Hogan Lovells partners Chris Donoho and Ron Silverman spoke to *DebtWire Radio* about current issues concerning cross-border restructurings. They addressed the factors that prompt foreign-based companies to avail themselves of the U.S. Bankruptcy Code in lieu of local insolvency proceedings. They also talked about the hurdles that such companies must overcome to secure a U.S. court’s administration of their Chapter 11 cases.

How does U.S. Chapter 11 law differ from other foreign insolvency regimes around the world?

**Silverman:** It’s becoming increasingly well known as time passes that since the adoption of the U.S. bankruptcy code, U.S. law provides debtors with protections that are unavailable under many other jurisdictions around the globe — whether those are common law jurisdictions or civil law jurisdictions. I think it helps to explain a few of the significant advantages to companies that U.S. Chapter 11 law provides when reorganizing — benefits that companies may not be able to obtain or obtain so quickly in courts around the world.

Maybe one of the most important and significant issues is under U.S. Chapter 11 law as a result of a filing, the management stays in control of the company. A trustee is not brought in unless there are extraordinary circumstances, and that is very much unlike most of the jurisdictions around the world. That’s comforting and attractive to existing management who want to continue to oversee their reorganization and not be looked at with 20-20 hindsight by a third party coming in that is unfamiliar with the case and perhaps critical of management’s decisions.

In addition, in terms of benefits to the company itself, Chapter 11 law provides that upon the filing of the proceeding and without any special request for relief, an automatic injunction against all creditor actions against the company goes into place, and all creditor actions must cease. That’s very much unlike regimes around the world where in some cases either such an injunction is not available or it’s only available upon specific rulings by a court, so you have to apply. Maybe you get that, maybe you don’t. Sometimes those injunctions are available against unsecured creditors but they are not available against secured creditors. Under Chapter 11 law, that injunction goes into place, we call that the automatic stay, and that’s applicable to everyone.
So that’s a great way for the companies to have a breathing space and begin to focus on the restructuring.

A few other things that are really attractive about U.S. Chapter 11 for companies — it provides that significant new financing can be obtained in the U.S. Chapter 11 court. That priming financing can be senior to existing senior secured financing. That’s something that is not often allowed or provided for in foreign bankruptcy laws. It’s interesting that other jurisdictions are beginning to see the attractiveness of it and are beginning to provide for that, including under Singapore’s companies law.

A couple other attractive aspects are that in order to approve a restructuring plan in a Chapter 11, you need two-thirds of a vote of the creditors in a class. That’s a lower threshold than many other jurisdictions — in a lot of common law jurisdictions you need a 75 percent threshold. Lastly, our avoidance actions or clawback actions in U.S. Chapter 11 can be very powerful not only in terms of the scope but in terms of their timeframe. The look-back periods can be very long compared to jurisdictions around the globe. And so that might be an attractive mechanism for companies to utilize in their restructuring efforts.

Do you think foreign-based companies are becoming more open and aware of U.S. Chapter 11?

Donoho: I think that companies and their advisors throughout the globe are much more familiar with Chapter 11. It’s a little less scary. I think everyone is concerned about getting home-towned where ever they may go. If you are a foreign company coming into the U.S, that might seem kind of scary. I think some of the fear has come off of that because of the history of results of foreign companies going through Chapter 11 in the U.S. I also think that the U.S. investors have diversified their positions — with money being relatively cheap in the U.S. and significant returns more and more difficult for funds to achieve looking at just U.S. investments. They’ve looked across the globe for more places to invest, and they’ve gotten involved in more things. When those companies have gotten into trouble, I think those investors have gone to those companies and said that they really need to think about a Chapter 11. And I think it dovetails really well with the thought that, ok if I’m a foreign company, and I’m going to have a lot of U.S. investors involved anyway, maybe filing a Chapter 11 is not such a bad thing after all.

What does it mean when we say bankruptcy law has jurisdiction to conduct a foreign company’s Chapter 11 case?

Silverman: Under U.S. law, for a court to adjudicate a dispute there has to be a provision of law that says the court is allowed to hear that dispute. Under U.S. law, there is a specific set of statutes that says when bankruptcy courts can hear disputes, when companies can be before the
bankruptcy courts to reorganize, and when they can have their issues resolved. There is a series of statutes that specify the jurisdiction — the ability of the bankruptcy court to conduct those proceedings. And then there are some specific provisions in the statute that say what type of company can be a Chapter 11 debtor in the United States.

There is a statute that's very specific and short under the U.S. bankruptcy law — that's Section 109 — and it says exactly who can be a Chapter 11 debtor and the parameters are extremely broad. And they are unlike the rules in many jurisdictions in foreign courts in that you do not need to be a United States company in order to be in a U.S. Chapter 11 court and have the court oversee the restructuring of your finances and your operations. Quite simply, the rules are very succinct. If you are a company that is domiciled in the U.S., or if you are a company that has a place of business in the U.S., or if you simply have assets in the United States, you are eligible — generally speaking — to be a Chapter 11 debtor.

There is no particular threshold or minimum amount of assets to qualify for that rule of having assets in the United States to be a Chapter 11 debtor. I think people will be sometimes surprised to hear that somewhat small amounts of money — even things like dollars in your lawyer's retainer in the United States — can technically qualify as assets in the United States to be a Chapter 11 debtor.

What are the practical implications of the low threshold that the U.S. jurisdictional provisions provide?

Donoho: I think the way that case law has developed in the mindset of the courts has a big role to play in all of this. The automatic stay — the congressional history on that and its application is pretty clearly a worldwide automatic stay. Whether that's real or not depends on the local jurisdiction's willingness to apply that. We've certainly seen some inconsistent application. But at least in terms of the bankruptcy judge's mindset, in their mind the stay that applies when a Chapter 11 is filed is a worldwide stay. And so they think like a judge that's responsible for a company across the globe — rightly or wrongly — but that's the mindset.

I also think that bankruptcy judges, rightly, think of themselves as fair people and are appropriate for handling troubled companies circumstances. So I think their natural inclination is if a company comes to them and says that it filed here for a reason and it needs help, a bankruptcy judge is going to be inclined to help. Now does that mean the bankruptcy judge is going to be inclined to help when all the creditors are coming into court and saying this is the wrong place, you shouldn’t do this here? That's going to be a major factor.

I think bankruptcy courts are very reluctant to dismiss bankruptcy cases on the basis that really the bulk of the activity is going to be someplace else. The court is going to defer to the company and its decision to file in the U.S. But if it looks strategic and it looks like it was done to take advantage over creditors or other constituents in the case, and those creditors or constituents
can come into the case early and explain why this is problematic, I think judges have shown a willingness to dismiss cases — especially when keeping the case might serve to embarrass a judge in another jurisdiction who would otherwise be responsible.

For More Information

To listen to the full 60-minute *DebtWire Radio* interview with Chris Donoho and Ron Silverman, click on the link below.

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