International Corporate Rescue

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2017 (6 issues)
Print or electronic access:
EUR 730.00 / USD 890.00 / GBP 520.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

A Tale of Two Islands: Recognising and Assisting Foreign Officeholders in Guernsey and the Cayman Islands

Sarah Brehaut, Partner, and **Phoebe Dengate Thrush**, Associate, Walkers (Guernsey) LLP and **Fiona MacAdam**, Senior Counsel, and **Amy McLeish**, Associate, Walkers, Cayman Islands

Introduction

In the increasingly internationalised corporate world, complex cross-border structures which include an offshore entity at some level within the structure are an everyday occurrence. However, the territorial limits of a court's powers can mean that such structures present difficulties for officeholders attempting to conduct an orderly and efficient winding up of a company's affairs.

In seeking to manage cross-border insolvency, officeholders rely on both statutory and common law powers of assistance, the latter of which have been the subject of much judicial debate since Lord Hoffman's articulation of the principle of 'modified universalism' in *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holdings Plc and others)*.[1]

The principle of modified universalism essentially provides that, within the constraints of public policy, courts should co-operate across jurisdictions. Thus, if a court-appointed officeholder operating in one jurisdiction (the 'home jurisdiction') requires assistance from the court of a different jurisdiction (the 'foreign jurisdiction'), the court in that foreign jurisdiction may, as a matter of common law, provide such assistance as that court properly can. Establishing what is proper in a given instance will depend both on the powers available to the court in the home jurisdiction, and also the powers available to the court in the foreign jurisdiction.

While important, the 'golden thread' of modified universalism is not a silver bullet to every jurisdictional difficulty faced by officeholders – each jurisdiction interfaces with the principle of modified universalism in its own way, as demonstrated by a comparison of the different approaches adopted in Guernsey and the Cayman Islands. Neither of these offshore jurisdictions is a party to the UNCITRAL Model Law on Cross-Border Insolvency 1997 (the 'Model Law') and statutory powers of assistance are only available in certain circumstances, with the result that the approach of each jurisdiction to the principle of modified universalism will often be determinative of assistance that can be provided to a foreign officeholder.

Statutory assistance

Guernsey

As explained above, Guernsey is not a signatory to the Model Law and is not a member of the European Union. As such, a foreign officeholder cannot rely upon the EU Regulation on Insolvency Proceedings or the Model Law to seek recognition and assistance in Guernsey. However, for liquidations occurring in England and Wales, Scotland, Northern Ireland, Jersey or the Isle of Man, section 426 of the English Insolvency Act 1986 (the 'Insolvency Act') has been extended to Guernsey by the Insolvency Act 1986 (Guernsey) Order, 1989. As a result, the Royal Court of Guernsey (the 'Royal Court') has a statutory power to provide assistance to officeholders appointed in those jurisdictions.

The procedure under section 426 of the Insolvency Act involves the foreign officeholder applying to the court in their home jurisdiction (i.e. England and Wales, Scotland, Northern Ireland, Jersey, or the Isle of Man) for an order that the home court send a letter of request to the Royal Court seeking assistance. Generally, the Royal Court must comply with the request unless it offends public policy or the outcome would be oppressive. In addition, section 426(5) of the Insolvency Act gives the Royal Court the ability to apply the insolvency law of either Guernsey or the foreign jurisdiction in relation to similar matters falling within its jurisdiction.

Cayman Islands

Companies Law (2018 Revision)

Like Guernsey, the Cayman Islands are not a signatory to the Model Law and prior to 2009, matters relating

Notes

1 [2006] UKPC 26 (on appeal from the High Court of Justice of the Isle of Man).

to cross-border insolvencies were not addressed in Cayman Islands legislation. The Companies (Amendment) Law 2007, which was brought into force on 1 March 2009, introduced what is now Part XVII of the Companies Law (2018 Revision) (the 'Companies Law') which, supplemented by the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018, sets out a mechanism by which the Grand Court of the Cayman Islands (the 'Grand Court') can provide assistance to the representative of a foreign company which is the subject of bankruptcy or insolvency proceedings in its country of incorporation.

Part XVII of the Companies Law gives the Grand Court a discretionary power to provide assistance for the purposes of:

(a) recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of the foreign company;

(b) enjoining the commencement or staying the continuation of legal proceedings against the foreign company;

(c) staying the enforcement of any judgment against the foreign company;

(d) requiring a person in possession of information relating to the business or affairs of the foreign company to be examined by and produce documents to its foreign representative; and

(e) ordering the turnover to the foreign representative of any property belonging to the foreign company.

In determining whether to provide assistance, the Grand Court is to be guided by 'matters which will best assure an economic and expeditious administration…' of the foreign company's estate, consistent with the following Cayman Islands policy objectives:[2]

(a) the just treatment of all holders of claims or interests in the foreign company's estate wherever they may be domiciled;

(b) the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;

(c) the prevention of preferential or fraudulent dispositions of property comprised in the foreign company's estate;

(d) the distribution of the foreign company's estate amongst creditors substantially in accordance with the order prescribed by Part V of the Companies Law (i.e. the order of distribution applicable to a liquidation commenced in the Cayman Islands);

(e) the recognition and enforcement of security interests created by the foreign company;

(f) the non-enforcement of foreign taxes, fines and penalties; and

(g) comity.

As noted by Justice Jones in *Picard and Bernard L. Madoff Investment Securities LLC (in liquidation) v Primeo Fund (in liquidation)*,[3] even if the foreign proceeding is recognised, the Grand Court may decline to provide assistance if the relief sought by the foreign representative would be likely to produce or contribute to an economic result which is inconsistent with the policy objectives of Cayman Islands corporate insolvency law.

The statutory provision reflects the traditional English common law rule that the court will only recognise the authority of a liquidator or trustee appointed under the law of the country of incorporation. This contrasts with the position under the Model Law which recognises the courts of the country in which an entity has its 'centre of main interests' ('COMI') (which is not necessarily the country in which the company is incorporated) as being competent to exercise bankruptcy jurisdiction.

For the purposes of Part XVII of the Companies Law, 'debtor' is defined as a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established. It does not include a Cayman Islands company which is the subject of a foreign bankruptcy proceeding and therefore it would not be possible, for example, for a trustee appointed in respect of a Cayman Islands company pursuant to Chapter 11 of the United States Bankruptcy Code to seek recognition and assistance from the Grand Court pursuant to Part XVII of the Companies Law. Assistance may, however, be available as a matter of common law (considered in further detail below).

Companies Winding Up Rules 2018

Where a Cayman Islands company in liquidation is also the subject of a concurrent bankruptcy proceeding under the law of a foreign country, or where the assets of a Cayman Islands company in liquidation located in a foreign country are the subject of a bankruptcy proceeding or receivership under the law of that country, the Cayman Islands liquidator has a duty under the Companies Winding Up Rules 2018 to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder. The purpose of an international protocol is to promote the orderly administration of the estate of a Cayman

Notes

2 Section 242 of the Companies Law.
3 [2013 (1) CILR 164]

Islands company in liquidation and avoid duplication of work and conflict between the Cayman Islands liquidator and the foreign officeholder.[4]

In *In the matter of Lancelot Investors Fund Limited,*[5] a Cayman Islands open-ended investment fund with both creditors and an investment manager located in the United States had filed for bankruptcy in the United States and a trustee had been appointed under Chapter 7 of the United States Bankruptcy Code. The Chapter 7 trustee claimed to have exclusive jurisdiction over all of the company's assets however certain investors considered that the company should be wound up in the Cayman Islands and therefore presented a winding up petition to the Grand Court. The Grand Court recognised the United States as the principal place for the liquidation of the company, but noted that investments into the company were made in the Cayman Islands, the arrangements by which investments were made were governed by the laws of the Cayman Islands and therefore any claims that investors may have had against the company would have to be examined and assessed according to the law of the Cayman Islands. Accordingly, the Grand Court considered it appropriate for the company to also be wound up in the Cayman Islands and for a Cayman Islands liquidator to be appointed. However, the Grand Court stayed the winding up order, in accordance with the principles of judicial comity and universalism in corporate insolvency, to give the Cayman Islands liquidator and the Chapter 7 trustee an opportunity to discuss their respective roles and to agree a co-operation protocol for the efficient liquidation of the company, thus avoiding multiple proceedings and the duplication of costs.

Common law assistance

The development of the principle of modified universalism

The extent of assistance that can be provided to a foreign officeholder as a matter of common law was considered by Lord Hoffman in *Cambridge Gas*. Lord Hoffman stated that:

> 'At common law, their Lordships think it is 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 the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.'

In *Cambridge Gas*, the Privy Council was faced with a letter of request sent by the Federal Bankruptcy Court for the Southern District of New York (the 'New York Bankruptcy Court') to the High Court of Justice of the Isle of Man. The letter of request sought assistance in giving effect to a plan of reorganisation put forward by the creditors of a business pursuant to Chapter 11 of the United States Bankruptcy Code which had been approved by the New York Bankruptcy Court. The plan of reorganisation had the effect of vesting shares in an Isle of Man company which were held by Cambridge Gas Transport Corporation ('Cambridge Gas'), a Cayman Islands company, in the creditors of the business. It was accepted by the Privy Council that the New York Bankruptcy Court had no personal jurisdiction over Cambridge Gas; the central issue in dispute was whether the order of the New York Bankruptcy Court approving the plan was a judgment *in rem* or a judgment *in personam*, the answer to which would determine whether the order could be enforced against the shares held by Cambridge Gas in the Isle of Man company. The Privy Council held that the order of the New York Bankruptcy Court was neither a judgment *in rem* nor a judgment *in personam*, on the basis that:

> 'Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established.'

Jurisdiction to provide assistance in *Cambridge Gas* by recognising and enforcing the order of the New York

Notes

4 The Cayman Islands have also recently implemented a new Practice Direction (Practice Direction No: 1 of 2018) which requires officeholders appointed in the Cayman Islands, companies subject to restructuring proceedings supervised by the Grand Court and other interested parties involved in cross-border insolvency cases to consider whether to incorporate all/parts of two sets of guidelines for court-to-court communications (the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court communications in Cross-Border Cases and The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters).

5 [2009 CILR 7]

Bankruptcy Court was, according to the Privy Council, conferred upon the Manx court by the principle of universality which underlays the common law principles of judicial assistance in international assistance.

In *Rubin v Eurofinance*,[6] the Supreme Court held that *Cambridge Gas* was wrongly decided in so far as it held that special rules apply to orders or judgments made within bankruptcy proceedings, with jurisdiction to provide assistance to a foreign officeholder being conferred upon the Manx court by the principle of universality. As stated by Lord Collins, 'a change in the settled law of the recognition and enforcement of judgments ... has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation'.

Further guidance as to the extent of assistance that can be provided to a foreign officeholder as a matter of common law was provided by the Privy Council in *Singularis Holdings Limited v PricewaterhouseCoopers.*[7] In *Singularis*, liquidators were appointed in the Cayman Islands to Singularis Holdings Limited ('Singularis'), a company incorporated in the Cayman Islands. The liquidators obtained recognition of their appointment to Singularis from the Bermudian court and then sought production of internal working papers from Singularis' auditor in Bermuda, PricewaterhouseCoopers ('PwC'), pursuant to the common law principle of modified universalism. The court in Bermuda made an order recognising the appointment of the liquidators in Bermuda and exercised what was termed a common law power 'by analogy with the statutory powers contained in section 195 of the Companies Act' to order PwC to produce documents which they could have been ordered to produce under section 195 of the Bermuda Companies Act 1981. The order was overturned by the Court of Appeal and subsequently appealed to the Privy Council.

Two issues arose for determination by the Privy Council:

(a) whether the Bermuda court had a common law power to assist a foreign liquidator by ordering the production of information in circumstances where:

    i. the Bermuda court had no power to wind up an overseas company such as Singularis; and

    ii. its statutory power to order the production of information was limited to cases where the company was being wound up in Bermuda; and

(b) whether, if such a power existed, it was exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation was proceeding.

The Privy Council's decision was not unanimous and was delivered by the members of the Board in five separate judgments. Whilst the Board agreed that the second issue should be determined in the negative, Lord Mance and Lord Neuberger disagreed as to the extent / existence of a common law power of assistance.

In relation to the first issue, Lord Sumption referred to the decision of the Privy Council in *Cambridge Gas* and stated that *Cambridge Gas*, if correct, was authority for three propositions:

(a) the first is the principle of modified universalism, namely that the court has a common law power to assist foreign winding up proceedings so far as it properly can;

(b) the second is that this includes doing whatever it could properly have done in a domestic insolvency, subject to its own law and public policy; and

(c) the third (which is implicit) is that this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction *in rem* or *in personam* according to ordinary common law principles is irrelevant.

Lord Sumption noted that the first proposition had been subjected to 'fierce academic criticism' and held by a majority of the Supreme Court in *Rubin* to be wrong, and the second proposition was weakened by the absence of any explanation as to where the common law power came from. The Board was therefore of the view that the second and third propositions for which *Cambridge Gas* was authority could not be supported. However, the majority of the Board confirmed that the first proposition, the principle of modified universalism itself, had not been discredited. On the contrary, Lord Sumption noted that the first proposition in *Cambridge Gas* had been accepted in principle in both *HIH Casualty and General Insurance Ltd*[8] and in *Rubin.*

The majority of the Board therefore accepted that the principle of modified universalism is part of the common law. However, it was held that the principle is much more limited in scope than articulated in *Cambridge Gas* – as stated by Lord Sumption, it is 'necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers'.

In the absence of a relevant statutory power available to a foreign officeholder, the question becomes how far it is appropriate to develop the common law

Notes

6 [2012] UKSC 46
7 [2014] UKPC 36 (on appeal from the Court of Appeal of Bermuda)
8 [2008] 1 WLR 852

to make the power sought by the foreign officeholder available. The majority of the Board was of the view that there is no single universal answer to this question – it very much depends on the nature of the power that the court is being asked to exercise. The fact that a statutory power exists to make a particular order in a domestic insolvency does not mean that a similar power automatically exists at common law. However, the existence of a statutory power does not exclude the possibility of an equivalent power at common law – the majority of the Board held that an implied exclusion of non-statutory remedies arises only where the statutory scheme can be said to occupy the field, which will normally be the case if the subsistence of the common law power would undermine the operation of the statutory one, usually by circumventing limitations or exceptions to the statutory power which are an integral part of the underlying legislative policy.

Lord Sumption stated that the common law power is subject to the following limitations:

(a) it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It is not, for example, available to assist a voluntary winding up, which is essentially a private arrangement and not conducted by or on behalf of an officer of the court;

(b) it is a power of assistance which exists for the purpose of enabling foreign courts to surmount the problems posed for a world-wide winding up of a company's affairs by the territorial limits of each court's powers. It is not, therefore, available to enable a foreign officeholder to do something which they could not do under the law by which they were appointed;

(c) it is available only when it is necessary for the performance of the officeholder's functions; and

(d) the order sought must be consistent with the substantive law and policy of the assisting court.

The majority of the Board ultimately refused to make the order requested by the liquidators on the basis that the liquidators could not have obtained similar relief in their home jurisdiction and it is 'not a proper use of the power of assistance to make good a limitation on the powers of the foreign court of insolvency jurisdiction under its own law'.

How has Singularis *been applied in Guernsey?*

In *Brittain v JTC (Guernsey) Limited,*[9] an English trustee in bankruptcy sought an order from the Royal Court recognising her right to examine persons involved in or connected with the bankrupt's affairs, including persons involved in the management of two Guernsey companies said to be connected to the bankrupt. There was power to seek such an order under section 426 of the Insolvency Act, however such power was not invoked due to concerns regarding delay and risk of tipping off the bankrupt. The Royal Court was therefore required to determine whether it has jurisdiction at common law to order a third party, resident within the jurisdiction of the Royal Court, to provide documents and information to an English trustee in bankruptcy. The trustee believed that the third party in question held information that might assist in the performance of her functions, including tracing assets of the bankrupt and allowing the trustee to understand the relevant affairs of the English bankrupt generally.

The trustee argued that, following the decision in *Singularis*, the issues for the Royal Court to consider were (i) whether or not any local laws would prevent the granting of the assistance sought, and (ii) whether there were any relevant considerations which meant that the granting of the order sought would be contrary to Guernsey public policy. The trustee argued that as there was no local law that prevented the granting of the order, and no relevant public policy considerations, assistance should be provided.

Lieutenant-Bailiff Hazel Marshall ('LB Marshall') did not accept this argument. In her view, the starting point was first to determine whether or not there was a power to make the order sought at all. She held that, when considering whether a particular power was common to both jurisdictions, this assessment was more of a procedural question to be addressed and not a part of the test for determining whether that power existed in the first place.

LB Marshall commented that the judicial division among the members of the Board in *Singularis* was on this very point – whether or not the common law power existed at all, or if there was in any event an inherent jurisdiction to make the orders sought. She noted that '[i]t is very unusual to have a dissenting judgment in the Privy Council, because it is general convention that the Privy Council gives unanimous advice to Her Majesty, and it is therefore to be inferred that this is a difficult legal point.'

LB Marshall went on to note that she preferred the minority view of the Privy Council in *Singularis* to the majority, and was inclined against the existence of a common law power:

> 'I would say that, untrammeled by any constraints of binding authority, my judgment would strongly side with the minority judgment in the Privy Council. I would find against the existence of any common law power in this context, i.e. an inherent jurisdiction

Notes

9 [2015] GLR 248

> to treat a power conferred only by statute as being available in a case which is not within the statute, relying on some combination of usefulness, a generous assessment of analogy, and resort to a supposed beneficial principle of "modified universalism" of insolvency law of indefinite and necessarily presupposed extent.'

She was also concerned that a finding that would oblige third parties, possibly under threat of contempt of court, to provide information in respect of the affairs of a third party was 'draconian', which one generally saw conferred by way of statute. In any event, LB Marshall noted that the absence of the power to compel third parties in Guernsey as sought by the trustee had actually been dealt with in earlier Guernsey cases, and she did not consider *Singularis* to overrule the local case law.

LB Marshall also viewed as persuasive the fact that the alternative statutory route was available to the trustee, but that this process had not been pursued when it would have been proper to do so. Accordingly, the Royal Court declined to make the order sought.

In *In the Matter of Lee Douglass (In Bankruptcy)*,[10] the application of *Singularis* was further considered from a Guernsey perspective in the context of the interface between foreign insolvency proceedings and the Guernsey customary laws of *désastre*.

The Norman customary law foundation to the common law in the Bailiwick means that a Guernsey insolvency can look quite different to bankruptcy in other jurisdictions. When a Guernsey person (including a corporate personality) is unable to pay its debts, they are said to be '*en état de désastre*' – quite literally in a 'state of disaster'. Historically, *désastre* had very few rules governing its procedure, but the purpose was to permit creditors to share in proceeds from the sale of a debtor's personal effects, those assets having been seized by Her Majesty's Sheriff (as distinct from any real estate, which is dealt with separately). As a matter of law, the declaration that a person is *en désastre* has no bearing on the future activities of the debtor, but it also does not operate as any sort of discharge from the debtors' liabilities in the way that a declaration of bankruptcy might.

In *Douglass*, English trustees in bankruptcy sought, *inter alia*, an order that would allow them to collect Guernsey funds and assets as part of the English bankruptcy proceedings.

Although insolvency proceedings against Mr Douglass were progressing in the English courts, Mr Douglass was also a judgment debtor in Guernsey, being the subject of both *saisie* (the process by which a creditor pursues the real estate of a debtor) and *désastre* processes.

Mr Douglass' creditors in Guernsey (Confiance Ltd) were engaging with both the English bankruptcy proceedings and the Guernsey *désastre* proceedings. Confiance Ltd opposed the trustees' application for all Guernsey assets to be turned over to the trustees, in so far as it could apply to funds now held by the Sheriff seized by way of *désastre* processes. In response, the trustees argued that in seeking to participate in the English bankruptcy proceedings, Confiance Ltd had '[overridden] its ongoing use of the désastre process in Guernsey'.

Deputy-Bailiff McMahon did not accept this argument, noting that the *désastre* process in Guernsey will not necessarily produce the same result as an English bankruptcy and therefore participation in the parallel proceedings was not inconsistent. Further, and importantly from a practical perspective, the assets held by the Sheriff did not form part of the estate of Mr Douglass as a matter of customary law, and therefore could not be affected by any order made for the benefit of the trustees.

Deputy-Bailiff McMahon also noted with apparent approval the views expressed by LB Marshall in *Brittain* in finding that Guernsey will prefer the minority judgment in *Singularis*:

> 'It is apparent that the courts in a number of jurisdictions have had to grapple with the means by which to provide assistance in cross-border insolvencies and the limitations that may be imposed on the extent of any such assistance. In Guernsey, this was the issue in the Brittain case (supra), in which the Lieutenant-Bailiff, not being bound by the majority decision in the Singularis case, preferred the reasoning of the minority (Lords Neuberger and Mance), rejecting the existence of any inherent jurisdiction to treat a power conferred only by statute as being available in a case which is not within the statute.'

Notwithstanding the view of LB Marshall, Deputy-Bailiff McMahon ultimately found that, at least concerning the recognition of an officeholder and the necessary ancillary powers (as opposed to what Deputy-Bailiff McMahon termed 'more far-reaching power that has no identifiable equivalent outside a statutory framework'), this recognition could be obtained by way of letter of request under section 426 of the Insolvency Act, or under the customary law. Deputy-Bailiff McMahon went on to draw a further distinction between an application under section 426 of the Insolvency Act where no local processes had been commenced, and circumstances where *désastre* or other customary law avenues were being pursued, which threw up additional issues concerning the effectiveness of modified universalism.

Notes

10 *Lee Douglass (in Bankruptcy) v Krasner & Wright* (2017) (Unreported, Royal Court, 10th July) (Guernsey Judgment No. 32/2017)

What does this mean for foreign officeholders seeking assistance in Guernsey?

In the light of the decisions in *Brittain* and *Douglass*, foreign officeholders may, in certain circumstances, be able to obtain certain orders in the pursuance of foreign insolvency proceedings in reliance on the common law, but this is by no means a *carte blanche*. In particular, foreign officeholders will need to pay particular attention to any local customary law proceedings on foot and may have difficulty obtaining orders that could be considered beyond the ordinary course.

From the point of view of both foreign creditors and foreign officeholders, such uncertainty is unsatisfactory. However, statutory reform of the Guernsey insolvency regime has been proposed which, if implemented, would provide a statutory basis for foreign officeholders to seek information from third parties in a way not currently allowed, and would provide a significant measure of clarity to the insolvency regime overall.

How has Singularis *been applied in the Cayman Islands?*

Comparatively, the principle of modified universalism has been expressly affirmed in the Cayman Islands (subject to the limitations on the common law power of assistance identified by Lord Sumption in *Singularis*).

In *Picard and Bernard L. Madoff Investment Securities LLC (in liquidation) v Primeo Fund (in liquidation)*,[11] which was decided after *Rubin* but before *Singularis*, the Grand Court held that the Supreme Court in *Rubin* did not reject the underlying proposition that recognition at common law 'carries with it the active assistance of the court'. As noted by Justice Jones, the Supreme Court in *Rubin* confirmed the common law power to recognise and grant assistance to foreign proceedings, and only rejected the proposition that 'active assistance' extended to the enforcement of *in personam* judgments made in bankruptcy proceedings which would not otherwise be enforceable in accordance with established conflict of law rules. Justice Jones considered that the Supreme Court in *Rubin* did not express a view on the question which he had to decide, which was whether the assistance available to a foreign officeholder at common law extends to providing the foreign officeholder with a 'direct remedy', meaning an original cause of action which could be pursued against a person in the Cayman Islands, and that it remained open to him to accept Lord Hoffman's answer to that question (based on *Cambridge Gas*). It was held that the scope of assistance available at common law did in fact include the power to apply Cayman Islands statutory provisions (in this instance, avoidance provisions of Cayman Islands insolvency law). However, the Grand Court did not have the ability to apply foreign law statutory provisions in the Cayman Islands.[12]

More recently, the Grand Court relied upon the decision of the Privy Council in *Singularis* in finding that assistance could be provided to a *foreign* officeholder appointed in respect of a Cayman Islands entity as a matter of common law (whilst the Grand Court has a statutory power to provide assistance to a foreign officeholder, such power can only be exercised where a foreign entity is subject to a foreign bankruptcy proceeding in the country in which it is incorporated and therefore the statutory power is of no assistance to a foreign officeholder appointed in respect of a Cayman Islands company).

In *In the matter of China Agrotech Ltd*,[13] the Hong Kong liquidators of China Agrotech Holdings Limited ('China Agrotech'), a Cayman Islands company, sought permission from the Grand Court to promote a scheme of arrangement in the Cayman Islands between China Agrotech and its creditors in the Cayman Islands. The scheme of arrangement was part of a corporate rescue of China Agrotech involving a parallel scheme of arrangement in Hong Kong and a restructuring of China Agrotech's capital. There were no parallel insolvency proceedings in respect of China Agrotech in the Cayman Islands.

The Grand Court's starting point for the consideration of the nature and scope of its non-statutory jurisdiction to recognise and assist foreign officeholders was the decision of the majority of the Board in *Singularis* (in particular, the judgment of Lord Sumption). Based on *Singularis*, Justice Segal made the following points:

(a) the Grand Court is to be treated as having a power to recognise and grant assistance to foreign proceedings and liquidators (at least where those proceedings are commenced in and the liquidators are appointed by the court). If the circumstances justify its use, and subject to the limitations on its use, the power can be exercised by making suitable orders for the purpose of enabling the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of its powers. This is the purpose for which the power can be exercised;

(b) the court's power is a non-statutory jurisdiction which is based on and justified by the public interests as identified by Lord Sumption in Singularis. In

Notes

11 [2013 (1) CILR 164]

12 This decision was appealed to the Cayman Islands Court of Appeal but was not overturned on this point.

13 Unreported, 19 September 2017, Segal J

deciding whether and how to exercise the power, the court has regard to and applies the approach which has been labelled 'modified universalism';

(c) suitable orders include any order which the court can make in the circumstances based on and by applying the applicable domestic substantive or procedural law, provided that such law is applicable to the particular case before the court;

(d) the court cannot grant relief by making an order which can only be made in reliance on a domestic statutory provision which, by its terms, does not apply in the circumstances. Nor can the court make an order that grants relief to a foreign liquidator which depends on there being a domestic law right which does not in the circumstances exist;

(e) where the foreign liquidator is appointed in the country of incorporation of the company concerned, the domestic private international law of the requested court will apply so that the liquidator is treated as being entitled to act for and on behalf of the company;

(f) when the foreign liquidator is not appointed in the country of incorporation, he cannot rely on this rule of private international law and instead must invoke the common law power in order to be permitted to act on behalf of the company; and

(g) the limitations on the common law power (both as to its scope and the circumstances in which it will be exercised) are those described by Lord Sumption in *Singularis*.

The Grand Court held that the common law power could be exercised to provide assistance to the Hong Kong liquidators for a number of reasons:

(a) the issue was who should be entitled to act and bring proceedings for a scheme of arrangement on behalf of China Agrotech. There were no competing claims by creditors which would result in different levels of recovery or returns depending on whether the liquidators were granted the relief they were seeking;

(b) the liquidators simply wished to be able to promote a parallel scheme of arrangement in the Cayman Islands and to prevent any proceedings in the Cayman Islands being litigated in a manner that would disrupt or interfere with the scheme process;

(c) there was no likelihood of an application being made for a winding up order in the Cayman Islands;

(d) China Agrotech had substantial contacts with Hong Kong – its shares were listed in Hong Kong, its business was administered from Hong Kong, it was registered in Hong Kong and the majority of shareholders had addresses in Hong Kong; and

(e) there was no need for or reason why creditors or members would benefit from a Cayman Islands winding up and there were no local reputational, regulatory or policy reasons requiring a Cayman Islands winding up.

Justice Segal noted that China Agrotech's COMI, as that term is used in the Model Law, was probably in Hong Kong and although that was not determinative (given that the Cayman Islands is not a signatory to the Model Law and there is no concept of COMI in Cayman Islands law), it was a consideration of considerable weight to be taken into account when deciding whether the 'foreign, non-place of incorporation, liquidation' should be treated as competent and justifying assistance.

What does this mean for foreign officeholders seeking assistance in the Cayman Islands?

Whilst the assistance that can be provided to a foreign officeholder will depend on the circumstances of each case, the authorities demonstrate that the Cayman Islands courts will adopt a pragmatic approach to a request by a foreign officeholder or foreign court for assistance and endeavour to facilitate the efficient and expeditious liquidation of companies wherever possible.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, US Corner, Economists' Outlook and Case Review Section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com