

International Companies Turn To US Restructurings for COVID-19 Relief

Skadden

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Shana A. Elberg

Partner / New York
212.735.3882
shana.elberg@skadden.com

Lisa Laukitis

Partner / New York
212.735.3290
lisa.laukitis@skadden.com

Liz Downing

Associate / Boston
617.573.4879
elizabeth.downing@skadden.com

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One Manhattan West
New York, NY 10001
212.735.3000

500 Boylston Street
Boston, Massachusetts 02116
617.573.4800

Many foreign companies experiencing financial distress due to the COVID-19 pandemic have utilized the American bankruptcy system to restructure. In 2020, major airlines in Chile, Colombia and Mexico availed themselves of Chapter 11 protections. The oil and gas sector, already struggling from a multiyear slump in commodity prices that worsened with the pandemic, also saw a surge in Chapter 11 filings by foreign entities. The world's largest offshore and well drilling company, based in London, filed for Chapter 11 in August 2020; and a Bermuda-incorporated offshore drilling contractor followed suit in February 2021. Three months later, the contractor confirmed a Chapter 11 plan that restructured its balance sheet and enabled it to continue operations.

Foreign companies are drawn to key benefits available under the U.S. Bankruptcy Code. Perhaps most significantly, there is a worldwide stay of actions against the debtor while a Chapter 11 case is pending; and management typically retains control of the company, in contrast to many jurisdictions, where a liquidator is appointed. Both U.S. and foreign-based companies experiencing financial distress should consider whether a Chapter 11 case (or its threat) can help right-size their balance sheets.

A foreign entity needs only minimal U.S. ties to qualify for relief under its bankruptcy laws. Section 109 of the Bankruptcy Code provides that "only a person that resides or has a domicile, a place of business, or property in the U.S., or a municipality may be a debtor." The property requirements under §109 have proven relatively easy to satisfy, making U.S. bankruptcy protection a viable option for many businesses incorporated elsewhere, even if they engage in little or no business activity in the United States.

Minimal or intangible property in the U.S. can serve as a foreign entity's "passport" into U.S. bankruptcy, because the Bankruptcy Code specifies no minimum amount or threshold. Courts (including in New York) have held that de minimis U.S. property satisfies the eligibility requirements. Bank accounts with even small balances have served as a common and simple way to satisfy §109(a). Retainers paid to professionals (e.g., lawyers and financial advisors) can also provide a basis for jurisdiction. Intangible property has been validated as well, including claims or causes of action against U.S. entities or property.

Also, Chapter 11 may be a viable and effective restructuring tool for foreign entities with U.S. creditors, such as secured credit lenders and bondholders, who must comply with U.S. court orders.

Additionally, filing for U.S. bankruptcy may provide a foreign entity with several other advantages (depending on the applicable laws in the entity's host country), including the automatic stay's global reach, the lack of an insolvency requirement, existing management's ability to remain in place, and the potential use of a prepackaged or prearranged plan of reorganization to complete a quick and efficient balance sheet restructuring. Even the threat of U.S. bankruptcy may convince recalcitrant parties to negotiate an out-of-court restructuring.

Importantly, however, a foreign debtor will only benefit from a U.S. bankruptcy if the bankruptcy court's orders are enforceable against the debtor's creditors or are recognized in foreign jurisdictions. For a U.S. bankruptcy filing to be a viable option, the creditors must be subject to U.S. jurisdiction and therefore unwilling to violate a U.S. court's order for fear of sanctions or other penalties. In addition, certain foreign jurisdictions may recognize and give effect to U.S. orders in their jurisdictions.

Foreign entities continuing to grapple with the COVID-19 crisis' impact can, and in many cases should, use the sophisticated and debtor-friendly U.S. reorganization laws to help resolve their business problems.