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Cayman Islands Restructuring: Court-to-Court Communication and Co-operation in Cross-Border Matters

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With a marked increase in large-scale cross-border insolvency and restructuring proceedings in the Cayman Islands and elsewhere, there is a greater focus on principles of comity and co-operation between courts and collaboration between officeholders.

In different contexts, the Cayman Court has shown a willingness to work with and assist other jurisdictions. In recent cross-border insolvency and restructuring matters, the Cayman Court has expressed a desire to formalise the channels of communication between courts when dealing with parallel proceedings and complex corporate groups. For example, in a recent decision in the matter of *Silver Base Group Holdings Limited*,[1] Mr Justice Doyle stated that:

> "*It may be that in the future a protocol can be arrived at for appropriate communications with courts in different jurisdictions dealing with cases involving the same companies but for the moment I endeavour to communicate my messages to the Hong Kong Court through this judgment.*"

Similarly, in *Re China Agrotech Holdings Limited*,[2] Mr Justice Segal's remarks on the desirability of co-ordinating court-to-court communication between the Cayman Court and the Hong Kong Court were echoed by William Wong SC, Deputy High Court Judge in the parallel Hong Kong proceedings.[3]

In the age of "modified universalism", many other like-minded courts share a common goal and some have even conducted joint-hearings across borders. As multi-national corporations operate seamlessly around the globe, without being unduly hampered by geographical borders, it makes sense that courts in different parts of the world should be permitted to communicate more freely and to continue to adjust the procedure by which that is achieved.

Given that courts have shown a willingness to embrace new technology and, at least in the Cayman Islands, are prepared to conduct hearings and even full trials by video-link in appropriate circumstances, it has become easier to envisage a scenario where it may become common practice to invite judges in different jurisdictions to hear cross-border cases together and to facilitate open dialogue between courts.

International innovation

The Canadian and United States Courts conducted a joint hearing by video-link in the highly-publicised example involving Nortel Networks Inc and Nortel Networks Corp. This case set a new precedent for efficient and collaborative cross-border decision-making.

Subsequently, the Federal Court of Australia and the High Court of New Zealand handed down contemporaneous judgments and made consistent orders, after sitting together in a hearing at the end of 2020, in relation to matters involving the insolvent estates of Halifax Investment Services Pty Ltd and Halifax New Zealand Limited. The Courts had already dealt with case management directions in a joint sitting by that stage and, in order to avoid issues related to recognition and inconsistency, there was a request that the New Zealand Court hear the proposed New Zealand proceedings concurrently with the Australian proceedings.

Although an in-person joint-sitting was proposed, the global pandemic removed that possibility and a livestream was arranged between the respective courtrooms with local counsel present. The main witnesses were sworn or affirmed in both proceedings, and both Courts received the same submissions and heard the same evidence.

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[1] *In the matter of Silver Base Group Holdings Limited*, FSD 329 of 2021 (DDJ), Judgment dated 8 December 2021 (unreported) at [22].
[2] *Re China Agrotech Holdings Limited (in Liquidation)*, FSD 68 of 2019 (NSJ), Judgment dated 22 July 2019 (unreported) at [37].
[3] *Re Da Yu Financial Holdings Limited (formerly known as China Agrotech Holdings Limited) (in Liquidation)* [2019] HKCFI 2531 (17 October 2019) at [46].

In a paradigm example of comity in practice, the Australian Court stated at an early stage of the proceedings that the Courts *"should endeavour to co-operate to the extent possible to promote the objectives of the liquidations of Halifax AU and Halifax NZ"* and *"that such co-operation could include a concurrent hearing… if the NZHC were amenable."* Following those observations, the Courts deliberated and determined the principal issues following co-ordinated discussions, while establishing a helpful blueprint for future cases.

Domestic framework

In the Cayman Islands, Practice Directions are issued to indicate the Cayman Court's general view in relation to the appropriate procedural approach to particular categories of cases. Practice Direction 1 of 2018 sets out the Cayman Court's starting position relating to court-to-court communications and co-operation in cross-border restructuring proceedings.

In broad terms, the Practice Direction provides that:

- the American Law Institute / International Insolvency Institute (ALI/III) and the Judicial Insolvency Network (JIN) Guidelines for court-to-court communications are suitable for use in cross-border insolvency cases;
- the above guidelines are relevant where insolvency or restructuring proceedings are being supervised by, or involve related applications to, courts in more than one jurisdiction; and
- Cayman office-holders should consider, at the earliest opportunity, whether to incorporate some or all of the guidelines into an international protocol to be approved by the Court.

Additionally, pursuant to the Companies Winding Up Rules (CWR), Order 21, rule 2(1), Cayman appointed official liquidators are under a duty to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder. Such a protocol may cover other matters including court-to-court communications and co-operation.[4] However, it is unlikely that a protocol which deals solely with court-to-court communications will be considered by the Court to fall within the scope of CWR Order 21.[5]

In *Re LATAM Finance Limited et al*,[6] the Grand Court of the Cayman Islands approved a cross-border court-to-court communication protocol between the Cayman Islands, United States, Colombian and Chilean Courts in order to facilitate the restructuring of the LATAM Airlines group. In that case, Kawaley J summarised the main principles to be considered on an application for approval of a court-to-court communication protocol as follows:

- the Court has a positive duty to assist the foreign main insolvency or restructuring proceeding, unless there are good reasons not to;
- there is a starting assumption that a clear framework for communication between the respective courts will improve the efficiency of the relevant cross-border case; and
- there is a starting assumption that the ALI/III Guidelines and/or the JIN Guidelines are suitable to adopt.

These principles are consistent with well-established rules of private international law which affirm the desirability that an insolvency proceeding involving multiple jurisdictions should, if possible, be dealt with on a universal basis within a single "main proceeding".

Jurisdictions such as the United States and United Kingdom have adopted variations of the UNCITRAL Model Law on Cross-Border Insolvency, which is designed to assist with the regulation of corporate insolvency and financial distress involving companies which have assets or stakeholders in more than one state. The Cayman Islands has not adopted the Model Law, but it does seek to achieve similar objectives in relation to efficiency and consistency by utilising tools derived from the common law, as opposed to a specific legislative instrument. Further, the Cayman Islands took significant strides this year by introducing a bespoke restructuring officer regime. The new regime allows a company to present a "restructuring petition" and invite the Cayman Court to appoint "restructuring officers" to promote a reorganisation with the benefit of an immediate extra-territorial stay on proceedings against the relevant company. Alongside existing provisions in the Companies Act dealing with international co-operation and assistance to foreign officeholders, the Cayman Islands has a ready-made reciprocal framework for effecting streamlined global restructurings.

Comment

Given that the Cayman Islands is often at the centre of major multi-national restructuring proceedings and has recently enacted dedicated restructuring legislation after consulting with industry leaders, it is well-placed to pioneer a sophisticated protocol for court-to-court dialogue and explore the potential of joint-hearings in a new digital age.

It is incumbent on office-holders and their legal advisers to consider *"at the earliest opportunity"* whether a formalised protocol for cross-border communication and co-operation between Courts is appropriate in any given case. In practice, a formalised protocol would be

[4] Practice Direction 1 of 2018, paragraph 7.
[5] *In the Matter of LATAM Finance Limited et al*, FSD 105, 106 and 154 of 2020 (IKJ), Judgment dated 24 August 2020 (unreported) at [5].
[6] ibid.

welcomed by officeholders and those advising them. Clear and concise protocols of that nature promote consistency and save time and costs associated with reporting and seeking feedback from different Courts via different channels. This is an essential building block for putting the “modified universalism” ideals into reality.

The Cayman Court has hinted at a readiness to explore progressive opportunities and to approve such protocols in the right cases. We consider that this is the time to push the boundaries and take lessons from the Trans-Tasman and North American examples of the past few years.

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