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Cross-Border Bankruptcy Issues

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Cross Border Insolvency Issues

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US Chapter 11 for Non-US Companies

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Foreign Jurisdictions vs. US Jurisdictions

- Foreign Jurisdictions
  - Only agree to handle insolvency cases for companies with their center of main interest (COMI) in that jurisdiction.
  - Only exercise jurisdiction over assets in that country.
  - Do not recognize the concept of group companies.
- United States
  - Jurisdictional basis in section 109(a) of the Bankruptcy Court references "property" in the United States as the basis for jurisdiction.
    - Becoming more and more permissive – cash in U.S. currency may be enough to assert jurisdiction.
      - Courts have consistently held that no minimum amount is implied.
    - *Compare with Chapter 15 eligibility requirements, where courts have found that the New York choice of law and forum selection provisions of a debt instrument were sufficient property interests in the US for purposes of section 109(a). See, e.g.*, *In re Berau Capital Resources Pte Ltd.*, 540 B.R. 80 (Bankr. S.D.N.Y. 2015)

In re Marco Polo Seatrade BV, et al.

- Marco Polo Seatrade was a Netherlands company that, along with three affiliates, filed chapter 11 in S.D.N.Y.
- Secured creditors sought to dismiss the cases on the ground that the debtors had no property in the U.S.
  - The debtors were organized under Netherlands law.
  - The debtors' ship operated under non-U.S. flags and mostly in foreign or international waters.
  - The debtors' principal offices were in the Netherlands.
  - Marco Polo had no U.S. business operations, offices or employees.
  - The debtors' loan documents were governed by foreign law and provided foreign courts with exclusive jurisdiction over disputes involving the loans.
  - The debtors' secured and unsecured creditors were foreign entities.

In re Marco Polo Seatrade BV, et al. (Cont'd.)

- Without denying those facts, Marco Polo argued it had property in the U.S.
  - Debtors had an interest in funds in a pooling account in the U.S.
  - Debtors had given a prepetition retainer to its U.S.-based bankruptcy counsel.
- The Bankruptcy Court held that the funds and the retainer were sufficient for jurisdiction.
  - Note: under NY law, absent explicit agreement to the contrary, retainers are property of the law firm, not the client, once paid.
    - *Query: Does the right to receive unused funds back from the firm at the end of the engagement preserve the client's rights in the retainer sufficiently for jurisdictional purposes?*

In re TMT Procurement Corporation, et al.

- TMT was a Taiwanese company that filed chapter 11 in Texas.
- Objectors asserted that jurisdiction had been created on the eve of filing by giving a retainer to U.S. Counsel.
- Despite agreeing with the objectors as to the manufacturing of jurisdiction, the Bankruptcy Court determined that the jurisdictional requirement of section 109 test were nonetheless satisfied.

In re TMT Procurement Corporation, et al. (Cont'd.)

- On secured creditors' motion to dismiss the case for bad faith filing, based on the same allegations of a manufactured jurisdictional nexus, the court declined to revisit the jurisdictional sufficiency of the retainer.
- The court narrowed the bad faith inquiry to assessing whether filing was in fact intended to accomplish a financial restructuring of debtors' obligations.
  - Nevertheless, the court used its equitable powers to protect creditors by requiring the debtors to deposit substantial funds with the court to assure that it could pay its obligations.

Practical Considerations in Preparing A Non-U.S. Company for Chapter 11

- Governance
  - Many European governance regimes implement a two-board structure.
- D&O Insurance
- Non-U.S. Bank Accounts
- Other Logistical Challenges
- European Privacy Laws
  - Compensation and/or other personal information

When Foreign Authorities Attack

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The *Oi* Decision

- In July 2016, certain affiliates of the Oi Group, a Brazilian telecommunications conglomerate, initiated reorganization proceedings in Brazil
  - Including Brasil Holdings Cooperatief U.A. ("Coop"), a Dutch subsidiary of Oi Group
- One day after the Brazilian proceedings were filed, the foreign representative appointed by the Brazilian court petitioned the S.D.N.Y. Bankruptcy Court for recognition of the Brazilian proceedings as a "foreign main proceeding."
- On July 22, 2017, after a hearing on the petitions, the Bankruptcy Court issued the order recognizing the Brazilian proceedings as a "foreign main proceeding"

The *Oi* Decision (Cont'd.)

- In August 2016, Coop initiated a "suspension of payment" proceeding in the Netherlands
  - A "suspension of payment" proceeding includes a court-ordered moratorium on all actions by unsecured creditors and restricts debtors from performing acts of administration or disposal of estate assets
- In December 2016-January 2017, a Coop creditor requested conversion of the "suspension of payment" proceedings to a Dutch bankruptcy proceeding
- Following appeal, Dutch courts ordered the conversion in April 2017 and an insolvency trustee was appointed
  - As under US law, the appointment of the trustee strips the debtor and its board of directors of authority to act on behalf of the debtor, including managing and disposing of assets of the estate

The *Oi* Decision (Cont'd.)

- In July 2017, the Insolvency Trustee for Coop petitioned for the Dutch proceedings to be recognized as the "foreign main proceeding" and sought to terminate the existing recognition.
- In its decision, the US court had to weigh the ties of the conglomerate to Brazil, and the ties of the individual entity to the Netherlands
  - The court concluded that the global reorganization could only be accomplished through the Brazilian proceedings

The *Exelco* Decision

- In June 2017, following a downturn in the market for diamonds, midstream diamond supply company Exelco NV and certain of its affiliates initiated discussions with its secured lenders to restructure the Exelco Group's debt obligations
- Abruptly, in July 2017, one of the secured creditors backed out of discussions and initiated seizure of all Exelco Group assets in Antwerp
- Following the successful appeal of the seizure, the Exelco Group filed a voluntary petition in Belgium for a temporary reprieve from paying its creditors, which insulated its assets from attachment and seizure
- In September 2017, the same secured creditor filed for termination of the protection order issued by the Belgian court
- Consensual restructuring impossible in Belgium, certain Exelco Group affiliates filed chapter 11 petitions in the District of Delaware

The *Exelco* Decision (Cont'd.)

- Following the commencement of the chapter 11 cases, the Exelco Group sought the protection of the automatic stay through a Stay Order and a TRO
- In October 2017, the Antwerp public prosecutor, at the behest of the creditor, filed a petition seeking the appointment of a provisional administrator for Exelco NV
- In November 2017, the Antwerp Commercial Court replaced the provisional administrator with liquidators for Exelco NV
- The liquidators first filed a petition for recognition of the Belgian liquidation as a "foreign main proceeding" under chapter 15, followed shortly thereafter by a motion to dismiss the Exelco Group's chapter 11 cases

The *Exelco* Decision (Cont'd.)

- Although the order granting recognition is currently pending appeal, the bankruptcy court's decision recognizing the Belgian proceedings as "foreign main proceedings" is instructive
  - The Automatic Stay was not respected by the judges in Belgium
    - US court had little ability to provide effective relief in light of unwillingness of Belgian courts to recognize the effect of the automatic stay and the authority of the Debtors to act
    - Foreign representatives, both the provisional administrator and the liquidators, were insulated from the automatic stay by the orders of the Belgian courts
    - Foreign secured creditor was permitted to run wild without bearing consequences of automatic stay violations
  - COMI is incredibly difficult to shift – the argument that operations had shifted away from Belgium following the seizure by the creditor bore little fruit

The *Exelco* Decision (Cont'd.)

- The court granted the US Trustee's motion to dismiss the chapter 11 cases for alleged failure to comply with certain US Trustee Operating Guidelines and other requirements of chapter 11 debtors
- These requirements at times may be difficult for foreign debtors to fully comply with
  - Approved depositories to open DIP accounts have KYC ("know your customer") and other federal banking requirements that may impose hurdles that debtors with foreign management and foreign operations may not be able to overcome
  - Many foreign debtors do not have D&O insurance prior to contemplating bankruptcy. D&O insurance is difficult to procure in the marketplace generally, even for a US debtor; it is nearly impossible for a foreign debtor, particularly one with limited resources to pay premiums
  - Foreign debtors may not have accounting systems in place that enable efficient and prompt monthly and case reporting