Briefing

BURGES SALMON

Corporate Turnaround and Insolvency

Saad, the Privy Council and common law assistance between courts – the limits of modified universalism

The much anticipated judgments in *PricewaterhouseCoopers v Saad Investments Company Limited [2014] UKPC 35 and Singularis Holdings Limited v PricewaterhouseCoopers [2014] UKPC 26* were handed down on 10 November. Where do we now stand on the common law rules concerning assistance to foreign courts?

The background

"Modified universalism" is the ideal that in multi-jurisdictional insolvencies the laws of the country in which a debtor is incorporated (or resident) should govern the conduct of the international aspects of proceedings, provided the principles of public policy in the country where the proceedings are to have effect would not be compromised. This means that, in cases where no statutory scheme applies to assist foreign courts (such as the EC Insolvency Regulation or the UNCITRAL Model Law), the common laws of domestic courts should be used to offer assistance to the foreign courts with principal jurisdiction.

The defect in the concept is that there is no universally applicable set of principles which the courts can look to when considering international requests for assistance – as confirmed by *Rubin v Eurofinance SA [2012]* UKSC 46. Each court must rely on its own particular common law and statutory jurisprudence.

In these two cases:

(i) Saad involved the Supreme Court of Bermuda sanctioning a winding up order made against a Cayman Islands incorporated entity (Saad, which had also been wound up in Cayman). The sole reason for the order, the making of which was appealed by the auditors, was to obtain an order for delivery up of documents against the auditors under Section 195 of the Bermudan Companies Act 1981 (CA 1981), which the court duly granted. The questions for the Privy Council was whether the court had exceeded its jurisdiction in approving the making of the winding up order and whether the section 195 order should be discharged.

(ii) Singularis involved a request for production of information by the liquidator of a Cayman Islands incorporated entity, Singularis, which was refused by the Court of Appeal of Bermuda.

In *Singularis*, the company was wound up in Cayman, and the Cayman court ordered its auditors to deliver up to the liquidator any property or documents belonging to the company. The liquidators also wanted property belonging to the auditors (exceeding the scope of the Cayman order) and sought an order under Section 195 of the CA 1981 in Bermuda. Such an order was only available in respect of companies which had been ordered to be wound up by the Bermudan courts. However the court of first instance purported to exercise a common law power to order the auditors to produce the necessary documents. The Court of Appeal of Bermuda overturned this order.

The question for the Privy Council was whether the Bermudan courts had jurisdiction to accede to such requests.

What did the court decide?

(i) In Saad, the courts analysed the Supreme Court of Burmuda's jusrisdicition to make a winding up order. It became apparent that the sole basis for making an order was under statute, and that under Section 161 of the CA 1981, the expression "companies" did not extend to foreign companies. A further Bermudan statute did not assist, as it did not anticipate that a winding up petition would involve the company being sued for a "cause of action".

Although the Bermudan Supreme Court had unlimited jurisdiction (meaning its decisions stand until overturned by the same court), they did have the power to stay the winding up proceedings, and that discretion should have been exercised. Although the auditors were "strangers" to the winding up and should not generally be allowed to appeal them, their submissions should have been heard and they ought to have been added as a party, as

continued overleaf

they were the target of the proceedings by reason of the Section 195 order. Accordingly the Section 195 order was discharged.

(ii) In *Singularis*, the Privy Council decided that under the principles of "modified universalism", the courts did have common law powers to assist foreign winding up proceedings. However, although statute might assist the common law, a similar power must exist under common law as that provided for under statute.

Additionally, although under modified universalism, being founded on public interest, it was in countries' interests in general to render assistance to foreign jurisdictions, it was only available to assist officers of a foreign court in the performance of that office-holder's functions, not for obtaining information in anticipation of bringing proceedings, and was conditional upon the office-holder undertaking to pay the third party's reasonable costs of compliance.

In this case the Cayman court had no power to make a corresponding order to the assistance requested by a foreign office-holder to the domestic court. The scope of the Cayman court's power was limited to property belonging to the company, not property belonging to third parties. Modified universalism and Bermudan court assistance should not be used to make good a limitation imposed upon the powers of a foreign court. Accordingly the Bermudan Court of Appeal's refusal to grant the Section 195 order was upheld.

What does this mean for practitioners?

Modified universalism is one of those (rare!) "sexy" areas of insolvency law with which it is all too easy to get carried away.

In practice, there are limitations on the type and extent of assistance which domestic courts will be prepared to offer foreign courts, as amply demonstrated by the *Singularis* decision.

When thinking about asking foreign courts to assist with office holder actions and duties, if matters are not covered by a substantive international treaty or piece of legislation (such as the EC Insolvency Regulation or UNCITRAL Model Law), the following general principles should be borne in mind:

1. Courts of other countries may not use their inherent jurisdiction or the common law to give IPs powers which are not available in the jurisdiction of their appointment.
2. If asking a foreign court to grant a winding up order in order to assist an English insolvency proceeding, the jurisdiction of the foreign court will need to be very carefully considered. Even in England and Wales, there are certain minimum threshold conditions which need to be considered (see for example *Re Buccament Bay Limited and another [2014] EWHC 3130*).
3. Foreign court assistance will only be granted to further the insolvency procedure – it will not be granted to permit a "fishing expedition" in anticipation of potential litigation.
4. If foreign court assistance is sought in order to pursue third parties located in the foreign jurisdiction, expect the above factors to be extremely carefully scrutinised.

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