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25 YEAR RETROSPECTIVE OF CROSS-BORDER INSOLVENCY

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PRESENTATION SUMMARIES

UNITED KINGDOM

1. Restructuring in the early 2000s

In 2000 there were two statutory tools for restructuring: scheme of arrangement and company voluntary arrangement. Both depended upon achieving a majority in favour of a proposal of 75% by value of creditors, but a scheme divided creditors into classes, while in a CVA, all unsecured creditors voted together.

Example of both being used together in a cross-border context: the restructuring of Turner & Newall, the UK arm of the US Federal Mogul group.

Numerous decisions of David Richards J in which the following issues were decided: (1) the case proceeded on the basis that there should be UK restructuring proceedings for the UK based T&N Group, in parallel with the Chapter 11 proceedings for Federal Mogul; (2) inter-court communication: the judge declined to enter into direct telephone communication with the Chapter 11 judge in the US, to discuss issues which were going to come before the UK court for substantive determination, because of the fear of pre-judging those issues; (3) inter-jurisdiction co-operation was instead achieved by way of a detailed protocol between the UK administrators and the US entities. The judge directed that the administrators of the UK entities should not participate in the plan, or propose a scheme or CVA without directions of the court; he gave a detailed judgment on the UK procedures [2005] PLR 1, in part to provide authoritative guidance on the UK position for the benefit of the US court; (4) ultimately the case involved a US plan, and a combination of CVA and Scheme of Arrangement in the UK; (5) it was essential to the effectiveness of the UK scheme that it included third party releases (to enable the liability insurers of the company to be released from claims from the company's creditors, the rationale and justification for which was explained, and has been followed in the UK ever since).

2. Changes since 2000

First, the Enterprise Act of 2002 was an important boost to the concept of "rescue culture" initiated in the 1986 Insolvency reforms. The UK has traditionally been a creditor-friendly insolvency jurisdiction. It was particularly friendly to secured creditors, who could stand outside a formal collective insolvency process and instead implement their own enforcement process, through the medium of administrative receivership: a procedure based on the floating charge, under which the entirety of a company's assets and business were provided as security to the secured creditor. Critically, under the 1986 Act an administration order could not be made if an administrative receiver was in office, without the receiver's consent. The 2002 Act abolished administrative receivership (in all but a few circumstances).

In return, secured creditors were empowered to appoint administrators. Those administrators, however, had to work towards achieving the purpose of the rescue of the company as a going concern, if that was reasonably feasible. If not, they had to seek a better return to all creditors. Only if that was not reasonably possible could they act with the purpose of realising assets to repay secured creditors.

Perhaps not coincidentally, it was from about the same time that the Scheme of Arrangement began to be used as a key restructuring tool for companies in financial distress, often in conjunction with a pre-pack administration (in which a sale of the company's business to a Newco is arranged in advance), so as to enable a 'debt for equity' swap to be achieved. The next 25 years saw a gradual 'pushing of the envelope' so far as the use of schemes of arrangement were concerned. From the international perspective, an important development was in respect of the basis for assuming jurisdiction in relation to a company; it is enough to establish jurisdiction to show that the company is a "company" as defined in legislation – including an overseas company – capable of being wound-up here; and it is enough to exercise that jurisdiction to show that there is a "sufficient connection" with the UK; sufficient connection can mean assets or business here, or that the debt is governed by English law; in recent times, jurisdiction has been established by combining the concept of third-party releases and establishment of a Newco in the UK, that assumes a primary obligation for the debt in order to establish jurisdiction.

So far as legislation is concerned, the three most important developments in the cross-border world are: (1) the European Regulation on Insolvency in 2000 – the importance of this lay in establishing pan-European rules for establishing jurisdiction for a primary insolvency proceeding, and for establishing what law governs various claims within the insolvency proceedings; (2) Cross-Border Insolvency Regulations of 2003, enacting the model law on cross-border insolvency (more on this under Q.3); and (3) the corporate insolvency and governance act of 2020, which introduced the concept of cross-class cram-down into the scheme jurisdiction. The first of these was a victim of Brexit, however, and is no more.

3. Impact of the Model Law

The impact has not been as wide-ranging in other jurisdictions, because of a more restrictive interpretation of the model law within the UK. Specifically, the conclusion that the UK regulations (CBIR, implementing the model law) do not permit the UK courts to apply substantive provisions of foreign law.

In order to put this in context, I need to explain something about the broader picture of cross-border insolvency.

In the early part of the 21st century, the "golden thread" of cross-border insolvency was applied broadly in the UK, this being the principle of modified universalism: "English courts should, where consistent with justice and UK public policy, cooperate with courts in the country where the main liquidation is taking place to ensure all assets are distributed to creditors under a single system." The high point was the Privy Council decision in *Cambridge Gas*, in which recognition was afforded to a US plan of reorganisation in respect of a company incorporated in the Isle of Man. Subsequently, however, the UK Supreme Court rowed back significantly from this in *Rubin v Eurofinance*. The Court established the following important propositions: (1) recognition of foreign judgments within the UK is subject to traditional rules of private international law, and there is no specific insolvency-related exception to this; (2) that means that a foreign judgment can be recognised if the defendant was present in the foreign jurisdiction or submitted voluntarily to it; (3) an attempt to argue that it should be sufficient to recognise a judgment against a debtor from a country where the debtor had its COMI was rejected: COMI is a statutory concept, and it cannot be transposed by the common law to areas beyond the reach of the statute.

The case is also important for its rejection of the argument that a foreign insolvency judgment could be recognised under the model law: the Model Law as enacted in the UK contained numerous forms of assistance, but recognition and enforcement of a foreign judgment was not one of them.

The story then continues with Re OJSC International Bank of Azerbaijan; Bakhshiyeva v Sberbank of Russia & Ors. [2018] EWCA Civ 2802. The facts of which were as follows: The Bank in Azerbaijan borrowed from Russian Funds under English law governed agreements; The Bank entered restructuring process in Azerbaijan; The Bank obtained from English court an Order recognising the restructuring proceeding as a foreign main proceeding, and imposing a moratorium, preventing creditors from commencing or continuing any action against the Bank in England; restructuring proceedings culminated in a Plan; in essence, the plan resulted in the discharge of financial indebtedness (including that owed to the Russian Funds) and replacement with certain entitlements, consisting mostly of debt securities; the Russian Funds did not participate in, and did not vote for, the Plan; but as a matter of Azeri law, the Plan was binding on all creditors, including them; the Plan having been approved, the restructuring proceedings were about to come to an end, and the Bank applied to the English court for a permanent moratorium, under Article 21 of the Model law.

The court refused the application. An important piece of context for its decision is the *Gibbs Rule* – which was agreed to apply in the UK up to the Supreme Court at least – under which the foreign restructuring proceedings could not discharge the English law governed debt. The Court of Appeal concluded that the Model Law was intended to create a procedural framework for international co-operation and assistance, but was not intended to enable the UK court to implement foreign law. A procedural stay could therefore be imposed within the UK on an English law governed debt, to enable a foreign restructuring to be completed; but a permanent stay – following the conclusion of the foreign restructuring – could not.

BRAZIL

How did large restructuring matters work in your country in the early 2000s?

Old Brazilian law. Didn't work well. Only in 2005 did we adopt a new legislation regulating the business judicial reorganization. A new era has started.

What was the statutory/legal and institutional framework?

Judge Carnio Costa make comments on the main aspects of the Brazilian insolvency law.

How were cross-border issues dealt with?

There was no cross-border regulation in Brazilian law until 2020, when Brazil adopted the Uncitral Model Law. Brazil used to go abroad asking for recognition and cooperation, specially for asset tracing and recovering. But it was not possible for Brazil to cooperate or recognize foreign decisions due to the lack of legal basis.

Discuss a case that exemplifies a restructuring with cross-border implications.

Judge Carnio Costa will talk about the Varig case where Judge Drain was very collaborative.

What significant changes – legislative, precedential, other - occurred between 2000 and the present that affected large restructuring matters, including the adoption and implementation of the UNCITRAL Model Law on Cross-Border Insolvency?

Judge Carnio Costa talk about the great legal reform of 2020 and the adoption of the Model Law.

How has implementation of the Model Law affected large cross-border restructurings?

It was game changing. Now Brazil has a dozen of cases where Brazil has already recognized foreign decisions. He will make comments on real cases.

CANADA

QUESTIONS:

How did large restructuring matters work in Canada in the early 2000's?

What was the statutory/legal and institutional framework?

How were cross-border issues dealt with?

What significant changes – legislative, procedural, other – occurred between 2000 and the present that affected large restructuring matters, including the adoption and implementation of the UNCITRAL - Model Law on Cross-border Insolvency?

How has implementation of the Model Law affected large cross-border restructurings?

COMMENTS

The vast majority of large restructuring matters in Canada involve cross-border filings with the United States.

The development of restructuring law in Canada over the past 25 years reflects a gradual movement from a creditor friendly liquidation regime to a US influenced rescue culture.

The statutory framework remains unchanged - in name only - since 2000.

The *Companies' Creditors Arrangement Act* ("CCAA") is the statute of choice for large corporate restructurings and going concern sales.

The *Bankruptcy and Insolvency Act* ("BIA") is utilized for bankruptcy proceedings, proposals and receiverships initiated by secured creditors.

However, there have been a number of statutory amendments which have been made in a conscious effort to move from a secured creditor controlled receivership or liquidation culture to a culture which prioritizes restructuring or a rescue culture.

The term "restructuring" has also evolved. No longer does it mean the same business with the same equity interests controlling the corporation. Rather, the business is restructured – but with a different equity structure or at the very least one that has an altered equity structure.

Creditor interests are recognized in a restructuring and it is common to see a debt to equity conversion with secured creditors continuing to have a charge on assets and junior creditors converted to equity. It is also common to see protection for existing trade creditors and employees of the business.

In the early 2000's, the Model Law had not been adopted in Canada. There were provisions in the CCAA enabling recognition of foreign insolvency proceedings, but the concept of a foreign representative having direct access to a Canadian court, applying for a stay, applying for recognition of foreign orders, did not really exist.

Rather, the process evolved with dual or plenary filings in both the US Bankruptcy Court and the Canadian court.

Recognizing that there had to be communication between the courts to avoid inconsistent results and to achieve efficiency, cross-border protocols were developed.

There was a degree of confusion in the early 2000s as to whether the protocols were intended to be solely procedural in nature or whether they also incorporated substantive provisions.

Ultimately, the International Insolvency Institute and the American Law Institute produced "Guidelines for Cross-border Protocols".

In the early 2000's Canadian and US proceedings did not mesh all that well. Two obvious examples illustrate the point.

1. Lack of statutory authority in Canada for DIP Financing.

2. Lack of statutory authority providing for subordination of equity claims.

The result was a degree of uncertainty. There was a mature DIP financing market in the United States and an immature market in Canada. The result was that DIP financing was primarily supplied by US financiers. The US Bankruptcy Code provided for a priority charge for DIP financing. However, in Canada, the result was uncertain. Case law existed that permitted DIP financing with a priority charge but there was no statutory authority for such a charge. The result was that DIP financiers would insist upon receiving a court order charge from the U.S. Bankruptcy Court.

Rather than having one proceeding in Canada to address large-scale restructurings of Canadian entities, the practice evolved into having parallel proceedings in both the United States and Canada. Given the importance of DIP financing, these parallel proceedings were to a large degree dominated by US court proceedings.

Examples of this are as follows: *Laidlaw, Loewen international* and *Olympia and York*.

The results of parallel proceedings was a duplication of legal proceedings with the overhanging possibility of inconsistent outcomes. All of which resulted in an erosion of value for creditors.

Other areas of uncertainty concerned going concern sales during a restructuring. Could these be done in Canada? There was no statutory authority in the early 2000s for going concern sales.

In 2009, Nortel Networks filed for CCAA protection in Canada and its US affiliates filed for Chapter 11 protection in the United States. Separate insolvency proceedings were also commenced in a number of countries, including the U.K. The filing took place in January 2009, mere months before the proclamation of significant amendments to the CCAA which incorporated the Model Law. Accordingly, the *Nortel Estate* was administered under the pre-Model Law regime.

A significant issue arose: Could there be going concern sales during the restructuring process? The *Nortel* case came to grips with the issue. The amending legislation authorized such sales and codified certain factors for the court to take into account on a going concern sale. The *Nortel* case referenced these factors and asset sales of a going concern nature became routine. Again, this illustrates the US influence on Canadian restructuring law.

Today, insolvency practitioners in Canada and the United States are very familiar with the provisions on the Model Law which are incorporated as Part IV of the CCAA and Chapter 15 in the US Bankruptcy Code. The courts that deal with restructuring matters in Canada are very familiar with the Chapter 15 regime as are the courts in the major US bankruptcy centres.

The practical result is that there has been a significant reduction in the number of parallel proceedings with a corresponding increase in foreign main proceedings which are then recognized in the receiving state.

There has also been a significant reduction in the number of court-to-court communication protocols. The reason for this is quite simple. Under the Model Law, the jurisdiction of the foreign main proceeding will grant an order. The receiving court will then hear a motion to recognize the order from the foreign main proceeding. There is no longer the need to have joint proceedings addressing the same issue. However, court to court communication guidelines are still very important to ensure that cross-border restructurings are dealt with in a consistent manner. The guidelines have been updated to reflect development of the past 25 years and the most accepted version is now the JIN Guidelines. JIN is the abbreviation of the Judicial Insolvency Network.

UNITED STATES

We will explore the evolution of cross-border restructurings in the United States over the past quarter-century, focusing on practical developments in key multinational cases and the impact of the Model Law's adoption through Chapter 15 of the Bankruptcy Code.

We begin by examining the landscape before the enactment of Chapter 15, with a focus on former section 304 of the Bankruptcy Code as well as the *Maxwell Communications* case. This case utilized parallel UK and US Chapter 11 proceedings and implicated significant choice of law issues, particularly regarding the limited extraterritorial application of U.S. statutes—such as avoidance powers—when a foreign insolvency proceeding is pending. *Maxwell* highlighted the complexities and challenges of coordinating multinational restructurings in the absence of a harmonized legal framework.

The next phase in the evolution of cross-border restructurings in the United States was marked by the adoption of the Model Law through the enactment of Chapter 15 of the Bankruptcy Code in 2005. Chapter 15 established a more predictable framework for recognition of foreign insolvency proceedings in the United States and clarified the scope of relief available to foreign representative involved in cross-border cases.

To demonstrate the various mechanisms for effecting cross-border restructuring in the United States, we will discuss two recent, high-profile examples: (i) the novel combination of Dutch WHOA proceedings, a US Chapter 11 case and the first-ever US Chapter 15 case to recognize a WHOA proceeding in the restructuring of *Diebold Nixdorf*; and (ii) the contrasting use of US Chapter 11 and ancillary recognition proceedings in Latin American countries in the restructuring of *LATAM Airlines*.

To further examine the benefits and limitations of Chapter 15, we discuss its application in: (i) the CCAA proceedings and US Chapter 15 case of the *Just Energy Group*, where the court abstained from deciding an issue of Texas utility regulation in a Chapter 15 case but granted first-ever recognition of a CCAA reverse vesting order through which Just Energy sold its business as a going concern; (ii) the British Virgin Islands ("BVI") liquidation proceeding and US Chapter 15 case in *Fairfield Sentry*, where the Second Circuit refused to recognize a sale order obtained in the BVI proceeding and instead held that U.S. bankruptcy law governed the sale of the foreign debtor's property located within the United States; and (iii) the Mexican insolvency proceedings and US Chapter 15 case in *Oro Negro*, where the court authorized the foreign representative to conduct extensive discovery under Chapter 15.

Finally, we will consider the rejection by the US Supreme Court of non-consensual third-party releases in the *Purdue Pharma* Chapter 11 reorganization plan and cases involving recognition of non-consensual third-party releases in Chapter 15. This discussion will consider limitations on recognition of non-consensual third-party releases established by the Fifth Circuit pre-*Purdue* in the *In re Vitro* case as well as novel approaches to obtain non-consensual third-party releases post-*Purdue* through the use of foreign proceedings and Chapter 15 recognition, as seen in the Chapter 15 cases of *Odebrecht* and *Credito Real*.

The cases discussed above represent landmark decisions that have shaped the jurisprudence of cross-border restructuring and insolvency cases in the United States over the last 25 years.