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ARTICLE

Cayman Communication: The Grand Court of the Cayman Islands Approves Direct Court-to-Court Communications Protocol for the First Time *In Re LATAM Finance Limited (and others)*[1]

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Synopsis

As a prominent offshore financial centre, the Cayman Islands continues to embrace its commitment to the co-operation and facilitation of cross-border insolvencies and restructurings. As the Cayman Islands is a traditional common law jurisdiction, with the foundation of its legal system based on a fusion of common law and legislation, it has the inherent flexibility to adapt to circumstances on a case-by-case basis. In the context of cross-border insolvency and restructuring, the rules of private international law and conflict of laws have not been codified and cannot be discerned in a single set of statutory rules.

Recently, as part of the on-going restructuring of the LATAM Airlines group, the Grand Court of the Cayman Islands (the 'Court') approved applications made by the joint provisional liquidators (the 'JPLs') of certain of its Cayman Islands group companies[2] for the entry into a direct cross-border court-to-court communications protocol (the 'Protocol') with the courts of New York, Chile and Colombia.

While the importance of court-to-court communications has been a key feature of international insolvency and restructuring for some time, this is the first occasion where the Court has handed down a judgment approving a protocol to facilitate direct court-to-court communications. With the jurisdictional basis for doing so previously being unclear, the Honourable Justice Kawaley helpfully took the opportunity to clarify the basis upon which the Court's jurisdiction could be unlocked:

(a) First, pursuant to the common law duty to assist foreign insolvency courts, as underpinned by the principles of comity and modified universalism (the principal basis); and

(b) Second, pursuant to subsidiary sources of jurisdictional rules, in particular: (i) the Court's inherent jurisdiction to manage its own processes; and (ii) Practice Direction No. 1 of 2018 (the 'Practice Direction'), which confirmed the appropriateness of the American Law Institute / International Insolvency Institute Guidelines (the 'ALI / III Guidelines') and the Judicial Insolvency Network Guidelines (the 'JIN Guidelines', together with the ALI / III Guidelines, the 'Guidelines') for use in cross-border insolvency and restructuring matters.

The detailed decision of Kawaley J in this matter re-affirms the Court's willingness and flexibility to facilitate cross-border restructurings, maintaining the Cayman Islands' reputation as a sophisticated insolvency and restructuring jurisdiction. The decision also serves as a useful reminder of the Court's practice regarding its co-operation with foreign courts.

Background

The present case concerned three Cayman domiciled companies which form part of the LATAM Airlines group ('LATAM'), the most significant airline in Latin America.

At the beginning of 2020, LATAM was financially and operationally one of the strongest groups in Latin America and was poised to continue its upward trajectory, predicting operational growth in all passenger segments and its cargo business. However, as a result of the COVID-19 pandemic, countries around the world, including each of those in which LATAM had its primary operations, announced severe travel restrictions and/or outright closure of their borders. The impact on the airline industry was almost instantaneous and by 16 March 2020, LATAM significantly reduced its total passenger operations.

These circumstances necessitated LATAM Airlines Group S.A. (the 'LATAM Parent') and certain of its affiliated debtors and debtors-in-possession (the

Notes

1 (Unreported), 24 August 2020, FSD 105, 106 and 154 of 2020.

2 LATAM Finance Limited ('LFL'), Peuco Finance Limited ('PFL') and Piquero Leasing Limited ('PLL') (together the 'Companies' and each a 'Company').

'Debtors') commencing voluntary reorganisation proceedings in the United States Bankruptcy Court for the Southern District of New York (the 'U.S. Court'), seeking relief under Chapter 11 of Title 11 of the United States Bankruptcy Code (the 'Bankruptcy Code') in an effort to ensure its stability and meet its obligations to stakeholders (the 'Chapter 11 Proceedings').

The Cayman Islands does not have an equivalent restructuring process to Chapter 11 in the United States (or to administration in the United Kingdom). Instead, insolvent Cayman Islands companies often rely on the provisional liquidation procedure (pursuant to Section 104(3) of the Companies Law (2020 Revision) (the 'Companies Law')) which protects the company from creditor enforcement action or proceedings being commenced and/or continued against it without the leave of court.[3] As was the case in the LATAM proceedings, an insolvent company that seeks the appointment of provisional liquidators can do so on a 'soft-touch' basis which enables the directors to retain the day-to-day management of the company whilst providing the provisional liquidators with the necessary powers to oversee the continuation of the company and the implementation of a restructuring.

Accordingly, as a crucial part of LATAM's restructuring strategy, each of the Companies made applications pursuant to section 104(3) of the Companies Law for orders appointing provisional liquidators to each Company which the Court approved.[4]

Application to approve the Protocol

Shortly after the commencement of the Chapter 11 Proceedings, the U.S. Court issued an order authorising the LATAM Parent to act as the foreign representative to the Debtors in foreign proceedings and requesting that the Chilean Court, Colombian Court, and any other additional courts (including the Cayman Court) grant recognition to the Chapter 11 Proceedings.

In response, the Superintendente de Insolvencia y Reemprendimiento, a Chilean government entity responsible for promoting the public's interest in reorganisation proceedings and their integrity, requested that the Chilean Court enter into a court-to-court protocol with the U.S. Court to allow for efficient coordination between the core foreign bankruptcy proceedings in the United States and the Chilean proceedings and to ensure that a framework was in place to address any cross-border issues that may arise from time to time in the proceedings and to promote international cooperation and respect for comity.[5] Thereafter, the Debtors submitted a motion in the U.S. Court for entry of an order to approve the Protocol as between the U.S., Chile, Columbia and Cayman Islands Court.

Accordingly, the JPLs made applications by way of *ex parte* summonses, seeking orders for directions that:

> 'The certain cross-border court-to-court communications protocol be approved subject to the approval of the same by each of the United States Bankruptcy Court for the Southern District of New York, the 2nd Civil Court of Santiago, Chile and the Superintendencia de Sociedades in Colombia.'

Walkers, as counsel for the JPLs,[6] made submissions with reference to the principles supporting the Court's jurisdiction to grant the applications including relying on the Court's previous willingness to cooperate with foreign courts to ensure the efficient management of cross-border insolvency proceedings.

Decision

In reasons delivered on 24 August 2020, Kawaley J remarked that the principal foundation of the Court's jurisdiction to approve the Protocol was the common law duty to assist foreign insolvency courts in service of the goal of universal application of the regime for dealing with creditors' claims being applied in the main insolvency proceedings (i.e. modified universalism).

In *Singularis Holdings Limited v Pricewaterhouse-Coopers*,[7] Lord Sumption described the sources of the modified universalism principle as follows:

> 'the principle of modified universalism is part of the common law, but 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. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law.'

Kawaley J cited Smellie CJ[8] who identified that the deeper underpinnings of the common law assistance power

Notes

3 Notably, the moratorium does not extend to restrict the rights of secured creditors who may enforce their security, notwithstanding the appointment of provisional liquidators.
4 Kris Beighton and Jeffrey Stower of KPMG were appointed as joint provisional liquidators of LFL and PFL on 28 May 2020 and PLL on 10 July 2020 upon the voluntary applications made by LATAM.
5 Later extended to include the other additional courts.
6 Walkers also act as counsel to LATAM.
7 [2015] AC 1675.
8 Writing extra-judicially in 'A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-Operation' (2011) 2 *Beijing Law Review* 145 to154 (at 147).

is the principle of comity: 'the over-arching principle is, of course, comity – that civilized notion that requires reciprocity of co-operation and assistance between the courts of different countries… It is our duty and pleasure to do all we can to assist that court, just as we would expect the United States Court to help us in like circumstances'.

It is this common law duty, namely to assist foreign insolvency courts in service of the goal of a universal application of the regime for dealing with creditors' claims in the main insolvency proceeding, which Kawaley J confirmed as the principal foundation of this Court's jurisdiction to approve the Protocol in the present case.

However, the Honourable Judge further acknowledged the relevance of other subsidiary sources of jurisdictional rules that are built on the foundations of comity and the common law duty to assist foreign insolvency courts. In particular, the Court's inherent jurisdiction, fortified by the constitutional protections for judicial independence, was the source of its power to issue practice directions. Here, importantly, the Chief Justice had issued the Practice Direction, which appeared to achieve the following objectives:

(a) it informally and administratively approves the Guidelines as suitable for use in cross-border insolvency cases;

(b) it explains that these Guidelines are relevant 'where the insolvency or restructuring proceedings are being supervised by, or involve related applications to, courts in more than one jurisdiction'; and

(c) it recommends that Cayman Islands office-holders 'consider, at the earliest opportunity, whether to incorporate some or all of the Guidelines with suitable modifications either into an international protocol to be approved by the Court or an order of the Court adopting the Guidelines.'

Kawaley J commented that the Practice Direction 'does not seek to promulgate new law', but seeks to encourage office-holders to consider, where applicable, inviting the Court to adopt either one or both of the Guidelines. The Practice Direction approves the Guidelines in principle as being in general terms 'fit for purpose' for use in cross-border insolvency cases.

The Guidelines include a series of practical operational principles, which are essentially different forms of communications, such as exchanging copies of court filings, communications between judges (on notice to the parties limited to logistical matters) and joint hearings. The overarching guiding principle in the ALI/III Guidelines is that 'a Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.' Kawaley J additionally quoted from the introduction to the ALI / III Guidelines, which notes that they 'are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements.'

The Court stated that the Practice Direction and associated Guidelines might be viewed as emerging sources of law, described as 'soft law instruments', which build on the more substantive common law principles mandating assisting foreign insolvency courts as far as possible and the inherent jurisdiction of the Grand Court to manage its own processes.

The Court accordingly held that the main governing principles applicable to an application to approve a court-to-court communication could be summarised as follows:

(a) the Court is under a positive duty to assist the primary foreign main insolvency or restructuring proceeding, unless there are good reasons not to do so;

(b) there is a starting assumption that a clear framework for communication between the Grand Court and any relevant foreign courts in cross-border insolvency cases will enhance the efficiency of the cross-border case; and

(c) there is a starting assumption that the ALI/III Guidelines and/or the JIN Guidelines are suitable guides to adopt and apply in cross-border cases.

In light of the clarity and depth of the common law principles commending judicial coordination and communication in cross-border insolvency cases, combined with the recent promulgation of the Practice Direction, Kawaley J stated that it was obvious that the Protocol could only properly be approved.

Comment

The recent decision in *LATAM Finance Limited* reaffirms both the common law role of modified universalism in the Cayman Islands and the Grand Court's willingness and flexibility to support cross-border insolvencies which, given the prevalence of cross-border insolvency and restructuring transactions with a Cayman nexus, should provide further support to the choice of the Cayman Islands as a premier jurisdiction for the incorporation of investment and other corporate entities.

It is notable to mention that reforms are presently being considered by the Cayman Islands' legislature to develop a new regime for corporate restructuring. These envisaged amendments to the Companies Law would enable companies to petition the Court to seek the appointment of restructuring officeholders and pursue a

restructuring without the presentation of a winding up petition, whilst retaining the benefit of a statutory moratorium.

If enacted, this procedure would provide an additional tool in the restructuring tool-kit and act as an alternative to the appointment of provisional liquidators, further promulgating the Cayman Islands as a leading jurisdiction for cross-border restructurings.

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