A CROSS-BORDER FINANCE LAWYER EXAMINES DIFFERENCES IN CANADIAN AND U.S. CORPORATE PRACTICE

Smarter Way to Cross Blog Archives
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As a U.S. finance lawyer working in Canada on cross-border deals, I have noticed a few differences between U.S. and Canadian corporate practice that impact in minor ways the transaction documents, but that may signal in some cases more fundamental differences in U.S. and Canadian corporate law. Here are a few of my observations about those differences:

Shareholders' Agreements. In the typical lending transaction in Canada, the officer's certificate delivered to the lender and the various counsel requires that any shareholder's declaration or shareholders' agreement be attached to the officer's certificate in the same way that the corporation's bylaws and certificate of incorporation would be attached. Alternatively if no shareholder's declaration or shareholders' agreement exists, a certification to that effect is required. We understand that, in Canada, unanimous shareholders agreements are expressly contemplated and referred to in the corporate statutes of many or the provinces and under the Canada Business Corporation Act. They are a sanctioned means of limiting the directors' discretion and are treated as part of the "constating" or organizational documents of a Canadian or provincial corporation. For example Section 184 1) of the Ontario Business Corporation Act provides: "[u]nless the articles or by-laws of *or a unanimous shareholder agreement otherwise provide*, the articles of a corporation shall be deemed to state that the directors of a corporation may, without authorization of the shareholders, a) borrow money upon the credit of the corporation; b) issue, reissue, sell or pledge debt obligations of the corporation; c) give a guarantee on behalf of the corporation to secure performance of an obligation of any person [emphasis added]."

Under U.S. corporate statutes, shareholders' agreements are generally not referred to as a potential limitation on the directors' powers and are not elevated to the level of the bylaws and the articles or certificate of incorporation of a corporation. Lender's counsel would not typically attach a shareholders' agreement to a corporate officer's certificate or require a certification that none exists. Shareholders' agreements limiting the discretion of directors can be effective for corporations formed under the "close corporation" provisions of the law of certain states, but the certificate of incorporation of such a corporation will make clear the enhanced role of shareholders and the need for further diligence.

Does a U.S. Corporation Need to Approve the Pledge by Its Shareholder of its Stock? Canadian lawyers frequently require in deals that include a stock pledge a specific resolution of the corporate issuer of the pledged stock approving the stock pledge and any subsequent transfer of the stock in connection with the enforcement of the pledge. Under U.S. law, a corporation is generally not required to approve the pledge of its stock, and one would not obtain a resolution approving a pledge unless there was a specific indication that such approval was required (for example by reference to a restriction on the stock certificate itself). We nevertheless do frequently add such a resolution in cross-border deals to facilitate getting the deal done without discussion of the issue. I have been unable to identify the reason for this difference in practice, and issue a challenge to Canadian lawyers to explain to me what purpose such a resolution serves!

Who Should Sign a Document on Behalf of a U.S. Corporation? In Canada, resolutions are often prepared authorizing directors or officers of corporations to sign documents. This is not the general practice in the United States, where officers, not directors, are typically authorized to sign documents. Consistent with U.S. practice, I generally revise form resolutions provided by Canadian counsel so that only officers of the U.S. corporations are authorized to sign the transactional documents. However, there is in theory no reason that a director of a U.S. corporation cannot be authorized by the board to act on behalf of that corporation (unless the by-laws would not permit). That said, Canadian lawyers should be aware that under U.S. corporate law, a director would not have any apparent or implied authority in his or her capacity as a director to bind a corporation absent facts or circumstances indicating that the corporation has made the director an agent of the corporation.

What Is the Purpose of a Registered Office of a U.S. Corporation? Under corporate statutes in the United States, a corporation will appoint a registered agent or have a registered office in the state where it is organized or qualified to do business. However labeled, the address of the registered agent or registered office need only be an address for the service of legal process and for receipt of certain notices from the corporate officials of the state of incorporation or qualification. Unless the registered office location also happens to be real place of business, the registered office address should not be used as a mailing address in a financing statement or a notice provision in an agreement. In fact, the registered office or agent address of a U.S. corporation could be a black hole – the address of a corporate service company that will not have been engaged to forward regular mail. In many other jurisdictions, and at least to some extent in Canada, it appears that a registered office may serve a broader function justifying broader use of the registered office address of a corporation.