GUIDE

Recognition of foreign insolvency proceedings and foreign insolvency practitioners in the BVI

April 2017

The interplay between the legislative framework in the BVI and the common law with respect to recognition and assistance in foreign insolvency proceedings has developed in recent years in response to the increased prevalence of cross-border insolvency proceedings; however, its development has not always been predictable. This short note will chart the development of BVI case law dealing with recognition and will clarify the position as to its availability under statute and/or the common law. This note also contains a brief overview of the BVI court's most recent decision in this area which deals with procedural questions surrounding applications for recognition by foreign office holders.

Cross-border insolvency regime in the BVI

BVI law is a mixture of common law and statute. The principle statute governing insolvency proceedings in the BVI (both corporate and personal) is the BVI Insolvency Act, 2003 (the **Act**) which is supplemented by the Insolvency Rules, 2005 (the **Rules**) and by the common law itself. Cross-border matters are dealt with by Part XVIII (Cross Border Insolvency), which, although having formed part of the Act since its inception in 2003, is still not in force, and Part XIX (Orders in Aid of Foreign Proceedings).

In summary, Part XVIII contains the UNCITRAL Model Law on Cross Border Insolvency and, if enacted, would allow persons appointed over a foreign insolvent estate to apply locally to have those proceedings recognised, provided that (amongst other things) the proceedings are under the supervision of the court of a designated state. Once recognition is granted, certain consequences would follow automatically (such as a stay of proceedings, stay of execution against the debtor's assets and the freezing of assets). Recognition would also allow the foreign representative to apply to the court for a broad range of relief which, if granted, would permit the appointee to act in the BVI as if he were a locally appointed liquidator or trustee in bankruptcy. As set out above, Part XVIII has not been enacted and remains under review, predicated as it is on the centre of main interest (**COMI**) concept, which does not currently form part of BVI law. Accordingly, one must look to Part XIX for the method by which assistance will be granted.

Part XIX, on the other hand, works slightly differently in that a foreign representative of certain specified countries[1] may apply for an order in aid of the foreign proceedings in respect of which he is appointed.[2] The court has very broad powers to order assistance in applications under this Part including, for example, the restraint of proceedings against the debtor (including execution or the levying of distress against the debtor or its property); requiring the delivery up of the debtor's property to the appointee; and orders to facilitate the coordination of a BVI insolvency with foreign proceedings. The Part XIX regime however is very much based upon an "application-by-application" approach and, while a foreign officeholder may

[1] The list is fairly limited and extends only to Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States of America.

[2] For these purposes, "foreign representative" means "a person or body authorised in foreign proceedings to administer the reorganisation or liquidation of the debtor's property or affairs or to act as a representative of the foreign proceedings, including those appointed on an interim basis".

apply for recognition either under the common law or under the Act (provided that certain criteria are met), recognition will not clothe that officeholder with the rights which he would have been granted if he had been appointed locally under the Act.

The chequered road to recognition: how the case law has developed

The first notable case in this line of authority in the BVI was decided by Justice Bannister in 2010 in a case arising out of the fraudulent investment activities undertaken by Bernard Madoff through Bernard L Madoff Investment Securities LLC (**BLMIS**) uncovered in December 2008 (*Irving H Picard v Bernard L Madoff Investment Securities LLC* (*in Securities Investor Protection Act Liquidation*)) BVIHCV0140 of 2010 (**Picard**).

In *Picard*, Mr Picard applied for orders including that: (i) he be recognised as a foreign representative within the meaning of Part XIX; (ii) he be entitled to apply for the broad relief available under Part XIX, and (iii) he be entitled by written notice to require any person to deliver up the Respondent's property. Mr Picard was applying in his capacity as the trustee appointed by the United States Southern District of New York for the liquidation of BLMIS under the auspices of the United States Investor Protection Act of 1970 (the **SIPA liquidation**). The SIPA liquidation was under the supervision of the United States Bankruptcy Court for the Southern District of New York (therefore a specified country for the purposes of Part XIX) and, while the SIPA liquidation was conducted under the United States Securities Investor Protection Corporation, Mr Picard was conferred the same powers as a trustee in bankruptcy under the United States Bankruptcy code.

Justice Bannister declined to make the orders sought on the basis that he considered, given Part XVIII was not in force (which would have entitled him to confer status on Mr Picard through recognition of the proceedings in which he had been appointed), Part XIX was predicated upon an application-by-application procedure which did not confer status but rather gave the foreign representative the express right to seek certain discretionary relief from the BVI courts in aid of the proceedings in which he had been appointed.

Justice Bannister decided that Parts XVIII and XIX were mutually exclusive such that, given Part XVIII had not been enacted, the legislature must have intended that foreign representatives were entitled only to the discretionary relief available under Part XIX (ie not to status). As part of the decision, Justice Bannister also found that the common law concept of recognition had no place under BVI law because the codification of recognition under Part XVIII (which had yet to be enacted) meant that any recognition order made under Part XIX would be uncertain. In particular, Justice Bannister noted that "if a court is to confer authority, not only must the source of that authority be identifiable, so that it can be seen whether it is being used for the purposes for which it has been enacted, but the nature and the extent of the power granted must be strictly delimited".[3] In so deciding, Bannister J relied upon Lord Hoffmann's comments in *Cambridge Gas Transportation v The Official Committee of Unsecured Creditors of Navigator Holdings PLC and others:* "what are the limits of assistance which a court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do".[4]

Justice Bannister was asked to revisit this decision in *In the matter of C (A Bankrupt)* BVIHC(COM) 80 of 2013 (**Re C**) in which the trustees in bankruptcy of the debtor's estate appointed by the Hong Kong court sought orders in the BVI under the common law and the court's inherent jurisdiction for recognition of the Hong Kong bankruptcy proceedings and their standing as trustees. They also sought orders that they be conferred with the same powers which they would have had if they had been appointed as trustees in bankruptcy under Part XII of the Act and, in the alternative, declarations that: (i) they were validly appointed as trustees of the Hong Kong bankrupt's estate; (ii) they were entitled to reduce the bankrupt's property situate in the BVI into their possession; and (iii) they had the right to apply for the discretionary relief available under Part XIX of the Act.

In bringing the application, the trustees in *Re C* sought an order for recognition on the basis that they considered *Picard* was wrongly decided. As trustees in bankruptcy appointed by the Hong Kong court, they fell within the definition of "foreign representative" within Part XIX but they also sought to argue that because common law bankruptcy subsisted in parallel with Part XIX of the Act, they considered that the BVI court should treat them as if they were appointed under the Act and should confer them with the same

---

[3] *Picard*, at [9].

[4] [2007] 1 AC 508 at [22], cited with approval in *Picard* at [10].

powers had they been appointed locally. Justice Bannister disagreed, and rejected the proposition that foreign insolvency practitioners may be clothed by the court with the rights and powers of an office holder appointed under the Act by virtue of nothing more than recognition.[5] In so finding, Bannister J held that the court "had no jurisdiction to confer upon a stranger powers which a statute confers only upon individuals accepting specified appointments under the statute" and, in coming to that conclusion, he considered that *Schmitt v Deichman* [2013] Ch 16 (an English High Court case) had been wrongly decided.[6] In reaching the decision, Bannister J also found that "what the court does when recognising foreign proceedings at common law is to deploy its own powers in aid of foreign proceedings. It does not invest the foreign office holder with powers of his own".[7]

Justice Bannister did, however, concede that he considered *Picard*, at least in part, to have been incorrectly decided in that he considered that section 470 of the Act[8] provides for the common law recognition of foreign representatives and for the provision of judicial assistance of the sort discussed by Lord Collins in *Rubin and Anor v Eurofinance SA and Ors* [2012] UKSC 46 to those representatives, irrespective of whether they applied under Part XIX or under the common law.[9] He did not, however, consider that the common law approach to recognition and assistance survived generally in the BVI in parallel to Parts XVIII and XIX on the basis that he considered that the provisions of those parts were clearly intended to be restrictive of the class of persons who may be the object of the court's recognition and the beneficiaries of its assistance. Bannister J considered the restrictions in the Act would be rendered futile if the court remained at liberty to grant recognition to any officeholder it chose, regardless of the jurisdiction in which he had been appointed.

The latest decision in this line of authority has confirmed a procedural, rather than substantive, matter – ie that the debtor/bankrupt need not be joined as a party to the recognition application, and therefore need not be served.

By a decision of the BVI Commercial Court in May 2016, a trustee in bankruptcy appointed by the Tokyo bankruptcy court applied for recognition in the BVI. That order was granted; however, the bankrupt appealed the order on the basis that he considered the BVI Insolvency Rules required that he be served with the recognition application. The Court of Appeal disagreed and dismissed the appeal holding that the procedure for seeking recognition was directed at securing the assistance of the BVI court in aid of the supervisory foreign court to which the foreign insolvency proceedings are subject, such that there was no requirement, under the Rules or otherwise, that the bankrupt should be joined as a party to the application. The Court of Appeal also ordered that the bankrupt should meet the costs of the appeal personally on the basis that the assets of the bankrupt's estate should not be used to meet a costs order made in an unsuccessful appeal as it would have the effect of reducing the value of the estate available to the bankrupt's creditors.

A cautionary tale

John Greenwood and Hadley Chilton as joint liquidators of FuturesOne Diversified Fund SPC Ltd & Ors v FuturesOne Diversified Fund SPC Ltd & Ors BVIHCM(COM) 1113, 116, and 115 (FuturesOne) provides a cautionary tale of who will, and who will not, fall within the definition of "foreign representative" for the purposes of seeking assistance and/or recognition under Part XIX.

The application for recognition formed part of a different application whereby the liquidators of four companies, incorporated in the BVI and operating as mutual funds, applied to the BVI court for relief

[5] Per Bannister J at [20].

[6] Per Bannister J at [15].

[7] Per Bannister J at [15].

[8] Section 470 of the Act provides "nothing in this Part limits the power of the Court or an insolvency officer to provide additional assistance to a foreign representative where permitted under any other Part of this Act or under any other enactment or rule of law of the Virgin Islands".

[9] Per Bannister J at [23]. Lord Collins' speech recognised the common law principle that assistance may be given to foreign office holders in insolvencies with an international element and gave such examples as the staying of local proceedings, orders for examination in support of foreign proceedings, orders for the remittal of assets to a foreign liquidation or the vesting of English assets in a foreign officer holder (*Rubin*, per Lord Collins at [29] to [34]).

intended to establish that they were validly appointed as liquidators over the four companies (the **Liquidators** and **Companies** respectively).

The recognition application was made by a federal equity receiver (which had been appointed by the United States District Court for the Northern District of Illinois Eastern Division upon the application of the United States Commodities and Futures Trading Commission (**CFTC**) over the Defendants in those proceedings which arose out of an investor fraud perpetrated by Mr Nikolai Simon Battoo (**Mr Battoo**) (the **US Proceedings**). The receiver, Mr Brick Kane (the **Receiver**), had been appointed over the Defendants in the US Proceedings together with "their affiliates and subsidiaries, and all of the funds, properties, premises, accounts, businesses, partnerships, sole proprietorships and any other kinds of assets directly or indirectly owned, beneficially or otherwise, managed or controlled by the Defendants, whether held in their name or their own name or in the name of others". While none of the Companies were Defendants in the US Proceedings, it was clear that Mr Battoo controlled at least three of the four Companies and the Liquidators believed, but had been unable to confirm, that he controlled the fourth.[10]

The relief sought by the Liquidators (and the background to which they sought such relief) is irrelevant for the purposes of this note; however, the Receiver's application for recognition is pertinent.

As has been explained above, Part XIX, and in particular section 467 of the Act, gives the court the broad power to make discretionary orders in support of foreign proceedings on the application of a foreign representative. "Foreign proceedings" for these purposes means "a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to the control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy and 'debtor' shall be construed accordingly".

The United States is a relevant country for the purposes of Part XIX of the Act, therefore, the question which fell to be determined was whether the US Proceedings were a collective judicial or administrative proceeding pursuant to *a law relating to insolvency*. An affidavit was placed before the court from the Receiver's US attorney opining on whether the US Proceedings were "foreign proceedings" within the meaning of Part XIX, though it did not touch upon whether the law under which the Receiver was appointed was a law relating to insolvency. Bannister J found that (i) the question was a matter of BVI law, not United States law, such that a US attorney was not able to opine on the point; and (ii) the US Proceedings appeared to be being conducted pursuant to the Commodities Exchange Act, 7 USC which, crucially, was an investor protection law, not a law relating to insolvency. The court ultimately found that it had no material before it which enabled it to conclude that the US Proceedings were proceeding pursuant to a law relating to insolvency.

Bannister J also considered that "reorganisation, liquidation or bankruptcy" referred to in section 466(1) of the Act must be intended to mean the reorganisation, liquidation or bankruptcy of a debtor, and there was no way in which he could find that the receivership within the US Proceedings was such a reorganisation, liquidation or bankruptcy of the affairs of a debtor. As such, it was determined that the Receiver had no standing to make an application under Part XIX of the Act.

Comment

Following *Picard*, it seemed that the BVI court had all but abandoned common law recognition, meaning that any relief would need to be sought under the Act, and the relief available would be only such relief as was contemplated under the Act. The position broadened (albeit slightly) under *Re C*, with a finding that common law recognition and certain assistance remained available, even in light of the Act (ie one can apply for recognition and assistance both under the common law and under statute, provided the relevant criteria are met).

In considering the broader question of whether the common law approach to recognition and assistance more generally survived the promulgation of the Act, Bannister J held it did not in that the Act had the

[10] The recognition application appears to have been predicated on Mr Battoo's control of the Companies though the matter was not expressly dealt with in the judgment.

effect of defining and limiting comity and the beneficiaries of the court's assistance to "foreign representatives" as defined under section 466 of the Act. This can be seen in FuturesOne where the receiver was found not to fall within the statutory definition, such that he had no standing to apply for recognition. Bannister J's decision in *Re C* also suggests that, whether applying under the common law or under the Act, the "foreign representative" must be supervised by a court in one of the following jurisdictions, Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the United States of America, to avoid the restrictions in the Act being rendered futile.

The latest case from the Court of Appeal demonstrates that, to the extent an officeholder meets the relevant criteria, recognition will be granted and that, where the Act and Rules are silent on matters of procedure, procedural requirements will take into account the purpose behind recognition: in this case, service on the debtor/bankrupt was not required because the application was to aid the Tokyo bankruptcy court, such that the debtor/bankrupt need not be joined as a party.

Contacts

Eleanor Morgan
Partner, Mourant Ozannes
BVI
+1 284 852 1712
eleanor.morgan@mourant.com

Jennifer Maughan
Senior Associate
Hong Kong
+852 3995 5747
jennifer.maughan@mourant.com

2021934/73081967/1