



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO. FSD 105 OF 2020 (IKJ)  
CAUSE NO. FSD 106 OF 2020  
CAUSE NO. FSD 154 OF 2020**

**IN THE MATTER OF THE COMPANIES LAW (2020 REVISION)**

**AND IN THE MATTER OF LATAM FINANCE LIMITED**

**AND IN THE MATTER OF PEUCO FINANCE LIMITED**

**AND IN THE MATTER OF PIQUERO LEASING LIMITED**

**IN CHAMBERS-VIA VIDEOCONFERENCE**

**Appearances:** Mr Marc Hecht and Ms Zoë Nolan, Walkers, on behalf of the Mr Kris Beighton and Mr Jeffrey Stower of KPMG, Joint Provisional Liquidators of each of the Companies (“JPLs”/ “Companies”)

**Before:** The Hon. Justice Kawaley

**Heard:** 29 July 2020

**Date of decision:** 29 July 2020

**Draft Reasons Circulated:** 20 August 2020

**Reasons Delivered:** 24 August 2020

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*Cross-border insolvency-approval of protocol for court-to-court communications-jurisdiction to approve protocol-governing principles*



## REASONS FOR DECISION

### Background

1. The JPLs were appointed with ‘light-touch’ powers to supervise a restructuring on the application of each of the Companies on May 28, 2020 (LATAM Finance Limited (“LTM”) and Peuco Finance Limited (“PF”)) and on July 10, 2020 (Piquero Leasing Limited (“PL”)), respectively. It was anticipated by each Petition that the Companies would seek relief under Chapter 11 of the US Bankruptcy Code.
2. By Ex Parte Summonses each dated July 22, 2020, the JPLs applied for Orders for directions that:

*“1. 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 2<sup>nd</sup> Civil Court of Santiago, Chile and the Superintendencia de Sociedades in Colombia.”*

3. The applications were supported by the First Affidavit of Jeffrey Stower which explained how the protocol idea had developed (prompted by the suggestion of the Chilean court) and placed the proposed form of protocol before the Court. Counsel for the JPLs addressed the Court’s jurisdiction to grant the applications, albeit by reference to general principles being unable to identify any directly applicable previous published decision of this Court. At the end of the hearing I granted the applications and made Orders, *inter alia*, that:

*“1. The cross-border court-to-court communications protocol as appended hereto (the ‘**Cross-Border Protocol**’), as it may be amended or supplemented by further order of this Honourable Court, be approved in all respects subject to approval of the same by each of the United States Bankruptcy Court for the Southern District of New York (the ‘**U.S. Court**’), the 2<sup>nd</sup> Civil Court of Santiago, Chile and the Superintendencia de Sociedades in Colombia (the ‘**Courts**’).”*

4. As this appears to be the first time that this Court has approved a ‘Court-to-Court Communications’ protocol, and the jurisdictional basis for this decision was somewhat unclear, I now give reasons for this decision.



## The JPLs submissions

5. In the JPLs' Skeleton Argument, it was firstly submitted that the “*law applicable to the presentation and consideration of international protocols is contained in Order 21 of the Companies Winding Up Rules, 2018 (the ‘CWR’)*” (paragraph 10). It was further submitted that the scope of the proposed Protocol was consistent with the requirements of CWR Order 21, rule 3. As I observed in the course of hearing, this was a difficult basis to rely upon given the apparent non-alignment between the types of protocols contemplated by Order 21 and the narrow scope of the proposed ‘Cross-Border Protocol’ (the “Protocol”).

6. It was then submitted as follows:

*“17. Importantly, Practice Direction No. 1 of 2018 (“PD”) stipulates that consideration should be given by provisional liquidators to the incorporation of the certain guidelines into international protocols and that the protocol may, subject to the approval of the Court; cover other matters including court-to-court communications and cooperation as provided for in the Guidelines.*

*18. It is noted that the Cross-Border Protocol is a distilled version of the ALI/ABA/III Guidelines, which are expressly referred to in the PD as being appropriate to the jurisdiction of the Cayman Islands.”*

7. Footnote 36 pointed out:

*“There are two main sets of guidelines (the “Guidelines”) for court-to-court communications and cooperation which might be adopted in this jurisdiction, with appropriate modifications. These are the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the “ALI/ABA/III Guidelines”) and The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters.”*

8. In the course of the hearing, Mr Hecht sensibly accepted that Practice Direction No.1 of 2018 (the “Practice Direction”) addressed the Protocol more directly than any other source of jurisdiction advanced.

9. Reliance was also placed on the fact that the JPLs had been empowered by paragraph 5(h) of the Order appointing them in respect of each of the Companies:

*“to enter into such protocol or other agreement as the JPLs deem appropriate for the co-ordination of these proceedings, the proceedings that have been commenced*



*by the Company and other entities within the LATAM group of companies under Chapter 11 of Title 11 of the U.S. Bankruptcy Code and any other like proceedings for the winding up, restructuring and/or reorganisation of the Company and other companies within the LATAM group of companies, subject to the approval of this Court and the U.S. Bankruptcy Court for the Southern District of New York in the United States of America.”*

10. This power was potentially relevant, because it contemplated protocols dealing with cross-border “*co-ordination of...proceedings*”, but the present application related to a protocol to be entered into, on its face, between the respective courts, and the JPLs appeared to be acting as facilitators of the Protocol rather than intending to actually enter into it.
11. Finally, most pertinently, reliance was placed on this Court’s established practice of promoting cross-border cooperation in insolvency cases. It was submitted by Mr Hecht and Ms Nolan in their Skeleton:

*“21. This Honourable Court has demonstrated its willingness, on various occasions, to cooperate with foreign Courts to ensure the efficient management of cross-border insolvency proceedings, including, by approving the entry into international protocols.*

*22. Indeed, this Honourable Court in the Matter of Lancelot Investors Fund Limited [2009 CILR 7]38, adopted the language of Lord Denning, who, when sitting in the Court of Appeal in Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. (7) ([1978] A.C. at 560) stated that:*

*‘It is our duty and our pleasure to do all we can to assist [the foreign] court, just as [the English court] would expect the [foreign] court to help us in like circumstances.’”*

## **Legal findings: the jurisdictional basis for entering into a court-to-court communications protocol**

### **Sources of jurisdiction**

12. The Cayman Islands, so far as cross-border insolvency law is concerned, remains to a significant extent a ‘traditional’ common law jurisdiction. The rules of private international law, or the conflict of laws, have not been codified and cannot be discerned in single set of statutory rules. The importance of international financial centres actively utilizing common law powers in the absence of comprehensive statutory international cooperation codes has long been recognised. As Deemster David Doyle opined in *Re Impex* [2003-2005] MLR 115:



*“52. Here on the Isle of Man, we are all citizens of the Island but we are also citizens of the global community in which we live, work and contribute. We need to recognise our international as well as our local responsibilities. If the English High Court requires assistance then the Manx High Court, if it has jurisdiction and subject to any necessary safeguards, should not, in a proper case, be slow to provide such assistance.”*

13. England and Wales was also primarily reliant on common law cross-border insolvency rules of private international law for many years. Then, partly under European Union influences, the ambit of the common law was narrowed in England and Wales by increased reliance on statutory rules. As Lord Hoffman observed, dealing with a Privy Council appeal from the Isle of Man in *Cambridge Gas Transport Corp-v- Committee of Unsecured Creditors of Navigator Holdings PLC* [2007] AC 508, [2006] UKPC 26:

*“16. The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated. For example, in *Solomons v Ross* (1764) 1 H Bl 131n a firm in Amsterdam was declared bankrupt and assignees were appointed. An English creditor brought garnishee proceedings in London to attach £1200 owing to the Dutch firm but Bathurst J, sitting for the Lord Chancellor, decreed that the bankruptcy had vested all the firm's moveable assets, including debts owed by English debtors, in the Dutch assignees. The English creditor had to surrender the fruits of the garnishee proceedings and prove in the Dutch bankruptcy.*

*17. This doctrine may owe something to the fact that 18<sup>th</sup> and 19<sup>th</sup> century Britain was an imperial power, trading and financing development all over the world. It was often the case that the principal creditors were in Britain but many of the debtor's assets were in foreign jurisdictions. Universality of bankruptcy protected the position of British creditors. Not all countries took the same view. Countries less engaged in international commerce and finance did not always see it as being in their interest to allow foreign creditors to share equally with domestic creditors. But universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view.*

*18. As Professor Fletcher points out (Insolvency in Private International Law (1999 OUP) at p. 93) the common law on cross-border insolvency has for some time been ‘in a state of arrested development’, partly no doubt because in England a good deal of the ground has been occupied by statutory provisions such as section 426 of the*



*Insolvency Act 1986, the European Council Regulation on Insolvency Proceedings (1346/2000/EC) and the Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030), giving effect to the UNCITRAL Model Law. In the present case, however, we are concerned solely with the common law....*

*21. Their Lordships consider that these principles are sufficient to confer upon the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan. As there is no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there can be no discretionary reason for withholding such assistance.*

*22. What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, section 426(5) of the Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply "the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction." At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."*

14. The following principles which are still largely uncontroversial can be extracted from the quoted extracts from *Cambridge Gas*:
- (a) there is a common law rule 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';
  - (b) 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
  - (c) the combination of these two common law rules is known as "modified universalism".

15. In the post-*Cambridge Gas* era, Anthony Smellie CJ identified the deeper underpinnings of the common law assistance power as being the wider, and older, principle of “comity”. Writing extra-judicially in ‘*A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-Operation*’ (2011) 2 Beijing Law Review, 145-154 ( at 147), he opined as follows:

*“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, classically described by Lord Denning in the Westinghouse case in relation to a request by the United States Federal Court in this way:*

*‘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. Do unto others as you would be done by.’ ”*

16. In *Singularis Holdings Limited-v-PricewaterhouseCoopers* [2015] AC 1675, in which actual decision in *Cambridge Gas* was disapproved, Lord Sumption described the sources of the modified universalism principle as follows:

*“19... In the Board’s opinion, 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.” [emphasis added]*

17. It is this common law duty to assist foreign insolvency courts in service of the goal of a universal application of the regime for dealing with creditors claims being applied in the main insolvency proceeding, which is the principal foundation of this Court’s jurisdiction to approve the Protocol in the present case.
18. However, it is important to acknowledge the relevance of other subsidiary sources of jurisdictional rules which are built on top of the foundations of comity and the common law duty to assist foreign insolvency courts. The next most important, in my judgment, is the inherent jurisdiction of the Grand Court to manage its own processes (i.e. its procedures). Section 11 of the Grand Court Law (2015 Revision) provides:

*“(1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this*



*and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by-*

*(a) Her Majesty's High Court of Justice; and*

*(b) the Divisional Courts of that Court, as constituted by the Senior Courts Act, 1981, and any Act of the Parliament of the United Kingdom amending or replacing that Act.”*

19. This statutory provision incorporates into Cayman Islands law the common law rules of practice under which English superior courts of record have the right to manage their own procedures to prevent the Court's processes being misused. Those inherent powers based almost entirely on judge-made law are supplemented by rules of court which are in substance made not by the Executive or legislative branches of Government, by the Judiciary itself.
20. Where a case management power is not found in legislation or, for present purposes, in the CWR, the gap may generally be filled by the Court's inherent jurisdiction. In some contexts, an inherent common law power may overlap with or be supplemented by a rule of court. A helpful example is the case management stay in ordinary civil litigation. In *Re Nangfong International Investments Ltd* [2018 (2) CILR 321], Moses JA stated:

*“42. There is no specific power contained within Cayman Islands legislation for the imposition of a case management stay. The courts invoke their inherent jurisdiction and their general case management powers derived from the preamble to the Grand Court Rules 1995 (Revised) and the Financial Services Division Guide, 2nd ed., s.A4, at 9–10 (2015), which reproduces the same text (see CIGNA Worldwide v. ACE Ltd. (3) (2012 (1) CILR 55, at paras. 55–57)).”*

21. This passage illustrates firstly that case management powers as significant as the power to grant a stay of proceedings are derived from the Court's inherent jurisdiction. But further, the passage demonstrates that the exercise of the power may be derived not just from formally promulgated rules of court, but also from practice directions such as the Financial Services Division Guide which, incidentally, reproduces the Overriding Objective from the Preamble to the Grand Court Rules. It is this inherent jurisdiction, fortified it might be said by the constitutional protections for judicial independence<sup>1</sup>, which may be viewed as the source of the power to issue practice directions to signify the Court's general view of the procedural approach to various types of cases and matters. In the present case, the JPLs' counsel rightly identified as important Practice Direction No.1 of 2018, '*Court-to-court Communication and cooperation in cross-border insolvency and restructuring cases*', issued by Anthony Smellie CJ on May 31, 2018 (the "Practice Direction").

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<sup>1</sup> Cayman Islands Constitution Order 2009, section 7(1) and 107.





22. The first section of the Practice Direction merits reproduction in full:

*“The Guidelines – what they cover and when they should be used.*

*1. This practice direction deals with the use and adoption in cases pending before the Grand Court of the Cayman Islands (Court) of published guidelines relating to court-to-court communications and cooperation in cross-border insolvency and restructuring proceedings.*

*2. There are two main sets of guidelines (Guidelines) for court-to-court communications and cooperation which might be adopted in this jurisdiction, with appropriate modifications. These are the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to Court Communications in Cross-Border Cases and The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. Copies of the current versions of both sets of Guidelines are attached to this Practice Direction.*

*3. The Guidelines primarily cover the procedural rules that may be adopted and applied in particular cross-border cases for regulating the manner of communications between the courts involved, the appearance of counsel in each court, notification to parties in parallel proceedings, the acceptance as authentic of official documents or orders made in the foreign jurisdiction or court and joint hearings. They are to be applied either by being incorporated in a protocol between the respective officeholders which protocol is then approved by the Court (and other courts involved as required) or by a separate order of the Court without a protocol (and orders of the other courts involved as required), in each case subject to such modifications as may be required in the circumstances.*

*4. The Guidelines are relevant where the insolvency or restructuring proceedings are being supervised by, or involve related applications to, courts in more than one jurisdiction. Such proceedings will include liquidation (including provisional and voluntary liquidation) and other insolvency or restructuring proceedings involving applications to court. Accordingly, the Guidelines will be relevant to schemes of arrangement relating to a company being supervised by the Court which also involve a parallel scheme (or debt adjustment proceeding) or ancillary proceedings in another jurisdiction (and may also be relevant in cases in which the Court has appointed a receiver or other officer of the Court and where the Cayman Islands Monetary Authority has appointed a controller pursuant to the Cayman Islands regulatory laws). The Guidelines can apply whether the officeholder is appointed by the Court or is appointed out of Court and whether the person is appointed in*



*respect of a company (incorporated in the Cayman Islands or abroad) other legal entity (established in the Cayman Islands or abroad) or an individual.*

*5. Officeholders appointed in the Cayman Islands, companies subject to restructuring proceedings supervised by the Court and other interested parties involved in cross-border insolvency cases should 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.* [Emphasis added]

23. The Practice Direction appears designed to achieve the following objectives:
- (a) it informally and administratively approves the ALI/III Guidelines and the JIN 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.*”
24. It may immediately be seen that the Practice Direction, probably like all practice directions, does not seek to promulgate new law. It seeks to nudge, rather than push, office holders towards considering in suitable cases inviting the Court to adopt either one of the two annexed sets of Guidelines. The Practice Direction approves the respective Guidelines in principle as being in general terms “fit for purpose” for use in cross-border insolvency cases. The recommended Guidelines are themselves international practice directions, which various other courts pre-approved. The Guidelines bear the *imprimatur* of distinguished sitting and former judges not just from the United States, Canada and England and Wales, but from countries in Africa, Asia, Australasia and Eastern Europe as well. The introduction to the ALI/III Guidelines (the “Guidelines”) concludes as follows:

*“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.”*

25. The Guidelines then set out a series of practical operational principles, 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 is best encapsulated in 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.”*

26. The Practice Direction and the ALI/III and JIN Guidelines may be viewed as emerging sources of law which have been described as “*soft law instruments*”: Gert-Jan Boon and Bob Wessels, ‘*Soft Law Instruments on Restructuring and Insolvency Law: Why They Matter (or Not)*’<sup>2</sup>. It is these instruments that most directly provide a jurisdictional basis for approving the Protocol, building on the more substantive common law principle mandating assisting foreign insolvency courts as far as possible and the inherent jurisdiction of the Grand Court to manage its own processes. The main governing principles applicable to an application for this Court to approve a court-to-court communication may 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 this Court and any relevant foreign courts in cross-border insolvency cases will enhance the efficiency of the cross-border case;
- (c) there is a starting assumption that the ALI/III and/or the JIN Guidelines are suitable guides to adopt and apply in cross-border case.

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<sup>2</sup> [law.ox.ac.uk/business-law-blog/blog/2018/07](http://law.ox.ac.uk/business-law-blog/blog/2018/07)”.



27. In my judgment it is consistent with both elevated constitutional principles of judicial independence, the more pragmatic principles of modified universalism and the even more functional inherent powers of this Court to protect the efficiency and integrity of its processes, that the particularities of how to advance the efficiency of cross-border insolvency proceedings at the operational case management level should be predominantly grounded in such ‘soft law instruments’. These instruments may be viewed as a form of extra-judicial ‘judge-made’ transnational procedural law. As Lord Dyson has noted in ‘*The Globalisation of Law*’<sup>3</sup>:

*“41. We are living in an increasingly interdependent world. Jurists read each other’s judgments with ease on the internet. They meet at international conferences to discuss issues of common interest. The good sense of learning from each other and taking the best that each of us has to offer is now well appreciated...”*

### **Past practice of the Grand Court**

28. There is a long and substantial history of this Court coordinating its hearings with parallel insolvency and restructuring proceedings in foreign courts and, in the process, communicating indirectly with such courts. The co-operation and coordination which occurs may usually too uncontroversial to be formally addressed in published judgments, but notable judicial statements have occasionally been made. The JPLs’ counsel aptly cited *Re Lancelot Investment Fund Limited* [2009] CILR 7 where Quin J held as follows:

*“71...the Grand Court embraces the concept of facilitation of co-operation and co-ordination in cross-border insolvency proceedings.”*

29. The same volume of the Cayman Islands Law Reports contains a report on one of the later of the various decisions relating to the huge BCCI liquidation, *Re Bank of Credit and Commerce International (Overseas) Limited (in liquidation)* [2009] CILR 373, where Anthony Smellie CJ stated:

*“1. The worldwide liquidation of the BCCI companies is now in its final stages. The bleak prospect of recoveries at the date of liquidation has since been transformed into the reality of actual dividends paid to creditors in the global liquidation of 86.5% to date. A major reason for this level of success has been the close co-*

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<sup>3</sup> Pilgrim Fathers Lecture, November 6, 2015, cited in ‘*International Judicial Cooperation*’, Doyle’s Notes in Respect of Talks to Trainee Manx Advocates at paragraph 57.

operation between the global liquidators of the principal BCCI companies...”  
[emphasis added]

30. The commercially-driven rationale of the doctrine of modified universalism underpins the instinctive assumption by this Court that it should manage insolvency cases with a cross-border element in way which fosters cooperation with overseas courts. In *Re CW Group Holdings Limited*, FSD 113 and 122 of 2018 (RJP), Judgment dated August 3, 2018 (unreported) Raj Parker J (dealing with a dispute as to the identity of provisional liquidators) held:

“67. It makes sense to use entities from the same group to allow for better coordination and communication between Singapore and Hong Kong which is likely to be of value to the company as they further engage with creditors and seek to propose and implement a restructuring. Following the approach of Hoffmann J in *Re Maxwell Communications Corp plc* [1992] BCC 372 it also seems to me that it makes sense to choose a firm which is already in possession of a great deal of information with which to carry on acting in the interests of efficiency and economy.” [emphasis added]

31. An even more recent illustration of robust judicial support for the general desirability of coordination in cross-border insolvency cases may be found in Justice Nicholas Segal’s remarks in *Re China Agrotech Holdings Limited (in Liquidation)*, FSD 68 of 2019 (NSJ), Judgment dated July 22, 2019 (unreported) at paragraph 37. In the parallel Hong Kong proceedings, Segal J’s remarks on behalf of this Court were echoed by William Wong SC, Deputy High Court Judge<sup>4</sup>, who reproduced those remarks in his own judgment:

*“Cross-border coordination*

*46. Finally, I would like to say a few words about cross-border coordination. In the Cayman Scheme Judgment, Mr Justice Segal made some apt and important remarks about the need for cross-border coordination (at §37):*

*‘37. I would add one further point. Throughout this case I have reminded the liquidators (and Perfect Gate) of the need to consider the coordination of the applications being made in this Court and the Hong Kong court (and the possible benefit of and need for common directions regarding the filing of evidence and submissions in both courts and even of court to court communication and simultaneous hearings). For reasons of which I am not*

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<sup>4</sup> *Re Da Yu Financial Holdings Limited (formerly known as China Agrotech Holdings Limited) (in liquidation)* [2019] HKCFI 2531 (17 October 2019).

*aware this has not proved to be possible in this case. I do not intend to be critical. There may be good reasons why these steps were considered to be inappropriate or unavailable in this case (and I would note with gratitude that Mr. Justice Harris in the Hong Kong court very helpfully sent me a copy of his Decision of 9 July). But I would remind parties for the future to keep the need for such coordination firmly in mind.*

47. *I would respectfully echo Mr Justice Segal’s remarks...* [emphasis added]

32. The cooperation and coordination between this Court and foreign insolvency cases that has taken place in past cases has, even if only tacitly, been grounded in this Court’s common law duty to assist foreign court and to promote the most economically efficient administration of transnational insolvency estates. Writing extra-judicially almost 10 years ago, Anthony Smellie CJ concluded a comprehensive review of early 21<sup>st</sup> century local case law with the following propitious remarks:

*“In the light of such decisions emanating from the early exercise of the statutory jurisdiction under Part XVII of the Companies Law, there is every reason to believe that the strong tradition of co-operation in trans-national insolvency and bankruptcy matters at common law will continue by the Cayman Islands Courts. Considerations such as whether the foreign court presides at the ‘centre of main interests’ of the debtor entity or whether the foreign proceedings are ‘main’ or ‘nonmain proceedings’ or whether in that regard the debtor entity had an ‘establishment’ in the foreign jurisdiction—all matters of import under the UNCITRAL Model Law—can all be accorded due if not exclusive weight by the Cayman Courts in deciding whether or not to grant recognition to foreign proceedings and foreign representatives. This ability to co-operate can, in large measure, be attributed to the flexibility provided by the wide discretion vested in the Court in exercise of the jurisdiction under Cayman Islands law.*

*Accordingly, the Cayman Islands jurisprudence can be expected to develop well in pace with the development of the common law principles of comity, in keeping with the principles of the UNCITRAL Model Law and in keeping with the legitimate demands of the international financial markets within the wider global economy.*<sup>5</sup>  
[emphasis added]

### **Findings: merits of application for approval of the Protocol**

33. 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, it was obvious that the Protocol could only properly be approved. The Protocol merely sought formal approval of the already

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<sup>5</sup> ‘A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-Operation’ (2011) 2 Beijing Law Review, 145-154 at 154.

administratively pre-approved ALI/III ‘*Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*’.

34. The judicial approval sought also implicitly required the Court to recognise the Chapter 11 proceeding as a foreign main proceeding which this Court, in conjunction with the Courts in Chile and Colombia, was willing to assist. This was also an entirely uncontroversial matter. The requisite recognition had already effectively been granted by this Court’s initial appointment of the JPLs in relation to the Companies for the explicit purpose of pursuing a restructuring. It was explicitly contemplated that such restructuring would take place primarily through Chapter 11 proceedings before the US Bankruptcy Court.

### **Conclusion**

35. For these reasons on July 29, 2020 I granted the JPLs the Orders which they sought approving the Protocol between each of the four Courts concerned with the Companies restructuring under the primary supervision of the US Bankruptcy Court for the Southern District of New York, subject to approval of the three other Courts.



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THE HONOURABLE MR JUSTICE IAN RC KAWALEY  
JUDGE OF THE GRAND COURT