

Q&A:

Managing parallel proceedings – USA & Cayman Islands

This month *eurofenix* sits down with **Kim Newmarch of DLA Piper LLP, Caroline Moran of Maples and Calder and Eleanor Fisher of Zolfo Cooper** to discuss their experiences in recent cross-border insolvency proceedings between the US and the Cayman Islands.

This involved the restructuring of the **Trident** group of companies that was carried out through a liquidation of the Cayman Islands holding company, **Trident Microsystems Far East (“TMFE”)**, in the Cayman Islands, and parallel and complementary Chapter 11 proceedings for that company in the US.

This article highlights key issues that can arise in such cross-border proceedings and gives some practical guidance for practitioners.

Eurofenix: *Can you give us some of the background to the Trident restructuring?*

Eleanor: TMFE was placed into Chapter 11 in Delaware and into a parallel provisional liquidation in the Cayman Islands in January 2012. At the same time, its NASDAQ listed, Delaware incorporated parent company, Trident Microsystems Inc (“**TMI**”) was also placed into Chapter 11 in Delaware. My partner, Gordon MacRae, and I acted as provisional and now official liquidators of TMFE. Maples and Calder serve as Cayman Islands counsel for TMFE and the liquidators and DLA Piper act for TMFE and TMI in the US. We have very nearly concluded the proceedings at this stage and creditors have received a 90% distribution from the estate.

Prior to the insolvency proceedings, the business of the Trident group, which operated on a global basis, was the development and sale of microchips and related software. By late 2011, the group was distressed. Given the global nature of the group’s business, there was a real concern that many creditors and assets may not be subject to the US jurisdiction. Accordingly, it was clear that we were going to need proceedings in both the US, where certain key assets were located, and the Cayman Islands, as the jurisdiction of incorporation, in order to sufficiently protect the assets of the group and effect a viable restructuring.

Eurofenix: *Why did you opt for a parallel Chapter 11 rather than seeking Chapter 15 relief?*

Kim: Initially we did consider a Chapter 15 proceeding, but given the global nature of the group, we were concerned that trying to establish COMI could cause delays. At the time the bankruptcy commenced, there was an urgent need to sell one of the main business units to secure cash for the restructuring. We were concerned that any delay in obtaining Chapter 15 relief could have a detrimental impact on the ability to complete the sale.

Given that TMI was going to be placed into Chapter 11, it made sense to also put TMFE into Chapter 11, but we needed to obtain protection for TMFE in the Cayman Islands as well. The Cayman Islands provisional liquidation process provided a good solution.

Caroline: The Cayman Islands do not have a specific, formal restructuring regime like Chapter 11 in the US or administration in the UK. Instead, our provisional liquidation regime, which gives the company the benefit of an automatic stay on proceedings, can be used for restructuring purposes.

The process is extremely flexible. Provisional liquidators have very few statutorily prescribed powers but instead, their powers are set out in the Court order appointing them. As such, it is possible to craft the order to suit the circumstances of the case and, for example, to mirror a Chapter 11 in order to permit the directors to operate the company as debtor in possession,

under the ultimate supervision of provisional liquidators who will apply a relatively light touch.

Eurofenix: *How did you coordinate the Cayman Islands and Delaware proceedings on an ongoing basis to avoid delays or even inconsistent rulings from the two jurisdictions?*

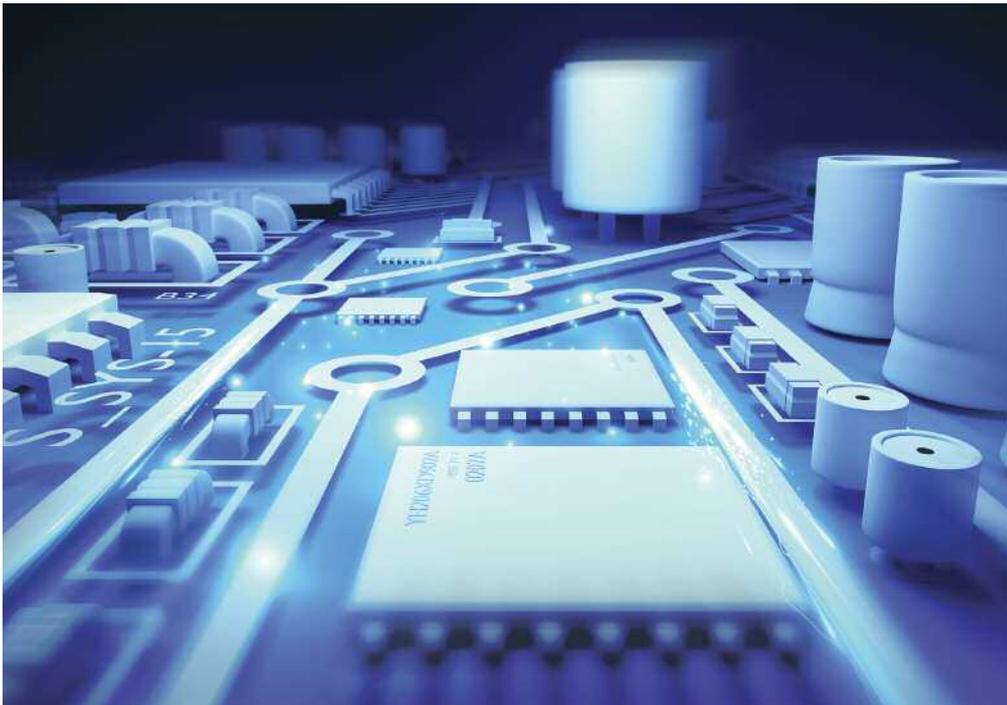
Caroline: The Cayman Islands has not adopted the UNCITRAL Model Law but our judges are very familiar with cross-border proceedings because most Cayman Islands companies have their assets and operations abroad. As a result, the Cayman Courts are keen to promote comity and to avoid jurisdictional conflicts and duplication of work in cross-border proceedings.

This means that we have been able to take a very practical and collaborative approach in this case. Both the Cayman Court and the Delaware Court have been fully involved in the proceedings from the outset. We filed both sets of proceedings at the same time which meant neither Court was playing catch up as to what steps were being taken. Also, throughout the proceedings, we obtained approval of both Courts for key actions and often held joint hearings by telephone.

Kim: Two weeks after the proceedings commenced, we held a joint hearing to approve a protocol between the liquidators, the directors and the chief restructuring officer appointed in the Chapter 11 proceedings (“**CRO**”). The protocol set out the division of responsibilities between the parties and put in place reporting structures for information sharing. This gave us



THESE CASES SHOW HOW IT IS POSSIBLE TO EFFECTIVELY RUN PARALLEL PROCEEDINGS PROVIDED THE PROFESSIONALS INVOLVED ARE PREPARED TO ADOPT A COLLABORATIVE APPROACH



a solid base for coordination and cooperation for the remainder of the proceedings.

As circumstances changed we went back to the Courts and obtained approval of any necessary amendments to the protocol. We also worked with both of the Courts to coordinate hearings so that they were on the same day or on consecutive days to ensure there was no delay.

Eleanor: Commencing the proceedings at the same time meant that the liquidators, the CRO and directors of the group companies were communicating and sharing information from the get-go. We held frequent meetings which avoided any second guessing of each other's decisions and allowed us to agree a coordinated restructuring strategy in relatively short order.

Eurofenix: How did you deal with the creditor claim process across the two jurisdictions?

Kim: This was definitely challenging. The process for adjudicating claims is very different in the two jurisdictions. In the US, the debtor files a schedule of liabilities, which sets out the creditor claims according to the debtor's books and records. If a creditor is not listed as

contingent, unliquidated or disputed and agrees with the amount on the schedule, that creditor does not need to file a proof and is deemed to have a claim in that amount and in that priority in the bankruptcy proceedings.

Eleanor: In the Cayman Islands creditors must file proof of debts (i.e. a notice setting out the value of their claim with back up documentation) and then the liquidators need to determine whether claims should be admitted or not. This is a key responsibility of a liquidator that we could not abrogate. There were also concerns about different priority schemes that we needed to address.

Caroline: Ultimately we agreed to park the issues around creditor claims until later in the case. We knew that many claims would be resolved during the process of selling the assets because they would be assumed by purchasers. We informed both Courts that we would file a supplemental protocol at a later date to deal with creditor claims and made clear that the filing of the schedules in the bankruptcy proceedings was only for information gathering purposes

rather than a decision about jurisdiction.

The creditor claim protocol approved by both Courts provided that creditors who agreed with the amount listed on the schedules of liabilities did not need to file a proof of debt in the Cayman Islands. By that time, the liquidators had reviewed TMFE's books and records and were comfortable with the figures included on the schedules. We also agreed that because all of the assets were located in the US, the liquidators would adjudicate the claims in accordance with Cayman Islands law but make distributions in accordance with US priorities.

Distributions have now been made, TMFE creditors received a 90% return and TMI creditors a 100% return which has brought the proceedings to a very successful conclusion.

These cases went from commencement to distributions within one year which is a real testament to how it is possible to effectively run parallel proceedings provided the professionals involved are prepared to adopt a collaborative approach. ■

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