

# KIRKLAND ALERT

September 2010

## Decision Clarifies Scope of Chapter 15 “Stay” of Non-U.S. Lawsuits

### *Introduction*

Chapter 15 of the Bankruptcy Code provides for formal “recognition” of a foreign insolvency proceeding and for broad protection of a foreign debtor’s U.S. assets during a debtor’s foreign bankruptcy case. In particular, upon recognition of a foreign debtor’s insolvency proceeding as a “foreign main proceeding,”<sup>1</sup> Chapter 15 provides for application of the U.S. Bankruptcy Code’s “automatic stay” provisions (sections 361 and 362 of the Bankruptcy Code) to the foreign debtor and to its U.S.-based property.<sup>2</sup>

Until recently, no court had addressed whether Chapter 15 stays litigation against the debtor pending in the U.S. only, or whether Chapter 15 also stays litigation against the debtor pending outside the U.S. Recently, in *In re JSC BTA Bank*, Case No. 10-10638 (JMP) (Bankr. S.D.N.Y. Aug. 23, 2010), the foreign representative of a foreign debtor in Chapter 15 recognition proceedings urged the court to adopt a broad interpretation of Chapter 15’s stay provisions to bar continuation of a Swiss arbitration proceeding. The court ultimately denied the motion, but the memorandum opinion suggests that the Chapter 15 stay may apply to foreign litigation if the litigation impacts a foreign debtor’s U.S. assets.

### *JSC BTA Bank*

JSC BTA Bank (“BTA”), one of Kazakhstan’s largest banks, operated through subsidiaries in Kazakhstan, Georgia, Armenia, Kirgizstan, Russia and Belarus. On October 7, 2009, BTA commenced an insolvency proceeding in Kazakhstan’s Financial Court. Entry of the Financial Court’s commencement order imposed a stay of all claims held by BTA’s creditors and protection of BTA’s property from execution and attachment until completion of the bank’s restructuring.

BTA’s U.S. connections were minimal. BTA’s sole U.S. assets consisted of cash held in New York bank accounts. BTA’s U.S. creditors consisted of a limited number of banks, mutual funds, hedge funds and governmental agencies. On February 2, 2010, BTA’s authorized foreign representative, the chairman of BTA’s management board, sought recognition of the Kazak insolvency proceeding by the U.S. Bankruptcy Court for the Southern District of New York pursuant to Chapter 15 of the Bankruptcy Code. BTA had filed its Chapter 15 petition in response to address certain adverse creditor actions, including arbitration proceedings in Switzerland that had been commenced by Banque Internationale de Commerce — BRED Paris, succursale de Geneve, Switzerland (“BIC-BRED”), after BTA had defaulted on a loan. On July 2, 2010, BTA’s foreign representative filed a motion to hold BIC-BRED in contempt for violation of the Chapter 15 stay and to stay the Swiss arbitration proceedings.

At the hearing to consider its motion, BTA made three principal arguments in favor of worldwide application of the Chapter 15 stay. **First**, BTA argued that section 1520 of the Bankruptcy Code, which becomes applicable upon entry of a recognition order in a “foreign main proceeding,” provides that the Chapter 15 stay on its face applies to a foreign debtor with no territorial restrictions, in addition to protecting property of the debtor located within the United States.<sup>3</sup> **Second**, BTA made reference to the bankruptcy court’s recognition order,

which provided, *inter alia*, for “application of the protection afforded by the automatic stay . . . to the Bank worldwide.” *Finally*, BTA noted that section 1521 of the Bankruptcy Code enables a bankruptcy court to grant additional relief to protect a foreign debtor’s property to the extent not otherwise granted under section 1520 of the Bankruptcy Code. Thus, even if the Chapter 15 stay did not specifically bar the arbitration, the bankruptcy court had discretion to do so under section 1521.

The court disagreed, noting, among other things, that application of a worldwide stay under Chapter 15 would, in effect, bar a debtor’s main insolvency proceeding in addition to any other pending proceedings. This, as the court stated, would undermine the very purpose of an ancillary insolvency regime, which is to support, not to supplant, a main foreign insolvency proceeding. In addition, the court expressed desire to avoid converting a U.S. Chapter 15 court into “a global clearing house” for resolving cross-border stay disputes. Moreover, the court expressly distinguished BTA’s ancillary proceedings from other Chapter 15 proceedings where a debtor has more substantial U.S. holdings, noting that the Swiss arbitration against BTA would have “no direct or indirect impact upon property within the territorial jurisdiction of the United States.”<sup>4</sup>

However, the court also suggested that a foreign debtor with more significant U.S. assets at stake might fare better in future Chapter 15 stay litigation. In particular, the court stated that while the stay only protects the debtor with respect to U.S. proceedings, the stay “may extend to the debtor as to proceedings in

other jurisdictions *for purposes of protecting property of the debtor that is within the territorial jurisdiction of the United States.*”<sup>5</sup>

### *Impact of JSC BTA Bank on Future Cross-Border Cases*

As even more foreign businesses expand their reach to the U.S., it is not difficult to imagine circumstances in which foreign litigation would involve a determination of rights of a third party in property of a foreign debtor that is within the territorial jurisdiction of the U.S., thereby triggering the Chapter 15 stay protection envisioned by the court. Statements from the decision could be used by future Chapter 15 debtors to argue for a wider application of the automatic stay. But for now, at least one court has ruled that the Chapter 15 stay does not protect debtors from lawsuits outside the territorial jurisdiction of the United States.

<sup>1</sup> Section 1501(5) of the Bankruptcy Code defines “foreign main proceeding” as a foreign proceeding pending in the country where the debtor has its “center of main interests.” See 11 U.S.C. § 1501(5).

<sup>2</sup> See 11 U.S.C. § 1520(a).

<sup>3</sup> See Hrg. Tr., *In re JSC BTA Bank*, Case No. 10-10638 (JMP) (Bankr. S.D.N.Y. Jul. 20, 2010).

<sup>4</sup> *Memorandum Decision Denying Motion of Foreign Representative for Contempt and Stay of Arbitration Proceedings* at 10 [Docket No. 33].

<sup>5</sup> *Id.* at 16.

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