JANUARY 2022

mourant

UPDATE

BVI Court refuses to give effect to foreign insolvency law to override ownership rights under BVI law

Update prepared by Eleanor Morgan, Jennifer Jenkins and Shane Donovan (British Virgin Islands).

The BVI Court has refused to grant an application made by Australian administrators for orders for recognition and assistance under Part XIX of the Insolvency Act, 2003 where the effect of doing so would have been inconsistent with contractual ownership rights governed by British Virgin Islands and English law. A parallel application for the appointment of 'soft touch' provisional liquidators over the Australian company in administration was also refused for similar reasons.

Introduction

The separate but related applications made to the BVI Commercial Court in *Tucker & Carruthers v Mongbwalu Goldfields Investment Holdings 6 Limited & Ors* (Claim No BVIHC (COM) 2021/0047) and *Vector Resources Limited (Administrators Appointed) v Mongbwalu Goldfields Investment Ltd* (Claim No BVIHC (COM) 2021/0048) raised complex issues in relation to the conflict of laws in an insolvency context, equitable ownership rights and the principle of *res judicata*.

Background

Mongbwalu Goldfields Investment Holdings 6 Limited (**MGIH6**) is a company incorporated in the British Virgin Islands (**BVI**) that holds an indirect interest in a gold mining project in the Democratic Republic of Congo (the **Project**). MGIH6 was wholly owned by another BVI incorporated company, Mongbwalu Goldfields Investment Ltd (**MGI**).

The Share Sale and Purchase Agreement

By a Share Sale and Purchase Agreement dated 10 July 2018 (the **SSPA**), entered into between MGI and an Australian corporation, Vector Resources Limited (**Vector**), MGI agreed to sell 69.5% of the issued share capital of MGIH6 (the **Shares**) to Vector for a total consideration of US$90 million. The SSPA was expressly governed by English law.

Pursuant to the terms of the SSPA, Vector was required to pay a first tranche of US$5 million towards the purchase price by a certain date, and then a second tranche of US$5 million by a further date, and then, by a yet further date, Vector was to make a credit facility available for the use of the Project in an amount of not less than US$10 million (the **Shareholder Loan Facility**). In the meantime, the legal ownership of the Shares would be transferred to Vector. But Vector would not by that time have paid the full purchase price of US$90 million, so Vector and MGI agreed a mechanism whereby legal title to the Shares could be transferred back to MGI in case Vector should default upon its payment and other contractual obligations. Such other obligations included completing a definitive feasibility study (the **Definitive Feasibility Study**) by a certain date.

The Escrow Arrangement

The agreed mechanism was that the Shares would be held by an independent escrow agent in the BVI, together with paperwork (the **Escrow Documents**) that would enable and indeed require the escrow agent to immediately transfer the Shares back to MGI if the escrow agent was instructed by MGI to do so in the event of a material default by Vector. All that might be needed to complete the paperwork to release the Shares back to MGI was for the retransfer date to be inserted, where or if that had been left blank.

The escrow arrangement was formalised by an Escrow Deed dated 3 September 2018 (the **Escrow Deed**), entered into by MGI, MGIH6, Vector and the BVI based escrow agent. It provided for the possibility of the escrow agent not immediately releasing the Escrow Documents in the event of uncertainty whether or not the retransfer had properly been triggered. BVI law expressly governed the Escrow Deed.

The Initial Breaches of the SSPA

The SSPA underwent several renegotiations and amendments. The 'effective date' of the SSPA became 10 January 2019. The 'completion date', as defined in the SSPA, became 24 January 2019. This was the date by which Vector was required to comply with its payment obligations to pay the first two tranches of US$5 million each, under clauses 3.1(a) and (b) respectively of the SSPA. When Vector failed to make payment by that date, MGI gave Vector 10 days' written notice to remedy its breaches of clauses 3.1(a) and (b) of the SSPA.

Vector was also required, under clause 3.1(c) of the SSPA, to make available to MGIH6 the Shareholder Loan Facility of no less than US$10 million by 7 February 2019. Again, Vector did not do so.

Further renegotiations ensued. On 9 February 2019, MGI undertook not to enforce its rights under the SSPA in respect of Vector's failure to remedy its breaches of clauses 3.1(a) and (b) until after 15 February 2019. That deadline was subsequently extended to 7 March 2019.

But before then, on or about 24 February 2019, Vector entered into a Convertible Note Agreement with certain investors (the **Convertible Note Investors**) pursuant to which Vector borrowed a sum of US$4,750,000.

The Standstill Deed

The following day, 25 February 2019, MGI and Vector entered into a Standstill Deed (the **Standstill Deed**), pursuant to which MGI agreed not exercise any rights under a particular clause of the SSPA, clause 7.3(b)(ii), for so long as any sum remained outstanding to the Convertible Note Investors. That clause had required Vector to complete the Definitive Feasibility Study by a certain date, failing which MGI had the right to call for a retransfer of the Shares.

Vector's Continuing Breach of the Obligation to Provide the Shareholder Loan Facility

By 7 March 2019, Vector had successfully discharged its obligations to pay the amounts required by clauses 3.1(a) and (b) of the SSPA, being the first two tranches of US$5 million each. But Vector was still in breach of its obligation to make available the Shareholder Loan Facility pursuant to clause 3.1(c) of the SSPA.

Between March 2019 and July 2020 Vector tried, unsuccessfully, to raise money from other investors. MGI accorded Vector this latitude. However, on 17 September 2020, MGI gave Vector 10 days' written notice under clause 7.3(a) of the SSPA to remedy its breach of clause 3.1(c), being its obligation to make available the Shareholder Loan Facility to MGIH6.

When Vector failed to remedy its breach of clause 3.1(c) of the SSPA, on 15 October 2020, MGI issued an instruction letter dated 13 October 2020 (the **Instruction Letter**) to the escrow agent confirming that a Release Condition had occurred and was continuing, and requiring it to release the Escrow Documents to effect the transfer of the Shares back to MGI. On 16 October 2020, the escrow agent wrote to Vector and MGI confirming that the Instruction Letter satisfied the requirements of the Escrow Deed and confirming that it would release the Escrow Documents to MGI on 20 October 2020, unless directed not to do so by the Court.

The Application for Interim Relief in Support of Intended Arbitral Proceedings

On 19 October 2020, Vector made an *ex parte* application to the BVI Court for an injunction to restrain the escrow agent from releasing the Escrow Documents pending the determination of then intended arbitral proceedings. The principal dispute which was to form the basis of Vector's intended arbitration was whether a term should be implied into the Standstill Deed to the effect that, notwithstanding that the Standstill Deed referred explicitly and exclusively to clause 7.3(b) of the SSPA, MGI ought not be able to exercise any rights under clause 7.3(a) for so long as any sum remained outstanding to the Convertible Note Investors under the Convertible Note Agreement.

The *ex parte* application for an injunction was granted on the papers without an oral hearing on 28 October 2020. A substantive return date hearing was eventually fixed for 20 January 2021, with a round of evidence being directed to take place in the meantime.

On 10 December 2020, before the return date hearing on 20 January 2021, Vector entered voluntary administration in Australia. On 18 December 2020, Vector commenced its arbitral proceedings against MGI under the auspices of the International Chamber of Commerce (**ICC**).

On 5 January 2021, as part of its evidence for the return date hearing, Vector filed an affidavit made by one of its administrators in which he stated his belief that a statutory moratorium on the enforcement of security interests under section 440B of the Australian Corporations Act 2001 (Cth) prohibited MGI from enforcing its rights under the Escrow Deed. Vector also relied upon the statutory moratorium at the return date hearing on 20 January 2021.

The Court (by the Honourable Mr Justice Adrian Jack) delivered its judgment on the return date hearing on 22 January 2021. The Court ordered the *ex parte* injunction to be discharged but stayed the effect of the order until 25 February 2021. In so doing, the Court held that there was no serious issue to be tried in relation to the implied term of the Standstill Deed contended for by Vector.

As regards the statutory moratorium under section 440B, the Court said:

> '*In my judgment, these points are irrelevant.*
>
> *The SSPA is governed by English law. It was established in Fibria Celulose SA and Pan Ocean Co. Ltd. and Another [2014] EWHC 2124 (Ch), [2014] Bus LR 1041, that provisions of a foreign insolvency law, in that case South Korean law, would not be applied to provisions purporting to prevent termination of contracts. Equally restrictions on the enforcement of security will not be recognised even supposing the agreement is a form of security, a point on which I did not hear full argument.*'

The Australian Insolvency Proceedings

Before the stay of the BVI Court's order lapsed, on 16 February 2021, Vector's administrators took out an application in the Federal Court of Australia seeking, amongst others:

(1) An order that during the voluntary administration of Vector, MGI is prohibited from effecting a transfer of Vector's shares in MGIH6 to MGI; and

(2) An order that MGI, MGIH6 and the escrow agent not take any steps to effect a transaction prohibited under (1) above.

On 24 February 2021, the Federal Court of Australia declared that:

(1) The Escrow Deed created, as between Vector and MGI, an interest in favour of MGI over the property of Vector that is a 'security interest' as that term is defined in the Corporations Act 2001 (Cth) and the Personal Property Securities Act 2009 (Cth);

(2) During the administration of Vector, section 440B of the Corporations Act 2001 (Cth) precludes MGI from enforcing its security interest against Vector, such that MGI cannot take any steps under the Escrow Deed to effect a transfer of Vector's shares in MGIH6 to MGI.

Nevertheless, the Federal Court of Australia declined to grant Vector's administrators the injunction that they had sought on the basis that it would be inappropriate for an Australian court to grant relief restraining foreign companies from dealing with foreign property in a foreign jurisdiction. The Federal Court considered that the question of whether it would be appropriate to give effect to the declaratory relief that it had granted would be a matter for the BVI Court.

The Assistance and Provisional Liquidation Applications

Armed with the declaratory orders of the Federal Court of Australia, Vector and its administrators then filed two further applications before the BVI Court. Those applications were:

(1) An application for the BVI Court's assistance (the **Assistance Application**) in the form of an order under section 467(3)(b) and/or 3(h) of the Insolvency Act 2003 (the **Act**) that, during the administration of Vector in Australia, MGIH6 and the escrow agent be restrained from taking any steps to effect a transfer of the Shares to MGI; and

(2) An application for the appointment of 'soft touch' provisional liquidators over Vector under section 170 of the Act, and an order under section 170(5) and/or 171(1) restraining MGIH6 and the escrow agent from taking any steps to effect the transfer of the Shares to MGI (the **Provisional Liquidation Application**).

Both applications were dismissed by the Court on 11 November 2021.

The Assistance Application

The BVI Court (by the Honourable Mr Justice Gerhard Wallbank) accepted that MGI had an unconditional contractual entitlement to have the Shares transferred to it by 15 October 2020 at the latest, when the Instruction Letter was provided to the escrow agent by MGI. The effect of those rights under the English and BVI governed law documents was that MGI became the unconditional beneficial owner of the Shares from that point in time, and they were thereafter held in Vector's name as bare trustee for the benefit of MGI. Accordingly, from that point, the Shares did not form any part of the assets of Vector that would be available for its creditors. This was an application of the equitable maxim that equity will treat as done that which ought to have been done.

The Court then considered whether Vector's contention that it was not in breach of its contractual obligations because the Standstill Deed operated to extend its time for meeting its obligations, not just with regard to completing a Definitive Feasibility Study, but also, by an implied term, with regard to providing the Shareholder Loan Facility, should override the operation of the equitable doctrine. The Court rejected that argument for two reasons:

(1) It accepted that the BVI Court (by Jack J) had already ruled that Vector's arguments concerning the alleged implied term disclosed no serious issue to be tried. Vector was estopped from seeking to re-litigate that issue on the Assistance Application; and

(2) In any event, Vector's argument in relation to the alleged implied term was, on the facts, '*beyond farfetched*'. The fact that Vector had commenced arbitral proceedings before the ICC in relation to the issue could not alter that assessment.

As regards the effect of the declaratory relief granted by the Federal Court of Australia in relation to the statutory moratorium:

(1) Wallbank J said that Jack J had already decided that the statutory moratorium was irrelevant;

(2) In any event, as stated above, MGI became the unconditional beneficial owner of the Shares *before* Vector entered administration in Australia on 10 December 2020. Whatever effect, as a matter of Australian law, entering administration might have had upon 'security interests', that must be irrelevant so far as MGI's prior accrued beneficial ownership rights to the Shares were concerned, because the Shares were then to be treated in equity as already outside Vector's estate of assets.

(3) The only reason that legal title to the Shares had not been able to be registered in MGI's name prior to Vector's administration was as a result of the *ex parte* injunction that had been obtained by Vector on 28 October 2020, which relief the BVI Court had held it was not entitled to. On the basis that equity would treat as done what ought to have been done, MGI should be treated as having become the unconditional beneficial owner of the Shares and to have had the unqualified right to register them in its name no later than 16 October 2020.

MGI had a prior and superior equity over whatever interests Vector may have retained in the Shares. In those circumstances, there was no reason why the BVI Court should assist Vector's administrators to prevent retransfer of the Shares, or give recognition to the orders of the Federal Court of Australia or the moratorium under Australian insolvency law.

The Provisional Liquidation Application

The Provisional Liquidation Application was dismissed for a number of reasons.

No Sufficient Connection to the BVI

Section 163 of the Act gives the Court the power to appoint a liquidator over a foreign company in a range of circumstances, including where the company is insolvent, but in each case the Court must be satisfied that the company has a sufficient connection to the BVI. Relevantly, by subsection (2), a foreign company has a connection with the BVI only if:

(a) it has or appears to have assets in the BVI;

(b) it is carrying on, or has carried on, business in the BVI; or

(c) there is a reasonable prospect that the appointment of a liquidator of the company will benefit the creditors of the company.

In this case, there was no suggestion that Vector was carrying on, or had carried on, business in the BVI. Vector's only assets in the BVI were said to be the Shares. However, the Court had found that MGI was the beneficial owner of the Shares which were held by Vector on bare trust for MGI. The Court held that assets held on a bare trust could not suffice to satisfy the jurisdictional requirements of section 163 because there is no reasonable possibility of benefit accruing to the creditors from the making of an order appointing liquidators.

Discretionary Matters

The Court's power to appoint a provisional liquidator where an application to appoint liquidators has been filed but not yet determined is to be found in section 170 of the Act. Subsection (4) materially provides as follows:

> '*(4) The Court may appoint a provisional liquidator under subsection (1) if-*
>
> *(a) the company, in respect of which the application to appoint a liquidator has been made, consents; or*
>
> *(b) the Court is satisfied that the appointment of a provisional liquidator-*
>
> *(i) is necessary for the purpose of maintaining the value of assets owned or managed by the company; or*
>
> (ii) *is in the public interest.*'

As regards subsection (4)(b), the Court held that there was no need to appoint provisional liquidators where MGI was the unconditional beneficial owner of the Shares, and was entitled to have them registered in its own name. Nor would it be in the public interest for the Court to appoint provisional liquidators where Vector's intent was to frustrate MGI's prior accrued and superior equity in the Shares.

As regards subsection 4(a), whilst Vector consented to the appointment of provisional liquidators, the fact that there was no possibility of any benefit accruing to creditors on the basis that the Shares would not fall within the insolvent estate led the Court to conclude that it should not exercise any discretion it might still have to appoint provisional liquidators.

Enforcement of Security

The Court also accepted MGI's argument that, without prejudice to its contention that it was the unconditional beneficial owner of the Shares (which the Court accepted), even if the escrow arrangement was a form of security interest, BVI law does not affect the ability of a secured creditor to enforce its security after a company is placed into liquidation.

No Real Prospect of Achieving a Restructuring

Finally, on the basis that the Shares, which were said to be Vector's only material asset, had been found to be the equitable property of MGI, any restructuring would require MGI's cooperation.

However, it was unwilling to cooperate, and accordingly, there was no real prospect of a restructuring being achieved in the Australian administration. The appointment of 'soft touch' provisional liquidators would therefore not achieve Vector's stated purpose.

Conclusion

As the Court itself concluded, Vector's resort to the Court with its Assistance and Provisional Liquidation Applications was simply too late. MGI's unconditional beneficial ownership of the Shares had accrued before Vector had been placed into administration.

The BVI Courts remain ready and willing to provide recognition and active assistance to foreign insolvency office holders in appropriate circumstances. However, as this case serves to demonstrate, the Court will not apply the provisions of foreign insolvency law where to do so would be inconsistent with ownership rights arising under BVI law. Nor will it give effect to moratoria on the enforcement of security under foreign insolvency law in circumstances where such moratoria are inconsistent with a secured creditor's BVI law rights to enforce its security notwithstanding the liquidation of a company in the BVI.

Shane Donovan of Mourant appeared on behalf of MGI on the hearing of the application to discharge the *ex parte* injunction obtained by Vector in support of its then intended arbitral proceedings. He was led by Richard Fisher QC of South Square on the hearing of the Assistance and Provisional Liquidation Applications.

Contacts

Eleanor Morgan
Managing Partner | Mourant Ozannes
British Virgin Islands
+1 284 852 1712
eleanor.morgan@mourant.com

Jennifer Jenkins
Partner | Mourant Ozannes
British Virgin Islands
+1 284 852 1709
jennifer.jenkins@mourant.com

Shane Donovan
Partner | Mourant Ozannes
British Virgin Islands
+1 284 852 1731
shane.donovan@mourant.com