

## Alto Maipo: Delaware ruling poses jurisdictional challenges for Ch11 debtors

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Norton Rose Fulbright partner **Andrew Rosenblatt** and senior counsel **Jason Blanchard** examine the “far-reaching” implications of a recent Delaware bankruptcy court decision that they say provides foreign counterparties in cross-border Chapter 11 cases with a potential tool to contest the assumption of their contracts.

Under Chapter 11 of the US Bankruptcy Code, a debtor may generally assume an executory contract if it cures any monetary defaults and provides adequate assurance of future performance. But in a case of first impression in the restructuring of Chilean hydroelectric plant operator Alto Maipo, the US Bankruptcy Court for the District of Delaware imposed an additional requirement for contract assumption, finding that it must have personal jurisdiction over the contract counterparty.

In rendering its decision, the court acknowledged the assumption of an executory contract is ordinarily an *in rem* proceeding and thus personal jurisdiction would typically not be relevant. In this instance, however, the debtors requested specific findings regarding defaults and cure amounts under the contract that necessarily implicated *in personam* considerations. Thus, the court declined to consider the motion absent the commencement of a separate adversary proceeding with its attendant constitutional safeguards.

The decision may have serious implications, principally on foreign debtors that file Chapter 11 cases in the US. Foreign debtors are more likely than US debtors to have contract counterparties with limited or no contacts with the US that can raise valid personal jurisdictional challenges. As a result, before commencing Chapter 11 proceedings, debtors with foreign contract counterparties should be mindful of potential jurisdictional challenges that could preclude contract assumption or make assumption unusually time-consuming and costly.

### Unsustainable capital structure

Alto Maipo is a special purpose company incorporated under Chilean law. The company was formed in 2011 to develop, construct, and operate several hydroelectric energy plants and related facilities in the Andes Mountains, approximately 30 miles southeast of Santiago. The plants became operational earlier this year and are expected to provide a significant source of zero-emissions energy to Chile’s electrical grid.

Soon after construction began, the company experienced unexpected construction delays. According to the company, the delays increased project costs precipitating two out-of-court restructurings that significantly increased the amount of debt Alto Maipo owed to creditors. Later shifts in supply and demand in the energy market exacerbated the company's financial distress. In the company's Chapter 11 filings, the company claimed the events caused Alto Maipo's capital structure to become unsustainable and it filed Chapter 11 cases along with its US affiliate, Alto Maipo Delaware, in Delaware in November 2021.

Pursuant to a committed power purchase agreement (PPA) with Chilean company Minera Los Pelambres (MLP), Alto Maipo agreed to sell energy generated at the plants to MLP at predetermined rates. The debtors anticipated that MLP's PPA commitment would cover nearly half of the project's energy output every year for nearly two decades. Indeed, the debtors said Minera Los Pelambres' desire to preserve the value of the PPA was one significant reason for filing for Chapter 11 protection. Moreover, the debtors' maintenance of the PPA was an integral component of a restructuring support agreement that embodied the terms of a consensual restructuring, which was agreed to by the debtors and key creditor constituencies. In fact, the rejection or termination of the PPA would allow for creditors to terminate their commitment to the consensual restructuring.

### Alto attempts to assume the PPA

In furtherance of the consensual restructuring, the debtors filed a motion to assume the PPA. According to the debtors, the PPA was essential to maximising the value of their estates: the PPA provided a locked-in revenue stream from a creditworthy counterparty upon which the debtors' business plan and revenue projections relied, it freed the debtors from the need to market, negotiate, and maintain other contracts for the project's energy outputs, and it alleviated the effects of market cycles and price fluctuations on the debtors' revenues. Moreover, maintenance of the PPA was a negotiated component of the restructuring and its assumption was a condition precedent to the effectiveness of the debtors' plan. For these reasons, the debtors contended that assuming the PPA was a proper exercise of their business judgement.

The PPA contained a provision allowing MLP to terminate the agreement if Alto Maipo was declared to be in liquidation, requested its own liquidation, or filed a reorganisation proceeding in Chile. During the cases, MLP sent letters to the debtors claiming the termination provisions had been triggered by filing for Chapter 11. The debtors disagreed and asserted that MLP did not have a right to terminate the PPA because Alto Maipo was not liquidating and the company had not commenced reorganisation proceedings in Chile. They also argued the insolvency provisions amounted to an unenforceable *ipso facto* clause. On these grounds, the debtors claimed no defaults had occurred and sought the court's determination that no cure amounts should be paid to MLP. They requested specific findings from the bankruptcy court that the filing of the Chapter 11 cases did not trigger the termination provisions of the PPA, constitute a liquidation or reorganisation within the meaning of the PPA and Chilean law, or qualify as an act of bad faith under the PPA that would permit MLP to terminate the PPA.

MLP filed a limited response and reservation of rights solely for the purpose of objecting to the sufficiency of service and notice of the assumption motion based on MLP's status as a foreign entity. It also disputed the bankruptcy court's authority to grant the requested relief without first establishing personal jurisdiction over MLP.

### Jurisdictional dispute

Before examining the parties' jurisdictional arguments, an overview of the bases for the bankruptcy court's jurisdiction over a debtor's property is necessary. Section 1334(e) of Title 28 of the United States Code provides that the district court, and derivatively, the bankruptcy court, "shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of [the] case, and of property of the estate." "Property of the estate" is with few exceptions comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case" wherever such property is located and by whomever it is held.

Courts have interpreted these sections to mean that Congress explicitly granted bankruptcy courts global *in rem* jurisdiction over the debtor's property.

*In rem* relief, the type of relief typically sought from bankruptcy courts, generally concerns enforcement of obligations against or rights to property, regardless of the persons involved. Indeed, the US Supreme Court has often stated that bankruptcy jurisdiction "is principally *in rem* jurisdiction." By contrast, *in personam* relief generally seeks to impose an obligation or liability on a person. It typically does not concern ownership of or rights in or to property of the estate.

Courts evaluate *in personam* jurisdiction by looking at a defendant's minimum contacts with the forum and whether the defendant was properly served. Depending on the specific relief sought, courts may require both *in personam* and *in rem* jurisdiction. For example, a bankruptcy court must have *in rem* jurisdiction to approve a sale of assets under section 363 of the US Bankruptcy Code, and *in personam* jurisdiction to grant additional relief binding on the purchaser and other parties in interest in connection with the sale.

Turning to the parties' arguments, MLP did not contend that the bankruptcy court lacked *in rem* jurisdiction over the PPA. Rather, MLP argued that the debtors were seeking *in personam* relief because the motion sought an adjudication of MLP's particularised rights and obligations under the PPA, particularly whether a breach had occurred based on the Chapter 11 filings. Therefore, MLP

reasoned that the court's jurisdiction depends on whether MLP's minimum contacts with the US were sufficient to satisfy due process. Because the PPA is between Chilean parties, governed by Chilean law, includes a Chilean arbitration dispute-resolution provision, and relates to a Chilean project, MLP argued the dispute did not arise out of contacts MLP has with the U.S. and therefore the court lacked personal jurisdiction over it.

The debtors and lenders principally argued that the assumption of the PPA is purely an *in rem* matter regarding property of the estate, i.e. a contract, and related enforcement rights, and therefore falls squarely within the bankruptcy court's power to adjudicate. Separate from *in rem* jurisdiction, bankruptcy courts have subject matter jurisdiction over all proceedings "arising under" the Bankruptcy Code. Pointing to the lack of case law supporting MLP's position, the debtors and lenders argued that, under the plain language of section 365 of the Bankruptcy Code, every debtor that seeks to assume an executory contract must cure all existing defaults. Thus, in every contract assumption motion, a bankruptcy court must determine whether a default has occurred regardless of whether it has personal jurisdiction over the contract counterparty.

According to the debtors and lenders, taking MLP's argument to its logical conclusion would require bankruptcy courts to determine personal jurisdiction over contract counterparties in every motion to assume an executory contract. This could result in the transformation of a summary proceeding intended for the efficient review of a debtor's business judgement decision to assume a particular contract into a lengthy trial with disputed issues and prolonged discovery.

### Personal jurisdiction required

Following oral argument, the court issued its ruling from the bench in April 2022. It began by stating that the assumption motion sought more than a determination of the debtor's business judgement because it seeks specific findings that no default had occurred under the PPA and thus no cure amounts were owed to MLP. The court reasoned it would need to determine the parties' rights under the PPA to make those findings – akin to deciding a breach of contract action, a quintessentially *in personam* action. The court acknowledged that the adjudication of whether a debtor has exercised proper business judgement to assume a contract is ordinarily a summary *in rem* proceeding that does not require personal jurisdiction. But, in the court's view, the requested findings went beyond just that and the court ruled it would not adjudicate the assumption motion without an adversary proceeding and establishment of personal jurisdiction over MLP.

Notably, the court declined the debtors' invitation to remove most of the proposed findings and retain those related to whether the insolvency language in the PPA amounts to an unenforceable ipso facto clause. In the court's view, this too would still require adjudication of MLP's rights under the PPA rather than the estate's property rights. The court also emphasised that the facts in the case were different than those in a traditional assumption situation given the court's view that the controversy concerned a pending contract dispute involving a foreign counterparty.

### New tool for foreign counterparties?

The *Alto Maipo* decision provides foreign counterparties in cross-border Chapter 11 cases with a potential tool to contest the assumption of their contracts. Though the court viewed the facts of the dispute to be unique, foreign companies holding foreign contracts frequently file for Chapter 11 to assume those contracts under section 365 of the Bankruptcy Code.

It is not uncommon for there to be disputes related to those contracts. Here, the court was persuaded that it needed personal jurisdiction over MLP based on the specific findings requested by the debtors that related directly to the parties' contract dispute. However, the decision raises red flags because a bankruptcy court must determine, with respect to every assumption motion, whether a default has occurred and, if so, the proper cure amount. This begs the question of whether the court would have ruled differently had the proposed findings been pared down and limited solely to confirming satisfaction of the statutory requirements for assumption of the contract.

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