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德汇美国破产法问答 （系列之一） Dorsey U.S. Bankruptcy Law Q&A Series One

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随着新型冠状病毒继续对全球经济造成负面影响，最近在美国根据美国破产法第 11 章申请破产的案件数量继续上升，并很可能会持续一段时间。如果您是一位外国供应商，当您的美国客户或买家申请第 11 章破产保护时，您应该如何应对呢？本问答系列旨在为申请破产的美国公司的海外供应商提供实用建议，其中包括中国外贸出口企业。本问答系列的第一篇文章将为您解答并介绍一些迫切需要考虑的基本问题和因素。我们将在后续文章中对其中多个问题和考量因素进行更详细地讲解（包括供应商索赔、破产程序中的权利保护、破产是如何运作的，以及第 11 章破产计划的程序）。

As the COVID-19 pandemic continues to negatively impact the global economy, the recent surge in Chapter 11 bankruptcy filings in the United States is likely to continue for some time to come. If you are a foreign supplier, what do you do when a U.S. customer files for Chapter 11 bankruptcy protection? This Q&A series aims to provide practical advice to foreign trade creditors (including Chinese suppliers) of bankruptcy U.S. companies. The first in the series will address general questions and considerations, many of which will be addressed in greater detail in future series which will cover specific issues relating to claims of suppliers, protecting rights in a bankruptcy proceeding, how bankruptcy works, and the Chapter 11 bankruptcy plan process.

问题 1：什么是"第 11 章破产"？它与其他破产程序有何不同？

Question: What is Chapter 11 Bankruptcy and how is it different from other bankruptcy proceedings?

"第 11 章破产"允许企业通过一个法院监督下的程序重组其财务，其主要目标是促进企业在未来继续长久经营。第 11 章破产允许债务人企业继续"持有"公司业务，即该公司继续由破产申请提交前的管理层经营。

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- Banking & Financial Institutions
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Chapter 11 bankruptcy allows businesses to reorganize their financial affairs in a court-monitored process whose primary goal is to facilitate businesses to continue operating into the future. Chapter 11 allows debtor businesses to remain “in possession”, that is, the company continues to be operated by the same management as before the bankruptcy case was filed.

企业的另一种破产程序选择是“第 7 章破产”。该程序涉及受托人的任命以及对债务人的清算。一旦该破产程序开始，该企业就将停止运营。尽管相关统计数据显示许多第 11 章破产案件均告失败，但大型案件（即涉及资产超过 1 千万美元的公司）往往有更高的重组成功率，尤其是在各利益相关人支持重组的情况下，包括债务人的供应商愿意继续与债务人进行业务往来的情况。

The alternative is Chapter 7 which involves the appointment of a trustee and liquidation of the debtor, which ceases operating once the bankruptcy case begins. While relevant statistics reflect that many chapter 11 cases fail, the larger cases (i.e. companies with over $10 million in assets) tend to have better rates of success, particularly when various stakeholders support the reorganization, including vendors willing to continue dealing with the debtor.

问题 2：在第 11 章破产案件中会发生哪些重要的交易和事件?

Question: What are the significant transactions and events that occur in a Chapter 11 bankruptcy case?

在任何第 11 章破产案件中都会发生一些重大交易。虽然每个案件的情况都有所不同，但主要可能发生以下重大交易:

A number of significant transactions will take place in any Chapter 11 bankruptcy case, and each case is different, but the following are likely to occur:

- 在破产案件的首日，债务人将提交“首日”动议，以寻求破产法院的授权，使其得以开展其在破产前的正常运营过程中可以开展、但在破产中需要法院许可才可以开展的各种活动。该等活动包括，向债务人提供货物和服务、持续向债务人提供维持其经营能力所必要的货物和服务的 “关键供应商”付款，以及举债向该等关键供应商付款。 On the first day of the case, the debtor will file “first day” motions seeking authority to do a variety of things that it would have been able to do in the ordinary course of business outside of bankruptcy, but require court permission in bankruptcy. This includes paying “critical vendors” that supply goods and services to debtors and whose continued provision of goods and services is essential to debtors’ ability to operate, and borrowing money to be able to pay those critical vendors.
- 美国受托人（隶属美国司法部）可以任命一个无担保债权人委员会来代表案件中的所有无担保债权人。 The U.S. Trustee (which is part of the U.S. Department of Justice) may appoint a committee of unsecured creditors to act on behalf of all unsecured creditors in the case.
- 债务人将提交详细的资产负债表。 The debtor will file detailed schedules of assets and liabilities.
- 债务人将每月提交一份经营报告，详细列出所有收入和支出以及未偿债务。 The debtor will file monthly operating reports detailing all receipts and disbursements, as

well as outstanding liabilities.

- 根据《美国破产法》的规定，债务人可以寻求出售无任何留置权、权利主张和权利负担的财产。 The debtor may seek to sell property free and clear of all liens, claims, and encumbrances, as provided by the U.S. Bankruptcy Code.
- 根据《美国破产法》的规定，债务人可以寻求承接或拒绝未完全履行的合同和未到期的租约。 The debtor may seek to assume or reject executory contracts and unexpired leases, as provided by the U.S. Bankruptcy Code.
- 法院将规定提出权利主张的截止日期。在此之后，法院将禁止债权人对债务人提出索赔。 The court will establish a deadline for filing claims, after which the creditor would be barred from asserting claims against the debtor.
- 债务人可以通过诉讼追回破产之前进行转移的某些资产。 The debtor may commence litigation to claw back certain transfers made prior to the bankruptcy.
- 在某些情况下，债务人在申请破产时已经准备好了一项重组计划（称为"预先准备完毕的计划"）。但更常见的是，债务人将与利益相关方（例如有担保债权人和无担保债权人委员会）进行谈判，以制定一项重组计划。经法院批准，该重组计划将被分发给债权人，债权人将就是否接受该计划进行投票。如果该重组计划得到法院的认可，则该计划将规定所有当事人在未来的权利、如何处理各项主张，以及债权人的可追偿的百分比。 In certain instances, debtors come into bankruptcy with a plan of reorganization already prepared (a "prepack"), but more commonly, debtors will negotiate with parties in interest, such as their secured creditors and the committee of unsecured creditors, to formulate a plan of reorganization. With court approval, the plan will be circulated to creditors who will get to vote on whether to accept or reject the plan. If the plan is confirmed by the court, it will dictate all parties' rights going forward, how claims will be treated, and the percentage of recovery on creditors' claims.

问题 3：什么是自动中止令?

Question: What is the automatic stay?

"自动中止令"在任何类型的破产案件提交后立即生效。自动中止令禁止采取任何行动来收回债务人所欠的债务，并且适用于债务人持有的位于任何地方的（在美国或世界其他地区的）所有财产。自动中止令仅保护已申请破产的债务人本身，不保护该债务人旗下未列入破产范围内的子公司和关联企业。

Immediately upon the filing of any kind of bankruptcy case, the "automatic stay" comes into effect. The automatic stay prohibits taking any actions to collect debts owed by the debtor and applies to all property owned by debtors wherever located – in the U.S. or elsewhere in the world. The automatic stay only protects entities that have filed for bankruptcy protection. It does not protect non-debtor affiliates.

虽然美国以外的国家未必总是承认美国破产法下的自动中止令，该自动中止令确实于破产案件提交时立刻生效。违反自动中止令的一方将有可能受到破产法院的制裁。

While the automatic stay may not always be recognized outside the U.S., it does apply the moment a bankruptcy case is filed. Parties that violate the automatic stay may be subject to sanctions by the bankruptcy court.

问题 4：第 11 章破产程序的进展有多快?

Question: How quickly does the Chapter 11 process play out?

这取决于每个案件的事实和实际情况。一个成功的"预先准备完毕的计划""的第 11 章破产案件，即一个在开案前就已经就重组计划协商取得一致安排的案件，可以在一至两个月内完成。大多数未预先准备完毕的案件至少需要四个月，并且可能会持续数年。

It depends on the facts and circumstances of each case. A successful "prepackaged" Chapter 11 case, where a plan is negotiated prior to initiation of the case, can be completed in a matter of one or two months. Most non-prepackaged cases take at least four months and may last years.

问题 5：在第 11 章破产案件中，外贸债权人面临的最大挑战是什么？为保护我们的权利，我们应该如何应对？

Question: What are the biggest challenges to foreign trade creditors and what should we do to protect our rights in a Chapter 11 bankruptcy case?

在收到您的美国客户或买家已递交破产申请的通知后，您应立即联系值得信赖的美国律师。法院将就您提起权利主张和就反对可能影响您权利的救济措施的时间规定截止日期。如果您错过了该等截止日期，则您可能无法收到您要求债务人支付的金额，或者您可能无法要求法院就影响您权利的事项听取您的诉求。

You should contact trusted U.S. counsel promptly upon receipt of notice that a company that you supply has filed a bankruptcy petition. The court will set deadlines for filing claims and for objecting to relief that may affect your rights. If you miss those deadlines, you may not be able to receive a distribution on your claim or be heard on matters affecting your rights.

作为已申请破产的美国企业的供应商，如果您继续与该企业进行业务往来，则您可能因在正常业务过程中出售的商品而有权收回货款或在索赔事宜上有优先权，这可能使您有权全额收回某些款项。

As a trade creditor, if you continue to do business with the debtor, you may be entitled to reclamation or priority claims on account of goods sold in the ordinary course of business which may entitle you to a full recovery of a portion of your claim.

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请您密切关注本系列的第二篇文章，该文章将解答诸如破产申请将如何影响供应商和其供应合同、以及如何安全地与处于破产状态的公司保持业务往来的问题。

Please keep an eye out for Series Two which will address questions relating to how suppliers and their supply contracts are impacted by a bankruptcy filing and how to safely keep doing business with a company in bankruptcy.

德汇律师事务所是一家拥有超过百年历史的国际律师事务所，在美国、加拿大、欧洲和亚洲（包括北京、上海和香港）设有 21 家办公室。德汇为各行各业的企业提供全方位法律服务，并被《钱伯斯美国》评选为“领先律师事务所”以及被 U.S. News 评选为“最佳律师事务所”。

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