Foreign enterprise chapter 11s: the more things change, the more they stay the same

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Foreign enterprises filing chapter 11 is an example of forum shopping. In 2020, seemingly as part of the COVID-19 fallout, large foreign companies made headlines by filing for chapter 11, at times within weeks of one another. Yet foreign enterprises have been filing chapter 11s for decades. Unfortunately, user-friendly tools for identifying and studying foreign enterprise chapter 11 filings do not exist.

In 2015, 37 years after the enactment of the current U.S. Bankruptcy Code, Professors Oscar Couwenberg and Stephen J. Lubben undertook the first in-depth study of foreign enterprise chapter 11 filings. In their article, *Corporate Bankruptcy Tourists*, Couwenberg and Lubben analysed filing statistics and made predictions about the future use of chapter 11 by foreign enterprises.

Despite their valuable contribution to the international insolvency community, their work has not been expanded upon in almost a decade. All stakeholders, including lawmakers and regulators, would have a better understanding of foreign enterprise chapter 11 filings if statistics were regularly compiled and publicly available.

Members of the international insolvency community should consider developing methods to readily identify, track and analyse plenary proceedings by foreign enterprises.

Forum shopping

US attorneys are responsible for advising clients on potential litigation jurisdictions and venues. The process of steering a case to a particular jurisdiction or venue—known as "forum shopping"—is sensible to litigants, has existed for time immemorial and to this day remains a "hot topic" for stakeholders and policy makers.[1] Forum shopping includes "shopping" for the perceived best place to file a plenary bankruptcy, which has been the subject of literature, seminars, proposed legislation and caselaw for decades with respect to domestic chapter 11 filings.

Much of what occurred during the COVID-19 pandemic has been referred to as "unprecedented," and in the insolvency community this included the successive chapter 11 filings by three Latin American airlines in a seven-week period.[2] To the uninitiated, it may have seemed odd for these foreign enterprises to seek plenary insolvency relief in the US as opposed to in their "home" countries with foreign recognition in the US. The initiated, however, recognised that the low eligibility threshold under the U.S. Bankruptcy Code requires only that a foreign debtor have "a place of business" or "property" in the US, which has allowed foreign enterprises to file for chapter 11 for decades before the COVID-19 pandemic.

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The Couwenberg & Lubben Report

Regardless of how one defines "foreign enterprise,"[3] there is no publicly available database that readily compiles separate statistics on foreign enterprise chapter 11 filings. Nor is there much research on the topic except for Couwenberg and Lubben's 2015 article, *Corporate Bankruptcy Tourists*.[4] They note the "obvious gap in the literature" and that foreign enterprise chapter 11 filings were "almost completely unstudied,"[5] which is remarkable given that the U.S. Bankruptcy Code was then 37 years old.

Couwenberg and Lubben created a "database for foreign corporate debtors" that filed chapter 11 between 2005 and 2012, analysed the results, and made certain predictions. For example, they observed that shipping was the dominant industry during the eight-year period and predicted foreign enterprise chapter 11 filings would trend upwards, especially for European debtors.[6]

Tens of billions of dollars in debt issued by foreign enterprises has been restructured through chapter 11 highlighting the importance of Couwenberg and Lubben's work. Forum shopping in insolvency proceedings has the potential for abuse, disenfranchisement, and similar problems; problems sometimes resolved by courts *sua sponte* or in response to motions filed by objectors.

Policy makers and regulators, however, do not appear to have reliable data to assess whether legislation or regulation is warranted. In this article, we modestly build on Couwenberg and Lubben's work and encourage the international insolvency community to continue expanding upon it.

A baseline for the discussion is estimating the number of foreign enterprise chapter 11 filings in a defined period. For the 2005-2012 period examined by Couwenberg and Lubben, we assumed that debtors without a "US parent"[7] were foreign enterprises and undertook "light touch" research to confirm the findings. While challenging, we used conventional legal and case research tools to compile a list of reported foreign enterprise chapter 11 filings since 2012, that while likely imperfect, is sufficiently reliable to support our conclusions.

Analysing foreign enterprise chapter 11 data

Recognising the limitations on cost-effectively obtaining highly accurate information, the data we located shows an increase in the number of foreign enterprise chapter 11 filings since 2012. A chart identifying the number of foreign enterprise chapter 11 filings from 2005 through April 1, 2024, is included below.

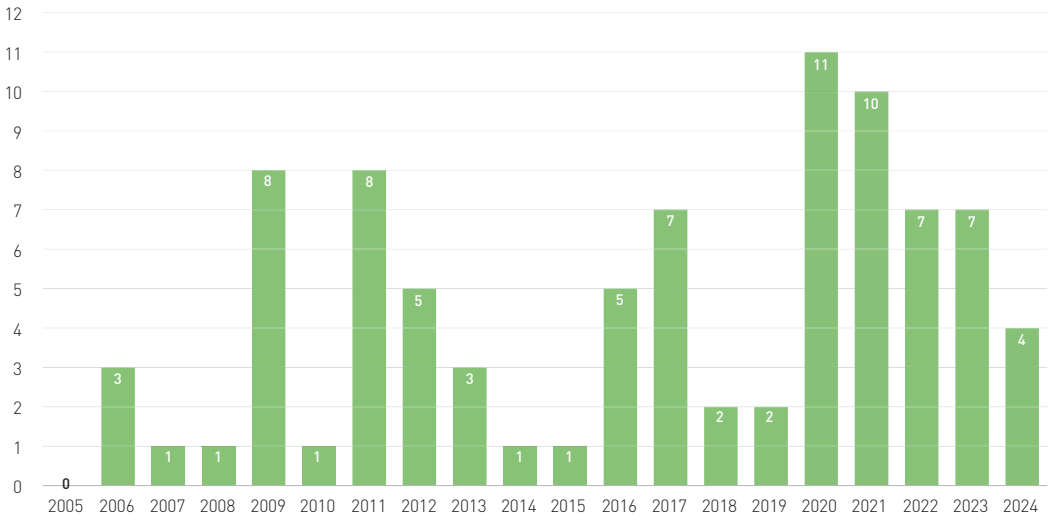
Assessing the magnitude of the increase in filings depends on the time period comparison undertaken. For example, during the 2005–2012 period, foreign enterprise chapter 11 filings averaged three times per year, whereas such filings averaged five times per year for the 2013–2023 period, reflecting a 67% increase.

By way of further example, six-year averaging from 2006 through 2023 reveals an average of 3.6 foreign enterprise chapter 11 filings for both the 2006–2011 and 2012–2017 periods, as compared to an annual average of 6.5 filings during the 2018–2023 period, ultimately reflecting an 80% increase in filings.

Depending on the assumptions used, five-year averaging, with the first period being 2006-2010 (2.5 filings on average per year) and the fourth period being 2021-2025 (where the average could be seven or more filings per year), results in a filing increase exceeding 200%. Notably, some filings during and after 2020 may not have occurred absent COVID-19.

Digging deeper into the data since 2012, we identified a total of 59 foreign enterprise chapter 11 filings, 24 of which involved European debtors. Foreign enterprises from Mexico, Canada and other non-US countries in North America accounted for 12 chapter 11 filings, followed by South America with 12, and Asia with six. Energy-related companies accounted for 14, or 26%, of the filings since 2012, followed by aviation, financials,

Foreign enterprise chapter 11 filings (2005 - 2024)*



*as of 4/1/2024

telecommunications, and technology in decreasing percentages.

The data also demonstrated a significant increase in the amount of debt restructured. While no foreign debtors had aggregate debts exceeding US$10bn between 2005 and 2012, since 2020 two debtors have had aggregate debts exceeding US$10bn. Similarly, the average number of foreign debtors with aggregate debts of up to US$10bn filing annually nearly doubled starting in 2020 as compared to the 2005-2012 period. According to Global Finance Magazine, roughly a third of the sixteen largest chapter 11 cases filed in 2022 were by foreign enterprises with debts ranging from US$3.7bn to US$10.3bn.[8]

Our findings also revealed that whereas approximately 70% of foreign debtors obtained debtor-in-possession loans (DIP loans) during the 2005-2012 period, the percentage of debtors doing so during and after 2020 dropped to approximately 55%. DIP loans in four foreign enterprise cases filed in 2020 or later surpassed the US$1bn mark, as compared to none in the 2005-2012 period.

There was also a sharp increase in the use of DIP "rollups." Rollups were used in nearly 60% of foreign enterprise cases filed in 2020 or later, whereas they were used in only approximately 20% of cases filed in the 2005-2012 period. Anecdotally, we understand that sizeable, priming, priority DIP-like loans have become customary in Western European insolvencies. While the treatment of DIP loans may impact where a foreign enterprise seeks plenary relief, the more common approval and enforcement becomes in non-US jurisdictions, the less likely it may be a leading factor in foreign enterprise chapter 11 filings.

Competition for foreign enterprise plenary proceedings

A factor that may impact a foreign enterprise's decision to file for chapter 11 is the availability of a bankruptcy regime in the foreign enterprise's home or another country that would enable it to achieve its goals. Couwenberg and Lubben recognised this, and in the context of anticipated European bond distress, suggested "there [was] little reason to think that legal regimes [would] adapt in sufficient time to address the issue."[9]

The magnitude of global insolvency law reform during the past decade, however, has been unprecedented. Several countries with insolvency regimes that focused primarily on liquidation have

since enacted new regimes that allow enterprises to reorganise. Other countries have reformed their legal regimes to enhance the likelihood of successful enterprise restructurings. In 2021, Couwenberg and Lubben acknowledged that insolvency legal reform could impact foreign enterprise chapter 11 filings.[10]

Professors Anthony J. Casey and Joshua C. Macey observed that "opportunistic debtors and creditors" could seek "to restructure in foreign jurisdictions like England, Singapore, Mexico, and the Netherlands," thereby "diminishing America's influence on bankruptcy law in general."[11]

In fact, we understand that foreign enterprises have sought and are continuing to seek plenary relief in certain Western European countries. Professors Casey and Macey also explain that "jurisdictions have also sought to entice foreign debtors, with insolvency specialists speculating that Singapore, in particular, could become 'an international centre for debt restructuring.'"[12]

Currently, the Singapore International Commercial Court has 21 international judges who include some of the most highly accomplished and respected bankruptcy and commercial judges and practitioners from their respective countries,[13] though we understand that 'a foreign enterprise plenary insolvency case' has yet to be filed.

Conclusion

Forum shopping is the "ancient sport" of attorneys. They are duty bound to advise clients on the options available for commencing plenary insolvency proceedings. Many US bankruptcy judges have facilitated forum considerations by enacting local rules, adopting procedures, and issuing rulings that are favorable and hospitable for large chapter 11 filings.

Unsurprisingly, other countries have recognised the potential benefits of luring enterprises with billions of dollars of debt to restructure and have undertaken measures to encourage foreign filings in their countries. The more things change, the more they stay the same. Forum shopping has been around for a long time, and is not going away, even if judges and authorities endeavor to regulate it to avoid perceived abuses.

Notes

1 For a current headline-grabbing and politically noteworthy example of policy makers attempting to curb certain "judge shopping" efforts (a finely tuned form of forum shopping), see the policies recommended by the Committee on Court Administration and Case Management and approved by the Judicial Conference in March 2024 (JCUS-MAR 2024) and the accompanying Guidance for Civil Case Assignment in District Courts (describing policy and guidelines designed to prevent a certain type of forum shopping).

2 Chapter 11 petitions were filed on May 10, 2020, for Avianca Holdings S.A., May 26, 2020 for LATAM Airlines Group S.A., and June 30, 2020 for Grupo Aeromexico, S.A.B. de C.V.

3 For purposes of this article, a "foreign enterprise" is one where the debtor's principle "Center of Main Interest" (COMI) considerations would likely result in a finding that its COMI is outside the US. We use the term "enterprise" to include both debtors whose cases are jointly administered (more often the case) and single debtor chapter 11 cases; in the case of jointly administered cases, we count them as a single chapter 11 filing rather than multiple chapter 11 filings.

4 See Couwenberg, Oscar, & Stephen J. Lubben, *Corporate Bankruptcy Tourists*, The Business Lawyer 70 no. 3 719 (2015): 719-50. https://www.jstor.org/stable/26417514.

5 *Id.* at 721.

6 *Id.* at 720-21.

7 *Id.* at 735-38.

8 See Luca Ventura, "The World's Biggest Bankruptcies" *Global Finance Magazine*, Apr. 13, 2023. https://doi.org/https://gfmag.com/data/worlds-biggest-bankruptcies/.

9 Couwenberg & Lubben, *Corporate Bankruptcy Tourists, supra* note 4, at 721.

[10] See Oscar Couwenberg & Stephen J. Lubben, *Good Old Chapter 11 in a Pre-Insolvency Word: The Growth of Global Reorganisation Options*, 46 N.C. J. Int'l Law 353 (2021). Available at: https://scholarship.law.unc.edu/ncilj/vol46/iss2/3 (identifying an increase of global alternatives to chapter 11).

[11] Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 Emory Bankr. Dev. J. 463, 468 (2021). Available at: https://scholarlycommons.law.emory.edu/ebdj/vol37/iss3/1/.

[12] *Id.*

[13] https://www.judiciary.gov.sg/singapore-international-commercial-court/who-we-are/judges.

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