UPDATE

OCTOBER 2020

mourant

Cayman court approves first court-to-court communications protocol in cross-border restructuring

Update prepared by Nicholas Fox (Partner, Cayman Islands) and Angelique McLoughlin (Associate, Cayman Islands)

In *Re LATAM Finance Limited et al* (unreported, 24 August 2020), is the first time the Cayman courts have approved a 'Court-to-Court Communications' protocol in a cross-border insolvency / restructuring case. The decision demonstrates the willingness of the Cayman courts to co-operate and assist other jurisdictions in cross-border insolvency proceedings and outlines the jurisdictional basis on which such orders can be made.

The LATAM Airlines group, the largest airline carrier in Latin America, filed US Chapter 11 bankruptcy proceedings in May 2020, seeking to effect a restructuring. At the same time, and as part of the same restructuring efforts, the Grand Court of the Cayman Islands appointed Joint Provisional Liquidators (**JPLs**) with 'light touch' powers over three of those same companies. There were also proceedings in Colombia and Chile.

Prompted by a suggestion from the Chilean court, the JPLs applied to the Cayman court, seeking the approval of a cross-border 'Court-to-Court Communications' protocol (the **Protocol**), between the Cayman, US, Colombian and Chilean courts.

Kawaley J approved the Protocol, implicitly recognising the Chapter 11 proceeding as a foreign main proceeding, which the Cayman court was willing to assist. Helpfully, for practitioners and interested observers, the Cayman court also detailed (a) the basis of its jurisdiction to make such an order and (b) the principles that would govern its discretion in considering such applications in the future.

The Court's jurisdiction to approve the Protocol

Kawaley J began by distinguishing between a court-to-court protocol and the types of officeholder-to-officeholder protocols that are covered by Order 21, rule 3 of the Cayman Companies Winding-Up Rules.

As they are not expressly covered by the Cayman Winding-Up Rules, the jurisdiction to approve court-to-court protocols must arise elsewhere. Kawaley J found that the Cayman court's jurisdiction to do so was founded in:

(a) the common law cross-border insolvency rules of private international law, including the principles from *Cambridge Gas* that still hold good today, namely:

(i) there is a common law of private international law which affirms the desirability that an insolvency proceeding which crosses jurisdictional borders should, so far as is practically possible, be administered on a global (or universal) basis within a single 'main proceeding';

(ii) where a single proceeding is not possible and the courts in an ancillary proceeding are requested to assist the foreign main proceeding, the ancillary court is under a common law duty to assist the foreign court, unless there are discretionary or mandatory statutory grounds for refusing relief; and

(iii) the combination of these two common law rules is known as 'modified universalism'.

(b) the inherent discretion of the Grand Court of the Cayman Islands, as a superior court of record, to manage its own processes;

(c) the court's inherent jurisdiction to fill any gap where a case management power is not found within legislation or the relevant procedural rules. Kawaley J remarked that it is this inherent jurisdiction, fortified by the constitutional protections for judicial independence, which may be viewed as the source of the power to issue practice directions to signify the Cayman court's general view of the procedural approach to various types of cases and matters.

Kawaley J considered Practice Direction 1 of 2018, issued by the learned Chief Justice on 31 May 2018, which sets out the Cayman court's views relating to court-to-court communications and cooperation in cross-border insolvency and restructuring proceedings. As summarised by him, that Practice Direction appears designed to achieve the following objectives:

(a) it informally and administratively approved the American Law Institute / International Insolvency Institute (ALI/III) and the Judicial Insolvency Network (JIN) Guidelines for court-to-court communications, 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 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 went on to examine and reflect upon the long and substantial history of the Cayman court co-ordinating its hearings with parallel insolvency and restructuring proceedings in foreign courts and, in the process, communicating indirectly with such courts. He commented that this history has been grounded in the Cayman court's duty to assist foreign courts and to promote the most economically efficient administration of transitional insolvency estates. Accordingly, the adoption of the Practice Direction was simply another step along the same road.

The principles governing any decision by the Cayman court as to whether to approve a future court-to-court communications protocol

Kawaley J surmised that the main governing principles applicable to an application for approval of a court-to-court communication protocol are as follows –

(a) the court has a positive duty to assist the foreign main insolvency or restructuring proceeding, unless there are good reasons not to;

(b) there is a starting assumption that a clear framework for communication between the respective 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 and/or JIN guidelines are suitable to adopt and apply.

In line with these principles, most applications for approval of a court-to-court communications protocol should, as in this case, be straightforward and broadly welcomed by the Cayman court.

Conclusion

As befits a world-leading financial centre, the Cayman Islands Grand Court has always been a forward and outward looking, pragmatic and internationalist court, with its aims set firmly on working together with overseas courts to achieve the best and most efficient outcomes in cross-border insolvency and restructuring cases.

The present decision is well in line with these principles, and with the long-standing practice of the courts in the Cayman Islands to facilitate co-operation and coordination of parallel insolvency and restructuring proceedings in foreign courts. As the world faces another wave of economic uncertainty, it can take some comfort in the fact that the courts of leading financial centres like the Cayman Islands are working closely together with other countries courts to deliver the best outcomes in insolvency and restructuring cases.

Contacts

Nicolas Fox
Partner, Mourant Ozannes
Cayman Islands
+1 345 814 9268
nicolas.fox@mourant.com

Angelique McLoughlin
Associate
Cayman Islands
+1 345 814 9263
angelique.mcloughlin@mourant.com

2021934/79050705/1