United Nations A/CN.9/SER.C/ABSTRACTS/158

General Assembly

Distr.: General
27 July 2015

Original: English

United Nations Commission on International Trade Law

CASE LAW ON UNCITRAL TEXTS (CLOUT)

Contents

V.15-05335 (E) 190815 200815

Introduction

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Each CLOUT issue includes a table of contents on the first page that lists the full citations to each case contained in this set of abstracts, along with the individual articles of each text which are interpreted or referred to by the Court or arbitral tribunal. The Internet address (URL) of the full text of the decisions in their original language is included, along with Internet addresses of translations in official United Nations language(s), where available, in the heading to each case (please note that references to websites other than official United Nations websites do not constitute an endorsement of that website by the United Nations or by UNCITRAL; furthermore, websites change frequently; all Internet addresses contained in this document are functional as of the date of submission of this document). Abstracts on cases interpreting the UNCITRAL Model Arbitration Law include keyword references which are consistent with those contained in the Thesaurus on the UNCITRAL Model Law on International Commercial Arbitration, prepared by the UNCITRAL Secretariat in consultation with National Correspondents. Abstracts on cases interpreting the UNCITRAL Model Law on Cross-Border Insolvency also include keyword references. The abstracts are searchable on the database available through the UNCITRAL website by reference to all key identifying features, i.e. country, legislative text, CLOUT case number, CLOUT issue number, decision date or a combination of any of these.

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

Case 1473: MLCBI 21(1)(e); 21(1)(g); 23
Australia: Federal Court
NSD 179 of 2015
Wild (Foreign Representative) v. Coin Co International PLC (Administrators appointed); In the matter of Coin Co International PLC (Administrators appointed)
[2015] FCA 354
16 April 2015
Original in English

[**keywords**: *avoidance action*, *relief – upon request*]

The foreign representative of the debtor sought recognition of an English administration as foreign main proceedings in Australia under the Cross-Border Insolvency Act 2008 (enacting the Model Law in Australia). They also sought orders (i) for entrustment of the administration and realization of the debtor's assets in Australia to two local practitioners (pursuant to Article 21(1)(e) MLCBI) and (ii) that the effective date of commencement of the Australian administration was either the date of the commencement of the English administration or the date of recognition of the English proceeding, relying upon Articles 21(1)(g) and 23 MLCBI. The date was of particular relevance to the initiation of avoidance actions under Article 23 MLCBI and the determination of the relation back day.

The proceedings were recognized as foreign main proceedings and the order pursuant to Article 21(1)(e) MLCBI granted. While the foreign representative had standing to initiate actions under Article 23 MLCBI following recognition, no such action had at that stage been instituted. For that reason, the court declined to make any finding with respect to the relevant date, indicating that the party or parties against whom such an action was brought would have an interest in the determination of the date and would be entitled to address that question by tendering evidence and making submissions. The court held that neither Article 21(1)(g) nor Article 23 MLCBI authorized the making of such a determination at that stage and, moreover, that the making of such an order was not relief of the kind contemplated by either of those provisions. That finding did not preclude the administrators or their Australian representatives from arguing the issue as to the date in the event that a particular action was initiated.

Case 1474: MLCBI [21(2)]; 22(1)[1]
Australia: High Court
S129 of 2014
Akers & Ors v. Deputy Commissioner of Taxation[2] [2014] HCATrans 231
17 October 2014
Original in English

[**keywords**: *creditors – protection*]

The foreign representative in proceedings recognized as foreign main proceedings in Australia under the Cross-Border Insolvency Act 2008 (enacting the Model Law in Australia) sought special leave to appeal to the High Court against the decision of the Full Court of the Federal Court that Article 22(1) MLCBI gave the court of the forum jurisdiction to make orders enabling taxation and penalty liabilities to be paid from the debtor's assets before removal of those assets to the debtor's centre of main interests (COMI) or elsewhere at the direction of the foreign representative. The court refused to grant special leave on the grounds that it was not persuaded there were sufficient reasons to doubt the correctness of the decision of the Full Court of the Federal Court.

Case 1475: MLCBI preamble; 2(b); 8; 16(3); 17; 21(1)(e); 21(2); 21(3)
Australia: Federal Court
VID 519 of 2014
Kapila, in the matter of Edelsten [2014] FCA 1112
10 October 2014
Original in English

[**keywords**: *centre of main interests (COMI) – determination*, *centre of main interests (COMI) – timing*, *creditors – protection*, *establishment*, *presumption – habitual residence*, *foreign non-main proceeding*]

The foreign representative of the debtor sought recognition in Australia under the Cross-Border Insolvency Act 2008 (enacting the Model Law in Australia) of proceedings commenced in the United States of America. The debtor was an Australian citizen with significant business and property interests elsewhere, including the United States, Indonesia and the Dominican Republic. There was little direct evidence of the debtor's current residence. The court considered the factors relevant to determining the location of the debtor's centre of main interests (COMI) (Article 16(3) MLCBI) and the time at which that determination should be made (Articles 2(b) and 17 MLCBI). With respect to the timing issue, the court considered the various sources of information available with respect to interpretation of the Model Law and various possible dates — (i) the date of the application for recognition, (ii) the date of commencement of the foreign proceeding, and (iii) the date the court considers the application for recognition. Noting that there were advantages in using the date of commencement of the foreign proceeding, the court went on to observe that if the other possible dates were used, the outcome could be influenced by the activities and movements of the debtor post the commencement of the foreign proceeding and lead to a diversity of outcomes in different States. That

[1] See also CLOUT cases Nos. 1219 and 1332.
[2] In the reports of the earlier cases, the foreign representative's name is cited as "Ackers".

approach, it said, would not meet the goals of cooperation and promotion of greater legal certainty as set out in the preamble and Article 8 MLCBI. The court expressed its preference for the date of commencement of the foreign proceeding.[3]

Considering the location of the debtor's habitual residence in the context of Article 16(3) MLCBI, the court observed that a wide variety of circumstances may bear upon where the debtor resides, whether that residence can be considered habitual and the impact of the debtor's past and present intentions on such questions. It was noted that those intentions should not be given controlling weight and may be ambiguous and that a transnational debtor might lead such a nomadic life as to not have a habitual residence. Various factors pointed to the residence being in Australia, including that that was the residential address the debtor gave and that the debtor owned real property in Australia (no freehold or leasehold in the United States was disclosed) and the evidence of his estranged wife supported residence in Australia. The court considered the factors listed in paragraph 147 of the Guide to Enactment and Interpretation of the Model Law and found that the presumption under Article 16(3) MLCBI had not been rebutted. Even though the debtor had many creditors and business ventures in the United States, many of the more tangible assets and definitive creditors, secured, unsecured and regulatory in nature appeared to be in Australia. The debtor's recent business dealings in the United States were sufficient, however, to constitute an establishment in the United States and the proceedings were recognized as foreign non-main proceedings.

As to relief, the court appointed an Australian practitioner to act as a designated person pursuant to Article 21(1)(e) MLCBI. It was satisfied, pursuant to Article 21(3) MLCBI, that the assets in Australia should be administered in the non-main proceeding in the United States and that the interests of creditors were sufficiently protected under Article 21(2) MLCBI, particularly since the United States' court had made orders (i) allowing foreign creditors, including the Australian Deputy Commissioner of Taxation, to file and prove claims and participate in the United States' proceeding, and (ii) providing that such claims would be treated and rank *pari passu* with other general unsecured creditors.[4] The court went on to say that the relief orders to be made would impose no greater restraint upon the Deputy Commissioner than if the debtor had been made bankrupt under the Australia legislation and administration of his estate was taking place under that legislation.

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[3] The court observed that previous decisions adopting different dates were not plainly wrong: *Moore* (CLOUT case No. 1477) and *Gainsford* (CLOUT case No. 1214).

[4] See *Ackers [Akers] v Saad Investments Company Limited* (CLOUT cases Nos. 1219, 1332, 1474) in which the court made orders protecting the Deputy Commissioner of Taxation against the inability to file and prove revenue claims in a foreign main proceeding. In the reports of the earlier cases, the foreign representative's name is cited as "Ackers" rather than "Akers".

Case 1476: MLCBI 16(3)
Australia: Federal Court
NSD 570 of 2014
Young Jr. in the matter of Buccaneer Energy Limited v. Buccaneer Energy Limited [2014] FCA 711
2 July 2014
Original in English

[**keywords**: *centre of main interests (COMI) – determination*, *presumption – centre of main interests (COMI)*]

The foreign representative of the debtor sought recognition in Australia under the Cross-Border Insolvency Act 2008 (enacting the Model Law in Australia) of proceedings commenced in the United States of America. The debtor was an Australian public company listed on the Australian Stock Exchange, with a number of wholly-owned subsidiaries incorporated in the United States. In determining the debtor's centre of main interests (COMI), the court considered Australian[5] decisions applying the Model Law and relevant European Union[6] cases, concluding that COMI must be decided by reference to criteria that are objective and ascertainable by third parties. Having examined a number of criteria,[7] the court concluded that the totality of the evidence pointed to it being objectively ascertainable by a third party that the debtor's COMI was in Houston, Texas. The court said it was not necessary to resolve the question of whether the presumption under Article 16(3) MLCBI continued to operate once any potential proof to the contrary had been adduced into evidence or continued to operate so as to place the onus on the foreign representative to prove that the debtor's COMI was not in Australia, because the overwhelming weight of the evidence constituted proof to the contrary within the meaning of Article 16(3) MLCBI.

Case 1477: MLCBI 16(3); 17; 21
Australia: Federal Court
NSD 882 of 2012
Moore as debtor-in-possession of Australian Equity Investors v. Australian Equity Investors [2012] FCA 1002
5 September 2012
Original in English

[**keywords**: *centre of main interests (COMI) – determination*; *centre of main interests (COMI) – timing*]

The foreign representative of two limited partnerships formed under the law of the United States of America and subject to insolvency proceedings in the United States, applied for orders under the Cross-Border Insolvency Act 2008 (enacting the Model Law in Australia). At the time the United States insolvency proceedings commenced, both debtors were subject to various court orders in litigation in Australia concerning certain real estate investments in Australia.

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[5] *Moore* (CLOUT case No. 1477) and *Ackers [Akers] v Saad Investments Company Limited* (CLOUT cases Nos. 1219, 1332, 1474). In the reports of the earlier cases, the foreign representative's name is cited as "Ackers" rather than "Akers".

[6] *Re Eurofood IFSC Limited* [2006 All ER (EC) 1078].

[7] See [2014] FCA 711, para. 12.

In considering the question of centre of main interests (COMI) under Article 17 MLCBI, the court held that it is to be determined at the time the court is called upon to make a relevant decision. The court also said that the location of the COMI is to be determined in the light of the facts as at the relevant time for determination, but that those facts may include historical facts that have led to the position as it is at the time for determination. In making a determination, the court said regard must be had to the need for the COMI to be ascertainable by third parties, creditors and potential creditors in particular. The court said it was important, therefore, 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. It was important also to have regard to the need, if the COMI was to be ascertainable by third parties, for an element of permanence. The court said it should be slow to accept that an established COMI had been changed by activities that may turn out to be temporary or transitory. The COMI of both debtors was found to be in the United States and the proceedings were recognized as foreign main proceedings. The court held that for various reasons particular to the case it was inappropriate to deal with the request for additional relief under Article 21 MLCBI at that stage.

Case 1478: MLCBI 17; 21
Japan: Tokyo District Court
2006 (shou) No. 1, 2007 (mi) No. 5
Azabu Building Company Ltd
7 December 2007
Original in Japanese

Abstract prepared by Chieko Sugano

[**keywords**: *coordination*, *cooperation*, *recognition*, *relief – upon request*]

Insolvency proceedings were commenced in the United States of America by a United States creditor of the Japanese debtor. The debtor sought recognition of the United States proceedings under the Law relating to Recognition and Assistance for Foreign Insolvency Proceeding (LRAF) (enacting the Model Law in Japan) in the Tokyo District Court. A decision on the recognition of the United States proceedings and a stay, inter alia, on procedures for compulsory execution were issued in February 2006.

The assistance available to the foreign insolvency proceedings under the LRAF is limited to those items specified in the law and does not include extension of the effect of a debt discharge under the foreign insolvency proceeding. That effect 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. Section 118.2 requires that the defendant be served with notice of the order commencing the suit. It was unclear whether notice to the creditor in a United States proceeding could be considered appropriate “service” under the Japanese law.

In order to obtain the effect of the debt discharge, the debtor applied to commence insolvency proceedings in the Tokyo District Court in June 2007,[8] after the reorganization plan in the United States proceedings had been approved by the United States’ court. The plan provided that commencement of the Japanese

[8] *Kaisha kosei Tetsuzuki*, 2007 (mi) No. 5.

insolvency proceeding and approval of a Japanese reorganization plan consistent with the United States plan were conditions of taking certain actions (e.g. the debt discharge, transfer of the debtor's assets etc.). The application for recognition of the United States proceeding was withdrawn on commencement of the Japanese proceeding.

Because of the prior United States proceeding, the Japanese proceeding was a pre-packaged reorganization in which most of the terms of the reorganization plan were consistent with the United States plan. Nevertheless, coordinating the two separate proceedings raised several issues. In order to deal with the different dates for the filing of claims, the Japanese representative requested unsecured creditors to file claims in the Japanese proceeding for the same amount that they had filed in the United States proceeding to achieve consistency with the United States plan. To avoid objections of duplication, the United States' court issued an injunction against the creditors who had already been involved in the United States proceeding to prohibit them from raising certain objections in the Japanese proceeding. The scope of priority claims is different under the relevant laws of the United States and Japan. For example, a creditor asserted that they held a security interest based on a judgment lien under United States' law on the debtor's key asset, a building, although such a "judgment lien" is not recognized as a security interest under Japanese law. To resolve the issue, the Japanese plan stipulated that where a claim was confirmed as an ordinary reorganization claim in the Japanese proceeding and the judgment lien was confirmed in the United States' proceeding, the claims would be treated as a preferred ordinary claim. The Japanese reorganization plan was confirmed in January 2008.

Case 1479: MLCBI 17; 21(1)(a); 21(1)(e)
Japan: Tokyo District Court
1 of 2007 *Debtor: Lehman Brothers Asia Holdings Ltd.*
1 June 2009
2 of 2007, *Debtor: Lehman Brothers Asia Capital Company*
3 of 2007, *Debtor: Lehman Brothers Commercial Corporation Asia Ltd.*
4 of 2007, *Debtor: Lehman Brothers Securities Asia Ltd.*
30 September 2009
Original in Japanese

Abstract prepared by Chieko Sugano

[**keywords**: *recognition*, *relief – upon request*]

The Tokyo District Court recognized the insolvency proceedings for the four debtors which had commenced in November 2008 in the Court of First Instance of the High Court of the Hong Kong Administrative Region of the People's Republic of China. It ordered the administration of the debtors' businesses and assets located in Japan by a recognized trustee who was one of the debtors' insolvency representatives under the Hong Kong proceedings. It also ordered that persons in possession of the debtors' assets in Japan or who were debtors of the debtors in Japan should be restrained from delivering those assets or repaying their debts to the debtor.

Case 1480: MLCBI 2(a); 2(d); 16(3); 17; 20(1)(a); 20(2)
New Zealand: High Court, Auckland
CIV-2014-404-001584
Downey v. Holland [2015] NZHC 595
2 July 2014, 27 March 2015
Original in English

[**keywords**: *foreign proceeding*, *foreign representative*, *presumption – habitual residence*, *relief – automatic*]

The defendant in this proceeding was the defendant in a civil proceeding for breach of fiduciary duties in New Zealand scheduled to be heard by the New Zealand court by way of formal proof in June 2014. On that date, the plaintiff in this proceeding applied (i) for recognition in New Zealand under the Insolvency (Cross-border) Act 2006 (enacting the Model Law in New Zealand) of a foreign proceeding commenced in Australia concerning the defendant, and (ii) for disapplication of the automatic stay under Article 20(1)(a) MLCBI if recognition was granted under Article 17 MLCBI as a foreign main proceeding. The court found that the voluntary procedure commenced under Part X of the Australian Bankruptcy Act 1966 was a "foreign proceeding" for the purposes of Article 2(a) MLCBI and that the plaintiff, as the controlling trustee, was a "foreign representative" under Article 2(d) MLCBI. Since the available evidence pointed to the defendant's habitual residence as being in Australia not New Zealand, there was nothing to displace the presumption in Article 16(3) MLCBI and the Australian proceeding qualified as a foreign main proceeding.

As to application of the automatic stay, the court noted that under the New Zealand enactment of Article 20(2) MLCBI the court has discretion to order that, subject to any conditions the court thinks fit, the stay does not apply in respect of any particular action or proceeding.[9] The court noted that appointment of a controlling trustee under Part X of the Australian Bankruptcy Act did not have the effect of imposing an automatic stay on civil proceedings that were being brought against a debtor; it was for the trustee, once appointed, to apply to the court for such a stay of the civil proceeding. Thus, the court said, had the civil proceeding been brought in Australia, it would not have been subject to an automatic stay. The court observed that if the automatic stay under Article 20(1)(a) MLCBI were to apply on recognition of the foreign proceeding, Australian creditors would enjoy an advantage over New Zealand creditors that was not available to them under the Australian law that underpinned that foreign proceeding. The court also said that a judgement from the New Zealand court on the claim for breach of fiduciary duties might be of assistance to the controlling trustee, as it would mean that an independent judicial officer had ruled on whether the claims had substance and, since the claims arose under New Zealand law, on a question of New Zealand law. On that basis, the court exercised its discretion under Article 20(2) MLCBI and ordered that the claim for breach of fiduciary duties could proceed.

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[9] Article 20, paragraph (2) of the Insolvency (Cross-border) Act 2006 provides: "Paragraph (1) of this article does not prevent the Court, on the application of any creditor or interested person, from making an order, subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets."

Case 1481: MLCBI [8]; 19; 20(1)(a); [20(2)]
New Zealand: High Court, Auckland
CIV-404-003242
You Sik Kim and Chun Il Yu v. STX Pan Ocean Co. Limited [2014] NZHC 845
29 April 2014
Original in English

[**keywords**: *relief – automatic*]

Various claimants sought leave to continue their statutory claims in rem under the Admiralty Act 1973 against a ship, the New Giant. Those admiralty proceedings had been stayed on recognition in New Zealand of Korean insolvency proceedings as foreign main proceedings pursuant to the Insolvency (Cross-border) Act 2006 (enacting the Model Law in New Zealand). The court found that the debtor's interest in the New Giant (a charter by demise) was an asset of the debtor for the purposes of Article 20(1)(a) MLCBI and, even if it was not, the admiralty proceedings concerned the debtor's "rights, obligations and liabilities" under that article.

With respect to the question of whether leave to continue the admiralty proceedings should be granted, the court's decision turned on the sequence of events connected with the commencement of the foreign proceedings and of the admiralty proceedings. The court found that the claimants had obtained security by operation of the Admiralty Act against the New Giant immediately upon issue of the admiralty proceedings, which occurred before the commencement of the insolvency proceedings in Korea. Thus, the debtor's rights, which were equivalent to a right of redemption, were immediately subject to those secured claims. It was common ground that under Korean law, the claimants would only have had in personam rights and could not have taken any in rem action against the ship.

The court found that an interim moratorium ordered in Korea before the commencement of the Korean proceeding did not purport to have extraterritorial effect. Moreover, the claimants were not prevented from filing the admiralty proceedings, as the moratorium did not purport to restrict creditors with maritime liens or statutory rights in rem against the New Giant or any other vessel owned by or under charter by demise to the debtor from pursuing those in rem claims. The court observed that the debtor had not immediately applied for recognition of the foreign proceedings or for interim relief under Article 19 MLCBI to protect its assets. The claimants were given leave to continue with their admiralty claims.

Case 1482: MLCBI 6; 8; 21(1); 21(1)(a); [22]
United Kingdom: High Court of Justice, Chancery Division, Companies Court
04446 of 2013
Re: Pan Ocean Co. Ltd [2014] EWHC 2124 (Ch)
30 June 2014
Original in English

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

Insolvency proceedings commenced in Korea against the debtor shipping company had been recognized as foreign main proceedings under the Cross-Border Insolvency Regulations 2006 (enacting the Model Law in Great Britain).[10] The company had the benefit of a long term shipping contract, governed by English law, with a Brazilian company. The foreign representative regarded continuation of the contract as important to the debtor's rehabilitation; the Brazilian company regarded that continuation as onerous. The express terms of the contract gave the Brazilian company the right to terminate the contract by reason of the Korean insolvency proceedings. While those terms were valid and enforceable under English law, it was contended that they were not valid and enforceable under Korean law.

The court held that service of a notice to terminate under the relevant clause of the contract (cl. 28.1) did not fall within the meaning of the words "the commencement or continuation of an individual action or proceedings" under Article 21(1)(a) MLCBI. On that basis, the court had no power under that article to restrain the Brazilian company from serving such a termination notice.

With respect to the chapeau of Article 21(1) MLCBI and the words "any appropriate relief", the court concluded that although those words might be given a wide meaning, in this context it was not intended that they should be given such a meaning and that the relief it could grant was limited to what would be available to the court when dealing with a domestic insolvency. Accordingly, the court held it did not have the power to restrain the Brazilian company from serving a notice to terminate. Even if it did, the court went on to say, it would not exercise that power in this case, as such an order was not "appropriate relief" within the meaning of Article 21 MLCBI. With respect to the suggestion that the court should do what a Korean court would do in this case, the court said it was not persuaded that the Korean court would make a restraining order. On the court's understanding of the expert evidence, the Korean court would hold that a termination notice, if served, would be ineffective to terminate the contract. On that basis, it was unnecessary to make an order restraining the Brazilian company from serving the termination notice.

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[10] Relief was ordered under Articles 20(6) and 21(1)(g) of the Model Law (as enacted in Great Britain). Nothing in those orders prevented the foreign representative from applying for further relief under Article 21.

Case 1483: MLCBI preamble
United States of America: Bankruptcy Court for the Southern District of New York
14-10438
In re Octaviar Administration Pty Ltd 511 B.R. 361
19 June 2014
Original in English

[**keywords**: *coordination*; *cooperation*; *preamble*; *recognition – applicant for*]

Foreign representatives of an Australian company filed a second application for recognition of foreign proceedings in the United States of America following refusal of recognition on the first application.[11] That refusal was based on the foreign debtor's failure to establish that it met the eligibility requirements in section 109(a) the United States Bankruptcy Code, which applied to chapter 15 (the provisions enacting the Model Law in the United States) because it did not reside or have a domicile, a place of business or property in the United States.

At the time of the second application, the foreign representatives had filed actions in both the Federal and State courts in the United States, actions which at the time of the first application had been identified as potential assets of the estate in the form of claims or causes of action against entities located in the United States. On the basis of the filing of those actions, which were claims under United States law against defendants located in the United States, the court found that the foreign representatives had met the burden of demonstrating that the debtor possessed property in the United States sufficient for the purposes of section 109(a). Moreover, the debtor also had property in the United States in the form of an undrawn retainer in the possession of the foreign representative's counsel, which had been established prior to the making of the second application. In response to the objection that the establishment of that retainer was an improper or bad faith attempt to manufacture eligibility in order to apply for recognition and evade the consequences of the refusal to grant recognition on the first application, the court found that although there may be cases where the existence of minimal property in the United States did not mean the domestic cases should be sustained, the foreign representative here had acted in good faith in establishing the retainer and it was sufficient to satisfy the requirements of section 109(a). The court also observed that granting recognition of the Australian proceedings would undoubtedly facilitate and promote cooperation between the courts in the two jurisdictions. Moreover, and in furtherance of the goals of chapter 15, the court said granting recognition would foster the fair, efficient and timely administration of the debtor's insolvency, and possibly assist in protecting the interests of the debtor and maximizing the value of its assets for the benefit of its creditors.

[11] See *In re Barnet* (CLOUT case No. 1336).