



The Guide to Corporate Crisis Management

Editors

Sergio J Galvis, Robert J Giuffra, Jr
and Werner F Ahlers

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United States Bankruptcy Proceedings for Latin American Corporates

Andrew Dietderich and Daniel Biller¹

Business professionals and non-US practitioners dealing with potential insolvencies of Latin American companies should consider whether US law can provide them with useful reorganisation tools, either in the form of plenary Chapter 11 proceedings or ancillary Chapter 15 proceedings supporting a home country reorganisation. While companies that lack a significant operation presence in the United States might not look to restructure there in the first instance, the US Bankruptcy Code is extraterritorial and allows US courts to assist actively in international restructurings of companies operating predominantly outside the United States.

Chapter 11

Historically, the United States has taken a different view towards corporate restructuring than other nations. The corporate reorganisation provisions of the Bankruptcy Code, which we can, for convenience, call ‘Chapter 11’, were not written for or by the banking community in the United States for the primary benefit of creditors. Indeed, the main objective of Chapter 11 is the preservation of long-term corporate value, not the punishment of bankrupts or even the maximisation of immediate creditor recoveries. For this reason, Chapter 11 has several essential elements that sometimes surprise non-US professionals. These elements can make Chapter 11 an attractive option for restructuring companies operating in Latin America.

¹ Andrew Dietderich is a partner and Daniel Biller is an associate at Sullivan & Cromwell LLP.

For example:

- a company need not be organised in, nor predominantly operating in, the United States, to file for Chapter 11;
- a company may be solvent and file for Chapter 11;
- the board and management remain in control during the Chapter 11 case;
- the internal affairs of the company in Chapter 11 are governed by the laws of the jurisdiction in which the company is organised;
- a broad moratorium prevents creditor action worldwide and the termination of contracts during the Chapter 11 case in any jurisdiction, even those contracts that expressly give counterparties termination rights upon an insolvency filing;
- to run its business, the company may borrow money and incur debts on a basis that is senior to its old debts, ignoring restrictive covenants;
- the board and management have the exclusive right, for a substantial period of time, to propose a plan of reorganisation to end the Chapter 11 case; creditors may not do so;
- the plan of reorganisation may repay creditors in many forms, including ‘take-back’ paper and equity, so long as certain rules are followed;
- the debtor may undertake avoidance actions under state and federal law in an attempt to claw back value for the benefit of the estate;
- the debtor can sell assets free and clear of claims and encumbrances, using the power of the court to provide clean title to purchasers;
- at the end of a successful reorganisation, debts are discharged and the board and management are exculpated from liabilities relating to the restructuring; and
- Chapter 11 is overseen, not by generalist commercial courts, but by special courts with specific expertise in corporate reorganisation and a broad mandate to play an active role in the progress of the restructuring.

This Chapter 11 ‘toolbox’ is made even more attractive for foreign debtors because of two principles of deference running through US jurisprudence: deference to foreign law and respect for foreign creditors. The Bankruptcy Code defers to non-bankruptcy law to determine most of the substantive rights of parties. As a result, the fiduciary duties of a board of directors, the value of a contract, the rights and obligations of parties under an agreement, the validity and priority of liens and the vast majority of other issues that arise in a Chapter 11 case, are all resolved by foreign law for international debtors. For example, the question of whether a creditor properly perfected his or her lien over real estate located in Brazil will be governed by Brazilian law, and the question of whether a party to an Ecuadorian contract has a claim against the debtor for failure to perform will be governed by Ecuadorian law. Equally important: courts have developed a set of principles to respect the rights of foreign creditors during a US bankruptcy case. For example, in a US bankruptcy case involving a foreign debtor, it is commonplace for the court to grant a special order exempting employees and trade creditors outside the United States from the application of the ‘automatic stay’, thereby allowing non-US employees and trade creditors to be paid in full while financial creditors or US creditors are substantially impaired.

The benefits of US restructuring law are available to companies organised in, and pre-dominantly operating in, other jurisdictions. Unlike most of the laws in the United States, Chapter 11 is expressly extraterritorial. There is no requirement that a debtor be organised in the United States. The technical jurisdictional requirement – including for a plenary Chapter 11 proceeding as well as for a Chapter 15 ancillary proceeding – is merely that the company have some property in the United States, and courts have interpreted the property requirement to be satisfied by a single bank account in New York City. Notwithstanding this low threshold, once a debtor is in Chapter 11, the orders of the court in the United States have global reach. For example, the moratorium on creditor action created by the filing of a Chapter 11 petition in the United States (called the ‘automatic stay’) prohibits creditor action anywhere in the world, instantaneously on the first day of the case and without a requirement for international recognition.

Any global company of sufficient size is likely to have US creditors and US stockholders, incur debts under US law, conduct business in US dollars and keep at least part of its money in US banks, even in the absence of direct US operations. The ubiquity of corporate contacts with the United States makes US jurisdiction feasible for a surprising number of foreign debtors. Although a US court will not accept a Chapter 11 case where critical court orders cannot be enforced, few internationally active companies are in a position where they do not have some assets or operations subject to the jurisdictional reach of the United States. This is equally true in many pre-insolvency situations, referred to in the United States as ‘prepackaged’ or ‘prearranged’ Chapter 11 cases, where the parties affected are internationally active financial creditors and businesses with multinational operations in dollars. Accordingly, Chapter 11 may be a very attractive option for multinationals looking to undertake a balance sheet or operational restructuring.

Chapter 15

Even where a company decides not to pursue a plenary Chapter 11 in the United States, it may very well wish to undertake an ancillary Chapter 15 proceeding to recognise and give support to a primary proceeding in its home country, so long as it meets the technical jurisdictional requirements discussed above. Chapter 15 of the United States Bankruptcy Code was added in 2005 as the adoption of the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law. The principal goal of Chapter 15 is to promote legal certainty in international reorganisations and the efficient administration of such proceedings as between US courts and courts of foreign jurisdictions. Chapter 15 accomplishes this by providing judicial aid and relief to foreign insolvency proceedings, mostly after a formal recognition process.

While Chapter 15 does not provide a foreign debtor with the full toolbox of statutory powers provided to a Chapter 11 debtor, there are a number of useful benefits that are still available, particularly once the foreign proceeding has been recognised. These benefits are especially valuable to companies with significant creditor constituencies or assets in the United States. They include:

- a moratorium that prevents creditor action on assets within the territorial jurisdiction of the United States;

- access to the United States court system, including the ability to bring suit and to request discovery;
- the recognition and enforcement of foreign restructuring plans approved by a foreign court in a fair process, even if the relief provided by those foreign plans exceeds the relief that a US court could provide on its own; and
- other relief at the discretion of the court.

Chapter 15 can, therefore, be valuable to use either as a sword – to pursue valuable litigation claims on behalf of the reorganising company – or as a shield – to protect the foreign debtor from creditor actions under a US jurisdictional umbrella. And just as in a Chapter 11 proceeding, a participant in a Chapter 15 can expect a United States court to defer to the laws of the home proceeding absent compelling circumstances. Such deference, in fact, underpins the purpose and function of the statute.

Limitations on United States proceedings

Both Chapter 11 and Chapter 15 are subject to limitations. These limitations must be carefully considered by business professionals and practitioners before deciding to proceed with a US case.

Cost

Chapter 11 is, of course, expensive. The debtor must pay for its own attorneys and financial advisers during the pendency of a bankruptcy proceeding, and also for the professional advisers to any official committees appointed for the benefit of creditors. Depending on the targeted timeline, the aggregate case cost can be significant. Chapter 15 proceedings are significantly less expensive, as they involve neither statutory creditor committees nor (at least, typically) the involved motion practice associated with a Chapter 11.

Jurisdiction

As noted above, limited jurisdictional requirements do apply to bankruptcy proceedings brought in the United States and, to file for Chapter 11 or Chapter 15, foreign debtors must have some property that is located in the United States. The bar is low – a single bank account with a few thousand dollars is sufficient – but care must be taken that jurisdiction is not manufactured. United States judges are empowered to, and do, dismiss both Chapter 11 and Chapter 15 cases that are brought in bad faith, including where jurisdiction has been manufactured for the purpose of gaming the system. Foreign debtors must avoid attempting to baldly manufacture US jurisdiction where none exists.

Abstention

United States courts have significant leeway to abstain from hearing Chapter 11 cases. A bankruptcy court's abstention powers may be less broad in a Chapter 15, but nonetheless, US judges will attempt to avoid situations where they know that, as a practical matter, their orders may be ineffective or interfere with the national or political interests. There are some examples of judges exercising their bankruptcy abstention powers to avoid hearing cases

when they could potentially be viewed as interfering in issues of national importance in other countries, or where they believe that the foreign debtor or its property is not realistically subject to regulation by a US court.

Practical limitations on enforcement

Even when a United States court is willing to provide relief, there can be significant practical limitations inherent in enforcing US orders in other nations. There are foreign jurisdictions where US court orders carry little weight. Furthermore, even in jurisdictions that may ultimately be willing to recognise and enforce US court orders, there can be procedural and substantive hurdles to satisfy before obtaining relief. While Chapter 15 compels judges to limit the scope of their orders to assets within the territorial jurisdiction of the United States, no such limitation exists for Chapter 11 relief. Foreign debtors considering a plenary Chapter 11 proceeding should review the location of their asset base and decide, with foreign counsel as appropriate, whether Chapter 11 proceedings can serve as practical bulwarks to creditor action.

Manifestly contrary to public policy

In Chapter 15 cases, courts are empowered to deny recognition and refuse enforcement of foreign orders, and may deny other forms of relief, if such relief would be ‘manifestly contrary’ to the public policy of the United States. This is a narrowly tailored exception, sometimes referred to as a ‘safety valve’, the limits of which have not been fully explored. There is, accordingly, at least a theoretical risk that a court will not recognise or enforce foreign orders that raise previously untested issues in US courts.

Unfair Process

As a practical matter, US judges considering relief in Chapter 15 cases will also be hesitant to enforce and uphold foreign orders that they believe were obtained through a fundamentally unfair process. If objecting parties identify fundamental concerns over due process or credible evidence of fraud or misconduct in connection with the foreign proceeding, US judges will hesitate to give force to foreign orders resulting from such proceedings.

Considering your options

A company faced with a potential insolvency will need to spend significant time with its financial and legal advisers, considering its particular facts and circumstances before making any decision – and any one company’s particulars are beyond the scope of this article. Nonetheless, there are some good rules of thumb to keep in mind when considering whether the best restructuring pathway involves Chapter 15, Chapter 11, a foreign proceeding, or some combination.

Chapter 15 proceedings can be useful and efficient restructuring tools for foreign corporations with a significant US creditor base or with outstanding debt instruments governed by US law. Chapter 15 is attractive especially where access to the full Chapter 11 ‘toolbox’ is unnecessary or unwarranted. This includes cases in which high levels of creditor consents may mean that a foreign debtor has no need to utilise the Bankruptcy Code’s cram-down

features, or where sufficient levels of liquidity will allow the foreign debtor to proceed with a restructuring without the need for priming financing. In these cases, it may make sense for a company to proceed with a main proceeding in its home location, along with an ancillary US proceeding. The ancillary proceeding will serve to enforce the outcome of the foreign proceeding in the United States and against US creditors, so long as the scheme is not manifestly contrary to the public policy of the United States.

A Chapter 11 proceeding, on the other hand, may be useful where a foreign debtor has a significant US presence or creditor base and wishes to use more of the helpful features of the Bankruptcy Code. For instance, a company considering filing may need liquidity to implement a desired restructuring, and so may turn to Chapter 11 to borrow money on a priming basis. Alternatively, a company may have meaningful preference claims against counterparties in the United States and wish to use a Chapter 11 to pursue those claims effectively. In particular, the utility of Chapter 11's cram-down features cannot be overstated. Cram down provides an effective pathway to consummating a restructuring plan over the objections of one or more classes of dissenting creditors, a pathway that is frequently unavailable in other jurisdictions. While companies are certainly not permitted to manufacture a Chapter 11 case for the purpose of evading creditor consent requirements of other jurisdictions, large multinationals often have multiple legitimate reorganisation pathways available to them, and cram-down powers are an important factor to consider when choosing the right jurisdiction.

Sometimes a company may wish to proceed with dual plenary proceedings – a Chapter 11 case for some entities in the corporate family, as well as a bankruptcy proceeding in one or more local jurisdiction's local laws for others. Dual plenary proceedings are particularly useful where the debtor has a significant asset base both in the United States and abroad, and the debtor either wishes to undertake an operational restructuring. Dual plenary proceedings may also occur as a result of multi-jurisdictional creditor actions against a foreign multinational. In the United States, creditors may attempt to file an involuntary proceeding under the Bankruptcy Code against the foreign multinational's US subsidiaries or subsidiaries operating in the United States. Depending on the facts and circumstances, these involuntary proceedings can frequently be converted to a voluntary Chapter 11, allowing the debtor to retain control of the bankruptcy, obtain the benefits of the automatic stay and eventually use the Chapter 11 proceeding to implement a global restructuring plan negotiated in the jurisdiction of its main interests.

Of course, there are times when it simply does not make sense to file any proceeding in the United States at all. A company with minimal US contacts, or one that has obtained a very high level of creditor consent to a proposed restructuring plan, may rightly feel that the marginal benefits of an ancillary proceeding do not outweigh the costs.

Corruption investigations, expropriation, industrial accidents: corporate crises take many forms, but each can be equally dangerous for companies in Latin America.

Published by *Latin Lawyer*, edited by Sergio J Galvis, Robert J Giuffra, Jr and Werner F Ahlers of Sullivan & Cromwell LLP, and containing the knowledge and experience of 40 leading practitioners from a variety of disciplines, *The Guide to Corporate Crisis Management* is designed to assist key corporate decision-makers and their advisers in effectively planning for and managing corporate crises in the region.

Covering the impact of political instability, the role of communications in crisis response, approaches to bribery investigations and game plans in response to financial stress, this book provides guidance that will benefit all practitioners when an unexpected crisis hits.