Introduction

At times such as these, we have seen the true nature of insolvencies with a multi-jurisdiction impact, both on creditors and shareholder investors. The ease (or lack of) with which insolvency officers can recover assets, enforce orders and achieve local enforcement assistance from different jurisdictions simply highlights the minefield in which an officer patrols without careful consideration and good counsel.

This paper gives an overview of how BVI, Cayman and Bermuda have evolved their approaches to international insolvency work. The extent to which assistance is considered appropriate is to some extent forged by political as well as commercial factors. We see, for example, how Bermuda’s efforts in this regard are firmly footed in common law (including the very recent decision from the Commercial Court of Bermuda in Global Fund Ltd), whilst at the same time how Cayman has very recently adopted a statutory framework more akin to the well established BVI foreign assistance provisions. Similarly, the approach of these jurisdictions to the UNCITRAL model law makes for an interesting study.

The Common Law Approach

Until recently, the courts in England adopted a rough and ready judge-made approach. If a company was wound up in England, the Court treated the winding up order as having universal effect with moveable property worldwide subject to the liquidation (‘the universality principle’). Similarly, movable property in England which had been assigned to an insolvency administrator under recognised foreign insolvency law was treated by the English Courts as validly assigned. The question of what was recognised or not was forged over time and often determined by the reciprocity test of “what would they do for us in the same situation”. Immovable property was always treated as subject to the lex situs.

As for which system of law was to prevail, English judges treated the liquidation taking place in the company’s “country of domicile” (i.e. the country under whose laws it was incorporated) as the principal liquidation and treated liquidations taking place in other jurisdictions (where the company might have assets or creditors) as “ancillary” – expecting the courts of the “ancillary” liquidations to take the same approach. On that basis, the liquidator in an ancillary winding up is supposed to get in the local assets and arrange for them to be pooled with those in the principal liquidation, in order to ensure pari passu distribution, but, in the process, applying the law of the jurisdiction in which the ancillary liquidation is proceeding – unless conflicts principles require a different answer.

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1 In the matter of the liquidation of Founding Partners Global Fund Ltd; [2009] SC (Bda) 36 Com (29 July 2009)
2 Re Azoff-Don Commercial Bank [1954] Ch 315 at 333
3 Galbraith v Grimshaw [1910] AC 508
4 In re English, Scottish and Australian chartered Bank [1893] 3 Ch 385
5 Re Bank of Credit and commerce International SA (No 10) [1997] Ch 213 at 239 - 240
This approach has been refined recently in the Global Fund case in which the Bermuda commercial judge seized an opportunity to give clarity on the scope and content of applicable common law rules when it came to assisting a foreign insolvency court in a non-Bermudian company liquidation. In citing Re Impex Services Worldwide Ltd, McGrath v Riddell, and Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc and others, the Court recognised Cayman appointed provisional liquidators and granted them such powers as a Bermudian liquidator could exercise under domestic legislation. Importantly, he also gave the liquidators the benefit of a stay of all proceedings against the company without leave of the Court. The principles applied to this common law recognition approach also included recognising within common law the statutory developments in other jurisdictions where express grounds for recognition and assistance have been enacted. Emphasis was placed upon the now famous paragraph 22 of Lord Hoffman’s opinion in Cambridge Gas;

“22 What are the limits of assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, section 426(5) of the Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply “the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction”. At common law, their Lordships think it doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.”

We can address further in discussion how recognition works where there are certain key parts of the overall process that are not implemented or in force in the foreign jurisdiction, but without which the whole benefit of recognition falls away and even undermines the principal jurisdiction’s order.

UNCITRAL

It is worthwhile briefly mentioning here the United Nations Commission on International Trade Law (‘UNCITRAL’) Model Law on Cross Border Insolvency. It is (broadly speaking) the UNCITRAL approach that is adopted in Part XVIII of the BVI Insolvency Act (not yet in force); it is noteworthy that this approach is not adopted, in draft or otherwise, in Cayman.

UNCITRAL is a protocol which many have adopted in some form or another into their domestic legislation. There are no plans to implement its terms in the BVI, though this is something currently under review. The US and England are among those that have adopted its terms as a model form of legislative assistance, and the EU directive on cross border assistance adopts the same approach of COMI (“centre of main interest”) analysis.

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6 [2004] BPIR 564 (Isle of Man)
7 [2008] UKHL 21
8 [2007] 1 AC 508
The Legislative Assistance Provided by Cayman (Part XVI) and BVI (Part XIX)

The Cayman provisions are recent\(^9\), Cayman has also adopted Foreign Bankruptcy Proceedings (International Cooperation) Rules 2008. Part XIX is headed “Orders in Aid of Foreign Proceedings”. In this section we highlight some thoughts on the more established BVI provisions and note the overlap with Cayman. We invite these comments to be considered in light of the new Cayman provisions and its possible application to them as much as to BVI.

It is the group of sections found in Part XIX that corresponds to (but has significant differences from) section 426 of the UK Insolvency Act 1986. Its core provision\(^10\) empowers the Court, upon the application of a “foreign representative”, to make various orders in aid of the foreign proceeding in respect of which the foreign representative is “authorised”.

“Foreign representative” is defined as a person authorised in a proceeding in a “relevant foreign country” to administer the re-organisation or liquidation of the debtor’s property and affairs\(^11\). “Proceeding” means a court or court supervised proceeding under the insolvency law of the designated “relevant foreign country” in which the property and affairs of a debtor are re-organised or subject to the processes of liquidation or bankruptcy.

A list of “relevant foreign countries” was originally designated by the BVI Financial Services Commission for the purposes of Part XIX on 25 August 2005. It is not extensive, and can be augmented on communication with the Insolvency Services Division of the FSC.

The question may be asked whether the High Court has some residual discretion to make orders in aid of insolvency proceedings on foot in countries not on the list of designated “relevant foreign countries”. Given the common law provisions are expressly reserved under section 470 of the Act, there is no reason in principle why another jurisdiction not yet designated could not benefit from the more generous common law approach we have seen in recent decisions, and seek assistance in a form that practically and realistically falls into the same relief one would seek under the specific statutory powers. It would need to be demonstrated that the common law would qualify another jurisdiction to seek such assistance, but it is not thought the mere absence from a list drawn up by the regulatory body in the BVI would itself disqualify another jurisdiction from legitimately coming to the BVI courts for help. We anticipate that the BVI Court might readily be persuaded to adopt a flexible and pragmatic approach.

Under Part XIX, the foreign representative is able to apply to the High Court for an order in aid of the foreign proceeding in which he is acting\(^12\). Upon such\(^13\) application, the Court may make such order or grant such relief as it considers appropriate\(^14\), but this catch-all provision is preceded by and forms part of a list of specific powers which will, presumably, be treated as providing (by the application of basic rules of construction) some sort of boundary by association so as to limit the otherwise apparent breadth of sub-section 467(3)(h). It is as yet difficult to tell the extent to which this catch-all will “fill the gap”. The power to grant relief is – in contrast to the corresponding UK provision – discretionary. However, it is submitted that where there is a need for relief not falling squarely into the specific examples of the section and the catch-all provision is relied upon, there is no reason in principle why that relief should not be as available as those specifically defined.

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\(^9\) Implemented under the Companies Law (2007 Revision) of the Cayman Islands, and brought into force 1\(^{st}\) March 2009
\(^10\) section 467 of the Act
\(^11\) or to act as a representative of the foreign proceedings: section 466(1) of the Act
\(^12\) section 467(2) of the Act
\(^13\) section 467(3) of the Act defines the application as being made under section 467(1), which seems to be a mistaken reference to section 467(2) of the Act.
\(^14\) section 467(3) of the Act
Part XIX lays considerable emphasis upon the need to ensure that the rights of persons in the Virgin Islands are not prejudiced, and that any distributions in the relevant foreign insolvency substantially follow Virgin Islands principles. A distinction could also possibly be prayed in aid in opposition to a wide construction of the catch-all provision in sub-section 467(3)(h).

The specific relief which may be granted in favour of the foreign insolvency representative by the Court is, in summary:

- the restraining of ‘any’ proceedings or other legal process;
- the restraining of the creation or exercise of any right or remedy over property of the debtor. “Property” is defined for these purposes as “property that is subject to or involved in” the relevant foreign proceeding;
- the requirement that “any” person deliver up to the foreign representative any property of the debtor or its proceeds;
- the making of orders designed to coordinate a Virgin Islands insolvency proceeding with a foreign proceeding;
- the appointment of an interim receiver of any property of the debtor;
- the authorisation of the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency in respect of the debtor;
- the staying or termination, or the making of any other appropriate order, in relation to a Virgin Islands insolvency proceeding.

Potentially the most far reaching of these powers from the perspective of erosion of privacy is the power in section 467(3)(f) to authorise the examination of any person who could be examined in the Virgin Islands in the insolvency of a debtor. It is noticed the examination referred to is an examination by the foreign representative. This clearly rules out any examination by the Court corresponding to one under sections 284 to 286 of the Act. But what does it mean? Does it afford the status of a fully appointed insolvency officer with all powers as though appointed over a BVI company within the jurisdiction? Can it mean a criminal sanction for failure to subject to a cross examination in the same way as a domestic appointment?

It is submitted that the preferred construction of section 467(3)(f) of the Act is that it does no more than remove an objection on comity grounds to the act of an insolvency representative from a relevant foreign company in seeking to interview or examine a person who could be examined under section 282. It does not give the foreign insolvency representative the powers of a Virgin Islands liquidator under section 282 nor, it is submitted, does it carry any of the collateral consequences of a notice served under or of an examination conducted under section 282. In particular, failure to comply with a request for information from the foreign representative will not incur criminal sanction under section 282(3) of the Act; nor will the removal of the privilege against self incrimination apply to an examination which the foreign insolvency representative is authorised to carry out under section 467(3)(f) of the Act.

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15 sections 468(1) and 468(2)
16 section 467(3)(a) of the Act
17 section 467(3)(b) of the Act
18 section 467(1) of the Act
19 section 467(3)(c) of the Act
20 section 467(3)(d) of the Act
21 as defined by section 467(1) of the Act
22 section 467(3)(e) of the Act
23 section 467(3)(f) of the Act
24 section 467(3)(g) of the Act
25 section 287(1) of the Act
Summary

The changes to the way assistance to foreign insolvency officials is approached in all three of these offshore examples collectively reflect the “new era” of cross border cooperation in insolvency matters. From the common law to the specific form of statutory relief, the trend is to achieve a more perfect “universality” expounded by Lord Hoffman in Cambridge Gas. Clearly reciprocity features in the policy decision whether to assist or not, but overall the borders are coming down slowly in both how insolvencies are handled between jurisdictions, and enforcement of domestic orders overseas. This trend is set to continue as UNCITRAL gains further implementation and multi-jurisdictional insolvencies increase in number. The far reaching effect of recent Ponzi schemes and associated liquidations are testimony to that.

The rule of thumb, however, remains: always ensure matters are comprehensively in hand in the jurisdiction of incorporation to firmly assert competence over the company’s internal affairs whether by local liquidation order, or assistance of a foreign order.

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This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

Notes to Editors

Conyers Dill & Pearman is a multi-jurisdictional law firm that advises on the laws of the Cayman Islands, British Virgin Islands, Bermuda and Mauritius. The firm specialises in company and commercial law, commercial litigation and private client matters. Conyers’ structure, culture and expertise enable the firm to consistently deliver on its promise of responsive, timely and thorough service. Conyers provides clients with the highest quality legal advice from strategic global locations including offices in the world’s leading financial centres in Europe, Asia, the Middle East and South America. Founded in 1928, Conyers comprises 600 staff including more than 150 lawyers. Affiliated companies (Codan) provide a range of trust, corporate secretarial, accounting and management services.

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