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ARTICLE

Hanging on by a (Golden) Thread: Modified Universalism and Cross Border Insolvency in the BVI

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Synopsis

This article considers the impact of the recent Eastern Caribbean Court of Appeal decision in *Net International Property Limited v Erez*, which confirmed that the BVI courts did have jurisdiction at common law to recognise foreign insolvency office-holders, but that the common law jurisdiction to provide assistance to such office-holders no longer applies in the BVI. The article explains the rationale for the decision, and considers the implications for the application of the doctrine of modified universalism in the BVI.

Introduction

The 'golden thread' of modified universalism in cross border insolvency has long been an aspiration, rather than a rule.[1] The common law concepts of recognition and assistance play a key role in achieving that aspiration. In recent years these concepts have been affirmed, but scaled back, by decisions such as that in *Singularis Holdings Limited v PricewaterhouseCoopers.*[2] Despite the scaling back of the common law from the 'high water mark' of the decision in *Cambridge Gas,*[3] recognition and assistance remain important in facilitating the efficacy of international insolvencies in the globalised economy.

For some years, doubt has been cast in the BVI over the continued application of the common law jurisdiction to grant recognition and assistance, due to uncertainty over the application of the BVI's insolvency legislation. Until the recent decision in *Net International Property*, there had been little substantive judicial consideration of this point, but obiter remarks had questioned whether the common law powers of recognition and assistance survived.

The Eastern Caribbean Court of Appeal has now considered the current state of the common law in the light of the BVI's statutory cross border assistance regime, and in doing so it has expressly limited the scope of modified universalism in the BVI.

Decision

In *Net International Property Limited v Erez,*[4] the Eastern Caribbean Court of Appeal considered whether the BVI Courts had jurisdiction at common law to recognise an insolvency office-holder appointed in the courts of Israel, and whether and to what extent the BVI Courts could grant assistance to that office-holder at common law.

The decision turned on the interplay between the Court's common law jurisdiction to recognise foreign insolvency appointments, and its statutory jurisdiction to grant assistance to insolvency office-holders from designated countries under Part XIX of the Insolvency Act, 2003 (the 'Act').

Statutory recognition and assistance in the BVI

Currently the statutory regime for seeking 'assistance' for foreign insolvency proceedings in the BVI is set out in Part XIX (*Orders in Aid of Foreign Proceedings*) of the Act. Under Part XIX, 'foreign representatives' (essentially, insolvency office-holders) from certain designated countries may apply to the BVI court for a range of remedies as set out in that part of the Act, primarily to enable the foreign representative to gain control of assets and take other steps to secure property and information within the jurisdiction in support of the foreign insolvency proceedings.

Part XIX operates on an application-by-application basis, and gives foreign representatives express rights to apply to the BVI court for orders, but without conferring broader 'recognition' of the foreign representative of the sort envisaged by the UNCITRAL Model Law on Cross-Border Insolvency (the 'Model Law').

Notes

1 Per Lord Hoffman in *Cambridge Gas Transp Corp v Official Cttee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.
2 [2014] UKPC 26.
3 *Ibid.*
4 BVIHCMAP2020/0010 (decision of 22 February 2021).

The list of designated countries for the purposes of Part XIX of the Act currently includes only nine countries: Australia, Canada, Finland, Hong Kong SAR (China), Japan, Jersey, New Zealand, the United Kingdom and the United States of America. Notably, it does not include Bermuda, Cayman, Cyprus or Guernsey – jurisdictions with which BVI companies frequently have a strong connection.

Whilst the Act does include provisions for the recognition and assistance of foreign representatives under Part XVIII of the Act (*Cross-Border Insolvency*), which is based on the Model Law, those provisions have never been brought into force, and there is no current intention to do so.

Common law recognition in the BVI

In *Net International*, the Israeli trustee in bankruptcy succeeded at first instance in obtaining an order for his recognition in the BVI, and an order, by way of common law assistance, rectifying a BVI company's register of members to record the trustee in bankruptcy as a shareholder.

On appeal, one of the key issues was whether the common law jurisdiction to grant recognition and assistance survives in the BVI, having regard to the provisions of Part XIX of the Act.

In analysing the position, the Court made clear that common law rights cannot be abrogated by statute unless that intention is clear from the wording of the statute or is necessary by implication of the words used. The Court held that there was no express provision in Part XIX which abrogates the common law recognition jurisdiction, nor was such abrogation implied by the terms of those provisions. Indeed, the Court held that Part XIX did not deal with the issue of recognition at all. The Court therefore unequivocally confirmed that the common law jurisdiction to recognise foreign insolvency office-holders survives in the BVI.

The Court made the point that Part XVIII of the Act does constitute a complete scheme for the recognition of foreign insolvency proceedings which may in turn abolish the common law right of recognition, if it were to be brought into force. However, given that there is no current intention to bring those provisions into force, this is a moot point.

Common law assistance in the BVI

The Court of Appeal emphasised that recognition and assistance were two distinct, albeit related concepts.

'Recognition' is the formal act of the BVI court recognising or treating the foreign representative as having status in the BVI.

'Assistance' goes further in giving the foreign representative power to deal with BVI assets.

The Court acknowledged that recognition by itself is generally of limited utility unless accompanied by the grant of assistance and that therefore recognition usually goes hand in hand with assistance. Despite this, the Court was clear that recognition does not necessarily include assistance.

The Court of Appeal therefore had to decide whether a common law right of assistance survived in the BVI having regard to the enactment of Part XIX of the Act. The Appellant relied on the first instance decision of Justice Bannister from 2013 in *Re C (a debtor)*,[5] in which the Judge made obiter findings that Part XIX was a complete code for granting assistance to foreign insolvency office-holders in the BVI, and as such assistance should not be made available at common law.

The Court of Appeal held that the obiter findings in *Re C* should be followed, ruling that Part XIX of the Act was a 'comprehensive scheme for applying for assistance' which only applies to foreign representatives from designated countries. Accordingly, the effect of Part XIX is that assistance at common law does not exist in the BVI, and foreign insolvency office-holders from non-designated countries are therefore unable to apply for assistance.

Thus, as Israel is not a designated country under Part XIX of the Act, the Israeli trustee in bankruptcy was *not* entitled to an order for rectification by way of common law assistance.

In giving judgment, Justice of Appeal Webster noted that he had come to this decision with some regret, 'as it does not further the principle of modified universalism and the movement of the courts towards greater co-operation in cross border insolvency matters.' However, he stressed that Part XIX of the Act clearly reflected a public policy in the BVI to afford assistance only to office-holders from designated countries.

Has the golden thread been cut?

This decision is helpful in confirming that the BVI court does have a common law jurisdiction to recognise foreign insolvency office-holders, but the utility of that position is unclear, and appears not to serve the purpose of the 'golden thread', which was to ensure as far as possible a unified rather than a fragmented approach to cross border insolvency.

The finding that common law assistance is not available will present challenges to insolvency office-holders from non-designated countries, which include many of

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5 BVIHC(COM) 0080/2013.

the offshore jurisdictions with close ties to the BVI, such as Cayman, Bermuda or Guernsey. Liquidators from those jurisdictions can no longer seek relief from the BVI Court on a summary basis; they will instead need to assert substantive legal rights in the jurisdiction.

In the case of *Net International*, for example, the trustee in bankruptcy would need to commence rectification proceedings in the BVI rather than simply seeking assistance to obtain an order for rectification. In other cases, foreign office-holders may need to apply for the appointment of a liquidator in the BVI, if the grounds to do so can be established, or assert other substantive rights, which may or may not require them to first seek recognition. The effect is therefore a tendency towards a multiplicity of proceedings, rather than a unified approach.

When is common law recognition required?

This then casts a spotlight on the concept of common law recognition as a standalone concept. Whilst it is helpful to have confirmation that the concept still exists in the BVI, there remains significant uncertainty as to its application.

There are remarkably few authorities considering this in the BVI, but the question of the need for recognition was considered by the BVI Commercial Court in *KMG International NV v DP Holding SA*.[6] In that case, a liquidator had been appointed in Switzerland in respect of a Swiss company which in turn owned the shares in a BVI company. The liquidator wished to vote the shares in the BVI company to appoint directors, and thus assume control of the company. The company objected to this, arguing that no such step could be taken unless and until the foreign liquidator had sought formal recognition of his appointment from the BVI court. That argument was rejected by the Judge, who found that where a foreign company's properly appointed liquidator is that company's agent under the law of its home jurisdiction, the liquidator does not need formal recognition or assistance of the BVI Court in order to vote and otherwise deal with shares that it owns in a BVI company.

Whilst the decision in *KMG* is helpful to some extent in confirming that recognition may not be required at all for a foreign office-holder (such as a properly appointed liquidator) to take steps to assert control over a BVI company, it remains somewhat unclear where the line should be drawn as to when recognition is or is not required. The judgment itself recognised this. The judge concluded as follows:

'It is an important question to ask in what circumstances a foreign liquidator would need to obtain the recognition and assistance of this Court. In my respectful view, for a foreign liquidator to vote shares held by the foreign corporation over which he is a liquidator, in accordance with the foreign law governing the corporation and his appointment, is not one of those circumstances.'[7]

Consequently, there remains no firm guidance as to when recognition would be required, and this remains a grey area in BVI law.

Conclusion

Given the BVI's prominent role in the international economy and the flow of global capital, and in the light of the likely fallout from the Covid-19 pandemic, the BVI's insolvency regime needs to be fully available to international stakeholders.

At present, the golden thread appears to have unravelled almost completely, save in respect of those nine countries that have been designated under Part XIX of the Act, and the residual jurisdiction to grant common law recognition (in circumstances which remain unclear).

The obvious solution would be either to substantially widen the list of designated countries under Part XIX so that foreign insolvency office-holders from more countries can avail themselves of the statutory cross border assistance regime, or to bring Part XVIII of the Act into force so that the BVI becomes a Model Law jurisdiction. It remains to be seen whether the BVI government will consider taking either of these steps.

Notes

6 BVIHC(COM) 144 of 2016 (decision of Justice Wallbank, 10 May 2017).

7 *Ibid.*, per Wallbank J at paragraph [35].

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialised enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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