

Demystifying offshore: Recognition and assistance in overseas territories

In this first of a series of articles, the authors outline the statutory and common law recognition and assistance orders available to Europe-based liquidators, highlighting recent cases



DESPITE THE SUBSTANTIAL FINANCIAL ACTIVITY THAT TAKES PLACE IN MAJOR OFFSHORE FINANCIAL CENTRES, MANY EUROPE-BASED INSOLVENCY PROFESSIONALS HOLD UNDULY PESSIMISTIC VIEWS OF WHAT CAN BE ACHIEVED THERE



In a global financial environment, insolvency office-holders will often need to look beyond their home jurisdictions in order to undertake their principal function of getting in and realising assets.

Within the EU this task is simplified by the detailed provisions of the Insolvency Regulation. Yet, despite the substantial financial activity that takes place in major offshore financial centres such as the British Virgin Islands, Cayman Islands, Guernsey and Jersey (which, for convenience, we will name the **Four Crown Dependencies and Overseas Territories (CDOTs)**)¹ many Europe-based insolvency professionals hold unduly pessimistic views of what can be achieved there. As the recent seminars hosted by INSOL Europe's Anti-Fraud Forum have illustrated, such pessimism is often misplaced.

While none of the Four CDOTs are members of the EU, and none of them have legislation in force which is based on the UNCITRAL Model Law on Cross-Border Insolvency 1997 (**Model Law**), each of the CDOTs have well recognised procedures for assisting foreign office-holders, that can be used for a variety of purposes, including to secure assets or obtain the necessary books and records in those territories.

Ancillary liquidations

Often foreign office-holders will

first consider whether there is a sufficient connection between the entity over which they are appointed and the relevant CDOT jurisdiction in order to enable an ancillary liquidation to be commenced there. Similar to secondary proceedings in Europe, an ancillary liquidation of a foreign company generally provides office-holders with the same local powers as they would have been accorded if appointed over a domestic company.

Cayman, Jersey and the BVI permit the winding up of foreign companies where, *inter alia*, they carry on business or have property located in those jurisdictions. At present there is no power to appoint a liquidator in Guernsey over a foreign company, but it is proposed to introduce such a power later in 2019.

Recognition and assistance

European office-holders may also consider seeking recognition of their appointment and assistance orders from the court of the relevant CDOT jurisdiction. They are not being appointed by the court as office-holders, but rather their status and power to act on behalf of the company is given domestic effect, and the court will assist this function through the making of other various orders.

Applications will usually follow a letter of request issued by the office holder's appointing court, setting out the nature of the recognition and the

assistance sought².

Such orders are generally available either under statute or at common law.

Statute

Orders under the BVI Insolvency Act, the Jersey Bankruptcy (Désastre) Law 1990 (**Jersey Bankruptcy Law**) and the Insolvency Act 1986 (Guernsey) Order, 1989 (**1989 Order**) can only be granted to office-holders from a small list of designated jurisdictions³. No such limitations apply in Cayman, where the Companies Law⁴ empowers the court to make orders in support of any bankruptcy proceedings in the entity's country of incorporation or establishment.

Under the Cayman statute, orders can be made for a number of listed purposes which include recognition of the office holder to act in the name of the company, preventing or staying proceedings or enforcement actions against the company, requiring the production of information or documents to the office holder, and the turnover of the property of the company (including the bringing of avoidance claims).

Similar orders are available in BVI (under the Insolvency Act⁵), Jersey (under Article 49 of the Jersey Bankruptcy Law) and Guernsey's 1989 Order. While the BVI Insolvency Act provides a similar (but not identical) list of orders that can be made to that in Cayman⁶, the Jersey or Guernsey statutes do not.

The BVI, Jersey and Guernsey courts may apply either domestic law or the law applicable in respect of the foreign proceeding when making assistance orders⁷, whereas under the Cayman statute only domestic law can be applied⁸.

Common law

The Four CDOTs also retain certain powers to grant recognition and assistance at common law.

In Jersey and Guernsey where the statutory coverage is less extensive, common law plays a more active role. In Jersey the courts may grant assistance to overseas office-holders, even when there are concurrent Jersey bankruptcy proceedings on foot. Similarly, in Guernsey, when a request comes from an overseas office holder appointed outside a designated jurisdiction, the court may exercise its inherent power to provide recognition and assistance. Following private international law principles, office-holders appointed by a national court in which a company is incorporated will be recognised by both the Guernsey and Jersey courts.

By contrast, in the BVI, it appears that the legislation essentially limits the beneficiaries of the Court's assistance to those foreign representatives appointed only within some designated jurisdictions⁹.

Nature of the discretion

The principles governing recognition or assistance orders which will be granted are similar in all Four CDOTs. They are set out under the relevant Cayman and BVI statutes, and include taking into consideration a number of factors, such as such as “*matters which will best assure an economic and expeditious administration of [the overseas liquidation] ... consistent with*”, “*the just treatment of all [the creditors claiming in that liquidation]*”, “*the protection of [local claim holders] against prejudice and inconvenience in the processing of claims in the foreign [liquidation]*” and “*comity*”¹⁰. Similar considerations are likely to

inform the decisions of the Guernsey and Jersey courts.

Common law – post *Singularis*

One objective of modern cross-border insolvency is reflected in the principle of modified universalism: that assets of a debtor should be collected and distributed on a worldwide basis in a single insolvency procedure, with domestic courts still protecting the interests of local stakeholders where necessary. Following *Cambridge Gas*, it was understood that the common law courts’ power to assist foreign winding-up proceedings was to be extended to making orders *as if* the relevant entity were in liquidation in the domestic forum.

The subsequent Supreme Court decision in *Rubin* and the Privy Council decision in *Singularis* have rolled-back the scope of modified universalism considerably. Whilst it remains part of common law, it is much more limited in scope than articulated in *Cambridge Gas* and, in particular, the domestic court can only ever act within the strict limit of its statutory and common law powers, and not make *as if* orders.

The full extent of those powers is still being explored. In *Singularis*, a majority held that there exists a common law power to require persons subject to the court's jurisdiction to provide information to overseas office-holders, as long as similar orders can be made in the office-holders' home forum. This has proved controversial in Guernsey, at least in the context of personal insolvency, with the Royal Court declining to follow the majority in *Singularis*, finding instead that the foreign trustee in bankruptcy of a foreign debtor could not use information collecting powers in Guernsey.¹¹

In two recent Cayman cases¹² the court has provided common law assistance to office-holders appointed by the Hong Kong court over Cayman companies. It granted them recognition to apply in the name of those companies for relief, available to the

companies under Cayman law (namely the commencement of a scheme of arrangement and the presentation of a winding-up petition, respectively), together with case management directions intended to stay Cayman proceedings against those companies. Both cases involved straightforward facts, in which there was no likelihood of a competing winding-up process and no potential prejudice to creditors from the orders being sought.

Conclusion

As set out above, the scope for ancillary proceedings or recognition and assistance orders in the Four CDOTs is considerable.

The courts in these jurisdictions, supported by well-qualified legal and accounting professionals, are responsive to global developments and well-versed in cross-jurisdictional insolvencies. European office-holders should not be deterred from seeking appropriate orders from the courts of those jurisdictions. ■



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Footnotes:

- 1 There are, of course, a significant number of other such jurisdictions, not considered in this article.
- 2 This is required in Guernsey, when applying under the 1989 Order.
- 3 For Guernsey: the UK, Isle of Man and Jersey; for the BVI: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the USA; for Jersey, the United Kingdom; the Isle of Man; Guernsey; Australia and Finland.
- 4 Part XVII, supplemented by the Foreign Bankruptcy Proceedings (International Co-operation) Rules, 2018
- 5 Part XIX of the Insolvency Act (Orders in Aid of Foreign Proceedings). The Insolvency Act also contains Part XVIII (Cross Border Insolvency), which has provisions based on the UNCITRAL Model Law. It has never been brought into force.
- 6 S.467(3)
- 7 BVI Insolvency Act, 2003, s. 467(5); 1989 Order; Article 49 of the Jersey Bankruptcy Law as applied in *Re Estates and General Developments Limited* 2013 (1) JLR 145. See also the Guernsey case of *Batty v Bourse Trust Company Ltd* [2017] GLR 54 where an order was made under the 1989 Order, applying English law avoiding undervalue transactions
- 8 *Picard v Primeo* [2014] 1 CILR 379]
- 9 In the matter of C (A Bankrupt) BVIHC(COM) 80 of 2013
- 10 Sections 242 and 468 respectively
- 11 *Brittain (Trustee in Bankruptcy of X) v GTC (Guernsey) Limited* [2015] GLR 248
- 12 *China Agrotech* 2017 (2) CILR 526 and *Changgang* (FSD 270 of 2017)