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ACROSS A WELL-TRAVELED BORDER: EXPERIENCE IN U.S.-CANADIAN INSOLVENCY PROCEEDINGS

Panel Session for New York State Bar Association, International Section
Annual Meeting
Montreal, Canada
October 25, 2018
4:30-5:45 pm

Hon. Martin Glenn, U.S. Bankruptcy Court, Southern District of New York
Hon. Mr. Justice Geoffrey B. Morawetz, Superior Court of Justice, Toronto
Denis Ferland, Davies Ward Phillips & Vineberg LLP, Montreal
Moderator: Mark D. Bloom, Greenberg Taurig, Miami

U.S. Practice Under Chapter 11 of the United States Bankruptcy Code

- No requirement of insolvency
- Automatic stay of creditor proceedings, subject to relief
- Debtor in Possession
- Financing and conduct of business operations
- Sale of assets under section 363
- Plan of Reorganization

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No requirement of insolvency

- Good faith intention to restructure business or achieve other result consistent with principles and goals of Bankruptcy Code
- Often used as tool for
 - Sale of assets free and clear of liens, claims and encumbrances
 - Restructure of debts to bind all creditors, including dissenting creditors, under Chapter 11 plan

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Automatic stay of creditor proceedings, subject to relief

- Very broad
 - Commencement or continuation of any action to recover a pre-petition claim
 - Enforcement of any judgment
 - Any act to obtain possession of or exercise control over property of estate
 - Any act to create, perfect or enforce any lien
 - Secured and unsecured creditors
- Theoretically worldwide in scope, subject to enforcement
- Relief available "for cause," including
 - Lack of adequate protection
 - Debtor lacks equity in property not necessary to reorganization



Debtor in Possession

- No concept of monitor or administrator in US law
- Authority to operate business in the ordinary course
- No appointment of Trustee except "for cause," including
 - Fraud
 - Dishonesty
 - Incompetence
 - Gross Mismanagement
- Rarely sought or obtained



Financing and conduct of business operations

- Ability to obtain financing for post-petition business operations
- Grant of senior or equal liens and superpriority claims
- Notice and hearing
 - Adequate protection of existing lienholders
- Robust and established credit market in US



Sale of assets under section 363

- Outside ordinary course of business
 - Can include all or substantially all assets of Debtor
- Free and clear of liens, claims and encumbrances
- Notice and hearing
 - Adequate protection

Increasingly common in Chapter 11 cases



Plan of Reorganization

- Preceded by disclosure statement
 - Must be approved by Court as containing "adequate information"
- Classification of claims and interests
 - Designation as impaired v. unimpaired classes
- Acceptance by at least one impaired non-insider class
 - >1/2 of creditors voting, who hold at least 2/3 in amount
 - Ability to "cram down" non-accepting classes
- "Feasibility" and "best interests" requirements
- Binding on all creditors and equity holders


