Canada-U.S. Cross-Border Restructurings: A Unique Case that does not need an UNCITRAL Solution

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Uniform laws regarding international insolvencies have an intellectual appeal. However, a solution of broad general application should not, for that reason, be adopted for truly unique situations. A case in point relates to insolvencies involving Canadian and U.S.-based assets and companies.

The Canada-U.S. trade relationship is the largest in the world. More trade crosses one bridge between Windsor and Detroit than takes places between all of Germany and France. The total trade between the United States and Japan is significantly less than the trade between one Canadian province, Ontario, and the United States. Restructuring efforts involving assets and businesses in both jurisdictions are now, and have been for many years, commonplace.

In such an environment, it is not surprising that the two jurisdictions would find ways to co-operate. The Canada-U.S. experience is a testament to the ability of two jurisdictions to work in harmony, resulting in practical, effective solutions for a wide variety of fact situations.

Both jurisdictions have laws that allow for a Court-supervised restructuring process, an independent representative of creditors and a mechanism to force plans upon objecting minorities. However, within these frameworks, the two jurisdictions vary greatly in approach. The American Chapter 11 system is more "rules based" whereas the Canadian *Companies' Creditors Arrangement Act* (the "CCAA") is often referred to as "principle based", meaning that the legislation is remarkably brief with the gaps left to be filled by judicial interpretation and invention. Notwithstanding these very different approaches, the two jurisdictions co-ordinate cross-border restructurings in an efficient and effective manner.

At least two major factors have contributed to this success: (a) the legislation in both jurisdictions already contemplates companion proceedings which are ancillary to a main proceeding in another jurisdiction (Section 18.6 in CCAA and Section 304 under Chapter 11);

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and (b) a significant willingness has been exhibited by the judiciary in both jurisdictions to have regard and respect for the proceedings in the neighboring jurisdiction in keeping with the best tradition of international comity. The ingenuity of counsel and other insolvency practitioners on both sides of the border would be useless without a sophisticated judiciary open to innovation and flexibility.

In the result, Canada-U.S. cross-border restructurings today may proceed in a variety of ways including:

(a) Concurrent CCAA and Chapter 11 filings with a court sanctioned protocol regarding both proceedings (*Everfresh)*;

(b) Concurrent Chapter 11 and CCAA filings but without a protocol (*Vicwest*);

(c) Chapter 11 filing with a companion filing under Section 18.6 of the CCAA (*Babcock & Wilcox, Noma*);

(d) CCAA filing with a Section 304 companion proceeding (*Air Canada, Euro United*); and

(e) Hybrid filings under which full proceedings may be initiated in both jurisdictions but which evolve into structured or limited proceedings in one jurisdiction such as a plan being filed only in respect of certain creditors or with respect to certain assets (*Philip Services, Laidlaw*).

The stakeholders decide whether a formal protocol is necessary to coordinate the proceedings. Protocols between the jurisdictions vary greatly but can mandate joint, simultaneous (video-cast) hearings, consolidated plans and co-ordinated claims processes (*Livent*). The UNCITRAL model law principles guide practitioners and the bench in coordinating proceedings even where no formal protocol exists.

This leaves the question: "Should the UNCITRAL model law be adopted in respect of Canada-U.S. insolvency proceedings?" From a practitioner's point of view, the answer is "No" - at least, from a Canadian perspective, as long as it is not adopted in the United States. The principles underlying the model law create a helpful guideline but the goals of co-operation, co-ordination

and certainty have already been achieved in Canada-U.S. restructurings. The cross-border system already functions smoothly in the vast majority of cases. There are a number of practical and efficient options from which practitioners can choose to meet the needs of each case and to tailor the process for an optimal result. There is concern that adoption of the UNCITRAL model law would limit or interfere with the degree of judicial discretion and flexibility that forms the backbone of the existing system. As such, the adoption of such law would not be a welcome change. In short, if it isn't broken, don't fix it.

The existing system is not perfect and there is a need to amend the domestic law, at least in Canada, to reduce the "forum shopping" element from decisions which are made regarding cross-border insolvencies. A leading candidate for such reform relates to shareholder actions that are subordinated to creditors' claims in Chapter 11 cases but not under CCAA. As class actions become more prevalent in Canada, this difference in the substantive law will tend to drive cross-border insolvencies into the United States.

The significant number of successful, co-operative proceedings between Canada and the U.S. leads one to the inescapable conclusion that the existing system is working and is not ripe for change such as might be effected by the adoption of the UNCITRAL model law.