

HOW JUDICIAL ACTIVISM CAN ENHANCE THE LEGAL MECHANISMS FOR ADJUDICATING CROSS-BORDER INSOLVENCY CASES IN THE COMMON LAW CARIBBEAN-ESPECIALLY WHERE MODERN STATUTORY PROVISIONS ARE LACKING

- Ian R.C, Kawaley¹-

(Paper submitted to the INSOL /UNCITRAL/World Bank ‘1st Caribbean Judicial Colloquium on Insolvency’, November 6, 2013, Cayman Islands)²

“In the absence of sufficient and predictable laws and procedures, creditors tend to extend funds only in return for unnecessarily high-risk premiums. In times of crisis they may withdraw financial support altogether. Countries would benefit substantially if creditor rights and insolvency systems were clarified and applied in a consistent and fully disclosed manner.” (World Bank, ‘Principles for Effective Insolvency and Creditors Rights Systems’, 2005)

“The UNCITRAL Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Enacting States are encouraged to use the Model Law to make useful additions and improvements to national insolvency regimes, in order to resolve more readily problems arising in cross-border insolvency cases.”(UNCITRAL, ‘UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective’, 2011)

“Courts should be leading in solving cross-border insolvency matters” (Professor Bob Wessels, Leiden Law Blog, May 2013)

Introduction

The failure of several Caribbean jurisdictions to adopt modern cross-border insolvency and/or corporate rescue legislation does not reflect a considered refutation of the thesis that such legislation is in general terms to be both admired and desired. However, experience in those common law jurisdictions which have been compelled to deal with substantial cross-border insolvency cases for many years without the most refined and modern statutory (or indeed treaty) tools teaches that much can be achieved by activist judges and insolvency practitioners committed to delivering justice to the key stakeholders of insolvent companies.

¹ Chief Justice, Bermuda. The writer was regretfully unable to attend the Colloquium.

² This paper is substantially based on a paper presented at the 2013 Caribbean Association of Judicial Officers Conference, September 26, 2013, Barbados entitled ‘Judicial Cooperation in Cross-border Corporate Insolvency Cases in the Caribbean: Why Judicial Activism is Essential’ for the Panel: ‘Insolvency in the Caribbean: Problems and Solutions’.

An attempt is made below to make the case for this general proposition, and to commend two practical policy steps which common law regional courts are competent to adopt without legislative action to demonstrate to the wider world (in particular potential creditors and other investors) that regional courts stand willing and able to handle modern cross-border insolvency cases in a modern manner despite the apparent absence of capacity to do so.

Two notable examples, it is submitted, are worthy of following in the Caribbean context:

- (1) the American Law Institute/ International Institute ‘Guidelines for Court to Court Communications in Cross-Border Cases’ (2000/2001), initially adopted by Canadian and US courts, but subsequently replicated elsewhere (e.g. Australia, Bermuda). It must be conceded that Mexico, a civil law country, seemingly did not adopt these Guidelines and awaited the enactment of statutory rules³;
- (2) the Memorandum of Guidance on Enforcement between the Dubai International Financial Centre (“DIFC”) Courts and the Commercial Court, Queens Bench Division of England and Wales⁴. This Memorandum represents a judicial commitment made by two courts without reference to international treaty or national legislative frameworks, to publish a statement of the general principles which would likely be applied to enforcing each other’s judgments.

One of these two initiatives is specifically designed for the cross-border insolvency context and the other is easily adaptable to the insolvency regime. They illustrate that judges can help to fill the gaps in cross-border insolvency law frameworks and need not wait for legislative or treaty provisions before acting. These judge-made rules do not in any way change the substantive law; they merely seek to enhance the procedural efficiency with which the existing substantive law rules are applied. The initiatives represent, at an institutional level, the fulfilment of the positive legal duty for courts adjudicating civil cases to achieve the overriding objective.

After considering these two matters in more detail, by way of conclusion brief mention will be made of the way in which corporate rescue proceedings can be launched without express provisions typically found dealing with this topic in modern statutory schemes.

Guidelines for Court to Court Communications in Cross-border Cases

³ Subsequent similar initiatives include the ‘European Communication and Cooperation Guidelines for Cross-Border Insolvency’ (2007) (the CoCo Guidelines), although it is unclear how far these non-statutory rules have been applied in practice, and the ALI/III ‘*Global Principles for Cooperation in Cross-Border Cases*’ (2012).

⁴ www.international.lawsociety.org.uk.

Most common law Caribbean jurisdictions have adopted civil procedure rules incorporating the concept of the overriding objective, which obliges courts to focus on managing civil cases in an efficient manner. Many jurisdictions have appreciated the need to not simply leave it to individual judges dealing with individual cases to work towards this both lofty and fundamentally practical goal. Creating a supportive institutional framework within which civil cases generally can be adjudicated has been deployed through issuing practice directions. A recent Barbadian example is Practice Direction No.1 of 2013, '*Backlog Reduction/Status Hearings*' issued by Chief Justice Sir Marston Gibson on January 23 2013. The aim of the Practice Direction is to establish an administrative framework within which the status of stale cases can be ascertained by the Court. There is no apparent legislative support for this proactive regime save for the broad umbrella principles embodied in the overriding objective.

The Bermudian Practice Direction issued by Chief Justice Richard Ground and the Commercial Judges on October 1, 2007, '*Guidelines for Court to Court Communication in Cross-Border Cases*', based on the ALI/III Guidelines, equally had no legislative support save for the overriding objective. The aim of the Practice Direction is to establish an administrative framework within which cross-border insolvency cases can be dealt with efficiently by proclaiming a commitment to an internationally recognised code of best practice. The full text is reproduced in Appendix 1. It prescribes operational principles governing the following matters, many of which are uncontroversial:

- (1) the Guidelines should be formally adopted before they are applied. This assumes they are compatible with generally applicable procedural rules. The Guidelines are based on the assumption that the coordination of related cross-border cases is likely to achieve efficient and just results;
- (2) courts may communicate with each other in order to coordinate and harmonise proceedings;
- (3) communication may take place through a foreign insolvency representative or some other authorised representative of the foreign court;
- (4) courts may authorise local liquidators to communicate with foreign courts, either directly or through a foreign liquidator or other representative of the foreign court;

- (5) courts may receive communications from a foreign court, a foreign liquidator or other representative of the foreign court;
- (6) communications may take place either (a) by transmitting documents directly to the other court, (b) directing counsel to file documents with the other court, and/or (c) direct communications between the courts by telephone, video-conference or other electronic means;
- (7) guidance for direct court-to-court communications is prescribed designed to ensure transparency;
- (8) in relation to all direct communications (unless otherwise ordered) counsel should be able to participate and a record of the communication should be made;
- (9) courts may conduct joint hearings;
- (10) the court should normally recognise the provisions of any relevant foreign law without formal proof;
- (11) the court should normally accept the validity of orders made by the foreign court without formal proof;
- (12) a Service List may be established for parties in the foreign proceeding entitled to receive notice of applications in the local proceeding;

(13) the court may direct that a foreign liquidator may appear without submitting to the jurisdiction of the local court;

(14) the court may dis-apply any general stay to applications made by foreign court representatives;

(15) the Guidelines should be applied wherever the interests of justice require, irrespective of a lack of commonality in the form, issues or parties of the respective proceedings;

(16) any directions issued by the court pursuant to the Guidelines are always subject to modification or change to meet the needs of the case in question;

(17) any arrangements made pursuant to the Guidelines do not affect the substantive rights of the parties.

None of what is contemplated by the Guidelines would fall outside of the remit of the inherent jurisdiction of a common law court construed in light of the overriding objective now based in statutory rules enjoying the status of subsidiary legislation. The Guidelines essentially reflect established practice in terms of court-to-court communications between common law insolvency courts. The only feature courts outside of North America might find to be novel is the notion of direct communications between courts, by telephone, video-link or other electronic means.

Nevertheless, the Guidelines are significant in terms of codifying international best practice and in representing an important statement of intent by courts adopting them and promising to put the principles into effect. Originally developed to facilitate cross-border insolvency justice within a then comparatively new economic trading area, the NAFTA Region, they are now being emulated within the European Union. The case for the adoption of similar guidelines within the CARICOM Region is, surely, compelling. No less compelling is the narrower case for its

adoption by offshore jurisdictions which have strong cross-border insolvency connections with Bermuda, most notably the British Virgin Islands and the Cayman Islands.

Memorandum of Guidance as to Enforcement of Insolvency Judgments and Orders between CARICOM Courts

An important legal underpinning of any transnational economic zone is a cross-border legal framework for the recognition and enforcement of insolvency judgments and orders as well as civil judgments generally. No transnational treaty regime currently governs such matters in the CARICOM region and so the prospects for implementing the Caribbean Single Market Economy (“CSME”) idea remain subject to some doubt.

Meanwhile, in the real commercial world, companies and other entities continue to conduct business and professional activities across the CARICOM region giving rise to a widening array of situations in which cross-border cooperation between different courts is required. This is in part attributable to CARICOM instruments expressly facilitating such cross-border activities, through for example, more liberal immigration rules⁵. It is in part due to other formal regional ties such as those arising under the OECS treaty which has created a regional court system for the Eastern Caribbean. However, the commercial ties which exist across the region, particularly the links between Bermuda, the Cayman Islands and the British Virgin Islands, are also due to other less formal and more ill-defined connecting factors.

CARICOM comprises the following members and associate members:

- (1) full members: Antigua & Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Kitts-Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname and Trinidad & Tobago (14, of which 11 are generally regarded as common law jurisdictions);

- (2) associate members: Anguilla, Bermuda, British Virgin Islands (“BVI”), Cayman Islands (“Cayman”), Montserrat and the Turks and Caicos Islands (6, all common law).

As far as foreign money judgments are concerned, most of the Commonwealth Caribbean has colonial-era national legislation providing for the reciprocal enforcement of foreign (final) judgments⁶ and most countries are parties to the ‘New York Convention on the Reciprocal

⁵ *Shanique Myrie-v-The State of Barbados* [2013] CCJ 1 (OR) (R).

⁶ E.g. the Bermudian Judgments (Reciprocal Enforcement) Act 1958 as read with the Judgments Extension Order 1956 provides for the reciprocal enforcement of judgments made by the courts of, *inter alia*, The Bahamas, Barbados, Dominica, Grenada, Guyana, Jamaica (and Cayman), the Leeward Islands (Anguilla, Antigua & Barbuda, BVI, Montserrat and St Kitts-Nevis), St. Lucia and St. Vincent. The Bermuda Act ought to be extended to other jurisdictions which have already made provision for the registration of Bermudian judgments such as Belize (

Enforcement of Arbitral Awards⁷. However, subject to recent changes of which the present writer is unaware, the insolvency law position is believed to be as set out in the table below.

TABLE 1⁸

Territory	Statutory International Cooperation Powers	Statutory Corporate Rescue provisions	Modern Insolvency law statute
1. ANGUILLA	No	No	No
2. ANTIGUA & BARBUDA	No	No	No
3. BAHAMAS	No	No	No
4. BARBADOS	Yes	Yes	Yes
5. BELIZE	No	No	No
6. BERMUDA	No	No	No
7. BVI	Yes	Yes	Yes
8. CAYMAN	Yes	Yes	Yes
9. DOMINICA (Civil Code)	No	No	No
10. GRENADA	No	No	No
11. GUYANA	No	No	No
12. HAITI (Civil Code)	No	No	No
13. JAMAICA	No	No	No
14. MONTSERRAT	No	No	No
15. ST. KITTS-NEVIS	No	No	No
16. ST. LUCIA (Civil Code)	No	No	No
17. ST. VINCENT & GRENADINES	No	No	No
18. SURINAME (Civil Code)	No	No	No
19. TRINIDAD & TOBAGO	Yes	Yes	Yes
20. TURKS & CAICOS	No	No	No

Assuming there is no imminent prospect of a CSME equivalent of the European Insolvency Regulation, what can courts in the region presently or prospectively confronted with cross-border insolvency cases involving one or more jurisdiction which lack modern international insolvency

Reciprocal Enforcement of Judgments Order, 2003 Revision); however reciprocal provision is not made in either the case of Bermuda or Trinidad & Tobago (Judgments Extension Act-Cap 5-02).

⁷ Haiti is also a party; Suriname appears not to be.

⁸ Based on Table 23.1, Kawaley (ed.), *Offshore Commercial Law in Bermuda* (Wildy, Simmonds & Hill: London, 2013) at page 502. The position in Suriname has not been verified.

cooperation statutes (the majority of CARICOM jurisdictions) do in order to deal with such cases efficiently?

As far as the common law jurisdictions are concerned, at least, the common law jurisdiction to cooperate with foreign insolvency courts is both extensive and (subject to statutory modifications), governed by the same legal rules. This common law jurisdiction has been utilised most extensively in offshore financial centres with a high density of cross-border insolvency cases, both within and without the region⁹. However, this common law jurisdiction has on occasion been considered by the United Kingdom courts as well: e.g. *Frank Schmitt v. Hennin Deichman* [2012] EWCH 62 (Ch); [2013] Ch 61 (Proudman J); *Rubin-v-Eurofinance* [2012] UKSC 46; [2013] 1AC 236.

One possible step which regional courts can adopt is to issue a general statement of intent with regard to how these shared but un-codified common law rules of cross-border insolvency cooperation will be applied in practice. This was precisely what the English Commercial Court and the Dubai International Financial Centre (“DIFC”) Court did in relation to civil money judgments the enforcement of which is governed in each jurisdiction by common law rules. On January 23, 2013, the two courts issued a ‘*Memorandum of Guidance on Enforcement between the Dubai International Financial Centre (“DIFC”) Courts and the Commercial Court, Queens Bench Division of England and Wales*’. The Introduction to the English/DIFC Memorandum explained its rationale as follows:

“Introduction

1. The purpose of this memorandum is to set out the parties’ understanding of the procedures for the enforcement of each party’s money judgments in the other party’s courts. This memorandum is concerned only with judgments requiring a person to pay a sum of money to another person.

2. This memorandum has no binding legal effect. It does not constitute a treaty or legislation, is not binding on the judges of either party and does not supersede any existing laws, judicial decisions or court rules. It is not intended to be exhaustive and is not intended to create or alter any existing legal rights or relations.

⁹ E.g. *Re Impex Services Worldwide Ltd* [2004] BPIR 564 (Isle of Man; Deemster Doyle); *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26; [2007] 1 AC 508; *Picard (as Trustee for the liquidation of the Business of Bernard L. Madoff Investment Securities LLC) et al-v- Primeo Fund (In Official Liquidation)*, Cayman Grand Court FSD 275 of 2010, Judgment dated January 14, 2013 (Andrew Jones J); *Re Saad Investments Company Limited – in Official Liquidation* [2013] SC (Bda) 28 Com (15 April, 2013) (Kawaley CJ); *Re C (a Bankrupt)*, BVIHC (Com) 0080 of 2013, Judgment dated July 31, 2013 (Bannister J (Acting)).

3. The parties desire and believe that the cooperation demonstrated by this memorandum will promote a mutual understanding of their laws and judicial processes and will improve public perception and understanding.”

The body of the Memorandum proceeds to summarise the common law rules relating to the enforcement of foreign money judgments which apply in each forum. The motivation behind the Memorandum seems clearly to be the desire to provide legal support for closer commercial ties between the two countries. The need for the Memorandum flows from a lack of clarity from the perspective of the world at large as to what rules govern enforcement of judgments in the absence of any reciprocal enforcement legislative or treaty regime.

The activist approach taken by the judicial heads of the English Commercial and DIFC courts provides powerful support for a similar approach to be taken in relation to the equally opaque topic of the common law rules governing judicial cooperation in cross-border insolvency cases in a CARICOM regional context. The majority of jurisdictions in the region presently lack modern statutory frameworks for international cooperation between insolvency courts. This creates the distinct impression, to potential investors seeking advice based on easily accessible statutory rules and to the world at large, that no legal capacity for dealing with cross-border issues effectively exists at all. In fact, at common law, the following rules probably apply:

- (a) courts will recognise liquidators appointed in and winding-up orders made in an insolvent company’s place of incorporation;
- (b) where such recognition is given, courts are under a positive duty to assist the foreign insolvency court by doing whatever would be done in the case of a local liquidation;
- (c) courts have a discretion to recognise and assist insolvency proceedings commenced in jurisdictions other than the debtor’s place of incorporation where the other forum is where the centre of main interests of the debtor are located;
- (d) in the absence of modern insolvency legislation, courts can conduct local or cooperate with foreign corporate rescue proceedings;
- (e) traditional case management powers are sufficiently flexible to enable courts to coordinate hearings in parallel proceedings in different jurisdictions.

A suggested form of ‘Memorandum of Guidance on the Recognition and Enforcement of Caribbean Insolvency Orders’ is set out in Appendix 2. It is accepted that Civil Law jurisdictions will not be able to fully participate in such a statement of intent. However, either the jurisdictions in question have equivalent statutory rules which can be referenced or they do not-in which case the imperative for those jurisdictions to modernise their insolvency law regimes is all the stronger.

Even where common law jurisdictions have modern insolvency statutes making provision for recognition of foreign proceedings, it may still be the case that common law rules have not been entirely repealed and replaced. For example, the Barbadian Bankruptcy and Insolvency Act 2002¹⁰ in Part XI makes provision for ‘*International Insolvencies*’. An important provision is section 224(1), which provides that where a foreign insolvency or reorganisation order has been made in relation to a debtor, production of a certified copy of the order will constitute *prima facie* proof of the appointment of the foreign representative and the insolvency of the debtor. Section 224(3) expressly empowers the Barbadian court to coordinate local and foreign proceedings. However subsection (5) of section 224 provides:

“(5) Nothing in this Part prevents the Court, on the application of a foreign representative or any other interested person, from applying such other legal or equitable rules governing the recognition of foreign insolvency orders and assistance to insolvency representatives as are not inconsistent with the provisions of this Act.”

This appears to be a deliberate attempt to preserve common law rules on the recognition of foreign insolvency orders and the provision of assistance to foreign insolvency courts; Part XI does not according its terms attempt to comprehensively codify this area of the common law. Section 239 of the Trinidad and Tobago Bankruptcy and Insolvency Act, 2007 is in substantially similar terms.

BVI’s Insolvency Act 2003 has extensive provisions for international cooperation in Part XVIII; but these provisions have yet to be brought into force. Part XIX does enable foreign representatives to apply for assistance from the BVI Court; but it appears that common law recognition rules may still be in play pending the bringing into force of the statutory code dealing with this topic. Edward Bannister J (Actng) of the BVI Commercial Court recently held:

*“[23] Having listened to Miss Harris’ careful submissions, I accept that this section provides for recognition at common law of foreign representatives (as defined) and for the provision of assistance (of the sort discussed by Lord Collins in **Rubin**) to them by the Court, whether or not they apply specifically under section 467...”¹¹*

¹⁰ CAP 303.

¹¹ *Re C (a Bankrupt)*, BVIHC (Com) 0080 of 2013, Judgment dated July 31, 2013.

The Cayman Islands’ position seems in general terms to be the same¹².

Conclusion

In summary, the proposition that Caribbean common law courts are bound to wait for uniform modern cross-border insolvency rules to be adopted through a multilateral treaty or national legislation before enhancing the commercial efficacy of this area of the law is not merely an entirely unsatisfactory one. It is completely misconceived in legal terms.

Proposing action by a ‘select’ common law ‘club’ should not in any way be viewed as disrespectful to the civil law countries in the region for whom extra-legislative action may not be possible. The substantive common law private international law rules which govern the cross-border insolvency field are well known as having their roots in the writings of Dutch legal scholars and a nineteenth century decision of a Guyanese court which was upheld by the Judicial Committee of the Privy Council almost 200 years ago: *Odwin-v-Forbes* (1817) Buck 57:

“23.20 It has been noted of the trial judge: ‘Although ... Jabez Henry, was common-law trained, he was equally at home in Roman-Dutch law, having served as President (i.e. Chief Justice) of Essequibo-Demerara from 1813–1816 and authored a ten-volume translation (published in 1828) of van der Linden’s Institutes of the Laws of Holland ...’. This historical legacy suggests that common lawyers can fairly boast of creating a more flexible case-by-case means of deciding what substantive law rules apply in the context of judicial cooperation in individual cross-border insolvency cases, but that they owe a heavy debt in terms of the content of the substantive legal rules to civil lawyers generally and Dutch lawyers in particular. And the case of Odwin v Forbes itself provides a helpful illustration of common law judicial cooperation at play. The continuing significance of this early 19th-century judgment is amply demonstrated by the recent re-publication of Justice Henry’s own subsequent post-retirement book commenting on the principles articulated in the decision: ‘The Judgment of the Court of Demerara, in the Case of Odwin v Forbes’.”¹³

And this distinguished judicial history suggests that Caribbean judges ought not to be timid about adopting an activist approach to modern cross-border insolvency problems, particularly since 2013 happens to be the 200th anniversary of the appointment of the first instance judge in that

¹² *Re Primeo Fund (In Official Liquidation)*, Cayman Grand Court FSD 275 of 2010, Judgment dated January 14, 2013 (Andrew Jones J), at paragraph 13.

¹³ Ian R.C. Kawaley, ‘Common Law Judicial Cooperation in the Cross-border Insolvency Cases in the British Atlantic and Caribbean World’ in ‘Offshore Commercial law in Bermuda’, op cit., Chapter 23.

case as President of the Guyanese Court. More substantively however, and rhetorical invocations apart, cross-border insolvency issues are already being dealt with by regional courts with judges forced to do their best without the benefit of clearly articulated and mutually agreed guiding rules.

Illustrative of this point is the ongoing liquidation and/or restructuring of the insurance business of British American Insurance Company Ltd. (“BAICO”), a Bahamian incorporated company owned by the Trinidadian CL Financial Ltd and operating through branch offices in Bermuda and the Eastern Caribbean. BAICO in 2009 was placed under judicial management in its place of incorporation (The Bahamas) while an ancillary liquidation proceeding was commenced in respect of its Bermudian branch operations in Bermuda. The Bermudian Official Receiver implemented a scheme of arrangement in Bermuda pursuant to an agreement with the Bahamian Judicial Manager which was approved by both the Bahamian and the Bermudian courts¹⁴. On February 15 2013, BAICO’s Bahamian Judicial Managers, KPMG, published a ‘*Report on the Transfer of BAICO’s Eastern Caribbean Traditional Business*’. The Report contemplated a transfer of policies pursuant to an insurance transfer scheme approved by the Bahamian and Eastern Caribbean Supreme Courts.

It ought also to be noted that, in purely domestic cases and cross-border cases alike, common law Caribbean courts which do not have explicit modern corporate rescue statutory frameworks will almost inevitably have implied statutory and/or common law and/or inherent powers to adjourn winding-up petitions while restructurings are explored and/or implemented. Rather than displacing the management altogether, a debtor-in-possession proceeding can be mimicked by appointing provisional liquidators to monitor the process and protect the interests of creditors. This practice has been well settled in Bermuda and elsewhere for many years¹⁵.

To ensure that cross-border insolvency cases are dealt with efficiently and justly, a measured degree of judicial activism is essential. The need for such activism is particularly pressing in the absence of uniformly adopted statutory rules governing cross-border insolvency cooperation. The 1st INSOL/UNCITRAL/World Bank Caribbean Insolvency Judicial Colloquium is respectfully encouraged to resolve that regional courts should consider with due despatch the desirability of:

- (a) adopting by way of a Practice Direction the ‘*Guidelines for Court to Court Communication in Cross-Border Cases*’, based on the ALI/III Guidelines; and

¹⁴ See ‘*History of the Company*’ in the Explanatory Statement between BAICO and its Scheme Creditors, pages 18-20: www.kpmg.com/BM/en/ba.

¹⁵ It was recently explained in *Re Titan Petrochemicals Ltd.* [2013] S Ct (Bda) 74 Com (18 October, 2013): www.judiciary.gov.bm.

(b) adopting a regional Memorandum of Guidance on the Recognition and Enforcement of Caribbean Insolvency Orders¹⁶.

Judicial activism along these lines would only serve to enhance the efficacy of the legal mechanisms for adjudicating cross-border insolvency cases in the common law Caribbean- especially where modern statutory provisions are lacking.

¹⁶ Inspired by, but not in any substantive way based on, the *Memorandum of Guidance on Enforcement between the Dubai International Financial Centre (“DIFC”) Courts and the Commercial Court, Queens Bench Division of England and Wales*’.

APPENDIX 1

“In The Supreme Court of Bermuda

Commercial Court

PRACTICE DIRECTION

ISSUED BY THE CHIEF JUSTICE AND THE COMMERCIAL JUDGES

Ref. A/50

CIRCULAR NO. 17 OF 2007

GUIDELINES APPLICABLE TO COURT-TO-COURT COMMUNICATIONS IN CROSS-BORDER CASES

Introduction

One of the most essential elements of cooperation in cross-border cases is communication among the administering authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to ensure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines were originally adopted and promulgated in ‘Transnational Insolvency: Principles of Cooperation Among the NAFTA Countries’ by the American Law Institute on May 16, 2000, and adopted by the International Insolvency Institute on June 10, 2001. The Guidelines have since been adopted by British Commonwealth courts, such as the British Columbia Supreme Court and the Ontario Commercial List. Extensive indirect communication between the Supreme Court of Bermuda and courts in, inter alia, the United States and Canada in cross-border insolvency cases has taken place on an ad hoc basis for many years.

The Commercial Court of Bermuda now adopts the Guidelines for application in relation to cross-border insolvency proceedings involving any other jurisdiction where the foreign court has either adopted the Guidelines, or substantially similar procedural rules, or where the foreign court has agreed to apply the Guidelines to the case in question.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases.

These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

The Guidelines 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. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction.

However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable Rules of Procedure in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied.

Coordination of Guidelines between Courts is desirable and officials of both Courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

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.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

- (a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;
- (c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means, in which case Guideline 7 should apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate; and

(d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the Rules of Procedure applicable in each Court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate; and

(d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish

appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

(a) Each Court should be able to simultaneously hear the proceedings in the other Court.

(b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.

(c) Submissions or applications by the representative of any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submissions to it.

(d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.

(e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or non-substantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof or exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the

proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List that may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction (“Non-Resident Parties”). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application or motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes

described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

Dated this 1st day of October 2007

Hon. Chief Justice Richard Ground
Hon. Mr. Justice Ian Kawaley
Hon. Mr. Justice Geoffrey Bell”

APPENDIX 2

Memorandum of Guidance on the Recognition and Enforcement of Caribbean Corporate Insolvency Orders

Introduction

1. The purpose of this memorandum is to set out the parties’ understanding of the procedures for the enforcement of foreign insolvency orders in their courts. This memorandum is concerned only with orders made in a winding-up proceeding or approving a scheme of arrangement or similar restructuring agreement designed to modify the rights of creditors of an insolvent company.
2. This memorandum has no binding legal effect. It does not constitute a treaty or legislation, is not binding on the judges of either party and does not supersede any existing laws, judicial decisions or court rules. It is not intended to be exhaustive and is not intended to create or alter any existing legal rights or relations.

3. In some jurisdictions statutory rules exist for the recognition of foreign insolvency orders and the winding-up of overseas companies. This memorandum seeks to clarify the common law rules which apply where such legislation either does not exist or does not apply. While the memorandum primarily speaks to the treatment to be accorded to judgments made in the parties' courts, the relevant rules will ordinarily apply to equivalent foreign orders regardless of their national or geographical origin.
4. The parties desire and believe that the cooperation demonstrated by this memorandum will promote a mutual understanding of their laws and judicial processes and will improve public perception and understanding.

Application of the common law of the parties

5. There is currently no treaty in place pursuant to which either party's insolvency orders may be enforced by the other party's courts.
6. In the absence of a relevant treaty, a foreign insolvency order may be afforded recognition enforced by an application made at common law, in accordance with the principles and practice described below.
7. Under the common law, where a court of competent jurisdiction in an overseas company's place of incorporation has appointed a liquidator or made a winding-up order, the relevant order will, on the application of the foreign liquidator (or other representative of the foreign debtor) be recognised by the local court.
8. An application for recognition of a foreign insolvency order may be made as a freestanding application at common law without the need to open an ancillary winding-up proceeding in relation to the foreign debtor.
9. Where the local court has recognised a foreign insolvency order to which paragraph 7 applies, the court will be subject to a positive duty to assist the foreign insolvency court. The local court possesses the discretionary power to assist by applying whatever remedies are available under local law including local insolvency law.
10. Where a foreign court of competent jurisdiction in an overseas company's place of incorporation approves an arrangement affecting creditors' rights in relation to the insolvent foreign debtor, the local court may in its discretion recognise the foreign proceeding and any orders made therein.
11. Where a foreign court of competent jurisdiction in a forum where the company carried out either its main business activities or some business activities makes an insolvency order or restructuring order, the local court may in its discretion recognise the foreign proceeding and any orders made therein.

12. Where foreign proceedings and any orders made therein are recognised under either paragraph 9 or 10, the local court may in its discretion assist by granting whatever remedies are available under local law including local insolvency law.

Dated [].

Signed by Heads of Jurisdiction of the following Courts:

[]