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The Nortel Experience: Tensions in Cross-border Insolvencies - The U.K. Pensions Perspective

By

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I. INTRODUCTION

Even the most carefully designed and coordinated cross-border insolvency proceedings cannot successfully eliminate the inherent friction that arises when a sovereign government seeks to implement or enforce a regulatory scheme that impacts upon – and is not necessarily compatible with – contractual and other multilateral arrangements (including cross-border protocols) established by the various debtors and their stakeholders. These tensions are heightened by the discernible tendency among courts overseeing such complex cross-border restructurings to favor collective action over the individual rights of foreign states to enforce their laws and policies. These tensions manifested themselves in the Nortel bankruptcy in the context of claims arising under the U.K. pensions regime.

II. U.K. PENSIONS FRAMEWORK

A. The U.K. Pensions Regulator

The Pensions Regulator was established under the Pensions Act of 2004 ("Pensions Act 2004"). The Pension Act 2004 brought about significant changes to the regulatory framework for pension schemes in the U.K. and was the result of the British Government's wider efforts to ensure improved protection of pension benefits – particularly in respect of defined benefit schemes. These changes were spurred, in part, by dissatisfaction with the prior statutory regime and, in particular, the reactive nature of the Pensions Regulator's predecessor agency, the Occupational Pensions Regulatory Authority ("OPRA"). As a result, in order to enhance protection of (and minimize risks to) members' benefits, it was thought necessary to create a new more "proactive" governmental agency that would be armed with broad regulatory and enforcement powers and entrusted with the responsibility of supervising and regulating the operations and administration of occupational pension schemes.

As set forth in section 5 of the Pension Act 2004, the principal objectives of the Pensions Regulator are to protect the benefits of members of occupational pension schemes, promote good administration of such pension schemes, and reduce the risk that claims for compensation are made against the Pension Protection Fund (the "PPF"), a statutory fund of last resort also established under the Pension Act 2004 (and described in more detail below). (See Section 5 of the Pensions Act 2004.)

As noted above, the Pension Act 2004 provides the Pensions Regulator with an extensive range of powers to enable it to further its statutory objectives.[2] These include, for example, the power to require persons to provide information and produce documents so that the Pensions Regulator can better analyze and identify those pension schemes where members' benefits are more likely to be at risk. (See section 72 of the Pensions Act 2004.) Under the 2004 Act, the Pensions Regulator was also given the power to issue improvement notices (section 13) or third party notices (section 14) to remedy breaches of the pensions laws and regulations, and the ability to freeze a scheme to protect members' benefits or scheme assets while investigations by the Pensions Regulator are pending (section 23).

One of the key areas of debate in the period leading up to the enactment of the Pension Act 2004 was the issue of the "moral hazard" risk created by the availability of a "safety net" offered by the PPF. As one court observed:

> During the passage of the Pensions Bill (which became the Pensions Act 2004) through Parliament, the government made it clear that it was concerned by the risk of 'moral hazard' associated with the introduction of the PPF. By 'moral hazard' was meant the opportunity for those managing occupational pension schemes to act irresponsibly[,] secure in the knowledge that the PPF would be available to bale out the fund if things went wrong.

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[2] Annexed as Exhibit A is an overview of the Pensions Regulator's powers under the Pensions Act 2004.

Independent Trustee Services Limited v Hope & Others, [2009] EWHC 2810 ¶ 55 (Ch); see also Secretary of State for Work and Pensions White Paper - Action on Occupational Pensions (June 11, 2003), at 13 (noting that "[s]ome respondents were concerned that introducing [the PPF] could introduce an element of moral hazard").[3] As a result, the Pension Act 2004 also conferred on the Pension Regulator a set of "anti-avoidance" powers, which were intended to address the "moral hazard" risk. Specifically, these new powers were designed to enable the Pensions Regulator to prevent employers from using complex corporate structures and business transactions as a means of avoiding their responsibility to properly fund a pension scheme, and thereby ultimately passing off the burden of their liabilities onto the PPF.

Principal among the "anti-avoidance" tools available to the Pensions Regulator are its powers to issue Financial Support Directions and Contribution Notices against corporate affiliates of sponsoring employers to recover pension funding deficits. (See "Consultation on the Moral Hazard Clauses in the Pensions Bill – Report for Grand Committee" (October 2004), at ¶ 7 ("[I]t has always been accepted that, once the Government introduced the Pension Protection Fund, it would also have to provide protection against the risk of moral hazard. This was achieved when two groups of clauses were introduced: (i) Contribution notices . . . [and] (ii) Financial support directions[.]" (annexed hereto as Exhibit C). Both of these mechanisms are discussed further below.

B. The Pension Protection Fund

As part of the overall regulatory framework introduced in the Pension Act 2004, a statutory fund – the PPF – was established for the purposes of providing compensation to members of eligible defined benefit pension schemes in cases where the sponsoring employer

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[3] A copy of the White Paper is annexed at Exhibit B.

has suffered an insolvency event and where the scheme's assets are insufficient to cover a specified level of compensation. The PPF is held and managed by the Board of the PPF (the "Board"), a statutory corporation also formed under the Pension Act 2004.

Funding for the PPF is derived, in part, from an annual statutory levy imposed on all eligible occupational pension schemes. Generally speaking, the total amount levied on a particular scheme is based partly on "scheme-based" factors (such as the number of members, earnings and liabilities of the scheme) and partly on "risk-based" factors, i.e., the likelihood that the Board will ultimately have to assume responsibility for providing pension benefits to the members of the scheme.

In order for an eligible pension scheme to qualify for acceptance into the PPF, there must have occurred a qualifying "insolvency event" in respect of the sponsoring employer, which triggers the commencement of a statutory "assessment period." During the assessment period, the PPF will undertake, with the assistance of the scheme trustee, an evaluation of the scheme's financial condition so that it can determine whether the Board is required under the relevant statutory provisions to take responsibility for the pension scheme. If, at the end of an assessment period, the value of the scheme assets are below the compensation levels offered by the PPF and a scheme rescue is not possible, the scheme will be accepted into the PPF.

The Pension Act 2004 provides the PPF with certain specific rights and powers during an assessment period. For example, the rights and powers of a trustee of a pension scheme in relation to any debt (including any contingent debt) due to them by the sponsoring employer are exercisable by the PPF to the exclusion of the trustee during the assessment period. Indeed, one of the main functions of the Board during an assessment period is to ensure that the scheme recovers all debts that are due to it. However, notwithstanding the creditor rights vested in the

PPF during the assessment period, the scheme trustee remains the legal owner of the debts and any amounts paid in respect of such debts are ultimately payable to the trustee on behalf of the pension scheme.

Where the PPF is required to accept responsibility for a scheme, the pension benefits payable to the members of that scheme are limited under statute to the PPF level of compensation. In most cases, this amount will be less than what the member would have received if the scheme had been adequately funded because pension benefits payable to members by the PPF are subject to a statutory cap and, in relation to certain categories of members, are limited to only a proportion of their accrued pension benefits.

C. Financial Support Directions and Contribution Notices

As noted above, the Pension Act 2004 grants the Pensions Regulator two key “anti-avoidance” tools to address the “moral hazard” risk and minimize draws on the PPF: the power to issue Financial Support Directions and Contribution Notices.

1. Financial Support Directions

Under the Pension Act 2004, the Pensions Regulator may seek issuance of a Financial Support Direction against any entity that is associated or connected with an employer in an underfunded pension scheme. If issued, the Financial Support Direction requires that entity (or entities) to submit a proposal to the Pensions Regulator for its approval, which sets out how that entity intends to provide financial support to eliminate the pension scheme’s funding deficit and ensure that such financial support remains in place while the pension scheme is in existence.

A Financial Support Direction may only be issued if certain statutory and other requirements are met, including (i) the employer in relation to the pension scheme is “insufficiently resourced” or a “service company” (as those terms are defined in section 44 of the Pensions Act 2004); (ii) the relevant entity is an associate of, or is connected with, the employer;

and (iii) issuance of a Financial Support Direction against that entity is reasonable in the circumstances. (See generally section 43 of the Pensions Act 2004.)

A "service company" for purposes of section 43 is a company whose revenues, as reflected in its financial statements, is solely or principally derived from amounts charged for the provision of the services of employees of the company to other companies in the same corporate group. (See section 44 of the Pensions Act 2004.) An employer may be considered "insufficiently resourced" under section 43 if, among other things, the value of its assets is less than 50% of its estimated "section 75 debt" as at a "relevant time" specified by the Pensions Regulator. (See section 44(3) of the Pension Act 2004.) An employer's "section 75 debt" refers to a statutory debt due from an employer to a scheme trustee upon the occurrence of certain triggering events set forth in section 75 of the Pensions Act of 1995 ("Pension Act 1995"), which include, among other things, winding up of the scheme or the employer suffering an insolvency event. In such circumstances, the employer's liability under section 75 (i.e., the "section 75 debt") is broadly equal to the deficiency in the funding of the pension scheme as estimated by the scheme's actuary on a "buy-out" basis. The deficiency on the "buy-out" basis represents the difference between the value of the scheme's assets and the cost – estimated by the scheme's actuary – of securing the members' benefits through the purchase of annuities from an authorized insurance company.

The procedure for issuing a Financial Support Direction is that the Pensions Regulator reviews the background and circumstances relating to the pension scheme. If it concludes that there are grounds to do so, the Pensions Regulator will set out the case for the issuance of a Financial Support Direction in a warning notice (the "Warning Notice"), which is sent to the named company or companies. The company or companies to whom the Warning Notice is addressed have the opportunity to make written representations as to the matters set out in the Warning Notice to the Pensions Regulator, and all parties have the opportunity to make oral submissions at a hearing in front of the Determinations Panel of the Pensions Regulator, which must then decide whether it is appropriate to issue a Financial Support Direction under the Pensions Act 2004 and related laws and regulations.

The Determinations Panel is an independent committee established by the Pensions Regulator consisting of persons with legal, business and/or pensions knowledge and expertise who are appointed under terms that are approved by the U.K. Secretary of State. Although a committee of the Pensions Regulator, the Determinations Panel is independent from the Pensions Regulator in that it has separately appointed membership.

The Pension Act 2004 enumerates various factors that the Determinations Panel may, in its discretion, consider when deciding whether it is reasonable to issue a Financial Support Direction. These factors include the relationship between the employer and the party against whom the Financial Support Direction may be issued, the value of benefits received by that party from the employer (in the case of a related entity), and the financial circumstances of the party.

A decision of the Determinations Panel to issue a Financial Support Direction may be referred to the Upper Tribunal (Tax and Chancery Chamber) for a *de novo* review by any party affected by the decision. Thereafter, an appeal may be taken (on points of law) from a decision of the Upper Tribunal, with leave, to the Court of Appeal of England and Wales.

The Pensions Regulator's powers to seek recovery of pension funding deficits from entities "associated" or "connected" with a scheme employer are conceptually similar to the powers available to the U.S. Pension Benefit Guaranty Corporation ("PBGC") under the

Employee Retirement Income Security Act of 1974 ("ERISA").[4] ERISA authorizes the PBGC to assert claims against members of a pension plan sponsor's "controlled group" in respect of pension underfunding liability that arises in certain circumstances, for example, termination of the plan. See 29 U.S.C. § 1362 (2010).[5] However, significant procedural differences exist between the two regimes. Whereas in the U.S., the PBGC's involuntary termination of a pension plan pursuant to 29 U.S.C. §1362 automatically gives rise to joint and several liability among entities in the controlled group, in the U.K., a direction to provide support for an affiliate's underfunded pension plan is issued only after notice, an opportunity to be heard and a determination by the Determinations Panel that the statutory criteria for issuance of an Financial Support Direction have been met, which determination is subject to *de novo* review on appeal.

2. Contribution Notices

If a Financial Support Direction is issued and the recipient fails to put or keep in place financial support in a form approved by the Pensions Regulator, the Pensions Regulator may seek issuance of a non-compliance Contribution Notice against the recipient. (See section 47 of the Pensions Act 2004.) A Contribution Notice imposes a statutory liability on the non-complying party to pay the sum specified therein, which may be in an amount equal to the whole of the debt that is (or would be) due by the employer under section 75 of the Pensions Act 1995.

As in the case of a Financial Support Direction, the issuance of a Contribution Notice is preceded by a Warning Notice sent to the non-complying party, who is then permitted to make written and oral representations to the Determinations Panel as to why a Contribution Notice

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[4] Annexed as Exhibit D is a general outline describing the PBGC's involvement in chapter 11 cases.

[5] Broadly speaking, an employer's "controlled group" includes its parent, subsidiaries and any other affiliates which satisfy the 80% common ownership requirement under the statute. See 26 U.S.C. § 1563 (2010).

should not be issued. The Determinations Panel may only issue a Contribution Notice if it is of the opinion that it is reasonable to impose liability on the party in question to pay the sum specified in the notice. In reaching its decision, the Determination Panel is required to consider, among other things, whether the non-complying party has taken reasonable steps to secure compliance with the Financial Support Direction; the relationship between that party and the scheme employer (including whether the party has or has had control of the employer); the value of any benefits received directly or indirectly by that party from the employer; and the financial circumstances of the party. (See section 47(4) of the Pensions Act 2004.)

A decision by the Determinations Panel to issue a Contribution Notice may be referred to the Upper Tribunal for review in the first instance, and thereafter an appeal on a points of law may be taken, with leave, to the Court of Appeal.

III. CROSS-BORDER TENSIONS

Two recent decisions of the United States Bankruptcy Court for the District of Delaware involving claims arising under U.K. pensions law aptly demonstrate some of the tensions that can arise when conflicting statutory regimes collide. The two cases also provide an interesting example of how seemingly similar issues can play out to very different results.

1. In re Sea Containers Ltd., No. 06-11156 (KJC), 2008 WL 4296562 (Bankr. D. Del. Sept. 19, 2008)

In Sea Containers, the trustees of two U.K. pension schemes entered into a settlement with the chapter 11 debtors (which included the sponsoring employer's parent company) to resolve claims filed by the trustees in the chapter 11 proceedings relating to the schemes' funding deficits. Sea Containers, 2008 WL 4296562, at *1.[6] The matter came before Chief

[6] A copy of the Sea Containers decision is annexed at Exhibit E.

Judge Kevin J. Carey of the United States Bankruptcy Court for the District of Delaware in the context of a motion by the debtors for approval of the settlement pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Prior to the execution of the settlement agreement, regulatory proceedings had been commenced in the U.K. by the Pensions Regulator seeking issuance of Financial Support Directions against the parent company in respect of the pension schemes' significant funding deficiencies. At the request of the parent company, a hearing was held before the Determinations Panel, at which evidence was taken (including cross-examination of each side's witnesses) and arguments were made by all parties. The Determinations Panel found that the statutory requirements for the issuance of a Financial Support Direction had been satisfied, including that the sponsoring employer was a "service company" within the meaning of the Pensions Act 2004 and that it was reasonable to issue a Financial Support Direction against the parent company requiring it to propose financial arrangements to rectify the schemes' pension deficits. (See Reasons of the Determinations Panel of the Pensions Regulator in Sea Containers, dated June 15, 2007, ¶ 26.)[7]

In reaching its decision, the Determinations Panel expressly acknowledged the parent company's pending chapter 11 cases and specifically considered whether those proceedings impacted the reasonableness of issuing Financial Support Directions. (See Reasons of the Determinations Panel of the Pensions Regulator in Sea Containers, dated June 15, 2007, ¶¶ 28-31 (recognizing that "the Chapter 11 issue is genuinely material" and that the Determinations Panel would "consider this issue in the context of whether or not it was reasonable" to issue an Financial Support Direction).) As to that issue, the panel concluded that the pendency of the

[7] A copy of Determinations Panel's reasons is annexed at Exhibit F.

chapter 11 cases did not by itself preclude the issuance of Financial Support Directions and that such issuance would not constitute a violation of the automatic stay. (Id.)

Further, the panel was not persuaded by the parent company's argument that it would be placed in an impossible position if a Financial Support Direction was issued and the U.S. Bankruptcy Court subsequently declined to approve any arrangements made to comply with the Financial Support Direction. In addressing that argument, the Determinations Panel recognized that the U.S. Bankruptcy Court would be the final arbiter of whether the scheme trustees' claims – which were based, in part, on the Financial Support Directions – would be allowed in the chapter 11 proceedings and that its approval of any arrangements was not "guaranteed." (See Reasons of the Determinations Panel of the Pensions Regulator in Sea Containers, dated June 15, 2007, ¶ 30(3).) However, it also noted that the framework created by the Pension Act 2004 allowed the panel to cater for that possibility insofar as the parent company's inability to secure the Bankruptcy Court's approval would be a relevant factor for the panel to consider in determining whether it was reasonable to issue a Contribution Notice against the parent company for failing to comply with a Financial Support Direction. (See Reasons of the Determinations Panel of the Pensions Regulator in Sea Containers dated June 15, 2007, ¶ 31.)

Various creditors in the chapter 11 proceedings, including the official committee of unsecured creditors for the parent company debtor, objected to the debtors' settlement with the scheme trustees. The objectors argued, among other things, that because the Financial Support Directions were issued in violation of the Bankruptcy Code's automatic stay provisions, they were invalid, provided no basis for the trustees' claims against the debtors, and precluded the debtors from satisfying their burden that the settlement was reasonable and should be approved under Bankruptcy Rule 9019. Sea Containers, 2008 WL 4296562, at *8. As to that argument, the scheme trustees contended in response that the Financial Support Direction proceedings did not violate the automatic stay because they were undertaken by the Pensions Regulator in furtherance of its regulatory powers under U.K. law and were, therefore, excepted from the scope of the automatic stay pursuant to the regulatory/police power exception contained in section 362(b)(4) of the Bankruptcy Code.

The Bankruptcy Court rejected the objectors' arguments based on the automatic stay. Instead, the court held that "the mere issuance of the [Financial Support Directions] does not violate the automatic stay" because the Pensions Regulator is "a statutorily created entity endeavoring to exercise its regulatory power" and the issuance of Financial Support Directions was the product of the Pensions Regulator "fulfilling its statutory objective of ensuring that pension schemes are properly funded and maintained." Sea Containers, 2008 WL 4296562, at *9. The court further held that, the "[i]ssuance of the [Financial Support Directions], without more, does not amount to an attempt to collect a debt or assert a claim against the Debtors," but rather, "provide[s] guidance as to the needs of the Schemes and therefore the pertinent considerations in valuing the Schemes' claims." Id.

In its decision, the Bankruptcy Court noted that notwithstanding the issuance of any Financial Support Directions against the parent company, "it would ultimately be for this Court to approve any proposed funding arrangement." Sea Containers, 2008 WL 4296562, at *9. That statement echoes the Determinations Panel's recognition, noted above, of the ultimate authority of the Bankruptcy Court to determine the allowance of the trustees' claims against the debtors based on the Financial Support Directions.

Objections to the settlement were also raised on the grounds that the methodology for valuing the schemes' pension deficiency claims was improper. Sea Containers, 2008 WL

4296562, at *8. In particular, the objectors argued that the section 75 “buy-out rate” prescribed by U.K. law for calculating the amount of the claims was inapplicable under U.S. law and, therefore, the schemes’ claims should be re-calculated using the “prudent investor” rate that certain U.S. courts have adopted for purposes of valuing pension claims. Id. The Bankruptcy Court rejected these arguments and held that the valuation methodology under U.K. law was appropriate given that the pension schemes were “created, operated, and regulated under U.K. pensions law.” Id. The court also noted that the use of the “prudent investor” rate for valuing pension claims under U.S. law has been “questioned.” Id. at *8 n.9.

2. In re Nortel Networks Corp., No. 09-10138(KG), 2010 WL 891264 (Bankr. D. Del. March 9, 2010)

In Nortel, the Pensions Regulator issued a warning notice in January 2010 against 29 affiliates of the sponsoring U.K. employer, which particularized the case for the issuance of Financial Support Directions against those entities, including two U.S. Nortel entities that had filed for chapter 11 protection. Nortel, 2010 WL 891264, at *4.[8] The U.S. debtors filed a motion in the Bankruptcy Court seeking an order enjoining the pension scheme trustee and the PPF from participating in the Financial Support Direction proceedings on the grounds that those proceedings violated the automatic stay and were not excepted from the scope of the stay by any statutory exception. The debtors also argued that participating in the Financial Support Direction proceedings would impose an unreasonable burden on the estates’ limited resources and would interfere with the debtors’ efforts to develop a multi-jurisdictional protocol for allocating asset sale proceeds.

The scheme trustee and the PPF opposed the U.S. debtors’ motion, arguing that, among

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[8] A copy of the Nortel decision is annexed at Exhibit G.

other things, the Financial Support Direction proceedings constitutes an exercise of the Pensions Regulator's "moral hazard" powers and, therefore, fell squarely within the ambit of the regulatory/police power exception under section 362(b)(4). The trustee and the PPF also relied on principles of international comity, and in particular precedent from the U.S. Court of Appeals for the Third Circuit expressing a "serious concern for comity,"[9] which they contended counseled strongly against granting the debtors' request for an order that essentially operated as an anti-suit injunction to enjoin the Financial Support Direction proceedings in the U.K.

Judge Kevin Gross of the Bankruptcy Court for the District of Delaware granted the debtors' motion and issued an order enjoining the trustee and the PPF from participating in the Financial Support Direction proceedings as to the U.S. debtors.[10] In its opinion, the court concluded that inasmuch as the Financial Support Direction proceedings constituted an attempt to assess or liquidate a debt against one or more of the debtors, those proceedings were subject to the automatic stay provisions of the Bankruptcy Code. Nortel, 2010 WL 891264, at *5. The court further ruled that the regulatory/police power exception to the automatic stay, which it held must be "narrowly construed," was not applicable under either the "pecuniary purpose" or "public policy" tests that some courts had developed to determine the availability of the exception. Id. at *6-8. Specifically, the court found that in commencing and pursuing the Financial Support Direction proceedings against the debtors, the Pensions Regulator was not acting in furtherance of any public interest, but instead was only seeking to recover a "pecuniary benefit" for "a private party" – the scheme trustee. Id. at *9. In the absence of a public purpose

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9 See, e.g., Stonington Partners, Inc. v. Lernhout & Hauspie Speech Prods. N.V., 310 F.3d 118, 126 (3d Cir. 2002); Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 160, 161 (3d Cir. 2001).

10 An appeal by the trustee and the PPF from Judge Gross's decision to the United States District Court for the District of Delaware is currently pending.

or benefit, the court found that the regulatory/police power exception was not applicable. Id. The Bankruptcy Court did not regard the Sea Containers decision as controlling and distinguished the holding in that case on the grounds that it arose "in an entirely different procedural context" and that the debtors there did not seek to enforce the automatic stay against the pension scheme trustees or the Pensions Regulator. Id. at *9.

In this respect, the court's decision represents a departure from the treatment afforded the PBGC in the chapter 11 context when it seeks to establish, but not enforce, pension funding liability against sponsors and members of their "controlled group." An established body of law has developed (both statutory and case law) providing that such actions by the PBGC are excepted from the scope of the automatic stay. See, e.g., 29 U.S.C. § 1342(e) (PBGC initiated plan termination action, which gives rise to joint and several termination liability under 29 U.S.C. § 1362 on "controlled group" entities, "may be filed notwithstanding the pendency in the same or any court of any bankruptcy . . . proceeding"); Pension Benefit Guar. Corp. v. LTV Corp. (In re Chateaugay Corp.), 87 B.R. 779, 806 (S.D.N.Y. 1988) (section 362(b)(4) exception applies to imposition of funding liability following restoration of plan by PBGC), aff'd, 875 F.2d 1008 (2d Cir. 1989), rev'd on other grounds, 496 U.S. 633 (1990); see also 3-362 Collier on Bankruptcy ¶ 362.05 (15th ed. rev.) ("Postpetition actions by the PBGC, within the scope of its authority under ERISA, are generally held to be excepted from the automatic stay.")

Several other aspects of the Bankruptcy Court's decision are worth noting. First, in reaching its decision, the Bankruptcy Court noted that the trustee and the PPF had submitted to the jurisdiction of the Bankruptcy Court by filing proofs of claim and, therefore, held that the resolution of those claims, including the question of whether a Financial Support Direction should be issued against the debtors, were matters that were appropriately determined in the chapter 11 proceedings. Id. at *6-7.

Second, the Bankruptcy Court's decision to enforce the automatic stay was also based on the overlap that may exist between the issues raised before the Determinations Panel in the Financial Support Direction proceedings and the matters sought to be resolved in the proposed global protocol for allocation of proceeds from the sale of the Nortel group's worldwide businesses. Id. at *10. Based on that overlap, the Bankruptcy Court was of the view that the Financial Support Direction proceedings would "prejudice the ultimate literally [sic] global resolution of these bankruptcy cases." Id. at *11.

Lastly, the Bankruptcy Court did not consider itself bound by principles of international comity to recognize the U.K. regulatory proceedings. Id. at *8. To the contrary, the court characterized the trustee and the PPF's participation in those proceedings as "ignoring comity" in light of its conclusion that the proceedings would interfere with the proposed allocation process "in which many debtors and creditors are working tirelessly to formulate a coherent, equitable plan." Id.

IV. CONCLUSION

The intersection of pensions and bankruptcy laws in the cross-border arena can give rise to a multitude of complicated legal issues, including, as demonstrated in the Nortel and Sea Containers cases, the scope of the bankruptcy stay in the context of foreign regulatory actions, the interplay between considerations of international comity and private party arrangements and protocols, and complex questions about claim valuation methodologies. It is hoped that the lessons learned from these cases and others can provide a platform for developing an effective legal framework to address these issues – and minimize, if not eliminate, the uncertainties that currently exist – with a view to achieving the ultimate goal of efficient management and resolution of cross-border insolvencies.