CROSS-BORDER INSOLVENCY LAW IN BERMUDA: A COMMON LAW COMMON SENSE APPROACH

(Paper presented at National Conference of Bankruptcy Judges, International Round Table, Miami Beach, Florida, September 28, 2015)

-by Ian R.C. Kawaley[1]-

Sessions House, home to Bermuda's Supreme Court and House of Assembly since 1821

[1] Chief Justice and Senior Commercial Judge, Bermuda.

Jurisdictional history

Bermuda began its legal history as an appendage to Virginia, and was settled in 1612 under the legal umbrella of the Charter of the Virginia Company. In 1615, the Somers Iles Company Charter was granted by King James I through Letters Patent conferring authority for the establishment of courts in Bermuda and conferring jurisdiction:

> "*…in cases civil and criminal, both maritime and others so always that the said statutes, ordinances and proceedings (as near as conveniently may be) be agreeable to the laws, statutes, government and policy of this our Realm of England…*"

The first Court of General Assize sat on June 15, 1616, the 401st anniversary of Magna Carta, under a corporate constitution which conferred on English settlers:

> "*all libertyes franchesies and immunities of free denizens and naturall subjectes within any of our dominions to all intents and purposes, as if they had been abiding and borne within this our Kingdome of England or in any other of our Dominions…*"

Although Bermuda was settled after Virginia, continuously operating courts took longer to establish in Virginia. Bermuda very arguably has the oldest continuously operating English-based court system in the New World[2]. The courts evolved gradually, initially presided over by laymen with a composition overlapping with the Governor's Council in the 1600's to courts presided over by a legally qualified Chief Justice by the 1800's.

[2] Although Newfoundland may have been settled before Bermuda, and an Admiralty Court presided over by a mariner sat as early as 1615, it appears that permanent courts were not established there until the 18th century: Joseph Hatton and Rev. W. Harvey, '*Newfoundland: the Oldest British Colony*' (Chapman & Hall Ltd.: London, 1883) at pages 27, 49 *et seq*.

State House, St. George's, home of Bermuda's courts and Parliament 1620- 1815: www.Bermuda-online.org.

The Supreme Court Act of 1905 unified the formerly separate courts of common law and equity. The summary jurisdiction formerly exercised justices of the peace was finally transferred to legally qualified magistrates by the Magistrates' Court Act 1948, although lay justices continued to sit with a magistrate in the Family Court and Juvenile Court (exercising criminal jurisdiction over minors)[3].

A Court of Appeal for Bermuda was established in 1964 as an intermediate appellate court between the Supreme Court and the Judicial Committee of the Privy Council in London. Bermuda's 1968 Constitution[4] included a Bill of Rights and established the superior courts of record as courts whose judges would be appointed by the Governor with security of tenure guarantees. In January 2006, via a Practice Direction, a Commercial Court was established as a division of the Supreme Court. Two judges are currently designated as Commercial Judges.

Insolvency law history

Bermuda, in common with England and Wales and many British Commonwealth territories, historically drew a clear dividing line, in terms of legislation and terminology, between the domains of personal bankruptcy and corporate insolvency. However, all British-based corporate insolvency law is ultimately derived from the core concepts developed in the far older law of personal bankruptcy. The Bankruptcy Act 1876 was probably the first Bermudian legislation dealing directly with personal bankruptcy. It took another 100 years for the first comprehensive corporate bankruptcy statute to be enacted, the Companies (Winding-Up) Act 1977. This incorporated into Bermudian law the provisions of Part IX of the UK Companies Act 1948, which today remains the primary source of Bermuda corporate bankruptcy or insolvency law, now found in Part XIII of the Companies Act 1981. While

[3] See generally Sir Allan Smith, '*An Outline of the History of the Courts of Bermuda*' (1960) 17 Bermuda Historical Quarterly pages96-106.
[4] Bermuda Constitution Order 1968: www.bermudalaws.bm. It was originally enacted as United Kingdom S.I. 1968: No. 182 made under the Bermuda Constitution Act 1967, 1967 Ch. 63 (UK).

English insolvency law has been modernised around the edges in recent times, the governing principles of Bermuda's insolvency law remain closely aligned to that those which appertain today in England & Wales.

Why was Bermuda a corporate bankruptcy-free zone for so long? The answer does not lie in management perfectionism. It lies in the legal quirk that until 1970, companies could only be incorporated by Act of Parliament. Anyone substantial enough to persuade a Parliament to confer on them the privileges of trading with the benefits of limited liability was either good enough to honour their debts or too important to be subjected the ultimate sanction of winding-up, at the instance of mere creditors. As far as international companies are concerned, the first foreign owned companies empowered to do business from Bermuda but not within Bermuda were incorporated in 1936. Bermuda's company law was designed to transform Bermuda's commercial law environment into a wealth-creation zone, not a creditor-friendly one.

This enterprising spirit was reflected in the establishment of the second international company in Bermuda in 1936, the International Match Realisation Company Ltd. The story of this company[5] has a bankruptcy twist to it:

> "*1.24 The establishment of the International Match Realization Company in Bermuda in 1936, in the middle of the Great Depression, may also be viewed as an early cross-border insolvency transaction. It certainly generated what may well be the first application by a Bermudian company in the United States Bankruptcy Court, generating a reported appellate decision which was affirmed (without reasons) by the US Supreme Court. This litigation sheds more light on the legal and commercial basis for the establishment of the Bermudian company. The International Match Corporation, a Delaware Corporation, was adjudicated bankrupt on April 19, 1932. The bankruptcy proceedings were referred to a referee in the US Bankruptcy Court for the Southern District of New York. In 1947, the estate was closed after $33.9 million had been paid to creditors, and the referee had received a commission of 1%. The fees from Match Corporation bankruptcy and other cases exceeded the prescribed $20,000 per annum fee cap; the referee was ordered at first instance to repay to the Bermuda company the fees received in excess of the permitted limit, namely $236,729.38 plus interest. In In re International Match Corp 190 F2d 458 (June 25, 1951), Augustus N Hand (on behalf of the United States Court of Appeals Second Circuit) described the involvement of the Bermudian company in this way:*
>
> > *'In December, 1948, International Match Realization Company, Limited, a Bermuda corporation, (Realization) to which had been assigned approximately 90% in amount of the claims proved against the Match estate obtained an order to show cause why that estate should not be reopened and respondent directed to repay to it so much of his commissions as might be determined to have been in excess of the $20,000 yearly maximum. The matter was referred to a special master*

[5] Ian R.C. Kawaley (ed), '*Offshore Commercial Law in Bermuda*' (Wildy, Simmonds & Hill: London, 2013).

who, proceeding summarily, held hearings at which the respondent appeared and presented his case, though denying the master's jurisdiction. The master's report recommending the reopening of the Match estate and a judgment against the respondent and in favor of Match in the sum set forth above was confirmed by Goddard, J."[6]

1.25 It appears that after the Delawarean company went into bankruptcy in 1932 and the Bermudian company was established in 1936, bondholders' claims representing 90% in value of the claims against the Delaware company were assigned to Realization together with the bonds themselves. Realization was effectively a special purpose vehicle established to make recoveries to discharge the vast majority in value of bankrupt Match company's debts. It also seems to be the case that the Bermuda company on behalf of the creditors of the Delawarean company became its largest single creditor. There is some albeit indirect evidence to suggest that that the shares of the Bermudian company were held in trust for the bondholder creditors of the bankrupt International Match Corporation in the following judicial reference:

'The Bank's records indicate that by 8 September 1937, the $1000 5% 10 year conv SFG Deb International Match Corp. 1941 bonds were exchanged for two voting trust certificates for capital shares in International Match Realization Company, Ltd, which were held on the Account Owner's account but registered in the Bank's name.'[7]

1.26 Ironically, the somewhat uncharitable attempt to claw back the US Bankruptcy Court's referee's fees appears to have ultimately failed. The judgment was uncollectible. An attempt by the successor trustee to belatedly sue the former trustee was held to be time-barred, in part because the minutes of a meeting held in Pembroke, Bermuda disclosed that Realization was aware of the option of suing the trustee when it elected to pursue the referee four years earlier[8]*".*

The Delawarean debtor was part of the global empire by a prominent Swedish match manufacturer Ivar Kreuger, popularly known as the 'Match King'. An empire which collapsed upon his unexpected death. The valueless bonds transferred to the Bermudian company grew substantially in value over the next few years in a tax-neutral environment generating a healthy return for the US debtor's creditors.

This concept of establishing Bermuda companies controlled by high-end US and other foreign entities to grow assets in a tax-neutral environment itself grew exponentially over the next 50 years. These corporate strategies have in times of recession been demonized by 'tax justice' advocates, but form a central part of the life-blood of modern international trade. Be that as it may, jurisdictions such as Bermuda have been aptly

[6] At pages 1-2. An appeal to the US Supreme Court against this decision was dismissed, apparently without reasons: *Ehrhorn v International Match Realization Co*. 72 SC 113, 342 US 870 (11/5/1951).
[7] Certified Award of the Claims Resolution Tribunal, *In re Holocaust Victims Assets Litigation,Re Kate Parisier* Case No CV96-4849).
[8] *Brust v Irving Trust Co*., 129 F Supp. 462 (1955) (SDNY 03/04/1955), at paragraph [30].

described as merely satellites of major metropolitan financial centres such as London and New York, in service of the onshore world rather than at odds with it[9].

Against this background, bankruptcy judges in Bermuda and the US are centrally involved in the task of policing commercial morality. This task is unlikely to be rendered obsolete by technological developments as long as the "greed is good" mentality, popularised by American-Bermudian actor Michael Douglas through the Gordon Gecco character in 'Wall Street', remains alive.

The New York Times.

LATE CITY EDITION • 2CENTS — NEW YORK, MONDAY, MARCH 14, 1932

THE MATCH KING IS DEAD

Ivar Kreuger was discovered today by his personal assistant, a bullet through his heart and a gun by his hand. The financier and popular hero, whose empire was built on his international match monopoly, had shot himself in his Paris hotel.

Ivar Kreuger, "The Match King"

WIELDING POWER IN SECRET

ENDS LIFE IN PARIS

Letters Tell of His Plan to Die Because of Poor Health and Reverses.

ASSOCIATES AWAITED HIM

Body Is Found Fully Clothed on Bed With Pistol Wound Under Heart.

HIS STOCKS SOLD HERE

A FAMOUS MATCH MAGNATE

EFFECT IN SWEDEN

PANIC HITS LEADING BANKS

Following Ivar Kreuger's suicide, the world's leading bankers nervously await news on some forged Italian bonds.

SWEDEN AUTHORIZES PRIVATE MORATORIA

ACTS TO AID KREUGER FIRMS

Stockholm Stock Exchange to Be Closed Tomorrow and Possibly Longer.

The Match King's death in 1932 led to the bankruptcy of his Delaware company and the formation of a Bermuda company in 1936 which subsequently paid a substantial dividend to the debtor's main creditors

[9] Nicholas Shaxson, '*Treasure Islands: Tax Havens and the Men Who Stole the World*' (The Bodley Head: London, 2011).

By the turn of the century Bermuda was not just a leading insurance and reinsurance centre. It was also a leading domicile for establishing holding companies for international commercial operations carried out by companies controlled by US and other foreign interests in various parts of the globe, as well as for freestanding investment vehicles such as fund companies. The development of Bermuda as a forum for establishing international companies gave birth and the introduction of a somewhat archaic but fundamentally sound and flexible insolvency code in the last two decades of the 20th century resulted in the birth of Bermudian cross-border insolvency law.

Cross-border insolvency law in Bermuda

The most important element of any jurisdiction's cross-border insolvency law regime is what assistance its courts can give to foreign insolvency courts and representatives. However, a subsidiary function is the process of local courts authorising the pursuit of assistance from overseas courts and, on occasion, commencing and coordinating parallel proceedings. Because the commercial heart of international companies established in Bermuda is often (in the non-insurance sphere) elsewhere, Bermuda insolvency judges are more likely to be involved in seeking assistance from the US Bankruptcy Court than in providing assistance.

Be that as it may, Bermuda has no statutory international cooperation provisions in its insolvency law framework. Nor does it have any explicit insolvency restructuring regime akin to Chapter 11. Under section 99-100 of the Companies Act 1981, provisions which can be engaged both by solvent and insolvent companies but which do not trigger the operation of the liquidation stay of proceedings against the debtor, a "scheme of arrangement" can be implemented between a company and its creditors or shareholders. If approved by a majority in number and 75% in value, a dissenting minority can be bound by what is broadly equivalent to a Chapter 11 Plan.

The US Bankruptcy Court was a major source of assistance to the Bermuda Court in the 1980's and 1990's when a wave of insurance insolvency swept from the West Coast of the United States to the East and washed up on Bermuda's shores. The Bermuda liquidations were unarguably primary proceedings and assistance was sought (for instance with a view to securing funds required to be posted by alien reinsurers as security by state insurance regulators) under section 304 of the US Bankruptcy Code.

When the dotcom bubble burst at the turn of the century, the need to restructure the debt of insolvent Bermudian companies whose creditors had frequently invested in instruments governed by New York law created an interesting conundrum. How could the Bermuda debtor obtain the benefits of a Chapter 11 Plan to restructure its US-law governed debt while preventing dissenting creditors from seeking inconsistent relief from

Bermuda, the debtor's domicile. The answer lay in what may loosely be called a 'common law common sense' application of Bermuda's 1948-vintage insolvency code which viewed the statutory framework as putty to shaped to meet the needs of individual cases rather than cast in stone.

The traditional view was that no equivalent of debtor in possession proceedings was possible under Part XIII of the Companies Act 1981. Once a company's management realised that the company was insolvent, they were duty bound to petition to wind up the company and appoint provisional liquidators who would displace the pre-existing management altogether. This analysis, in Bermuda and other offshore jurisdictions with similarly old-fashioned insolvency laws, overlooked an important nuance. The provision empowering the Court to appoint a provisional liquidator or liquidators before making a winding-up order read in salient part as follows:

> "(3) *When the Court appoints a provisional liquidator, the Court may limit his powers by the order appointing him.*"

Ingenious practitioners conceived and Bermudian insolvency judges implemented a new form of provisional liquidation where provisional liquidators were appointed with so-called 'soft' powers, limited to supervising the directors' restructuring of the company in a provisional liquidation proceeding supervised by the Court. The appointment order would authorise filing a Chapter 11 petition; the directors would remain in office; but the provisional liquidator would exercise oversight on behalf of unsecured creditors. This created a vehicle for parallel restructuring proceedings in the US Bankruptcy Court and Bermuda, despite the fact that the Bermuda legislation did not explicitly contemplate restructuring proceedings at all. More radically still, the Bermuda Court was willing in the exercise of its common law discretion, in the absence of any statutory incorporation of the COMI concept, to regard the Chapter 11 as (in effect) a 'foreign main proceeding'. In *Re ICO Global Satellite Holdings* [1999] Bda LR 69, L. Austin Ward CJ held as follows:

> "*A look at the background to the application may be instructive. On* [27 August 1999] *a Petition was filed by the company which was insolvent seeking the appointment of joint provisional liquidators. There was no prayer that the company be wound up immediately. On the same date the company filed for protection under Chapter 11 of the U.S. Federal Bankruptcy Code to allow it to consider a re-financing/re-organisation which, if successful, would result in the company continuing business.*
>
> *An Order was made that Messrs. Wallace and Butterfield be appointed joint provisional liquidators. I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act 1981 and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under*

it the directors of the company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court.

I do not accept that because the company is a Bermuda registered company therefore the Bermuda Court should claim primacy in the winding-up proceedings and deny the joint provisional liquidators the opportunity of implementing a U.S. Chapter 11 re-organisation. Nor do I accept that a Chapter 11 re-organisation will, of its very nature, destroy the rights of creditors and contributories under the regime being established. Such an approach would be to deny the realities of international liquidations where action must be taken in many jurisdictions simultaneously. In this case proceedings are being conducted in the USA and in the Cayman Islands as well as in Bermuda. The aim of the proceedings is to enable the company to re-finance in the sum of [USD] 1.2 billion or to re-organise so as to continue in operation. Under such circumstances the Court should co-operate with Courts in other jurisdictions which have the same aim in relation to the affairs of the company. It is not a question of surrendering jurisdiction as much as harmonisation of effort. Moreover, the joint provisional liquidators are officers of this Court who submit confidential Reports informing the court of progress being made in the liquidation from time to time. I am satisfied that proceedings in many jurisdictions relating to the same subject matter may properly be conducted at the same time where there is a connecting factor. Barclays Bank plc v Homan and others [1993] BCLC 680."[10]

Over the last 15 years, numerous Bermudian companies have been restructured in a similar manner using modified provisional liquidation proceedings twinned with Chapter 11 proceedings which have been recognised by the Bermudian Court, at common law, as foreign main proceedings. Oddly, this practice was recently seemingly departed from when on June 29, 2015 North Shore Mainland Inc and 14 Bahamian companies (the Baha mar companies) commenced Chapter 11 proceedings in Delaware without first commencing provisional liquidation proceedings in The Bahamas. The Bahamas Supreme Court declined to recognise and assist the US Bankruptcy Court on various technical grounds, which might be described as teething problems with a new 2011 statutory international cooperation regime. However this decision was vindicated because the Chapter 11 proceedings commenced by the Baha Mar companies were

[10] At pages 1-2.

subsequently dismissed and the companies are now reportedly in provisional liquidation in The Bahamas[11].

Viewed from offshore, the stereotypical profile of the US Bankruptcy Court is of a jurisdictionally rapacious court which will assume jurisdiction based on the most tenuous jurisdictional connecting factors. Kevin Carey's September 15, 2015 decision in *In re Northshore Mainland Services, Inc. et al* Case No. 15-11402 roundly discredits such notions. The case concerned the largest single resort development in the western hemisphere and an application by, *inter alia*, the Export Import Bank of China to dismiss the bankruptcy cases on the grounds that the proceedings ought to have been commenced in The Bahamas. Judge Carey opined as follows:

> "*The matter before me is truly an international case with the main contestants hailing from Wilmington, Delaware, to Beijing, China, to Nassau, The Bahamas. The central focus of this proceeding, however, is the unfinished Project located in The Bahamas. The Debtors argue that Bahamian law limits their options to a liquidation proceeding. This argument has been challenged by the Movants, who argue that a provisional liquidator may work with the parties to come to an arrangement or compromise that involves a restructuring*…
>
> *Notwithstanding some agreed venue provisions in some of the relevant documents, I agree with Justice Winder's determination in his July 31, 2015 ruling that many stakeholders in the Project would expect that any insolvency proceedings would likely take place in The Bahamas, the location of this major development Project. I perceive no reason - - and have not been presented with any evidence - - that the parties expected that any 'main' insolvency proceeding would take place in the United States. In business transactions, particularly now in today's global economy, the parties, as one goal, seek certainty. Expectations of various factors - - including the expectations surrounding the question of where ultimately disputes will be resolved - - are important, should be respected, and not disrupted unless a greater good is to be accomplished. Under these circumstances, I can perceive no greater good to be accomplished by exercising jurisdiction over these chapter 11 cases, except for that of Northshore. Northshore is a Delaware corporation with operations in the United States.*…
>
> *(4) Comity*
>
> *'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of*

[11] Sophie Rolle-Kapousouzoglou, '*Supreme Court Declines Recognition of Chapter 11 Proceedings*', International Law Office, September 25, 2015.

other persons who are under the protection of its laws. Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895). See also In re Yukos Oil Co., 321 B.R. 396, 408 (Bankr. S.D. Tex. 2005). Although abstention under §305 is considered an extraordinary remedy, 'the pendency of a foreign insolvency proceeding alters the balance by introducing considerations of comity into the mix.'…

Here, considerations of comity support abstention pursuant to §305(a). The proceedings that have occurred to date in the Bahamian Supreme Court demonstrate that the Debtors are being treated fairly and impartially. Although there are clear differences between the Bahamian insolvency proceedings and the United States' chapter 11 process, there has been no evidence that the Bahamian laws contravene the public policy of the United States."

This decision appears to be wholly consistent with the spirit and letter of the UNCITRAL Model Law principles embedded in Chapter 15 of the US Bankruptcy Code and a common law common sense approach to cross-border insolvency law generally. It also resonates with the long-established Bermudian approach of recognising Chapter 11 proceedings commenced by Bermudian debtors as primary proceedings based on the commercial realities of the case and, implicitly at least, notions of comity.

Can the Bermudian courts recognise foreign representatives and furnish assistance without statutory authority? The answer is yes. As a matter of common law conflict of law rules, there is a discretionary power to recognise foreign liquidators appointed in a company's domicile and, if recognition is granted, a positive common law duty to assist. The power to assist a foreign liquidator to claim assets in Bermuda held in the name of the foreign debtors is uncontroversial. In *Re Founding Partners Ltd.* [2011] Bda LR 22, the claim of liquidators appointed in the company's domicile trumped that of a US Receiver. I held as follows:

"*44. Mr. Woloniecki invited the Court to recognise the US as the COMI and the Receivership proceedings as the main insolvency proceedings, adopting a modern 21 century internationalist approach rather than rigidly applying outmoded 19th – 20th century conflicts rules. This Court must reject counsel's siren call to indulge in what would amount to almost an orgy of ground-breaking judicial activism.*

45. There is no doubt that the Receiver's appointment has been and should be recognised to the extent that, for the purposes of US law, he is duly appointed and authorised to collect the assets of the Company (in the sense of assets held by the Company's debtors) located in the US and quite possibly abroad as well. But this does not justify the secondary conclusion that the Receiver should be recognised as the representative of the Company for all purposes, including exercising control over assets already held in the Company's name.

There is no credible evidence that the Receivership Order according to its terms was intended to have this effect…. The evidence of Professor Westbrook merely shows that the Receivership proceedings may at some future date mature into proceedings which are analogous to insolvency proceedings because either

> *(a) distribution rules analogous to the US bankruptcy rules will be deployed by the Receiver, or*
>
> *(b) the Receiver himself will commence bankruptcy proceedings in relation to the Company. The Florida District Court is not at this juncture a foreign insolvency court, either formally or substantively.*

46. It may fairly be contended that this Court's common law discretion to cooperate with foreign insolvency courts should be informed by the UNCITRAL Model Law as evidence of the rules of international best practice in this regard. Mr. Woloniecki characterised the Model Law's principles as reflecting "customary rules of private international law". But Article 2(a) of the Model Law on Cross-border Insolvency makes it clear that the Model Law's principles are concerned with cooperation between insolvency 10 courts:

> *'Foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation…"*

47. This largely explains why a similar SEC Receivership was found by the English High Court (and Court of Appeal) not to be a foreign insolvency proceeding which qualified for recognition as a foreign "main proceeding" pursuant to the UK implemented version of the Model Law in In the Matter of Stanford International Bank Limited et al 20 [2010] EWCA Civ 137. As to the common law position, I adopt the following dictum of Lewison J in the latter case upon which Mr. Elkinson relied:

> *'105. If it is established (as here) that a liquidator has been properly appointed in the place of incorporation of a corporation, with the power and a duty to collect assets on behalf of all creditors, then barring exceptional circumstances, the liquidator should be left to get on with his job without outside interference from others. That would promote the general policy of universalism; namely that there should be one collective proceeding in which all creditors are entitled to participate, irrespective of where they are located: Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, #16."*

48. In my judgment no exceptional circumstances exist to justify interfering with the JOLs' right to take possession of the Bermuda assets. In the absence

of any competing insolvency proceedings in the US, no need to characterise the Caymanian proceedings as the main or non-main proceedings arises. Even if the Receivership proceedings did qualify as insolvency proceedings, it is far from obvious that the COMI should inevitably be regarded as being the US merely because the Company invested on behalf of non-US shareholders in the US in circumstances where (a) the Company was incorporated in and regulated in Cayman, and (b) its administrators (initially) and auditors were based there, while (c) one of two directors and various bank accounts were located in Bermuda. Moreover, unlike cases where the principal creditors are bondholders whose claims against the debtor fall in any event to be determined by US law (typically New York law), in the offshore hedge fund context the investor/creditors' rights arise as shareholders under instruments governed by the offshore debtor's domiciliary law.

49. The nearly consummated draft Protocol is, perhaps, the best evidence of the fact that Cayman presently has at least an arguable case on the merits to be regarded as the primary liquidation Court. It contemplated not that the Bermuda assets would be remitted to the US to be distributed in the Receivership; rather it envisaged that the Bermuda assets would be remitted to the Receiver to fund recoveries from the Company's debtors, which net recoveries would (in the first instance at least) be remitted to the JOLs for distribution in accordance with Caymanian law. However, I accept that if a US bankruptcy was at some future date commenced such US insolvency proceeding might very well qualify as a foreign main proceeding in relation to the Company. The most important point is that there is at present only one liquidation proceeding pending in relation to the Company; and that is before the Caymanian Court.

50. Accordingly, there are no credible legal or factual grounds for declining to recognise the JOLs as the duly appointed representatives of the Company entitled to exercise control over the Bermuda assets."

Although there is no statutory international insolvency cross-border cooperation code under Bermuda law, the common law common sense approach to these matters is demonstrated by the 2007 adoption by the Bermuda Commercial Court of a Practice Direction based on the ALI/III '*Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*'. The Introduction states in part as follows:

"*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 NAFT A 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..."

Bermuda is believed to be the only non-NAFTA territory to adhere to the ALI/III Guideline rules.

An unusual recent insolvency involved New Stream Capital Fund Ltd, a segregated account company in which investors acquired shares in two main classes, one in relation to insurance-linked investments and the other class non-insurance-linked business. New stream was one of three 'feeder funds', one based in Cayman and the other in the US. The Supreme Court of Bermuda appointed Receivers in respect of certain segregated accounts on the application of an investor who complained that an out of court plan promoted by the Fund managers was inconsistent with the segregated nature of the Bermuda Fund company. On May 27, 2010, the Supreme Court ruled[12]:

"*204. In the present case the Loan and Security Agreement linked to the Plaintiffs' segregated accounts was purportedly modified by the Defendant without account owner consent as part of a wider restructuring which made assets linked to those accounts available to meet the claims of persons who had no pre-existing rights to the relevant assets. This was in breach of provisions of the Segregated Accounts Company Act incorporated into the Defendant's Bye-laws which neither the Act nor the Bye-laws authorised the directors to contract out of in the manner which occurred, without the Plaintiffs' consent.*

205. Accordingly, the Plaintiffs are entitled to declarations that the purported modification of the Loan Agreement linked to Classes C and I segregated accounts are unlawful and are of no legal effect, to the extent that the relevant modifications affect assets linked to those two specific segregated accounts. I see no reason why this Court should invalidate the implementation of the Plan to any greater extent, particularly since it seems likely that the Plan was, as regards some at least of the Defendant's other segregated accounts validly (in substantive terms, if not technically) approved, either unanimously or by the 75% majority required to vary special share rights.

[12] [2010] SC (Bda) 26 Com (27 May 2010); [2010] Bda LR 34 (Kawaley J).

206. It follows logically from the invalidity finding that the Plaintiffs are entitled to apply for the appointment of a receiver to enforce their repayment rights, either as 100% (former) account owners or as 100% creditors (subject to whatever counterparty claims there be in respect of management fees or other cross-claims which may arise out of any US Bankruptcy Court proceedings which may be filed). The Defendant's management through purporting to implement the Plan without the Plaintiffs' consent and through committing themselves to representing the collective interests of all segregated accounts are clearly unable to represent what have been since May 28, 2009 the manifestly different interests of Classes C and I.

207. In these circumstances, it is plainly just and equitable for the purposes of section 19(1) of the Act that a Receiver be appointed to manage their accounts, and self-evident that the objectives of section 19(3) of the Act will be achieved, even if a contentious US Bankruptcy proceeding results and the ultimate return the Plaintiffs will obtain is (a) both uncertain, and (b) not clearly more than they would obtain under the Plan. The Defendant, the Cayman and US Feeders, NSI and NSSC are all under common ownership and the Plan has been on hold since the present proceedings commenced in June last year. The Plaintiffs have a huge financial incentive in common with the Defendant and other parties involved in the Plan to maximize the value of NSI's underlying assets23. The primary object of the Plaintiffs' Receivership application, a negotiated solution, accordingly seems to have realistic prospects of success."

In related bankruptcy proceedings commenced in Delaware in relation to various US-based entities, the US Bankruptcy Court reportedly recognised the segregated account structure of New Stream in distributions made to investors in the Bermuda Fund. As a result of a separate SEC complaint, former managing partner of New Stream Capital LLC was sentenced to almost 3 years imprisonment in Connecticut in May 2015 for conspiring to defraud clients of New Stream[13].

British ties

Despite strong American ties, Bermuda remains a self-governing British Overseas Territory with whose judges are appointed by a Governor appointed by Her Majesty and the Judicial Committee of the Privy Council in London (usually comprising members of the UK Supreme Court) serving as a final Court of Appeal.

[13] Jonathan Stempel, 'Executive at failed Connecticut hedge fund gets 2-3/4 years' prison', May 5, 2015: www.reuters.com.

Plumed hats are still in: the Chief Justice swears in His Excellency the Governor, George Ferguson, May 23 2012 (Bernews.com).

In *Re Singularis*[2014]UKPC 36, the Privy Council unanimously confirmed that a common law power existed to recognise foreign liquidators and provide certain forms of assistance. However, the minority doubted that assistance at common law extended to obtaining information required for use in the primary liquidation.

Conclusion

While the lack of statutory international cooperation provisions can be problematic in exceptional cases, there is firm track record of the Bermudian courts applying the common law flexibly with a view to delivering common sense results in cross-border insolvency cases[14].

[14] For further reading on this topic, see Kawaley (ed.) '*Offshore Commercial Law in Bermuda*', Chapter 23; Kawaley; Kawaley, Bolton & Mayor (eds), '*Judicial Cooperation in Offshore Litigation*', 2nd edition (Wildy, Simmonds & Hill-to be published January 2016) Chapter 17.