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Recognition of foreign office-holders: How far does it go?

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In the last decade or so, cross-border liquidation has given rise to thorny legal issues which have required the Court's assistance. When a company with multi-jurisdictional presence is liquidated in one jurisdiction, questions arise as to whether the office-holder appointed in that jurisdiction can be or should be recognized and/or assisted by the Courts of other jurisdictions.

This apparently straightforward question can manifest itself in many different forms. For example, the jurisdiction in which the company is liquidated may or may not be the jurisdiction in which the company is incorporated. Should a liquidator appointed in a jurisdiction other than the place of incorporation be recognized ("**the First Question**")?

Alternatively, the company may not be in the process of compulsory liquidation, but in analogous proceedings, such as administration, or voluntary liquidation. Should those non-compulsory liquidation proceedings be recognized ("**the Second Question**")?

Legislative intervention

Some jurisdictions address these issues by way of legislation (typically, by adopting the UNICITRAL Model Law on Cross-border Insolvency).

Specifically, in relation to the First Question, Article 21(3) of the Model Law provides that a foreign representative of foreign "non-main proceedings" may apply for assistance, as long as the local court is satisfied that the relief relates to assets which, under local law, should be administered in the foreign non-main proceedings or concerns information required in that foreign non-main proceeding.

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In relation to the Second Question, under Article 2(a) of the Model Law, the "foreign proceeding" to be recognized includes "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation".

In *Re Stanford International Bank* [2010] 3 WLR 941, the English Court of Appeal observed that "law relating to insolvency" does not have to relate exclusively to insolvency.

Thus, in *Re New Paragon Investments Ltd* [2012] B.C.C. 371, a creditors' voluntary winding up in Hong Kong was recognized as a "foreign proceeding" under the English Cross-Border Insolvency Regulations 2006 (which is based on the Model Law).

Paragraph 71 of the UNCITRAL Guide to Enactment and Interpretation further elaborated on the concept of "foreign proceeding":

> *Within the parameters of the definition of a foreign proceeding, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding-up or reorganization. The definition would also include those proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments, "debtor in possession").*

Common law response

In contrast, for jurisdictions with no cross-border insolvency legislation, these questions remain largely unanswered.

For example, in *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd* [2015] 4 HKC 215 the First Question, i.e. the question of whether the Hong Kong court should recognize an office-holder appointed in a jurisdiction other than the jurisdiction of incorporation, was expressly left open by the Court (at [9]).

In keeping with the common law tradition, it should not be surprising that the answers to the First and Second Questions need to be dealt with in a case-by-case basis.

Happily, the Second Question was partially addressed in the recent Singaporean decision of *Re Gulf Pacific Shipping Ltd (in creditors' voluntary liquidation)* [2016] SGHC 287.

That decision concerns a Hong Kong company in creditors' voluntary winding-up. The company had a bank account with ABN AMRO Bank NV Singapore Branch. The liquidators sought copies of the bank statements, but the bank insisted on an order from the court.

In the premises, the liquidators sought assistance from the Singaporean court.

Aedit Abdullah JC was careful to note that assistance was sought by liquidators appointed in the place of incorporation (at [5]). Therefore, unlike in the case of *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd*, the First Question did not arise.

His Lordship then addressed whether assistance should be given to non-compulsory winding-up office-holders, i.e. the Second Question. While his Lordship noted that Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 took the view that voluntary liquidation ought not to be recognized (at [7]), he nevertheless granted assistance to the liquidators. This is because (at [10]):

> *the foundational doctrine in the recognition of foreign insolvency proceedings is the promotion and facilitation of the orderly distribution of assets, as well as the orderly resolution and dissolution of the affairs of entities being wound up. The traditional, territorial focus on the interests of local creditors no longer has primacy over more internationalist concerns. Thus, the precise mode of the winding up would not generally be material, and no distinction should be drawn between voluntary and compulsory processes, or between in court and out of court dissolution.*

Therefore, Aedit Abdullah JC held that voluntary liquidation can also be recognized at common law.

Implications

Aedit Abdullah JC's approach is, with respect, to be welcomed, particularly in Hong Kong and other jurisdictions without cross-border insolvency legislation.

Creditors' voluntary winding-up can be recognized under the UNCITRAL Model Law. The UNCITRAL Guide to Enactment also discourages the drawing of the distinction between compulsory and voluntary winding-up. There appears to be no compelling reason why the same approach should not be adopted under the common law.

It is perhaps noteworthy that, in *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd*, Harris J was prepared to assume that assistance could be granted to administrators (rather than liquidators), although the Court eventually left that point open and refused assistance on other grounds.

Nonetheless, a number of difficult issues remain unresolved. Prime among them is the status of members' voluntary liquidation, which (by definition) is not an insolvent liquidation.

To this end, it is noteworthy that Aedit Abdullah JC relied on the American case of *In re Betcorp Limited (In Liquidation)* 400 BR 266 (Bankr. D. Nev. 2009) in support of his ruling. In that case, the American court recognized the members' voluntary liquidation in Australia.

These decisions, as well as Aedit Abdullah JC's decision in *Re Gulf Pacific Shipping Ltd (in creditors' voluntary liquidation)*, tend to suggest that members' voluntary liquidation should also be recognized.

Nonetheless, there are respectable counter-arguments against such recognition. Most importantly, members' voluntary winding-up can be sensibly described as "essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court" (as per Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers*, at [25]). Reasonable opinions may differ as to whether such a private arrangement among members inter se deserves the judicial assistance of a foreign court.

All in all, the full extent of the court's common law powers to recognize and assist foreign office-holders remains unclear. The question of "how far does it go" no doubt has to be answered on a case-by-case basis.