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An Interdisciplinary Group Meets The Challenge Of A Public Company Cross-Border Reorganization

The Editor interviews Louis M. Solomon, Partner, Proskauer Rose LLP.

Louis M. Solomon

Editor: Mr. Solomon, would you tell our readers something about your background?

Solomon: I graduated from Harvard Law School in 1976, and I have been litigating ever since. Before joining Proskauer. I was with a smaller firm that focused almost exclusively on litigation.

Editor: I know you've explained what things attracted you to Proskauer. Are any of them pertinent to the international litigation you are doing?

Solomon: Oh, yes. Proskauer's experience in areas in addition to litigation is quite extraordinary — the corporate and labor groups are but two examples — and the opportunity to collaborate with lawyers possessed of such abilities has been essential in litigating in this area of cross-border restructurings.

Editor: Please tell us about your practice. How has it evolved over the course of your career?

Solomon: We have all witnessed the extraordinary increase in the complexity of civil commercial cases over the course of the last 25 years. Fortunately, Proskauer has one of the very finest litigation departments, one that has more than managed to keep up with the increasing complexity of the matters it handles. One of the particular skills the firm's lawyers possess, I think, is the ability to translate this complexity into something that judges, juries, arbitrators, and other non-experts can understand.

Editor: You have been representing a group of retail investors and other creditors in a complex cross-border reorganization of an Argentine public company, Multicanal SA. For starters, would you provide our readers with the background on this matter?

Solomon: Our client, Argentinian Recovery Company LLC or ARC, is affiliated with the Huff Investment Management Group. Huff ultimately represents the interests of about 6 million American workers, pensioners, and retirees. Huff came to us in 2003. At that point, Multicanal SA was going through a restructuring involving more than half a billion dollars in debt. It appeared as if Multicanal was not compensating its creditors fairly, and Huff's clients held about $150 million in Multicanal debt — that's the face value of the debt. The amounts owing to these creditors at the time exceeded $200 million when you included unpaid interest.

Multicanal is a wholly-owned subsidiary of Grupo Clarín, an Argentine media conglomerate and a very powerful company. As an indication of that clout, a senior member of the Clarín governing board actually threatened U.S. creditors if they voted against the restructuring plan the board was proposing. This was something that came out at the U.S. trial. In our eyes, the proposed restructuring represented an attempt at a massive transfer of wealth from U.S. creditors to this powerful Argentine conglomerate.

Editor: Speaking of creditors, who were the institutional investors who held roughly 80 percent of Multicanal's debt? How about the retail investors?

Solomon: The finding made by Judge Gropper, the Bankruptcy Judge in the Southern District of New York, and affirmed by Judge Hellerstein, the United States District Judge in the Southern District, was that the overwhelming majority of all the creditors, more than 80 percent, were U.S. entities. Multicanal came to the United States to sell its debt through U.S. instrumentalities, including U.S. brokers, U.S. underwriters and U.S. marketing agents. Multicanal registered this debt with the SEC under the Trust Indenture Act. As part of all of this, Multicanal promised that the debt would be U.S. debt, paid in the U.S. in U.S. dollars. The creditors were specifically and repeatedly promised access to, and the protections of, U.S. law and U.S. courts. The face value of the debt exceeded $500 million, and with interest there is now more than three-quarters of a billion dollars owing by Multicanal to U.S. creditors. We proved that as much as $50 million of the face value of the debt was held by U.S. retail investors, which represents close to 10 percent.

Editor: Multicanal sought reorganization under an Argentine procedure, the Acuerdo Preventivo Extrajudicial. How does this process connect to §304 of the Federal Bankruptcy Code?

Solomon: The Acuerdo Preventivo Extrajudicial, or APE, was a newly-enacted Argentine statute to address the economic crisis that Argentina was experiencing in the period 2001-02. Multicanal, which had a temporary economic set-

back with the devaluation of the Argentine currency in late 2001, missed some interest payments and decided to take advantage of the new APE rules. However, because, as I said, this was in reality U.S. debt, Multicanal also needed to cut off the claims of U.S. creditors in U.S. courts. The statutory mechanism that Congress had put in place is §304, which is a statute that says a U.S. court can assist a foreign bankruptcy. Our view is that this is a foreign bankruptcy in name only. We are not dealing with foreign employees or taxing authorities or the dismantling of assets overseas. Multicanal is simply restructuring its public debt — the vast preponderance is held by U.S. entities — and it is attempting to do it by recourse to a non-U.S. process.

Editor: Briefly, what happened at the first trial?

Solomon: ARC alleged that Multicanal's proposed restructuring constitutes a scam. The U.S. courts have thus far deferred to findings made by the foreign tribunal with respect to most but not all of the issues tried so far. On the issues on which deference has been given, we respectfully think the wrong balance has been struck in terms of the degree of deference to be shown a foreign proceeding that is so heavily controlled by the interested party. In an APE, unlike United States bankruptcy proceedings, there is no independent trustee, and there is no entity with special fiduciary duties to its creditors. These basic protections are simply absent, and I believe that the Second Circuit Court of Appeals is going to have to decide how much deference is appropriate under these circumstances.

Editor: There was a question of registration — or exemption from registration — under the Securities Act. How did that figure in this process?

Solomon: At trial, we proved that Multicanal's restructuring proposal discriminated against U.S. retail investors in offering them less than what was offered the institutional investors. Judge Gropper of the Bankruptcy Court found that to be unlawful discrimination on the part of Multicanal. Judge Gropper also said, however, that if Multicanal could come up with a cure he would permit them to implement that cure. He added that ARC might challenge the cure at a later point. It's important to note that Judge Hellerstein also found discrimination, but he disagreed with Judge Gropper and went on to rule that Multicanal had to cure it *before* §304 approval could be given to the restructuring.

One of the proposed cures involves the SEC registration of part of the offering to creditors right now, but since only part of the offering is involved, the legality of the SEC registration itself has now become an integral part of the analysis.

Editor: Multicanal offered the institutional investors a recovery of as much as 44 cents on the dollar, while the retail investors were offered only 30 cents. Please tell us how this is playing out.

Solomon: We put on evidence at trial that Multicanal was in a position to pay all of its creditors in full — 100 cents on the dollar. It had experienced, but then overcome, a short-term financial downturn, that's all. Although that issue has not captured the attention of the U.S. courts so far, the differential as between offering one group of investors 44 cents on the dollar and another group 30 cents is the discrimination that Multicanal has been told it must cure. The 30 cents would be given to U.S. retail holders.

As part of Judge Hellerstein's consideration of the issues, one of the issues he remanded back to Judge Gropper is the determination of whether the proposed cure — that partial registration of the offering — is lawful under the securities laws. We maintain it is plainly unlawful — you can't register only a part of an offering in a case like this. However, it is also our position that, even if the partial registration is found to be lawful under the securities laws, Multicanal is then going to create *more*, not less, discrimination in its restructuring by doing it, since now, it — will be giving some creditors registered securities and others in the very same offering unregistered securities. This is intolerable from a legal and fairness perspective. We believe all of this is unfair and improper under §304. This, too, has been remanded to Judge Gropper.

Editor: So you have a set of issues remanded to the Bankruptcy Court and another set appealed to the Second Circuit.

Solomon: We do. I think that we will hold the latter so that the Second Circuit can look at all the issues at the same time.

Editor: What is your prediction on going to the Second Circuit on this complicated set of circumstances?

Solomon: We have extraordinary respect for Judge Gropper and Judge Hellerstein, but I do not believe that Congress intended the deference to be shown to a foreign proceeding is quite what they indicate it is on the facts here, and I think that the Second Circuit should take a long hard look at where the line should be drawn between deferring to a so-called "foreign" proceeding and prejudicing the rights of U.S. citizens, who were promised the protections of the U.S. law. We believe that Congress meant for U.S. interests to be protected on the basis of equality and fairness. Yet what is going on here is light years from equal or fair.

Editor: In handling a matter of this kind, how do you go about drawing upon the firm's resources — in terms of expertise and personnel — to meet the needs of your clients?

Solomon: For starters, we have 225 litigators at Proskauer who are able to help on an immediate basis. In this particular case, we were also able to draw upon a very deep bench of corporate and bankruptcy practitioners, and we have a Latin American group which provided a great deal of support to our efforts. The international reach of the firm is quite substantial, and I'm not even speaking of our international arbitration practice, which is a world-class practice handled out of our Los Angeles, New York, and Paris offices.

I'm talking about depth in the area of international practice and litigation. For example, our Latin American group handles a wide range of activities, including corporate restructurings specific to Latin America. My partners Carlos Martínez and Peter Samuels are engaged in a considerable volume of corporate transaction work involving Latin America, and Jeff Levitan, who is a member of our bankruptcy group, has done a great deal of Latin American work as a part of his cross-border practice. My own practice includes a number of litigations which bring me into the Latin American arena. The lesson, I think, is that this region continues to be a very important and growing sector of the global economy; it is attracting the attention of a wide array of disciplines and practice groups. As Latin America's presence on the world stage increases, so will Proskauer's presence on that stage grow.