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Bankruptcy Court Jurisdiction May Be More Limited than You Think



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Congress granted bankruptcy courts in the U.S. broad geographical jurisdiction. For starters, Congress expressly granted bankruptcy courts *in rem* jurisdiction over all of a debtor's property, "wherever located."² Moreover, the Bankruptcy Code provides that the commencement of a chapter 11 case creates an estate comprised of all of the debtor's property, also expressly including the phrase "wherever located."³ In fact, it is that hook — that a debtor's bankruptcy estate includes its property wherever located — that provides foreign debtors with the comfort to file for bankruptcy outside of a home jurisdiction.⁴

The U.S. bankruptcy court's jurisdictional reach has frequently caught the attention of foreign debtors, including Alto Maipo, SpA and its co-debtor, Alto Maipo Delaware LLC, which recently sought protection under chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.⁵ Alto Maipo is a special-purpose company incorporated under the laws of Chile, with the primary business purpose of constructing and operating a "large run-of-river hydroelectric project" outside of Santiago, Chile.⁶ The company filed for chapter 11 relief on Nov. 17, 2021, in order to effectuate the terms of a pre-arranged chapter 11 restructuring plan.⁷

On March 10, 2022, the debtors filed the "Debtors' Motion for Entry of an Order Pursuant to Sections 363 and 365 of the Bankruptcy Code Approving Assumption of Agreement with MLP" (the "assumption motion").⁸ With this motion, the debtors sought to assume "one of [its] most valuable assets,"⁹ a power-purchase agreement (PPA) dated June 28, 2013, between Alto Maipo and Minera Los Pelambres (MLP), pursuant to which "MLP is committed to purchase power from Alto Maipo."¹⁰

On April 26, 2022, the court considered whether it could grant the assumption motion "without establishing *in personam* jurisdiction over MLP."¹¹ The court ultimately held that under the specific circumstances present in the debtors' chapter 11 cases, personal jurisdiction was a necessary precondition to consideration of a debtor's motion to assume an executory contract. Given the novelty of this issue and importance of the court's ruling, this article examines the parties' arguments, the court's ruling and the potential ramifications for current and future debtors in possession and creditors.

Section 365 of the Bankruptcy Code and Personal Jurisdiction

Executory contracts are indisputably property of the estate,¹² and as the Bankruptcy Code authorizes a debtor to assume or reject its executory contracts,¹³ one could assume that bankruptcy court jurisdiction should not present an impediment to a debt-

1 This article represents the views of its authors, and the statements made herein are not those of their firm or its clients. Unless otherwise indicated, all references to "ECF No." are to documents identified by docket entry, filed in *In re Alto Maipo Delaware LLC, et al.*, No. 21-11507 (KBO) (Bankr. D. Del. 2021).

2 See 28 U.S.C. § 1334(e)(1) (emphasis added).

3 See 11 U.S.C. § 541(a) (emphasis added).

4 See Timothy Graulich, Stephen Piraino & Matthew Masaro, "International Airlines and the Benefits of Chapter 11," 15 *Insolvency and Restructuring Int'l* 22 (April 2021) ("One of the central reasons that the U.S. is an ideal forum is because the U.S. Bankruptcy Code broadly defines property of the estate to include property wherever located.")

5 *In re Alto Maipo Delaware LLC, et al.*, No. 21-11507 (KBO) (Bankr. D. Del. 2021).

6 Disclosure Statement for the Joint Chapter 11 Plan of Reorganization of Alto Maipo SPA and Alto Maipo Delaware LLC Pursuant to Chapter 11 of the Bankruptcy Code at 1, ECF No. 465.

7 *Id.* at 2.

8 ECF No. 350.

9 *Id.* at ¶ 1.

10 ECF No. 465 at 34.

11 See ECF No. 461 at ¶ 1(a).

12 See *In re Windstream Holdings Inc.*, 627 B.R. 32, 42 (Bankr. S.D.N.Y. 2021) (executory contracts "are property of the debtor's estate under 11 U.S.C. § 541") (citations omitted).

13 See 11 U.S.C. § 365.

or's assumption or rejection of one of its wherever-located executory contracts. However, in the face of the assumption motion, the jurisdictional reach of bankruptcy courts was put under critical scrutiny.

In the months leading up to the filing of the assumption motion, Alto Maipo and MLP had exchanged a series of letters¹⁴ wherein MLP asserted, and Alto Maipo contested, an alleged right to terminate the PPA, purportedly resulting from Alto Maipo seeking bankruptcy protection in the U.S. MLP further asserted that to grant the assumption motion, the court must find that it has personal jurisdiction over MLP. In light of the foregoing, the court ordered a briefing on whether a finding of personal jurisdiction was necessary to grant the assumption motion, and scheduled a hearing for April 26, 2022.¹⁵

The crux of MLP's argument was that personal jurisdiction over MLP was required to approve the assumption motion because the debtors were asking the court to adjudicate, among other things, "MLP's particularized rights and obligations in the Agreements."¹⁶ Consequently, MLP argued that because the requested "relief [was] *in personam* in nature ... personal jurisdiction must be established,"¹⁷ as "due-process protections [are] afforded [to] a party against whom expressly *in personam* relief is sought."¹⁸ Stated differently, because, according to MLP, the assumption motion sought "particularized relief" *vis-à-vis* MLP, the U.S. Constitution's Due Process Clause requires that the court have personal jurisdiction over MLP to adjudicate the assumption motion.

Conversely, the debtors' central argument was that bankruptcy courts have *in rem* jurisdiction over property of the estate, including a debtor's executory contracts, which jurisdiction is sufficient to grant the assumption motion.¹⁹ In addition, the debtors and/or their supporters highlighted for the court that courts routinely approve assumption motions without finding personal jurisdiction over the contract counterparty, and ruling in MLP's favor could have significant negative knock-on effects.²⁰ From the debtors' perspective, because they were merely seeking to assume a contract that is property of their estates without modifying the rights or obligations of either party thereunder, particularized relief was not being sought *vis-à-vis* MLP.

The debtors conceded that a finding of personal jurisdiction would be required had they sought to modify the terms of the PPA as part of the assumption motion or should the debtors seek to enforce an order granting the assumption motion against MLP. But, according to the debtors, merely seeking an order approving assumption of the PPA without more is analogous to the general, non-particularized relief frequently granted by bankruptcy courts. Moreover, the debtors and their supporters argued that most bankruptcy court orders affect the rights of parties-in-interest, "including, most fundamentally, orders enforcing automatic stays and

orders confirming plans of reorganization,"²¹ and that entry of such orders does not require personal jurisdiction over those affected, as MLP contended.

At the April 26, 2022, hearing on the personal-jurisdiction issue, the court focused on the difference between an *in rem* and *in personam* action — asking both the debtors' and MLP's counsel to define "*in personam* relief."²² The debtors defined it as a situation "where there is specific relief being sought to require a judgment or performance from the adverse party,"²³ whereas MLP responded by alleging, as it had in the letters exchanged between the parties, that commencement of the chapter 11 cases gave MLP a termination right under the PPA, noting that the debtors "are seeking to have [the court] litigate this contract and whether or not there's a breach, whether or not there is a right to terminate. [The debtors] want [the court] to litigate that issue ... [which] is fundamentally *in personam* relief."²⁴ In addition, the court questioned how it could grant the assumption motion without determining whether the bankruptcy filing triggered an MLP termination right under the PPA, and how adjudicating such a dispute would not be an inquiry into the particularized rights of MLP under the PPA.

The court ultimately agreed with MLP, holding that it "will not adjudicate the assumption motion without an adversary proceeding, proper service and an establishment of personal jurisdiction."²⁵ The court's rationale was that the assumption motion "seeks more than a determination of the debtor's business judgment in seeking to assume the agreement. It seeks findings that, among other things, there are no existing defaults and, thus, no required cure under the agreement in order to comply with Section 365(b)."²⁶ The court opined that the only way it could "mak[e] the request[ed] findings regarding default and cure requires a determination of the party's contractual rights and responsibilities in the agreement and would constitute an *in personam* action."²⁷ In short, the court held that "the due process clause precludes [a bankruptcy court] from adjudicating those issues and making the debtor's requested findings in the absence of personal jurisdiction over MLP."²⁸

Notwithstanding, the court distinguished uncontested and contested assumption motions, finding that while the former does not require a bankruptcy court to find personal jurisdiction, the latter may. The court's rationale for drawing this distinction was that an uncontested assumption motion is a "summary proceeding intended to efficiently review the debtor's or trustee's decision" to assume or reject a contract, whereas when adjudicating disputed contract issues

21 ECF No. 526 at 4. Notably, the court had previously entered an order enforcing the automatic stay in the debtors' chapter 11 cases.

22 April 26, 2022, Hr'g Tr. at 34, ECF No. 548 (noting that issue before court was "[h]ow do you determine whether something is *in rem* — is an *in rem* action versus an *in personam* action?").

23 *Id.* at 18.

24 *Id.* at 35.

25 *Id.* at 58-59.

26 *Id.* at 59. MLP refrained from making substantive arguments to the court (likely to avoid risking submitting to the court's jurisdiction), and it was the debtors who alerted the court (in the assumption motion and by filing the dueling letters between the debtors and MLP) of the dispute between the parties regarding the alleged insolvency-triggered termination right. The existence of the potential PPA default dispute may have been outcome-determinative, as it (together with MLP's jurisdictional challenge) led to the court's characterization of the assumption motion as contested (which it found requires a finding of personal jurisdiction), notwithstanding that MLP did not itself challenge the assumption motion on the merits. Moreover, the debtors submitted a robust proposed order approving the assumption motion, which aided the court in distinguishing the assumption motion from the run-of-the-mill assumption motions that the court suggested could be and often are granted without a personal-jurisdiction finding.

27 *Id.* at 59.

28 *Id.* at 60.

14 See generally ECF Nos. 350, 548.

15 See ECF No. 461 at ¶ 1(a). To be clear, the court did not consider whether it had personal jurisdiction over MLP, as the issue presented was only whether such jurisdiction was necessary to grant the relief requested.

16 See ECF No. 489 at 3.

17 See ECF No. 532 at 3.

18 ECF No. 489 at 2.

19 See generally ECF No. 524.

20 See *id.* at 11; ECF No. 526 at 2.

(*i.e.*, whether a default exists), “an adversary proceeding is required.”²⁹ Further, the court noted that it is assumption motions prosecuted as summary proceedings that are customarily approved by bankruptcy courts without a finding of personal jurisdiction over the counterparty — not assumption motions that are actively objected to on the basis of personal jurisdiction and where the existence of a default is in dispute — and that the “unique circumstances [of the debtors’ chapter 11 cases] are not present in 99.999 percent of the cases before [the court].”³⁰ For this reason, the court opined that its ruling would not have the dire effects espoused by the debtors and their supporters.

Next Steps: What Does This Mean for Future Parties-in-Interest?

The debtors and their supporters rightly focused on the negative externalities that the court’s ruling could have on debtors with global operations. The court’s intentionally narrow holding is that where a dispute over a potential contract default or breach exists — even where the counterparty does not raise the dispute itself in the bankruptcy case — such contract can only be assumed if the bankruptcy court has personal jurisdiction over the counterparty.

While the court took efforts to narrow its ruling so that it was not applicable to all assumption motions, the distinction drawn could turn out to be one without a difference. For example, a disgruntled counterparty could attempt to put a contractual dispute before the court without submitting itself to personal jurisdiction,³¹ which, if successful, may result in the debtor being unable to assume the contract outside an adversary proceeding and without a finding of personal jurisdiction.

The court’s decision could result in allowing foreign contractual counterparties to have their cake and eat it, too (*i.e.*, object to a debtor’s assumption motion by substantively arguing that it is a default), in the sense that the bankruptcy court lacks jurisdiction to adjudicate without submitting to the court’s jurisdiction. The decision could also, contrary to the spirit of the Bankruptcy Code, incentivize limited disclosure, as prudent debtors might be less likely to disclose the existence of a contractual dispute where it is believed that the foreign counterparty is unlikely to present a substantive argument to the court in fear of submitting to personal jurisdiction.

At least for the time being, a debtor with global operations should continue to operate as similarly situated debtors have and assume contracts as a summary proceeding (*i.e.*, file an assumption motion without commencing an adversary proceeding or submitting evidence to establish the court’s personal jurisdiction). Such debtors should also consider proposing a narrowly drafted proposed order.

Conclusion

The U.S.’s restructuring regime is robust for a variety of reasons, but central among them is that it provides a debtor

with a central forum to reorganize its worldwide operations. Bankruptcy courts — with their statutory worldwide jurisdiction over a debtor’s property — provide that central forum. Notwithstanding the foregoing, the decision in *Alto Maipo* casts doubt on whether a debtor, relying on the court’s worldwide jurisdiction, will be able to take advantage of the full slate of protections afforded by the Bankruptcy Code, particularly the ability to assume a contract that is property of the bankruptcy estate. **abi**

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²⁹ *Id.* at 61.

³⁰ *Id.* at 63.

³¹ Outside of the circumstances presented in *Alto Maipo* (*i.e.*, where a debtor itself alerts the court to the existence of a contract dispute), a debtor’s contractual counterparty that argues that a contract cannot be assumed due to an alleged default is, at least arguably, at risk of submitting to the court’s jurisdiction.