

COMPANIES AND SHAREHOLDERS IN THE SPOTLIGHT:



THE LAW IN THE BVI ON THE RECOGNITION OF FOREIGN OFFICIALS AND ORDERS IN AID OF FOREIGN PROCEEDINGS FOLLOWING THE COURT OF APPEAL'S DECISION IN NET INTERNATIONAL PROPERTY LIMITED

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Introduction

This article considers Parts XVIII and XIX of the Insolvency Act, 2003 (the "Act") of the BVI in the context of the Eastern Caribbean Supreme Court appellate decision *Net International Property Limited v Adv. Eitan Erez* BVIHCMP2020/0010 (delivered 22 February 2021) ("Net International").

Background to Proceedings

In *Net International*, the BVI Commercial Court was being asked to grant recognition in the BVI to Adv Eitan Erez, a trustee in bankruptcy appointed in Israel (the "Trustee") over the assets of an Israeli citizen Mrs Rachel Sayag Sofer the "Debtor", namely her "interests" in *Net International Property Limited* ("Net International" or the "Company") a company incorporated in the BVI.

1. In its decision of 21 March 2016, the District Court of Israel found that Mrs Sofer was the owner of the bearer shares and the controlling owner and 'moving force' of *Net International* and stated that the Trustee ought to take steps in the BVI to register himself as shareholder of *Net International* in accordance with the Company's articles and under the law of the British Virgin Islands.

The decision of the District Court was appealed by Mrs Sofer.

On 3 October 2018, the Supreme Court of Israel affirmed the decision by the District Court that Mrs Sofer was the owner of shares in the Company and its moving force. As a consequence and to gain control of *Net International* in the jurisdiction in which it was domiciled, the Trustee brought a claim in the BVI seeking an order that he be recognised in the BVI as Trustee of the assets of Mrs Sofer in the BVI, namely her beneficial and legal interests in the shares of *Net International*, and for ancillary orders that may be reasonably required to assist in his duties as Trustee in view of satisfying the claims of the Debtor's creditors, including but not limited to an order compelling the registered agent of the Company to deliver up the register of members of *Net International*. Since Israel was not on the list of countries designated under the Act, the Trustee sought to invoke the Court's common law power to recognise a foreign official.

First-Instance Decision

On 9 June 2020, the Commercial Court Judge Justice Adrian Jack [Ag] recognised the Trustee in the BVI. The Judge went on to direct *inter alia* that the Trustee be registered as shareholder of *Net International* and that the registered agent rectify the

register of members to reflect that change. In arriving at that decision, the Judge relied on the Court's common law and inherent jurisdiction to grant both recognition and assistance to the Trustee. *Net International* appealed that decision.

Appellate Decision

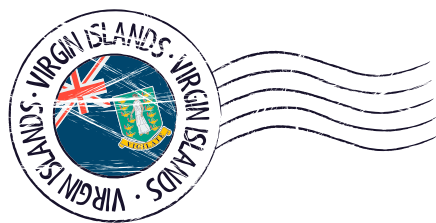
On 22 February 2021, the Court of Appeal affirmed the first-instance decision recognising the Trustee as the trustee of the assets of Mrs Sofer in the BVI but set aside the orders granting assistance to the Trustee. While recognising the limiting effect of its decision, the Court of Appeal concluded that while the Court retained a common law jurisdiction to grant common law recognition, the common law on assistance had been superseded by section 466 of the Act.

As a result the court did not have the jurisdiction to grant assistance to the Trustee because, having been appointed in Israel, he was not a foreign representative appointed by a court in a relevant foreign country.

Recognition and Assistance Distinguished

In effect, the Court of Appeal's decision confirmed that a Trustee could be recognised in the BVI and thus treated as if he/she was a BVI trustee, but stated that the Court could not grant orders in aid of a foreign representative under the Act.

In its judgment, while the Court of Appeal emphasised that recognition was the formal act of a local court recognising or treating a foreign office holder as having status in the BVI in accordance with his appointment by the foreign court, it took the view that assistance was a different concept as it aimed to provide the foreign office holder with the means and power to deal with the BVI assets. In making this important distinction, the Court of Appeal accepted that the two concepts were at times blurred in practice, as recognition will usually be accompanied by assistance.



Relevant Legislation: Parts XVIII and XIX of the Act

Part XVIII provides the regulatory framework for recognition of foreign office holders and was drafted for the purpose of promoting cooperation between foreign countries in cases of cross-border insolvency, and for facilitating the protection and maximisation of the value of a debtor's assets. Part XVIII, however, is not yet in force.

Part XIX provides a comprehensive scheme for assisting foreign office holders without the need to apply for recognition under the common law. Part XIX prescribes a wide array of orders in aid of foreign proceedings including conferring on the Court the power to grant any such relief it considers appropriate to facilitate, approve or implement arrangements that will result in the co-ordination of cross-border insolvency proceedings. Significantly, section 470 under Part XIX affords the BVI Court further powers by providing that "nothing in this Part limits the power of the Court or an insolvency officer

to provide additional assistance to a foreign representative where permitted under any other Part of this Act or under any other enactment or under any rule of law of the Virgin Islands."

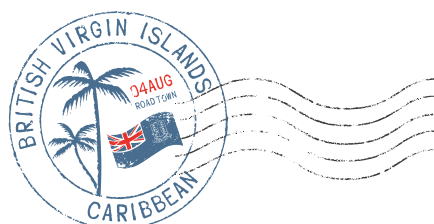
A significant aspect of Part XIX is that it is only available to those foreign office holders appointed by the courts of a "relevant foreign country".

The relevant foreign countries are designated by the Financial Services Commission of the Territory of the Virgin Islands, and are Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, United Kingdom and United States of America (the "Designated List"). The designations took effect on the 23rd day of August 2005 and remain the same as of the date of publication of this article.

On the Court of Appeal's analysis, the Commercial Court Judge was right to grant recognition to the Trustee as recognition was a part of the common law of the BVI before the passing of the Act, and would remain the case while Part XVIII was not yet in force. While Part XVIII remains ineffective, there can be no express or implied abrogation of the common law right of recognition. On the other hand, Part XIX expressly abrogated the common law right of assistance as those provisions are in effect. In circumstances where the Trustee was appointed in Israel, a country not on the Designated List, the Court had no power to grant assistance to the Trustee and that included the rectification order against the registered agent of Net International.

What Next?

The clarification by the Court of Appeal that the common law jurisdiction to recognise a foreign official wherever appointed remains and has not been superseded by subsequent decisions or the Act, is a welcomed development not least because until the decision in that case, opinions on the boundaries of that jurisdiction were conflicting.



It is the view of these authors that a trustee recognised by a BVI court with the consequence that that trustee is treated as if he/she were appointed by a BVI court would have the authority to bring an action on the Company's behalf, take corporate steps on behalf of the company, require disclosure from former officers etc. so there are very tangible practical benefits to recognition.

However, that there is no jurisdiction to grant orders in aid of a foreign official if that official is not appointed by the courts of a designated country is limiting, and the need for legislative change enlarging the countries designated for the purpose of the Act becomes even more important. Perhaps in part as a result of that decision and a clear recognition of the need for further change, on 29 October 2021 a few months after the Net International decision, the Financial Services Commission, by letter to key stakeholders, sought a view on whether or not the list of nine jurisdictions designated under section 466 should be extended, and if so, to which countries. An expansion of the list of designated countries coupled with clarity on the common law position in the BVI is likely to be invaluable to practitioners seeking creative solutions to corporate cross-border dilemmas: more commonly the tracing, identification and the ability to deal with assets for the benefit of the estate of a BVI corporate entity or a judgment or award creditor.

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