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# BANKRUPTCY LAW

## Relief for non-U.S. debtors

New amendments raise question of whether a second avenue has opened offering broader benefits.

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NON-U.S. DEBTORS (or their creditors) often need relief that is not available under the insolvency laws of the debtors' home jurisdiction, but is available in the United States under Title 11 of the U.S. Code, the Bankruptcy Code. For example, a non-U.S. debtor may need the benefit of a stay of all actions pending against it, the opportunity to reorganize rather than liquidate, the ability to manage its business throughout the reorganization or the ability to have a plan of reorganization confirmed without the support of 100% of its creditors or equity holders.

Under certain circumstances, non-U.S. debtors may seek such relief in U.S. courts by filing full-fledged or "plenary" Chapter 11 cases, without filing a parallel proceeding in their home jurisdiction. With the adoption of the new amendments to the Bankruptcy Code, which went into effect on Oct. 17, the question has arisen as to whether new Chapter 15, which has replaced § 304 of the Bankruptcy Code, has opened a second avenue by which non-U.S. debtors may be able to obtain the broad relief described above.

Prior to the recent amendments to the Bankruptcy Code, the only way a non-U.S. debtor could reap the benefits of most of the provisions of the Bankruptcy Code was by filing a Chapter 11 case. This was true because the relief available under prior § 304—pursuant to which a non-U.S. debtor could file an "ancillary proceeding" in the United States after filing an insolvency proceeding in its home jurisdiction—was limited. Under § 304, a bankruptcy court could enjoin actions and the enforcement of judgments against either a debtor or its property; order the turnover of property of the debtor's estate; and order other "appropriate relief." See 11 U.S.C. 304(b).

While courts interpreted these provisions broadly, § 304 was used by non-U.S. debtors largely to obtain injunctive relief. Additionally, non-U.S. debtors filing ancillary proceedings under § 304 had to prove the factors enumerated in § 304(c), such as comity considerations, in order to obtain relief under § 304. See 11 U.S.C. 304(c).

Two notable cases in which non-U.S. debtors sought the benefits of Chapter 11 relief by filing plenary cases are *In re Aerovias Nacionales de Colombia S.A. Avianca*, No. 03-11678 (Bankr. S.D.N.Y. 2003), and *In re Yukos Oil Co.*, No. 04-47742-H3-11 (Bankr. S.D. Texas 2004). In *Avianca*, a Colombian airline filed a voluntary Chapter 11 case in the U.S. Bankruptcy Court for the Southern District of New York without filing a parallel proceeding

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in Colombia. In order to reorganize, Avianca needed the benefit of § 365 of the Bankruptcy Code, which enabled it to renegotiate and assume its aircraft leases—core assets that were critical to its survival. Under Colombian law, Avianca would have had a short time to make payments to plane lessors current before facing liquidation.

*Yukos* involved the voluntary Chapter 11 filing by a major Russian oil company in the U.S. Bankruptcy Court for the Southern District of Texas. Having been assessed $28 billion in back taxes by the Russian government, Yukos filed a plenary proceeding in the United States in an attempt to stay the Russian government's imminent tax-foreclosure sale of its main operating subsidiary, YNG. Yukos did not file a parallel proceeding in Russia because it did not believe it would get a fair hearing or any relief in Russia.

## Jurisdictional requirements

A non-U.S. debtor has to clear certain hurdles, such as jurisdictional issues and likely motions to dismiss, in order to commence and maintain successfully a plenary proceeding. In the Southern District of New York, Avianca fared well jurisdictionally. The Bankruptcy Code permits any person or entity that "resides or has a domicile, a place of business or property in the U.S." to be a debtor. 11 U.S.C. 109(a). Courts have held that a non-U.S. debtor needs only nominal property in the United States to satisfy § 109, and bankruptcy jurisdiction has been based on as little as a single bank account, a retainer given to a law firm or a securities clearing account. See *Bank of America N.T. & S.A. v. World of English N.V.*, 23 B.R. 1015, 1019-23 (N.D. Ga. 1982) (finding bank account was sufficient basis for jurisdiction); *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. Del. 2000) (finding retainer was sufficient basis for jurisdiction); *In re Axona Int'l Credit & Commerce Ltd.*, 88 B.R. 597, 614 (Bankr. S.D.N.Y. 1988), aff'd, 115 B.R. 442 (S.D.N.Y. 1990) (finding clearing account was sufficient basis for jurisdiction).

Accordingly, even though the vast bulk of Avianca's assets, employees and operations were in Colombia, it had no real jurisdictional problems because it had a Miami sales office, small (but existing) U.S. bank accounts, aircraft leases with U.S. lessors, flight routes to the United States and a receivables facility in the United States. See *In re Aerovias Nacionales de Colombia S.A. Avianca*, 303 B.R. 1, 8 (Bankr. S.D.N.Y. 2003).

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At the outset of its bankruptcy case, it appeared that Yukos might have jurisdictional problems. The company had minimal property in, or contacts with, the United States. On the eve of its filing, Yukos had transferred $2 million to a Houston bank account and had given its bankruptcy counsel a $6 million retainer. Its chief financial officer had relocated to Houston recently, unable to return to Russia because of threats of arrest. Nonetheless, despite allegations of "manufactured jurisdiction," the bankruptcy court found that it had sufficient jurisdiction under § 109 to entertain Yukos' Chapter 11 case and enter a temporary restraining order. See *Yukos Oil Co. v. Russian Fed'n* (*In re Yukos Oil Co.*), 320 B.R. 130, 132 (Bankr. S.D. Texas 2004).

Both Avianca and Yukos still had to overcome motions to dismiss their Chapter 11 cases under §§ 305(a) and 1112(b). Section 305(a)(1) permits a court to dismiss or suspend bankruptcy proceedings if "the interests of creditors and the debtor would be better served by such dismissal or suspension." 11 U.S.C. 305(a)(1). Courts have agreed that dismissal under this section is a form of extraordinary relief. See, e.g., *In re RCM Global Long Term Capital Appreciation Fund Ltd.*, 200 B.R. 514, 524 (Bankr. S.D.N.Y. 1996).

**New § 1507 provides for 'additional assistance.'**

In addition, the test applied by the courts in determining applications to dismiss under § 305(a)(1) is not a balancing test. It requires that both sides of the aisle—creditor and debtor—benefit from dismissal. See *Eastman v. Eastman (In re Eastman)*, 188 B.R. 621, 624-25 (9th Cir. B.A.P. 1995). Therefore, unless most of the debtor's creditors and the debtor agree that a proceeding should be dismissed, this is a tough standard to meet.

Section 1112(b) is a more common basis for motions to dismiss. Prior to the recent amendments, § 1112(b) provided that the bankruptcy court "may" dismiss a case for "cause," and included a nonexclusive list of 10 items that constituted "cause." This list included the inability to effectuate a plan of reorganization or unreasonable delay that was prejudicial to creditors. Dismissal has been the exception rather than the rule.

## No dismissal in 'Avianca'

In *Avianca*, an aircraft lessor sought dismissal, contending that since Avianca had not filed a parallel Colombian proceeding, it would not be able to effectuate a plan of reorganization because it could not prevent Colombian creditors from taking actions to protect their individual interests. Dismissal was opposed by most of the parties in interest, including the debtor, the Official Committee of Unsecured Creditors, Avianca's employees, a large equipment lessor and other major creditors.

Judge Allan L. Gropper refused to dismiss the case under § 305(a)(1), finding that it was in the best interests of the debtor and its creditors to allow the case to proceed in the United States because, among other reasons, Colombia's bankruptcy law was relatively new and untested and did not give the debtor leverage to negotiate with its aircraft lessors; Avianca's most important assets—its aircraft and gate leases—were located in the United States or Europe; all major constituencies were participating fully in the case and, therefore, no one was being unfairly prejudiced by the application of U.S. law; and the Chapter 11 process was benefiting the debtor's business, which was fully up and running.

Gropper also rejected the lessor's contention that the case should be dismissed pursuant to § 1112(b) because he declined to

presume that Avianca would be unable to achieve its reorganization in the absence of a parallel Colombian proceeding. *In re Avianca*, 303 B.R. at 10, 17. Avianca was thus permitted to maintain a plenary proceeding in the United States.

### Yukos' case was dismissed

*Yukos* came out the other way. In *Yukos*, a creditor sought dismissal under § 1112(b). Creditors did not strongly oppose the motion to dismiss and, notably, the U.S. equity holders (which owned 15% of Yukos) remained silent. Further, the Russian government had effectively—and publicly—told the bankruptcy court that its rulings were meaningless: The auction of YNG had gone forward, albeit without Gazprom, the presumed purchaser (subject to the auction), and its financing banks, which (unlike the Russian government) did not enjoy sovereign immunity and were subject to the temporary restraining order the bankruptcy court had issued.

**The question is how far 'additional assistance' extends.**

Ultimately, Judge Letitia Z. Clark dismissed Yukos' Chapter 11 case pursuant to § 1112(b). See *In re Yukos Oil Co.*, 321 B.R. 396. In finding that dismissal of the case was appropriate, Clark focused on "the totality of the circumstances," as opposed to individual § 1112(b) factors. See id. at 400. Clark described the test as an inquiry into the debtor's "good faith," which depended largely on the bankruptcy court's on-the-spot inquiry into the debtor's financial condition, motives and local financial realities. See id. at 410-11.

The bankruptcy court focused its analysis on the size and importance of Yukos to the Russian economy: Yukos produced 20% of the oil and gas in Russia before its dismemberment; the need for the Russian government's participation in the resolution of issues related to Yukos, given its roles as the regulator of petroleum production in Russia and the central taxing authority there; and the bankruptcy court's inability to obtain jurisdiction over the Russian government and other necessary parties. Unlike the bankruptcy court in *Avianca*, this bankruptcy court also questioned Yukos' attempt to substitute U.S. law for Russian or other applicable law.

For Avianca, which had solid ties to the United States and a broad consensus among its creditors, the hurdles to a successful plenary case proved to be surmountable. Many non-U.S. debtors will not, however, be in as strong a position to commence or maintain a plenary case. With the adoption of Chapter 15, the question has arisen as to whether these non-U.S. debtors will now be able to obtain under Chapter 15 the type of relief that in the past has required a plenary proceeding.

### What the new provisions mean

For a non-U.S. debtor that has filed an insolvency proceeding in its home jurisdiction (a "foreign main proceeding"), the statutory language of Chapter 15 offers broader relief on its face than did the language of § 304. Under new § 1520, upon the recognition of its case, a debtor that has brought a foreign main proceeding will immediately receive the benefit of the automatic stay of § 362 of the Bankruptcy Code, the right to sell its property within the United States under § 363 and the right to operate its business, in addition to certain other rights. See 11 U.S.C. 1520(a).

Additionally, non-U.S. debtors seeking the kind of relief that was formerly available only in plenary proceedings may find that they can obtain such relief under new § 1507. Entitled "Additional assistance," § 1507 states that, subject to certain limitations, once recognition is granted, the court "may provide additional assistance to a non-U.S. representative under this title or under other laws of the United States." 11 U.S.C. 1507(a).

The question is how far this "additional assistance" will extend. For example, will § 1507 permit a non-U.S. debtor to renegotiate and assume—or, if necessary, reject—its leases under § 365, as Avianca did; to secure debtor-in-possession financing pursuant to § 364; to renegotiate collective bargaining agreements under § 1113 or address retiree benefits under § 1114; to retain professionals pursuant to § 327?

Or does it refer to the more limited relief that a court "may" grant under § 1521, which is similar to the relief that was permitted under old § 304? See 148 Cong. Rec. H5704-03 (daily ed. July 25, 2002) (statement of Rep. James Sensenbrenner) (§ 1521 "does not expand or reduce the scope of relief currently available in ancillary cases under sections 105 and 304").

### Possible significant advantages

If bankruptcy courts interpret new § 1507 expansively, non-U.S. debtors may find that they have a new route to access the benefits of U.S. bankruptcy law. Chapter 15 may permit a non-U.S. debtor that is unable to commence a plenary proceeding because it lacks sufficient jurisdictional ties to the United States to obtain relief (that was previously unavailable to it) by filing an insolvency proceeding in its home jurisdiction and a case in the United States under Chapter 15. If such relief were available under Chapter 15, then Chapter 15 could provide a non-U.S. debtor significant advantages. The non-U.S. debtor could obtain broad relief without being subject to the constraints of Chapter 11, such as creditor committee requirements, which are part and parcel of a plenary proceeding.

While the new benefits Chapter 15 might afford non-U.S. debtors could be substantial, inherent limitations still exist. Enforcement issues will limit who will be able to benefit from the additional relief § 1507 may provide. For example, creditors will require assurances that the court in the debtor's home jurisdiction will recognize and enforce the U.S. bankruptcy court's orders before they enter into debtor-in-possession financing agreements. Thus, even if § 1507 were applied expansively, not all non-U.S. debtors would be able to take advantage of the broader relief § 1507 may offer. Section 1507 would best be utilized in situations where the court system in the debtor's home jurisdiction is stable, has a structure and procedural safeguards similar to those of U.S. courts, and has a history of cooperating with U.S. courts. NLJ


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