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# corporate restructuring bulletin

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## recognition of US plan confirmation order under the CCAA

In the recent decision in *Re Xerium Technologies Inc.*[1], the Ontario Superior Court of Justice recognized an order made by the U.S. Bankruptcy Court for the District of Delaware that confirmed the debtor's pre-packaged Chapter 11 plan of reorganization. The decision provides useful guidance on how the Ontario Court may consider similar applications in the future. Many will take comfort from the fact that the decision revisits a number of relevant factors established in case law that pre-dates the current formulation of the cross-border provisions that make up Part IV of the CCAA. That formulation was proclaimed into force in September 2009 and is based on the UNCITRAL Model Law on Cross Border Insolvency.

### background

Xerium Technologies Inc. and its subsidiaries, including Xerium Canada Inc., manufacture and supply products used in paper production. As global demand for paper products declined in 2008 and 2009, Xerium and its subsidiaries experienced financial difficulties.

Anticipating breaches of financial covenants under its credit facilities, Xerium entered into discussions with its lenders in order to explore restructuring alternatives. Xerium, its subsidiaries and its principal lenders developed a pre-packaged plan of reorganization, pursuant to the terms of which Xerium commenced solicitation of votes. The plan was overwhelmingly accepted on March 26, 2010 by the classes of creditors entitled to vote.

On March 30, 2010, Xerium and its subsidiaries commenced cases in Delaware under Chapter 11 of the U.S. Bankruptcy Code. The next day, the Bankruptcy Court entered an order scheduling a combined hearing to consider approval of the disclosure statement, the solicitation procedures and the forms of ballots as well as confirmation of the plan. On April 1, 2010, the Ontario Court made an order that, among other things, recognized the Chapter 11 cases as a foreign main proceeding, recognized Xerium as a foreign representative and gave effect to the automatic stay provided for under Section 362 of the Bankruptcy Code.

[1] 2010 ONSC 3974.

## decision of the U.S. Bankruptcy Court

On May 12, 2010, the Bankruptcy Court found that the notice and content of the disclosure statement and the voting process were appropriate, met the requirements of the Bankruptcy Code, and fairly considered the interests of those affected. Accordingly, the Bankruptcy Court approved the disclosure statement and confirmed the plan.

## decision of the Ontario Court

On May 14, 2010, the Ontario Court made an order that recognized the plan and confirmation order together with several other orders made by the Bankruptcy Court in the Chapter 11 cases. The Ontario Court found that the plan provided for substantial recoveries to creditors in the "impaired" classes, including existing equity holders. The Ontario Court was also satisfied that it had the authority and indeed the obligation to grant the recognition sought and observed that such recognition was precisely the kind of comity in international insolvency contemplated by Part IV of the CCAA.

The Court referred to the purpose of Part IV, as identified in Section 44 of the CCAA, and also considered the non-exclusive list of factors set out in *Re Babcock & Wilcox Canada Ltd.*[2], a case decided under provisions of the CCAA that previously dealt with international insolvencies. The factors that favoured recognition of the confirmation order were:

(i) the plan was critical to the restructuring of Xerium and its subsidiaries as a global corporate unit;

(ii) Xerium and its subsidiaries were a highly integrated business managed centrally from the United States;

(iii) the credit facility that was being restructured was governed by the laws of the State of New York and each of the Chapter 11 Debtors was a borrower or guarantor, or both, under the facility;

(iv) the plan was confirmed by the Bankruptcy Court in accordance with well-established procedures and practices;

(v) by granting the Initial Order which recognized the Chapter 11 cases as a foreign main proceeding, the Ontario Court had already acknowledged Canada as an ancillary jurisdiction in the restructuring of Xerium and its subsidiaries;

(vi) Xerium carried on business in Canada through its subsidiary, Xerium Canada, which was a Chapter 11 Debtor; and

(vii) recognition of the confirmation order was necessary to ensure the fair and efficient administration of the cross-border insolvency in which all stakeholders holding an interest in the Chapter 11 Debtors would be treated equitably.

[2] 18 CBR (4th) 157.

Because the plan had been confirmed by the Bankruptcy Court (and therefore complied with applicable U.S. principles), the Ontario Court was of the view that the plan was consistent with the purpose of the CCAA. Specifically, it was made in good faith, did not breach applicable law, was in the interest of the creditors and equity holders, and would likely not be followed by a liquidation or further reorganization. The Ontario Court also noted that recognizing and implementing the plan was preferable to forcing Xerium Canada to incur the cost of a separate restructuring under the CCAA.

## conclusion

The Xerium decision provides another example of the Ontario Court recognizing a U.S. confirmation order involving Canadian debtors where:

- the case had been recognized by an Ontario Court;
- the plan solicitation process met the requirements of the Bankruptcy Code;
- there was no evidence of unfairness in either the process or result; and
- there was no inconsistency with Canadian law or public policy.

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