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A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-Operation

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ABSTRACT

The freedom of movement of capital in the modern global economy has been indispensable to the development of international corporate enterprise. This paper argues that the judicial and legal institutions of states are as essential to the stability of the global economy as the traditionally heralded international economic channels that have been so carefully crafted globally. In fact, in the sphere of trans-border insolvency and bankruptcy, judicial and legal institutions could be perceived as even more vital, as the vibrancy and the health of global enterprises can be radically challenged and even severely impeded should countries fail to institute universally accepted legislative and judicial codes of practices. The quest for this normative approach has found expression by the United Nations in its development of the UNCITRAL Model Law, a prototype which has since been adopted by twenty-two States. A number of other States, as well, have adopted measures which mirror the cooperation and co-ordination principles of the UNCITRAL Model Law. These States all accept that legislative and judicial capacity and competence are essential ingredients in the salutary infusion of mutual confidence, and it is this very shared trust that is the ultimate catalyst for successful resolution of cross-border and other disputes. For Offshore Financial Centres (OFCs), reinforcement of confidence in their Courts in the international arena is perhaps even more highly critical to their sustained roles in today's globalized economy. This paper outlines the legislative and judicial competencies and roles that have enabled the Cayman Islands, as an example of a key OFC, to emerge as a major player in international cross-border conflict resolution. This discourse also acknowledges the hurdles OFCs have had to overcome in both perceptions and reality in the global marketplace and the increased pressures faced by Courts today in meeting demands of public policy objectives. With specific regard to the Cayman Islands as an example of an effectively functioning OFC, the paper examines the Islands' insolvency regime, reviews a number of cases demonstrating the efficacy of the approach of the Islands' Courts, and highlights relevant Cayman Islands' legislation and orders made pursuant to those laws. This analysis demonstrates how, by implementing through its Courts a public policy model on a par with international codes of conduct, the territory has vouchsafed its ability to render the kind of international judicial assistance that is critical to the fulfilment of the tenets of the UNCITRAL Model law and to the principles of universality of bankruptcy that the Law embraces. A further benefit is that Cayman's Courts and court-appointed officials, in turn, may expect to receive full cooperation from other jurisdictions. Indeed, the emergence of the Cayman Islands as a leader among financial centres is due in no small part to its compliance with international regulatory requirements across the breadth of its financial industry. In addition to complying with FATF Directives on money laundering, the territory complies with OECD threshold requirements for tax information exchange and serves as a member of the Steering Committee of the OECD's Global Forum on Transparency and Exchange of Information. Furthering its position of strength, the Islands' legal and judicial system is based on English common law traditions, and its local legislative arsenal is being constantly modernized to meet contemporary Cayman Islands' needs. This legislative progression, given the Islands' continued status as a British Overseas Territory (UKOT) located in the North West Caribbean Sea, includes the extension, as required, of United Kingdom legislative provisions to the Islands.

KEYWORDS

Global Economy; Bankruptcy; Judicial Capacity; Cross-Border; Insolvency Regime; Legislation

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