

Cullen and Dykman successfully litigates a cross-border dispute for KBC Bank N.V.

February 23, 2018

Cullen and Dykman successfully litigated a cross-border dispute in which its client, KBC Bank N.V. (“KBC”) sought to dismiss bankruptcy proceedings of its borrower in the Delaware Bankruptcy Court in favor of proceeding in Belgium. Exelco N.V. (“Exelco”), a Belgian diamond distributor, filed a chapter 11 bankruptcy case in Delaware after defaulting on its loans from KBC. Prior to the chapter 11 filing, however, KBC had filed an action in Belgium to appoint a liquidator with respect to Exelco’s assets and Exelco itself filed a voluntary petition for bankruptcy relief in Belgium. After the chapter 11 filing, the Belgian Court continued to assert jurisdiction over Exelco and assigned a provisional administrator who seized all of Exelco’s available assets and initiated a process to determine if liquidation should occur in Belgium. The Belgian Court later found that Exelco was bankrupt and appointed two permanent foreign representatives who were given authority to act on behalf of Exelco on all matters.

In deciding KBC’s motion to dismiss the chapter 11 case in favor of the Belgian proceedings, the Court first considered the Bankruptcy Rules and found that while not necessarily applicable in cases involving a foreign country’s jurisdiction, Bankruptcy Rule 1014(b) was instructive in providing that the Court where the first case was filed should determine where the case should proceed. The Delaware Court recognized that the Belgian Court was the Court in which proceedings over Exelco had first been filed.

The U.S. Bankruptcy Court also found that it should abstain in favor of the foreign proceeding and dismiss Exelco’s chapter 11 bankruptcy case. In doing so, the Delaware Court concluded that the Belgian proceedings were procedurally fair, did not contravene U.S. policy and that the proceedings in Belgium and in Delaware were not substantially different since both cases involved liquidation or sale of Exelco’s assets. Based on the prior pending insolvency proceedings in Belgium, the Court held that the case belonged in Belgium and dismissed the chapter 11 case. Although that decision is on appeal, Cullen and Dykman does not expect the order of the Bankruptcy Court to be reversed.

This case has importance to any financial institution or other entity based on foreign soil as it provides a groundwork to maintaining the jurisdiction of the foreign courts over disputes between purely foreign entities. It also teaches that the U.S. will follow the “first to file” rule for jurisdiction even when dealing with competing foreign, as opposed to solely U.S., jurisdictions.

If you have any questions about this case or any other matters involving bankruptcy and creditors' rights, please contact Matthew G. Roseman, at 516-296-9106, or via email at mroseman@cullenanddykman.com, Bonnie Pollack at 516-296-9143 or via email at bpollack@cullenanddykman.com or, Michelle McMahon at 212-510-2296 or via email mmcmahon@cullenanddykman.com.

Matthew Roseman, Bonnie Pollack, and Michelle McMahon represented the client in this case.

Practices

- Bankruptcy and Creditors' Rights

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