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Cross-Border Insolvency Program

Cross-Border Update

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Cross-Border Update

2:45 – 3:45 p.m.



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ABI Cross-Border Insolvency Program 2023

Cayman Islands Restructuring Officer Regime



Fiona MacAdam
Partner, Walkers

Making financial services work

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Restructuring Officer Regime

- **Overview**
 - Who can petition?
 - Grounds
 - Powers of Restructuring Officers and Directors
 - Automatic moratorium
- **Recent Cases**
 - *Oriente Group Limited*
 - *Rockley Photonics Holdings Limited*
- **Compromise of foreign debt under a Cayman Islands process**
 - Rule in *Gibbs*
 - *Norwegian Air*

Cayman Islands - Restructuring Officer Regime

- Statutory and standalone rehabilitation procedure introduced on 31 August 2022
- **Who can petition?** (section 91B and 91C Companies Act)
 - A company may present a petition to the Court for the appointment of a restructuring officer
 - Foreign companies liable to be wound up under the Cayman Islands Companies Act
 - Director does not require a resolution of the members and/or express power in articles to present a petition for the appointment of a restructuring officer
- **Grounds** (section 91B Companies Act)
 - (i) Company is or is likely to be come unable to pay its debts (section 93); **and**
 - (ii) Intends to present a compromise or arrangement to its creditors (or classes thereof) pursuant to the Companies Act, foreign restructuring or by way of consensual restructuring
- **Powers** (section 91B and section 91D Companies Act)
 - Powers and functions set out in the appointment order
 - Must be a qualified IP

In the matter of Oriente Group Limited

- Earlier case law authorities regarding the restructuring or 'light touch' provisional liquidation regime would be both relevant and persuasive
- The Grand Court of the Cayman Islands has "*broad discretionary jurisdiction*" to appoint restructuring officers:
 - (i) the statutory precondition of **insolvency (or likelihood of becoming insolvent)** is met, by reference to credible evidence from the relevant company or some other source;
 - (ii) the statutory precondition of an "**intention**" to **present a restructuring proposal to creditors** (or any class thereof) is met, by reference to credible evidence of a "*rational proposal with **reasonable prospects of success***"; and
 - (iii) "*... the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding up of the company...*"

Restructuring Officer Regime (cont.)

- **Automatic moratorium** takes effect from date of presentation of petition for the appointment of a restructuring officer
- **Secured creditors not affected:** secured creditor may enforce security without leave of the Court and/or restructuring officer
- **Extra-territorial effect**



In the matter of Rockley Photonics Holdings Limited

- First successful RO appointment that was granted in support of concurrent US Chapter 11 Proceedings
- The automatic moratorium does not operate as a stay of foreign restructuring proceedings
- 'Authorisation' for the Joint Restructuring Officers to implement the Plan of restructuring as approved by the US Bankruptcy Court
- Judicial comity



Compromising foreign debt under a Cayman Islands process

- International recognition
- US law governed debt
- English law governed debt and the Rule in *Gibbs*
- *Norwegian Air*



ABI Cross-Border Insolvency A Restructuring Regime Comparison

October 24, 2023



US Bankruptcy Code

What is a Chapter 11 Bankruptcy?

- It is a formal in court process that allows debtors and creditors to resolve the debtor's financial problems through a court supervised plan process.
- DOES NOT mean the company has no money—rather it is used as a strategic process in a lot of cases to give the company some breathing room.
- A company can either liquidate in a Chapter 11 OR restructure in a Chapter 11. A company can also file a Chapter 7 bankruptcy. Here, there can be NO operations at the time of the bankruptcy filing and a Chapter 7 trustee is automatically appointed.

What is a Chapter 15 Bankruptcy?

- Used to provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants, and other parties of interest involving more than 1 country. It is usually ancillary to a primary proceeding pending in another country.

US Bankruptcy Code

What is an Involuntary Bankruptcy?

- It is a tool used by creditors who have not been paid. The debtor company must have at least 12 creditors and 3 of the creditors must petition for the involuntary. The three petitioning creditors must hold non-contingent, undisputed, and unsecured debts totaling at least \$16,750.
- These are rarely filed because, if the case is dismissed, the petitioning creditors can be sanctioned and have to pay the debtor's costs and legal fees (which is not normal in the U.S.) The petitioning creditors could also be forced to pay lost profits, reputational, punitive and other damages if the petition was filed recklessly or with intent to injure the debtor.

US Bankruptcy Code

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 | 13

Restructuring the Company Through a Chapter 11 Bankruptcy

Pros

- The debtor can stay in place operating the company (called a "debtor in possession")
- Finality
- Automatic stay
- 363 sale free and clear of liens (including a sale on a going concern basis)
- Shed onerous contracts
- Payment of creditors over time through a plan
- One forum for all litigation
- Can be used to orderly liquidate company as well as restructure

 | 14

Restructuring the Company Through a Chapter 11 Bankruptcy

Cons

- Can have a negative stigma attached to it
- Very expensive and usually requires debtor in possession financing
- Creditors committee can be aggressive and may attempt to unbury skeletons, including evidence to support D&O actions and to attack secured creditors' liens
- Fraudulent transfers and preferential payments can be clawed back
- Can be long and complex
- Very public—docket and hearings open to public, can be lots of press coverage
- Creditors can lift the stay and come after collateral
- Chapter 11 trustee can be appointed (especially if there is alleged fraud)



What is the Difference?
Cayman v. USA

Differences:

- Control: Debtor in Possession (Chapter 11) vs. RO (Cayman restructuring)
- Creditors Committee vs. Liquidation Committee
- Active litigation claims: possible in Ch 11 v not really in KY Restructuring Regime
- Cram down differences
- Ch 11: equity subordinate to other creditors

 **STOUT** | 17

Differences:

- Cayman windown vs. US Restructuring
- CIMA Controller vs. SEC Receivership
- Involuntary v. Liquidation
- Priority of payments
- Discovery Process
- Automatic Stay
- Avoidance laws—preference and fraudulent transfer

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Alternatives

Bankruptcy Toolkit

Bankruptcy Alternatives

- ABCs
- Receiverships
- Article 9 sales
- Out of court sales

Pros

- Less Expensive
- Often Less time consuming
- Debtor maintains control
- Minimal publicity
- Eliminates bankruptcy stigma

Cons

- No finality
- Usually need key constituents, like secured creditors, to agree
- Creditors can continue to pursue lawsuits—there is no stay in place
- No ability to shed onerous contracts

Insolvency: Cayman Islands

Options and Alternatives

- Official and Provisional Liquidation
- Scheme of Arrangement
- Out of Court Restructuring
- Directorships
- Replacement GP
- Replacement Fiduciary
- Receivers

REVERSE VESTING ORDERS

Authority to approve reverse vesting transactions in
Canada and the United States



KEY FEATURES OF REVERSE VESTING TRANSACTIONS

- Usually completed by way of a share transaction or a hybrid asset sale and share sale.
- All existing shares are cancelled or retracted and reissued. One or several new “clean” shares are then issued by insolvent debtors
- Purchaser obtains all of the “clean” shares of the insolvent debtor company
- Any licences, tax attributes, special permits, etc. remain with the debtor company
- Transaction Agreement specifies which assets, contracts and liabilities are included (stay with debtor) or excluded (transferred to ResidualCo or creditor trust)
- Any excluded assets, contracts and liabilities vest in ResidualCo or creditor trust, which is then wound up under a bankruptcy or liquidation
- Any claims that existed against the debtor company at the time of the sale are preserved and vested against the ResidualCo and/or creditor trust, including any assets that are transferred to those entities
- The net sale proceeds (if any) are distributed to the claimants according to their legal priority by the relevant administrator (trustee or monitor)



BENEFITS OF REVERSE VESTING TRANSACTIONS

- Preserve value of intangible assets like tax attributes, licences, permits and especially valuable in highly regulated industries
- Provide more certainty and finality to a restructuring:
 - Eliminate need to obtain regulators' consent to transfer licences
 - Intellectual property stays with debtor company, eliminating need to transfer IPs through various databases
 - Key contracts also stay with debtor company without needing to obtain approval
- Allow debtor company to continue operations after insolvency “cleansed” of its liabilities and go forward as a going concern



ONLY A FEW RVO'S APPROVED IN CHAPTER 15

"Order: (I) Recognizing and Enforcing the CCAA Vesting Order; (II) Approving the Sale of Substantially all of the Debtors' Interests Free and Clear of Liens, Claims and Encumbrances; and (III) Granting Related Relief"

- Orders granted under sections 105(a) 363, 365, 1501, 1507, 1520, 1521, 1525, and 1527 of the Bankruptcy Code,
- **Just Energy Group Inc. et al**
 - Order granted December 1, 2022, Case 21-30823, Doc 239
 - United States Bankruptcy Court, Southern District of Texas
- **Acerus Pharmaceuticals Corporation et al**
 - Order granted June 13, 2023, Case 23-10111, Doc 78
 - United States Bankruptcy Court, District of Delaware
- **Dynamic Technologies Group Inc. et al**
 - Order granted July 20, 2023, Case 23-41416-elm15, Doc 59
 - United States Bankruptcy Court, Northern District of Texas



CASE STUDY - DYNAMIC TECHNOLOGIES GROUP INC. REVERSE VESTING TRANSACTION

Key business features necessitating a Reverse Vesting Transaction:

- Publicly traded parent company with an operational Canadian subsidiary and a US subsidiary that primarily ran a parts business for customers in the US
- Filed Chapter 15 to deal with contingent liabilities and warranty claims for work done in United States as well as to convey assets in parts business
- Main operations were designing, engineering and manufacturing theme park rides which was done from location in Vancouver, BC
- Value of designs were secured through number of patent and IP registrations in multiple countries
- One entity held number of ISOs, an internationally recognized engineering certification
- Dynamic Group had unique tax attributes, valued at approximately \$88.6 million



KEY TERMS OF DYNAMIC REVERSE VESTING ORDER (CANADA)

- Approval of Transaction Agreement (and Reorganization Steps) with purchaser, Promising Expert Limited ("PEL")
- Direction that all Claims attach against the net sale proceeds and Excluded Assets
- Reorganization steps
 - Purchased Shares transferred to PEL and all other outstanding shares are deemed cancelled
 - All directors of RVO Entities deemed to resign with new director named under PEL Transaction Agreement deemed to be appointed
- Purchased Shares transferred free and clear of any and all Claims, Liabilities and Encumbrances



- Key Terms of Dynamic Reverse Vesting Order (Canada)
 - All RVO Entities' rights, title and interest to Excluded Assets vest absolutely with ResidualCo
 - All Claims, Liabilities and Encumbrances attached to Excluded Assets continue to attach in same nature and priority
 - All Excluded Liabilities and Excluded Contracts are transferred to, and vested absolutely in, ResidualCo
 - RVO Entities and all of their Retained Assets are forever released and discharged from all Excluded Contracts and Excluded Liabilities and all related Claims, Liabilities and Encumbrances
 - All equity interests of the RVO Entities are deemed terminated and cancelled
 - Any person with a claim against the RVO Entities respecting the Excluded Liabilities and Excluded Contracts have an equivalent claim against ResidualCo



KEY TERMS OF DYNAMIC REVERSE VESTING ORDER (CANADA)

- RVO Entities removed from CCAA action and replaced with ResidualCo
- All of the Dynamic Group, their directors, officers and employees, their advisors, the Monitor and its advisors (among others) are released from any and all claims relating to the management of Dynamic Group's business up to the Closing Date



U.S. ORDER RE SALE MOTION – KEY TERMS

- Canadian CCAA Reverse Vesting Order approved and recognized.
- PEL Transaction Agreement approved in its entirety, including all transactions contemplated thereunder, the sale of assets, and transfer of assets, liabilities and claims.
- All relevant parties, including U.S. entities, authorized to take any and all steps to complete the PEL Transaction Agreement.
- The Releases set forth in paragraphs 17-21 of the RVO are recognized and given full force and effect.



U.S. ORDER RE SALE MOTION – KEY TERMS (CONT'D)

- All Purchased Assets are transferred to the Purchaser and vest the Purchaser with all rights, title and interests in the Purchased Assets, free and clear of all liens, claims, encumbrances and other interests other than Permitted Encumbrances.
- The Excluded Assets, Excluded Contracts, and Excluded Liabilities are transferred to, and vest absolutely in, ResidualCo.
- Upon the closing the PEL Transaction Agreement, all persons with a claim against the RVO Entities or the Excluded Assets are forever barred and enjoined from enforcing their claim against the Released Parties.



AUTHORITY TO APPROVE REVERSE VESTING TRANSACTIONS

***Just Energy Group Inc. et al v Morgan Stanley Capital Group Inc. et al*, 2022 ONSC 6354, per Justice McEwen**

29 The jurisdiction to approve a transaction through a reverse vesting order is found in s. 11 of the CCAA. Section 11 gives this court broad powers to make orders that it sees fit, subject to the restrictions set out in the statute. There is no provision in the CCAA that prohibits a reverse vesting order structure: see *Quest University (Re)*, 2020 BCSC 1883, at para. 157.

30 Some courts have also held that s. 36 of the CCAA confers jurisdiction. Section 36 contemplates court approval for the sale of a debtor company's assets out of the ordinary course of business: see *Black Rock Metals Inc.*; *Quest University (Re)*, at para. 40.

31 In any event, it is settled law that courts have jurisdiction to approve a transaction involving a reverse vesting order. Moreover, courts agree that the factors set out in s. 36(3) of the CCAA should also be considered on a motion to approve a sale, including one involving a reverse vesting order.



CITED AUTHORITY FOR APPROVING REVERSE VESTING TRANSACTION IN U.S. ORDER

- Reverse Vesting Transaction approved under:
 - Section 105(a) – General power of the Court
 - Section 363(f) – Court-approved asset sales
 - Section 1501 – Purpose and scope of application of Cross-Border model law for insolvency proceedings
 - Section 1520 – Effect of recognizing a foreign main proceedings
 - Section 1521 – Relief granted upon recognizing a foreign main proceeding
 - Section 1525 – Cooperation to the maximum extent possible
 - Section 1527 – Forms of cooperation



APPENDIX “A” – COMPARISON OF CANADA AND US AUTHORITY FOR REVERSE VESTING ORDER

Companies’ Creditors Arrangement Act, RSC 1985, c C-36

- **Section 11 – broad powers for the Court to make any Order it considers appropriate in the circumstances.**

“Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.”



AUTHORITY FOR REVERSE VESTING ORDER - CANADA

Companies' Creditors Arrangement Act, RSC 1985, c C-36

- **Section 36 – Court's authority to approve the sale of the debtor company's assets out of the ordinary course of business**

36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court.



AUTHORITY FOR REVERSE VESTING ORDER - CANADA

Companies' Creditors Arrangement Act, RSC 1985, c C-36

36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- b) whether the monitor approved the process leading to the proposed sale or disposition;
- c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- d) the extent to which the creditors were consulted;
- e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.



AUTHORITY FOR REVERSE VESTING TRANSACTIONS – U.S.

U.S. Bankruptcy Code, s. 105(a) – General power of the Court

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Similar to CCAA Section 11

Provides the court with broad powers to make any order it sees fit.



AUTHORITY FOR REVERSE VESTING TRANSACTIONS – U.S.

U.S. Bankruptcy Code s. 363(b) – Use, sale, or lease of property

The trustee may, after notice and a hearing, use, sell or lease any property of the estate other than in the ordinary course of business, so long as it complies with certain rules and laws about the disclosure of confidential information.

Similar to CCAA Section 36

Debtor may not sell or dispose of assets outside the ordinary course of business unless authorized by the Court based on its consideration of factors under 36(3).



AUTHORITY FOR REVERSE VESTING TRANSACTIONS – U.S.

U.S. Bankruptcy Code s. 1501 – Purpose and scope of cross-border application

The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency to provide effective mechanisms for dealing with cross-border insolvencies, with the objectives of cooperation, greater legal certainty, fair and efficient administration of cross-border insolvencies, protection and maximization of value, and rescue of financially troubled businesses.

Similar to CCAA Section 44

The purpose of this Part is to provide mechanisms for dealing with cross-border insolvency cases and promote cooperation, greater legal certainty, fair and efficient administration of cross-border insolvencies, protection and maximization of value, and rescue of financially troubled businesses.



AUTHORITY FOR REVERSE VESTING TRANSACTIONS – U.S.

Section 1520 – U.S. Bankruptcy Code

Once a foreign proceeding is recognized as a “foreign main proceeding”, the debtor entities are entitled to adequate protection under 361 and an automatic stay of proceedings under 362.

The sale of any property must be in line with 363.

The trustee can void certain post-petition transactions under 549.

Any property acquired by the debtor post-filing is not subject to any security agreement entered into pre-filing under 552.

Similar to CCAA Section 48

If the Court makes an Order recognizing a foreign proceeding as a “foreign main proceeding”, the Court shall make an order subject to any terms and conditions it considers appropriate:

- a) staying any proceedings against the debtor;
- b) restraining further proceedings in any action against the debtor;
- c) prohibiting the commencement of any action; and
- d) prohibiting the debtor from selling or disposing of its assets outside the ordinary course without a court order.



AUTHORITY FOR REVERSE VESTING TRANSACTIONS – U.S.

Section 1521 – U.S. Bankruptcy Code

Once a foreign proceeding is recognized, either as a main or nonmain proceeding, the court may grant any relief, including:

- 1) staying the commencement or continuation of a proceeding that isn't otherwise stayed under 1520;
- 2) staying execution against the debtor's assets;
- 3) suspending the right to dispose of the debtor's assets that isn't otherwise limited by 1520;
- 4) providing for collection of evidence relating to debtor's assets, affairs, obligations, liabilities;
- 5) entrusting the administration of the debtor's assets to the foreign representative or another person;
- 6) extending relief under 1519(a); and
- 7) granting any additional relief that may be available for a trustee.

Similar to CCAA Section 48

If the Court makes an Order recognizing a foreign proceeding as a "foreign main proceeding", the Court shall make an order subject to any terms and conditions it considers appropriate:

- a) staying any proceedings against the debtor;
- b) restraining further proceedings in any action against the debtor;
- c) prohibiting the commencement of any action; and
- d) prohibiting the debtor from selling or disposing of its assets outside the ordinary course without a court order.



AUTHORITY FOR REVERSE VESTING TRANSACTIONS – U.S.

Section 1525 – U.S. Bankruptcy Code

- a) The Court shall cooperate to the maximum extent possible with a foreign court or foreign representative.
- b) The Court is entitled to communicate directly with, and request information from, a foreign court or foreign representative.

Similar to CCAA Section 52(1)

If an order recognizing a foreign proceeding is made, the Court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved.



AUTHORITY FOR REVERSE VESTING TRANSACTIONS – U.S.

Section 1527 – U.S. Bankruptcy Code

Cooperation under section 1525 may be implemented by any appropriate means, including:

- 1) appointment of a person/body to act at the court's direction;
- 2) communication of information by any means the court considers appropriate;
- 3) coordinating the administration and supervision of the debtor's assets and affairs;
- 4) approving or implementing agreements concerning the coordination of proceedings; and
- 5) coordinating concurrent proceedings regarding the same debtor.

Similar to CCAA Section 52(3)

For the purpose of this section, corporation may be provided by any appropriate means, including:

- a) appointing a person to act at the court's direction;
- b) communicating information by any means the court considers appropriate;
- c) coordinating the administration and supervision of the debtor's assets and affairs;
- d) approving or implementing agreements concerning the coordination of proceedings; and
- e) coordinating concurrent proceedings regarding the same debtor.



AUTHORITY TO VEST OUT LIABILITIES

Similar to s. 11 of Canada's CCAA, s. 105 of the U.S. Chapter 15 Bankruptcy Code grants the Court with broad authority to "take any action or make any determination necessary or appropriate to enforce or implement court orders or rules..."

Canadian courts have relied on their broad authority under s. 11 of the CCAA and their authority to approve sales that satisfy certain factors under s. 36(3) of the CCAA to approve reverse vesting transactions.

ENHANCED PRIORITY FOR PENSION PAYMENTS

The Pension Protection Act

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45

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BACKGROUND

On April 27, 2023, Bill C-228, the *Pension Protection Act* (PPA), received royal assent and was proclaimed into force in Canada. Because the PPA fundamentally changes how pension obligations are addressed in insolvency proceedings, it is important for lenders to understand the nature and impact of the legislation.

Below are five key considerations about the impact and application of the PPA.

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46

KEY CONSIDERATIONS

1. Pension reform to prioritize wind-up obligations/solvency deficiencies in insolvency has been attempted many times via private members' bills since 2004. Until now, these attempts have never been successful – including due to lack of support from the majority government then in power. The PPA aims to ensure that in the event of an employer becoming bankrupt or insolvent, the employer must prioritize paying and maintaining eligible employees' pensions before addressing other financial liabilities – including special payments, solvency deficiencies, and other wind-up and liquidation costs.

There are approximately 9,000 defined benefit pension plans (DB Plans) in Canada with approximately 4.5 million members. Between 2009 and 2022, only 10 insolvency proceedings resulted in a reduction to pension benefits. These proceedings affected approximately 50,000 people or 1% of all current members of DB Plans.

KEY CONSIDERATIONS

2. Insolvency proceedings in Canada are primarily governed by two federal statutes: the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA). Because the PPA has amended both statutes, all federally or provincially registered pension plans are potentially subject to the PPA in the event of a formal insolvency of the employer and may be impacted by the restructuring.
3. The PPSA has significantly expanded the super-priority protections that the BIA and the CCAA provide for pensions in the insolvency of a debtor employer. These protections now include amounts required to fund any unfunded liability or solvency deficiency of federally or provincially registered DB Plans.

KEY CONSIDERATIONS

4. **Unintended Consequences.** While the market's reaction to the PPA has been mixed, there appears to be a broad consensus that the PPA may actually trigger many negative and unintended consequences. Its effects may include the restriction or increased cost of credit for employers with DB Plans, or even the termination or conversion of DB Plans. In 2022, the Association of Canadian Pension Management estimated the PPA could "lead to a loss of pension coverage for up to a million Canadians."

KEY CONSIDERATIONS

5. The PPA contains a four-year transition period for employers that had prescribed pension plans in place before the PPA came into force. Given the PPA's significant impact on the priority of secured creditor rights, lenders should carefully consider whether the PPA changes the risk profile of their borrowers and determine what steps, if any, could be taken to help mitigate that risk.

IMPLICATIONS OF AMENDMENTS

- Unpaid employee deductions and normal costs were predictable and readily ascertained
- Special payments, and the amount to adequately fund an unfunded liability, is more difficult to assess
- Unfunded liabilities and solvency deficiencies do not have a fixed value and fluctuate over time; they can only be assessed at a fixed point in time.
- Borrowers with defined contribution plans (roughly 2/3 of all pension plans), will be less affected, as employer liability is limited to predefined contributions
- Borrowers with defined benefit plans will have more difficulties assessing the amount of any potential pension liability
- Difficulties in assessing risk may limit lenders from extending credit and increase the cost of borrowing

EFFECTIVE DATE OF AMENDMENTS

- Pension Protection Act passed on April 27, 2023
- Any employers with a defined benefit plan before April 27, 2023 have four years before their plans will be affected by the Pension Protection Act
- In that time, we may see employers move away from defined benefit plans to defined contribution plans
- May also see lenders refusing to lend to, or placing more restrictions on, companies that contribute to defined benefit plans

APPENDIX “A”

HOW PENSION PLANS ARE FUNDED

Employers are required make the following payments to fund a pension plan:

- a) a payment equal to the normal cost of the plan;
- b) going concern special payments;
- c) if there is a solvency deficiency, annual solvency special payments equal to the amount by which the solvency deficiency divided by 5 exceeds the amount of going concern special payments that are payable during the plan year;
- d) if there is an additional solvency deficiency due to an amendment to the plan, additional annual solvency special payments payable from the date of the amendment and equal to the amount by which the additional solvency deficiency divided by 5 exceeds the going concern special payment in respect of the unfunded liability emerging from the amendment to the plan; and
- e) by an amount required to be paid by an employer under a defined contribution provision.

See section 9(4) of *Pension Benefits Standards Regulation*, 1985, SOR/97-19 (the “**Pension Regulation**”)

FORMER PRIORITY SCHEME FOR PENSION PAYMENTS

Under the *BIA* and *CCAA*, the following unpaid pension payments were treated as a charge on the debtor’s assets that ranked ahead of every other secured claim against the debtor’s assets, regardless of when they arose, except for rights of unpaid suppliers (81.1), certain claims from farmers (81.2) and unpaid wages (81.3 and 81.4):

- a) unpaid amounts deducted from the employees’ remuneration for payment to pension plan; and
- b) unpaid “normal costs” the employer was required to pay to the pension fund.

“**Normal costs**” means the cost of benefits, excluding “special payments”, that accrue during the plan year, as determined on the basis of a going concern value.

Normal costs essentially “prefund” promised pension benefits.

Typically, normal costs are calculated as a percentage of the employee’s average salary over their last few years of employment.

PENSION PROTECTION ACT – “SPECIAL COSTS”

Pension liabilities with a super priority now include:

- a) “Special payment” determined under section 9 of the Pension Regulation that an employer must pay to the pension plan to liquidate any unfunded liability or solvency deficiency; and
- b) any amount required to liquidate any other unfunded liability or solvency deficiency of the pension plan.

Under 9(3) of the Regulation, an unfunded liability of a plan must be funded by going concern special payments that are sufficient to liquidate the unfunded liability with equal annual payments for 15 years from the date the unfunded liability emerged.

PENSION PAYMENTS THAT FORMERLY HAD PRIORITY

- a) a payment equal to the normal cost of the plan;
- b) going concern special payments;
- c) if there is a solvency deficiency, annual solvency special payments equal to the amount by which the solvency deficiency divided by 5 exceeds the amount of going concern special payments that are payable during the plan year;
- d) if there is an additional solvency deficiency due to an amendment to the plan, additional annual solvency special payments payable from the date of the amendment and equal to the amount by which the additional solvency deficiency divided by 5 exceeds the going concern special payment in respect of the unfunded liability emerging from the amendment to the plan; and
- e) by an amount required to be paid by an employer under a defined contribution provision.

PAYMENTS THAT CURRENTLY HAVE PRIORITY

- a) a payment equal to the normal cost of the plan;
- b) going concern special payments;
- c) if there is a solvency deficiency, annual solvency special payments equal to the amount by which the solvency deficiency divided by 5 exceeds the amount of going concern special payments that are payable during the plan year;
- d) if there is an additional solvency deficiency due to an amendment to the plan, additional annual solvency special payments payable from the date of the amendment and equal to the amount by which the additional solvency deficiency divided by 5 exceeds the going concern special payment in respect of the unfunded liability emerging from the amendment to the plan; and
- e) by an amount required to be paid by an employer under a defined contribution provision.

The Dentons logo, consisting of the word "DENTONS" in white capital letters inside a white arrow-shaped box pointing to the right.

U.S. Bankruptcy Code and Extraterritoriality

Lynn P. Harrison III
Dentons US LLP

ABI Cross-Border Insolvency Program 2023 | October 24, 2023

Grow | Protect | Operate | Finance

U.S. Bankruptcy Code and Extraterritoriality

General Concepts

- A. Presumption: No extraterritorial application of U.S. laws
- B. Exception: Presumption does not apply if it can be discerned from the statute's intent or legislative history that the statute should be applied extraterritorially or if the conduct that the statute is meant to address involves a domestic applications of U.S. law
- C. Plan Discharge: Courts have specifically held the automatic stay and the bankruptcy discharge to apply extraterritorially
- D. "Void *ab initio*": Extraterritorial acts in violation of the discharge will be void, not voidable

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59

U.S. Bankruptcy Code and Extraterritoriality

U.S. Bankruptcy Court Jurisdiction Generally

- A. *In rem* jurisdiction over estate property "wherever located"
- B. Personal jurisdiction over debtor
- C. Personal jurisdiction over creditors and parties in interest who:
 - 1. consent (participation in bankruptcy case)
 - 2. waive ("minimum contacts")

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60

U.S. Bankruptcy Code and Extraterritoriality

Examples of the Limits of U.S. Bankruptcy Court Jurisdiction

- A. Limit on U.S. Bankruptcy Court extraterritorial enforcement
 - Requires jurisdiction over the violator or violator's property
 - Ancillary proceeding may be an option
- B. Types of enforcement
 - Sanctions against the violator
 - Levy against the violator's property
- C. In absence of jurisdiction over violator or violator's property, violator may proceed with void violations without sanctions

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61

U.S. Bankruptcy Code and Extraterritoriality

Illustrative Cases Demonstrating the Limitations of Extraterritorial Effect of U.S. Bankruptcy Code

In re Sheehan – Cannot bootstrap *in rem* jurisdiction as substitute for personal jurisdiction

In re Alto Maipo – *In rem* jurisdiction without personal jurisdiction may not bind foreign counterparty to executory contract

In re China Fishery – *In rem* jurisdiction without personal jurisdiction probably cannot constrain rogue creditor's collection efforts

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62

U.S. Bankruptcy Code and Extraterritoriality

Takeaway

Although the U.S. perspective continues to be that the Bankruptcy Court's *in rem* jurisdiction extends worldwide, there are limitations which practitioners should consider when attempting to enjoin or avoid actions taken abroad in violation of the U.S. Bankruptcy Code.

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63

Take-Aways

Overview:

- Given the new Cayman Regime, an overview and comparison to the US Bankruptcy Code (Chapter 11, Chapter 15, etc)?
- Provide a deeper understanding of the latest positive and negative aspects to Chapter 11 (highlighting Chapter 11 with foreign connections: Cayman etc)
- Explore alternatives to Bankruptcy and alternatives to the new Cayman Regime

Key Takeaways:

- When you have a multi-jurisdictional distress situation or are preparing for an insolvency administration/bankruptcy it is important to pause and seek joint advice on the possible outcomes from filing in the different jurisdictions.
- Understanding the positive and negatives to Chapter 11 and the New Cayman Regime
- An analysis of the litigation claims and how they can interact with the insolvency and related parties is key


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Take-Aways

- In Canada amendments to the CCAA and BIA are providing a new priority for pension claims in insolvency.
- It is still not clear on exactly how those new pension priorities will be determined or calculated.
- The priorities are being phased in over time and will be done over the next 4 years which could affect some defined benefits plans for employers in Canada.
- In Chapter 15 proceedings only a handful of cases have recognized a reverse vesting order (RVO) from Canada.
- RVO's are a new tool in the restructuring tool box in Canada that allows debtor companies and creditors to preserve the value of tax losses, preserve regulatory approvals, keep intellectual property and other valuable assets unique to the debtor in the original entity that has been cleansed of all of its liabilities.
- RVOs generally are also accompanied by a release of all directors and officers for claims both past and present against the RVO entities.



Take-Aways

- Although the U.S. perspective continues to be that the Bankruptcy Court's in rem jurisdiction extends worldwide, there are limitations which practitioners should consider when attempting to enjoin or avoid actions taken abroad in violation of the U.S. Bankruptcy Code.



Questions?





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
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Lynn P. Harrison, III is a partner in the Restructuring, Insolvency and Bankruptcy practice of Dentons in New York and has more than 30 years of experience in workouts, reorganizations and liquidations on behalf of debtors, creditors, liquidators and trustees. His clients have included foreign and domestic corporations (both public and private), financial institutions, underwriters and governmental creditors. He primarily advises them on chapter 11 reorganizations, chapter 15, and other ancillary proceedings, structured financings, distressed trades and acquisitions. Prior to joining Dentons, Mr. Harrison led the insolvency aspects of the representation as conflicts counsel of Lehman Brothers Holdings Inc. and its affiliates in one of the largest and most complex chapter 11 cases ever filed. He also played a key role in the international representation of the Italian Extraordinary Administrator of Parmalat S.p.A., a multinational dairy and food corporation, and its affiliates in restructuring some of the company's subsidiaries in the United States and Latin America. He also counseled the foreign representatives of Gruppo Covarra S.A. de C.V., the first successful ancillary proceeding initiated by a "sindico" (a Mexican liquidator) in the U.S. since the enactment of Mexico's insolvency law, the Ley de Concurso Mercantiles. In addition, he has international experience with such cases as China Fishery, SLS Capital, Abengoa and Arcapita. Mr. Harrison is a frequent lecturer and prolific writer on international and domestic insolvency issues. In 2019, he was invited to participate in the Second Circuit Judicial Conference, where he served on a panel among U.S. bankruptcy judges addressing

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