/CN.9/WG.V/WP.44 on the phrase “or other law relating to insolvency”; Fogerty v Petroquest Resources, Inc. (*In re Condor Ins. Ltd.*) 601 F.3d 319, 326 (5th Cir. 2010), CLOUT 1006, referring to A/CN.9/419 [paras. 50–53]; Vitro S.A.B. de C.V. 701 F.3d 1031, 1048 (5th Cir. 2013), CLOUT 1310 referring to A/CN.9/419 [paras. 112–113] on appointment of the foreign representative, also cited in OAS S.A. 533 BR 83, 94–95 (Bankr. S.D.N.Y. 2015), CLOUT 1629.

²² E.g., *England*: Stanford International Bank Limited [2009] EWHC 1441 (Ch) affirmed [2010] EWCA Civ 137, CLOUT 1003; *Japan*: Think3 Inc., case Nos. (shou) 3 and 5 of 2011, Tokyo District Court (31 July 2012); case No. (ra) 1757 of 2012 (appeal), Tokyo High Court (2 November 2012), CLOUT 1335; *United States*: Gerova Financial Group, Ltd. 482 B.R. 86, 92 (Bankr. S.D.N.Y. 2012), CLOUT 1275, which refers to amendments to the Guide to Enactment being prepared (at that time) by UNCITRAL Working Group V, citing United Nations document A/CN.9/742 Report of Working Group V (Insolvency) on the Work of its forty-first session (New York, 30 April–4 May 2012), at [para. 60], wherein “a proposed change to the Model Law to clarify that the COMI determination be made as of the date of the commencement of the foreign insolvency proceeding ‘received wide support.’”; Oi Brasil Holdings Cooperatief U.A., 578 B.R. 169, 242 (Bankr. S.D.N.Y. 2017) referring to the goals of the work being undertaken by UNCITRAL on enterprise group insolvency.

²³ *Australia*: Raithatha v Ariel Industries PLC [2012] FCA 1526 [paras. 38–39]; Tucker, in the matter of Aero Inventory (United Kingdom) Limited v Aero Inventory (United Kingdom) Limited (No. 2) [2009] 181 FCR 374 [para. 22], CLOUT 922; Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [para. 41], CLOUT 1332. See also *United States*: Betcorp Limited 400 B.R. 266, 282–283 (Bankr. D. Nev. 2009), CLOUT 927 referring to the explanatory memorandum prepared for the Parliament of Australia that serves as an aid to understanding the purpose and structure of the legislation and that courts in Australia may use the memorandums to interpret legislation that has been enacted. *United States*: the House Report contemplates the courts looking to the Guide to Enactment and reports cited therein to aid the courts in achieving uniform interpretation of Ch. 15: H.R. Rep. No. 109–31, pt. 1 at 109–110 (2005) reprinted in 2005 USCCAN 88, 172–173.

²⁴ E.g., *England*: Rubin v Eurofinance SA [2012] UKSC 46 [paras. 167–168], CLOUT 1270; Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) [para. 92], CLOUT 1482; Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [paras. 47–48], CLOUT 1819. *Canada*: Probe Resources Ltd. (2011), 2011 CarswellBC 1043, 79 C.B.R. (5th) 148 (B.C. S.C.) [paras. 21–22]. *United States*: Basis Yield Alpha Fund (Master) 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789; Betcorp Limited 400 B.R. 266, 277, 286–287 (Bankr. D. Nev. 2009), CLOUT 927; Fogerty v Petroquest Resources, Inc. (*In re Condor Ins. Ltd.*) 601 F.3d 319 (5th Cir. 2010), CLOUT 1006, at 321, 324 and 326; Morning Mist Holdings Ltd. v Kryss (*In re Fairfield Sentry Ltd.*) 714 F.3d 127, 135 (2d Cir. Apr. 16, 2013), CLOUT 1339; Lavie v Ran (*In re Ran*) 607 F.3d 1017, 1025 (5th Cir. 2010).

²⁵ *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 37], CLOUT 1214 – court said that via principles of statutory construction applicable in Australia it would be permissible to have regard to general principles of interpretation of such international instruments set out in the Vienna Convention and, via art. 32 of that Convention, to the preparatory work of UNCITRAL on the MLCBI; also Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 45–49], CLOUT 1332 – court said MLCBI must be interpreted having regard to its character as an international convention, as required by art. 8, which imports the rules of interpretation of arts. 31 and 32 of the Vienna Convention. See also *England*: Sturgeon Central Asia Balanced Fund Ltd (in liq) [2019] EWHC 1215 (Ch) [paras. 45–46], CLOUT 1819.

Chapter II. Access of foreign representatives and creditors to courts in this State

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 9 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 176–178]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 77–79 and 172–173]; A/CN.9/422 [paras. 144–151]; A/CN.9/433 [paras. 50–58]; A/CN.9/435 [paras. 129–133];

(b) GE (1997): A/CN.9/436 [para. 54]; A/CN.9/442 [para. 93];

(c) GEI (2013): A/CN.9/766 [para. 31].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 108].

INTRODUCTION

1. The GEI [para. 108]¹ notes that article 9 is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State. The foreign representative is thus freed from having to meet formal requirements such as licences or consular action.

CASE LAW ON ARTICLE 9

2. One case reported confirms that, following recognition under article 17 (a requirement included in the enacting legislation in that State), the foreign representative has the capacity to sue and be sued under article 9.² Another court has noted that the principle of direct access in article 9 did not dictate that relief must be given to the foreign representative, as relief was specifically addressed under other articles.³

Notes

¹ GE [para. 93].

² *United States*: *Massa Falida Do Ban Cruzeiro Do Sul S.A.*, 567 B.R. 212 (Bankr. S.D.Fla. 2018). United States Bankruptcy Code, 11 U.S.C. sect. 1509, enacting art. 9 of the MLCBI, includes a requirement for recognition and otherwise extends art. 9; cases reported are largely unrelated to the bare right of access in art. 9 of the MLCBI as drafted.

³ *United States*: *Cozumel Caribe, S.A.*, de C.V. 482 B.R. 96, 109–110 (Bankr. S.D.N.Y. 2012), CLOUT 1311.

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 10 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 179–182]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/422 [paras. 160–166]; A/CN.9/433 [paras. 68–70]; A/CN.9/435 [paras. 134–136];
 - (b) GE (1997): A/CN.9/436 [paras. 55–56]; A/CN.9/442 [paras. 94–96];
 - (c) GEI (2013): A/CN.9/763 [para. 27]; A/CN.9/766 [para. 31].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 111].

Notes

¹ GE [paras. 94–96].

² *United States: In re Lloyd (Les Mutuelles du Mans Assurances IARD, United Kingdom Branch)* case No. 05-60100 (Bankr. S.D.N.Y. Dec. 7, 2005), CLOUT 788 – upon granting recognition, the court included in its order the following language: “that no action taken by the Petitioner, the Scheme Advisers, the Scheme, MMA, or each of their successors, agents, representatives, advisers or counsel, in preparing, disseminating, applying for, implementing or otherwise acting in furtherance of or in connection with the Foreign Proceeding, the scheme of arrangement, this Order, or this Ch. 15 case, or any adversary proceeding herein, or further proceeding commenced hereunder, shall be deemed to constitute a waiver of the immunity afforded to such persons under 11 U.S.C. sects. 306 and 1510.” See also *CSL Australia v Britannia Bulkcarriers A/S*, case No. 08-15187 (S.D.N.Y. Sept. 8, 2009) – United States Bankruptcy Code, 11 U.S.C. sect. 1509 (*e*), provides that subject to art. 10, a foreign representative is subject to applicable non-bankruptcy law and must therefore comply with court orders; *SNP Boat Service SA*, 453 B.R. 446 (Bankr. S.D. Fla. 2011), CLOUT 1314 – court threatened to revoke recognition of a foreign main proceeding because the foreign representative was not complying with the discovery process.

INTRODUCTION

1. The GEI [paras. 109–111]¹ notes that article 10 constitutes a “safe conduct” rule aimed at ensuring that the court in the enacting State does not assume jurisdiction over all the assets of the debtor on the sole ground that the foreign representative has made an application for recognition of a foreign proceeding. The limitation is not, however, absolute and is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. Other possible grounds for jurisdiction over the foreign representative or the assets and affairs of the debtor under the laws of the enacting State are not affected; a tort committed by, or misconduct on the part of, the foreign representative may provide grounds for dealing with the consequences of that tort or misconduct.

CASE LAW ON ARTICLE 10

2. The immunity afforded by this article has been reiterated in the orders issued by some courts.²

*Article 11. Application by a foreign representative to commence a proceeding under
[identify laws of the enacting State relating to insolvency]*

A foreign representative is entitled to apply to commence a proceeding under [*identify laws of the enacting State relating to insolvency*] if the conditions for commencing such a proceeding are otherwise met.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 11 are contained in the following documents :

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 183–187]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/422 [paras. 170–177]; A/CN.9/433 [paras. 71–75]; A/CN.9/435 [paras. 137–146];
 - (b) GE (1997): A/CN.9/436 [para. 57]; A/CN.9/442 [paras. 97–99];
 - (c) GEI (2013): A/CN.9/763 [para. 27]; A/CN.9/766 [para. 31].

Notes

¹ GE [paras. 97–99].

² United States Bankruptcy Code, 11 U.S.C. sect. 1511, enacting art. 11 of the MLCBI, provides that the right to commence a voluntary proceeding in the United States requires recognition under Ch. 15.

3. Relevant working papers are referred to in the reports and in the GEI following [para. 114].

INTRODUCTION

1. The GEI [paras. 112–114]¹ indicates that article 11 is designed to ensure that it is clear under the law of the enacting State that the foreign representative has standing to request the commencement of an insolvency proceeding in that State, subject to the commencement conditions applicable under that law being satisfied. Recognition is not a precondition to that commencement on the basis that the proceeding may be crucial in cases of an urgent need to preserve the assets of the debtor. The article makes no distinction between the foreign representative of a foreign main or non-main proceeding.

CASE LAW ON ARTICLE 11

2. Reported cases have not dealt with issues of interpretation of article 11.²

*Article 12. Participation of a foreign representative in a proceeding under
[identify laws of the enacting State relating to insolvency]*

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under *[identify laws of the enacting State relating to insolvency]*.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 12 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 188–189]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/422 [paras. 114–115, 147 and 149]; A/CN.9/433 [para. 58]; A/CN.9/435 [paras. 147–150];
 - (b) GEI (1997): A/CN.9/436 [paras. 58–59]; A/CN.9/442 [paras. 100–102];
 - (c) GEI (2013): A/CN.9/763 [para. 27]; A/CN.9/766 [para. 31].

Notes

¹ GE [paras. 100–102].

² *United States: Reserve Int'l. Liquidity Fund, Ltd. v Caxton Int'l Ltd.*, 09 Civ. 9021 (S.D.N.Y. April 29, 2010) – court made no reference to art. 12, but confirmed that recognition was required before a foreign representative could appear in an interpleader action relating to the distribution of funds of the debtor. Allowing them to do so without recognition would constitute, the court said, tacit recognition that the foreign proceedings were valid and that the liquidators were in control of the debtor fund, both of which were matters that should be determined in an application under Ch. 15.

3. Relevant working papers are referred to in the reports and in the GEI following [para. 117].

INTRODUCTION

1. The GEI [paras. 115–117]¹ indicates that purpose of the article is to ensure that when an insolvency proceeding concerning a debtor is taking place in the enacting State, the foreign representative of a foreign proceeding concerning that debtor will have standing to participate in the proceeding in the enacting State. The article does not specify what participation should mean, but the GEI suggests it may include, for example, making petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding.

CASE LAW ON ARTICLE 12

2. Reported cases have not dealt with issues of interpretation of article 12.²

*Article 13. Access of foreign creditors to a proceeding under
[identify laws of the enacting State relating to insolvency]*

1. Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [*identify laws of the enacting State relating to insolvency*] as creditors in this State.

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [*identify laws of the enacting State relating to insolvency*], except that the claims of foreign creditors shall not be ranked lower than [*identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims*].^a

^a The enacting State may wish to consider the following alternative wording to replace paragraph 2 of article 13:

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [*identify laws of the enacting State relating to insolvency*] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [*identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims*].

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 13 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 190–192]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/422 [paras. 179–187]; A/CN.9/433 [paras. 77–85]; A/CN.9/435 [paras. 151–156];

(b) GE (1997): A/CN.9/436 [paras. 60–61]; A/CN.9/442 [paras. 103–105].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 120].

INTRODUCTION

1. The GEI [paras. 118–120]¹ explains that article 13 embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such a proceeding, should not be treated worse than local creditors. Paragraph 2 makes it clear that the principle of non-discrimination embodied in paragraph 1 leaves intact the provisions on the ranking of claims in insolvency proceedings, including any

provisions that might assign a special ranking to claims of foreign creditors. However, in order to avoid emptying the principle of non-discrimination of its meaning, paragraph 2 establishes the minimum ranking for foreign creditor claims: the rank of general unsecured claims, except in those cases where an equivalent domestic claim would be ranked lower under the law of the enacting State than general unsecured claims (such as claims for financial penalties or fines, claims whose payment is deferred because of a special relationship between the debtor and the creditor or claims that have been filed after the expiry of the time period for doing so). The alternative provision in the footnote differs from the provision in the text only to the extent that it provides wording that permits States that deny recognition to foreign tax and social security claims to continue to discriminate against those claims.

CASE LAW ON ARTICLE 13

2. One court has said the MLCBI expressly recognized the possibility (in the footnote to article 13, paragraph 2), but did not expressly provide, for the local forum to exclude taxation and social security claims by foreign sovereigns from participating in the local distribution of the insolvent's estate. Moreover, the court noted that, in the reports of the UNCITRAL Working Group V (Insolvency Law) on the work of its nineteenth, twentieth and twenty-first sessions, in April 1996, October 1996 and January 1997 respectively, there was no discussion of the MLCBI operating in a manner by which, through recognition of a foreign proceeding, local revenue debts were to be destroyed or made locally unenforceable or irrecoverable.²

Notes

¹ GE [paras. 103–105].

² *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 46, 48], CLOUT 1332.

*Article 14. Notification to foreign creditors of a proceeding under
[identify laws of the enacting State relating to insolvency]*

1. Whenever under [*identify laws of the enacting State relating to insolvency*] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.
2. Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.
3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:
 - (a) Indicate a reasonable time period for filing claims and specify the place for their filing;
 - (b) Indicate whether secured creditors need to file their secured claims; and
 - (c) Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 14 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 193–198]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/419 [paras. 84–87]; A/CN.9/422 [paras. 188–191]; A/CN.9/433 [paras. 86–98]; A/CN.9/435 [paras. 157–164];
 - (b) GE (1997): A/CN.9/436 [paras. 63–65 and 84]; A/CN.9/442 [paras. 106–111, 120–121].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 126].

INTRODUCTION

1. The GEI [paras. 121–126]¹ explains that paragraph 1 is intended to reflect the principle of equal treatment of

Notes

¹ GE [paras. 106–111].

creditors, ensuring that foreign creditors will be notified whenever notification is required for creditors in the enacting State. Individual notification for foreign creditors is required, but courts are left with the discretion to decide otherwise in a particular case (e.g., if individual notice would entail excessive cost or would not seem feasible under the circumstances). Where notice is to be given, it is to be effected by whatever expeditious means the court considers appropriate, but letters rogatory or other formalities are not required. The GEI raises the relevance to cross-border insolvency cases of treaties dealing with judicial cooperation and procedures for communicating judicial or extrajudicial documents to addresses abroad and suggests that generally paragraph 2 would not be inconsistent with obligations under those treaties; to the extent that that there might be conflict, article 3 provides the solution. The content of the notice is specified, while other matters that might need to be included are referred to in the GEI [para. 126].

CASE LAW ON ARTICLE 14

2. Reported cases have not dealt with issues of interpretation of article 14.

Chapter III. Recognition of a foreign proceeding and relief

Article 15. Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.
2. An application for recognition shall be accompanied by:
 - (a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
 - (b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
 - (c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.
3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.
4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 15 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 199–209]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/419 [paras. 62–69, 178–189]; A/CN.9/422 [paras. 76–93, 152–159]; A/CN.9/433 [paras. 59–67, 99–104]; A/CN.9/435 [paras. 165–173];
 - (b) GE (1997): A/CN.9/436 [paras. 66–69]; A/CN.9/442 [paras. 112–121];
 - (c) GEI (2013): A/CN.9/742 [para. 40].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 136].

INTRODUCTION

1. The GEI [paras. 127–136]¹ explains that article 15, in conjunction with article 16, defines the core procedural requirements for an application by a foreign

representative for recognition, focusing on simplicity and speed. Paragraph 2 takes a flexible approach to the evidence that is required in support of the application, so that if the applicant is unable to submit documents that in all details meet the requirements of subparagraphs (a) or (b), subparagraph (c) enables the court to consider other evidence acceptable to it. The information required under paragraph 3 is intended to assist the court in appropriately tailoring relief in support of the foreign proceeding to ensure consistency with other proceedings concerning the same debtor. Paragraph 4 entitles, but does not compel, the court to require a translation of some or all of the documents accompanying the application for recognition. If it is compatible with the procedures of the court for it to proceed without translation, that may facilitate a decision being made on the application at the earliest possible time. The JP [para. 41] notes that the MLCBI makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the foreign proceeding satisfies the requirements of article 15, recognition should follow in accordance with article 17.²

CASE LAW ON ARTICLE 15

ARTICLE 15, PARAGRAPH 1

2. No reported cases have referred to issues arising under paragraph 1.

ARTICLE 15, PARAGRAPHS 2 AND 3

3. Courts have indicated that the first requirement for recognition is that the procedural elements of article 15, which are to be strictly construed,³ be satisfied.⁴ The foreign representative bears the burden of proof of those elements (see discussion on burden of proof under article 16, paragraph 3).⁵ In a case in which recognition of multiple proceedings was sought in a single petition, it was held that a separate petition was required for each foreign proceeding for which recognition was sought.⁶ Similarly, where the proceeding for which recognition had been sought (and granted) had terminated and a further proceeding commenced (without the recognizing court being advised), the court held a new application for recognition was required as it was not possible to amend the existing proceeding to cover recognition of the wholly new proceeding.⁷

Interpretation of words and phrases**“Appointing” and “appointment” (subparagraphs 2 (a)–(c)) (see also article 2, subparagraph (d))**

4. As to the meaning of the words “appointing” and “appointment” as used in article 15, subparagraphs 2 (a)–(c), one court suggested it suffered from the same ambiguity as the word “authorized” in article 2, subparagraph (d).⁸ At best, the court suggested, the foreign representative must be appointed in the context or in the course of a foreign proceeding,⁹ but by whom was not specified. In many reported cases, the foreign representative was appointed by the foreign court, as generally evidenced by the information provided to comply with article 15, subparagraph 2 (b).¹⁰ In some cases, the foreign court has also specified that the foreign representative has the power to commence recognition proceedings in another jurisdiction and to act as foreign representative in those proceedings.¹¹

“Other evidence” (subparagraph 2 (c))

5. With respect to the evidence required under paragraph 2, in a case where no certified documents were available as required under subparagraphs 2 (a) and (b),¹² other evidence was held to be sufficient to satisfy the requirement, including: (a) verified copies of minutes, court orders, reports to creditors and company searches in relation to the appointment and activities of the foreign representative of the debtor; (b) relevant correspondence with the registrar of companies and the relevant court registry and company searches in relation to a change in the status of the foreign proceeding, verified copies of the notices relating to that change; and (c) registration of the foreign representative as the liquidator of the debtor. A document from the foreign corporate regulator showing that liquidators had been appointed to the debtor pursuant to the applicable legislation has also been relied upon under article 15, paragraph 2,¹³ on the basis that the regulator was an “authority” within the meaning of article 2, subparagraph (c), of the MLCBI. In a case where the applicant did not comply with the requirements of article 15, paragraphs 2 (a) or (b), providing only copies of various court documents, counsel referred the court to subparagraph 2 (c). While the court was satisfied that the necessary evidentiary basis for the application to go forward had been established, it pointed out that there must be some basis upon which the court could resort to subparagraph 2 (c), for example, some reasonable explanation from the applicant as to why the documents referred to in subparagraphs 2 (a) or (b) were not available and why the alternate form of proof should be accepted.¹⁴ Presentation of additional information relating to the nature of the foreign proceedings has been permitted after the recognition application was made and the recognition proceedings commenced.¹⁵

ARTICLE 15, PARAGRAPH 4

6. Reported cases have not referred to issues arising under paragraph 4.

Notes

¹ GE [paras. 112–121].

² See also discussion on full and frank disclosure under art. 6 above.

³ *United States*: Vitro S.A.B. de C.V. 701 F.3d 1031, 1046 (5th Cir. 2013), CLOUT 1310 – court said “these requirements are to be strictly construed in line with our holding that the requisite analysis is not a ‘rubber stamp’ exercise and that even in the absence of an objection, courts must undertake their own jurisdictional analysis and grant or deny recognition under Chapter 15 as the facts of each case warrant”, quoting *Lavie v Ran (In re Ran)* 607 F.3d 1017, 1021 (5th Cir. 2010), *Bear Stearns*, 374 B.R. 122, 126, 130 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794; see also art. 17, para. 1.

⁴ *United States*: *Lavie v Ran (In re Ran)*, 607 F.3d 1017, 1021 (5th Cir. Tex. 2010).

⁵ *United States*: *Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789.

⁶ *United States*: *British-American Insurance Co., Ltd.*, 425 B.R. 884, 889 (Bankr. S.D. Fla. 2010), CLOUT 1005.

⁷ *Australia*: *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA* [2017] FCA 331, CLOUT 1799.

⁸ See above chap. 1, art. 2 (d); *Vitro S.A.B. de C.V.* 701 F.3d 1031, 1047 (5th Cir. 2013), CLOUT 1310.

⁹ *United States*: *Vitro S.A.B. de C.V.* 701 F.3d 1031, 1047 (5th Cir. 2013), CLOUT 1310.

¹⁰ E.g., *United States*: *Grand Prix Associates, Inc.*, Bankr. D.N.J. May 18, 2009) – purported foreign representative presented an order by the foreign court appointing it as the foreign representative of the business entities in question.

¹¹ E.g., *Canada*: Probe Resources Ltd. (2011), 2011 CarswellBC 1043, 79 C.B.R. (5th) 148 (B.C. S.C.) – a United States court had authorized the applicant to act as the foreign representative of itself and its subsidiaries. *United States*: Oversight & Control Commission of Avanzit, S.A. 385 B.R. 525, 534 (Bankr. S.D.N.Y. 2008), CLOUT 925 – insolvency court in Spain had power to appoint foreign representative for recognition purposes; Basis Yield Alpha Fund (Master), 381 B.R. 37, 46 (Bankr. S.D.N.Y. 2008), CLOUT 789; Innua Canada, Ltd., case No. 09-16362 (Bankr. D.N.J. April 15, 2009) p. 4 – receivership order entered by court in Canada stated foreign representative had capacity to commence recognition proceeding in the United States.

¹² *Australia*: Raithatha v Ariel Industries PLC [2012] FCA 1526 [paras. 47–48].

¹³ *United States*: Betcorp Limited 400 B.R. 266, 294–295 (Bankr. D. Nev. 2009), CLOUT 927.

¹⁴ *Canada*: Probe Resources Ltd. (2011), 2011 CarswellBC 1043, 79 C.B.R. (5th) 148 (B.C. S.C.) [paras. 14–16].

¹⁵ *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 907 (Bankr. D.Fla. 2010), CLOUT 1005 – at the time the application was made, there was a question as to whether the foreign proceeding was for reorganization or liquidation; subsequent orders of the foreign court clarified that issue: see above art. 2, subpara. (a).

Article 16. Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2 and that the foreign representative is a person or body within the meaning of subparagraph (d) of article 2, the court is entitled to so presume.
2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.
3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 16 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 204–206] and on the work of its forty-sixth session (*Official Records of the General Assembly, Sixth-eighth session, Supplement No. 17 (A/68/17)*) [para. 197]. See also summary records of the thirtieth session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/52/17 [paras. 204–206]; A/CN.9/435 [paras. 170–172];
 - (b) GE (1997): A/CN.9/442 [paras. 122–123];
 - (c) GEI (2013): A/CN.9/715 [paras. 14–15, 38–41, 44–45]; A/CN.9/738 [paras. 22–30]; A/CN.9/742 [paras. 41–56]; A/CN.9/763 [paras. 29–48]; and A/CN.9/766 [paras. 33–40].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 149].

INTRODUCTION¹

1. The GEI [paras. 137–149]² explains that article 16 establishes presumptions that allow the court to expedite the evidentiary process, while not preventing the court from calling for or assessing other evidence if the conclusion suggested by the presumption is called into question. Paragraph 1 creates presumptions with respect to the definitions in article 2 of “foreign proceeding” and “foreign representative”, enabling the court to rely upon the information contained in the foreign decision (or certificate) referred to in article 15 when it is relevant to the satisfaction of those requirements. Paragraph 2 dispenses with the requirements for legalization of documents, but the court retains the discretion to decline to rely on the presumption of authenticity or to conclude that contrary evidence prevails (see also GEI

[paras. 128–130]; [para. 130]³ addresses the relationship between the MLCBI and relevant treaties on mutual recognition and legalization of documents).

2. The concept used in the presumption in paragraph 3, “centre of main interests”, or COMI, is fundamental to the operation of the MLCBI, but is not defined in article 2. What constitutes a debtor's COMI has given rise to considerable discussion, particularly with respect to the proof required for the presumption in article 16, paragraph 3, to be rebutted. The GEI [paras. 143–149] and the JP [paras. 93–125] give considerable space to discussing the interpretation of this paragraph. They indicate that, as a general statement, when the debtor's COMI is at the same location as its place of registration, no issue concerning rebuttal of the presumption is likely to arise. However, when there appears to be a separation between the debtor's registered office and its alleged COMI, the party alleging the COMI is not located at the place of registration will be required to satisfy the court as to its location. In the latter situation, the GEI suggests, a debtor's COMI will be identified by factors that are both objective and ascertainable by third parties,⁴ i.e., factors indicating to those who deal with the debtor, especially creditors, where the COMI is located. The evolution of courts' consideration of which factors are relevant to this analysis is discussed below.

3. The GEI [para. 145] proposes that in most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's COMI. The factors are the location: (a) where the central administration of the debtor takes place; and (b) which is readily ascertainable by creditors. Several courts, in analysing the factors relevant to rebuttal of the presumption, have responded to the discussion that took place in UNCITRAL in the course of revising the GEI.

4. When the principal factors noted above do not yield a ready answer regarding the debtor's COMI, the GEI suggests several additional factors concerning the debtor's business that may be considered. Those factors are set out in the GEI at [para. 147].⁵ They might be relevant in specific cases, but it is suggested that they should be considered of secondary importance and only to the extent they relate to

the two key factors. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. Not all factors will necessarily be ascertainable by third parties (e.g., the details of income disclosed in tax returns). In all cases, however, the endeavour is a holistic one, having regard to the totality of the evidence, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's COMI, as readily ascertainable by creditors.

CASE LAW ON ARTICLE 16

ARTICLE 16, PARAGRAPH 1

5. Courts typically cite the evidence provided in support of the article 15 requirements and note that they are entitled to rely on the presumption in paragraph 1 with respect to the facts evidenced, including where the evidence relied upon is statements by the foreign court as to the status of the proceeding and the foreign representative.⁶

6. Courts have confirmed that the presumption in paragraph 1 does not prevent the court from examining the facts and that it always has the power to make its own determination on qualification under article 17, notwithstanding the presumption in paragraph 1 and the absence of actual objection.⁷

ARTICLE 16, PARAGRAPH 2⁸

7. Courts have cited the documents that have been submitted in support of the application for recognition and stated their reliance on the presumption on the question of authenticity.⁹ A debtor's claim not to have been officially told of the appointment of the foreign representative was held not to constitute a rebuttal of the presumption in paragraph 2.¹⁰ Reliance on the presumption has also been held not to violate the right of interested parties to be heard and to present evidence challenging reliance on the basis that the documents were false.¹¹

ARTICLE 16, PARAGRAPH 3

Purpose of the presumption

8. The GEI [para. 137]¹² explains that the purpose of the presumption in paragraph 3 is to provide a convenient means of dispensing with formal proof, but leaving the way open for the court to find, on the evidence, that the contrary is the case. As noted above in the introduction to this article, the presumption has given rise to considerable discussion, under both the MLCBI and the EIR, most commonly in the context of corporate rather than individual debtors (although there are several cases addressing individual debtors – see below), with the focus of that discussion being upon the factors relevant to rebuttal of the presumption – the determination of COMI is necessarily fact driven in each particular case.

Meaning of “centre of main interests” (COMI)

9. Cases note that the term COMI is not defined in the MLCBI. Reference has been made, in seeking to establish the meaning of the term, to the GEI (and the material cited above in the Introduction to this article) and the EIR and its relevant interpretative documents (e.g., Virgos-Schmit Report), as well as to the JP [para. 93–104] (see article 8 above). Courts have noted the derivation of the concept and that the various guides to interpretation of COMI show it was intended that it should bear a similar meaning in both the MLCBI and the EIR.¹³ In some jurisdictions, COMI has been described as being similar to the concept of principal place of business.¹⁴

10. Each debtor, it is suggested, has only one location in which it has its COMI and, as there is only one COMI, it follows that there can only be one main proceeding. In a case where a creditor objected to the recognition of foreign proceedings on the basis that the debtor had no COMI and no establishment in the foreign State, the court held that a debtor must have a COMI and that it must be in a specific country.¹⁵ Where the debtor had registered offices in two States, the court concluded that it was possible to have more than one registered office and that the MLCBI did not define registered office as being the one in the State of the debtor's initial incorporation. Thus, the presumption in article 16, paragraph 3, did not apply to presume COMI to be in one State or the other.¹⁶

Cases decided under the EIR

11. In early cases decided under the EIR, courts took the view that the decisive question in determining COMI was where the company's head office functions were carried out.¹⁷ The presumption in favour of the place of the company's registered office was not a particularly strong one, just one of the factors to be taken into account with the whole of the evidence in reaching a conclusion as to the location of the COMI.¹⁸ In making its decision, one court said it must have regard to the need for the COMI to be ascertainable by third parties; in particular, creditors and potential creditors (see further discussion on ascertainability below). It is important, the court said, to have regard not only to what the debtor is doing, but also to what the debtor would be perceived to be doing by an objective observer.¹⁹

12. The key decision under the EIR is that in Eurofood,²⁰ in which the ECJ held that “in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community Legislature in favour of the registered office [...] can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.”²¹ The ECJ suggested the presumption could be rebutted in the case of a “letterbox company”, which did not carry out any business in the territory of the State in which its registered office was situated. It also took the view

that “the mere fact” that a parent company made economic choices (for example, for tax reasons) as to where the registered office of its subsidiary might be situated would not be enough to rebut the presumption.²² The decision places significant weight on the need for predictability.

13. In the subsequent case of *Interdil*,²³ the ECJ held that the second sentence of article 3 of the EIR²⁴ must be interpreted to mean that “a debtor company’s main centre of interests must be determined by attaching greater importance to the place of the company’s central administration, as may be established by objective factors which are ascertainable by third parties.” The court went on to say that when management, including the making of management decisions, and supervision of a company take place in the same location as the registered office, in a manner that is ascertainable by third parties, the presumption cannot be rebutted. However, where a company’s central administration is not in the same place as its registered office, a comprehensive assessment of all the relevant factors must be undertaken to establish, in a manner that is ascertainable by third parties, the location of the company’s actual centre of management and supervision and of the management of its interests. In that case, the court held that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a European Union member State other than the one in which the registered office is situated could not be regarded as sufficient factors to rebut the presumption, unless the comprehensive assessment of all relevant factors pointed to that other member State. Article 3, paragraph 1, of the EIR recast now provides greater definition of the concept of COMI.²⁵

Operation of the presumption under the MLCBI

14. As indicated in paragraph 2 above, when the debtor’s COMI is alleged to be at the same location as its place of registration, no issue concerning rebuttal of the presumption will generally arise.²⁶ Where there is no serious controversy, the presumption provides convenience of proof, permitting and encouraging fast action in cases where speed may be essential,²⁷ linking the presumption to the imperative under article 17, paragraph 3, that an application for recognition is to be decided upon at the earliest possible time.²⁸

15. However, some courts have said that they are not bound to “blindly follow” the article 16 presumption,²⁹ and it is the task of the receiving court to review each petition to determine whether all requisites for recognition are met,³⁰ to consider independently where the debtor’s COMI is located³¹ and to analyse the relevant factors.³² In a case where the applicants for recognition relied upon the presumption and the absence of any objection, electing not to address or establish facts supporting the existence of a “main” proceeding, the court said there was evidence to the contrary and the court’s power to examine the facts underlying article 17 could not be side-stepped or eliminated by election not to plead or introduce relevant facts.³³ In another case, the fact that three courts in other jurisdictions acting under the MLCBI had accepted the application of the presumption in article 16, paragraph 3 in

relation to the particular debtor was said by the receiving court to be a factor that could also be taken into account in the recognition proceedings.³⁴

Burden of proof

16. As indicated above, in the introduction, the GEI [para. 143] notes that when a foreign representative seeks recognition of a foreign proceeding as a main proceeding and there appears to be a separation between the place of the debtor’s registered office and its alleged COMI, the party alleging the debtor’s COMI is not at its place of registration will be required to satisfy the court as to its location.³⁵ In one State, a different approach applies and the ultimate burden lies upon the person asserting that the particular proceedings are main proceedings, usually the foreign representative, not upon the party opposing that contention.³⁶ The opposing party may be a creditor or an interested party or the issue may be raised by the court itself. When the court itself calls the article 16 presumption into question, on the basis that it regards the issues to be sufficiently material to warrant further inquiry,³⁷ it may call for and assess information in accordance with procedural law.³⁸ Where there is a substantial dispute, the presumption is of less weight³⁹ and reliance upon it would be inappropriate.⁴⁰ In a case involving disputed facts, where there was no cross-examination, the court has said that in applying article 16, paragraph 3, the court must be satisfied, or as satisfied as it can be, having regard to the limitations that an interlocutory process imposes,⁴¹ that the COMI is not in the State of the registered office.

Ascertainability

17. As noted above, in the introduction to this article, the factors relevant to rebuttal of the presumption in article 16, paragraph 3, should be both objective and ascertainable by third parties.⁴² Although not a specific requirement of the MLCBI, it has been suggested that that absence does not alter the position as the framers of the MLCBI envisaged the interpretation of COMI under the EIR (which would necessarily take into account recital 13)⁴³ would be equally applicable to the MLCBI. Courts in different jurisdictions have adopted that approach.⁴⁴

18. The cases analysing COMI typically demonstrate that courts do not apply any rigid formula or consistently find one factor dispositive; instead they have tended to analyse a variety of factors to discern, objectively, where a particular debtor has its COMI. It is important, courts have suggested, to consider not just what the debtor was doing, but also what the objective observer perceived the debtor was doing.⁴⁵ That inquiry examines the debtor’s administration, management and operations together with the expectations of third parties⁴⁶ and in particular, whether reasonable and ordinary third parties (including creditors and potential creditors,⁴⁷ and investors)⁴⁸ can discern or perceive where the debtor is conducting those various functions.⁴⁹ Whether there is an element of permanence in the conduct of these functions is also a consideration.⁵⁰

19. What is ascertainable by a third party is said to be what is in the public domain and what a typical third party would learn as a result of dealing with the debtor in the ordinary course of business.⁵¹ That information may be obtained from a variety of sources, including documents to be filed with corporate regulators;⁵² press releases, presentations and prospectuses;⁵³ address information on the business cards of key executives; the address given on insurance, fundraising and guarantee documents;⁵⁴ or from a company's website.⁵⁵ One court has suggested that factors ascertainable only on enquiry would be excluded, as they would introduce an element of uncertainty to the analysis.⁵⁶ Where the debtor's activities cease on or before commencement of the foreign insolvency proceeding, courts have suggested it may be appropriate to consider, in the COMI analysis, the location in which any relevant activities, including the debtor's liquidation activities and administrative functions, are carried out.⁵⁷ However, as noted below, the determination of the habitual residence of a natural person for the purposes of article 16, paragraph 3, may involve reception by the court of facts not readily ascertainable to third parties.

**COMI with respect to corporate debtors:
relevant factors**

20. Courts have held a wide range of factors to be relevant to rebutting the presumption in article 16, paragraph 3, as it relates to both corporate and individual debtors. As the JP [para. 99] notes, several subtle differences in approach have emerged and it might be that courts in some jurisdictions seek evidence of a greater quality or quantity to rebut the presumption than is the case in other States determining the location of the debtor's COMI. Early cases decided under the MLCBI identified several factors that have been added to, refined and reduced over time.

21. The following five factors have been identified by courts as being among the most important with respect to corporate debtors, with courts giving one or other factor more weight depending on the facts of the specific case. Some courts have indicated these factors are not exclusive and do not all have to be met in each case:⁵⁸

- (a) The location of the debtor's headquarters;
- (b) The location of those who actually manage the debtor (which could conceivably be the headquarters of a holding company);
- (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 creditors who would be affected by the case;
- (e) The jurisdiction whose law would apply to most disputes.⁵⁹

22. These factors have been refined, so that subparagraph (a) can be characterized as the location of the debtor's head office functions⁶⁰ or "nerve centre";⁶¹ subparagraph (b) includes those who direct the debtor;⁶² and subparagraph (c) includes the location of the debtor's operations.⁶³ An additional key

factor, as noted above, is the expectations or perceptions of third parties about the location of the debtor's COMI and that it be ascertainable by those third parties. It has also been recognized that where the debtor's activities have been conducted for an extended period of time in connection with winding up the debtor's business, the activities of the liquidator may be both relevant and important to the COMI determination.⁶⁴

23. Other factors referred to by courts have included:

- (a) The location of the debtor's books and records;⁶⁵
- (b) The location where financing was organized or authorized;⁶⁶
- (c) The location from where the cash management system was run;⁶⁷
- (d) The location of the debtor's primary bank or other principal lender;⁶⁸
- (e) The location of employees⁶⁹ or employee administration, including human resource functions;⁷⁰
- (f) The location in which commercial policy was determined;⁷¹
- (g) The site of the controlling law⁷² or the law governing the main contracts of the company;⁷³
- (h) The location from which decisions on purchasing and sales policy, marketing, staff, treasury management functions, including accounts payable, were directed;⁷⁴
- (i) The location from which communication functions/computer systems were managed;⁷⁵
- (j) The location from which contracts (for supply) were organized;⁷⁶
- (k) The location from which reorganization of the debtor is being conducted;⁷⁷
- (l) The location in which the debtor is subject to supervision or regulation;⁷⁸
- (m) The location whose law governed the preparation and audit of accounts and the location in which they were prepared and audited;⁷⁹
- (n) The location from which claims processing and investment, actuarial and legal functions were managed;⁸⁰
- (o) The location to which invoices from financial advisors were sent;⁸¹
- (p) The location in which pricing decisions and new business development initiatives were created;⁸²
- (q) The location at which technical evaluation, engineering design, operational and logistical preparation and execution were conducted;⁸³
- (r) The location in which tax returns indicated income from trade and business was derived.⁸⁴

24. In the context of enterprise groups (i.e., where the debtor seeking recognition is a member of an enterprise group), some courts have examined additional factors including:⁸⁵

- (a) Whether the enterprise is managed on a consolidated basis;

(b) Where other members of the corporate group are incorporated;

(c) The extent of integration of the enterprise's international operations, including corporate, strategic, financial and management perspectives, such as the existence of shared management between the entities and within the organization.

25. Since adoption of the GEI in 2013 to provide more information on the factors relevant to determination of COMI,⁸⁶ case law has confirmed the principal factors as being (a) where the central administration of the debtor takes place,⁸⁷ and (b) which is readily ascertainable by creditors. Several courts, in analysing the factors relevant to rebuttal of the presumption, have responded to the discussion that took place in UNCITRAL in the course of revising the GEI.⁸⁸

26. With respect to the factors noted in the GEI as being additional to the two key factors,⁸⁹ it has been suggested that while they might be relevant in specific cases, they should be considered of secondary importance and only to the extent they relate to the two key factors⁹⁰ and that the court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case.⁹¹ It has also been noted that not all of those factors will necessarily be ascertainable by third parties (e.g., the details of income disclosed in tax returns).⁹² In all cases, however, it is suggested that the endeavour is a holistic one, having regard to the totality of the evidence, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's COMI, as readily ascertainable by creditors.⁹³

COMI with respect to individuals: habitual residence

27. While the concept of "habitual residence" is not defined in the MLCBI, it has a long history of usage in many international conventions and instruments and a settled body of law concerning its meaning has developed. In considering what constitutes the habitual residence of a particular debtor, some courts have looked to those international sources and indicated that they can see no reason why, in respect of individual debtors, the determination of "habitual residence" should not be conducted in the same way it is approached in their particular jurisdiction with respect to other international instruments in which the expression is used, such as the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.⁹⁴ Some courts have suggested that habitual residence can be interpreted as what is regarded as a customary or usual residence.⁹⁵ Courts have also noted that ascertainment of "habitual residence" may entail the reception of facts which, though relevant, are not readily ascertainable by third parties.⁹⁶

28. Some courts have held that a wide variety of circumstances can bear upon the question,⁹⁷ but the weight given to any one of the factors will likely vary depending on the relative importance of the factor to the debtor and the debtor's personal circumstances.⁹⁸ Factors considered have included:

(a) The debtor's settled purpose;⁹⁹

(b) The actual and intended length of stay in a State,¹⁰⁰ interpreted in some States as being an intention to remain for an indefinite period of time¹⁰¹ or for the foreseeable future unless and until something might occur to prompt or compel a change (e.g., loss of employment, family needs, illness, job opportunities, retirement);¹⁰²

(c) The purpose of the stay;

(d) The strength of ties to the State and to any other State (both in the past and currently), requiring a meaningful connection and an element of permanence and stability;¹⁰³

(e) The degree of assimilation into the State (including living and schooling arrangements);

(f) Cultural, social and economic integration,¹⁰⁴ including location of the individual's regular activities, such as possible club memberships or affiliations with religious organizations, and other recognized ties to the community that are indicative of residential status and community involvement.¹⁰⁵

29. Reference to an individual debtor's historical position may be critical in determining whether the present residential position is "habitual". Courts have suggested that the scope for factual inquiry is broad and, though a debtor's subjective intention is not irrelevant, the conclusion as to habitual residence must be reached after an objective examination of the whole of the evidence.¹⁰⁶ Intention is not to be given controlling weight¹⁰⁷ as an insolvent's intentions may be ambiguous.¹⁰⁸ In one case it was suggested that a transnational insolvent may lead such a nomadic life as not to have a habitual residence.¹⁰⁹

30. Referring to the types of factor found to be relevant to determining the COMI of a corporation, one court found the ones that might be useful in instances where the debtor was an individual included:

(a) The location of the debtor's primary assets;

(b) The location of the majority of the debtor's creditors or a majority of the creditors that would be affected by the case;

(c) The jurisdiction whose law would apply to most disputes.¹¹⁰

31. Another court indicated that some of the additional factors listed in the GEI [para. 147] in relation to a corporate debtor might also be relevant for a natural person and included, in addition to those cited in the previous paragraph, the location of:

(a) The debtor's books and records;

(b) The debtor's principal bank or other principal lender;

(c) The debtor's administration, payroll, accounts payable or cash management activity relating to the debtor's business;

(d) The tax authority relevant to the debtor's income from personal exertion and taxation thereon.¹¹¹

Notes

¹ Poland has deleted from its Bankruptcy and Recovery Law 2003 article 391, which gave effect to art. 16 of the MLCBI; the cross-border part of the Polish law no longer allows reliance on presumption.

² GE [paras. 113–115, 122–123].

³ GE [para. 115].

⁴ GEI [para. 145].

⁵ Those additional factors, listed in no particular order or priority, may include the following: the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

⁶ *United States*: Grand Prix Assocs., case No. 09-16545 (Bankr. D.N.J. June 26, 2009), p. 5 – court confirmed that art. 16, para. 1, allowed the court to presume that the foreign proceeding was such if the foreign court's order stated that it was a foreign proceeding and that the appointed person or entity was a foreign representative; *Innuva Can., Ltd.*, case No. 09-16362 (Bankr. D.N.J. Apr. 15, 2009), p. 4 – court recognized a receivership from Canada as amounting to as foreign proceeding relying, under art. 16, para. 1, on the foreign court's declaration that the receiver was the foreign representative of a foreign proceeding and was specifically authorized to seek recognition in the United States under the relevant legislation (see above art. 2, subpara. (a)), for cases in which a receivership was found not to be a foreign proceeding). See also *England*: *Worldspreads Limited* [2012] EWHC 1263 (Ch) [para. 38] – to facilitate recognition in certain foreign States, the English court commencing the special administration proceeding included in its orders confirmation that the proceeding qualified as a foreign proceeding under art. 2, subpara. (a), of the MLCBI and as a foreign main proceeding under art. 2, subpara. (b), of the MLCBI, and the appointed special administrators qualified as foreign representatives under art. 2, subpara. (d), of the MLCBI.

⁷ *United States*: *Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789; *Oversight & Control Commission of Avanzit, S.A.*, 385 B.R. 525, 532 (Bankr. S.D.N.Y. 2008), CLOUT 925.

⁸ Some States provide that the court “may” require legalization of documents supporting the application for recognition under art. 15, e.g., Chile (art. 314, 20.720 Law of 2014) and Colombia (art. 100, Law 1116, 2006).

⁹ E.g., *United States*: *SPhinX, Ltd.* 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), CLOUT 768.

¹⁰ *Australia*: *Gainsford*, in the matter of *Tannenbaum v Tannenbaum* [2012] FCA 904 [para. 27], CLOUT 1214.

¹¹ *Mexico*: case No. 2006429, Commercial Insolvency Act. Conditions for Recognition of Foreign Proceedings in Mexico. Ninth Epoch. First Chamber, Weekly Federal Court Report, Book 6, May 2014, vol. 1, p. 551 (Court precedent: 1st CLXXXII/2014 (10th)).

¹² GE [para. 122].

¹³ *England*: *Stanford International Bank Limited* [2010] EWCA Civ 137, CLOUT 1003 [53] referring to the report of the Commission on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17)*) [153] and the GE; see also cases under ascertainability below.

¹⁴ *Australia*: *Katayama v Japan Airlines Corporation* [2010] FCA 794 [25]. *Japan*: *Think3*, case Nos. (shou) 3 and 5 of 2011, Tokyo District Court, ch. 3, issue 2-2, (2), CLOUT 1335 – court said that the Insolvency Law Group Meeting of the Legislative Council of the Ministry of Justice in Japan explained that the “principal place of business” is used in the Act because the notion of COMI in the MLCBI is almost consistent with the “principal place of business” in the Code of Civil Procedure of Japan. In addition, in the writing by the person in charge of this legislative work, it is explained that the notion of COMI is not different in essence from the “principal place of business”. Therefore, the court said, the “principal place of business” in the Act is considered to have, substantively, the same meaning with COMI in the MLCBI. *United States*: *Tri-Continental Exchange, Ltd.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006), CLOUT 766; *Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48 (Bankr. S.D.N.Y. 2008), CLOUT 789; *Tradex Swiss AG*, 384 B.R. 34, 43 (Bankr. D. Mass. 2008), CLOUT 791; *Bear Stearns*, 389 B.R. 325, 336 (S.D.N.Y. 2008), CLOUT 794 – appellate court noted the early decision in *Tri-Continental Exchange, Ltd.* properly equated COMI with the United States concept of “principal place of business”; *Betcorp Limited*, 400 B.R. 266, 287, 289–290 (Bankr. D. Nev. 2009), CLOUT 927; *British American Isle of Venice, Ltd.*, 441 B.R. 713, 720 (Bankr. S.D. Fla. 2010); *RHTC Liquidating Co.*, 424 B.R. 714, 723 (Bankr. W.D. Pa. 2010); *compare Morning Mist Holdings Ltd. v Kryss (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 135–136, 138 (2d Cir. Apr. 16, 2013), CLOUT 1339 – in footnote 10, the appellate court reiterated that since Congress chose the term “COMI” rather than “principal place of business”, the later concept did not control the analysis. But to the extent that the concepts were similar, it said, a court may certainly consider a debtor's “nerve centre”, *citing Hertz Corporation v Friend*, 559 U.S. 77, 130 S. Ct 1181, 1192 (2010).

¹⁵ *United States*: *Jay Tien Chiang* 437 B.R. 397, 399 (Bankr. C.D. Cal. 2010), CLOUT 1318 – If a debtor has no COMI, there is no legal regime governing its commercial activities, it could be unregulated and operating outside the law (403–404).

¹⁶ *Australia*: *Legend International Holdings Inc.* [2016] VSC 308 [para. 123], CLOUT 1619 – apart from complying with the regulatory requirements of Delaware and the original incorporation in Delaware, the court determined the location of the COMI to be in Australia by reference to a number of factors indicating that the preponderance of the debtor's activities was conducted in Australia.

¹⁷ *EIR*: *Collins v Aikman* [2006] B.C.C. 606.

¹⁸ *EIR*: *Ci4net.com Inc.* [2005] B.C.C. 277.

¹⁹ *EIR*: *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966 [para. 55].

²⁰ *EIR*: *Eurofood IFSC Ltd (Re)* [2006] Ch 508 (ECJ). The case is discussed in the JP [paras. 100–104].

²¹ *Ibid.*, *EIR*: *Eurofood* [para. 34].

²² *Ibid.*, *EIR*: *Eurofood* [para. 36].

²³ *EIR*: *Interdil, Srl.* [2011] EUECJ C-396/09.

²⁴ *EIR* art. 3, para. 1, second sentence provides: “In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.”

²⁵ *EIR* recast art. 3, para. 1: “The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.”

²⁶ *United States*: Gerova Financial Group, Ltd. 482 B.R. 86, 91 (Bankr. S.D.N.Y. 2012), CLOUT 1275 – virtually no evidence was provided to the contrary.

²⁷ *United States*: SPhinX, Ltd. 371 B.R. 10, 18 (S.D.N.Y. 2007), CLOUT 768 *citing* the legislative history to the United States Bankruptcy Code (11 U.S.C.) Ch. 15 (H.R.Rep 109–31 pt. 1, 109th Cong. 1st Sess. at 112–113 (2005)).

²⁸ *Australia*: Akers v Saad Investments [2010] FCA 1221 [para. 46] (appeal on other grounds), CLOUT 1219.

²⁹ *United States*: Basis Yield Alpha Fund (Master) 381 B.R. 37, 51 (Bankr. S.D.N.Y. 2008), CLOUT 789.

³⁰ *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 900 (Bankr. S.D.Fla. 2010), CLOUT 1005.

³¹ *United States*: Bear Stearns 389 B.R. 325, 335–336 (S.D.N.Y. 2008), CLOUT 794.

³² *Canada*: Cinram International Inc. [2012] ONSC 3767, CLOUT 1269 – the (originating) court in Canada listed in its decision factors that might be considered relevant to a determination of the debtor’s COMI, but noted that that discussion was provided for information purposes only, recognizing that it was the function of the recognizing court to determine the location of the COMI and whether in this case the proceeding in Canada was the foreign main proceeding;

United States: Gerova Financial Group, Ltd. 482 B.R. 86, 91 (Bankr. S.D.N.Y. 2012), CLOUT 1275; Betcorp Limited 400 B.R. 266, 285–286 (Bankr. D. Nev. 2009), CLOUT 927; Bear Stearns 389 B.R. 325, 335 (S.D.N.Y. 2008), CLOUT 794; Basis Yield Alpha Fund (Master) 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008), CLOUT 789 – when joint provisional liquidators sought summary judgment relying on the presumption only, the court held they could not rely on the presumption as a substitute for real evidence.

³³ *United States*: Basis Yield Alpha Fund (Master) 381 B.R. 37, 47–48 (Bankr. S.D.N.Y. 2008), CLOUT 789; see also Bear Stearns 389 B.R. 325, 335 (S.D.N.Y. 2008), CLOUT 794 – court confirmed the lower court’s rejection of the appellants’ position that “this Court should accept the proposition that the Foreign Proceedings are main proceedings because the Petitioners say so and because no [one] else says they aren’t”: 374 B.R. 122, 129.

³⁴ *Australia*: Akers v Saad Investments [2010] FCA 1221 [para. 55] (appeal addresses other issues), CLOUT 1219 – see above, art. 8 – use of foreign interpretations and judicial precedents.

³⁵ *Ibid.*, *Australia*: Akers [para. 54] (appeal addresses other issues), CLOUT 1219; Young v Buccaneer Energy [2014] FCA 711 [paras. 7–14], CLOUT 1476. *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 33], CLOUT 1003. *United States*: Tri-Continental Exchange, Ltd., 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006), CLOUT 766; Bear Stearns, 389 B.R. 325, 335–336 (S.D.N.Y. 2008), CLOUT 794.

³⁶ The legislative history of the United States Bankruptcy Code, 11 U.S.C. sect. 1516 (c) (enacting art. 16 (3) MLCBI), explains that the word “proof” was changed to “evidence” to make it clearer, using United States terminology, that the ultimate burden is on the foreign representative (H.R. REP. No. 109–31, 112–13 (2005)); see the JP (2013) [para. 99]. Tri-Continental Exchange, Ltd., 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006), CLOUT 766 – court confirmed United States jurisprudence holds that the burden of proof lies on the person who is asserting that the particular proceedings are “main” proceedings and that it is never on the party opposing that contention. That party has only a burden of adducing some evidence inconsistent with the COMI being located at the registered office: Tradex Swiss AG, 384 B.R. 34, 43 (Bankr. D. Mass. 2008), CLOUT 791: Tradex’s registered office was in Switzerland, but the court said that did not end the inquiry. If contrary evidence was submitted, the burden of establishing the COMI shifted to the foreign representatives to demonstrate that Tradex’s COMI was in Switzerland. The petitioning creditors had met the burden with respect to contrary evidence by introducing critical information such as the location of the trading platform in the United States, the fax confirmation of trades from the United States, the location of assets and a significant number of creditors in the United States, and the fact that signatory authority was designated to the manager of the office in the United States. The burden then rested upon the foreign representatives to show that, by a preponderance of the evidence, the COMI was in Switzerland. Although there was evidence of some presence in Switzerland – the location in Switzerland was larger than the office in the United States, although with far fewer employees in Switzerland; the individual who may have benefited financially from the alleged fraudulent scheme was registered as a resident of Switzerland; there were plans to have visas issued to bring individual customers to Switzerland and there were wholly unfulfilled expectations of setting up offices worldwide – it was not enough to show that the principal place of business was in Switzerland. While acknowledging the difficulty in the instant case of providing appropriate evidence, the court said the foreign representatives still must establish the COMI by a preponderance of the evidence and had failed to discharge that burden.

³⁷ *United States*: Creative Finance Ltd., 543 B.R. 498, 517 (Bankr. S.D.N.Y. 2016), CLOUT 1624 *citing* Basis Yield Alpha Fund (Master), 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789.

³⁸ *United States*: Innua Can., Ltd., case No. 09-16362 (Bankr. D.N.J. Apr. 15, 2009), pp. 5–6 – no objections to the location of COMI were made, but the court elected to examine the factors relevant to determining COMI; Basis Yield Alpha Fund (Master), 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789 – the court said it always had the power to make its own determination on qualification under [article 17], notwithstanding the presence of [article 16] and the absence of actual objection.

³⁹ *United States*: SPhinX, Ltd., 371 B.R. 10, 18 (S.D.N.Y. 2007), CLOUT 768.

⁴⁰ *Australia*: Akers v Saad Investments [2010] FCA 1221 [para. 31] (appeal addresses other grounds), CLOUT 1219. *United States*: SPhinX, Ltd., 371 B.R. 10, 18 (S.D.N.Y. 2007), CLOUT 768; Creative Finance Ltd., 543 B.R. 498, 517 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

⁴¹ *Gibraltar*: Peabody Holdings (Gibraltar) Ltd, Claim No. 2016-Comp-008, 31 May 2016; *England*: Stanford International Bank Limited [2010] EWCA Civ 136 [para. 30], CLOUT 1003.

⁴² GEI [para. 145].

⁴³ Report of the Commission on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17)*) [para. 153]; GE [para. 72], GEI [paras. 81–84]; recital 13 of the EIR provides: The “centre of main interests” should

correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. This is now covered by recital 28 of the EIR recast.

⁴⁴ E.g., *Gibraltar*: Peabody Holdings (Gibraltar) Ltd, Claim No. 2016-Comp-008, 31 May 2016. *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 53]. *EIR*: The rationale is that potential creditors should be able to ascertain in advance the legal system that would resolve any insolvency affecting their interests: Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ) [para. 33]. *United States*: SPhinX, Ltd., 371 B.R. 10, 19 (S.D.N.Y. 2007), CLOUT 768; Bear Stearns, 389 B.R. 325, 337 (S.D.N.Y. 2008), CLOUT 794; British-American Insurance Co., Ltd., 425 B.R. 884, 909 (Bankr. S.D.Fla. 2010), CLOUT 1005 – these cases recognized that the Eurofood decision (Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ)) was not inconsistent with United States courts’ reading of the COMI presumption.

⁴⁵ *Australia*: Moore v Australian Equity Investors [2012] FCA 1002 [para. 19], CLOUT 1477; Kapila, Re Edelsten [2014] FCA 1112 [para. 53], CLOUT 1475. *England*: Stanford International Bank Ltd [2010] EWCA Civ 137 [paras. 48–49], CLOUT 1003. *United States*: Tri-Continental Exchange, Ltd. 349 B.R. 627, 633–634 (Bankr. E.D. Cal. 2006), CLOUT 766; Betcorp Limited, 400 B.R. 266, 291 (Bankr. D. Nev. 2009), CLOUT 927; Lavie v Ran (*In re* Ran), 607 F.3d 1017, 1026 (5th Cir. 2010), CLOUT 1276.

⁴⁶ *Gibraltar*: Peabody Holdings (Gibraltar) Ltd, Claim No. 2016-Comp-008, 31 May 2016 [para. 27]; *United States*: British-American Insurance Co., Ltd., 425 B.R. 884, 909 (Bankr. S.D.Fla. 2010), CLOUT 1005.

⁴⁷ *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 53], CLOUT 1475.

⁴⁸ *United States*: Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88, 93 (S.D.N.Y. 2012), CLOUT 1208.

⁴⁹ *Australia*: Akers v Saad Investments [2010] FCA 1221 [para. 49] (appeal addresses other issues), CLOUT 1219 following Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ), Stanford International Bank [2010] EWCA Civ 137, CLOUT 1003 and Betcorp Limited, 400 B.R. 266, 290–291 (Bankr. D. Nev. 2009), CLOUT 927; followed in Young v Buccaneer Energy [2014] FCA 711 [para. 7], CLOUT 1476. *Canada*: Massachusetts Elephant & Castle Group Inc. [2011] ONSC 4201 [paras. 30–31], CLOUT 1206. *England*: Stanford International Bank Ltd [2010] EWCA Civ 137 [paras. 55–56], CLOUT 1003. *United States*: Betcorp Limited 400 B.R. 266, 290–291 (Bankr. D. Nev. 2009), CLOUT 927; Lavie v Ran (*In re* Ran) 607 F.3d 1017, 1025–6 (5th Cir. 2010), CLOUT 1276.

EIR: Shierson v Vlieland-Boddy [2005] 1 WLR 3966 [para. 55]; recital 28 of the EIR recast provides some further explanation: “When determining whether the centre of the debtor’s main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means”; see also Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ) [para. 33].

⁵⁰ *Australia*: Moore v Australian Equity Investors [2012] FCA 1002 [para. 19], CLOUT 1477; Kapila, Re Edelsten [2014] FCA 1112 [para. 53], CLOUT 1475.

⁵¹ *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 56.3], CLOUT 1003.

⁵² *United States*: Collins v Oilsands Quest, Inc., 484 B.R. 593, 596 (S.D.N.Y. 2012).

⁵³ *Ibid.*

⁵⁴ *Australia*: Young v Buccaneer Energy [2014] FCA 711 [para. 12], CLOUT 1476.

⁵⁵ *United States*: British-American Insurance Co., Ltd., 425 B.R. 884, 912–913 (Bankr. S.D.Fla. 2010), CLOUT 1005.

⁵⁶ *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 56], CLOUT 1003.

⁵⁷ *United States*: Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 137 (2d Cir. Apr. 16, 2013), CLOUT 1339 – in this case those activities related to the fact that more than 18 months before the application for recognition and more than seven months before the foreign proceeding commenced the debtor had effectively ceased business, severed its relations with its investment manager in New York, and had begun a winding up process. The court concluded that it was appropriate to consider those liquidation activities in connection with a determination as to COMI. The court also suggested [footnote 10] that a court may consider a debtor’s “nerve center”, including from where the debtor’s activities are directed and controlled, in determining COMI (*citing* Hertz Corp. v Friend, 130 S.Ct. 1181, 1193–94 (2010)); see also Betcorp Limited, 400 B.R. 266, 292–293 (Bankr. D. Nev. 2009), CLOUT 927; British-American Insurance Co., Ltd. 425 B.R. 884, 914 (Bankr. S.D.Fla. 2010), CLOUT 1005; British American Isle of Venice, Ltd., 441 B.R. 713, 720–724 (Bankr. S.D. Fla. 2010); Bear Stearns 389 B.R. 325, 338–339 (S.D.N.Y. 2008), CLOUT 794; Lavie v Ran 607 F.3d 1017, 1027 (5th Cir. 2010) – courts in these cases said that bankruptcy proceedings are intentionally temporary and transitory, they could not be viewed as an industrial or professional activity; Creative Finance Ltd. 543 B.R. 498, 521 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

⁵⁸ *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 909 (Bankr. S.D.Fla. 2010), CLOUT 1005; British American Isle of Venice, Ltd., 441 B.R. 713, 720 (Bankr. S.D. Fla. 2010) – court noted that in the case before it, several of the important factors were not helpful in assisting it to determine the debtor’s COMI, which was ultimately found to be located at the foreign representative’s offices.

⁵⁹ *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 54], CLOUT 1475 – with respect to (*d*), and in the context of COMI of a natural person, the court said that the relative significance of each creditor could have to be evaluated, as well as variables such as number, value, whether secured or not, and whether present, future, certain or contingent in comparing relative differences in two or more jurisdictions; Katayama v Japan Airlines Corporation [2010] FCA 794 [para. 25]. *Canada*: Gyro-Trac (United States) Inc. [2010] QCCA 800. *Japan*: Think3, case No. (ra) 1757 of 2012, Tokyo High Court (2 November 2012) ch. 3, 2 (2). *United States*: SPhinX, Ltd. 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768 followed in Bear Stearns, 389 B.R. 325, 336–337 (S.D.N.Y. 2008), CLOUT 794; Tradex Swiss AG, 384 B.R. 34, 42–43 (Bankr. D. Mass. 2008), CLOUT 791; Petition of Ernst & Young, Inc., 383 B.R. 773, 779–780 (Bankr. D. Colo. 2008), CLOUT 790; Basis Yield Alpha Fund (Master), 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008), CLOUT 789; Betcorp Limited, 400 B.R. 266, 292–293 (Bankr. D. Nev. 2009), CLOUT 927; Collins v Oilsands Quest, Inc., 484 B.R. 593, 596 (S.D.N.Y. 2012).

⁶⁰ *United States*: OAS S.A., 533 B.R. 83, 101–102 (Bankr. S.D.N.Y. 2015), CLOUT 1629; Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88, 92 (S.D.N.Y. 2012), CLOUT 1208; Collins v Oilsands Quest, Inc., 484 B.R. 593, 596 (S.D.N.Y. 2012) – location of strategic decision making and corporate functions; British-American Insurance Co., Ltd., 425 B.R. 884, 911–12 (Bankr. S.D.Fla. 2010), CLOUT 1005 – the court said the headquarters of a corporate entity is more than the location of the board of directors. The term headquarters or head office contemplates the place where the primary management of the entity’s business is undertaken. That includes all relevant business functions, such as financial, administrative, marketing, information technology, investment and legal functions. Other functions may be relevant depending on the nature of the debtor’s

business; Tradex Swiss AG, 384 B.R. 34, 47 (Bankr. D. Mass. 2008), CLOUT 791; Basis Yield Alpha Fund (Master), 381 B.R. 37, 47 (Bankr. S.D.N.Y. 2008), CLOUT 789; Bear Stearns, 389 B.R. 325, 336–337 (S.D.N.Y. 2008), CLOUT 794; SPhinX, Ltd. 371 B.R. 10, 19 (S.D.N.Y. 2007), CLOUT 768.

EIR: Collins & Aikman Corporation Group [2005] EWHC 1754 (Ch) [para. 19].

⁶¹ *United States*: OAS S.A. 533 B.R. 83, 101–102 (Bankr. S.D.N.Y. 2015), CLOUT 1629; Morning Mist Holdings Ltd. v Kryss (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 138 n. 10 (2d Cir. Apr. 16, 2013), CLOUT 1339.

⁶² *England*: Stanford International Bank Limited [2010] EWCA Civ 137, CLOUT 1003.

⁶³ *Canada*: Digital Domain Media Group Inc. [2012] BCSC 1565 [para. 28], CLOUT 1334; Massachusetts Elephant and Castle Group Inc. [2011] ONSC 4201 [paras. 30–31], CLOUT 1206. *United States*: Collins v Oilsands Quest, Inc., 484 B.R. 593, 596 (S.D.N.Y. 2012).

⁶⁴ *United States*: British American Isle of Venice, 441 B.R. 713, 723 (Bankr. S.D. Fla. 2010) – debtor’s liquidation proceedings in the British Virgin Islands was a foreign main proceeding – *citing* British-American Insurance Co., Ltd. 425 B.R. 884, 914 (Bankr. S.D. Fla. 2010), CLOUT 1005, in which the court did not conclude that the actions of a foreign representative, such as the judicial manager here, could never be considered evidence in support of a finding of COMI, but said “There may be instances where a foreign representative remains in place for an extended period, and relocates all of the primary business activities of the debtor to his location (or brings business to a halt), thereby causing creditors and other parties to look to the judicial manager as the location of a debtor’s business. This could lead to the conclusion that the center of its main interest has become lodged with the foreign representative.” and Morning Mist Holdings Ltd. v Kryss (*In re* Fairfield Sentry Ltd.), 714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT 1339; Creative Finance Ltd., 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016), CLOUT 1624 – recognizing that the liquidator’s efforts in pursuing its obligations could cause a COMI shift, but finding that in the instant case the liquidator’s efforts in the British Virgin Islands were so minimal as to be insufficient to establish that the COMI had moved from Spain, Dubai or possibly England, where the sole shareholder of the debtor did business. The court said that Fairfield Sentry provided a means for United States recognition of letterbox jurisdiction insolvency proceedings, provided the estate fiduciaries did enough work in those jurisdictions; see also below on movement of COMI.

⁶⁵ *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 913 (Bankr. S.D. Flor. 2010), CLOUT 1005.

⁶⁶ *EIR*: MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)); Daisy Tek-ISA Ltd [2003] B.C.C. 562 (Ch D) (Leeds District Registry).

⁶⁷ *Australia*: Katayama v Japan Airlines Corporation [2010] FCA 794 [25]. *Canada*: Angiotech Pharmaceuticals Ltd. [2011] BCSC 115 [para. 7], CLOUT 1207. *United States*: Petition of Ernst & Young, Inc., 383 B.R. 773, 780–781 (Bankr. D. Colo. 2008), CLOUT 790.

⁶⁸ *EIR*: MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)); Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch).

⁶⁹ *Australia*: Katayama v Japan Airlines Corporation [2010] FCA 794 [para. 25]. *Canada*: Gyro-Trac (United States) Inc. [2010] QCCA 800; *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 31], CLOUT 1003. *United States*: Tradex Swiss AG, 384 B.R. 34 (Bankr. D. Mass 2008), CLOUT 791; Gold & Honey, Ltd. 410 B.R. 357, 371 (Bankr. E.D.N.Y. 2009), CLOUT 1008; British-American Insurance Co., Ltd. 425 B.R. 884 (Bankr. S.D. Flor. 2010), CLOUT 1005; Collins v Oilsands Quest, Inc. 484 B.R. 593, 596 (S.D.N.Y. 2012). *EIR*: Eurotunnel Finance, Ltd., Paris Commercial Court, 2 August 2006.

⁷⁰ *Canada*: Angiotech Pharmaceuticals Ltd. [2011] BCSC 115 [7], CLOUT 1207.

⁷¹ *EIR*: MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)).

⁷² *United States*: Tradex Swiss AG, 384 B.R. 34 (Bankr. D. Mass 2008), CLOUT 791.

⁷³ *EIR*: MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)).

⁷⁴ *Canada*: Angiotech Pharmaceuticals Ltd. [2011] BCSC 115 [para. 7], CLOUT 1207.

⁷⁵ *Ibid.*, *Canada*: Angiotech. *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 911 (Bankr. S.D. Fla. 2010), CLOUT 1005.

⁷⁶ *EIR*: Daisy Tek-ISA Ltd [2003] B.C.C. 562 (Ch D) (Leeds District Registry); MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)).

⁷⁷ *EIR*: Eurotunnel Finance, Ltd Paris Commercial Court, 2 August 2006; Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch).

⁷⁸ *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [31], CLOUT 1003. *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 914 (Bankr. S.D. Fla. 2010), CLOUT 1005. *EIR*: Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ).

⁷⁹ *EIR*: Eurofood IFSC Ltd (Re) [2006] Ch 508 (ECJ).

⁸⁰ *United States*: British-American Insurance Co., Ltd. 425 B.R. 884, 911 (Bankr. S.D. Fla. 2010), CLOUT 1005.

⁸¹ *Australia*: Young v Buccaneer Energy [2014] FCA 711 [para. 12], CLOUT 1476.

⁸² *Canada*: Angiotech Pharmaceuticals Ltd. [2011] BCSC 115, CLOUT 1207.

⁸³ *Australia*: Young v Buccaneer Energy [2014] FCA 711 [para. 12], CLOUT 1476.

⁸⁴ *Ibid.*

⁸⁵ *Canada*: Fraser Papers Inc. 56 CBR (5th) 194 [paras. 37–42], 2009 OJ 2648 (SCJ); Xerium Technologies Inc. 2010 ONSC 3974 [para. 27]; Caesars Entertainment Operating Co., 2015 CarswellOnt 3284, 23 C.B.R. (6th) 154, 2015 ONSC 712 [para. 35], [2015] O.J. No. 1201 (Ont. S.C.J.) – in addition to the principal factors noted in the GEI, the court noted that the group was functionally integrated from a corporate, strategic, financial and management perspective and that apart from the entity incorporated in Canada, the other 172 debtors in the group had their head office or headquarters in the United States; Colt Holding Company LLC, 2015 ONSC 3928 [paras. 25–26]; Horsehead Holding Corp and Zochem Inc (2016), 2016 ONSC 958 [para. 25], or 2016 CarswellOnt 1748 (Ont. S.C.J. [Commercial List]); Payless Holdings Inc. LLC (2017), 2017 CarswellOnt 5926, 2017 ONSC 2242 [para. 29] (Ont. S.C.J.); Angiotech Pharmaceuticals Ltd. [2011] BCSC 115 [para. 7], CLOUT 1207; *United States*: Collins v Oilsands Quest, Inc. 484 B.R. 593 (S.D.N.Y. 2012).

⁸⁶ See GEI [para. 18].

⁸⁷ *Canada*: Massachusetts Elephant & Castle Group Inc. [2011] ONSC 4201 [paras. 30–31], CLOUT 1206; Digital Domain Media Group Inc. [2012] BCSC 1565, CLOUT 1334. *England*: Videology Limited [2018] EWHC 2186 (Ch) [paras. 47–73], CLOUT 1823. *United States*:

SPhinX, Ltd, 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768; Bear Stearns, 389 B.R. 325, 336–337 (S.D.N.Y. 2008), CLOUT 794; Betcorp Limited 400 B.R. 266, 290 (Bankr. D. Nev. 2009), CLOUT 927; Collins v Oilsands Quest, Inc., 484 B.R. 593 (S.D.N.Y. 2012); Millennium Global Emerging Credit Master Fund Ltd., 474 B.R. 88 (S.D.N.Y. 2012), CLOUT 1208.

⁸⁸ E.g., *Canada*: Caesars Entertainment Operating Co., 2015 CarswellOnt 3284, 23 C.B.R. (6th) 154, 2015 ONSC 712 [2015] O.J. No. 1201 (Ont. S.C.J.); Massachusetts Elephant and Castle Group Inc., 2011 ONSC 4201 [para. 30], CLOUT 1206; Lightsquared LP [2012] ONSC 2994 [para. 28], CLOUT 1204. *Japan*: Think3, Tokyo High Court, case No. (ra) 1757 of 2012 (2 November 2012) (appeal).

⁸⁹ GEI [para. 147], see above, footnote to para. 4 of the introduction to article 16.

⁹⁰ *Canada*: Massachusetts Elephant & Castle Group Inc. [2011] ONSC 4201, CLOUT 1206.

⁹¹ *Canada*: Lightsquared LP [2012] ONSC 2994 [paras. 25–26], CLOUT 1204.

⁹² *Australia*: Young v Buccaneer Energy [2014] FCA 711, CLOUT 1476.

⁹³ *Canada*: Massachusetts Elephant and Castle Group Inc., 2011 ONSC 4201 [30], CLOUT 1206; Lightsquared LP [2012] ONSC 2994 [paras. 25–26, 28, 31], CLOUT 1204.

⁹⁴ *New Zealand*: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] 2 NZLR 380 (12 October 2010) [para. 42], CLOUT 1220; *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 41], CLOUT 1214.

⁹⁵ *United States*: Loy, 380 BR 154, 162 (Bankr. E.D. Va. 2007), CLOUT 924.

⁹⁶ *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 46], CLOUT 1214.

⁹⁷ *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 46], CLOUT 1475.

⁹⁸ *United States*: Kemsley, 489 B.R. 346, 360 (Bankr. S.D.N.Y. 2013), CLOUT 1274.

⁹⁹ *United States*: Pirogova, 593 B.R. 402, 409 (Bankr. S.D.N.Y. 2018) – the debtor’s stated intention was to leave the Russian Federation permanently and never reside there again and she had obtained permanent residence status in the United States.

¹⁰⁰ *Ibid.* citing Ran, 607 F.3d 1017, 1022–1023 (5th Cir. 2010).

¹⁰¹ *United States*: Kemsley, 489 B.R. 346, 352 (Bankr. S.D.N.Y. 2013), CLOUT 1274 citing Ran, 607 F.3d 1017 (5th Cir. 2010).

¹⁰² *Ibid.* *United States*: Kemsley.

¹⁰³ *Ibid.* *United States*: Kemsley.

¹⁰⁴ *New Zealand*: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] NZLR 380 [para. 42] (12 October 2010), CLOUT 1220 quoting Basingstoke v Groot [2007] NZFLR 363 (CA).

¹⁰⁵ *United States*: Kemsley, 489 B.R. 346, 360 (Bankr. S.D.N.Y. 2013), CLOUT 1274.

¹⁰⁶ *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904 [para. 44], CLOUT 1214.

¹⁰⁷ *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 46], CLOUT 1475.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* *Australia*: Kapila [para. 47].

¹¹⁰ *United States*: Kemsley, 489 B.R. 346, 360 (Bankr. S.D.N.Y. 2013), CLOUT 1274 citing Loy, 380 B.R. 154, 162 (Bankr. E.D. Va. 2007), CLOUT 924 and SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006), CLOUT 768.

¹¹¹ *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 54], CLOUT 1475.

Article 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:
 - (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
 - (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
 - (c) The application meets the requirements of paragraph 2 of article 15; and
 - (d) The application has been submitted to the court referred to in article 4.
2. The foreign proceeding shall be recognized:
 - (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.
3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 17 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 29–33, 201–202]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) The MLCBI: A/CN.9/419 [paras. 62–69]; A/CN.9/422 [paras. 76–93]; A/CN.9/433 [paras. 99–104]; A/CN.9/435 [paras. 167, 173];
 - (b) The GE (1997): A/CN.9/436 [paras. 68–69]; A/CN.9/442 [paras. 124–131];
 - (c) The GEI (2013): A/CN.9/715 [paras. 14–15, 32–35]; A/CN.9/738 [paras. 33–35]; A/CN.9/742 [paras. 57–62]; A/CN.9/763 [paras. 49–55]; A/CN.9/766 [paras. 41–44].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 167].

INTRODUCTION

1. The GEI [paras. 150–167]¹ explains article 17 establishes that recognition should be granted to the foreign proceeding as a matter of course provided recognition is not contrary to the public policy of the State under

article 6 and provided the application meets the requirements set out in paragraph 1. In making its recognition decision, the receiving court is limited to the preconditions set out in paragraph 1; in particular, it might be noted that no provision is made for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under the applicable law (see the JP [para. 41]).² In making its decision, the court may rely on the presumptions in article 16.

2. Paragraph 2 requires the court to decide between recognizing the proceeding as a main or a non-main proceeding; recognition of proceedings commenced in a foreign State in which the debtor has assets, but no establishment as defined in article 2, is not envisaged (see the JP [paras. 44–46]). The use of the present tense in article 17, subparagraph 2 (b), i.e., “if it is taking place [...]” requires the foreign proceeding to be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State at that time (i.e., it is no longer “taking place”, having been terminated or closed), there is no proceeding that would be eligible for recognition under the MLCBI. This issue is also discussed in the JP [paras. 129–134].

3. The GEI [paras. 157–160] discusses the date by reference to which the debtor’s COMI (or establishment) is to be determined, an issue not specifically addressed by the MLCBI. The GEI suggests that the appropriate date is the date of commencement of the foreign proceeding. The GEI [para. 159] notes that, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded to the decision commencing the foreign proceeding and appointing the

foreign representative, the date of commencement of that proceeding is the appropriate date for determining COMI. Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor's COMI is the foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the debtor's COMI by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a COMI, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 (a), is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine COMI provides a test that can be applied with certainty to all insolvency proceedings.

4. Paragraph 3 emphasizes the importance of recognition being obtained speedily; it may be noted that interim relief should be available under article 19 while the recognition application is pending.

5. Paragraph 4 clarifies that the decision on recognition may be revisited if the grounds for granting it were fully or partially lacking or have ceased to exist. The court's ability to review its decision is assisted by the obligation imposed on the foreign representative under article 18 to inform the court of changed circumstances. The JP [paras. 56–58] also discusses this point.

CASE LAW ON ARTICLE 17

ARTICLE 17, PARAGRAPH 1

6. Article 17, paragraph 1, makes provision for recognition of a foreign proceeding; it does not address recognition per se of a foreign representative. However, recognition of the foreign proceeding does require the court to be satisfied under article 17, subparagraph 1 (b), that the foreign representative applying for recognition is a person within the meaning of article 2, subparagraph (d).³ It has been noted in one case that while recognition of a foreign proceeding entitles the foreign representative to, among other things, seek relief from the recognizing court, it does not make that person an officer of that court, and the court cannot therefore exercise punitive or disciplinary powers against that person.⁴

7. Courts have emphasized that the requirements of articles 15⁵ and 17⁶ are to be strictly construed: the court must make an independent analysis of whether the proceedings meet the definitional requirements listed in articles 2 and 17 and, if satisfied, recognition should follow. This outcome is underlined by the words used in article 17, paragraph 1, that specify the one qualification to recognition – “subject to [...]”, which sends a clear message

to the judiciary that it is not subject to other things that are not so included.⁷ The court, it has been indicated, has no discretion in that regard and it would be improper to disregard the nature of the foreign proceeding or to look behind the judgment of the foreign court.⁸ Further, the court's power to examine facts underlying a request for recognition under article 17 cannot be sidestepped or eliminated by elections to not plead or introduce relevant facts or by a party's failure to object to recognition; the court may consider any and all relevant facts (including facts not yet presented).⁹ In a case that has been much cited,¹⁰ the court said that the analysis to be made was not a “rubber stamp exercise” that would enable recognition to be granted on the basis that there was no objection to recognition and because no proceedings had been commenced elsewhere.

ARTICLE 17, PARAGRAPH 2 (see also article 2, paragraph (f))

8. Once the requirements for recognition of article 17, paragraph 1, are met, the court must decide whether the foreign proceeding is to be recognized as a main or non-main proceeding under article 17, paragraph 2.¹¹ Although there are cases in which the court recognized the proceedings as “foreign proceedings” without determining whether they were main or non-main,¹² subsequent cases have emphasized the need to make the distinction as specified in article 17 and because of the different consequences flowing from recognition of the two types of proceeding.¹³ There are no exceptions to recognition other than those provided in the MLCBI. For example, in a case where the debtor's assets were entirely leveraged, the court found that there was no exception to recognition based on the debtor's debt to value ratio at the time of its insolvency.¹⁴

9. Where a non-main proceeding is taking place, it can be recognized as such without the need for a main proceeding to be taking place; one court said that it would run contrary to logic as well as the statute's plain language and purpose to force the court to recognize a foreign proceeding as a “main” proceeding simply because it was the only proceeding currently taking place.¹⁵

Timing with respect to the consideration of COMI and habitual residence

10. In considering the debtor's COMI, courts have made reference to several possible dates as being the most relevant to that determination,¹⁶ including:

- (a) The date of commencement of the foreign proceeding for which recognition is sought;
- (b) The date of the application for recognition;
- (c) The date the court is called upon to decide the application;
- (d) A date determined by reference to the operational history of the debtor.

(a) The date of commencement¹⁷ of the foreign proceeding for which recognition is sought¹⁸

11. One view is that because the date of application for recognition is an arbitrary or random matter¹⁹ and the proceeding for recognition is ancillary or secondary to the foreign proceeding, an interpretation by reference to the date in (a) is to be preferred.²⁰ It has also been suggested that the use of the present tense in article 17, paragraph 2 (i.e., use of the words “is taking place”), may be seen as a requirement that the foreign proceeding is to be current at the time of the recognition proceeding, but that one should not read too much into what might merely be seen as a neutral verb tense.²¹ Choosing the date of commencement of the foreign proceeding, it is suggested, will avoid different outcomes in different jurisdictions where applications for recognition are made at different times and the debtor may have moved around between those times (particularly in the case of a natural person debtor).²² It is also suggested that diversity of outcomes does not promote the goals of the preamble to the MLCBI or the need to promote uniformity of interpretation under article 8.²³ Another court noted that the date of commencement of the foreign proceeding is fixed and readily verifiable, while in contrast, the date for filing an application for recognition can vary greatly depending on the circumstances and the diligence of the foreign representative.²⁴

(b) The date of the application for recognition²⁴

12. Courts supporting the time referred to in (b) have focused on the use of the present tense (“has” its COMI) in paragraph 2 to conclude that a plain meaning interpretation would lead to the conclusion that the COMI is to be determined by reference to the facts as at the date of filing of the recognition application.²⁵ It is also suggested that that approach allows for the harmonization of transnational insolvency proceedings on the basis that limiting the inquiry to the time of filing avoids a detailed examination of the operational history of the applicant, which may entail conflicting COMI determinations by different courts.²⁶ A further argument in favour of this approach is that it allows the court to account for shifts in the debtor’s COMI in the period between the commencement of the foreign insolvency proceeding and the date of the application for recognition, which may be unobjectionable on the basis that it grants companies the discretion to select the jurisdiction that will offer the best prospects for achieving an effective restructuring solution and may be of particular relevance where all of the necessary measures are not in place by the time of commencement of the proceedings, the relevant date for COMI determination in some States.²⁷ One court has suggested that considering the period between the commencement of the foreign insolvency proceeding and the application for recognition may offset a debtor’s ability to manipulate COMI.²⁸

(c) The date the court is called upon to make a decision on the application²⁹

13. In support of this date, reliance has been placed upon the provision in the MLCBI for notifying changes of status under article 18 and for modifying or terminating recognition based on changed circumstances.³⁰ It has been suggested that those provisions exhibit a policy that the recognition process should be flexible and consider the actual facts relevant to the court’s decision rather than setting an arbitrary determination point. In the light of these provisions, it is suggested, if the location of a debtor’s COMI changed between the date the recognition application was filed and the date a court made a determination on recognition, the court could look to the facts on the latter date for the purposes of COMI.

(d) The operational history of the debtor

14. While this approach has been argued in several cases,³¹ it has been rejected on the basis that it would increase the likelihood of conflicting COMI determinations and competing main proceedings, undermining uniformity and harmonization. If followed, those cases suggest, courts may tend to attach greater importance to activities in their own countries, or may simply weigh or analyse the evidence differently. The approach may also have an impact upon the question of whether the COMI was ascertainable by third parties. One court has suggested that the COMI was to be decided in the light of the facts as at the relevant time for determination, but that those facts could include historical facts that have led to the position as it is at the time for determination.³²

**Movement of COMI and the date for determination of COMI
(see also below, abuse of process)**

15. The JP [paras. 126–128] notes that a debtor’s COMI may move prior to commencement of insolvency proceedings, in some instances in close proximity to commencement and even between the time of the application for commencement and the actual commencement of those proceedings. Whenever there is evidence of such a move in close proximity to the commencement of the foreign proceeding, the JP [paras. 119–121] suggests it may be desirable for the receiving court, in determining whether to recognize those proceedings, to consider the additional factors identified in the GEI [para. 147] (see introduction to article 16) more carefully and to take account of the debtor’s circumstances more broadly. In particular, the test that the COMI is readily ascertainable to third parties may be harder to meet if the move of the COMI occurs in close proximity to the commencement of proceedings. Put another way, a COMI that is regular and ascertainable by third parties is not easily subject to tactical removal.³³

16. The time at which COMI is to be determined may also have an impact upon the location of COMI where it has moved after the commencement of insolvency proceedings.

As noted above,³⁴ determination of COMI by reference to the date of the application for recognition, for example, may grant a debtor the discretion to take advantage of a jurisdiction that will offer the best prospects for achieving an effective restructuring solution, and may be particularly relevant where all of the necessary measures are not in place by the time of commencement of the proceedings, the relevant date for COMI determination in some States.³⁵

17. Under the EIR, it has been suggested that a court should be slow to accept that an established COMI had been changed by activities that could turn out to be temporary or transitory.³⁶ In a later case, the ECJ held that where a debtor's registered office was transferred before a request to commence insolvency proceedings was made, the debtor's COMI was presumed to be the place of the new registered office.³⁷ The EIR recast provides the presumption that the debtor's registered office is its COMI only applies if the registered office has not been moved to another European Union member State within the three-month period prior to the request for commencement of insolvency proceedings. In the case of habitual residence, the time period is six months.³⁸

Timing with respect to establishment

18. The GEI [para. 160] and the JP [para. 143] suggest that the same considerations apply to the date at which any determination with respect to the existence of an establishment of the debtor should be made. Accordingly, the date of commencement of the foreign proceeding is the relevant date to be considered in making that determination.

ARTICLE 17, PARAGRAPH 3

19. As indicated above,³⁹ courts have noted that the goal of paragraph 3 is served by the presumptions provided in article 16.⁴⁰ Not all enacting States have adopted article 17, paragraph 3; some States have specified a period of time in which the recognition decision should be made.⁴¹

ARTICLE 17, PARAGRAPH 4

20. The court can revisit matters as provided in article 17, paragraph 4, when the original grounds for granting recognition were fully or partially lacking or had ceased to exist. Courts have characterized the recognition ruling as merely a "summary determination" that is not full and final and thus available for review,⁴² although revisiting recognition is not mandatory, but within the court's discretion.⁴³ The JP [para. 57] indicates some examples of circumstances where review might be appropriate, including where: the order commencing the foreign proceeding has been reversed on appeal; the recognized foreign proceeding has been terminated;⁴⁴ the nature of the recognized proceeding has changed; or new facts have emerged that require or justify a change in the court's decision.

21. It has been suggested that the factors relevant to determining whether to terminate recognition are the same factors

as those relating to granting recognition,⁴⁵ noting that either arm of the test in article 17, paragraph 4, is sufficient to enable the court to modify or terminate recognition. It has also been suggested that the court evaluating the presence or absence of either one of those conditions is not limited to considering only the evidence that was or ought to have been available at the time the court granted recognition, but may consider new evidence.⁴⁶ So, for example, if later investigation and collection of evidence were to show that where a court had applied the presumption of COMI in article 16, paragraph 3, and the actual COMI was elsewhere, that court could revisit the earlier order for recognition under article 17, paragraph 4.⁴⁷

22. In a case where statements made by the debtor relating to his COMI were found to be not entirely accurate in the light of subsequent developments, the court said revisiting the recognition order that was over two years old would not only essentially abrogate the meticulously reasoned decision of the court, but also potentially frustrate the ruling of a judge in the originating jurisdiction and undermine one of the purposes of the MLCBI – cooperation. The court concluded that it would revisit recognition only upon a full and complete record that was accurate and transparent in all material respects.⁴⁸

23. Where it was argued that recognition should not be granted or should be conditional because the decision commencing the foreign proceeding was subject to appeal, the court observed that there was nothing in articles 15 or 17 that required the foreign decision to be final or non-appealable.⁴⁹ The court went on to say that the order of the foreign court was sufficient to permit the foreign representatives to take up their duties and, if the order were to be reversed on appeal, article 18 would require the representatives to advise the court accordingly.⁵⁰

OTHER ISSUES APPLICABLE TO RECOGNITION

Abuse of process, bad faith, fraud, improper purpose (see also article 6)

24. Several reported cases have involved different aspects of bad faith or abuse of process relating, for example, to the commencement of the foreign proceeding, the motivation behind the application for recognition, or the location of the debtor's COMI.

25. With respect to commencement of the foreign proceeding, it has been suggested that a court could refuse to grant recognition if it was convinced a foreign decision was the result of corruption.⁵¹

26. Where the concern related to the motivation behind the application for recognition, it was suggested that recognition should not be used by a debtor attempting to evade its legitimate foreign creditors⁵² and, where improper forum shopping and frustration of an existing judgment were the only apparent reasons for the recognition application, those

circumstances supported denial of recognition as foreign main proceedings on the ground that recognition was being sought for an improper purpose.⁵³ Another view is that where bad faith is alleged to exist it is not a legal basis for disregarding the statutory requirements for recognition under article 17.⁵⁴

27. As to bad faith or abuse of process relating to COMI, courts have said that the payment of bribes in the place where the debtor was audited or regulated may affect the accuracy of the audit or the effectiveness of the regulation, but did not establish that the debtor was audited or regulated elsewhere for the purposes of determining COMI. Moreover, since the existence of such bribes was secret, it was not ascertainable by third parties.⁵⁵ In another case concerning the time at which COMI should be determined (see movement of COMI above), a court said that in view of the EIR and other international interpretations, which focused on the regularity and ascertainability of a debtor's COMI, a court could consider the period between the commencement of the foreign insolvency proceeding and the filing of

the recognition application to ensure that a debtor had not manipulated its COMI in bad faith.⁵⁶ In a further case concerning COMI, a court said that in some cases the location of the debtor may not be critical, for example, where no real business activity was conducted at that location and the debtor was a vehicle for fraud.⁵⁷ It has also been suggested that a COMI manipulated in bad faith would not be a valid COMI on which to rely.⁵⁸

28. It has been noted that facts which come to light or are uncovered at a later date, such as the existence of a Ponzi scheme, may not have been in the public domain or apparent to a typical third party doing business with the debtor at any relevant time and thus may not be relevant to the rebuttal of the presumption in article 16, paragraph 3.⁵⁹ The argument that COMI could be determined by reference to an entity comprising all those involved in a fraudulent Ponzi scheme on the basis that it was not possible to have a COMI of some loose aggregation of companies and individuals has been rejected.⁶⁰

Notes

¹ GE [paras. 124–132].

² *United States*: Creative Finance Ltd., 543 B.R. 498, 515 (Bankr. S.D.N.Y. 2016), CLOUT 1624 – court said that recognition turns on compliance with the requirements of art. 17 alone, notwithstanding findings of bad faith; Millard 501 B.R. 644, 650 (Bankr. S.D.N.Y. 2013); see comments below on art. 17, para. 4, with respect to the impact of bad faith on recognition, as well as discussion under art. 6.

³ *Australia*: Pink v MF Global UK Limited [2012] FCA 260 [para. 16] – applicant sought recognition of the foreign proceeding and of the foreign representative. Court indicated that recognition of the latter was not contemplated by the MLCBI and was beyond the court's powers; court was, however, satisfied that the administrators were the foreign representatives and that they had standing to bring the application for recognition.

⁴ *England*: Brian Glasgow (the Bankruptcy Trustee of Harlequin Property (SVG) Ltd.) v ELS Law Ltd. [2017] EWHC 3004 (Ch) [para. 85]; see also Candey Ltd v Crumpler [2020] EWHC Civ 26 [paras. 18, 29] – court said recognition order did not have the effect that the foreign representative was thereafter treated as either acting as, or acting in the capacity of, an English liquidator.

⁵ See case law on article 15, para. 3.

⁶ *New Zealand*: Williams v Simpson (No. 5) [2010] NZHC 1786 [2011] NZLR 380 (12 October 2010) [para. 26], CLOUT 1220 – if the requirements are not met and the foreign proceeding is neither main nor non-main, there is no jurisdiction to grant recognition under article 17. *United States*: Bear Stearns, 389 B.R. 325, 333 (S.D.N.Y. 2008), CLOUT 794 – explaining that recognition “turns on the strict application of objective criteria”; Basis Yield Alpha Fund (Master), 381 B.R. 37, 45 (Bankr. S.D.N.Y. 2008), CLOUT 789; Atlas Shipping A/S, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009), CLOUT 1277; British-American Insurance Co., Ltd., 425 B.R. 884, 900 (Bankr. S.D.Fla. 2010), CLOUT 1005; Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010), CLOUT 1007; Ashapura Minechem Ltd., 480 B.R. 129, 136 (S.D.N.Y. 2012), CLOUT 1313.

⁷ *United States*: Millard 501 BR 644, 654 (Bankr. S.D.N.Y. 2013); Loy, 380 B.R. 154, 168 (Bankr. E.D.Va. 2007), CLOUT 924 – court said that Congress did not include language in Ch. 15, sects. 1509, 1515, or 1517, which suggested a court was permitted to include equitable considerations in its determination of whether the prerequisites for foreign proceeding recognition had been met, *cited* in Ran, 406 B.R. 277, 288 (S.D.Tex.2009), CLOUT 929, affirmed on other grounds, 607 F.3d 1017 (5th Cir.2010), CLOUT 1276; in Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 78 (Bankr. S.D.N.Y. 2011) affirmed 474 B.R. 88 (S.D.N.Y. 2012), CLOUT 1208, the Bankruptcy Court took a different view to the court in Loy, observing that although there were decisions that rigidly asserted equitable factors should play no role at the recognition phase of an application for recognition under Ch. 15 of the United States Bankruptcy Code, a determination relative to recognition and to the COMI of an enterprise should take into account the existence of a fair and impartial judicial system and a sophisticated body of law, as aspects of the bona fides of the proceedings.

⁸ *Ibid.* *United States*: Millard 650.

⁹ *United States*: Basis Yield Alpha Fund (Master), 381 B.R. 37, 47–48, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789; see also Bear Stearns 389 B.R. 325, 335 (S.D.N.Y. 2008), CLOUT 794 – court confirmed the lower court's rejection of the appellants' position that “this Court should accept the proposition that the Foreign Proceedings are main proceedings because the Petitioners say so and because no [one] else says they aren't”: 374 B.R. 122, 129.

¹⁰ *United States*: Bear Stearns 374 B.R. 122, 130 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794, departing from the decision in SPhinX Ltd 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) affirmed 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768; *cited* in Basis Yield Alpha Fund (Master), 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008), CLOUT 789; Gold & Honey, Ltd., 410 B.R. 357, 366 (Bankr. E.D.N.Y. 2009), CLOUT 1008; Lavie v Ran, 607 F.3d 1017, 1021 (5th Cir. 2010).

¹¹ *Republic of Korea*: legislation enacting the MLCBI in the Republic of Korea (Debtor Rehabilitation and Bankruptcy Act 2005) makes no distinction between main and non-main proceedings, referring only to “foreign bankruptcy proceedings” (DRB A, sect. 632).

¹² In several early cases decided under legislation enacting the MLCBI in the United States, recognition was granted to a “foreign proceeding” without the court determining whether it was main or non-main: *Spencer Partners Limited*, case No. 07-02356, Bankr. D.S.C. May 29, 2007, CLOUT 759 – court deferred that decision to a later time, but held that the foreign representative was entitled to the relief set forth in 11 U.S.C. § 1521 [art. 21 of the MLCBI]; *Schefenacker Plc*, case No. 07-11482, order dated 14 June, 2007, unreported, CLOUT 767 – court granted recognition to a foreign proceeding without specifying whether main or non-main proceeding, because the foreign debtor clearly qualified as one or the other and the relief sought could be appropriately granted in either type of proceeding. The court was particularly reluctant to undertake the task on the basis that it would have put it in the position of reviewing the determination of a foreign court with respect to that issue; *SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), CLOUT 768 – court had suggested that there was a separation under Ch. 15 between the concept of recognition under art. 17, para. 1, and the requirement to determine whether the proceeding was main or non-main under art. 17, para. 2. Although going on to suggest that in some cases it might be appropriate to defer consideration of the characterization as main or non-main, since no negative consequence flowed from that distinction in terms of the relief available in the case in question, the court found the proceedings to be non-main proceedings, that finding affirmed on appeal 371 B.R. (S.D.N.Y. 2007).

¹³ E.g., *United States*: *Loy* 380 B.R. 154, 162 (Bankr. E.D.Va. 2007), CLOUT 924 – court said a simple recognition of a foreign proceeding as “a foreign proceeding without specifying more (i.e., with no declaration as to either ‘main or non-main’) was insufficient as there were substantial eligibility distinctions and consequences” quoting *Bear Stearns*, 374 B.R. 122, 125 (Bankr. S.D.N.Y. 2007), CLOUT 760 affirmed 389 B.R. 325 (S.D.N.Y. 2008), CLOUT 794. *New Zealand*: *Batty* (as trustee in bankruptcy of *Reeves*) v *Reeves* [2015] NZHC 908, CLOUT 1801; *Leeds v Richards* [2016] NZHC 2314, CLOUT 1800.

¹⁴ *United States*: *ABC Learning Centres Ltd.*, 728 F.3d 301 (3d Cir. 2013), CLOUT 1338 – such an exception, the court said, could contravene the stated purposes of Ch. 15 and the mandatory language of Ch. 15 recognition.

¹⁵ *United States*: *SPhinX, Ltd.* 351 B.R. 103, 122 (Bankr. S.D.N.Y. 2006) affirmed 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768; the United States Bankruptcy Code, 11 U.S.C. sect. 1517 (b), enacting art. 17, subpara. 2 (a), of the MLCBI, replaces the words “taking place” with the word “pending”; the same usage occurs in sect. 1502 (4) and 1502 (5) enacting art. 2, subparas. (d) and (e), of the MLCBI (see notes on art. 2, subpara. (b), above).

¹⁶ A summary of the different approaches and an analysis of their relative merits is provided in *Singapore*: *Re: Zetta Jet Pte Ltd and Others* (Asia Aviation Holdings Pte Ltd, intervener) [2019] SGHC 53 [39–61], CLOUT 1816.

¹⁷ It might be noted that in some States the date of the application for commencement and commencement can be the same, hence cases might refer to the date of the filing of the proceeding rather than the date of commencement of the proceeding – e.g., *United States*: *Kemsley*, 489 B.R. 346, 359–360 (Bankr. S.D.N.Y. 2013), CLOUT 1274. Where the dates are different, the focus should be upon the date of commencement, in view of the words in art. 17, subpara. 2 (a), “if it is taking place” – prior to actual commencement it cannot be taking place see *United States*: *Morning Mist Holdings Ltd. v Kryss* (*In re Fairfield Sentry Ltd.*), 714 F.3d 127, 134 (2d Cir. Apr. 16, 2013), CLOUT 1339.

¹⁸ *Australia*: *Kapila, Re Edelsten* [2014] FCA 1112 [paras. 35–39], CLOUT 1475; *King*, in the matter of *Zetta Jet Pte Ltd* [2018] FCA 1932, CLOUT 1817 – court said the case showed that if alternative approaches were followed, the debtor might not have been engaged in any activities at all, compare *Gainsford*, in the matter of *Tannenbaum v Tannenbaum* [2012] FCA 904 [para. 44], CLOUT 1214 and *Moore v Australian Equity Investors* [2012] FCA 1002 [para. 18], CLOUT 1477. *Japan*: *Think3*, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 1 (2), based on the reasoning in the District Court case Nos. (shou) 3 and 5 of 2011, CLOUT 1335. The High Court also suggested that when a significant period of time elapses between the filing of the petition to commence and the application for recognition, or when the principal place of business is transferred just before the application for commencement, special circumstances may need to be considered: ch. 3, 2 (5). *United States*: *Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011) (decision not appealed on that point), CLOUT 1208 – court said the date of the petition for recognition was a matter of happenstance; in the case in question, the application for recognition was made three years after the filing of the liquidation in Bermuda, apparently occasioned by the possible passage of one or more statutes of limitation on causes of action of the estates; *Gerova Financial Group, Ltd.*, 482 B.R. 86, 92–93 (Bankr. S.D.N.Y. 2013), CLOUT 1275; *Kemsley*, 489 B.R. 346, 354, 359–360 (Bankr. S.D.N.Y. 2013), CLOUT 1274 – court agreed with the approach in *Gerova Financial Group, Ltd.*, 482 B.R. 86, 92–93 (Bankr. S.D.N.Y. 2013), CLOUT 1275 and *Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011), CLOUT 1208, that the date of application for commencement of the foreign proceeding is the first date when the opportunity for cross-border cooperation first came into being, it is a fixed and readily verifiable date, in contrast to the date of the petition for recognition which can vary greatly depending on circumstances and the diligence of the foreign representatives.

¹⁹ *Japan*: *Think3*, District Court, case Nos. (shou) 3 and 5 of 2011 at ch. 3, 2 (3), CLOUT 1335.

²⁰ *United States*: *Kemsley*, 489 B.R. 346, 359–360 (Bankr. S.D.N.Y. 2013), CLOUT 1274 citing *Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011) affirmed 474 B.R. 88 (S.D.N.Y. 2012), CLOUT 1208.

²¹ *GEI* [158]; *Australia*: *Kapila, Re Edelsten* [2014] FCA 1112 [para. 35], CLOUT 1475. *United States*: *Kemsley*, 489 B.R. 346, 359–360 (Bankr. S.D.N.Y. 2013), CLOUT 1274.

²² *Ibid.* *Australia*: *Kapila* [para. 37]. *Japan*: *Think3*, case Nos. (shou) 3 and 5 of 2011 Tokyo District Court, ch. 3, issue 2–1, (1)–(5) affirmed case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 2 (3), (5), CLOUT 1335.

²³ *Ibid.* *Australia*: *Kapila* [para. 38]. *Japan*: *Think3*, case No. (ra) 1757 of 2012 (appeal), Tokyo High Court, ch. 3, 2 (1), CLOUT 1335.

²⁴ *United States*: *Kemsley*, 489 B.R. 346, 354 (Bankr. S.D.N.Y. 2013), CLOUT 1274.

²⁵ *Australia*: *Gainsford*, in the matter of *Tannenbaum v Tannenbaum* [2012] FCA 904 [para. 44], CLOUT 1214. *United States*: *Betcorp Limited* 400 B.R. 266, 290–291 (Bankr. D. Nev. 2009), CLOUT 927 citing *Ran*, 607 F.3d 1017, 1025 (5th Cir. 2010); *British American Isle of Venice (BVI), Ltd.*, 441 B.R. 713, 720–21 (Bankr. S.D. Fla. 2010); *British-American Insurance Co., Ltd.* 425 B.R. 884, 909–10 (Bankr. S.D. Fla. 2010), CLOUT 1005; *Morning Mist Holdings Ltd. v Kryss* (*In re Fairfield Sentry Ltd.*), 714 F.3d 127, 133 (2d Cir. Apr. 16, 2013), CLOUT 1339.

²⁶ *United States*: *Lavie v Ran* (*In re Ran*), 607 F.3d 1017, 1025 (5th Cir. 2010); *Morning Mist Holdings Ltd. v Kryss* (*In re Fairfield Sentry Ltd.*), 714 F.3d 127, 133 (2d Cir. Apr. 16, 2013), CLOUT 1339 – court examined both the EIR and the UNCITRAL Guide to Enactment of the MLCBI, but found that overall, international sources are of limited use in resolving whether United States courts should determine COMI at the time of the Ch. 15 petition or in some other way.

²⁷ *United States*: *Lavie v Ran (In re Ran)*, 607 F.3d 1017, 1025–1026 (5th Cir. 2010); *Ocean Rig UDW Inc.*, 570 BR 687, 704 (Bankr. S.D.N.Y. 2017) followed in *Singapore*: *Re: Zetta Jet Pte Ltd and Others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53 [paras. 53, 61], CLOUT 1816.

²⁸ *Singapore*: *Re: Zetta Jet Pte Ltd and Others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53 [para. 57], CLOUT 1816.

²⁹ *United States*: *Morning Mist Holdings Ltd. v Kryss (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 133 (2d Cir. Apr. 16, 2013), CLOUT 1339.

³⁰ *Australia*: *Moore v Australian Equity Investors* [2012] FCA 1002 [para. 18], CLOUT 1477; *United States*: *British-American Insurance Co., Ltd.* 425 B.R. 884, 910 (Bankr. S.D.Fla. 2010), CLOUT 1005.

³¹ *United States*: *British-American Insurance Co., Ltd.* 425 B.R. 884, 910 (Bankr. S.D.Fla. 2010), CLOUT 1005.

³² *United States*: *Betcorp Limited* 400 B.R. 266, 291 (Bankr. D. Nev. 2009), CLOUT 927 *citing* *Lavie v Ran*, 390 B.R. 257, 300 (Bankr. S.D.Tex. 2008) in which the court rejected this approach on the basis that it increased the likelihood of conflicting COMI determinations and competing main proceedings, as courts may tend to attach greater importance to activities in their own countries, or may simply weigh the evidence differently. Further, it may affect the issue of ascertainability of COMI by third parties; this issue was also raised, but rejected by the court, in *British-American Insurance Co., Ltd.* 425 B.R. 884, 909–910 (Bankr. S.D.Fla. 2010), CLOUT 1005 and *Morning Mist Holdings Ltd. v Kryss (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 133 (2d Cir. Apr. 16, 2013), CLOUT 1339.

³³ *Australia*: *Moore v Australian Equity Investors* [2012] FCA 1002 [para. 19], CLOUT 1477.

³⁴ *United States*: *Creative Finance Ltd.*, 543 B.R. 498, 517 (Bankr. S.D.N.Y. 2016), CLOUT 1624 – court said that while COMI can change from the jurisdiction in which a foreign debtor actually did business to a “letterbox” jurisdiction, it can only do so where material activities had been undertaken in the jurisdiction in which the foreign proceeding was filed, thus providing a meaningful basis for the expectation of third parties. The court found (at 501), consistent with the principles articulated in *Morning Mist Holdings Ltd. v Kryss (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. Apr. 16, 2013), CLOUT 1339, that the minimal activities undertaken by the liquidator were insufficient to change the COMI and he never developed a COMI in the jurisdiction in which he was appointed. The court (at 511) described the actions of the liquidator as falling far short of anything that could legitimately be characterized as “material efforts”.

³⁵ See timing with respect to the consideration of COMI and habitual residence, section (b).

³⁶ See also *United States*: *Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017).

³⁷ *EIR/England*: *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974 [2005] 1 WLR 3966 [para. 55] *cited in Australia*: *Moore v Australian Equity Investors* [2012] FCA 1002 [para. 20], CLOUT 1477.

³⁸ *EIR*: *Interedil, Srl v Fallimento Interedil, Srl* [2011] EUECJ C-396/09 [para. 59], [2012] Bus LR 1582.

³⁹ *EIR recast*, art. 3, para. 1.

⁴⁰ Introduction to article 16, para.1, and operation of the presumption under the MLCBI.

⁴¹ *Australia*: *Akers v Saad Investments* [2010] FCA 1221 [para. 46] (appeal on other grounds), CLOUT 1219.

⁴² E.g., Canada, Colombia, Poland and Uganda have not enacted this provision; the Dominican Republic specifies 15 days, the Philippines 30 days and the Republic of Korea one month.

⁴³ *United States*: *Petition of Ernst & Young, Inc.*, 383 B.R. 773, 781 (Bankr. D. Colo. 2008), CLOUT 790; *British American Insurance Co., Ltd.* 425 BR 884, 901 (Bankr. D.Fla.2010), CLOUT 1005.

⁴⁴ *England*: *Sturgeon Central Asia Balanced Fund* [2020] EWHC at [paras. 34–47] where the court considered both MLCBI and local procedural rules in undertaking a review of a previous decision. *United States*: *Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169 (Bankr. S.D.N.Y. 2017) *citing* *Loy* 448 BR 420, 439 (Bankr. E.D.Va. 2011), which confirmed the discretionary nature of art. 17, para. 4.

⁴⁵ *England*: *Sanko Steamship Co. Ltd.* [2015] EWHC 1031 (Ch): the foreign proceedings terminated when a certain percentage of distributions had been reached.

⁴⁶ *United States*: *Cozumel Caribe, S.A. de C.V.*, 508 B.R. 330, 335 (Bankr. S.D.N.Y. 2014), see also *Cozumel Caribe, S.A., de C.V.*, 482 B.R. 96 (Bankr. S.D.N.Y. 2012), CLOUT 1311, a related case.

⁴⁷ *Australia*: *Akers v Saad Investments* [2010] FCA 1221 [para. 53], CLOUT 1219 (appeal on other grounds). *United States*: *Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 225–235 (Bankr. S.D.N.Y. 2017).

⁴⁸ *Ibid.*

⁴⁹ *United States*: *Loy* 448 B.R. 420, 443 (Bankr. E.D.Va. 2011).

⁵⁰ *United States*: *Gerova Financial Group, Ltd.*, 482 B.R. 86, 94 (Bankr. S.D.N.Y. 2013), CLOUT 1275; JP [para. 57].

⁵¹ *Ibid.*

⁵² *United States*: *Perry H. Koplík & Sons, Inc.*, 357 BR 213 (Bankr. S.D.N.Y. 2006); on the question of equitable factors to be considered in recognition, see discussion above, case law on art. 17, para. 1, footnote to the third sentence.

⁵³ *United States*: *Octaviar Administration Pty Ltd*, 511 B.R. 361, 374 (Bankr. S.D.N.Y. 2014), CLOUT 1483 – *citing* *Morning Mist Holdings Ltd. v Kryss (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 132 (2d Cir. Apr. 16, 2013), CLOUT 1339.

⁵⁴ *United States*: *SPhinX, Ltd.*, 371 B.R. 10, 19 (S.D.N.Y. 2007), CLOUT 768. *England*: *OGX Petroleo E Gas S.A.* [2016] EWHC 25 (Ch) [para. 60], CLOUT 1622 – court said it was strongly arguable that, notwithstanding art. 6 was to be given a restrictive interpretation, the court must have the discretion to refuse recognition if satisfied that the applicant was abusing that process for an illegitimate purpose. The applicant failed to disclose the material fact that the arbitration which it sought to suspend through the recognition application was not covered by the foreign proceeding and could not therefore be subject to the automatic stay under art. 20; see also cases relating to full and frank disclosure discussed under art. 6 above.

⁵⁵ *United States*: *Millard* 501 BR 644, 647 (Bankr. S.D.N.Y. 2013) – court went on to say that such behaviour might later provide a basis for subsequent relief under other sections of the United States Bankruptcy Code (including relief from the stay), which could cause recognition to be vacated; *Creative Finance Ltd.*, 543 B.R. 498, 515–516, 522–23 (Bankr. S.D.N.Y. 2016), CLOUT 1624 – court held that although it was offended by the conduct of the debtors, the question of recognition, on the facts of the case before it, turned on compliance with the requirements of art. 17, not on application of art. 6.

⁵⁶ *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [para. 61], CLOUT 1003.

⁵⁷ *United States*: Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 138 (2d Cir. Apr. 16, 2013), CLOUT 1339 cited in Creative Finance Ltd., 543 B.R. 498, 522–23 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

⁵⁸ *United States*: Petition of Ernst & Young, Inc., 383 B.R. 773, 780 (Bankr. D. Colo. 2008), CLOUT 790.

⁵⁹ *United States*: Morning Mist Holdings Ltd. v Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 138 (2d Cir. Apr. 16, 2013), CLOUT 1339; Creative Finance Ltd., 543 B.R. 498, 524 (Bankr. S.D.N.Y. 2016), CLOUT 1624.

⁶⁰ *England*: Stanford International Bank Limited [2010] EWCA Civ 137 [paras. 56, 60], CLOUT 1003.

⁶¹ *Ibid.* *England*: Stanford [para. 56]. *United States*: Petition of Ernst & Young, Inc., 383 B.R. 773 (Bankr. D. Colo. 2008), CLOUT 790.

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

- (a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and
- (b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 18 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 113–116, 201–202, 207]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) GE (1997): A/CN.9/442 [paras. 133–134];
 - (b) GEI (2013): A/CN.9/742 [para. 63]; A/CN.9/763 [para. 56]; A/CN.9/766 [para. 45].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 169].

INTRODUCTION

1. The GEI [paras. 168–169]¹ notes it is possible that, after the application for recognition or the decision on recognition has been made, changes may occur in the foreign proceeding that would have affected a decision on relief or recognition had those facts been known at the time the application or decision was made. To ensure the court is kept fully informed of such changes when they are of a substantial nature, article 18 imposes a duty on the foreign representative to advise of those changes, including to the status of the proceeding or the foreign representative's appointment, and of any additional proceedings concerning the debtor that may become known to the foreign representative subsequent to the statement concerning the foreign proceedings concerning the debtor known to the foreign representative that is required to be made to the court under article 15, paragraph 3. The obligation under paragraph (b) would allow the court to consider whether relief already granted should be coordinated with any insolvency proceedings commenced after the decision on recognition is made (see article 30) and would facilitate cooperation under chapter IV.

CASE LAW ON ARTICLE 18

2. Where a change occurs in the foreign proceeding, for example it is suspended, and it is unclear what the precise effect of that change might be and whether a change in recognition is warranted as a result of the change, a court has indicated it can order a status report to be filed in accordance with the obligation under article 18.² Where a proceeding is terminated following recognition, the obligation under article 18 requires the court to be informed because there is thus no foreign proceeding that could continue to be recognized, that could sustain continued operation of the article 20 stay or applications for further relief.³ In that situation, however, it has been noted that a difficulty arises because the obligation to inform under article 18 falls upon the foreign representative, who is no longer in office.⁴ In one case it was found that in such a circumstance, the obligation to inform the court might appropriately fall upon the debtor.⁵

3. Approval of a reorganization plan and the return of management and daily control to the debtor was held in one case as not necessarily producing a substantial change in status that would mean the proceeding ceased to be a foreign proceeding as contemplated under article 18.⁶ In reaching its decision, the court noted that the debtor was obligated to continue making payments under the plan for two years and that the foreign court retained oversight of those payments, as well as authority to resolve any disputes relating to the plan. In another case in which the reorganization plan had been accepted by the foreign court so that it became binding on creditors and as a consequence of which the foreign representative had retired from office, the recognizing court said that retirement was the kind of substantial change to which article 18 was directed. The court observed that subparagraph (a) took into account that technical modifications in the status of the proceedings or the foreign representative's appointment were frequent, but that only some of those modifications would affect the decision granting relief or the decision recognizing the proceeding.⁷ The court also said it was particularly important that the court be informed of modifications when its decision on recognition concerned a foreign "interim" proceeding.

Notes

¹ GE [paras. 133–134].

² *United States*: Cozumel Caribe, S.A., de C.V., 482 B.R. 96, 107–108 (Bankr. S.D.N.Y. 2012), CLOUT 1311; on the duty to file under art. 18 see also Daewoo Logistics Corp., 461 B.R. 175, 179–180 (Bankr. S.D.N.Y. 2011), CLOUT 1315.

³ *England*: Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia [2018] EWCA Civ 2802 [para. 97], CLOUT 1822 – court noted that the duty to inform the court under art. 18 fell upon the foreign representative and it could only be performed while the foreign proceeding was still in existence and the foreign representative still in office. The strong implication, the court said, was that once the foreign proceeding had come to an end, and the foreign representative no longer held office, there was no scope for further orders in support of the foreign proceeding to be made and any relief previously granted under the MLCBI should terminate. The court also said that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would surely have addressed the question explicitly and provided an appropriate mechanism for that purpose.

⁴ *Australia*: Board of Directors of Rizzo-Bottiglieri-De-Carlino Armatori SpA v Rizzo Bottiglieri-De-Carlino Armatori SpA [2017] FCA 331 [13–14], CLOUT 1799 and [2018] FCA 153, in which court observed [paras. 27–29]: The problem is that once the foreign proceeding, pursuant to which the foreign representative brought proceedings for recognition in the local forum, has been either terminated or withdrawn, that event necessarily also extinguishes the status or authority of the foreign representative to act in respect of the debtor and his, her or its affairs. In reality, the foreign representative subsequently will be highly unlikely to be in a position financially (or feel responsible) to inform the local court that had acted earlier to recognize the foreign proceeding in the forum, of that fact under art. 18 of the MLCBI [para. 28]. As a matter of common sense, once the foreign representative ceases to occupy his or her position in the jurisdiction of the foreign court that appointed him or her (such as the court in Italy in this case), he or she will have no resort to funds of the debtor or, more particularly, no sense of responsibility to another court, such as this, to which the foreign representative may have no realistic chance of being made to account, if he or she fails to act under art. 18 (a) to draw attention to any substantial change of status of himself or herself or the recognized foreign proceeding [para. 29]. That practical reality means that any interim or final recognition orders by the local court [...] will remain in force in its jurisdiction even though the change of status in the jurisdiction of the foreign court has removed the very foundation of, or continuing justification for, the local court's orders under the MLCBI. Thus, the interim stay and other orders made on 17 June 2015 remained in force in Australia in the period between the dismissal of the second proceeding in Italy on 28 April 2016 and 3 February 2017, when orders vacating those orders (with retrospective effect) were made, despite the earlier dismissal in Italy of the very proceeding that the orders of the court in Australia were supposedly continuing to recognize: [2017] FCA 331 at [paras. 13–19].

⁵ *Australia*: Yakushiji (No. 2) [2016] FCA 1277 [paras. 17, 20–22] – court noted that since the person previously appointed as foreign representative was no longer able to fulfill that obligation, the debtors were best placed to bring to the recognizing court the information concerning termination orders issued in the foreign proceeding and the retirement of the foreign representative.

⁶ *United States*: Oversight & Control Commission of Avanzit, S.A., 385 B.R. 525, 536 (Bankr. S.D.N.Y. 2008), CLOUT 925.

⁷ *Australia*: Yakushiji (No. 2) [2016] FCA 1277 [paras. 17, 20–22].

*Article 19. Relief that may be granted upon application
for recognition of a foreign proceeding*

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the debtor's assets;

(b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) Any relief mentioned in paragraph 1 (c), (d) and (g) of article 21.

2. [Insert provisions (or refer to provisions in force in the enacting State) relating to notice.]

3. Unless extended under paragraph 1 (f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 19 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 34–46]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 174–177]; A/CN.9/422 [paras. 116, 119, 122–123]; A/CN.9/433 [paras. 110–114]; A/CN.9/435 [paras. 17–23];

(b) GE (1997): A/CN.9/436 [paras. 71–75]; A/CN.9/442 [paras. 135–140];

(c) GEI (2013): A/CN.9/763 [para. 57]; A/CN.9/766 [para. 46].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 175].

INTRODUCTION

1. The GEI [paras. 170–175]¹ explains that article 19 authorizes the court, at the request of the foreign representative, to grant the type of relief that is usually available only in collective insolvency proceedings, as opposed to individual types of relief that may be granted before the commencement of insolvency proceedings under rules of civil procedure (i.e., measures covering specific assets identified by a creditor). Collective measures may be required before the

recognition decision is made in order to protect the assets of the debtor and the interests of creditors, but those measures are only available on an urgent and provisional basis, pending the recognition decision. Paragraph 2 deals with issues of notice. Paragraph 3 provides that interim relief ordered under article 19 terminates upon recognition, although it may be extended under article 21, subparagraph 1 (f). Paragraph 4 pursues the same objective as article 30, subparagraph (a), of fostering coordination of pre-recognition relief with any foreign main proceedings, the existence of which should be included in the statement provided by the foreign representative under article 15, paragraph 3. The JP [paras. 146–147, 150–156] also provides an explanation of article 19.

CASE LAW ON ARTICLE 19

2. The chapeau to paragraph 1 refers to the application for relief under article 19 being made by the foreign representative.² In one case where the debtor applied for that relief, the court found there was insufficient evidence to show the debtor was the foreign representative for the purposes of article 19.³

3. A second requirement under article 19 is that an application for recognition must have been made. Where a foreign representative sought an order for a stay without seeking recognition, the court confirmed that it had no authority to consider such a request under the MLCBI; either an application for recognition was required for such relief to be ordered under article 19 or recognition for it to be ordered under article 21.⁴

4. Courts have confirmed that the purpose of article 19 is to provide a mechanism to enable the court to order “urgently needed” relief where an application for recognition has been made and is pending,⁵ to protect

assets or the interests of creditors when concern exists that the assets may perish, be susceptible to devaluation or otherwise in jeopardy in the period before the hearing of the recognition application. That jeopardy, it has been suggested, could include circumstances where efforts by creditors to control or possess assets or terminate unfavourable contracts, require security deposits, tighten credit terms or take other detrimental business actions against the creditor would interfere with the jurisdictional mandate of the court under the MLCBI, interfere with and cause harm to the debtor's efforts to administer its estates pursuant to the foreign proceeding and undermine the foreign representative's efforts to achieve an equitable result for the benefit of all the debtor's creditors, causing immediate and irreparable injury.⁶ In a case where the interim relief sought was a stay on litigation, the court noted that recognition was required for such relief to be ordered; it was not a form of relief available under article

19, but rather under article 21.⁷ Another purpose of interim relief, it is suggested, is to ensure that the effects of article 20, when recognition is granted, will not be rendered ineffective, especially where the relief sought concerns the right to transfer, encumber or otherwise dispose of any assets of the debtor.⁸

5. Courts have observed that since the framers of the MLCBI could not have anticipated the vast array of circumstances in which interim relief might be required, article 19 is expressed in non-exhaustive terms, using the word "including" before specifying particular types of relief that might be ordered.⁹ Emphasis has been placed on flexibility of approach.¹⁰ That flexibility has been regarded as justification for the issue under article 19 of a search warrant to ascertain whether there were assets that were being concealed that might be in jeopardy if some form of interim relief did not attach to them.¹¹

Notes

¹ GE [paras. 170–174].

² *Republic of Korea*: relief can be granted by the court on its own motion: (2017) GOOKSEUNG 100001 (10 March 2017), the Seoul Bankruptcy Court ordered relief under the local equivalent of art. 19 (Debtor Rehabilitation and Bankruptcy Act, 2005, sect. 635) on its own motion on the day following the filing of an application for recognition, to quickly protect the debtor's assets, taking account of the origin of the foreign proceedings (United States); relief under art. 19 was ordered in the Republic of Korea for the first time in (2012) GOOKJI 1 (10 August 2012), Seoul Central District Court.

³ *United States*: Daymonex Limited (Bankr. S.D. Ind, Feb. 7, 2007), CLOUT 757 – debtor applied for relief under art. 19 and the court found there was insufficient evidence to show the debtor was the foreign representative, noting that only the foreign representative could apply for relief under art. 19.

⁴ *United States*: *United States v J.A. Jones Const. Group, LLC* 333 B.R. 637, 638 (E.D.N.Y. 2005), CLOUT 763.

⁵ *Australia*: *Chow Cho Poon (Private Limited)* [2011] NSWSC 300 [para. 64], CLOUT 1218; *Yu v STX Pan Ocean Co Ltd (South Korea)* [2013] FCA 680 [para. 17], CLOUT 1333 – court noted that although art. 19 referred to the possibility that "relief mentioned in" art. 21 may be granted on a provisional basis, the source of power to grant provisional relief of that kind lay in art. 19, not art. 21. Accordingly, provisional orders would cease to operate altogether when recognition was granted. From that time, art. 20 would operate and if consequences additional to those accomplished by art. 20 were intended, additional orders under art. 21 would be necessary.

⁶ *United States*: *Japan Airlines Corp.* (Bankr. S.D.N.Y. Jan. 28, 2010), pp.1–2.

⁷ *United States*: *Halo Creative & Design Limited v Comptoir des Indes Inc.*, case No. 14C 8196 (N.D. Ill Oct. 2, 2018); *United States v J.A. Jones Constr. Group, LLC*, 333 B.R. 637 (E.D.N.Y. 2005), CLOUT 763.

⁸ *Australia*: *Tucker* (2009) FCA 1354 [para. 22], CLOUT 922 – court referred to relief available under art. 20, subpara. 1 (c).

⁹ *New Zealand*: *Williams v Simpson* (No. 1) [2011] NZHC 1631 (17 September 2010) [para. 44].

¹⁰ *Ibid.*

¹¹ *Ibid.*, *New Zealand*: *Williams* [para. 47] – in the same case, a second application for interim relief was made seeking the examination of certain persons to determine issues of ownership of the items that had been seized pursuant to the search warrant. The court refused to grant the application on the basis that the relief sought was not urgent as required under art. 19, para. 1. The court held that since the assets whose ownership was in question had already been seized and the issue of ownership would become relevant after the determination on recognition of the foreign proceedings, the order was not necessary.

Article 20. Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding,
 - (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
 - (b) Execution against the debtor's assets is stayed; and
 - (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article*].
3. Paragraph 1 (a) of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.
4. Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] or the right to file claims in such a proceeding.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 20 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 47–60]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/419 [paras. 137–143]; A/CN.9/422 [paras. 94–110]; A/CN.9/433 [paras. 115–126]; A/CN.9/435 [paras. 24–48];
 - (b) GE (1997): A/CN.9/436 [paras. 76–79]; A/CN.9/442 [paras. 141–153];
 - (c) GEI (2013): A/CN.9/742 [para. 64]; A/CN.9/763 [para. 58]; A/CN.9/766 [para. 47].
3. Relevant working papers are referred to in the reports and in the GEI following [188].

INTRODUCTION¹

1. The GEI [paras. 176–188]² notes there are several differences between the relief available under articles 19 and 21 and that under article 20. First, article 20 provides for an effect or state of affairs, described in article 20, paragraph 1, that is applicable by law, not by order of the court, and that flows automatically from recognition of a foreign main proceeding.³ Secondly, the extent of such an effect or state of affairs (“the scope, and the modification or termination, of the stay and suspension”) can be affected by

the operation of the laws referred to in each State's enactment of article 20, paragraph 2. Article 20 does not therefore import foreign law, but rather specifies the effects that are considered necessary for an orderly and fair conduct of a cross-border insolvency. The relief automatically applicable under article 20 is not subject to the same requirements for adequate protection of interests under article 22 that apply to any discretionary relief granted under articles 19 and 21. Nor can the relief applicable under article 20 be modified or terminated under article 22, paragraph 3. It may, however, be affected in the event of concurrent proceedings under article 29, subparagraphs (a) (ii) and (b) (ii). The JP [paras. 161–167] also provides a discussion of article 20.

CASE LAW ON ARTICLE 20

ARTICLE 20, PARAGRAPH 1

Interpretation of words and phrases

“Commencement or continuation of individual actions or individual proceedings”

2. Words along those lines (the discussion is also relevant to article 21, subparagraph 1 (a)) have been interpreted by courts having regard to local cases, foreign cases and to the GE [paras. 145–146],⁴ which indicate that the word “action” would cover an action before an arbitral tribunal and that the word “proceedings” might extend to “enforcement measures by creditors outside the court system”. In one case, the court referred also to several local cases,⁵ which suggested that the word “proceedings”, used with the words “commence” and “continue”, was far more appropriate to legal proceedings than to the doing of some act of a more general nature. Together, the court said, those words embraced all steps in legal proceedings from the issue of initiating process, to their

final termination in the process of execution or other means of enforcement of a judgment. The words “commence” or “continue” indicated, the court said, a process which had an independent existence of its own apart from the step by which it was commenced or continued; the process either continued after, or was in existence before, the taking of the relevant step. The court concluded that the service of a notice to terminate a contract, in accordance with its terms, was not the commencement or continuation of an individual action or proceeding.⁶ In another State,⁷ the court said the term “proceedings” was not confined to legal proceedings on the basis that the text did not say so and that the GEI contemplated “measures initiated by creditors outside the court system”.⁸

“Debtor’s assets”/ “assets of the debtor”

3. What constitutes “the debtor’s assets” in article 20, paragraph 1 (the discussion is also relevant to article 21), has been considered by courts by reference to the definition of “assets of the debtor” in the Legislative Guide.⁹ The court concluded that the debtor’s interest in the ship in question (pursuant to a charter by demise) was an asset for the purposes of the legislation enacting the MLCBI and that admiralty proceedings with respect to that ship concerned the debtor’s “rights, obligations or liabilities” in terms of article 20, subparagraph 1 (a).

Scope of the automatic stay

4. In a case where the question concerned an arbitration conducted in a foreign State after the commencement of the recognition proceeding, the recognizing court held that the scope of the automatic stay under that State’s enactment of article 20¹⁰ was limited to proceedings that could have an impact on the debtor’s property located in, or within the territorial jurisdiction of, that State.¹¹ The automatic stay in the recognition proceeding did not apply globally to all proceedings against the debtor and the arbitration was thus unaffected. In another State, where an arbitration hearing was scheduled to take place in that State (the receiving State) on the day following the court’s consideration of the recognition application, it was held that the arbitration was automatically stayed as a result of the recognition decision.¹² A court has also said the automatic stay was not intended to operate upon recognition of collective foreign proceedings to prevent persons whose claims were not subject to those collective proceedings from being able to pursue those claims against the debtor.¹³

5. The scope of the automatic stay under article 20 has been the subject of requests for variation under article 21, subparagraph 1 (a), especially in the context of reorganization proceedings where the debtor needs be able to continue trading; some courts have said that the article 20 stay may not be appropriate in those circumstances as it is primarily designed for foreign liquidations.¹⁴ Lifting of the stay was sought to enable continuation of an arbitration in circumstances where a party had earlier undertaken not to continue

with arbitration proceedings until “final determination of the recognition application”. The court observed that the possibility of an interim determination did not exist under the MLCBI or the local enacting legislation and the word “final” (as included in the parties’ undertaking) must refer to a time when appeal of the recognition judgment was no longer a possibility.¹⁵

Duration of the automatic stay

6. The MLCBI does not specify the length of the duration of the automatic stay. Most cases focus on the time at which the stay ceases to apply, although one case does address a request for effect retroactive to the date of commencement of the foreign proceeding.¹⁶ It has been suggested that the automatic relief afforded by recognition of a foreign main proceeding is normally coterminous with the stay applicable in the corresponding foreign proceeding. Accordingly, absent exigent circumstances, the automatic stay under the MLCBI ceases when the foreign proceeding is closed,¹⁷ the purpose of the stay, i.e., to allow the debtor time to devise a plan and prevent creditors from pursuing alternative remedies, being no longer applicable. It might be noted that on termination of the foreign proceeding there may be no foreign representative who has standing to apply for relief under the MLCBI (see also discussion under article 18 above).¹⁸ The MLCBI does not specifically address closure of the recognition proceeding; in a case where the assets in the non-main proceeding had been fully administered and the foreign representative applied for an order to close the case, the court noted that there was little, if any, authority relating to the entry of a final order in recognition cases. However, as assets located in the recognizing State had been fully administered without dispute, the court found it appropriate to close the case.¹⁹

7. It has been suggested that continued enforcement of a stay after the closure of the foreign proceeding might be available in some circumstances, such as where the stay was violated prior to that closure²⁰ or to allow the plan approved in the foreign proceeding to control the distribution of the debtor’s assets and prevent creditors from seeking to recover debts in excess of the amounts provided in that plan.²¹

ARTICLE 20, PARAGRAPH 2

8. As indicated in the GEI [para. 183],²² notwithstanding the “automatic” or “mandatory” nature of the effects under article 20, paragraph 1, it is expressly provided under paragraph 2 that the scope of those effects depends on exceptions or limitations that may exist in the law of the enacting State to grant protection to those classes of people who would normally receive protection in insolvency proceedings commenced in the enacting State. Some of the exceptions or limitations that have been enacted include: preserving the right to take steps to enforce security over the debtor’s property or to repossess goods in the debtor’s possession under a hire-purchase agreement or to exercise a right of set-off against a claim by the debtor.²³

9. Some enacting laws also provide discretion for the court to modify or terminate the stay and suspension in subparagraph 1 (*a*) or any part of it, either altogether or for a limited time, on such terms and conditions as the court thinks fit.²⁴

ARTICLE 20, PARAGRAPH 3

10. The GEI [paras. 186–187] notes that paragraph 3 was added to article 20 to protect creditors from losing their claims where a stay applied pursuant to subparagraph 1 (*a*) and to authorize the commencement of individual actions to the extent necessary to preserve those claims.²⁵ Once the claims have been preserved, the stay would govern the taking of further action.²⁶

11. Commencement of such individual actions may be subject, under the law of the receiving State, to certain exceptions. One law, for example, includes an exception for governmental units acting in a regulatory or police capacity. Under that provision, the court held that in seeking to commence a proceeding regarding a funding shortfall for the debtor's pension fund in another State, that State's pension

regulator was acting as a trustee on behalf of private creditors for a pecuniary purpose and not as a regulator protecting the public safety or welfare. Accordingly, the action proposed by the foreign regulator would violate the applicable automatic stay.²⁷

ARTICLE 20, PARAGRAPH 4

12. This paragraph clarifies that the automatic stay pursuant to subparagraph 1 (*a*) does not prevent a request for commencement of local insolvency proceedings or restrict participation in such proceedings. Even though observing that multiple proceedings should be the exception, one court has noted that commencement of a plenary proceeding in the receiving State in accordance with article 20, paragraph 4, may be appropriate, notwithstanding recognition of foreign proceedings, where creditors could demonstrate there was a need for additional protection.²⁸ Where recognition of a foreign proceeding, whether main or non-main, took place subsequent to the commencement of a local proceeding, another court indicated that recognition would not necessarily lead to dismissal of that prior local proceeding.²⁹

Notes

¹ Some enacting States have not adopted art. 20 of the MLCBI, e.g., the Republic of Korea (Debtor Rehabilitation and Bankruptcy Act 2005) and Japan (Law on Recognition of and Assistance in Foreign Insolvency Proceedings, 2001). Relief in those States is available under provisions equivalent to arts. 19 and 21 of the MLCBI.

² GE [paras. 141–153].

³ Noted in *Australia: Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 [paras. 55–56], CLOUT 1332.

⁴ GEI [paras. 180–181].

⁵ *England: Fibria Cellulose S/A v Pan Ocean Co. Ltd* [2014] EWHC 2124, (Ch) [paras. 67–70], CLOUT 1482 referring to *Bristol Airport plc v Powdrill* [1990] Ch 744, 765; *Re Olympia & York Canary Wharf Ltd* [1993] BCC 154, 157–158.

⁶ *Ibid.*, *England: Fibria Cellulose S/A* [para. 75].

⁷ *Australia: Kapila, Re Edelsten* [2014] FCA 1112 [para. 69], CLOUT 1475.

⁸ Referring to the GEI [para. 181]; GE [para. 146]; *Australia: Pink v MF Global UK Limited* [2012] FCA 260 [para. 20] – court, under art. 21, subpara. 1 (*a*), extended the stay under art. 20, subpara. 1 (*a*), to cover “any individual action or legal proceeding, including, without limitation, any arbitration, mediation or other quasi-judicial administrative action, proceeding or process whatsoever”.

⁹ The analysis was by reference to art. 8 and provisions of the enacting legislation that authorized interpretation by reference to the MLCBI and any document relating to it originating from UNCITRAL or the working group that assisted in preparing the MLCBI. See for instance: *New Zealand: Kim and Yu v STX Pan Ocean Co. Ltd* [2014] NZHC 845 [paras. 16–18], CLOUT 1481; see also *England: Fibria Cellulose S/A v Pan Ocean Co. Ltd* [2014] EWHC 2124 (Ch) [para. 61], CLOUT 1482 – although not explored at the hearing, the court posited two issues: (*a*) whether the contract in question had ceased to be an asset of the debtor because it had been assigned; and (*b*) whether the relevant asset of the debtor in this case was in relation to a contract that was not subject to termination or whether the asset of the debtor was the contract subject to the possibility of termination. In the latter scenario, for example, the court suggested that preventing the exercise of the right to terminate would not only protect, but also enhance, the assets of the debtor. For the definition of assets of the debtor in the Legislative Guide, see glossary, subpara. 12 (*b*): “Assets of the debtor: property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor's interests in encumbered assets or in third party-owned assets”.

¹⁰ United States Bankruptcy Code, 11 U.S.C. sect. 1520 (*a*) (enacting art. 20 (*a*) of the MLCBI), provides that, upon recognition of a foreign main proceeding: “sections 361 and 362 [the automatic stay] apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States.”

¹¹ *United States: JSC BTA Bank* 434 BR 334, 337 (Bankr. S.D.N.Y. 2010), CLOUT 1211; see also *Gold & Honey, Ltd.*, 410 B.R. 357, 373 n. 19 (Bankr. E.D.N.Y. 2009), CLOUT 1008; *Pro-Fit Holdings Ltd.*, 391 B.R. 850, 863 (Bankr. C.D. Cal 2008), CLOUT 926.

¹² *England: Samsun Logix Corporation* [2009] EWHC 576 (Ch) [para. 11]; in a subsequent case – *H & CS Holdings Pte. Ltd v Glencore International AG* [2019] EWHC 1459 (Ch), CLOUT 1820 – modification of the stay was sought to permit the arbitration to continue, on the basis that the arbitration proceedings had concluded except for issuing of the decision and determination of costs; further costs would be incurred if the arbitration was stayed. The court modified the automatic stay to enable arbitration to proceed to award, but not enforcement.

¹³ *England: OGX Petroleo E Gas S.A.* [2016] EWHC 25 (Ch) [para. 53], CLOUT 1622 – arbitration proceedings were being conducted under a contract entered into after approval of the reorganization plan and were not covered by that plan.

¹⁴ In such cases, United Kingdom courts, as a matter of practice, replace the automatic stay with the stay applicable under the Insolvency Act, 1986, Schedule B1, para. 43: *Pan Oceanic Maritime Inc.* [2010] EWHC 1734 (Comm); *Transfield ER Cape Ltd.* [2010] EWHC 2851 (Ch) [paras. 5–6]; *Ronelp Marine Ltd* [2016] EWHC 2228 (Ch) [paras. 15–16]; *19 Entertainment Ltd.* [2017] BCC 347 [paras. 20–22], CLOUT 1621; *OJSC International Bank of Azerbaijan* [2017] EWHC 2075 (Ch), CLOUT 1821; *Videology Limited* [2018] EWHC 2186 (Ch) [para. 19], CLOUT 1823.

¹⁵ *England: Sberbank of Russia v Ante Ramljak* [2018] EWHC 348 (Ch), CLOUT 1796 – court denied the request to lift the stay as the time for appeal of the recognition decision had not passed; see also *United Drug (UK) Holdings Ltd v Bilcare Singapore Pte Ltd.* [2013] EWHC 4335 (Ch) [para. 24] – with respect to an arbitration commenced before recognition, court said given the clear reasons the applicant had evinced for wishing to remove the stay and the lack of real evidence that would enable the burden on the office holders to be measured, the balance came down squarely in favour of lifting the stay.

¹⁶ *Canada: Hanjin Shipping Co.*, 2016 BCSC 2213 [paras. 24–30] – court declined to make an order that the automatic stay be effective retroactive to the date of commencement of the foreign proceeding in order to promote fair treatment among creditors and international cooperation and comity, noting that no specific authority was provided as to the necessity of such an order, nor was any evidence or jurisprudence from around the world shown in support of the request.

¹⁷ *Australia: Yakushiji (No. 2)* [2016] FCA 1277 [paras. 21–22]; *Board of Directors of Rizzo-Bottiglieri-De-Carlino Armatori SpA v Rizzo-Bottiglieri-De-Carlino Armatori SpA* [2017] FCA 331 [paras. 17–19], CLOUT 1799. *United States: Daewoo Logistics Corp.*, 461 B.R. 175, 179 (Bankr. S.D.N.Y. 2011), CLOUT 1315. The Legislative Guide (part two, chap. VI, paras. 16–19) notes that States adopt different approaches to closure of proceedings.

¹⁸ *England: Sanko Steamship Co. Ltd.* [2015] EWHC 1031 (Ch) [paras. 38–50]; *Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802 [para. 97] CLOUT 1822 – the foreign representative applied to extend the existing moratorium for an indefinite period beyond the termination of the foreign proceeding to prevent creditors with claims governed by the law of England and Wales, who were not bound by the plan enabled by the foreign proceeding, from pursuing their claims in England. Denial of the request was upheld on appeal, the appeal court noting [98] that had the MLCBI ever contemplated the continuance of relief after the end of the relevant foreign proceeding, it would have addressed the question explicitly and provided appropriate machinery for that purpose.

¹⁹ *United States: Three Estates Company Limited*, case No. 07-23597 (Bankr. E D Cal Mar. 31, 2008), CLOUT 793.

²⁰ *United States: Daewoo Logistics Corp.*, 461 B.R. 175, 180 (Bankr. S.D.N.Y. 2011), CLOUT 1315 *citing* Oversight & Control Commission of Avanzit, S.A., 385 B.R. 525, 533–34 (Bankr. S.D.N.Y. 2008), CLOUT 925 – court granted recognition after approval of a plan in the foreign proceeding in order to adjudicate a stay violation that occurred pre-approval. Court also suggested that further relief might be available after the closing of the foreign proceeding under article 7 of the MLCBI, which authorizes provision of additional relief to foreign representatives. See also *England: Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802 [para. 97] CLOUT 1822 – Court of Appeal, noting the decisions of the United States courts in *Daewoo* and *Ho Seok Lee*, 348 B.R. 799, 803 (Bankr. W.D. Wash., 2006), CLOUT 754, observed [para. 100] that the background to the enactment of the MLCBI in the United States differed significantly to that of Great Britain or Australia and different interpretation and application of the MLCBI might thus be expected.

²¹ *United States: Ho Seok Lee*, 348 B.R. 799, 803 (Bankr. W.D. Wash., 2006), CLOUT 754 – an alternative approach of keeping the Ch. 15 proceeding open in order to keep the stay operative, was dismissed by the court as not being cost-effective when it could grant a permanent injunction under art. 21.

²² GE [para. 148].

²³ E.g., *England: CBIR art. 20.2*: “The stay and suspension referred to in para. 1 of this article shall be —

(a) the same in scope and effect as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 (a) or had his estate sequestrated under the Bankruptcy (Scotland) Act 1985 (b), or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986; and (b) subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case, and the provisions of para. 1 of this article shall be interpreted accordingly.”

²⁴ E.g., *England: CBIR art. 20, para. 6; New Zealand: Cross-Border Insolvency Act, art. 20, para. 2*. On the basis of such a provision, courts have granted relief from the stay following recognition to, for example, (a) allow continuation of admiralty proceedings initiated before the commencement of the foreign proceeding: *New Zealand: Kim and Yu v STX Pan Ocean Co. Ltd* [2014] NZHC 845, CLOUT 1481; (b) permit pursuit of claims for breach of fiduciary duties in a situation where the commencement of the foreign proceeding in question did not lead to the imposition of a stay on such claims: *New Zealand: Downey v Holland* [2015] NZHC 595, CLOUT 1480; (c) prevent steps from being taken to enforce a security in circumstances where the legislation enacting the MLCBI exempted such steps from the automatic stay applicable under art. 20: *England: Pan Oceanic Maritime Inc.* [2010] EWHC 1734 (Comm); (d) authorize a creditor to exercise its recoupment and set-off rights, instead of sending the creditor to the foreign court to ask for the same relief: *United States: Sivec SRL*, 476 B.R. 310 (Bankr. E.D. Okla. 2012), CLOUT 1312; (e) allow a State court to continue to administer and adjudicate the parties’ relative rights to funds held by that court: *Comercial V.H., S.A. de C.V.* (Bankr. D. Ariz. September 13, 2012) – foreign representative of an insolvency proceeding in Mexico obtained recognition as a foreign main proceeding in order to appear in a court of the State of Arizona proceeding to assert the rights of the foreign proceeding to funds held in *custodia legis* by that court. Defendants in the state court action who feared that the representative would take the funds to Mexico objected to recognition and sought relief from the stay. The court declined, finding that the funds were adequately protected in the hands of the state court; (f) pursue contractual claims in an arbitration in the recognizing State, whose law governed the dispute: *England: Re Pan Ocean Co. Ltd.; Seawolf Tankers Inc. v Pan Ocean Co. Ltd.* [2015] EWHC 1500 (Ch) [paras. 59–60] – court balanced a number of factors including that there was no evidence to suggest the arbitration would adversely affect the foreign proceedings, there was no evidence of cost or equivalent detriment to the foreign representative, the issues of dispute raised were far from straightforward under applicable law and it was important to recognize that the parties had chosen arbitration, the law applicable and the location for dispute resolution. See also *England: Ronelp Marine Ltd. v STX Offshore & Shipbuilding Co. Ltd.* [2016] DEWHC 2228 (Ch) [para. 29] – court said creditor applying to continue existing proceedings (for breach of contract) must identify the nature of the interests to be promoted by the relief sought, address whether the grant of that relief is likely to impede the purpose of the insolvency proceedings, enable the court to balance the creditor’s legitimate interests against those of other creditors, having regard to the probability of occurrence of prejudice on either side.

²⁵ See for example, *United States: Sivec SRL*, 476 B.R. 310, 315 and 319 (Bankr. E.D. Okla. 2012), CLOUT 1312, based on the need to protect the creditors interests in accordance with arts. 6, 19 and 21; *Cozumel Caribe, S.A., de C.V.*, 482 B.R. 96 (Bankr. S.D.N.Y. 2012),

CLOUT 1311 – the Bankruptcy Court conditionally granted the foreign representatives’ request for post-recognition relief in the nature of a temporary stay of a cause of action brought by a creditor to exercise its rights against funds of non-debtor affiliates allegedly present in the same account in the United States with funds of the foreign debtor, pending the determination of certain issues of ownership of the funds by the originating court in Mexico.

²⁶ GE [paras. 151–152].

²⁷ *United States*: Nortel Networks Corp., 669 F.3d 128 (3d Cir. 2011).

²⁸ *United States*: Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 82 (Bankr. S.D.N.Y. 2011) affirmed 474 B.R. 88 (S.D.N.Y. 2012), CLOUT 1208.

²⁹ *United States*: Tradex Swiss AG, 384 B.R. 34, 44 (Bankr. D. Mass. 2008), CLOUT 791 – where a proceeding in Switzerland was recognized as a non-main proceeding, the court concluded that dismissal of the local proceeding was not warranted as the purposes of Ch. 15 were best served by permitting that local proceeding to go forward. The trustee had begun collecting assets and should be permitted to continue with the administration of the case, especially if the proceeding in Switzerland was to remain “in limbo” until a decision was made on a pending appeal. The vast majority of creditors were located outside Switzerland, with a great number in the United States; RHTC Liquidating Co., 424 B.R. 714, 724–729 (Bankr. W.D. Pa. 2010) – where a proceeding in Canada was recognized as a foreign main proceeding, a motion to dismiss the local United States case was denied on the basis that the stated purposes of the cross-border legislation (reflecting the preamble of the MLCBI) were not best served by dismissal.

*Article 21. Relief that may be granted upon recognition
of a foreign proceeding*

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;

(b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;

(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;

(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) Extending relief granted under paragraph 1 of article 19;

(g) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 21 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 61–73]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).

2. Reports of Working Group V (Insolvency Law) relating to:

(a) MLCBI: A/CN.9/419 [paras. 148–152, 154–166]; A/CN.9/422 [paras. 111–113]; A/CN.9/433 [paras. 127–134, 138–139]; A/CN.9/435 [paras. 49–61];

(b) GE (1997): A/CN.9/436 [paras. 80–83]; A/CN.9/442 [paras. 154–159];

(c) GEI (2013): A/CN.9/742 [para. 65]; A/CN.9/763 [para. 59]; A/CN.9/766 [para. 48].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 195].

INTRODUCTION¹

1. The GEI [paras. 189–195]² notes that article 21 is broader in scope than article 20 and applies to both recognized main and non-main proceedings. Relief under article 21 is discretionary (as it is under article 19) and is typical of the relief most frequently granted in insolvency proceedings. The list in paragraph 1 of the relief available is not exhaustive (as indicated by use of the word “including”) and the court is not restricted unnecessarily in its ability to grant, at the request of the foreign representative,³ any type of relief that is available under the law of the enacting State. Article 22 permits the court to subject the relief granted under article 21 to any conditions it considers appropriate. The turnover of assets to the foreign representative in paragraph 2 is subject to the proviso that the interests of local creditors are adequately protected, as well as to the broader protection of article 22, paragraph 1, and the possibility that the court may subject that turnover to conditions under article 22, paragraph 2. The JP [paras. 168–182] also provides information on article 21.

2. See case law on article 20 above on the meaning of the words “assets of the debtor” and “commencement or continuation of individual actions or individual proceedings”.

CASE LAW ON ARTICLE 21

3. Article 21 has been described by some courts as providing a very broad reservoir⁴ of power that enables courts to grant any appropriate relief to effectuate the purpose of the MLCBI and to protect assets of the debtor or the interests of creditors.⁵ It has been emphasized that the issue of relief should be treated separately to the question of recognition; recognition turns on the strict application of objective criteria under article 17, which promotes predictability and reliability, while relief is largely discretionary and turns on factors that remain flexible and pragmatic in order to foster cooperation in appropriate cases.⁶ The question of whether granting relief under article 21 is appropriate must be determined by the court, at its discretion and after recognition has been ordered.

4. Courts have underlined the distinction between the automatic relief available on recognition of a foreign main proceeding and the discretionary nature of relief available on recognition of a foreign non-main proceeding, observing that the relief that can be granted under article 21, paragraph 1, is circumscribed in several ways: it must be necessary to protect the interests of the creditors (meaning the interests of the general body of creditors as a whole)⁷ or, as an alternative, to protect the assets of the debtor;⁸ it would be subject to the public policy exception under article 6;⁹ and regard must be had to article 22, paragraph 1, which emphasizes the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interests of those affected by such relief, without unduly favouring one group of creditors over another.¹⁰ Under article 22, paragraph 2, the court may impose conditions on discretionary relief, such as by requiring the posting of a security or bond.¹¹

ARTICLE 21, PARAGRAPH 1

5. Courts have suggested that the words “upon recognition” in the chapeau of article 21 define the date from which relief may be granted, but that those words do not necessarily define the date by reference to which the rights (in respect of which relief is to be granted) are to be identified.¹²

6. Courts have taken different views of the scope of the relief that can be ordered under article 21, paragraph 1. In some States, it has been suggested, the recognizing court can give effect to the position in the foreign main proceeding, which might mean the relief that can be ordered in the recognizing State is not limited to the relief that would be available in a hypothetical domestic insolvency proceeding.¹³ In other States, courts have said that the words “any appropriate relief” do not allow the court to grant relief that would not be available when dealing with a domestic insolvency.¹⁴ Some courts have also said that while the relief granted in the foreign proceeding and that available under article 21 need not be identical,¹⁵ it must be of a type that is cognizable under the law of the recognizing court and not manifestly contrary to public policy under article 6.¹⁶

7. In a State in which the statutory regime enacting the MLCBI makes specific reference to comity,¹⁷ courts have held that, once a foreign main proceeding has been recognized, the enacting legislation specifically contemplates that the court will exercise its discretion to fashion appropriate post-recognition relief consistent with the principles of comity.¹⁸ That has been held to include enforcing certain orders for relief issued in the foreign proceeding that were broader than would have been permitted under the law of the recognizing State.¹⁹ The key determination, the court said, was whether the procedures used in the foreign proceeding met the fundamental standards of procedural fairness in the recognizing State.²⁰ Another court in the same State made its own order under article 21 on the same terms as the foreign order prohibiting the termination of executory contracts without the leave of the court,²¹ while in a further case the court held that it could apply the law of the foreign proceeding, to avoid fraudulent transfers in the recognizing State, because the court had the authority under article 21 to grant relief under the avoidance law as “appropriate relief”.²² In a case that considered what might constitute “appropriate relief” under article 21, paragraph 1, the court said that the general power to grant “any appropriate relief” meant relief that could have been awarded under current law or under the previously applicable law. The type of relief sought in the particular case (concerning third party releases) did not fall into either of those categories and could not therefore be granted. When such relief had been granted, the court went on to say, it had been granted under the equivalent of article 7, not article 21.²³

8. Courts in another State have adopted a similar approach. In one case, the court said that giving effect to the debtor-in-possession finance facility order made in the foreign proceeding raised no issues of public policy in the recognizing State, notwithstanding that it was, in part, impermissible under local law because that type of charge could not secure an obligation that existed before the commencement of the insolvency proceedings.²⁴ The court was satisfied, however, there would be no material prejudice to local creditors and the fact that the order was made by the particular foreign court was considered to be significant; the recognizing court said there was no basis for second-guessing the decision of that court. The recognizing court concluded that recognition of the foreign order was necessary for protection of the debtor company’s property and the interests of creditors.²⁵

9. A different interpretation suggests that approach goes too far and even though the words “any appropriate relief” are capable of being given a wide literal meaning, the relief that may be ordered under article 21 can only reflect the relief that could be ordered in the case of a domestic insolvency.²⁶ In one case, the court observed that since the parties had agreed that the contract in question would be governed by the law of the recognizing State (in which an insolvency termination clause would be valid), the court should not seek to override that bargain and accordingly, declined to restrain the serving of a termination notice.²⁷ Courts in that

same State have also held that there is nothing in article 21 to suggest it would apply to the recognition and enforcement of foreign judgments against third parties.²⁸ In another State, an appeal court has held that the relief that could be granted on recognition of a foreign proceeding provides procedural support for that proceeding and could not substantively change a creditor's claim. Recognition of a foreign discharge order, the court went on to say, went beyond the scope of relief available under the MLCBI.²⁹

ARTICLE 21, SUBPARAGRAPH 1 (a)

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;

10. A stay under article 21, subparagraph 1 (a), was held to apply to an action for breach of contract by the debtor. In order to determine that claim, the court said, it would have to find that certain funds currently held in the debtor's account in the defendants' bank were not part of the debtor's insolvency estate and instead belonged to the plaintiff. Since such a finding would have an adverse impact on the estate, the claims were barred by article 21, subparagraph 1 (a).³⁰ In another case, two arbitrations had commenced, only the second of which directly involved the insolvent company and was thus automatically stayed under art. 20 on recognition of the foreign proceedings. The court considered whether the first arbitration should also be stayed, finding that it was at least arguable that the underlying dispute related to the property of the debtor company, or at least to property in relation to which the debtor had an arguable claim to a beneficial interest which, under article 22, paragraph 1, the court had to be satisfied was adequately protected. The court permitted the first arbitration to continue, but enforcement or execution of any arbitral award was to be stayed until the debtor had the opportunity to restore the matter to the court in the event that any aspect of the interests of its creditors or office holders was not addressed by the arbitrators, or upon appeal.³¹ In a case which involved an application for indefinite continuation of the stay applicable under article 20, the court denied the application on the basis that the effect sought was substantive, rather than procedural; and would forever prevent certain creditors from exercising their rights under the law of the recognizing State (which was also the law of the contract) in order to conform their position to the law of the State in which the insolvency was taking place. The court indicated that even if it had the jurisdiction to grant that relief, it was unlikely to do so given the balancing required under article 22.³²

ARTICLE 21, SUBPARAGRAPH 1 (b)

(b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;

11. No cases addressing the interpretation of this subparagraph have been reported.

ARTICLE 21, SUBPARAGRAPH 1 (c)

(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of article 20;

12. No cases addressing the interpretation of this subparagraph have been reported.

ARTICLE 21, SUBPARAGRAPH 1 (d)

(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

13. Article 21, subparagraph 1 (d), has both a jurisdictional and a discretionary component. The court must be satisfied that the information sought concerned the debtor's assets, affairs, rights, obligations or liabilities and, if it was so satisfied, then it had discretion to order the delivery of that information. In exercising that discretion, one court said, it must have regard to all relevant circumstances and ensure that the interests of the person against whom the order was sought were adequately protected.³³

14. It has been suggested that article 21, subparagraph 1 (d) was intended to set a common minimum standard. The foreign representative was entitled to seek relief under that subparagraph regardless of whether a local officeholder would be entitled to that relief under local law. If local law provided for additional relief, the foreign representative could seek that under article 21, subparagraph 1 (g). In the case in question, the court said the precise scope of article 21, subparagraph 1 (d), was unimportant as the foreign representative could rely on article 21, subparagraph 1 (g); if subparagraph 1 (d) was narrower than subparagraph 1 (g), that was of no consequence in that case.³⁴

15. Where a foreign representative sought discovery against an individual, the court ruled that the scope of the discovery was limited by the requirement that it must concern the "debtor's assets, affairs, rights, obligations or liabilities." Since certain private information sought did not concern the "debtor's assets, affairs, rights, obligations or liabilities" (but rather the assets of the person who had allegedly controlled the debtor) the request was denied. Other requests, however, were clearly germane to the assets, affairs, rights and obligations or liabilities of the debtor and were permitted.³⁵ In another case, where discovery was sought against third-party non-debtors, the court differentiated between those entities with economic relationships to the debtor and those unrelated to the debtor. It held that the foreign representative generally was not permitted to obtain discovery relating to third-party non-debtor entities unless (a) the documents that had been

requested pertained to transactions with debtor entities, or (b) the targets of the discovery requests were entities in which a majority of the stock was owned by a debtor entity. As to the latter types of document request, the court held that broad financial discovery was permissible because the ownership interests in these non-debtor targets were assets of the debtor's estate.³⁶ Discovery has been ordered in a recognizing jurisdiction in a situation in which it would not have been available under the law of the main proceeding.³⁷ In some States, discovery may also be afforded as "additional relief" under the additional assistance provisions of article 7.³⁸

16. Following recognition of the foreign proceeding as a main proceeding, examination of a former director of the debtor, apparently residing in the recognizing State, was ordered under article 21, subparagraph 1 (d), on the basis that that person was likely to have an intimate knowledge of the affairs of the debtor. Although the director asserted that he had resigned from a directorship of the debtor, the court indicated it was not necessary to determine his status vis-à-vis the company (e.g., as an actual or shadow director) because article 21, subparagraph 1 (d), extended to anyone that could be regarded as a "witness".³⁹ It has been considered fair to characterize a desire to examine witnesses under article 21, subparagraph 1 (d), as an attempt to "protect", or preserve the value of an inchoate asset, and while a potential cause of action was not a perishable asset, relevant limitation periods might constrain the time available for a liquidator to fully apprise him or herself of relevant considerations, before deciding whether to issue proceedings.⁴⁰

ARTICLE 21, SUBPARAGRAPH 1 (e)

(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

17. The power of entrustment under article 21, subparagraph 1 (e), satisfies the need of the foreign representative to gain control of the assets and is thus incidental to the task of administering and realizing assets of the debtor in the recognized proceeding, but it does not authorize distribution of those assets. This is achieved by the power under article 21, paragraph 2, to entrust the foreign representative with distribution of the debtor's assets in the recognizing State, several courts noting the distinction between these two provisions.⁴¹ The granting of relief under subparagraph 1 (e), it has been observed, permits all creditors worldwide to pursue their rights and remedies in one court of competent jurisdiction and is therefore the more economical and efficient approach to take.⁴²

18. Courts have emphasized the limitation in subparagraph 1 (e) that the assets in question must be located in the recognizing State. An action seeking to recover certain assets by challenging transfers from the foreign debtors was held not to be within that specific territorial limitation of

subparagraph 1 (e), which referred to tangible property located within the territory of the recognizing State and intangible property deemed under applicable non-bankruptcy law to be located within that territory, because in the case in question there were no such assets.⁴³ In a subsequent case in the same State, the court declined to follow that decision, holding that subparagraph 1 (e) did not limit the court's subject matter jurisdiction over an intangible asset located in a foreign State.⁴⁴

19. Administration and realization of assets under subparagraph 1 (e) have been made subject to conditions. In a case concerning the question of whether entrusting the administration or realization of equity interests of the debtor to the foreign representative would trigger defaults under loan documents and other agreements, the court made the order under subparagraph 1 (e) with a caveat: because the foreign representatives were "stepping into the shoes" of the debtor, whatever actions they took in the performance of their duties had to comport with the fiduciary duties imposed by the applicable law. If they ignored those duties, the court would be available to address any disputes that might arise.⁴⁵ In another case, the court entrusted the foreign representatives with administration and realization of certain assets within the territory of the recognizing State under article 21, subparagraph 1 (e), and allowed them to seek turnover of those assets under other sections of the bankruptcy law, by motion on notice with an opportunity for opposing parties to be heard. That would enable the court to ensure the interests of creditors and affected parties were protected under article 22.⁴⁶

20. In a case where the only assets of the debtor that could be subject to an order under article 21, subparagraph 1 (e), were ships entering the waters of the recognizing State, the court noted that while article 20, by virtue of article 20, paragraph 2, preserved the operation of local law (which in this case would include the right of secured creditors to realize or otherwise deal with their security), additional orders under article 21 did not.⁴⁷ The court denied the relief sought, but ordered that any application for the issue of a warrant of arrest in the State of any vessel owned or chartered by the debtor should be dealt with by a judge of the same court and that the court's reasons for the present judgment should be drawn to the attention of that court at the time such application might be made.

ARTICLE 21, SUBPARAGRAPH 1 (f)

(f) Extending relief granted under paragraph 1 of article 19;

21. Relief granted under article 19, subparagraph 1 (c) (referring to article 21, paragraphs 1 (c), (d) and (g)), was extended on recognition of foreign main proceedings because of the failure of the debtor and its directors to comply with the relief ordered under article 19 and the inability of the foreign representative to discharge its duties without that relief being extended.⁴⁸

ARTICLE 21, SUBPARAGRAPH 1 (g)

(g) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

22. It might be noted that some States have omitted subparagraph 1 (g) from their enactment of the MLCBI.⁴⁹

ARTICLE 21, PARAGRAPH 2

(*see also discussion of adequate protection under article 22*)

23. The collection of property is permitted by article 21, subparagraph 1 (e), while article 21, paragraph 2, permits the foreign representative to distribute the property in the foreign proceeding, provided creditors in the recognizing State are adequately protected pursuant to article 21, paragraph 2, and article 22, paragraph 1. Adequate protection⁵⁰ in the context of the MLCBI has been described in one State as embodying three basic principles: “[*(a)*] the just treatment of all holders of claims against the bankruptcy estate; [*(b)*] the protection of local claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceedings; and [*(c)*] the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by local law”.⁵¹ The relationship between article 21, paragraph 2, and article 22, paragraph 1, has been noted – that the notion of adequate protection involves an evaluation of the protection afforded to relevant creditors. The balancing of the protection of the local creditors under article 21, paragraph 2, and the protection of all creditors under article 22, paragraph 1, the court said, is thus achieved by recognizing the equality of all creditors, when considering the dealing with, and access to, the funds of the company.⁵²

24. A court denied a request for turnover of funds to the foreign representative on the basis that the creditor would not be adequately protected in the foreign proceeding, noting that basic elements of due process were lacking in that proceeding and that the creditor’s status would be vastly different from the status it would have in the recognizing State.⁵³ In another case, the recognizing court was satisfied that local creditors were adequately protected in the light of the evidence of the foreign law and arrangements made in a protocol to protect the interests of creditors who had submitted proofs of debt in the local liquidation. Those arrangements included review by the local liquidators of any proofs rejected by the foreign liquidators, and the preservation for those creditors of set-off rights under local law.⁵⁴

25. It was noted by one court that while the GE characterizes article 22, paragraph 1, as a general statement of the principle of protection of local interests, it later acknowledges

[para. GE 163]⁵⁵ that while in many cases the affected creditors under article 22, paragraph 1, will be “local” creditors, it is not advisable to attempt to limit the article to local creditors, given the difficulty of crafting an appropriate definition and the absence of any justification for discriminating against creditors on the basis of criteria such as place of business or nationality.⁵⁶ The court concluded it must be satisfied that the interests of local creditors were sufficiently protected before allowing a foreign representative to distribute property in a foreign proceeding and, although not an express requirement, it was not precluded from satisfying itself that foreign creditors’ interests were also sufficiently protected before allowing such distribution.⁵⁷

ARTICLE 21, PARAGRAPH 3

26. Courts have noted that the restriction under this paragraph of article 21 applies only in the case of non-main proceedings,⁵⁸ and that since the scope of non-main proceedings might be less than all-encompassing, the scope of the foreign proceeding should be considered in fashioning appropriate relief.⁵⁹

27. A recognizing court found that local assets should be administered in the foreign proceedings on the basis that it was efficient to have a single mechanism for the distribution of the debtor’s assets in accordance with the foreign law, where that mechanism was designed to treat all similarly situated creditors in a similar way, with the exception of the revenue rule. The foreign court made orders allowing foreign creditors, including the tax authority of the recognizing State, to file and prove claims and participate in the foreign proceeding.⁶⁰

RELATIONSHIP BETWEEN
ARTICLES 21 AND 7

28. An appeal court of one State⁶¹ has outlined an approach for analysing requests for relief under articles 7 and 21. That approach requires a receiving court to first determine whether relief requested by a foreign representative falls into one of the enumerated categories of article 21.⁶² If not, the court should decide whether the relief could be considered “appropriate relief” under article 21, paragraph 1, which entails, *inter alia*, consideration of whether the requested relief would otherwise be available under the law of the receiving State. If the requested relief went beyond the relief currently available under the law of that State, article 7 functioned as a “catch-all” that included forms of relief “more extraordinary” than those permitted under either the specific or the general provisions of article 21. The court reasoned that such a framework would prevent courts from subjecting relief under article 7 to the same limitations as relief under article 21, unless those limitations were specifically applicable and would avoid “all-encompassing applications” under article 7 and expanding the reach of the law enacting the MLCBI “beyond current international insolvency law.”

Notes

¹ *Republic of Korea*: legislation enacting the MLCBI (Debtor Rehabilitation and Bankruptcy Act 2005) does not include the equivalent of art. 20 of the MLCBI and relief must therefore be sought under the equivalents of arts. 19 and 21 (DRBA sects. 635 and 636). Art. 22 has also not been implemented, but it has enacted art. 21, para. 2 (DRBA sects. 636 (2)). (2014) GOOKJI 1 (26 May 2014) – after reviewing protections available for creditors from the Republic of Korea, including opportunities for participation in the foreign proceeding, the court granted an application for repatriation of assets to the United States. (2010) GOOKJI 1 (7 February 2011) – the court ordered a stay of a pre-judgment attachment on a domestic asset of the debtor.

² GE [paras. 154–160].

³ Some States have broadened the article to enable relief to be granted at the request of other parties. For example, in Japan, the Law on Recognition of and Assistance to Foreign Insolvency Proceedings 2001, art. 25 (relief similar to art. 21 of the MLCBI), enables the court to grant relief upon or after recognition on its own initiative or on the petition of any interested party.

⁴ *United States*: Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009), CLOUT 1277 quoting Leif M. Clark, “Ancillary and other cross-border insolvency cases under Chapter 15 of the Bankruptcy Code” (2008) at 70; *England*: Larsen v Navios International Inc [2011] EWHC 878 (Ch) [para. 23 (b)], CLOUT 1273 – court said there is every reason to give art. 21 a broad scope.

⁵ *United States*: AJW Offshore, Ltd., 488 B.R. 551, 559 (Bankr. E.D.N.Y. 2013); see also Rede Energia, S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014), CLOUT 1630.

⁶ *United States*: Bear Stearns 389 B.R. 325, 333 (S.D.N.Y. 2008), CLOUT 794; the JP [para. 149].

⁷ *England*: Larsen v Navios International Inc [2011] EWHC 878 (Ch) [para. 23 (a)], CLOUT 1273.

⁸ *England*: Pan Ocean Co Ltd [2014] EWHC 2124 (Ch) [para. 61], CLOUT 1482; *United States*: Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr. S.D.N.Y., 2009), CLOUT 1277.

⁹ See art. 6 above; *Ibid. England*: Pan Ocean [para. 104] – court discussed different outcomes in United States and England with respect to relief sought in the case of Dr. Juergen Toft, see *United States*: Toft, 453 B.R. 186, 192 (Bankr. S.D.N.Y. 2011), CLOUT 1209.

¹⁰ *United States*: Lavie v Ran (*In re Ran*), 607 F.3d 1017, 1026 (5th Cir. 2010); Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr. S.D.N.Y., 2009), CLOUT 1277 and Toft, 453 B.R. 186, 196 (Bankr. S.D.N.Y. 2011), CLOUT 1209 quoting Tri-Continental Exchange, Ltd., 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006), CLOUT 766.

¹¹ *United States*: Tri-Continental Exchange, Ltd., 349 B.R. 627, 636 (Bankr. E.D. Cal. 2006), CLOUT 766.

¹² *England*: Larsen v Navios International Inc. [2011] EWHC 878 (Ch) [paras. 22, 24], CLOUT 1273 – court held that rights of set-off were to be determined as at the date of commencement of the foreign insolvency proceeding, not at the date of recognition of that proceeding.

¹³ *United States*: Sino-Forest Corporation, 501 B.R. 655, 665–666 (Bankr. S.D.N.Y. 2013) – following the approach in Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697–699 (Bankr. S.D.N.Y. 2010), CLOUT 1007, on third-party releases; Vitro S.A.B. de C.V., 701 F.3d 1031, 1044 n. 42, 1053–1054 (5th Cir. 2013), CLOUT 1310; Fogerty v Petroquest Resources, Inc. (*In re Condor Ins. Ltd.*), 601 F.3d 319, 322–329 (5th Cir. 2010), CLOUT 1006.

¹⁴ *England*: Fibria Cellulose S/A v Pan Ocean Co. Ltd [2014] EWHC 2124 [paras. 107–108] (30 June 2014), CLOUT 1482.

¹⁵ *United States*: Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010), CLOUT 1007; CT Inv. Management Co., LLC v Carbonell, 10 Civ. 6872 (S.D.N.Y. Jan. 11, 2012), p. 5; Rede Energia, S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014), CLOUT 1630.

¹⁶ *United States*: Toft, 453 B.R. 186, 192 (Bankr. S.D.N.Y. 2011), CLOUT 1209.

¹⁷ United States Bankruptcy Code, 11 U.S.C. sect. 1509 (b) (3), provides that comity shall be granted following the United States recognition of a foreign proceeding under Ch. 15, subject to the caveat that comity shall not be granted when to do so would contravene fundamental United States public policy under sect. 1506.

¹⁸ *United States*: Atlas Shipping A/S, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009), CLOUT 1277.

¹⁹ *United States*: Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010), CLOUT 1007 – the court observed that the United States and Canada shared the same common law traditions and fundamental principles of law, that courts in Canada afforded creditors a full and fair opportunity to be heard in a manner consistent with standards of United States due process and that United States federal courts had repeatedly granted comity to proceedings from Canada; see also Sino-Forest Corporation, 501 B.R. 655 (Bankr. S.D.N.Y. 2013).

²⁰ *United States*: Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010), CLOUT 1007, cited in Sino-Forest Corporation, 501 B.R. 655, 662–663 (Bankr. S.D.N.Y. 2013) – the court held that the foreign procedures met that test. In analysing procedural fairness, courts have looked at factors such as whether: (a) creditors of the same class are treated equally in the distribution of assets; (b) the liquidators are considered fiduciaries and are held accountable to the court; (c) creditors have the rights to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (d) the liquidators are required to give notice to potential claimants; (e) there are provisions for creditors meetings; (f) a foreign country’s insolvency laws favour its own citizens; (g) all assets are marshalled before one body for centralized distribution; and (h) there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.

²¹ *United States*: Gandhi Innovations Holdings, LLC (Bankr. W.D. Tex. 2009); also W.C. Wood Corp., Ltd., case No. 09-11893 (Bankr. D. Del. June 1, 2009) – the recognizing court made an order under art. 21 expressly prohibiting the termination of executory contracts; see also *Canada*: Lightsquared LP (2012) ONSC 2994 [paras. 38–39], CLOUT 1204 – the recognizing court made an order restraining the right to discontinue or terminate any supply of products or services to the United States debtors.

²² *United States*: Fogerty v Petroquest Resources, Inc. (*In re Condor Ins. Ltd.*), 601 F.3d 319, 329 (5th Cir. 2010), CLOUT 1006 – the court applied the law of Nevis.

²³ *United States*: Vitro S.A.B. de C.V., 701 F.3d 1031, 1056–1058 (5th Cir. 2013), CLOUT 1310; see note under art. 7 with respect to United States enactment of that provision and the direction as to comity; see also CGG S.A., 579 B.R. 716 (Bankr. S.D.N.Y. 2017) – court found the recognition and enforcement of the order sanctioning a sauvegarde plan in France was “appropriate relief” under section 1521 (a) of the

Bankruptcy Code, and also “additional assistance” under section 1507; *Cell C Proprietary Ltd.*, 571 B.R. 542 (Bankr. S.D.N.Y. 2017) and *Rede Energia S.A.*, 515 B.R. 69 (Bankr. S.D.N.Y. 2014), CLOUT 1630.

²⁴ *Canada*: *Hartford Computer Hardware*, 2012 ONSC 964, CLOUT 1205.

²⁵ *Canada*: See also *Massachusetts Elephant and Castle Group Inc.*, 2011 ONSC 4201, CLOUT 1206 – recognition of a number of orders made in the United States proceedings, appointment of an information officer and granting of an administrative charge; *LightSquared LP* [2012] ONSC 2994, CLOUT 1204 – after granting the initial recognition, the court also had to consider a request for additional discretionary relief pursuant to sect. 49 of the Companies’ Creditors Arrangement Act, including the appointment of an information officer, the granting of an administrative charge and the recognition of United States first-day orders. The court found the requested relief to be appropriate in the circumstances – [paras. 35, 37] on the basis that the relief sought was necessary for the protection of the debtor company’s property or the interests of a creditor or creditors, and would facilitate these proceedings and the dissemination of information concerning the United States proceedings.

²⁶ *England*: *Fibria Cellulose S/A v Pan Ocean Co. Ltd* [2014] EWHC 2124 (Ch) [paras. 107–108], CLOUT 1482; *Larsen v Navios International Inc* [2011] EWHC 878 (Ch) [paras. 23 (f), 31–32], CLOUT 1273; *Rubin v Eurofinance SA* [2010] EWCA Civ 895 [para. 62].

²⁷ *England*: *Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), CLOUT 1482 – the court distinguished the interpretation given in *Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319 (5th Cir. 2010) [paras. 106, 114], CLOUT 1006, which appeared to support an interpretation of those words that would allow the recognizing court to give effect to an order of the foreign court, even if the recognizing court could not itself have made such an order in its own domestic proceedings. While noting that art. 8 of the MLCBI directed the court to have regard to the need to promote uniformity in its application, the court gave several reasons for not following the United States case. These included that although the legislative history of Ch. 15, and in particular the words “any appropriate relief”, appeared to enable United States’ courts to apply the law of the foreign proceedings, there was no comparable legislative history in Great Britain and it was open to the court to conclude that implementation of the MLCBI in the United States and Great Britain was not identical.

²⁸ *England*: *Rubin v Eurofinance SA* [2012] UKSC 46 [para. 143], CLOUT 1270. On the issue of enforcement of judgments, see UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments and Guide to Enactment, available at <https://uncitral.un.org>.

²⁹ *Republic of Korea*: (2006) GOOKSEUNG 1 (22 January 2007), Seoul Central District Court, CLOUT 1002; (2007) GOOKSEUNG 2 (12 February 2008), Seoul Central District Court; (2008) HAHAP 20 (28 August 2008), Seoul Central District Court; RA 1524, Seoul High Court, CLOUT 1000; (2009) Ma 1600 (25 March 2010), Supreme Court of Korea. See also *Japan*: *Azabu Building Company Ltd*, case No. (shou) 1 of 2006; case No. (mi) 5 of 2007, Tokyo District Court, CLOUT 1478 – the effect of a debt discharge in the foreign proceeding can be recognized in Japan only if the discharge satisfies the conditions for recognition of the effect of a foreign judgment under section 118 of the Civil Procedure Code.

³⁰ *United States*: *Capitaliza-T Sociedad De Responsabilidad Limitada De Capital Variable v Wachovia Bank of Del. N.A.*, 10 Civ.520 (D. Del. Dec. 20, 2011) – following recognition of the foreign main proceeding taking place in Mexico, the court entered an order under the equivalent of art. 21, subpara. 1 (a), staying the commencement or continuation of proceedings concerning the debtor’s assets, rights, obligations or liabilities. An action was commenced in a different court for, inter alia, breach of contract by the debtor. That court concluded that in order to determine that claim it would have to find that certain funds currently held in the debtor’s account in the defendants’ bank were not part of the debtor’s bankruptcy estate and instead belonged to the plaintiff. The court concluded that since the debtor was the real party in interest and a determination against the non-debtor defendants would have an adverse impact on the property in the debtor’s estate, the claims were barred by the order under art. 21, subpara. 1 (a). The court did, however, allow the plaintiffs to amend one of their complaints, but indicated that it would then be stayed pursuant to the order under art. 21, subpara. 1 (a).

³¹ *England*: In the matter of *Armada Shipping SA* [2011] EWHC 216 (Ch) [para. 64].

³² *England*: *Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia* [2018] EWHC 59 (Ch) [paras. 142 (3), 158 (4)], denial of relief affirmed on appeal. Appeal court said indefinite stay could only be ordered if two conditions were satisfied: stay was necessary to protect debtor’s creditors and the stay was an appropriate way of achieving that protection. Court also said that if the power to grant the stay under art. 21 had been intended to override the substantive rights of creditors under the proper law governing their debts, it could be expected to have been explicit, or at the very least the subject of discussion and positive recommendation at the preparatory stage. In the absence of that material, the court could find no reason to treat the power under art. 21 as anything other than procedural in nature with the main object of providing a breathing space of the kind envisaged by the GE: *Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802 [paras. 89, 97].

³³ *England*: *Picard v FIM Advisers LLP* [2010] EWHC 1299 (Ch) [para. 23] – in exercising its discretion, the court considered in some detail the period to be covered by the order, the locations to be searched and several disputed categories of documents. The court found that the need for the trustee to discharge its duties, including investigating the conduct, property, liabilities and financial conditions of the debtor, outweighed oppression on the respondent. *New Zealand*: *ANZ National Bank Ltd v Sheahan and Lock* [2012] NZHC 3037 (15 November 2012) [paras. 111–114].

³⁴ *England*: *Chesterfield United Inc.* [2012] EWHC 244 (Ch) [paras. 11–12], CLOUT 1271.

³⁵ *United States*: *Glitnir banki hf*, case No. 08-14757, 21 (Bankr. S.D.N.Y. Aug. 19, 2011).

³⁶ *United States*: *Petroforte Brasileiro de Petroleo Ltda.*, 542 B.R. 899, 903 (S.D. Fla 2015), CLOUT 1625 – court said if a debtor owned a majority interest in a third-party target, the trustee was entitled to all financial information of any such third party in order to value the ownership interest.

³⁷ *United States*: *Platinum Partners Value Arbitrage Fund L.P.*, 583 B.R. 803 (Bankr. S.D.N.Y. 2018) – discovery concerned work papers of the debtor’s former accountants. The court said the scope of discovery available in the foreign jurisdiction was not a valid basis upon which the recognizing court, in the exercise of its discretion, must limit the relief available to the foreign representative. The court rejected arguments that discovery should first be sought in the originating jurisdiction and that the discovery dispute was subject to arbitration under the terms of the letter of engagement of the accountant.

³⁸ *United States*: *Millennium Global Emerging Credit Master Fund Ltd.*, 471 B.R. 342 (Bankr. S.D.N.Y. 2012); United States Bankruptcy Code, 11 U.S.C. sect. 1507 (enacting art. 7, MLCBI), gives effect to the principle of art. 7 of the MLCBI, but is much more detailed, specifying the requirements for such relief to be granted.

³⁹ *Australia*: *Crumpler v Global Tradewaves* [2013] FCA 1 [para. 23], CLOUT 1331.

⁴⁰ *New Zealand*: ANZ National Bank Ltd v Sheahan and Lock [2012] NZHC 3037 (15 November 2012) [paras. 105, 112].

⁴¹ The distinction is noted in *United States*: Atlas Shipping A/S, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009), CLOUT 1277; Tri-Continental Exchange Ltd., 349 B.R. 627, 636 (Bankr. E.D. Cal 2006), CLOUT 766.

⁴² *United States*: Atlas Shipping A/S, 404 B.R. 726 (Bankr. S.D.N.Y. 2009), CLOUT 1277 – relief was granted under art. 21, subpara. 1 (*e*), and para. 2 with respect to funds held in United States bank accounts and subject to maritime attachment orders granted both before and after the commencement of the foreign proceedings.

⁴³ *United States*: *In re* Fairfield Sentry Ltd. Litigation, 458 B.R. 665 (S.D.N.Y. 2011).

⁴⁴ *United States*: British-Am. Ins. Co. v Fullerton, 488 B.R. 205, 233–36 (Bankr. S.D. Fla. 2013), CLOUT 1309.

⁴⁵ *United States*: Lee, 472 B.R. 156, 186 (Bankr. D. Mass. 2012).

⁴⁶ *United States*: AJW Offshore, Ltd., 488 B.R. 551, 561 (Bankr. E.D.N.Y. 2013) – court said the same protection would apply to discovery under art. 21, subpara. 1 (*d*), i.e., by motion on notice with an opportunity for hearing to the adverse parties and by making examination and production of documents available, with any discovery allowed to be subject to conditions imposed in accordance with art. 22; International Banking Corporation B.S.C., 439 B.R. 614, 627 (Bankr. S.D.N.Y. 2010), CLOUT 1317 – court declined to release to the foreign representative funds that were subject to an attachment order in favour of a foreign bank, because the attachment order was issued and perfected prior to the commencement of the foreign proceeding. The court directed that parties seek a ruling from the foreign court as to the voidability of the attachment orders under applicable foreign law; in the interim, the funds were to continue to be held in the United States; Tri-Continental Exchange Ltd., 349 B.R. 627, 636 (Bankr. E.D. Cal 2006), CLOUT 766 – court granted entrustment under art. 21, subpara. 1 (*e*), without conditions, noting that if it later transpired there was reason for the court to have discomfort about its conclusion, art. 22, para. 3, enabled it to revise its position and exercise its art. 22, para. 2, authority to impose conditions on the entrustment to the foreign representatives, such as the giving of security or the filing of a bond.

⁴⁷ *Australia*: Yu v STX Pan Ocean Co Ltd [2013] FCA 680 [para. 41], CLOUT 1333 – relief sought included “5. Pursuant to paragraph (*e*) of article 21 (1) of the Model Law, the administration and realisation of all of the Defendant’s assets located in Australia be entrusted to the foreign representative”, which the court denied.

⁴⁸ *Australia*: Lawrence v Northern Crest [2011] FCA 925, CLOUT 1217.

⁴⁹ E.g., Colombia, Mauritius, Romania, Seychelles and South Africa.

⁵⁰ While the MLCBI requires “adequate protection”, the United States legislation uses the term “sufficient protection”.

⁵¹ *United States*: Atlas Shipping (2009) 404 B.R.726, 740, CLOUT 1277, quoting *In re* Artimm, 335 B.R. at 160, which analysed the previous law, but was noted as being “essentially the same” as art. 21, para. 2 – in Atlas there were no United States claimants, the creditors opposing relief were foreign creditors, and the claims had no connection to the United States other than the success in garnishing the debtor’s funds in New York in support of London arbitration against the debtor.

⁵² *Australia*: Akers v Deputy Commissioner of Taxation [2014] FCAFC 57 [paras. 139–114], CLOUT 1332 – court was concerned with how a local (recognizing) court should approach the question of the position of a creditor who had enforceable rights in the local (recognizing) jurisdiction, but who would be stripped of all the benefit of those rights if assets were sent to the foreign main proceeding, because the law of that jurisdiction did not permit the enforcement of such a debt (in this case a revenue claim).

⁵³ *United States*: Sivec SRL, 476 B.R. 310, 328–329 (Bankr. E.D.Okla. 2012), CLOUT 1312 – in the United States, the creditor was a secured creditor, while in the foreign proceeding in Italy, the creditor was not recognized as a creditor and at best would be treated as an unsecured claimant and likely receive nothing on its claim.

⁵⁴ *England*: Swissair Schweizerische Luftverkehrsaktiengesellschaft [2009] EWHC 2099 (Ch) [para. 14].

⁵⁵ GEI [para. 198].

⁵⁶ *United States*: SNP Boat Service S.A. v Hotel Le St. James, 483 B.R. 776, 783–784 (S.D. Fla. 2012), CLOUT 1314.

⁵⁷ *Ibid*

⁵⁸ *England*: Swissair Schweizerische Luftverkehrsaktiengesellschaft [2009] EWHC 2099 (Ch) [para. 14].

⁵⁹ *United States*: British-American Insurance Co., Ltd. 425 B.R. 884 (Bankr. S.D.Fla. 2010), CLOUT 1005 – the proceeding for which recognition was sought related to the insolvency of a branch of the debtor and it was argued that that proceeding could not be regarded as being for the purposes of liquidation or reorganization of the debtor (as required by art. 2 (*a*)) as it did not have a comprehensive impact on the debtor’s insolvency estate.

⁶⁰ *Australia*: Kapila, Re Edelsten [2014] FCA 1112 [para. 61], CLOUT 1475.

⁶¹ *United States*. See JP [para. 181] referring to *Vitro S.A.B. de C.V.* 701 F.3d 1031, 1056–1058 (5th Cir. 2013), CLOUT 1310, case No. 29 in the JP. Applying the framework to the facts before it, the appeal court affirmed the denial of the foreign representative’s request to enforce an order confirming the foreign reorganization plan that novated and in effect released the obligations of subsidiaries of the foreign debtor that had guaranteed notes issued by the debtor, but had not themselves applied to commence insolvency proceedings. The court first determined that art. 21, paras. 1 and 2, did not provide for discharge of the obligations of non-debtor guarantors. Next, the court determined that the general grant of relief in art. 21, para. 1, did not provide the requested relief because non-consensual, non-debtor releases through a bankruptcy proceeding were “generally not available” under local law and were “explicitly prohibited” in the particular court. Turning to art. 7, the court noted that such releases were sometimes available in other courts and the relief sought was therefore not precluded under art. 7. The court found, however, that since the debtor had failed to provide evidence of the existence of extraordinary circumstances sufficient to establish a case for non-debtor releases under the law of those courts that allowed such releases, the lower court had not abused its discretion in denying relief under art. 7.

⁶² *United States*: Cozumel Caribe, S.A., de C.V., 482 B.R. 96 (Bankr. S.D.N.Y. 2012), CLOUT 1311 – court held it was unnecessary to look to art. 7 because art. 21 would permit the relief sought – the stay of a declaratory action brought in the recognizing State. With respect to art. 22, para. 1, court concluded that at least with respect to the funds belonging to the non-debtor affiliates remaining in the cash management account, the applicant was sufficiently protected as a temporary matter as long as the funds remained in the United States. The court observed that the applicant might be dissatisfied with the status, pace or a ruling in the foreign proceeding, but that alone did not justify permitting the applicant to continue the proceedings in the recognizing court, as those proceedings involved the same legal issues as the foreign proceeding.

*Article 22. Protection of creditors
and other interested persons*

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 22 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 82–93]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/422 [para. 113]; A/CN.9/433 [paras. 140–146]; A/CN.9/435 [paras. 72–78];
 - (b) GE (1997): A/CN.9/436 [para. 85]; A/CN.9/442 [paras. 161–164];
 - (c) GEI (2013): A/CN.9/715 [para. 39]; A/CN.9/763 [para. 60]; A/CN.9/766 [para. 49].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 199].

INTRODUCTION¹

1. Article 22, paragraph 1, provides mandatory protection for the interests of creditors and other interested persons when relief is granted or denied under articles 19 or 21. The GEI [paras. 196–199]² and the JP [paras. 157–159] note the idea underlying article 22 is that there should be a balance between the relief that may be granted to the foreign representative and the interests of persons that may be affected by that relief, such as creditors, the debtor and other interested persons. Article 22, paragraph 2, reinforces the idea inherent in the nature of discretionary relief (i.e., the relief granted under articles 19 and 21) that the court may tailor that relief to the case at hand. In each case, it will be necessary for a judge to determine the relief most appropriate to the circumstances of the particular case and any conditions on which the relief should be granted. The article also addresses the need for the interests of the persons that may be affected by that relief to be adequately protected when the court is granting, modifying or terminating that relief. The requirement for adequate protection in article 22 is broader than the requirement in article 21,

paragraph 2, which refers only to adequate protection of creditors of the recognizing State. Article 22, paragraph 3, provides for modification or termination of the relief granted under articles 19 or 21.

CASE LAW ON ARTICLE 22

2. Several courts have referred to article 22 as giving effect to the preamble to the MLCBI by implementing fair, efficient and cooperative procedures designed to maximize the value of the debtor’s assets for distribution.³

ARTICLE 22, PARAGRAPH 1

Interpretation of words and phrases

“Interested persons”

3. The words “interested persons” in paragraph 1 have been interpreted to mean any person potentially affected by the relief⁴ and would include persons against whom, for example, an order for delivery of information under article 21, subparagraph 1 (d), was sought.⁵ Courts have also considered the interpretation of similar terms, such as “party in interest”, which it has been held should be construed broadly to protect the interests of affected parties and give courts broad latitude to shape the relief to be ordered.⁶

*“Adequate protection”*⁷

4. Courts have emphasized the need, in ordering relief under articles 19 and 21, to achieve a balance between the different interests referred to under article 22, paragraph 1, without unduly favouring one group of creditors over another⁸ so that protection can be considered adequate for the purposes of both article 22 and article 21, paragraph 2.⁹ In achieving that balance, it has been noted that the interests of creditors and those of the debtor are often antagonistic and achieving the protection of one side may well occasion some expense to the other.¹⁰ In addition to the interests to be balanced under article 22, paragraph 1, it has been suggested that there may need to be a balance between those interests and protection of local creditors under article 21, paragraph 2. This can be achieved, it is suggested, by recognizing the equality of all creditors, when considering dealings with and access to the available funds of the

debtor.¹¹ However, one appellate court has suggested that while the question of whether the interests of foreign creditors in general were adequately protected could be considered before remitting property to the foreign jurisdiction, that consideration would not involve an inquiry into the individual treatment a particular creditor would receive in the specific foreign proceeding because that would require the court to judge the foreign proceeding.¹²

5. As noted above (see discussion under article 21, paragraph 2), one court has identified three basic principles governing what amounts to adequate protection: (a) the just treatment of all holders of claims against the bankruptcy estate; (b) the protection of local claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding; and (c) the distribution of proceeds of the foreign estate substantially in accordance with the order prescribed by local law.¹³ Another court has suggested that what adequate protection requires, whether or not the above principles should be adopted, is an evaluation of the protection afforded to relevant creditors.¹⁴ In one case, creditors' interests were held to be adequately protected because they were able to file their claims in the foreign proceeding, in which they were entitled to equal treatment with other unsecured creditors.¹⁵

6. Other examples of circumstances giving rise to a discussion about adequate protection have included:

(a) When the debtor was not eligible to be wound up in the recognizing State, the local creditor could not prove for any distribution in the foreign proceedings (because it had a revenue claim that was excluded under the law of the originating State) and it could not avail itself of statutory remedies under the law of the recognizing State because of the existing relief ordered under article 21 that conferred a benefit on all other creditors of the debtor;¹⁶

(b) When the foreign representative sought economic control of the foreign debtor's equity interests in the recognizing State, which the debtors argued would expose them to liability;¹⁷

(c) When the relief sought (permanently staying a lawsuit brought by a secured creditor in the recognizing State

and requiring the parties to try their claim in the originating State) would result in the creditor not being able to set off its claim because set-off rights were not allowed in the foreign proceeding and the creditor would be deprived of notice in the foreign proceeding because it was not regarded as a creditor under the law of the originating State;¹⁸

(d) Where the applicant in the recognizing State sought the release of certain funds held in that State, on the basis that it was dissatisfied with the status, pace or ruling in the foreign proceeding, the court held it would be adequately protected if the funds remained in the recognizing State;¹⁹

(e) Where creditors sought to both liquidate and determine the priority of their claims in local courts rather than the foreign proceeding and the foreign representative had agreed to creditors liquidating their claims in any court of competent jurisdiction, including a local court, the court found that an appropriate balance had been reached.²⁰

ARTICLE 22, PARAGRAPH 2

7. It has been assumed that the wording of article 22, given its breadth, authorizes the court to require a bond or security to be posted in appropriate cases as a matter of discretion.²¹

ARTICLE 22, PARAGRAPH 3

8. It has been noted that while article 22, paragraph 3, refers to modification or termination of the relief granted under articles 19 or 21, it makes no reference to amending the legal effect of recognition of the foreign main proceedings brought about by article 20.²² In a case where a broad stay ordered in the originating State had been recognized in the receiving State, relief from that stay was sought in the recognizing State in order to pursue claims that arose solely under the labour laws of the recognizing State for the protection of employees in the recognizing State. Having weighed the interests of the interested parties, the court modified the stay under article 22, paragraph 3, for the specific purpose of preserving the claims, noting that it would be unreasonable to require the applicants to seek relief from the stay in the originating State in view of the nature of the claims.²³

Notes

¹ Legislation enacting the MLCBI in the Republic of Korea (Debtor Rehabilitation and Bankruptcy Act 2005) does not include art. 22 of the MLCBI. It does however include the equivalent of art. 21, para. 2 (DRBA sect. 636 (2)) and the court considered protections available for creditors in making an order for repatriation of assets under that article: (2014) GOOKJI 1 (26 May 2014), Seoul Central District Court. Similarly, the Law on Recognition of and Assistance in Foreign Insolvency Proceedings of Japan does not include the equivalent of art. 22, but anticipates that creditors will be adequately protected by way of court supervision and court orders.

² GE [paras. 161–167].

³ *United States*: SPhinX, Ltd., 351 B.R. 103, 113 (Bankr. S.D.N.Y. 2006) affirmed on appeal 371 B.R. 10 (S.D.N.Y. 2007), CLOUT 768; *Australia*: Akers v Saad Investments [2013] FCA 738 [para. 38], CLOUT 1219 affirmed on appeal [2014] FCAFC 57, CLOUT 1332.

⁵ *United States*: Cozumel Caribe, S.A. de C.V., 482 B.R. 96,108 (Bankr. S.D.N.Y. 2012), CLOUT 1311, International Banking Corporation B.S.C. 439 B.R. 614, 626 (Bankr. S.D.N.Y. 2010), CLOUT 1317.

⁶ *England*: Picard (Foreign Rep of Bernard Madoff Investment Securities LLC) v FIM Advisers LLP [2010] EWHC 1299 [para. 22] (Ch).

⁷ *United States*: International Banking Corporation, B.S.C., 439 B.R. 614, 626 (Bankr. S.D.N.Y.2010); Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 108 (Bankr. S.D.N.Y. 2012); Zhejiang Topoint Photovoltaic Co., Ltd. case No. 14-24549 (Bankr. D.N.J. May 12, 2015) p. 3.

⁸ See United States Bankruptcy Code, 11 U.S.C. sect. 1522 (enacting art. 22 of the MLCBI). The Bankruptcy Code substitutes the term “sufficient protection” for the phrase “adequate protection” used in the MLCBI because “adequate protection” is used elsewhere in the Code. The drafters sought to avoid importing the large body of case law construing “adequate protection” into Ch. 15, thereby allowing a separate body of law to develop, consistent with principles of international law and promoting uniformity, as provided in art. 8 of the MLCBI.

⁹ *United States: Tri-Continental Exchange, Ltd.*, 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006), CLOUT 766 cited in *Sivec SRL*, 476 B.R. 310, 323 (Bankr. E.D.Okla. 2012), CLOUT 1312; *Jaffé v Samsung Electronics Co., Ltd.*, 737 F.3d 14, 29 (4th Cir. 2013), CLOUT 1337 – appeal court held that the District Court correctly interpreted the sufficient protection requirement of sect. 1522 (a) as requiring a particularized balancing analysis that considers the “interests of the creditors and other interested entities, including the debtor,” 11 U.S.C. sect. 1522 (a), and, in this case in particular, a weighing of the interests of the foreign representative (the debtor) in receiving the requested relief against the competing interests of those who would be adversely affected by the grant of such relief (here, the licensees). It also agreed that sect. 1506 was an additional, more general protection of United States interests that may be evaluated apart from the particularized analysis of sect. 1522 (a).

¹⁰ *United States: Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1060 (5th Cir. 2013), CLOUT 1310 – appeal court said that the Bankruptcy Court did not abuse its discretion in finding the foreign reorganization plan did not provide for an appropriate balance among the interests of the debtor, its creditors, and certain guarantors under arts. 21 and 22 and thus did not provide creditors “sufficient protection” as required specifically under art. 21; *AJW Offshore, Ltd.*, 488 B.R. 551, 561 (Bankr. E.D.N.Y. 2013) – court said no protections under art. 22 were required to grant the relief sought (to realize and administer assets within the United States) on the basis that the foreign representatives were granted broad powers in the foreign proceeding and removal of assets from the United States was not sought.

¹¹ *United States: Jaffé v Samsung Electronics Co., Ltd.*, 737 F.3d 14, 27 (4th Cir. 2013), CLOUT 1337.

¹² *Australia: Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 [para. 139], CLOUT 1332 – court cited earlier authority (*Debis Financial Services (Aust) Pty Limited v Allied Bellambi Collieries Pty Limited* [1999] NSWSC 935 [para. 14]; 17 ACLC 1636), in which the court considered what was meant by the term “adequate protection”: “adequate” is a word which imports notions of relativity. It is relevantly defined in the Macquarie Dictionary as: “equal to the requirement or occasion; fully sufficient, suitable, or fit [...]”. In other words, the protection as to which the court is required to be satisfied is not protection which is absolute or perfect in all circumstances, but protection which is adequate or suitable considering the circumstances which actually prevail.” The court also considered the discussion in *Atlas Shipping A/S*, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009), CLOUT 1277.

¹³ *United States: SNP Boat Service, S.A. v Hotel St. James*, 483 B.R. 776, 786 (S.D. Fla. 2012), CLOUT 1314.

¹⁴ *United States: Atlas Shipping A/S*, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009), CLOUT 1277 quoting *Artimm S.r.L.* 335 B.R. 149, 160 (Bankr. C.d. Cal 2005) (analysing the concept under sect. 304 (c) of the old Code, but noting that the analysis would be “essentially the same” under the United States Bankruptcy Code, 11 U.S.C. sect. 1521 (b)).

¹⁵ *Australia: Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 [paras. 128–138], CLOUT 1332 – court went on to say that the most potent informing principle is the notion of fair and equal treatment of creditors and *pari passu* distribution of assets of the debtor.

¹⁶ *United States: Daebo Int’l Shipping Co., Ltd.*, 543 B.R. 47, 54 (Bankr. S.D.N.Y. 2015), CLOUT 1626.

¹⁷ *Australia: Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57, CLOUT 1332 – court considered that art. 22, para. 1, gave the court of the forum jurisdiction to make orders enabling the payment of taxation and penalty liabilities to be made from the debtor’s assets held by it or a foreign representative appointed under arts. 19 or 21 before those assets were removed from the local forum and sent to the debtor’s COMI or elsewhere at the direction of the foreign representative.

¹⁸ *United States: Lee*, 472 B.R. 156, 182 (Bankr. D. Mass. 2012) – the foreign representative testified that he had a duty under the foreign law to take possession of those property interests and that he was a rational actor, with a duty to protect and maximize the value of the property and to respect applicable transfer restrictions. The court concluded that the foreign representative had satisfied the burden of proof that creditors and the debtor would be sufficiently protected if the turnover order were granted, and that the debtors had not met their ultimate burden of establishing the absence of adequate protection.

¹⁹ *United States: Sivec, Srl.*, 476 B.R. 310, 328–329 (Bankr. E.D. Okla. 2011), CLOUT 1312.

²⁰ *United States: Cozumel Caribe, S.A., de C.V.* 482 B.R. 96, 111 (Bankr. S.D.N.Y. 2012), CLOUT 1311.

²¹ *United States: Energy Coal S.P.A.*, 582 B.R. 619 (Bankr. D. Del. Jan. 2, 2018) [para. 28].

²² *United States: Tri-Continental Exchange, Ltd.*, 349 B.R. 627, 636 (Bankr. E.D. Cal. 2006), CLOUT 766; *Millard 501 BR 644* – court said there appeared to be no case [...] where a foreign representative was required to post a bond (in favour of a foreign taxing authority whose \$18 million default judgment the foreign representatives sought to contest) to obtain recognition or to enjoy the fruits of recognition and accordingly, it refused to do so. It might be noted that the United States Bankruptcy Code, 11.U.S.C. sect. 1522 (b) (enacting art. 22 of the MLCBI), adds the words “including the giving of security or the filing of a bond” to the text of art. 22, para. 2, as drafted.

²³ *Australia: Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 [paras. 60, 80], CLOUT 1332 – the court noted that that effect, if it was to occur, came from the results of an application under art. 20, para. 2.

²⁴ *United States: Sanjel (USA) Inc.* (Bankr. W.D. Tex. July 28, 2016), CLOUT 1623.

Article 23. Actions to avoid acts detrimental to creditors

1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [*refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation*].
2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 23 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 210–216] and on the work of its forty-sixth session (*Official Records of the General Assembly, Sixth-eighth session, Supplement No. 17 (A/68/17)*) [para. 197]. See also summary records of the thirtieth session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/433 [para. 134]; A/CN.9/435 [paras. 62–66];
 - (b) GE (1997): A/CN.9/436 [paras. 86–88]; A/CN.9/442 [paras. 165–167];
 - (c) GEI (2013): A/CN.9/742 [para. 66]; A/CN.9/763 [para. 61]; A/CN.9/766 [para. 50].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 203].

INTRODUCTION¹

1. The GEI [paras. 200–203]² and the JP [paras. 183–186] note that the purpose of article 23 is to provide that, as an effect of recognition, the foreign representative has standing to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is narrowly drafted in that it neither creates any substantive rights regarding such actions nor provides any solution involving conflict of laws; the MLCBI

does not address the right of a foreign representative to bring such an action in the enacting State under the law of the State in which the foreign proceeding is taking place. The effect is that the foreign representative is not prevented from initiating such actions by the sole fact that he or she is not the insolvency representative appointed in the enacting State. Under paragraph 2, the court must consider whether any action to be taken under the article 23 authority relates to assets that should be administered in the foreign non-main proceeding. The GEI [para. 203]³ also notes that while the granting of standing under article 23 is not without difficulty, the right to commence such actions is considered essential to protect the integrity of the assets of the debtor and is often the only realistic way of achieving that protection.

CASE LAW ON ARTICLE 23

2. One court has suggested that article 23, as a simple grant of standing, neglects to address choice of law and forum issues. It does not create or establish any legal right of avoidance nor does it create or imply any legal rules with respect to the choice of applicable law as to the avoidance of any transfer of obligation.⁴ However, in one appellate decision, the court ruled that that limitation did not apply to a foreign representative's pursuit of avoidance actions available to it under the law of the State in which the foreign proceeding was pending.⁵
3. In a State where recognizing courts typically order that the foreign representative should have the same powers as if they had been appointed as liquidator of the debtor company under the relevant local law, the foreign representative would thus, in accordance with article 23 of the MLCBI, have standing to initiate actions to avoid or otherwise render ineffective acts detrimental to creditors of the debtor company that would be available in the State to a person appointed as liquidator to the company under the State's law.⁶

Notes

¹ It might be noted that article 23 has not been enacted in the Republic of Korea. United States Bankruptcy Code, 11 U.S.C. sect. 1523 (enacting art. 23 of the MLCBI) modifies art. 23 to accommodate United States policy concerns that the avoidance provisions of the Bankruptcy Code should only be available to a foreign representative in a plenary proceeding where the court could give full consideration to the relevant choice of law issues. See also 11 U.S.C. sect. 1521 (a) (7) (United States enactment of art. 21 of the MLCBI), which bars a foreign representative from employing the avoidance provisions listed in the section; these can be pursued only if a full bankruptcy case is initiated under another chapter of the Code. See JP (2014) [para. 186]. For that reason, it has been suggested, art. 23 of the MLCBI cannot be relied upon to interpret the United States legislation: *O'Sullivan v Loy (In re Loy)*, 432 B.R. 551 (E.D. Va. 2010).

² GE [paras. 165–167].

³ GE [paras. 167].

⁴ *United States: Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319, 325 (5th Cir. 2010), CLOUT 1006. In holding that an avoidance action may be commenced under foreign law, the court said, at 327, that “the application of foreign avoidance law [...] raises fewer choice of law concerns as the court is not required to create a separate bankruptcy estate”. See also *Massa Falida do Ban Cruzeiro do Sul S.A.*, 567 B.R. 212 (Bankr. S.D.Fla. 2018).

⁵ *Ibid.*, *United States: Fogerty* 324 – appellate court said that “If Congress wished to bar all avoidance actions whatever their source, it could have stated so; it did not.” Prior to this appellate decision, a similar interpretation had been approved in *Atlas Shipping A/S*, 404 B.R. 726, 744 (Bankr. S.D.N.Y. 2009), CLOUT 1277 where the court held that maritime attachments obtained after the foreign insolvency case had been filed, but before the Ch. 15 application was made, were void under United States law (*citing* *Cunard Steamship Co. Ltd. v Salen Reefer Svcs. AB.*, 773 F.2d 452, 460 (2d Cir. 1985)). It ordered the funds be remitted to the foreign court in Denmark and indicated that the foreign court should determine the voidability of the post-filing attachments. The United States court had concluded that the decision of the court in *Condor Insurance* was open to question: the conclusion that a foreign representative was prevented from bringing avoidance actions based on foreign law was “not supported by anything specifically in the legislative history” of Ch. 15. In another decision involving maritime attachments, *CSL Australia Pty. Ltd. v Britannia Bulkers A/S*, case No. 08-15187 (S.D.N.Y. Sept. 8, 2009), the foreign proceedings had been recognized and the United States court with jurisdiction over the maritime proceedings vacated attachments and ordered funds be remitted to Australia so that the court in Australia could determine whether the attachment was valid or avoidable under the law of Australia. In *International Banking Corporation B.S.C.*, 439 B.R. 614, 628 (Bankr. S.D.N.Y. 2010), CLOUT 1317, the court refused to release funds when an attachment was completed prior to commencement of the foreign case in Bahrain. To protect the interests of the United States creditors, the court ruled that the attachments would not be invalidated until the court in Bahrain had made certain rulings, including a determination on the voidability of the attachments and any security interests created; see also *Awal Bank, BSC v HSBC Bank United States*, 455 B.R. 73 (Bankr. S.D.N.Y. 2011).

⁶ *Australia: Wild v Coin Co International PLC* [2015] FCA 354 [paras. 71–73], CLOUT 1473 – court also said nothing in art. 21, subpara. 1 (g), of the MLCBI or art. 23 of the MLCBI authorized it to make a determination specifying the commencement date of the administration in Australia (in order to calculate the date of the relation back day for the purpose of bringing avoidance actions under art. 23) at a stage when no such action had been brought. The court held that making such a determination would constitute a determination which affected the rights of parties who had not had any opportunity to be heard; see also *King (Trustee), in the matter of Zetta Jet Pte Ltd v Linkage Access Limited* [2018] FCA 1979, CLOUT 1818 – court said that art. 23 of the MLCBI was merely a procedural standing rule and did not alter the substantive law of Australia. Accordingly, art. 23 did not create any cause of action that the foreign representative could enforce if other domestic laws did not confer jurisdiction.

*Article 24. Intervention by a foreign representative
in proceedings in this State*

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 24 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 117–123]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/422 [paras. 148–149]; A/CN.9/433 [paras. 51, 58]; A/CN.9/435 [paras. 79–84];
 - (b) GE (1997): A/CN.9/436 [paras. 89–90]; A/CN.9/442 [paras. 168–172];
 - (c) GEI (2013): A/CN.9/763 [para. 62]; A/CN.9/766 [para. 51].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 208].

INTRODUCTION

1. The GEI [paras. 204–208]¹ explains that the purpose of article 24 is to avoid denial of standing to the foreign representative of both main and non-main proceedings to intervene in proceedings merely because the procedural legislation may not have contemplated the foreign representative as being among those having such standing. The Guide also clarifies that the word “intervene” in the context of article 24 is intended to refer to cases where the foreign representative appears in court and makes representations in proceedings, whether those proceedings be individual court actions or other proceedings instituted by the debtor against a third party or by a third party against the debtor. The proceedings in which the foreign representative might intervene are those that have not been stayed under article 20, subparagraph 1 (a), or article 21, subparagraph 1 (a). The article makes it clear that the conditions of the local law remain intact. Intervention in individual proceedings under article 24 can be distinguished from participation in collective proceedings under article 12.

CASE LAW ON ARTICLE 24

2. Case law confirms the right of the foreign representative to intervene in proceedings in which the debtor is a party after the foreign proceedings have been recognized.²

Notes

¹GE [paras. 168–172].

²United States cases mentioning the grant of authority under art. 24 of the MLCBI tend to raise issues of interpretation of United States Bankruptcy Code, 11 U.S.C. sect. 1509 (enacting art. 9 of the MLCBI), which is more extensive than art. 9 of the MLCBI, e.g., *CT Inv. Mgmt. Co., LLC v Carbonell*, 10 Civ. 6872 (S.D.N.Y. Jan. 6, 2012); *Fogerty v Petroquest Resources, Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319 (5th Cir. 2010), CLOUT 1006; *Reserve Int’l Liquidity Fund, Ltd. v Caxton Int’l Ltd.*, 09 Civ. 9021 (S.D.N.Y. 2010); *United States v J.A. Jones Constr. Group, LLC*, 333 B.R. 637 (E.D.N.Y. 2005), CLOUT 763.

Chapter IV. Cooperation with foreign courts and foreign representatives

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State].
2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on chapter IV are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 124–129]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/419 [paras. 75–76, 80–83, 118–133]; A/CN.9/422 [paras. 129–143]; A/CN.9/433 [paras. 164–172]; A/CN.9/435 [paras. 85–94];
 - (b) GE (1997): A/CN.9/436 [paras. 91–95]; A/CN.9/442 [paras. 173–183];
 - (c) GEI (2013): A/CN.9/742 [paras. 67–68]; A/CN.9/763 [para. 6]; A/CN.9/766 [para. 52].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 223].

INTRODUCTION¹

1. The GEI [paras. 209–223]² indicates that a widespread limitation to cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvency is derived from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, supporting cooperation and coordination. Chapter IV is aimed at providing that specific authorization, while leaving it up to courts and insolvency representatives to determine when and how to cooperate. Such cooperation does not require a formal decision to recognize the foreign proceeding. The emphasis on direct communication

(article 25, para. 2) is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory. Article 26 reflects the important role that insolvency representatives can play in devising and implementing cooperative arrangements, within the parameters of their authority. Article 27 provides an indicative list of the types of cooperation that are authorized by articles 25 and 26. The Practice Guide³ expands upon the forms of cooperation mentioned in article 27 and compiles practice and experience with the use of agreements concerning the coordination of proceedings under subparagraph (d), which are referred to in the Practice Guide as cross-border insolvency agreements or protocols.

CASE LAW ON ARTICLE 25

2. The GEI [para. 212]⁴ suggests that the requirement of cooperation is not tied to a formal order of recognition. Few cases address that situation, although in one that does, the court confirmed that in circumstances where the foreign proceeding is not entitled to recognition, articles 25 and 26 are not intended to limit any jurisdiction the court might otherwise have to provide assistance.⁵
3. For article 25 to apply, one court said there must be a “foreign representative” of a “foreign proceeding” (whether main or non-main was unimportant) as defined in article 2.⁶ What article 25 envisaged, it has been suggested, was some form of collaboration, joint enterprise or agreed parallel or complementary action of two or more courts in relation to the exercise of the independent jurisdiction of each within the framework of the law of the States concerned and not that one State should disregard important provisions of its own legal system.⁷ The forms of cooperation listed in article 27 supported that interpretation. It was not possible, the court went on to say, to think that a court could “cooperate with” another without that other court being aware.⁸ Moreover, granting the relief sought by a foreign representative or hearing and determining a case brought by them did

not amount to cooperation with that foreign representative under chapter IV; article 25 did not provide a means of out-flanking articles 19 and 21.⁹

4. It has been suggested that cooperation under article 25 is principally administrative and would not require the court to refuse any kind of modification to recognition orders already made¹⁰ or prevent a court considering matters relevant to the protection of the local creditor in making orders under articles 20, paragraph 2 or 22, paragraph 3.¹¹

5. It has also been suggested that the goals of articles 25 and 27 would be furthered by approval of a settlement agreement that would resolve the recognition proceedings, the foreign proceedings and claims and issues between the parties.¹² Those goals would also be furthered, it was suggested, by the court not

placing itself in a position that could impede the progress of the main proceeding, which was the vehicle through which it was anticipated that primary recovery for all creditors (including those in the recognizing State) would be accomplished.¹³

ARTICLE 25, PARAGRAPH 2

6. Local conditions may apply to the manner in which communication between courts may take place.¹⁴ Courts may be reluctant to communicate if such communication might be seen, for example, as pre-empting the foreign court's decision on certain matters or impinging on the principle of comity, which is based on common courtesy and mutual respect, or as an unwarranted interference.¹⁵ Particular concerns may arise where an application has been made *ex parte* and all interested parties have not been heard.¹⁶

Notes

¹ It should be noted that the enacting legislation of some States e.g., Great Britain, has changed the imperative “shall” in art. 25 of the MLCBI to the discretionary “may”: Cross-Border Insolvency Regulations 2006, Schedule 1, art. 25.

² GE [173–178, 179–180].

³ Practice Guide [article 27, paras. 1–21]; see also JP [paras. 187–204].

⁴ GE [para. 177].

⁵ See *Australia: Gainsford, in the matter of Tannenbaum v Tannenbaum* (2012) FCA 904 [para. 55], CLOUT 1214.

⁶ *Australia: Chow Cho Poon (Private) Limited* [2011] NSWSC 300 [paras. 33–37], CLOUT 1218.

⁷ *Ibid.*, *Australia: Chow Cho Poon* [para. 57] quoting *Rubin v Eurofinance* [2009] EWHC 2129 [para. 71] (Ch), CLOUT 1270; *Republic of Korea: (2014) GOOKJI 1* (26 May 2014), following recognition of the foreign proceeding in (2014) GOOKSEUNG 1 (8 May 2014), the Seoul Central District Court appointed the foreign representative as “cross-border insolvency administrator” (a role not found in the MLCBI), who then sought to repatriate to the United States the proceeds of sale of the debtor’s real estate in the Republic of Korea. In the first case initiated by the courts in the Republic of Korea based on art. 25 of the MLCBI (Debtor Rehabilitation and Bankruptcy Act, sect. 641), the court actively cooperated with the originating court (Eastern District of Virginia, United States) and granted the application after satisfying itself that creditors from the Republic of Korea would be protected (the DRBA does not include the equivalent of art. 22 of the MLCBI) and were offered the same opportunities for participation in the United States proceedings as United States creditors.

⁸ *Ibid.*, *Australia: Chow Cho Poon* [para. 59].

⁹ *Ibid.*, *Australia: Chow Cho Poon* [para. 65].

¹⁰ *Australia: Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 [para. 153], CLOUT 1332.

¹¹ *Ibid.*, *Australia: Akers* [para. 156].

¹² *United States: Grand Prix Assocs.*, case No. 09-16545 (Bankr. D.N.J. June 26, 2009).

¹³ *United States: Tri-Continental Exchange, Ltd.*, 349 B.R. 627 (Bankr. E.D. Cal. 2006), CLOUT 766.

¹⁴ *Australia: Lehman Brothers Australia Limited* [Parbery; in the matter of *Lehman Brothers Australia Limited (in liq)* [2011] FCA 1449 [paras. 59, 62], CLOUT 1215 – court observed that cooperation between the court in Australia and any foreign court will generally occur within a framework or protocol that has previously been approved by the court and is known to the parties in the specific proceeding [in accordance with a Practice Note of the Federal Court]. Such a protocol would need to provide for notice of the proposed communication to be given to the parties directly affected.

¹⁵ *England: Perpetual Trustee Corp. Limited* [2009] EWHC 2953.

¹⁶ *Australia: Parbery; in the matter of Lehman Brothers Australia Limited* [2011] FCA 1449 [paras. 53, 59, 62], CLOUT 1215.

Article 26. Cooperation and direct communication between the
 [insert the title of a person or body administering a reorganization or liquidation under the law of
 the enacting State] *and foreign courts or foreign representatives*

1. In matters referred to in article 1, a [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

2. The [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

TRAVAUX PRÉPARATOIRES

See references under article 25 above.

INTRODUCTION

See introduction under article 25 above.

CASE LAW ON ARTICLE 26

1. While no case law dealing expressly with the interpretation of article 26 has been reported, one court has noted

that since the MLCBI as enacted in that State was expressly not intended to limit the jurisdiction of the court to otherwise extend assistance to the courts of other nations [articles 8, 25 and 26], the court was able to grant the relief sought under other law, notwithstanding its inability to recognize the foreign proceedings under the MLCBI.¹

Notes

¹ *Australia*: Gainsford, in the matter of Tannenbaum v Tannenbaum [2012] FCA 904, CLOUT 1214.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

- (a) Appointment of a person or body to act at the direction of the court;
- (b) Communication of information by any means considered appropriate by the court;
- (c) Coordination of the administration and supervision of the debtor's assets and affairs;
- (d) Approval or implementation by courts of agreements concerning the coordination of proceedings;
- (e) Coordination of concurrent proceedings regarding the same debtor;
- (f) [*The enacting State may wish to list additional forms or examples of cooperation.*]

TRAVAUX PRÉPARATOIRES

See references under article 25 above.

INTRODUCTION

See introduction under article 25 above.

ADDITIONAL REFERENCES ON ARTICLE 27

1. The Practice Guide discusses the various subparagraphs of article 27. See chapter II [paras. 2–3] on subpara. (a); [paras. 4–10] on subpara. (b); [para. 11] on subpara. (c); [paras. 12–13] on subpara. (d); [paras. 14–16] on subpara. (e); and [paras. 18–21] on subpara. (f); and chapter III [paras. 148–181].

CASE LAW ON ARTICLE 27

2. One court has suggested that the forms of cooperation included in article 27 give the impression that the MLCBI contemplated there should be practical cooperation and communication within the framework of the law in both

States, but not that one State should disregard important provisions of its own legal system.¹ It might be noted that the types of cooperation referred to in article 27 provide for coordination of proceedings, not for proceedings in one country to be treated as proceedings in the other.² Enforcing a judgment of a foreign court directly in the receiving State was held not to constitute cooperation within the meaning of article 27; the receiving court said much clearer words would have been used if that had been the intention behind these provisions.³

3. In a case involving a cooperation protocol, the foreign representative was to seek recognition of what had been agreed should be the foreign main proceeding, and a locally appointed officer was to exercise, in the recognizing State, the powers granted to the foreign representative by the foreign court, so long as that officer acted in good faith collaboratively with the foreign representative. The court said that while it was very unusual that the foreign main proceeding would not be directing the restructuring of the local subsidiary, it was reluctant to upset the balance that had been struck in the cooperation protocol and thus declared the foreign proceeding to be the main proceeding.⁴

Notes

¹ *Australia*: Chow Cho Poon (Private Limited) [2011] NSWSC 300 [para. 57], CLOUT 1218 citing *England*: Rubin v Eurofinance SA [2009] EWHC 2129 (Ch) [para. 71], CLOUT 1270.

² *England*: Rubin v Eurofinance [2009] EWHC 2129 (Ch) [para. 71], affirmed [2012] UKSC 46, CLOUT 1270.

³ *England*: Rubin v Eurofinance [2012] UKSC 46, CLOUT 1270 – Supreme Court rejected the suggestion (not a concluded view) of the Court of Appeal [2010] EWCA Civ 895 [para. 31] that cooperation “to the maximum extent possible” should surely include enforcement of a judgment even though not specifically mentioned in the MLCBI or GE. The Supreme Court said there was nothing in arts. 21, 25 and 27 to suggest that they apply to the recognition and enforcement of foreign judgments against third parties. See generally UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018).

⁴ *Canada*: Urbancorp Toronto Management Inc., 2016 CarswellOnt 8410, 37 C.B.R. (6th) 44, 2016 ONSC 3288 [paras. 27–32] (Ont. S.C.J. [Commercial List]).

Chapter V. Concurrent proceedings

*Article 28. Commencement of a proceeding under
[identify laws of the enacting State relating to insolvency]
after recognition of a foreign main proceeding*

After recognition of a foreign main proceeding, a proceeding under [identify laws of the enacting State relating to insolvency] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 28 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 94–101]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/422 [paras. 192–197]; A/CN.9/433 [paras. 173–181]; A/CN.9/435 [paras. 180–183];
 - (b) GE (1997): A/CN.9/436 [para. 96]; A/CN.9/442 [paras. 184–187];
 - (c) GEI (2013): A/CN.9/742 [para. 69]; A/CN.9/763 [para. 64]; A/CN.9/766 [para. 53].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 228].

INTRODUCTION¹

1. The GEI [paras. 224–228]² notes that article 28, in conjunction with article 29, provides that recognition of a foreign main proceeding will not prevent the commencement of local insolvency proceedings concerning the same debtor, provided the debtor has assets in the State.³ While that local insolvency proceeding would ordinarily be limited to the assets located in the State, in some situations a meaningful administration of the local proceeding would have to include certain assets located abroad, especially when there is no foreign proceeding necessary or available in the State where the assets are located. Article 28 allows the effects of the proceeding in the enacting State to extend, to the extent necessary, to other property

of the debtor that should be administered in that proceeding. There are two restrictions to that extension: the extension is permissible to the extent necessary to implement cooperation and coordination under articles 25–27 and the foreign assets must be subject to administration in the enacting State under the law of the enacting State. Article 28 is also discussed in the JP [paras. 205–209].

CASE LAW ON ARTICLE 28

2. While article 28 extends the jurisdiction of the court over certain foreign assets of the debtor upon the commencement of a subsequent plenary bankruptcy case, one court has indicated that it did not expand jurisdiction as to the debtor itself, thus confirming the shared and cooperative nature of the jurisdiction over a debtor that was already subject to the jurisdiction of at least one foreign court.⁴ In another case, the court observed that where there were concurrent proceedings, the local court must cooperate with the foreign proceedings, but that did not mean the local court could not commence local proceedings. It was clear throughout the MLCBI, it was said, that local proceedings could be commenced irrespective of the existence of unrecognized foreign proceedings.⁵

3. Following discharge of the debtor in the originating State, the proceeding was reopened and recognition was sought. After recognition of the foreign proceeding was granted, a local proceeding was commenced in the recognizing State to enable a local creditor to pursue its claim. On appeal, the court held that the local proceeding was properly commenced in the recognizing State on the basis that the relief that could be granted on recognition of a foreign proceeding provided procedural support for that proceeding and could not substantively change the creditor's claim. Recognition of a discharge order went beyond the scope of relief available under the MLCBI, the creditor's claim had not been discharged by the foreign discharge order and the creditor was therefore eligible to commence a local proceeding.⁶

Notes

¹ *Mexico*: the legislation implementing the MLCBI, Commercial Insolvency Law 2000, includes 2 provisions (sects. 293 and 294) not included in the MLCBI, which require that where the debtor has an establishment in Mexico, insolvency proceedings must be brought against that debtor in Mexico in order to grant recognition of a foreign proceeding concerning that debtor. A court has indicated this requirement is consistent and congruent with the principle of equality of domestic and foreign creditors; if such proceedings were not commenced it would result in the risk that claims of creditors from Mexico would not be heard in the foreign proceeding and the debtor would only pay foreign claimants: case No. 171137, Commercial Insolvency Act. Conditions for Recognition of Foreign Proceedings in Mexico. Ninth Epoch. Collegiate Circuit Courts, Weekly Federal Court Report, vol. XXVI, October 2007, p. 3210 (Court precedent I.11o.C.176C).

² GE [paras. 184–187].

³ *United States*: Toft, 453 B.R. 186, 192 (Bankr. S.D.N.Y. 2011), CLOUT 1209 – court explained the fact that art. 28 contemplates commencement of a local proceeding following recognition of a foreign main proceeding only where the debtor has assets suggests that the MLCBI contemplates no assets are required for a recognition application.

⁴ *United States*: JSC BTA Bank, 434 B.R. 334, 343–344 (Bankr. S.D.N.Y. 2010), CLOUT 1211.

⁵ *Australia*: Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840 [12, 17, 19], CLOUT 1216.

⁶ *Republic of Korea*: (2006) GOOKSEUNG 1 (22 January 2007), Seoul Central District Court, CLOUT 1002; (2007) GOOKSEUNG 2 (12 February 2008), Seoul Central District Court; (2008) HAHAP 20 (28 August 2008), Seoul Central District Court; RA 1524, Seoul High Court, CLOUT 1000; (2009) Ma 1600 (25 March 2010), Supreme Court of Korea. See also *Japan*: Azabu Building Company Ltd, case No. (shou) 1 of 2006; case No. (mi) 5 of 2007, Tokyo District Court, CLOUT 1478 – effect of a discharge of debt in the foreign proceeding can be recognized in Japan only if the discharge satisfies the conditions for recognition of the effect of a foreign judgment under section 118 of the Civil Procedure Code.

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding

Where a foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

- (a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed,
- (i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and
 - (ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;
- (b) When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,
- (i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and
 - (ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State;
- (c) In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 29 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 106–110]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/435 [paras. 190–191];
 - (b) GE (1997): A/CN.9/442 [paras. 188–191];
 - (c) GEI (2013): A/CN.9/742 [para. 70]; A/CN.9/766 [para. 53].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 232].

INTRODUCTION

1. The GEI [paras. 229–232]¹ notes that article 29 provides guidance to the court on the approach to be taken to cases in which the debtor is subject to a foreign and a local proceeding at the same time. The salient principle is that the commencement of the local proceeding does not prevent or terminate the recognition of a foreign proceeding, but article 29 maintains the pre-eminence of the local insolvency proceeding over the foreign proceeding. This has been done by

(a) requiring relief granted to the foreign proceeding to be consistent with the local proceeding; (b) any relief already granted to the foreign proceeding must be reviewed and modified or terminated to ensure consistency with the local proceeding; (c) if the foreign proceeding is a main proceeding, the automatic effects of recognition under article 20 are to be modified or terminated if inconsistent with the local proceeding; and (d) if a local proceeding pending at the time the foreign proceeding is recognized as a main proceeding, the foreign proceeding does not enjoy the automatic effects of article 20. The principle in article 21, paragraph 3, that relief granted to a representative of a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding or must concern information required in that proceeding, is restated in article 29, subparagraph (c). Article 29 is also discussed in the JP [paras. 210–213].

CASE LAW ON ARTICLE 29

2. In a case where the debtor was already subject to a local liquidation when the foreign representative sought recognition of a foreign proceeding, the court said that article 29, subparagraph (a) (i), required the order sought in the recognition proceeding (i.e., for remittal of funds) to be consistent with the local liquidation. The court went on to say that it was not necessary to examine the precise meaning and limits of that qualification because in the circumstances of the case the proposed remittal was unquestionably consistent with the liquidation.²
3. Another case involved the question of whether an insolvency order could be made in one State against a debtor who

was already under an insolvency administration in another State, but recognition of that administration had not been sought. The court noted it was clear throughout the MLCBI that local proceedings could be commenced irrespective of the existence of unrecognized foreign proceedings. The

court observed that article 29 required the foreign insolvency representative to take action; it did not provide a remedy that could be sought by an individual creditor. Where the foreign representative declined to take that action, the individual creditor could seek to commence a local proceeding.³

Notes

¹ GE [paras. 188–191].

² *England*: *Swissair Schweizerische Luftverkehrsaktiengesellschaft* [2009] EWHC 2099 [para. 14] (Ch).

³ *Australia*: *Bank of Western Australia v Henderson (No. 3)* [2011] FMCA 840 [para. 44], CLOUT 1216.

*Article 30. Coordination of more than
one foreign proceeding*

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) Any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 30 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 111–112]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
GE (1997): A/CN.9/442 [paras. 192–193].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 234].

INTRODUCTION

1. The GEI [paras. 233–234]¹ notes that the objective of article 30 is similar to that of article 29 in that it is designed to aid cooperation through proper coordination and consistency of relief. It deals with cases in which the debtor is

subject to insolvency proceedings in more than one foreign State and the foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies irrespective of whether there is a proceeding pending in the enacting State. If, in addition to two or more foreign proceedings, there is a proceeding in the enacting State, the court will have to act pursuant to both articles 29 and 30. Article 30 requires that any relief granted in favour of a foreign non-main proceeding must be consistent with the foreign main proceeding, thus according preference to the foreign main proceeding, if there is one. Where there are only foreign non-main proceedings, any relief ordered should be coordinated. Relief granted under article 30 may be terminated or modified to ensure that consistency can be achieved. Article 30 is also discussed in the JP [paras. 214–218].

CASE LAW ON ARTICLE 30

2. Very little case law has been reported on article 30. In one case, an application for recognition sought coordination under article 30, but since only a single foreign non-main proceeding had been recognized, relief under article 30 was denied.²

Notes

¹ GE [paras. 192–193].

² *United States: British-American Insurance Co., Ltd.*, 425 B.R. 884 (Bankr. S.D. Fla. 2010), CLOUT 1005.

*Article 31. Presumption of insolvency based on recognition of
a foreign main proceeding*

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [*identify laws of the enacting State relating to insolvency*], proof that the debtor is insolvent.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 31 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 94, 102–105]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/422 [para. 196]; A/CN.9/433 [paras. 173, 180–181]; A/CN.9/435 [paras. 180, 184];
 - (b) GE (1997): A/CN.9/436 [para. 97]; A/CN.9/442 [paras. 194–197];
 - (c) GEI (2013): A/CN.9/742 [para. 71]; A/CN.9/766 [para. 53].

3. Relevant working papers are referred to in the reports and in the GEI following [para. 238].

INTRODUCTION

1. The GEI [paras. 235–238] explains that for jurisdictions in which insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of a foreign main proceeding, a rebuttable presumption of insolvency of the debtor for the purposes of commencing a proceeding in the enacting State. The presumption does not apply if the foreign proceeding is a non-main proceeding. The court of the enacting State is not bound by the decision of the foreign court and local criteria for demonstrating insolvency remain operative, as clarified by the words “in the absence of evidence to the contrary”.

CASE LAW ON ARTICLE 31

2. Article 31 has not been authoritatively considered.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [*identify laws of the enacting State relating to insolvency*] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

TRAVAUX PRÉPARATOIRES

The *travaux préparatoires* on article 32 are contained in the following documents:

1. Report of the United Nations Commission on International Trade Law on the work of its thirtieth session (*Official Records of the General Assembly, Fifty-second session, Supplement No. 17 (A/52/17)*) [paras. 130–134]. See also summary records of that session (*Yearbook*, vol. XXVIII: 1997, part three, annex III).
2. Reports of Working Group V (Insolvency Law) relating to:
 - (a) MLCBI: A/CN.9/419 [paras. 89–93]; A/CN.9/422 [paras. 198–199]; A/CN.9/433 [paras. 182–183]; A/CN.9/435 [paras. 96, 197–198];
 - (b) GE (1997): A/CN.9/436 [para. 98]; A/CN.9/442 [paras. 198–200].
3. Relevant working papers are referred to in the reports and in the GEI following [para. 241].

INTRODUCTION

1. The GEI [paras. 239–241] explains that the rule in article 32 (sometimes referred to as the “hotchpot” rule) provides a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to avoid a situation in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. An example of how the rule operates can be found in GEI [para. 239]. Article 32 does not affect the ranking of claims as established by the law of the enacting State and is solely intended to establish the equal treatment of creditors of the same class. To the extent that claims of secured creditors or creditors with rights *in rem* are paid in full, those claims are not affected by the provision. Article 32 is also discussed in the JP [paras. 219–222].

CASE LAW ON ARTICLE 32

2. Operation of the “hotchpot” rule has been discussed generally¹ in the context of determining adequate protection under article 22; the principle of “hotchpot” is based on fairness and equality.

Notes

¹ *Australia: Akers v Deputy Commissioner of Taxation* [2014] FCAFC 57 135 [para. 139], CLOUT 1332.

Annex

List of cases by jurisdiction

AUSTRALIA

Akers v Deputy Commissioner of Taxation [2014] FCAFC 57, CLOUT 1332 *affirming* Akers (as joint foreign representative) v Saad Investments Company Ltd [2013] FCA 738, *affirming* Akers v Saad Investments Co Limited (in official liq) [2010] FCA 1221 (also 190 FCR 285), CLOUT 1219; also Akers & Ors v Deputy Commissioner of Taxation [2014] HCA Trans 213, CLOUT 1474 *denying leave to appeal to High Court*: articles 16 (3); 17 (3), (4); 20; 21 (2); 22 (3); 25 (1); 32

Bank of Western Australia v Henderson (No. 3) [2011] FMCA 840, CLOUT 1216: preamble, articles 1; 8; 28

Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA [2017] FCA 331, CLOUT 1799; Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA [2018] FCA 153: articles 15 (2), (3); 18; 20

Chow Cho Poon (Private Limited), Re [2011] NSWSC 300, CLOUT 1218: articles 1, 2 (a), 2 (debtor); 16 (2), (3); 17 (2); 25; 26

Crumpler (as liquidator and joint representative) of Global Tradewaves Ltd v Global Tradewaves (in liq); in the matter of Global Tradewaves (in liq) [2013] FCA 1127, CLOUT 1331: article 21 (1) (d)

Gainsford, in the matter of Tannenbaum vs Tannenbaum [2012] FCA 904, CLOUT 1214: articles 8; 16 (2), (3); 17 (2); 25; 26

Hur (in his capacity as Foreign Representative of Samsun Logix Corporation) v Samsun Logix Corporation [2009] FCA 372, *CLOUT 9211¹

Kapila, Re Edelsten [2014] FCA 1112, CLOUT 1475; Kapila (Trustee), in the matter of Edelsten (Bankrupt) (No. 2) [2016] FCA 1269: preamble; articles 2 (c), 2 (f); 8; 16 (3); 17 (2); 20 (1), (3)

Katayama v Japan Airlines Corporation [2010] FCA 794: articles 2 (a), (d); 16 (3)

King, in the matter of Zetta Jet Pte Ltd [2018] FCA 1932, CLOUT 1817; King (Trustee), in the matter of Zetta Jet Pte Ltd v Linkage Access Limited [2018] FCA 1979, CLOUT 1818: articles 8; 17 (2)

Lawrence v Northern Crest Investments Limited (in liq) [2011] FCA 672, CLOUT 1217: article 21 (1) (f)

In the matter of Legend International Holdings Inc. [2016] VSC 308, CLOUT 1619: article 16 (3)

Moore, as Debtor-in-possession of Australian Equity Investors [2012] FCA 1002, CLOUT 1477: articles 16 (3); 17 (2) (movement of COMI)

Parbery, in the matter of Lehman Brothers Australia Limited (in liq) [2011] FCA 1449, CLOUT 1215: article 25 (2)

Pink v MF Global UK Limited (in special administration) [2012] FCA 260: articles 17 (1); 20 (1)

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¹ CLOUT cases marked with an asterisk (*) have not given rise to issues of interpretation of the articles of the MLCBI. They are referred to in footnote 16 of the Digest, but not in the substantive articles. They have been reported in CLOUT as examples of applications under the MLCBI.

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(2012) GOOKSEUNG 1 (30 August 2012), Seoul Central District Court; (2012) GOOKJI 1 (10 August 2012), Seoul Central District Court: article 19

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² The Republic of Korea manages recognition and relief applications with respect to the same foreign proceeding separately, hence the numerous case references with respect to the same recognition application.

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- In re Manley Toys Limited*, 580 B.R. 632 (Bankr. D. N. J 2018): articles 2 (a); 6
- In re Massa Falida do Ban Cruzeiro do Sul S.A.*, 567 B.R. 212 (Bankr. S.D.Fla. 2018): articles 9; 23
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- In re Mood Media Corp.*, 569 B.R. 556 (Bankr. S.D.N.Y. 2017): article 2 (debtor) (enterprise groups)
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