

# RE MTGOX: USING THE BIA TO RECOGNIZE FOREIGN INSOLVENCY PROCEEDINGS

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In a recent decision, the Ontario Superior Court clarified the test by which Ontario courts will recognize foreign bankruptcy proceedings. Specifically, in *Re MtGox Co* [\[1\]](#) the court applied *Part XIII of the Bankruptcy and Insolvency Act* ("BIA"), [\[2\]](#) which deals with cross-border insolvencies, to recognize Japanese bankruptcy proceedings for MtGox Co., Ltd. ("MtGox") in Canada.

Earlier cases in Canada had recognized foreign insolvency proceedings under parallel provisions in the *Companies' Creditors Arrangement Act* ("CCAA"), [\[3\]](#) but there is little, if any jurisprudence dealing with the cross-border insolvency provisions of the BIA introduced in 2009. In addition to clarifying the test to recognize a foreign bankruptcy proceeding under the BIA, the MtGox decision also indicates that BIA cross-border provisions are equally as effective and useful as similar CCAA cross-border provisions.

## MtGox's Bankruptcy

MtGox was one of the largest Bitcoin exchanges in the world. At the beginning of 2014, MtGox halted all withdrawals of Bitcoins, claiming that it lost 850,000 Bitcoins in a hacking attack. MtGox subsequently filed a petition for a civil rehabilitation proceeding in Tokyo, which is analogous to restructuring proceedings available to debtors in Canada. Recognizing the difficulty of a successful rehabilitation, the Tokyo District Court dismissed the civil rehabilitation petition and commenced bankruptcy proceedings, appointing a bankruptcy trustee.

Following the bankruptcy, Canadian investors launched a \$500 million class action against MtGox alleging negligence, breach of contract and fraud. In response, MtGox's bankruptcy trustee sought recognition of the Japanese bankruptcy proceeding in Ontario. Recognition would result in a stay of all actions brought against the company in Canada, including the class action. In order to obtain such relief, MtGox had to demonstrate that: (i) the bankruptcy proceedings in Japan were a "foreign proceeding"; (ii) the trustee was a "foreign representative"; and (iii) the bankruptcy proceedings in Japan were a "foreign main proceeding."

## The Concept of "Foreign Proceeding" and "Foreign Representative"

On the first two questions, the court considered section 268(1) of the BIA which lays out the definitions of "foreign proceeding" and "foreign representative" and found that the bankruptcy proceedings in Japan are a "foreign proceeding" and the trustee is a "foreign representative." The Court determined that the bankruptcy proceedings in Japan fell under the definition of "foreign proceeding" because the Japan bankruptcy proceeding were a judicial proceeding dealing with the creditors' collective interest under the Japan *Bankruptcy Act*. In addition, the Court also determined that the trustee met the two-part definition of "foreign representative" because: (a) the trustee had the authority, pursuant to the Japan *Bankruptcy Act* and the bankruptcy order made by the Tokyo District Court to administer MtGox's property and affairs for the purpose of liquidation; and (b) the trustee had the authority to act as a representative in respect of the foreign proceeding.

### **The Importance of the Designation: "Foreign Main Proceeding"**

After recognizing that the bankruptcy proceedings in Japan were a "foreign proceeding" and that the trustee was a "foreign representative," the Court considered whether the claims against MtGox should be stayed. A determining factor is whether the foreign proceedings are a foreign main proceeding or a foreign non-main proceeding. A foreign main proceeding is defined in section 268(1) as a foreign proceeding in a jurisdiction where the debtor company has the **centre of main interests** ("COMI"). Section 268(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the COMI. In this case, the Court held that the Japan bankruptcy proceedings are a foreign main proceeding because MtGox's COMI was in Japan. The Court considered the following factors, among others:

- i. the location is readily ascertainable by creditors;
- ii. the location is one in which the debtor's principal assets and operations are found; and
- iii. the location is where the management of the debtor takes place.

Furthermore, a number of relevant facts supported a finding that MtGox's COMI was in Japan, including (i) that MtGox had no assets or offices in Canada, (ii) that MtGox was and always has been organized under the laws of Japan, (iii) the registered office and books and records of MtGox were in Japan, (iv) the sole director of MtGox resides, and at all relevant times had resided, in Japan, (v) most of MtGox's bank accounts are located in Japan, (vi) MtGox's parent corporation supplied services to it in Japan, (vii) the MtGox website clearly disclosed that it was a Japanese corporation located in Japan, and (viii) MtGox was investigating the hacking that occurred against it under the oversight of the Tokyo District Court.

### **Significance and Implications**

The effect of recognizing the Japan bankruptcy proceedings as a foreign main proceeding was an automatic

grant of relief, as set out under subsection 271(1) of the BIA, which included staying the class action commenced in Canada against MtGox.

The analysis and outcome in the MtGox case is consistent with the body of case law that has emerged under the CCAA concerning recognition of foreign proceedings and highlights the willingness of Canadian insolvency courts to recognize principles of international judicial co-operation and comity in the context of foreign insolvency proceedings that may impact stakeholders in Canada. Further, the decision in MtGox suggests that an application under the BIA for recognition of a foreign proceeding may be equally effective as an application under the CCAA. This approach may offer a more efficient and cost-effective venue for obtaining a stay in Canada in respect of a foreign insolvency proceeding where no restructuring in respect of the debtor company is being contemplated in Canada.

For more information on the doctrine of COMI and recognition of foreign insolvency proceedings in Canada, please refer to our earlier bulletin, [clarifying COMI: locating a debtor's centre of main interests](#).

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[1][ps2id id='1' target=''] *MtGox Co, Re*, 2014 ONSC 581, 2014 CarswellOnt 13871.

[2][ps2id id='2' target=''] *Bankruptcy and Insolvency Act*, RSC 1985 c B-3.

[3][ps2id id='3' target=''] *Companies' Creditors Arrangement Act*, RSC 1985 c C-36.

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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