



AMERICAN
BANKRUPTCY
INSTITUTE

2020 International Insolvency Forum

Cross-Border Communication: Getting the Message Across

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Cross-Border Communication

Getting the Message Across



Panelists

Deborah D. Williamson – USA
Kenneth D. Kraft – Canada
Mark A. Russell – Cayman Islands
Frank Spizzirri, CS - Moderator



Introduction and Overview

A Brief History of Cross-Border Communication
In the US, Canada, and Cayman Islands



Introduction and Overview

The Participants

Courts and Judicial Officers

Lawyers, Trustees and other Participants (Accountants, Financial Advisors, Appraisors)

Creditors (Secured, Unsecured, "Other")

Creditors Committees

Foreign Representatives



Introduction and Overview

Language

Different Languages, Different Dialects

The same word meaning different things

eg "Bankruptcy", "Trustee", "Lienholder"

Different Words meaning the same thing

eg "Guaranty," vs. "Guarantee"

Same Words, different spelling

eg "Appraisors" vs. "Appraisers"

Common Law vs. Civil Law



Procedural Sources

United States

Federal Statute – 11 U.S.C. § 101 *et seq.*

Federal Rules of Bankruptcy Procedure

Federal Rules of Civil Procedure

Federal Rules of Evidence

Local Rules (by Federal District)

Hearings, live testimony, proffers, cross-examination of witnesses, who may be compelled to testify, etc.

Local Procedures (generally by Judge)



Choosing A Process

USA – Chapter 15 vs. Other Options

What relief do you need? Is the relief substantive or procedural?

How will you exit?

Are you selling assets?

Who are you worried about?

Creditors, New Money/DIP loan

What assistance do you need from each court?

Investigations, Challenging Transactions, (Preferences, Fraudulent Conveyances)



Procedural Sources

Canada

Federal statutes

BIA, CCAA, WURA

Provincial Courts, Provincial Rules

Rules of Civil Procedure and Evidentiary Rules and Practices Vary Province by Province

Court Specific Procedures

Practice Directions and Specialized Courts



Choosing A Process

Canada – Ch. XIII (BIA), Part IV (CCAA), Other Options

What relief do you need? Is the relief substantive or procedural?

How will you exit?

Are you selling assets?

Who are you worried about?

Creditors, New Money/DIP loan

What assistance do you need from each court?

Investigations, Challenging Transactions. (Preferences, Fraudulent Conveyances, Transfers at Under Value)



Procedural Sources

Cayman Islands

- Companies Law (2020 Revision)
- Companies Winding Up Rules 2018
- Common law, including the duty to assist foreign insolvency courts
- Grand Court Practice Directions



Choosing A Process

Cayman Islands – Local Proceeding, Statutory Recognition or Common Law Recognition?

- What relief do you need? Is the relief substantive or procedural?
- How will you exit?
- Are you selling assets?
- Who are you worried about?
 - Creditors, New Money/DIP loan, Recognition in other jurisdictions, Gibbs Rule issues
- What assistance do you need from each court?
 - Investigations, control of assets, challenging transactions



Communications Vary Depending on Participants

Communications between Courts

With or without Counsel

Communications between Counsel

Communications between Counsel and Client



Communications between Courts

“this is the way we always do it in ...”

Don't expect rubber stamp, particularly on substantive issues

DIP financing

Payments or disbursements to creditors

Ongoing Suppliers – Not all jurisdictions have concept of administrative priority



Communications between Courts

Protocols

When do you need one?

Are there standard protocols in a particular jurisdiction?

Houston - [https://www.txscourts.gov/sites/txs/files/general-](https://www.txscourts.gov/sites/txs/files/general-orders/In%20Re%20Guidelines%20for%20Communication%20and%20Cooperation%20Between%20Courts%20n%20Cross-Border%20Insolvency%20Matters.pdf)

[orders/In%20Re%20Guidelines%20for%20Communication%20and%20Cooperation%20Between%20Courts%20n%20Cross-Border%20Insolvency%20Matters.pdf](https://www.txscourts.gov/sites/txs/files/general-orders/In%20Re%20Guidelines%20for%20Communication%20and%20Cooperation%20Between%20Courts%20n%20Cross-Border%20Insolvency%20Matters.pdf)

New York - <https://www.nysb.uscourts.gov/sites/default/files/m511.pdf>

Ontario - https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/commercial/#Part_XXVI_Protocol_Concerning_Court-to-Court_Communications_in_Cross_Border_Cases

Guidelines are guidelines and parties are expected to agree on a protocol and obtain approval of a protocol from each court



Communications between Courts

Joint Hearings

Standard provisions

Court should be entitled to communicate without or without counsel to:

- establish procedures
- to coordinate and resolve and procedural, administrative or preliminary matters
- To determine outstanding issues, post hearing

Foreign counsel might be permitted to appear

Simultaneous presentations of evidence

Retention by each court of sole and exclusive jurisdiction and power over the conduct of its own proceedings and determination of matters arising in its proceeding



Communications between Counsel

Retaining Local Counsel

Attornment

Admission/Appearance of Foreign Counsel

Clarifying Respective Roles

Conflicts and Waivers

Settlement Discussions/Privileged Communications/Pre-Hearing Discussions

Judicial Preferences (written and unwritten)



Communications With Clients

Education

Similarities and Differences between Regimes

Managing Expectations, Concerns and Risks

Cross-Border Proceedings Run Differently than Solely Domestic Proceedings

Priorities Differences between Countries

Directors and Management

understanding personal exposure to potential claims (i.e. wages), civil/criminal/quasi-criminal penalties, etc.



The Last Slide

Questions?

Thank you for attending.

Stay Safe.



Contact Information



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