



AMERICAN
BANKRUPTCY
INSTITUTE

2020 International Insolvency Forum

Troubled Non-U.S. Airlines Landing in Chapter 11: The Inside Story

Presented by the American Bankruptcy
Institute (ABI)

Albert J. Togut, Moderator

Togut, Segal & Segal LLP | New York, USA

Hon. Shelley C. Chapman

U.S. Bankruptcy Court (S.D.N.Y.) | New York, USA

Timothy R. Coleman

PJT Partners | New York, USA

Timothy Graulich

Davis Polk & Wardwell LLP | New York, USA

William K. Harrington

Office of the U.S. Trustee | New York, USA

Lisa M. Schweitzer

Cleary, Gottlieb, Steen & Hamilton LLP | New York, USA

Selected Issues in Chapter 11 Cases of Foreign Airlines

November 12, 2020



Davis Polk

Davis Polk & Wardwell LLP

Automatic Stay

The “automatic stay” is one of the main pillars of the Bankruptcy Code

- The automatic stay stops most creditor action in connection with prepetition claims and goes into effect automatically upon filing
 - Other entities cannot bring or continue new legal proceedings against the debtor, setoff prepetition debt or take actions against property of the estate (including property of the estate located outside the United States)
 - Violations of the automatic stay are punishable by sanctions for contempt
 - The automatic stay applies extraterritorially; however, the practical effect of the stay will depend on local law recognition and whether a creditor is subject to jurisdiction in the United States
 - A debtor may choose to file a recognition proceeding in the local jurisdiction and request the local court to impose a stay under Article 19 of the UNCITRAL Model Law (provisional relief) or Article 21 (relief upon recognition)
 - If a creditor has a nexus to the U.S. or has submitted to the U.S. court’s jurisdiction, the debtor can file a motion with the Bankruptcy Court for contempt for actions taken outside of the U.S.
 - As a general rule, the automatic stay only applies to the debtor itself and not its directors, officers or shareholders
-

First Day Relief Generally

Chapter 11 is a balance between maintaining business as usual and providing a debtor with meaningful protections to reorganize

- When a debtor files for bankruptcy, it is prohibited from paying prepetition debt absent court authority
 - So that a debtor can continue to honor its obligations to customers, vendors and employees, it will often file “first day” motions seeking relief under the “necessity of payment” doctrine
 - This doctrine “recognizes the existence of the judicial power to authorize a debtor in a reorganization case to pay prepetition claims where such payment is essential to the continued operation of the debtor.” *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989).
 - The Bankruptcy Rules also provide that courts can issue orders granting “a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition” within 21 days of filing a petition
 - Typical first day motions include authority to pay prepetition wages, taxes and trade debt to critical suppliers
-

First Day Relief for Airlines

Airline debtors typically seek a suite of relief to ensure regular flight operations and minimize the impact of the filing on the customer experience

- Critical and foreign vendors motion
 - Airlines may not be able to easily switch to an alternative vendor if a current vendor threatens to cease doing business unless its prepetition invoices are paid. So, a debtor will seek authority to make payments to these vendors up to a cap negotiated with the key parties in interest.
 - A debtor may also seek relief to pay foreign vendors—even if they are not critical—to avoid the risk of a proceeding in the foreign jurisdiction (especially without a local recognition proceeding)
- Employee Wages
 - It is common practice in domestic cases for a debtor to seek relief on the first day to seek authority to pay any outstanding prepetition wages
 - For non-U.S. debtors, the employee wages motion is of increased importance because wage claims in other jurisdictions may have constitutional or other local law protection

First Day Relief for Airlines (cont.)

- Taxes
 - It also common practice in domestic cases for a debtor to seek relief to pay certain taxes and other governmental assessments and fees, especially taxes and fees that would otherwise have a statutory priority or are collected on behalf of a governmental entity and are arguably trust property
 - Because a foreign government is unlikely to submit to the bankruptcy court's jurisdiction, this relief is particularly important for a non-U.S. debtor, especially operating in a regulated industry like an airline, to avoid adverse action in the local jurisdiction
- Orders confirming the statutory protections of the Bankruptcy Code
 - While the fundamental protections of the Bankruptcy Code, like the automatic stay, are self-executing, debtors will often seek an order from the court confirming these protections
 - A debtor is then able to provide its creditors, particularly those unfamiliar with the U.S. bankruptcy process, with an unambiguous court order confirming these protections

First Day Relief for Airlines (cont.)

- Critical airline contracts motion
 - Airlines are parties to various contracts with each other, known as interline agreements, that facilitate coordination among airlines so that passengers can fly on a single ticket, even when flying on different airlines. Airline debtors will seek to continue to honor their obligations under these contracts at the outset of the case.
 - Airlines will also seek to continue to honor their obligations under alliance agreements and industry-wide cooperation agreements
- Customer programs motion
 - Through this motion, a debtor seeks authority to continue honoring its prepetition obligations to customers. For airlines, this includes everything from honoring tickets purchased prepetition for postpetition flights to allowing frequent flier programs to continue to operate in the ordinary course so that customers can continue to earn and redeem points.

Troubled Non-U.S. Airlines Landing in Chapter 11: The Inside Story — Select Topics in US Cases and Recent Airline Cases

Lisa Schweitzer
November 12, 2020

clearygottlieb.com



Chapter 11 Background

Overview

Chapter 11 has gained a strong foothold as a pathway for foreign companies to reorganize, whether or not they have substantial operations in the United States.

Chapter 11 can be a highly effective both for fully prepackaged debt restructurings and also for corporations that want to undertake a broader restructuring or where a final deal has not been reached.

The typical goal in Chapter 11 is for the debtor to emerge from bankruptcy as a going concern, but the debtor also can sell its assets or otherwise liquidate under Chapter 11 if necessary.

A Chapter 11 case is commenced by the filing of a “petition,” which is a simple form that is completed and signed by the debtor company.

— The petition must be approved by the board of directors or other authorized parties pursuant to the company’s applicable governance procedures.

Not all entities in a corporate group have to file for relief if a specific affiliate files, and a company does not need to be insolvent to file as long as it is experiencing financial distress.

A Chapter 11 case is culminated through confirmation (*i.e.*, approval) of chapter 11 plan of reorganization by a bankruptcy court following acceptance by the requisite creditors.

Commencement of a Chapter 11 Case

Eligibility and Jurisdiction

To be eligible for bankruptcy, a company is not required to be insolvent, but the company must be experiencing “financial distress.”

The jurisdictional requirements for access to Chapter 11 are relatively low compared to certain other jurisdictions, and such minimum requirements are frequently satisfied by having some property in the United States.

- Debtors do not need not have operations in the United States to file for Chapter 11.
- A debtor’s property in the United States does not have to be substantial and does not necessarily need to relate directly to the company’s operations.

NOTE

Even where jurisdiction is proper, a case may be dismissed when a court finds that it has been filed in bad faith or if the ties to the U.S. are so remote that the company cannot effectively reorganize under the U.S. laws (although these are high hurdles to prove)

CLEARY GOTTlieb

3

Commencement of a Chapter 11 Case

Operations, Financing of a Debtor-in-Possession

The company’s management generally stays in control of operations and oversight of the company’s assets (*i.e.*, no trustee is appointed), absent fraud or gross mismanagement

The debtor has a general duty to preserve and maximize the value of the estate for the benefit of its creditors and stakeholders, and the company’s fiduciary duty run to its stakeholders generally.

The debtor may operate in the ordinary course of business without court approval but may not use, sell, or lease property of the estate outside of ordinary course of business (including entering into sale transactions or material contracts), without notice and court approval.

- May sell assets “free and clear” of liens / interests if certain requirements are met (*e.g.*, liens attach to proceeds of sale) and court approval is obtained.

The debtors’ use of cash collateral and incurrence of post-petition financing requires court approval.

- DIP lenders can be granted a superpriority lien (“priming lien”) that ranks above existing liens if secured parties are given adequate protection (*e.g.*, equity cushion) or consent to superpriority lien.

CLEARY GOTTlieb

4

Debtor in Possession (DIP) Financing

DIP financing is any financing provided to a debtor-in-possession during Chapter 11, where the pre-bankruptcy lenders are not required to continue to extend credit to the debtor in bankruptcy.

The key features of DIP financing include:

- The grant of a superpriority lien and claim, as well as administrative priority status;
- Budgets itemizing the use of proceeds, and restrictions on variances and using proceeds in manner adverse to DIP lender;
- The inclusion of case milestones tied to the general restructuring plan (*i.e.*, sale or plan milestones);
- Possible roll-ups of pre-filing debt (effectively converting pre-petition debt into DIP financing);
- Mandatory repayment provisions upon any refinancing or emergence from bankruptcy;
- If the DIP lender is an existing lender, debtor stipulations on the validity of pre-petition debt and liens, plus a limited period to challenge pre-petition debt and liens; and
- An advance waiver of automatic stay to foreclose upon event of default.

The DIP lender can obtain a “priming lien” over already-pledged collateral.

- Must show that the financing is not available on any other more favorable terms.
- Existing secured lenders that are primed must either consent or be given adequate protection.

The DIP financing may be approved on an interim basis early in the case, and then on a final basis around 20-25 days after the filing of the case.

CLEARY GOTTLIB

5

Comparison of Recent Airline DIP Financings

	Aeromexico	LATAM	Avianca
Total	\$1 billion	\$2.45 billion	\$1.989 billion (\$1.216 billion new money/\$773mm roll-up)
Tranches	<ul style="list-style-type: none"> — Tranche 1: \$200mm — Tranche 2: \$800mm 	<ul style="list-style-type: none"> — Tranche A: \$1.3 billion — Tranche B: Up to \$750mm (uncommitted) — Tranche C: \$1.15 billion 	<ul style="list-style-type: none"> — Tranche A: \$1.289 billion (\$900mm new money/\$389mm roll-up) — Tranche B: \$700mm (\$316mm new money/\$384mm roll-up)
Carve-out	\$15mm	\$20mm	
Pricing	<ul style="list-style-type: none"> — Tranche 1 DIP Facility: Adjusted LIBOR + 8.0% or ABR + 6.0% payable in cash. — Tranche 2 DIP Facility: Adjusted LIBOR + 12.5% or ABR + 11.0% payable in cash or Adjusted LIBOR + 14.5% or ABR + 13.0% payable in kind. — Default Interest: + 2% 	<ul style="list-style-type: none"> — Tranche A: LIBOR + 9.75%/8.75% (Eurodollar/ABR Borrowing) if paid in cash, or LIBOR + 11%/10% (Eurodollar/ABR Borrowing) if paid in kind. — Tranche C: 14.5% — Default Interest: + 2% 	<ul style="list-style-type: none"> — Tranche A: L+ 1,000 –1,050bps cash / L+ 1,150 –1,200bps PIK, 0.5% floor (payable in cash or in-kind at Borrower's election), 98 OID w/ back-end fee of 0.75%. — Tranche B: 14.50%
Additional Fees	<ul style="list-style-type: none"> — DIP Lender Advisor Fee -1.50% — Upfront Fee -1% — Unused Commitment Fee: <ul style="list-style-type: none"> • Tranche 1 -4.50% • Tranche 2 -8% — Commitment Termination Fee -2% — Break Fee -\$12mm — Exit Fee: <ul style="list-style-type: none"> • Tranche 1 -0.75% • Tranche 2 -5%(10% if participating in equity conversion) 	<ul style="list-style-type: none"> — Back-end Fees: <ul style="list-style-type: none"> • Tranche A -0.75% • Tranche C -2.50% — Undrawn Commitment Fee: <ul style="list-style-type: none"> • Tranche A -0.50% • Tranche C -0.50% — Extension Fee: 0.50% — Yield Enhancement Fee: 2.0% — Break Fee -\$9.75mm (for Tranche A) 	<ul style="list-style-type: none"> — Tranche A Undrawn Fees: <ul style="list-style-type: none"> • 0-30 days: 50bps • 31-60 days: 33% of drawn spread • 61-120 days: 50% of drawn spread • 120 days+: 100% of drawn spread
Equity Conversion	<ul style="list-style-type: none"> — Equity conversion available at the lenders' option for Tranche 2. 		<ul style="list-style-type: none"> — Equity conversion available at the debtors' option for Tranche B.

CLEARY GOTTLIB

6



© 2020 Cleary Gottlieb Steen & Hamilton LLP. All rights reserved.

Throughout this presentation, "Cleary Gottlieb" and the "firm" refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term "offices" includes offices of those affiliated entities.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

_____	x
In re:	: Chapter 11
	:
LATAM Airlines Group S.A., <i>et al.</i> ,	: Case No. 20-11254 (JLG)
	:
Debtors. ¹	: Jointly Administered
	:
	: Related Docket No. 413
_____	x

**ORDER PURSUANT TO 11 U.S.C. §§ 105(a) APPROVING
CROSS-BORDER COURT-TO-COURT COMMUNICATIONS PROTOCOL**

Upon the motion, dated June 30, 2020 (the "Motion"),² of LATAM Airlines Group S.A., and its affiliated debtors, as debtors and debtors in possession in the above-captioned cases (the "Debtors"), for entry of an order, as more fully described in the Motion, pursuant to section 105(a) of title 11 of the United State Code (the "Bankruptcy Code"), and consistent with General Order M-511 (*Procedural Guidelines for Coordination and Cooperation Between Courts in Cross-Border Insolvency Matters*) and General Order M-532 (*Adoption of Judicial Insolvency Network Modalities of Court-to-Court Communication*), approving that certain cross-border

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's tax identification number (as applicable), are: LATAM Airlines Group S.A. (59-2605885); Lan Cargo S.A. (98-0058786); Transporte Aéreo S.A. (96-9512807); Inversiones Lan S.A. (96-5758100); Technical Training LATAM S.A. (96-847880K); LATAM Travel Chile II S.A. (76-2628945); Lan Pax Group S.A. (96-9696800); Fast Air Almacenes de Carga S.A. (96-6315202); Línea Aérea Carguera de Colombia S.A. (26-4065780); Aerovías de Integración Regional S.A. (98-0640393); LATAM Finance Ltd. (N/A); LATAM Airlines Ecuador S.A. (98-0383677); Professional Airline Cargo Services, LLC (35-2639894); Cargo Handling Airport Services, LLC (30-1133972); Maintenance Service Experts, LLC (30-1130248); Lan Cargo Repair Station LLC (83-0460010); Prime Airport Services Inc. (59-1934486); Professional Airline Maintenance Services LLC (37-1910216); Connecta Corporation (20-5157324); Peuco Finance Ltd. (N/A); Latam Airlines Perú S.A. (52-2195500); Inversiones Aéreas S.A. (N/A); Holdco Colombia II SpA (76-9310053); Holdco Colombia I SpA (76-9336885); Holdco Ecuador S.A. (76-3884082); Lan Cargo Inversiones S.A. (96-9696908); Lan Cargo Overseas Ltd. (85-7752959); Mas Investment Ltd. (85-7753009); Professional Airlines Services Inc. (65-0623014). For the purpose of these Chapter 11 Cases, the service address for the Debtors is: 6500 NW 22nd Street Miami, FL 33131.

² Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Motion.

court-to-court communications protocol attached hereto as Exhibit A (the "Protocol"); and upon consideration of the First Day Declaration; and adequate notice of the Motion having been given as set forth in the Motion; and it appearing that no other or further notice is necessary; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and approval of the Protocol having been sought from the Cayman Court, the Chilean Court and the Colombian Court; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief requested in the Motion, and that such relief is in the best interests of the Debtors, their estates, their creditors and the parties in interest; and upon the record in these proceedings; and after due deliberation;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.
2. The Protocol is approved in all respects, subject to approval of the same by the Cayman Court, Chilean Court and Colombian Court, as it may be amended or supplemented by further order of this Court, obtained after a notice and a hearing. For the avoidance of doubt, no additional proceedings shall be subject to the Protocol absent further order of this Court.
3. Nothing herein shall prejudice the rights of any party in interest to apply for modifications to the Protocol as warranted to facilitate the administration of the Debtors' Chapter 11 Cases in conjunction with the respective proceedings before the Cayman Court, the Chilean Court, and the Colombian Court.
4. Notwithstanding any provision in the Federal Rules of Bankruptcy Procedure to the contrary, (i) the terms of this Order shall be immediately effective and enforceable upon its entry, (ii) the Debtors are not subject to any stay in the implementation, enforcement or realization of the relief granted in this Order, and (iii) the foreign representatives of these

Chapter 11 Cases and the Debtors may, in their discretion and without further delay, take any action and perform any act authorized under this Order.

5. For the avoidance of doubt, the Protocol is procedural in nature and shall not constitute a limitation on or waiver by the Court of any powers, responsibilities, or authority, or a substantive determination of any matter in controversy before the Court, or a waiver by any of the parties in interest of these Chapter 11 Cases of any of their substantive rights and claims, except to the extent specifically provided for in the Protocol, as permitted by applicable law.

6. For the avoidance of doubt, to the extent that there are any inconsistencies relating to the Protocol and other matters set forth herein as between this order and the orders the Cayman Court, Chilean Court and/or Colombian Court, the terms and provisions of this Order shall control over matters arising in or relating to the Chapter 11 cases and proceedings before this Court.

7. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: September 1, 2020
New York, New York

/s/ James L. Garrity, Jr.
HONORABLE JAMES L. GARRITY JR.
UNITED STATES BANKRUPTCY JUDGE

20-11254-jlg Doc 978 Filed 09/01/20 Entered 09/01/20 12:05:18 Main Document
Pg 4 of 22

Exhibit A

Cross-Border Protocol

CROSS-BORDER COURT-TO-COURT COMMUNICATIONS PROTOCOL

This cross-border court-to-court communications protocol (the “Protocol”) shall govern the conduct of all parties in interest in the Proceedings (as such term is defined herein).

The Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the “Guidelines”) attached as Schedule A hereto, shall be incorporated by reference and form part of this Protocol. The Modalities of Court-to-Court Communication (the “Modalities of Communication”) attached as Schedule B hereto, shall be incorporated by reference and form part of this Protocol. Where there is any discrepancy between the Protocol and the Guidelines and/or Modalities of Communication, this Protocol shall prevail.

A. Background

1. LATAM Airlines Group S.A. (“LATAM Parent”) and certain of its affiliates (collectively, the “U.S. Debtors”),¹ have commenced reorganization proceedings (the “Chapter 11 Cases”) under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”), in the United States Bankruptcy Court for the Southern District of New York (the “U.S. Court”), and such cases have been consolidated (for procedural purposes only) under Case No. 20-11254 (JLG). The U.S. Debtors are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession,

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor’s tax identification number are: LATAM Airlines Group S.A. (59-2605885); Lan Cargo S.A. (98-0058786); Transporte Aéreo S.A. (96-9512807); Inversiones Lan S.A. (96-5758100); Technical Training LATAM S.A. (96-847880K); LATAM Travel Chile II S.A. (76-2628945); Lan Pax Group S.A. (96-9696800); Fast Air Almacenes de Carga S.A. (96-6315202); Línea Aérea Carguera de Colombia S.A. (26-4065780); Aerovías de Integración Regional S.A. (98-0640393); LATAM Finance Ltd. (N/A); LATAM Airlines Ecuador S.A. (98-0383677); Professional Airline Cargo Services, LLC (35-2639894); Cargo Handling Airport Services, LLC (30-1133972); Maintenance Service Experts, LLC (30-1130248); Lan Cargo Repair Station LLC (83-0460010); Prime Airport Services Inc. (59-1934486); Professional Airline Maintenance Services LLC (37-1910216); Connecta Corporation (20-5157324); Peuco Finance Ltd. (N/A); Latam Airlines Perú S.A. (52-2195500); Inversiones Aéreas S.A. (N/A); Holdco Colombia II SpA (76-9310053); Holdco Colombia I SpA (76-9336885); Holdco Ecuador S.A. (76-3884082); Lan Cargo Inversiones S.A. (96-9696908); Lan Cargo Overseas Ltd. (85-7752959); Mas Investment Ltd. (85-7753009); Professional Airlines Services Inc. (65-0623014).

pursuant to sections 1107 and 1108 of the Bankruptcy Code. On June 5, 2020, the United States Trustee for Region 2 appointed an official committee of unsecured creditors (the “UCC”). No trustee or examiner has been appointed in the Chapter 11 Cases.

2. On May 28, 2020, the Bankruptcy Court entered the *Order Authorizing Debtor LATAM Airlines Group S.A. to Act as the Foreign Representative of the Debtors*, ECF No. 52, permitting LATAM Parent to act as the foreign representative to the Debtors in foreign proceedings (when acting as foreign representative LATAM Parent will also be referred to as the “Foreign Representative”) and requesting that the 2nd Civil Court of Santiago, Chile (the “Chilean Court”), the Superintendencia de Sociedades in Colombia (the “Colombian Court”), and any other additional courts grant recognition to the Chapter 11 Cases.

3. On June 4, 2020, the Chilean Court issued an order recognizing these Chapter 11 Cases under the Chilean Insolvency and Reorganization Law (the “Chilean Proceedings”), which domesticated the UNCITRAL Model Law on Cross-Border Insolvency. On June 19, 2020, the Superintendente de Insolvencia y Reemprendimiento (the “Superintendent”), a branch of the Chilean state responsible for transparency and promoting the public’s interest in reorganization proceedings, submitted a letter to the Chilean Court requesting the establishment of a coordination and cooperation protocol between the Chilean Court and the Bankruptcy Court. The Superintendent’s filing stated that such a protocol would allow for efficient coordination between the core foreign bankruptcy proceedings in the United States and the recognition proceedings in Chile.

4. On June 12, 2020 the Colombian Court issued an order recognizing these Chapter 11 Cases under the Colombian Insolvency and Reorganization Law (the “Colombian Proceedings”), which domesticated the UNCITRAL Model Law on Cross-Border Insolvency.

5. On May 27, 2020 the Grand Court of the Cayman Islands (the “Cayman Court”), Financial Services Division issued orders appointing Kris Beighton and Jeffrey Stower as joint provisional liquidators (the “JPLs”) for two of the debtors, LATAM Finance Limited and Peuco Finance Limited. (the “Cayman Debtors”) under the Companies Law (2020 Revision) of the Cayman Islands (the “Cayman Proceedings”) (the “Cayman Orders”). The Debtors contemplate that these will be conducted as “light touch” proceedings and serve to implement and effectuate orders of this Court under the supervision of the JPLs and in accordance with Cayman Islands law. The Cayman Orders expressly provide for the JPLs to enter into such protocols and agreements with LATAM, as they may deem appropriate, under the Bankruptcy Code and any other like proceedings for the winding up, restructuring and/or reorganization of the Cayman Debtors and other companies within LATAM, subject to the approval of the Cayman Court and this Court.

6. For convenience, (a) the Chapter 11 Cases, the Chilean Proceedings, the Colombian Proceedings, and the Cayman Proceedings shall be referred to herein collectively as the “Proceedings,” and (b) the U.S. Court, Chilean Court, the Colombian Court, and the Cayman Court shall be referred to herein collectively as the “Courts”, and each individually as a “Court.”

B. The Protocol

7. Notwithstanding anything to the contrary in the exhibits, in these Proceedings, “Parallel Proceedings” shall exclusively mean the Chapter 11 Cases, the Chilean Proceedings, the Colombian Proceedings and the Cayman Proceedings and shall not have any other meaning. As it is used in the Protocol, the term Parallel Proceedings is not to be considered synonymous with the term concurrent proceedings as used in Chapter V of the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law. The

Protocol shall not apply to or contemplate any additional proceedings absent further order of each of the Courts.

8. As set forth in the Guidelines and Modalities of Communication, the Courts may, to the extent permitted by practice and procedure, and with the prior consent of each Court, engage in Court-to-Court communications and conduct joint videoconference hearings or joint teleconference hearings with respect to any matter related to the administration of the Proceedings if necessary to facilitate the proper and efficient administration of the Proceedings. The Debtors and the Foreign Representative will arrange for a translator for any such hearing. For the avoidance of doubt, during Court-to-Court communications, a Court shall not disclose any document or information filed under seal in that Court with any other Court.

9. If the Courts agree that a joint videoconference hearing or joint teleconference hearing is necessary or appropriate, the party submitting any notice, submission or application that are or become the subject of the joint hearing of the Courts (the “Pleadings”) shall provide a copy of the pleadings to all of the following parties via email:

- a. counsel to the Debtors, Cleary Gottlieb Steen & Hamilton LLP, One Liberty Plaza, New York, NY 10006, Attn: Richard J. Cooper, Esq., Lisa M. Schweitzer, Esq., and Luke A. Barefoot, Esq. (email: rcooper@cgsh.com, lschweitzer@cgsh.com, and lbarefoot@cgsh.com);
- b. the United States Trustee, 201 Varick Street, Room 1006, New York, New York 10014, Attn: Brian Masumoto, Esq. and Serene Nakano, Esq. (email: brian.masumoto@usdoj.gov and serene.nakano@usdoj.gov);
- c. counsel to the UCC, Dechert LLP, Three Bryant Park, 1095 Avenue of the Americas, New York, New York, 10036-6797 Attn: Allan Brilliant, Esq. and Craig Druehl, Esq. (email: allan.brilliant@dechert.com and craig.druehl@dechert.com)
- d. the JPLs, KPMG, P.O. Box 493, SIX Cricket Square, Grand Cayman, KY1-1106, Cayman Islands Attn: Kris Beighton and Jeffrey Stower (email: krisbeighton@kpmg.ky and jstower@kpmg.ky);

- e. the Superintendencia de Insolvencia y Reemprendimiento (Superir), Amunátegui 228, Santiago, Chile. Attn: Eduardo Cáceres and Rocío Vergara (email: ecaceres@superir.gob.cl and rvergara@superir.gob.cl);
- f. counsel to the Foreign Representative, Claro & Cia., Apoquindo 3721, piso 13, Las Condes, Santiago. Attn. José María Eyzaguirre and Nicolás Luco (email: jmeyzaguirre@claro.cl and nluco@claro.cl);
- g. counsel to the Foreign Representative, Brigard Urrutia, Calle 70 Bis No. 4 – 41, Bogota, Colombia. Attn. Carlos Lázaro Umaña Trujillo, Jaime Elías Robledo Vásquez, and Paola Guerrero Yemail (emails: cumana@bu.com.co, jrobledo@bu.com.co, and pguerrero@bu.com.co); and
- h. Any other person or entity with respect to specific matters who has been reasonably requested to participate by any of the foregoing parties.

For the avoidance of doubt, Pleadings filed under seal with any Court shall not be provided to any party mentioned in this paragraph, except as required under the orders of the Court in which the Pleading was filed.

10. The Foreign Representative, the Debtors and JPLs shall issue written reports to the Courts (i) at such time as they consider it to be appropriate to inform the Courts on the progress of the restructuring or developments in any of the Proceedings, or (ii) as otherwise directed by any of the Courts (the “Reports”). Such Reports shall be accompanied by a professional translation of any documents attached that are not in the language in which the relevant Court conducts its business.

11. Any Report submitted to any of the Courts shall be concurrently submitted to any other Court and by email to the U.S. Trustee, the UCC and the Superintendent (collectively, the “Notice Parties”, and each individually as a “Notice Party”). Copies of any Report shall be filed with the Courts (together with translations where required), subject to appropriate redactions.

For the avoidance of doubt, any Report filed under seal with any Court shall not be concurrently submitted to the other Courts or Notice Parties, except as required under the orders of the Court

in which the Report was filed subject to substantially identical confidentiality restriction as entered by the Court that directed sealing of the relevant documents.

12. At the request of any Court, the Debtors and the JPLs shall make themselves available to respond to inquiries of the Courts regarding the content of any Report (each a “Chambers Conference”). The Debtors for the Chapter 11 Cases, the Foreign Representative for the Chilean Proceedings and the Colombian Proceedings, and the JPLs for the Cayman Proceedings shall promptly give notice by email to the Notice Parties of any Chambers Conference. Counsel to the Notice Parties shall be entitled to appear at any such Chambers Conference.

13. For the avoidance of doubt, each Court shall have sole and exclusive jurisdiction over any estate representative or any professional retained by or with the approval of such Court. Nothing in this protocol shall require any estate representative or professional retained to take any action that violates any provision of law or professional rule to which they are subject.

14. Each Court shall have sole and exclusive jurisdiction over the conduct of proceedings in such Court and the hearing and determination of matters arising in such proceedings.

15. All documents filed on behalf of the Debtors in relation to any application for approval of this Protocol will be served on the Notice Parties.

16. Except as expressly set forth herein, nothing in this Protocol shall affect or prejudice the rights of the Debtors or Notice Parties to take any action in or in connection with the Proceedings.

17. This Protocol shall be deemed effective upon its approval by the U.S. Court, the Chilean Court, the Colombian Court, and the Cayman Court. This Protocol shall have no

binding or enforceable legal effect until approved by the U.S. Court, the Chilean Court, the Colombian Court, and the Cayman Court. This Protocol may not be amended except with prior notice to the Debtors and Notice Parties, as well as, the approval of the U.S. Court, the Chilean Court, the Colombian Court, and the Cayman Court.

20-11254-jlg Doc 978 Filed 09/01/20 Entered 09/01/20 12:05:18 Main Document
Pg 12 of 22

Schedule A

**GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN
COURTS IN CROSS-BORDER INSOLVENCY MATTERS¹**

INTRODUCTION

- A. The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction (“Parallel Proceedings”) by enhancing coordination and cooperation among courts under whose supervision such proceedings are being conducted. These Guidelines represent best practice for dealing with Parallel Proceedings.
- B. In all Parallel Proceedings, these Guidelines should be considered at the earliest practicable opportunity.
- C. In particular, these Guidelines aim to promote:
 - (i) the efficient and timely coordination and administration of Parallel Proceedings;
 - (ii) the administration of Parallel Proceedings with a view to ensuring relevant stakeholders’ interests are respected;
 - (iii) the identification, preservation, and maximization of the value of the debtor’s assets, including the debtor’s business;
 - (iv) the management of the debtor’s estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved in Parallel Proceedings;
 - (v) the sharing of information in order to reduce costs; and
 - (vi) the avoidance or minimization of litigation, costs, and inconvenience to the parties² in Parallel Proceedings.
- D. These Guidelines should be implemented in each jurisdiction in such manner as the jurisdiction deems fit.³
- E. These Guidelines are not intended to be exhaustive and in each case consideration ought to be given to the special requirements in that case.
- F. Courts should consider in all cases involving Parallel Proceedings whether and how to implement these Guidelines. Courts should encourage and where necessary direct, if they have the power to do so, the parties to make the necessary applications to the court to facilitate such

¹ These Guidelines are distilled in large part from the ALI/ABA/III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases.

² The term “parties” when used in these Guidelines shall be interpreted broadly.

³ Possible means for the implementation of these Guidelines include practice directions and commercial guides.

implementation by a protocol or order derived from these Guidelines, and encourage them to act so as to promote the objectives and aims of these Guidelines wherever possible.

ADOPTION AND INTERPRETATION

Guideline 1: In furtherance of paragraph F above, the courts should encourage administrators in Parallel Proceedings to cooperate in all aspects of the case, including the necessity of notifying the courts at the earliest practicable opportunity of issues present and potential that may (a) affect those proceedings; and (b) benefit from communication and coordination between the courts. For the purpose of these Guidelines, “administrator” includes a liquidator, trustee, judicial manager, administrator in administration proceedings, debtor-in-possession in a reorganization or scheme of arrangement, or any fiduciary of the estate or person appointed by the court.

Guideline 2: Where a court intends to apply these Guidelines (whether in whole or in part and with or without modification) in particular Parallel Proceedings, it will need to do so by a protocol or an order⁴, following an application by the parties or pursuant to a direction of the court if the court has the power to do so.

Guideline 3: Such protocol or order should promote the efficient and timely administration of Parallel Proceedings. It should address the coordination of requests for court approvals of related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

Guideline 4: These Guidelines when implemented are not intended to:

- (i) interfere with or derogate from the jurisdiction or the exercise of jurisdiction by a court in any proceedings including its authority or supervision over an administrator in those proceedings;
- (ii) interfere with or derogate from the rules or ethical principles by which an administrator is bound according to any applicable law and professional rules;
- (iii) prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction or which would not sufficiently protect the interests of the creditors and other interested entities, including the debtor; or
- (iv) confer or change jurisdiction, alter substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any applicable law.

Guideline 5: For the avoidance of doubt, a protocol or order under these Guidelines is procedural in nature. It should not constitute a limitation on or waiver by the court of any powers, responsibilities, or authority or a substantive determination of any matter in controversy before the court or before the

⁴ In the normal case, the parties will agree on a protocol derived from these Guidelines and obtain the approval of each court in which the protocol is to apply. Pending such approval, or in Parallel Proceedings where there is no protocol, administrators and other parties are expected to comply with these Guidelines.

other court or a waiver by any of the parties of any of their substantive rights and claims, except to the extent specifically provided in such protocol or order as permitted by applicable law.

Guideline 6: In the interpretation of these Guidelines or any protocol or order approved under these Guidelines, due regard shall be given to their international origin and to the need to promote good faith and uniformity in their application.

COMMUNICATION BETWEEN COURTS⁵

Guideline 7: A court may receive communications from a foreign court and may respond directly to them. Such communications may occur for the purpose of the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to any joint hearing where Annex A is applicable. Such communications may take place through the following methods or such other method as may be agreed by the two courts in a specific case:

- (i) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.
- (ii) Directing counsel to transmit or deliver copies of documents, pleadings, affidavits, briefs or other documents that are filed or to be filed with the court to the other court, or other appropriate person, in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.
- (iii) Participating in two-way communications with the other court, including by telephone, video conference call, or other electronic means, in which case Guideline 8 should be considered.

Guideline 8: In the event of communications between courts, other than on procedural matters, unless otherwise directed by any court involved in the communications whether on an *ex parte* basis or otherwise, or permitted by a protocol or order, the following shall apply:

- (i) In the normal case, parties may be present.
- (ii) If the parties are entitled to be present, advance notice of the communications shall be given to all parties in accordance with the rules of procedure applicable in each of the courts to be involved in the communications, and the communications between the courts shall be recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of each court involved in the communications, may be treated as the official transcript of the communications.
- (iii) Copies of any recording of the communications, of any transcript of the communications prepared pursuant to any direction of any court involved in

⁵ Communications between administrators are also expected under and to be consistent with these Guidelines.

the communications, and of any official transcript prepared from a recording may be filed as part of the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as any court may consider appropriate.

- (iv) The time and place for communications between the courts shall be as directed by the courts. Personnel other than judges in each court may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties.

Guideline 9: A court may direct that notice of its proceedings be given to parties in proceedings in another jurisdiction. All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to be provided to such other parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court in accordance with the procedures applicable in the court.

APPEARANCE IN COURT

Guideline 10: A court may authorize a party, or an appropriate person, to appear before and be heard by a foreign court, subject to approval of the foreign court to such appearance.

Guideline 11: If permitted by its law and otherwise appropriate, a court may authorize a party to a foreign proceeding, or an appropriate person, to appear and be heard on a specific matter by it without thereby becoming subject to its jurisdiction for any purpose other than the specific matter on which the party is appearing.

CONSEQUENTIAL PROVISIONS

Guideline 12: A court shall, except on proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in other jurisdictions without further proof. For the avoidance of doubt, such recognition and acceptance does not constitute recognition or acceptance of their legal effect or implications.

Guideline 13: A court shall, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in other jurisdictions were duly and properly made or entered on their respective dates and accept that such orders require no further proof for purposes of the proceedings before it, subject to its law and all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders. Notice of any amendments, modifications, extensions, or appellate decisions with respect to such orders shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

Guideline 14: A protocol or order made by a court under these Guidelines is subject to such amendments, modifications, and extensions as may be considered appropriate by the court consistent with these Guidelines, and to reflect the changes and developments from time to time in any Parallel Proceedings. Notice of such amendments, modifications, or extensions shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

ANNEX A (JOINT HEARINGS)

Annex A to these Guidelines relates to guidelines on the conduct of joint hearings. Annex A shall be applicable to, and shall form a part of these Guidelines, with respect to courts that may signify their assent to Annex A from time to time. Parties are encouraged to address the matters set out in Annex A in a protocol or order.

ANNEX A: JOINT HEARINGS

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following shall apply, or where relevant, be considered for inclusion in a protocol or order:

- (i) The implementation of this Annex shall not divest nor diminish any court's respective independent jurisdiction over the subject matter of proceedings. By implementing this Annex, neither a court nor any party shall be deemed to have approved or engaged in any infringement on the sovereignty of the other jurisdiction.
- (ii) Each court shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters arising in its proceedings.
- (iii) Each court should be able simultaneously to hear the proceedings in the other court. Consideration should be given as to how to provide the best audio-visual access possible.
- (iv) Consideration should be given to coordination of the process and format for submissions and evidence filed or to be filed in each court.
- (v) A court may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it. If such an order is made, consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant court and/or its professional regulations.
- (vi) A court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.
- (vii) A court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters. Consideration should also be given as to whether some or all of such communications should be recorded and preserved.

20-11254-jlg Doc 978 Filed 09/01/20 Entered 09/01/20 12:05:18 Main Document
Pg 18 of 22

Schedule B

MODALITIES OF COURT-TO-COURT COMMUNICATION

Scope and definitions

1. These Modalities apply to direct communications (written or oral) between courts in specific cases of cross border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction (“Parallel Proceedings”). Nothing in this document precludes indirect means of communication between courts, (e.g., through the parties or by exchange of transcripts, etc.) This document is subject to any applicable law.
2. These Modalities govern only the mechanics of communication between courts in Parallel Proceedings. For the principles of communications (e.g., that court-to-court communications should not interfere with or take away from the jurisdiction or the exercise of jurisdiction by a court in any proceedings, etc.), reference may be made to General Order M-511: *Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters* (the “Guidelines”).
3. These Modalities contemplate contact being initiated by an “Initiating Judge” (defined below). The parties before such judge may request him or her to initiate such contact, or the Initiating Judge may seek it on his or her own initiative.
4. In this document:
 - a. “Initiating Judge” refer to the judge initiating communication in the first instance;
 - b. “Receiving Judge” refers to the judge receiving communication in the first instance;
 - c. “Facilitator” refers to the person(s) designated by the court where the Initiating Judge sits or the court where the Receiving Judge sits (as the case may be) to initiate or receive communications on behalf of the Initiating Judge or the Receiving Judge in relation to the Parallel Proceedings. The Facilitator shall be the Clerk of the Court, and in the Clerk of Court’s absence, the Chief Deputy Clerk.

Designation of Facilitator

5. The Receiving Judge will supervise the initial steps in the communication process after being informed of the request by the Facilitator.
6. The Court will prominently publish the contact details of the Facilitator on its website.
7. The language in which initial communications may be made is English. The Court will prominently so state and decide the technology available to facilitate communication between or among courts (e.g. and disclose telephonic and/or video conference capabilities, any secure channel email capacity, etc.) on its website.

Initiating communication

8. To initiate communication in the first instance, the Initiating Judge may require the parties over whom he or she exercises jurisdiction to obtain the identity and contact details of the Facilitator of the other court in the Parallel Proceedings, unless the information is already known to the Initiating Judge.
9. The first contact with the Receiving Judge should be in writing, including by email, from the Facilitator of the Initiating Judge's court to the Facilitator of the Receiving Judge's court, and contain the following:
 - a. the name and contact details of the Facilitator of the Initiating Judge's court;
 - b. the name and title of the Initiating Judge as well as contact details of the Initiating Judge if the Receiving Judge wishes to contact the Initiating Judge directly and such contact is acceptable to the Initiating Judge;
 - c. the reference number and title of the case filed before the Initiating Judge and the reference number and title (if known; otherwise, some other unique identifier) of the case filed before the Receiving Judge in the Parallel Proceedings;
 - d. the nature of the case (with the due regard to confidentiality concerns);
 - e. whether the parties before the Initiating Judge have consented to the communication taking place (if there is any order of court, direction or protocol

for court -to-court communication for the case approved by the Initiating Judge, this information should also be provided);

- f. if appropriate, the proposed date and time for the communication requested (with due regard to time differences); and
- g. the specific issue(s) on which communication is sought by the Initiating Judge.

Arrangements for communication

- 10. The Facilitator of the Initiating Judge's court and the Facilitator of the Receiving Judge's may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation of counsel or the parties unless otherwise ordered by one of the courts.
- 11. The time, method and language of communication should be to the satisfaction of the Initiating Judge and the Receiving Judge, with due regard given to the need for efficient management of the Parallel Proceedings.
- 12. Where translation or interpretation services are required, appropriate arrangements shall be made, as agreed by the courts. Where written communication is provided through translation, the communication in its original form should also be provided.
- 13. Where it is necessary for confidential information to be communicated, a secure means of communication should be employed where possible.

Communication between the Initiating Judge and the Receiving Judge

- 14. After the arrangements for communication have been made, discussion of the specific issue(s) on which communication was sought by the Initiating Judge and subsequent communications in relation thereto should, as far as possible, be carried out between the Initiating Judge and the Receiving Judge in accordance with any protocol or order for

communication and cooperation in Parallel Proceedings¹.

15. If the Receiving Judge wishes to by-pass the use of a Facilitator, and the Initiating Judge has indicated that he or she is amenable, the judges may communicate with each other about the arrangements for the communication without the necessity for the participation of counsel or the parties.
16. Nothing in this document should limit the discretion of the Initiating Judge to contact the Receiving Judge directly in exceptional circumstances.

¹ See Guideline 2 of the *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters*.