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Inter-Court Communications

Rafael X. Zahralddin-Aravena, Moderator
Elliott Greenleaf; Wilmington, Del.

Jan Golaszewski
Carey Olsen; Cayman Islands

Alex L. MacFarlane
Borden Ladner Gervais LLP; Toronto

Craig Martin
DLA Piper LLP; Wilmington, Del.

Justice Fred Myers
Ontario Superior Court of Justice; Toronto

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Rafael X Zahralddin-Aravena
Elliott Greenleaf
Wilmington, Delaware

The Honorable Fred L. Myers
Ontario Superior Court of Justice
Ontario, Canada

Alex MacFarlane
Borden Ladner Gervais LLP
Toronto, Canada

R. Craig Martin
DLA Piper LLP (US)
Wilmington, Delaware

Jan Golaszewski
Carey Olsen
Cayman Islands

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Oksana Koltko Rosaluk
Associate
DLA Piper LLP (US)
Chicago, Illinois

Tim Baildam
Associate
Carey Olsen
Cayman Islands

Tara Nair
Attorney
DLA Piper LLP (US)
Chicago, Illinois

Jade Williams
Associate
DLA Piper LLP (US)
Chicago, Illinois

Introduction

Inter-court cooperation has become critical in today's global economy as corporate insolvencies burst beyond jurisdictional boundaries and present themselves as complex cross-border proceedings.

As a result, inter-court communication is the cornerstone of effective and efficient inter-court cooperation in cross-border insolvency proceedings.

Industry professionals and judiciary are facilitating inter-court communication by developing, adopting, and utilizing various types of inter-court communication protocols.

Sources of Inter-Court Communication

- Guidelines Developed by Associations, Institutes, and Trade Groups
- Model Law
- Court-Developed Protocols
- Local Rules

Judicial Insolvency Network

- In October 2016, judges from the Cayman Islands, the British Virgin Islands, Singapore, Australia (Federal Court and New South Wales), Canada (Ontario), England and Wales, the USA (District of Delaware and Southern District of New York), and Hong Kong (as an observer) – met in Singapore for the inaugural Judicial Insolvency Network ("**JIN**") Conference (the Chief Justice of Bermuda participated by way of a written submission).

- At the JIN Conference, the participating judges discussed the need for guidelines and the key aspects of communication and cooperation among courts, including the role of insolvency officeholders and other representatives and parties involved in cross-border insolvency proceedings.

- The JIN Conference culminated in the *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters* (the "**JIN Guidelines**"), which distilled concepts of the *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases,* promulgated jointly by the American Law Institute, American Bar Association, and International Insolvency Institute.

- JIN Guidelines cover the adoption and interpretation of the JIN Guidelines, communication between the courts, appearance in court, and consequential provisions.

JIN Guidelines: Goals

- To improve the interests of all stakeholders in the cross-border insolvency proceedings;
- To drive efficiencies, effectiveness, and transparency into cross-border insolvency proceedings;
- To ensure that relevant stakeholders' interests are respected while information is shared to reduce costs in identifying, preserving and maximizing the value of the debtors' assets and businesses;
- To minimize litigation, costs, and inconvenience to all stakeholders;
- To ensure the management of a debtor's estate in a way that is proportionate to the aggregate amount of the financial claims that are involved, the nature of the case, and the complexity of the issues, as well as the number of creditors and jurisdictions involved in the parallel insolvency proceedings;
- To complement the rules and ethical principles by which an administrator is bound according to applicable law and professional standards of each jurisdiction;
- To establish a standard of best practice for dealing in cross-border insolvency proceedings.

JIN Guidelines: Content

Guidelines 1-6 ***(Adoption and Interpretation)*** address the manner and scope of the adoption of the JIN Guidelines, including the guidance that the courts supervising parallel insolvency proceedings should encourage their adoption as early as practicable to aid in administration of proceedings.

- **Guideline 1** encourages administrators in cross-border proceedings to cooperate in all aspects of the case.
- **Guideline 2** provides that the JIN Guidelines should be adopted by a protocol or court order following an application by the parties or, if the court has power to do so, at its own direction.
- **Guideline 3** provides that, if possible, the protocol or order should address coordination of requests for court approvals or communications with creditors in a time-saving manner that avoids unnecessary and costly court hearings.
- **Guideline 4** provides that the JIN Guidelines are not intended to interfere with a court's jurisdiction in administering the proceeding before it, to interfere with or derogate from the applicable rules or ethical principles that are relevant to the proceeding., or to alter substantive rights.
- **Guideline 5** clarifies that JIN Guidelines are procedural in nature.
- **Guideline 6** provides that, when interpreting the JIN Guidelines or any protocol or order issued under them, due regard must be given to their international origin and to the need to promote good faith and uniformity in their application.

JIN Guidelines: Content (*Cont'd*)

Guidelines 7-8 ***(Communication Between Courts)*** lay the ground work for developing inter-court communication protocols.

- **Guideline 7** provides that courts may communicate (whether by telephone, video, or other electronic means) directly with foreign courts for the purpose of making submissions, rendering decisions, and coordinating and resolving procedural, administrative, or preliminary matters relating to any joint hearing.
- **Guideline 8** provides that, in the event of commutations between courts (other than regarding administrative matters or unless the courts otherwise direct), the parties may be present, and if the parties are entitled to be present, they should receive advance notice in accordance with the courts' rules. The communications between the courts should be recorded, and any written transcript, which may be prepared based on the recording, may be filed as part of the record in the proceedings and made available to the parties, subject to any confidentiality.

JIN Guidelines: Content (*Cont'd*)

Guideline 9 ***(Notification)*** permits a court to provide notice of all proceedings to parties in the proceedings in another jurisdiction, ensuring transparency. All notices, applications, motions, and other materials in the proceedings may be ordered to be provided to other parties.

Guidelines 10-11 ***(Appearance in Court)*** allow a party or appropriate person to appear before and be heard by a foreign court without submitting oneself fully to the jurisdiction of such court.

- **Guideline 10** provides that a court may authorize a party, or an appropriate person, to appear before and be heard by a foreign court, subject to approval of the foreign court to such appearance.
- **Guideline 11** provides that, if permitted by its law and otherwise appropriate, a court may authorize a party to a foreign proceeding, or an appropriate person, to appear and be heard on a specific matter by it without becoming subject to its jurisdiction for any purpose other than the specific matter on which the party is appearing.

JIN Guidelines: Content (*Cont'd*)

Guidelines 12-14 ***(Consequential Provisions)*** provide for recognition of foreign statutes, regulations, orders, and rules of court.

- **Guideline 12** provides that, a court should, except on 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 other jurisdictions without further proof, which recognition *will not* constitute recognition of their legal effect or implications.
- **Guideline 13** similarly provides that, a court should accept that orders made in the proceedings in other jurisdictions were duly and properly entered on their respective dates and accept that such orders require no further proof, subject to its law and 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, with notices of any amendments to or appellate decision with respect to such orders must be provided as soon as practicable.
- **Guideline 14** permits that a protocol or order made under the JIN Guidelines might be amended, modified, and extended as appropriate by the relevant court and consistent with the JIN Guidelines.

JIN Guidelines: Content (*Cont'd*)

Annex A to the JIN Guidelines (*Joint Hearings*) sets forth 7 principles that should apply to joint hearings:

(i) The implementation of the Annex does not divest nor diminish any court's respective independent jurisdiction over the subject matter of proceedings.

(ii) Each court should have exclusive jurisdiction and power over the conduct of its own proceedings and determination of matters arising in its proceedings.

(iii) Each court should be able simultaneously to hear the proceedings in the other court, considering how to provide the best audio-visual access.

(iv) Consideration should be given to the coordination of the process, and the]format for submissions and evidence filed or to be filed in each court.

(v) A court may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it, in which case consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant court and/or its professional regulations.

(vi) A court should communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions and to coordinate/resolve any procedural, administrative or preliminary matters.

(vii) A 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 outstanding issues, considering whether the issues include procedural or substantive matters. And whether some or all of such communications should be recorded and preserved.

Adoption of JIN Guidelines

The following courts have adopted the JIN Guidelines into their local rules:

- Singapore Supreme Court
- The United States Bankruptcy Court for the District of Delaware
- The United States Bankruptcy Court for the Southern District of New York
- The Commercial Court of Bermuda

The Ontario Superior Court also is contemplating moving exclusively to the JIN Guidelines.

First Caribbean Region Judicial Colloquium on Insolvency

- On November 6, 2013, the Cayman Islands hosted the first Caribbean Region Judicial Colloquium on Insolvency Law **("Colloquium")** with 23 participants (from 14 jurisdictions) in attendance, including most of the island judiciary, as well as representatives from the regional courts and judges from other jurisdictions.
- The Colloquium was designed to compare judicial practice in dealing with issues arising in cross-border insolvency cases in the Caribbean, with input from other jurisdictions involved in cases in that region such as the USA, Canada, and the UK.
- The Colloquium addressed several judgments entered by the English courts in two cross-border insolvency proceedings that created uncertainty and led to conflicting results:

  (i) *Cambridge Gas Transp. Corp. v Unsecured Creditors of Navigator Holdings* [2007] 1 AC 508
  (ii) *Rubin v Eurofinance SA* [2012] UKSC 46

- The Colloquium encouraged judicial cooperation through the use of cross-border protocols (both between the parties and the judges) and discussed cases in which protocols were utilized.
- The Colloquium also addressed the issues that judges face in cases where a protocol is adopted, noting that judges may only be influenced by what is before them, and potential difficulties may arise if in the course of the communication one judge seeks to impose his/her view on the other judge, or if one judge raises an idea that the other judge had not considered. The corresponding protections for the judge comes from (i) exposing that idea to the parties in the case and allowing them to consider it and (ii) providing notice to the parties of an intent to communicate.

Court-to-Court Protocols with Cayman Islands

- Cross-border protocols are now frequently agreed between the officers of the debtor and the provisional liquidators and can be invaluable in ironing out the practicalities of how the parties will cooperate to ensure efficient administration of the debtor's estate. Ideally, at the outset, Cayman and US practitioners will discuss the potential areas of conflict or jurisdictional tension in the proceedings and seek to deal with these in the protocol.

- The scope of such protocols is entirely flexible and can be used to set out agreed procedures on important issues, such as exchanging information between the provisional liquidators and the officers of the debtor, co-ordinating applications between the Cayman Court and the relevant US bankruptcy court, filing creditor claims and addressing the subsequent claims adjudication process. Protocols can also consider the formulation of restructuring proposals, the preservation and realisation of assets, and the conduct of litigation. To be conclusively binding on all parties, such protocols should be approved by both the Cayman Court and the relevant US bankruptcy court.

- As an example, in the *Ocean Rigs* case, parallel proceedings were issued on the same day in the Cayman Islands through winding up petitions and in the Southern District of New York seeking relief under Chapter 15. The Courts approved a cross-border insolvency protocol that aimed to ensure the just, efficient and expeditious administration of both proceedings. The protocol provided for communications and updates between the Courts, with an aim of having transparency and accountability in the conduct of the proceedings.

Letters of Request

Letters of request are sent by one court to a foreign court in cross-border insolvencies where there are proceedings underway in both courts., requesting assistance from the foreign court and seeking to establish cooperation between the courts:

- ***China Agrotech Holdings Ltd*** – in this case, the Hong Kong Court sent a letter of request to the Cayman Court, requesting that the Cayman Court make certain orders (which the liquidators then sought from the Cayman Court). The Cayman Court permitted the liquidators to apply for and promote a parallel scheme in the Cayman Islands, but made orders in a different form from the orders contained in the letter of request. For example, the Cayman Court refused to make an order that no proceedings could be commenced against the company in the Cayman Islands except with leave of the Court, but instead directed that all proceedings commenced against the company would be heard by the same judge (Justice Segal), to allow suitable case management decisions to be made.

- ***China Medical Technologies Ltd*** – this case concerned a company incorporated in the Cayman Islands, the directors of which were suspected to be involved in a fraud that occurred in Hong Kong. The Hong Kong Court dismissed a petition to wind up the company in Hong Kong because liquidation proceedings were underway in the Cayman Islands. However, following receipt of a letter of request from the Cayman Islands Court, the Hong Kong Court made an order for production of documents in Hong Kong.

Examples of Effective Judicial Cooperation

In the Matter of Lancelot Investors Fund Ltd – this case concerned an application for the Cayman Islands company to be wound up and liquidators appointed. Existing proceedings had been brought in the US under chapter 7, as the company's creditors and investment manager were located in the US. The Cayman Court granted the application but recognised that the US was the principal place for the liquidation. Therefore, the Cayman Court stayed the Cayman proceedings, to give the Cayman official liquidator and the Chapter 7 trustee an opportunity to discuss their respective roles and try to agree a protocol for the efficient liquidation of the company, thus avoiding multiple proceedings and duplication of costs. The Cayman Court also encouraged the Chapter 7 trustee to apply for recognition in the Cayman Islands.

Examples of Effective Judicial Cooperation (*Cont'd*)

- ***In the Matter of Z-Obee Holdings Ltd*** – this case concerned a Bermuda company listed on the Hong Kong Stock Exchange. The company was in provisional liquidation in Hong Kong, but following negotiations with an investor sought to be restructured rather than wound up, which would not be possible in a Hong Kong liquidation. The company therefore applied to the Bermuda Court to appoint the Hong Kong JPLs as Bermuda JPLs, to facilitate the restructuring. The Bermuda Court granted the application, on the basis that the Hong Kong proceedings would be discontinued and the Bermuda Court would send a letter of request to the Hong Kong Court seeking assistance in the form of promoting a parallel scheme of arrangement in both jurisdictions.

Examples of Effective Judicial Cooperation (*Cont'd*)

- ***In the Matter of Trident Microsystems (Far East) Limited*** – the company subject to the winding up proceedings was incorporated in the Cayman Islands, and its parent company was incorporated in Delaware. On the same day, the companies jointly applied for Chapter 11 relief in Delaware, and filed a winding up petition in the Cayman Islands. The Delaware Court and the Cayman Court approved a cross-border insolvency protocol following a joint hearing by telephone, which provided a framework for cooperation between the Courts, including the need to seek sanction from both Courts for the sale of assets. A copy of the protocol is attached to the judgment.

Example of Lack of Effective Judicial Cooperation

In the Matter of Soundview Elite Ltd. - a group of mutual funds incorporated in the Cayman Islands were subject to winding-up proceedings in the Cayman Islands and Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of New York. The funds were managed and administered from New York.

In January 2014, Judge Gerber heard competing applications to determine whether to stay the chapter 11 proceedings in favour of the Cayman liquidation, and whether to hold the Cayman JOLs in contempt of court for progressing the Cayman liquidation without the consent of the US Court. The judge refused to stay the US proceedings, and ruled that the automatic stay arising under US law became effective as soon as the chapter 11 filing was made, and all acts in the Cayman Islands (including appointing the JOLs) after that date were void under US law and a violation of the stay. The judge criticised the JOLs in pursuing the liquidation in the Cayman Islands, including advertising the liquidation, forming a liquidation committee, holding a stakeholder meeting, and delivering reports to the Cayman Court, and stated that they should have applied for an order that the US stay did not apply or granting relief from it.

However, Judge Gerber ultimately granted relief from the stay and ratified the otherwise voidable acts to encourage cooperation between the courts. The judge also refused to hold the JOLs in contempt, but continued the motion for contempt pending consideration of their future conduct, and stated that consent would be needed from the US Court to take any further steps in the Cayman liquidation.

US-Canada Inter-Court Cooperation: Generally

- Canadian and US courts have had good relations for decades – particularly between Ontario Superior Court, on one side, and United States Bankruptcy Court for the District of Delaware and United States Bankruptcy Court for the Southern District of New York, on the other.
- US bankruptcy courts have considerable regard for the Canadian insolvency process and have demonstrated a comfort level with Canadian courts asserting primary jurisdiction over cross-border matters having a centre of main interest ("**COMI**") in Canada.
- There is routine exchange between the Canadian and US judiciaries and the respective bars of each jurisdiction in professional trade groups (such as the American Bankruptcy Institute and National Conference of Bankruptcy Judges in addition to conferences held across various Canadian provinces). Protocols for inter-court communication were developed through these exchanges.

US-Canada Inter-Court Cooperation: Legislative Support

- Chapter 15 of the US Bankruptcy Code expressly permits direct communication by Canadian and US bankruptcy judges (but does not necessitate protocols or other formal arrangements).
- Despite the fact that Canadian and US courts had already been working quite effectively together on cross-border insolvencies for years, Part IV of the Companies' Creditors Arrangement Act ("**CCAA**") was amended in 2009 to largely adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvencies to further advance the fair and efficient administration of cross-border insolvencies.
- Part IV of the CCAA codifies and mandates the cooperation of Canadian courts with their foreign counterparts to the "maximum extent possible" (subject to public policy exceptions) and grants courts the flexibility to approve or implement agreements concerning the coordination of proceedings.

US-Canada Inter-Court Cooperation: Examples

The Ontario Superior Court has approved cross-border protocols where both the CCAA and the US chapter 11 proceedings were coordinated to avoid inconsistent, conflicting or duplicative rulings by the courts:

- substantive rights of all parties were protected;
- all parties were provided with sufficient notice of key issues in both proceedings; and
- the jurisdictional integrity of the respective courts were preserved.

The following are examples of such cases:

- *In re Nortel Networks Corp.*
- *In re Eddie Bauer of Canada Inc.*
- *In re Matlack*
- *In re Muscletech Research & Development Ltd.*

US-Canada Inter-Court Cooperation: *Nortel* Case Study

- ***In re Nortel Networks Corp***. – the Delaware bankruptcy court, in adopting the cross-border court-to-court protocol, acknowledged the need to coordinate activities in the insolvency proceedings that were taking place both in Canada and the US for several reasons, including the following:
  - To protect the rights of the parties;
  - to ensure the maintenance of the courts' respective inherent jurisdictions; and
  - to give effect to the doctrines of comity.
- The court in *Nortel* clarified that the approval and implementation of the protocol did not divest nor diminish the US or Canadian courts' respective independent jurisdictions over their respective subject matter.
- Moreover, the adopted protocol allowed the US and Canadian courts to hear expert evidence and seek the advice and direction of the other court in respect of a foreign law that was to be applied to determine an issue.

US-Canada Inter-Court Cooperation: Obstacles to Cooperation

- Both the US Bankruptcy Code and the CCAA (and BIA) allow courts the flexibility to refuse cooperation where doing so would be contrary to the public policy of the respective country.
- That said, this exception has rarely been relied on and the court of the S.D. of New York has held that this public policy exception should be narrowly interpreted and restricted to the most fundamental policies of the United States (*Muscletech*).
- In *Muscletech*, four US parties objected to the recognition by the US Bankruptcy Court for the Southern District of New York of a Canadian Order on the basis that the Canadian Order was manifestly contrary to the public policy of the United States in that it deprived the objectors of their right to a trial by jury.
- The Court denied the objections, noting the Ontario and US courts had substantially the same substantive and procedural due process protections (the right to counsel, the right to present evidence and witnesses and to examine evidence, and a right to appeal to a higher court).
- The Court went on to observe that the notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world – the procedure that brought about the Canadian Order plainly afforded claimants a fair and impartial proceeding. The Court noted that nothing else was required by the US Bankruptcy Code nor any other law.

Inter-Court Communication in 5 Years

- **Technological Developments**
  - There have been amazing technological advances over the last 15 years, encouraging courts in cross-border insolvency cases to take advantage of opportunities presented by these kinds of advances.
  - Skype, which rebranded Microsoft Lync, is widely used for intra-office communication and telephony and recognized as affordable.
  - Nortel, is connected to Microsoft Outlook, but is more expensive.
- **The Need for Reform**
  - United States
    - The United States Supreme Court has not adopted a specific standard for two- or multi-way video testimony.
    - The legislative reform in this space seems unlikely at this time – Chapter 15 took over 8 years due to other issues attached to 2005 Amendment; also, the ABI Commission on Reform of Bankruptcy Code has very little commentary on cross-border issues or need for reform.
  - Canada
  - Other Jurisdictions