

Wrinkles in Bankruptcy Court's Jurisdiction: Assumption of Executory Contracts in A Foreign Company's Chapter 11

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Foreign companies frequently choose to reorganize in the United States under Chapter 11 of the Bankruptcy Code. Examples include various airlines that were forced into bankruptcy because of the pandemic's effects on the industry, including LATAM Airlines, AeroMexico, and Scandinavian Airlines. Among the often-cited reasons why the U.S. is the jurisdiction of choice for foreign companies are: 1) it has the most well-developed law of any insolvency regime in the world for helping troubled companies restructure their affairs; 2) it allows management control of the restructuring; 3) it provides for approval of prepackaged workouts; 4) U.S. bankruptcy courts can handle corporate groups, and 5) debtors can confirm a reorganization plan with less than unanimous stakeholder support.

Another essential feature of the U.S. insolvency regime is the debtor's right to assume or reject executory contracts and leases with binding effect on the counterparties. The U.S. bankruptcy court's jurisdictional reach in connection with a motion to assume a contract between a foreign debtor and its foreign counterparty was questioned in early 2022 in the Alto Maipo case. The Court agreed with the counterparty that it did not have personal jurisdiction to approve the assumption of an agreement between Alto Maipo and its counterparty.

Alto Maipo SpA and Alto Maipo Delaware L.L.C. sought bankruptcy protection in Delaware to carry out a prepackaged restructuring plan. Alto Maipo SpA is a Chilean company involved in developing, constructing, and operating a run-of-river hydroelectric project in Chile. The counterparty that challenged the Court's authority to approve the assumption of its executory contract with Alto Maipo SpA, Minera Los Pelambres ("Minera"), is a Chilean company that runs a copper mine. It had a long-term power-purchase agreement with Alto Maipo signed back in 2013. Alto Maipo claimed that the power-purchase agreement was central to the debtors' reorganization efforts and was the core of their business plan because Minera was obligated to purchase power from the debtors' hydroelectric project on favorable, predictable, and long-standing terms.

The agreement was governed by Chilean law, was written in Spanish, and required Chilean arbitration. Minera had no presence or business activities in the U.S. and was not subject to general or special jurisdiction in the U.S. In response to the Debtor's Motion for Entry of an Order Pursuant to Sections 363 and 365 of the Bankruptcy Code Approving Assumption of Agreement with Minera (the "Motion"), Minera asserted that the Court could not grant the requested relief without finding and exercising *in personam* jurisdiction because Alto Maipo had defaulted. The Debtors' position, supported by the senior secured lender, equity owner of Alto Maipo, the parties to a restructuring support agreement and the unsecured creditor's committee, was that the requested relief was *in rem* because (i) the Court had statutory *in rem* jurisdiction over all property of the Debtors' estates, wherever located, under 28 U.S.C. § 1334(e)(1), and (ii) separately, it had statutory authority to determine questions of contract-breach under Section 365(b) of the Bankruptcy Code. Minera challenged the position that the Court had the power to address contract breach questions under Section 365(b) exclusively as *in rem* matter or concerning anyone, including a

non-debtor that is not subject to personal jurisdiction in the United States.

The Court agreed with Minera because the Debtors sought findings that, among other things, there were no existing defaults and, thus, no required cure under the agreement to comply with Section 365(b). Therefore, the action was not traditionally *in rem*. “Making the requesting findings regarding default and cure required a determination of the party’s contractual rights and responsibilities in the agreement and would constitute an *in personam* action. A breach of contract action is a common example of an *in personam* action and, effectively, the findings sought here would require the same determination whether a breach of contract occurred and the appropriate remedy, if any.” April 26, 2022, Hr’g Tr. at 59, E.C.F. No. 548.

This ruling raises the question of whether a bankruptcy court should make an individualized determination on personal jurisdiction for each contract that a foreign debtor is trying to assume and a counterparty raises breach of contract issues, and if it would deter foreign debtor filings in the U.S.

For further information, please feel free to reach out to [Albena Petrakov](#).