

# Over the hills and far away

David H. Conaway reports on the world-wide reach of the US Chapter 11 ‘Automatic Stay’



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**I**n our global economy, it is common for companies to be doing business and have assets located in multiple countries. When such companies become insolvent, protecting assets globally can be complicated.

From the debtor company’s perspective, it seeks to prevent creditors from seizing assets or pursuing collection actions against the debtor, wherever the assets or creditor may be located. Naturally, the creditor’s perspective is the opposite: creditors seek to recover payment for goods or services that were provided to the debtor. When the debtors, creditors, and assets are located in multiple jurisdictions, knowing the applicable laws that apply is essential, albeit not simple.

On 19 October 2021, the U.S. Bankruptcy Court for the Southern District of New York (SDNY) addressed this scenario. In *Kumtor Gold Co. CJSC, and Kumtor Operating Co. CJSC* (collectively, “Kumtor”), the mining company Kumtor, located in the Kyrgyz Republic, filed for Chapter 11 protection in the SDNY on 31 May 2021. Kumtor, a wholly owned subsidiary of Centerra Gold, Inc., operated Kumtor’s Gold Mines, pursuant to contracts with a state-owned entity, Kyrgyzaltyn JSC (JSC), which purchased the gold from Kumtor. JSC then refines the gold and sells it outside Kyrgyzstan. JSC is Centerra’s largest shareholder owning a 26% interest.

Before Kumtor’s Chapter 11 filing, as part of a politically motivated business nationalization program, Kyrgyzstan enacted a

“Temporary Management Law” which allowed the Kyrgyz President to seize the Kumtor gold mines and related bank accounts to “secure” payment of alleged environmental claims of \$3 billion, and \$350 million in alleged tax claims. In response, Kumtor filed for Chapter 11 in the SDNY, which triggered application of Chapter 11’s “automatic stay” under section 362 of the US Bankruptcy Code. Moreover, Kumtor filed a motion for a “362 Order” to make clear the automatic stay applied to all parties including foreign creditors, specifically in this case foreign governments. Kyrgyzstan filed an objection to the 362 motion based in part on the doctrine of sovereign immunity, which Kyrgyzstan asserted should exclude Kyrgyzstan from the automatic stay. Kyrgyzstan also filed a motion to dismiss the Chapter 11 case, also on grounds of sovereign immunity and lack of corporate authority to file Chapter 11 in the first instance.

Next, Kyrgyzstan filed a lawsuit against Kumtor in a Kyrgyz court seeking a declaration that Kumtor’s Chapter 11 filing was invalid, because the board resolutions authorizing the Chapter 11 were likewise invalid under Kyrgyz law. Kumtor in turn filed a motion to enforce the section 362 stay and for sanctions against Kyrgyzstan for violating the stay, along with a motion for a temporary restraining order (TRO) to prohibit Kyrgyzstan from violating the “362 Order”.

The SDNY granted Kumtor’s stay motion finding that Kyrgyzstan violated the Section 362 automatic stay and the

SDNY held Kyrgyzstan in contempt of court for violating the automatic stay and awarded sanctions to Kumtor for its actual costs and attorneys’ fees. However, the SDNY did not enjoin the legal actions in Kyrgyzstan, due to lack of service of process on Kyrgyzstan. Kyrgyzstan appealed the SDNY’s ruling finding a violation of the automatic stay and awarding sanctions, specifically a direct appeal to the U.S. 2nd Circuit Court of Appeals, bypassing the U.S. District Court. This appeal was denied by the District Court. Remaining pending are Kyrgyzstan’s motion to dismiss the Chapter 11 case for lack of corporate authority to file Chapter 11, and a renewed motion by Kumtor for contempt and sanctions against Kyrgyzstan relating to the litigation in Kyrgyzstan. These issues have not yet been resolved.

In essence, the fight is about whether Kumtor’s property was wrongfully expropriated by Kyrgyzstan, based on specious environmental and tax claims, asserted by Kyrgyzstan to parlay its claims into a controlling ownership interest in the Kumtor Gold Mines. The Kumtor case raises many interesting legal issues in a politically charged environment. A key issue is the world-wide reach of the automatic stay of Chapter 11. Kumtor asserts that section 362(a)(3) of the Bankruptcy Code stays:

*“any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate...”*

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Section 541(a) of the Bankruptcy Code defines the scope of property of the estate to include property “wherever located and by whomever held”. This seems pretty clear. However, the Kumtor rulings so far compromise that clarity and allow for a creditor to practically evade the Section 362 automatic stay, as such rulings did not also enjoin the legal actions in Kyrgyzstan. Even if the SDNY enjoined the Kyrgyzstan legal proceedings to effectively nationalize the Kumtor Gold Mines without compensation, would Kyrgyz courts enforce the SDNY order? There is no bilateral treaty between the U.S. and Kyrgyzstan regarding recognition and enforcement of foreign judgments. Absent a treaty, it is highly unlikely a Kyrgyz court would rule in Kumtor’s favour, where the operating assets are located.

The UNCITRAL Model Law on Cross-Border Insolvency, designed to facilitate a successful “main” insolvency proceeding in

one nation (here, the Kumtor U.S. Chapter 11 proceeding), with assistance from courts in other jurisdictions, could be helpful in this context. Particularly, the Chapter 11 representative could initiate an ancillary proceeding in another jurisdiction to obtain access to the local courts to provide assistance consistent with the goals of the “main” insolvency proceeding. While the U.S. and 52 other countries have adopted the UNCITRAL Model Law, Kyrgyzstan has not. Thus, it is highly unlikely the SDNY will be able to impact the ongoing legal proceedings in Kyrgyzstan. Even if these issues are presented to the U.S. 2nd Circuit Court of Appeals, the same limitation will exist.

The Kumtor case is a cautionary tale for companies seeking to utilize U.S. Chapter 11 as a “main” insolvency proceeding, where the assets are not in the U.S. Clearly, Kumtor is struggling to fight the alleged nationalization without

compensation of the Kumtor Gold Mines. For creditors in foreign jurisdictions, Kumtor is a playbook for continued collection actions against Chapter 11 debtors regarding legal actions and against assets outside the U.S., particularly where both parties have not adopted the UNCITRAL Model Law. While this case involved the U.S. and Kyrgyzstan, the same issues would exist if any European country were involved, since few EU countries have adopted the UNCITRAL Model Law. ■

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