

Modified universalism: not a principle of universal application

Rosalind Nicholson, a partner with Walkers in the BVI, and John Crook, a senior associate in Hong Kong, analyse recent developments in cross-border recognition in Bermuda, Cayman and the BVI.

In today's global economy, cross-border structures, frequently including an offshore entity, have become familiar to office holders around the world.

However, the territorial limits of a court's powers can mean that such structures present obstacles with which office holders attempting to conduct an orderly and efficient winding up of a debtor's affairs need to familiarise themselves.

The principle of modified universalism mandates that, within the constraints of public policy, courts should co-operate across jurisdictions.

So, if an office holder appointed in one jurisdiction requires assistance from the court of a different jurisdiction, the secondary court may, at common law, provide such assistance as it properly can.

Establishing what is proper for this purpose in a given instance, will depend not only on the powers available to the court in the appointing jurisdiction, but also the powers available to the court in the secondary jurisdiction and any limits which fetter those powers.

A closer look reveals that modified universalism is not a principle of universal application: each jurisdiction approaches the question of international cooperation which the principle embodies in its own way, as demonstrated by a comparison of the different approaches adopted in Bermuda, BVI and the Cayman Islands.

These offshore jurisdictions are not parties to the UNCITRAL Model Law on Cross-Border Insolvency 1997. Statutory (in Bermuda,

common law) powers of assistance are only available in certain circumstances, with the result that the approach of each of these three jurisdictions is different and will be determinative of the assistance that can be provided to a foreign office holder.

There are two, different but complimentary, concepts at play here: recognition and assistance, sometimes elided but in fact, distinct.

'Recognition' denotes the formal act of the foreign court recognising or treating the foreign office holder as having status within that court's jurisdiction.

'Assistance' affords the recognised foreign office holder prescribed rights and powers to deal with the assets of the insolvent estate within the jurisdiction of the foreign court.

BERMUDA

In the absence of a statutory regime, the Bermudan Court has common law power to recognise foreign insolvency and restructuring proceedings and to cooperate with courts of foreign jurisdictions informed by the Model Law as evidence of international best practice: see *Re Founding Partners Global Fund Ltd* (in Liquidation) [2011] Bda LR 22 at para 46.

Recognition of a foreign office holder is permissible where there are assets within the jurisdiction and assistance will be provided to clothe the liquidator with the authority to deal with such assets: see *Stephen John Hunt v Transworld Payment Solutions UK Limited* (in liquidation) [2020] SC (Bda) 14 Com.)

CAYMAN

In the Cayman Islands, Part XVII of the Companies Act (2021 Revision) contains the statutory



regime for recognition and assistance for foreign representatives appointed in insolvency proceedings outside the Cayman Islands.

The ancillary relief that the Cayman Courts have discretionary jurisdiction to grant includes recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor; enjoining the commencement or staying the continuation of legal proceedings against a debtor; staying the enforcement of any judgment against a debtor; requiring a person in possession of information relating to the business or affairs of a debtor and ordering the turnover to a foreign representative of any property belonging to a debtor.

Notably there is no restrictive list of designated countries from which foreign office holders will be given assistance.

THE BVI

In Part XVIII of the Insolvency Act, 2003 (the 'BVI Insolvency Act'), which is drawn from the Model Law, the BVI has made provision for the recognition of foreign representatives. However, that Part of the BVI Insolvency Act has never been brought into force. Historically, some doubts were expressed by the BVI Courts as to whether Part XVIII has abrogated the common law power of recognition.

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However, that debate has been laid to rest and it is now established that, in the absence of an effective statutory regime, the BVI Court has jurisdiction at common law to recognise a foreign office holder.

The BVI Insolvency Act also includes, in Part XIX which is in force, a statutory regime (the 'BVI Statutory Assistance Regime'), whereby a foreign representative appointed to act in a 'relevant foreign country' may apply to the courts of the BVI for orders in aid of the proceedings in which he or she is appointed.

The BVI Statutory Assistance Regime operates on an application-by-application basis.

It gives a foreign representative from a relevant foreign country express rights to apply to the courts of the BVI for orders in aid, but without conferring status on the foreign representative through the recognition of the foreign proceedings in which he or she has been appointed.

The BVI Statutory Assistance Regime lists specific areas in which assistance can be granted as well as the general power of assistance in appropriate cases.

The 'relevant foreign countr[ies]' are designated by the BVI Financial Services Commission; those currently designated are listed in the box below.

Designated countries under the BVI Statutory Assistance Regime

- AUSTRALIA
- CANADA
- FINLAND
- HONG KONG
- JAPAN
- JERSEY
- NEW ZEALAND
- THE UNITED KINGDOM
- THE UNITED STATES OF AMERICA

However, the limited number of jurisdictions in respect of which the BVI Statutory Assistance Regime applies, begs the question as to the extent, if any, assistance is available to foreign office holders appointed by courts in non-designated countries?

This question has recently been considered by the BVI Court of Appeal (the Court of Appeal of the Eastern Caribbean Supreme Court, Territory of the Virgin Islands) in *Net International Property Limited v ADV. Eitan Erez BVIHCMA2020/0010*.

The court there concluded, "with some regret" (per Webster JA at para. 50), that the BVI Statutory Assistance Regime provides a complete and exhaustive code whereby a qualified foreign representative may apply for assistance and therefore that assistance at common law is not available to foreign office holders appointed in non-designated countries.

BVI alternatives

This decision creates challenges for insolvency office holders from non-designated countries wishing to take steps to recover assets in the BVI. Although office holders from non-designated countries may be recognised in the BVI, the BVI Court has no jurisdiction to afford them any assistance.

However, this challenge is not an absolute obstacle to such recoveries.

It does not prevent the foreign office holder from pursuing any substantive legal rights in the BVI.

For example, where under the foreign law of insolvency, a debtor's estate has vested in the foreign office holder, and that estate includes shares in a BVI company, the foreign office holder can seek an order from the BVI court rectifying the register of the BVI company

to substitute his or her name for that of the debtor.

In certain circumstances, it may be also possible to obtain a substantive order from the BVI court appointing a liquidator or trustee in bankruptcy to the debtor under the BVI Insolvency Act.

Further, there are some circumstances where there is no need for court assistance.

For example, a foreign office holder appointed in respect of a foreign company which has BVI subsidiaries, does not require the benefit of a BVI Court order to enable him or her to exercise the foreign company's voting rights and, where the subsidiary's shares are majority owned by the foreign company, to take control of the subsidiaries in that way: see *KMG International NV v DP Holding SA BVIHC(COM) 144 of 2016*.

It follows that foreign office holders appointed in non-designated countries in respect of debtors holding assets within the BVI need not despair of the prospect of recovering those assets for the benefit of the debtor's estate.

There are workarounds which do not require the BVI Court to make an assistance order. A couple of these have been mentioned above, but there are others.

Good BVI Counsel will always be keen to explore the alternative routes available to foreign office holders with the objective of recovering and returning value to creditors.

