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After the Pandemic:
Helping Troubled International Companies Return to Financial Health

The coronavirus pandemic has not only caused untold misery, it has forced the virtual shutdown of the global economy. Everyone hopes that this crisis will pass, but events have shown there is a false choice between mitigation and resumption of economic activity. Mitigation, with testing and social distancing must be done to avoid wave after wave of disease, which will only lead to rolling cessations of economic activity. Given the economic dislocation occasioned by this global crisis and that it is likely to continue for at least a few more months, we can anticipate that many businesses will fail; and others will require time and help to restore financial health and operations. There is little doubt that innumerable global businesses will need the protection of an organized and coordinated insolvency and reorganization process as soon as this crisis is over. The time for them to begin planning is now.

As we work remotely, international insolvency lawyers can usefully consider how we can think ahead to expedite economic recovery when the time comes. The UNCITRAL international insolvency process, embodied in the United States through Chapter 15 of the Bankruptcy Code, enables liquidators, administrators and other foreign representatives of troubled businesses to obtain broad relief in the United States, including most importantly the ability to stop a chaotic scrum for liquid assets located in New York financial institutions. In addition, to the extent overseas businesses have material U.S. assets, the protections of Chapter 11 are available to create, administer and reorganize those assets and operations in the United States.

Chapter 15 is available to foreign representatives of insolvent or bankrupt or reorganizing entities with a place of business or property within the United States. The foreign representative must be appointed by and report to a foreign court or judicial supervisory body. Chapter 15 authorizes discovery, injunctions, protection and turnover of assets located in the United States, and other equitable relief. Virtually any entity qualifies, although it excludes banks, insurance or investment companies and certain regulated entities, and almost any property interest will suffice. The proceeding is commenced with a straightforward petition that describes the company and the circumstances of its entering into an insolvency-type foreign proceeding, as well as the nature of the proceeding and the supervision of the process. The showing required in the initial court filing for Chapter 15 recognition is fairly minimal. Courts routinely accept evidence such as a foreign court order commencing an insolvency or reorganization proceeding and appointing a specific individual to represent the estate. The petition can request recognition of the foreign insolvency as either a "main proceeding" (if the foreign insolvency was commenced in the jurisdiction that was the company's "center of main interests") or as a "non-main proceeding" (if the foreign insolvency was commenced where the entity merely had an "establishment" or non-transitory business). In both situations, Chapter 15 provides the foreign representative with important powers to assist in the foreign insolvency proceeding.

A foreign representative who is appointed in a main proceeding qualifies for an Immediate, automatic, nationwide stay of litigation as well as enforcement of any judgments, liens or setoffs. The foreign representative can assert control over all U.S operations, assets and real estate. He or she also has the power to avoid post-petition transfers or executions. One important limit on the power of foreign representatives is that they cannot exercise U.S. avoidance powers to unwind pre-petition preferences.

A main proceeding representative can also ask the Bankruptcy Court to exercise its discretion to order discovery and various equitable remedies. A foreign representative who is appointed in a non-main can seek similar relief, but it is discretionary with the Bankruptcy Court. Importantly, the bringing of a Chapter 15 proceeding is not a submission to U.S. jurisdiction for purposes other than the bankruptcy.

Chapter 15 is one option, but some foreign companies may benefit from even more relief under U.S. bankruptcy laws. If such companies have assets in the United States, they may be able to avail themselves of Chapter 11 bankruptcy protections. There are many reasons why foreign companies seek Chapter 11 protections. For example, insolvency laws in certain foreign jurisdictions may not permit management to stay in place. Often, a liquidator or trustee may be appointed with little relevant experience in the field and no knowledge of the company. Chapter 11 generally permits management to remain unless there has been misconduct. It also provides liberal rules for restructuring and allows the company to gain new post-insolvency financing that is senior even to secured financing. For companies interested in restructuring flexibility, Chapter 11 provides many benefits, and foreign companies with a place of business or assets in the U.S. will generally be eligible to file for Chapter 11. This may also be of particular interest to companies in immediate need of relief in countries where the courts are closed because of the pandemic.

In other cases, a foreign insolvency has little need for U.S. court powers other than to obtain discovery of financial or other information. In such cases, Chapter 11 and 15 proceedings are likely to be unnecessarily cumbersome and expensive for what is required. An alternative means of obtaining evidence in the United States is the filing of a simple petition under 28 U.S.C. Section 1782. This provision requires only a foreign proceeding or one in reasonable contemplation. Thus, if a company is facing bankruptcy or cannot get into court, it could still obtain vital documentation through Section 1782 in a U.S. federal court. Section 1782 requires that a witness with relevant documents or testimony (including a company) resides or "is found" in the U.S. The application can be made by any interested person, including any party. The application is often made ex parte, describing the status of the contemplated or foreign proceeding, the evidence required, why it is relevant and why it is likely to be in the U.S. jurisdiction – or even outside the U.S. jurisdiction provided that it is within the possession, custody, or control of a U.S. person or entity.

While many companies will fail during the coronavirus crisis, many more will only require some flexibility and uninterrupted time to get back on their feet. There will be much uncertainty once the crisis has passed regarding what debts are owed, what terms have been modified by law or

force majeure or Acts of God clauses, what security can be taken, and a wide variety of other issues. Clutching and grabbing for assets in a disorganized way will only increase uncertainty and waste assets. The U.S. system provides a number of mechanisms that can bring order to the likely chaos to come over the next months. Now is the time for companies to develop a strategy to allow business to flourish again under predictable rules and conditions.

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