A Bespoke Solution for an Imperfect World: An Analysis of the Use of a Cross-Border Insolvency Protocol between Estate Representatives in the United States and Bermuda

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Synopsis

It has become a relatively frequent occurrence for Bermuda companies to enter into 'light touch' provisional liquidation in Bermuda for restructuring purposes. This is often in tandem with parallel insolvency proceedings in the United States, Hong Kong or elsewhere, and where the Bermuda Supreme Court is acting as the ancillary court to a primary process taking place in the company's centre of main interests. Where there are proceedings of this nature, the Court may require the implementation of a cross-border insolvency protocol and will often have to grapple with issues of recognition of a foreign order or plan. A recent *ex tempore* ruling of Narinder Hargun CJ on 6 October 2023 in the matter of *Re BlockFi International Ltd (in provisional liquidation for restructuring purposes)* No.363 of 2022 has shed some light on the importance of such a protocol which was drafted, somewhat atypically, not primarily to enhance inter-court cooperation and communication but to delineate and to an extent, regulate, the roles of estate fiduciaries and representatives appointed in Bermuda and in Chapter 11 proceedings in the United States.

Walkers' Bermuda office acted jointly on behalf of BlockFi International Ltd and its joint provisional liquidators, and were successful in seeking orders approving a comprehensive cross-border protocol and recognition order with respect to the confirmed Chapter 11 plan. This article provides an overview of the proceedings, the common law basis for protocols and recognition, the challenges in designing a protocol to fit the circumstances, and the key procedural aspects, including the court's jurisdiction to give directions to its officers, and to grant relief in support of an order for recognition of a foreign plan, including (in this specific case) a self-liquidating plan.

The proceedings

BlockFi International Ltd ('the Company') was a digital asset business and lender, licensed in Bermuda by the Bermuda Monetary Authority as a Class F digital assets business pursuant to the Digital Asset Business Act 2018. The Company served the international clients (i.e. non-US) of the BlockFi group ('BlockFi Group'). On 28 November 2022, the Company filed simultaneous winding-up and voluntary petitions in Bermuda and the United States Bankruptcy Court for the District of New Jersey (the 'Bankruptcy Court'). The filing in the US was part of a group filing under Chapter 11 of the United States Bankruptcy Code. On 29 November 2022, the Supreme Court of Bermuda (the 'Bermuda Court') appointed joint provisional liquidators (the 'JPLs')[1] on a 'light touch' basis. This allowed the Company to gain the protection of the statutory stay in Bermuda upon appointment of provisional liquidators.[2] The board remained in place and the concurrent proceedings proceeded on a 'debtor in possession basis'. The JPLs were appointed with a remit to 'advise and assist' the Company in its restructuring efforts, to monitor the Chapter 11 proceedings and to report to the court on a regular basis.

While it was initially intended that the business, or part of it, could be restructured, or significant assets sold to raise cash, by late June 2023 it had become apparent that this would not be possible. BlockFi Group in the Chapter 11 proceedings therefore shifted their focus to a self-liquidating plan, whereby the digital assets and cash of BlockFi Group would be distributed to creditors, and recoveries pursued against a number of third parties, specifically FTX and its affiliate Alameda Research (the 'Vested Claims'). Following court directed mediation, a joint plan was agreed in late July between BlockFi Group and the Official Committee of Unsecured Creditors (the 'UCC') appointed in the Chapter 11 cases.

Notes

1 Pursuant to the creative interpretation by Ward CJ in *Re ICO Global Communications (Holdings) Ltd* [1999] Bda LR 69 of the court's powers to appoint provisional liquidators, limit their powers and adjourn a petition in sections 170(1) and (3) and 167(4) of the Companies Act 1981.

2 For further analysis of this provisional liquidation regime, see Nicole Tovey and Ben McCosker, 'Bermuda's "Light-Touch" Approach to Cross-Border Restructuring', *International Corporate Rescue Special Issue* 2019.

A date was set for confirmation hearing on 26 September 2023 before the Honourable Michael B. Kaplan to confirm the Third Amended Joint Chapter 11 Plan (the 'Joint Plan') and Amended Disclosure Statement.

The Joint Plan was to be implemented in the United States by the Plan Administrator, an estate fiduciary nominated by the UCC and confirmed by the Bankruptcy Court. At the same time, no longer faced with the option of restructuring, the Company would enter liquidation in Bermuda, and permanent liquidators would be appointed. In this way, there would be concurrent liquidation proceedings in two jurisdictions, two sets of estate representatives, and the application of potentially divergent legal systems. The potential for duplicative work, increased costs, delay, inefficiency and jurisdictional friction were apparent.

Protocols and the common law

At the inception of the proceedings in Bermuda, the JPLs and the management of the Company had agreed a protocol to define the Company's obligations and establish information sharing protocols, and to set out a system for approving the operational costs of the Company. This management protocol was approved by the Bermuda Court on 8 December 2022.

The framework for a protocol between officeholders to replace this management (and essentially administrative) protocol was, however, less certain. Although Bermuda has adopted the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters, which have been implemented in the jurisdiction by a practice direction,[3] there is no statutory basis to sanction protocols between officeholders. Bermuda is not a Model Law country and nor is there any equivalent of section 426 of the UK Insolvency Act 1986. Nonetheless, the Bermuda Court has proven adept at approving such protocols on a common laws basis in a series of unreported cases spanning over 20 years. This no doubt reflects the increasingly internationalised corporate world and the territorial limits of a court's powers faced by an officeholder when navigating the administration of parallel insolvency proceedings. The principle of modified universalism essentially provides that, within the confines of public policy, courts should co-operate across jurisdictions. Thus, the Bermuda Court may, as a matter of common law, provide such assistance to a foreign insolvency court as it properly can. Establishing what is a proper assistance in each case will depend on the powers available in the domestic court (i.e. here, the Bermuda Court), and also the powers available in the foreign court.[4] In concurrent Bermuda provisional liquidation and Chapter 11 proceedings, this typically takes the form of a recognition order recognising a Chapter 11 plan and/or an injunction in support of it, imposing a permanent stay of claims brought or continued against the Bermuda company. The Bermuda Court has made such orders in recent years in a number of high profile cases, including *Re C&J Energy Services Ltd*, *Re Energy XXI Ltd* and *Re Seadrill Ltd & Others.*[5] There is no reason, however, why this assistance could not take the form of a cross-border protocol. The purpose of a cross-border protocol is after all to promote the orderly administration of the estate in both jurisdictions and avoid the duplication of work and conflicts between officeholders.

For example, *Peregrine Investments Holdings Limited* (No. 15 of 1998, unreported) concerned concurrent insolvency proceedings in Hong Kong and Bermuda. The insolvency representatives in that case agreed a protocol, which was approved by Ward CJ, 'to harmonize and coordinate the proceedings'.[6] The protocol determined that the Bermuda proceedings would be the main proceedings but the adjudication of creditor claims and dividends would principally be dealt with in Hong Kong. The protocol also included provisions on rights and powers with respect to the exchange of information, applications to both courts and costs. Further examples of the Bermuda Court approving and authorising its officeholders to enter into cross-border protocols include *Manhattan Investment Fund Limited* (No. 37 of 2000, unreported), *Kong Wah Holdings Limited (In Compulsory Liquidation)* (No. 272 of 2000, unreported) and *Re Akai Holdings Limited* (No. 271 & 272 of 2000, unreported).[7]

The common law roots of protocols have rarely been explored in reported cases. Where detail is provided, the driving force tends to be commercial pragmatism. One of the earliest reported cases is *Re P Macfadyen & Co. ex parte Vizianagaram Company Ltd*,[8] which concerned an Anglo-Indian partnership with companies in both jurisdictions. The English High Court (Bigham J) rejected a creditor's challenge to a cross-border protocol agreed between the English and Indian estate representatives, on the grounds that it was a 'clearly common sense business arrangement to make' which was 'manifestly for the benefit of all parties'. This was notwithstanding that the Bankruptcy Act 1883 contained no provisions

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3 See Practice Direction Circular No. 6 of 2017.
4 See *Singularis Holdings Ltd v PricewaterhouseCoopers* (on appeal from Bermuda) [2015] AC 1675, per Lord Sumption.
5 [2017] SC Bda 20 Com (28 February 2017), [2016] Bda LR 90 and [2018] SC Bda 30 Com (5 April 2018) respectively.
6 See the brief description of the case in the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* at p. 132.
7 *Ibid.*, p. 117.
8 [1908] 1 K.B. 675.

authorising such a protocol. The protocol approved by the court was also wide ranging in form (perhaps radically so, even on contemporary terms) and provided for (i) concurrent continuation of both sets of insolvency proceedings; (ii) the treatment of both companies as one company; (iii) the rateable distribution of the assets of both companies to all creditors; (iv) exchange of information on claims admitted in each proceeding; and (v) the recognition of claims duly admitted in one proceeding in the other proceeding. A less radical and more familiar approach was taken by Hoffman J (as he then was) in the liquidation of *Maxwell Communication Corporation Ltd* (1991, unreported). In that case, the court approved a protocol regulating the relationship between English administrators and an examiner appointed in Chapter 11 proceedings. This protocol laid down general lines of demarcation for running the proceedings on both sides of the Atlantic, with a view to avoiding delay and duplication of effort. Hoffman, J, writing extra judicially, described the process thus:

> 'The Protocol was brought before me for approval. I think it took me about twenty minutes to read and approve it. I checked to see whether it contained anything which looked like an obvious mistake. Otherwise the chances are that I would have approved of whatever it said. I certainly did not see myself as giving effect to some unusual form of cross-border insolvency cooperation … But in general the attitude of the court is that if the administrators' business judgment is that doing something would be in the best interests of the creditors, the court will accept that judgment.'[9]

Kong Wah Holdings Ltd (In Compulsory Liquidation)[10] is rare example of a first instance judge articulating in some detail the reasons for approving a protocol. In *Kong Wah*, the Hong Kong Court of First Instance (Kwan J) was asked to approve a protocol between Hong Kong and Bermuda liquidators (who were in fact the same individuals), where it was recognised that Bermuda would act as the primary jurisdiction. Counsel for the liquidators emphasised the long history of the Hong Kong Court approving such protocols, including in *Peregrine Investments Holdings Ltd* (as cited above). Taking this into account, and noting the protocols had been drafted to take into consideration the relevant provisions of Hong Kong and Bermuda insolvency law and rules, in granting the relief sought Kwan J identified the following key considerations:[11]

(a) the court's role in determining whether to approve a protocol is a limited supervisory role, although the court will of course not simply approve whatever is placed before it without the exercise of its own discretion;

(b) nonetheless, in the absence of special circumstances, the court should accept the professional judgment of liquidators appointed by the court to agree a protocol as a pragmatic solution to enable both liquidations to be administered in the most economical way, reducing the conflicts and complications which arise in cross-border insolvency matters;

(c) the protocol should not conflict with the generally accepted principles of comity in private international law, nor infringe on the independent jurisdiction and sovereignty of the respective courts; and

(d) in considering whether to approve a protocol, in the absence of legislation dealing with protocols, the concern of the court is ultimately the best interests of creditors.

Where parallel provisional liquidation and US proceedings are concerned, protocols have been less frequently observed in Bermuda, although there are examples from elsewhere, such as *Re Lancelot Investors Fund Ltd.*[12] In this case, a Chapter 7 trustee appointed in the United States challenged a winding-up petition filed by investors in Cayman (as the place of incorporation) on the grounds that he had exclusive jurisdiction over the company's assets (which were all in the US). Quin J, noting the scope for conflict which could result, appointed a Cayman liquidator but stayed the winding up order to allow an opportunity for the estate representatives to discuss their respective roles and agree a cross-border insolvency protocol, with the view to avoiding multiple proceedings and duplication of costs. This resulted in a protocol, approved by the Grand Court of Cayman which, amongst other things, addressed the following: jurisdiction over the liquidation of Lancelot's assets; protection of claims and causes of action; responsibility for the adjudication of proofs for the Cayman entity; and payment of the Cayman liquidator's professional fees.

This offers a precedent but a distinctly one sided one, as the Cayman proceedings in *Re Lancelot* had been commenced by a small group of creditors sometime after the US proceedings had started, and where the fund's assets and business were essentially US based. The Cayman liquidator, in short, may have had a weak hand to negotiate the terms of a protocol after already hostile proceedings had taken place.

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9 Leonard Hoffman, 'Cross-border Insolvency: A British Perspective', Volume 64, Issue 6, 1996, *Fordham Law Review*, pp. 2516-2517.
10 [2004] HKCU 1160.
11 It is noted at paragraph 4 of the judgment that the Bermuda Court approved the protocol to coordinate the liquidations on 8 January 2004.
12 [2009] CILR 7.

The Drafting Challenge

As identified in *Kong Wah*, the key purpose of a protocol should be to promote the best interests of creditors. It must follow the principles of comity, not infringe the sovereignty of either court, and should be drafted so as to take into account the insolvency law and rules of each jurisdiction (to the extent relevant). Some guidance can also be usefully gleaned from other sources. In *Re Lancelot Investors Fund Ltd*, Quinn J, in addressing the potential scope of protocols, referred to the Note by the Secretariat of the United Nations Commission on International Trade Law,[13] which states that:

> '[P]rotocols have been used in a number of different cross-border cases to achieve different goals. They have no prescribed format and are intended to address issues unique to a specific case, with flexibility for amendment in the event that circumstances change … The provisions of a protocol generally cover procedural issues and, in some cases, substantive issues. Issues covered may include governance, claims adjudication, notice, co-ordination of asset disposition or preservation, measures to avoid duplication of efforts, minimization of fees and expenditure, sharing of information, mapping out of responsibility for claims resolution, development of a plan of reorganization and access to courts.'

In the present case, it became clear at an early stage that a detailed protocol would be required between the Plan Administrator and the JPLs. The focus was not on inter-court relationships and communications, as this had progressed harmoniously during the parallel proceedings, with Bermuda law requirements written heavily into iterations of the Joint Plan from the outset, and orders made by both courts which were, in necessary respects, conditional upon similar relief being granted in the other court. The protocol would also need to deal with some substantive matters (in this case, a Bermuda claims adjudication process) as well as the procedural ones.

The final protocol, approved by both courts, is a public document in the Chapter 11 proceedings.[14] As stated in the recital, the protocol is designed to (i) promote the orderly and efficient conduct and administration of the parallel insolvency proceedings following the effective date of the Joint Plan; (ii) honour and maintain the independence and separate jurisdiction of the respective courts; (iii) promote international cooperation and respect for comity among the parallel proceedings; and (iv) avoid or reduce conflicts, including by incorporating a mechanism for resolving disputes without multiple hearings in different jurisdictions. In order to achieve this, and having regard to both the similarities and significant differences between the insolvency laws of the United States and Bermuda, the protocol incorporated the following elements tailored to the unique circumstances of this case:

(a) An important series of checks and balances safeguarding the interests of the Company's creditors in that the protocol identifies specific areas, such as settlement of the Vested Claims, allocation to the Company of fees and expenses in the Chapter 11 proceedings, and the implementation of material changes to the anticipated distributions which require the Plan Administrator to first obtain the JPLs' consent;

(b) Acknowledgement of the right to appear and be heard in each estate representative's home proceedings;

(c) Establishment of a Bermuda claims adjudication process to permit creditors of the Company who had not submitted proofs of claim in the Chapter 11 proceedings or had their claims administratively scheduled (i.e. accepted in full by the Company based upon its books and records) to file a claim in Bermuda to be adjudicated by the joint liquidators following a bar date set by the Court. This is to ensure fairness and compliance with Bermuda law;[15] and

(d) Safeguards to ensure that the principles of comity are not infringed, including provisions that nothing in the protocol shall increase, decrease or modify the independence, sovereignty or jurisdiction of the respective courts or require the Plan Administrator or the JPLs to take or refrain from taking any action that would result in a breach of duty imposed on them by any applicable law; and

(e) A process by which the JPLs and Plan Administrator can resolve any disputes which may arise under the protocol either by mediation or joint hearing between the Bermuda and Bankruptcy Courts.

The procedural approach

Approval of the protocol was dealt with in two stages. Firstly, the JPLs applied on an *ex parte* basis for directions.

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13 See the Note by the Secretariat of the United Nations Commission on International Trade Law in its 40th Session in Vienna between 25 June and 6 July 2007.

14 A copy can be found at https://restructuring.ra.kroll.com/blockfi/Home-DownloadPDF?id1=MjUzNTQ4Mg==&id2=-1.

15 The Chapter 11 proceedings involved thousands of relatively small creditors (there were no significant institutional creditors for instance). However, some of the debts were Bermuda law governed, hence the requirement for the inclusion of a Bermuda proof of debt process. Those who had already submitted in the United States were already bound (see *Re OJSC International Bank of Azerbaijan* [2019] Bus. LR. 1130).

As part of its supervisory jurisdiction, the Bermuda Court has a wide discretionary power pursuant to section 176(3) of the Companies Act 1981 to give directions to its officers 'in relation to any particular matter arising under the winding-up'.[16] The directions being sought were twofold: a direction authorising the JPLs to negotiate and agree a cross-border protocol, and a direction approving a draft form of protocol (which was to be subject to final approval of the agreed protocol by the Bankruptcy Court and the Bermuda Court). The latter approach was necessary as the Joint Plan was still undergoing amendments and the Plan Administration Agreement was a work in progress.

This application was granted in full on 25 August 2023. The Bermuda Court accepted that it had the common law power to approve a cross-border protocol, and that it was appropriate to do so having received extensive written submissions on the nature of this jurisdiction, including in relation to the factors identified in the judgment in *Kong Wah*.

Subsequently, the JPLs, with input from the UCC and the intended Plan Administrator, agreed a final form of protocol with the management of the Company. This protocol was included in the Joint Plan Supplement, and the Joint Plan was supported by the overwhelming majority of creditors solicited to vote, and confirmed by the Bankruptcy Court at the confirmation hearing on 26 September 2023. Following this hearing, on 6 October 2023, the Bermuda Court granted relief by recognising the confirmed Joint Plan by imposing a permanent stay on all claims against the Company (other than in accordance with the Bermuda claims adjudication process, as set-out in the protocol), approving the final form of the protocol and authorising the JPLs to implement the Joint Plan in accordance with it. In doing so, the Chief Justice reiterated the common law jurisdiction of the court to provide assistance to a foreign insolvency court by exercising the court's inherent powers to stay proceedings and to approve a protocol with the objective of harmonising proceedings to the benefit of creditors.

As a sequelae, the Company was wound up on 10 November 2023 and the JPLs were appointed as permanent liquidators, with a streamlined form of winding-up process put in place. This dispensed with the need for the first statutory meetings of creditors and contributories, a committee of inspection, the preparation of a list of contributories and the requirement for a statement of affairs.[17]

Conclusion

The significance of this case is that it represents the first time the Bermuda Court has examined in any detail the court's powers to approve a cross-border protocol on a common law basis. Moreover, the case was an innovation on the usual approach to concurrent provisional liquidation and US bankruptcy proceedings in that the court was faced not with recognition of a Chapter 11 plan of reorganisation but rather one entailing the orderly self-liquidation of the Company, which would need to run alongside a fuller than usual Bermuda liquidation process, i.e. in other cases such as *C&J Energy Services*, the Chapter 11 plan had led to the creation of a new entity and the insolvent company was left as an empty shell which could be wound up on an accelerated basis. In this case, a detailed protocol was required to guide the way through a transition from provisional liquidation through to liquidation and ultimately the dissolution of the Company; all in the context of a confirmed Chapter 11 liquidation plan already dealing with the majority of substantive issues arising in the wind-down of the Company's estate.

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16 While the section refers to a 'liquidator', it has been previously determined in *Re C&J Energy Services Ltd* [2017] Bda LR 22 that there is no fine distinction to be drawn between a 'liquidator' and 'provisional liquidator' within Part XIII of the CA 1981 when exercising relevant powers (per Kawaley CJ).

17 *Ibid*. The Bermuda Court held that it had a discretion to dispense with certain parts of the statutory insolvency regime when it was just to do so.