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March 9, 2017 Current Issues Relevant to Our Clients

Not Just Boilerplate — The Importance of Always Verifying a Forum Selection Clause in a Commercial Contract

In a stark reminder to the bankruptcy community of the old adage that "you can run but you can't hide," the U.S. Bankruptcy Court for the Southern District of New York — in an adversary proceeding seeking the claw back of funds received by holders of interests in a now infamous General Motors term loan – recently denied an Austrian bank's motion to dismiss for lack of personal jurisdiction. The Court held that, among other things, the bank: (i) had consented to the jurisdiction of the courts in New York under the terms of a Term Loan Agreement under which the bank was an assignee; and (ii) the bank had consented to jurisdiction through accepting a repayment of its investment in the term loan with knowledge of the terms of the bankruptcy court's DIP Order, which provided that any "Prepetition Senior Facilities Secured Party accepting Payment shall submit to the jurisdiction of the Bankruptcy Court[.]" The decision in *Motor Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A., et al.*, Adversary Proceeding 09-00504 (MG) (Bankr. S.D.N.Y.) reinforces the need for financial institutions to carefully review forum selection clauses and governing law clauses to consider how such clauses might be applied in potential disputes. In this case, the effect could be the loss of the Austrian bank's $10 million investment.

The circumstances of the case arise out of Immigon portfolioabbau ag's (formerly Oserreichische Volkdbanken Aktiengesellschaft ("OEVAG")) (together "Immigon") purchase of a $10 million interest in a General Motor's syndicated $1.5 billion term loan. In November 2006, GM obtained the seven-year term loan evidenced by a note under a Term Loan Agreement. The term loan was secured by a collateral agreement, under which GM and Saturn granted JP Morgan Chase (the "Lender") a secured interest in equipment and fixtures in its manufacturing facilities in the United States. The term loan was syndicated, through which a number of financial institutions — including the Lender — committed to provide funding. The term loan permitted the bank lenders to sell interests on the secondary market through the assignment of interests to qualified investors. In September 2007, OEVAG purchased a $10 million interest in the term loan through two trades with the Lender as the counterparty.

When GM filed its chapter 11 petition in June 2009, the term loan was repaid to the purportedly secured lenders under the terms of a DIP Order. OEVAG received $9,893,347.29, which was paid by the Lender into OEVAG's account at the Bank of New York Mellon. Thereafter, as the world now knows, it was determined that the lien securing most of the collateral for the term loan had been released in error prior to the petition date. The Motor Liquidation Co. Avoidance Action Trust ("AAT"), having succeeded to the rights of the official committee of unsecured creditors in the GM bankruptcy, then commenced an adversary proceeding seeking to claw back payments to the holders of interests in the term loan, including those payments made to OEVAG, for the benefit of the unsecured creditors of GM.

Immigon then moved to dismiss the action against it, arguing that the New York bankruptcy court lacked personal jurisdiction over Immigon (and its predecessor OEVAG), and for lack of proper service. As pointed out by Immigon, OEVAG was the central institute of the Austrian co-operative banks named Volksbanken and was located in Vienna, Austria. It was then in a wind-down phase. Neither Immigon nor OEVAG had offices, employees or property in the United States. Neither entity did business in the United States or provided financial or other services within the United States. As such, Immigon argued that the Court did not have personal jurisdiction over it or OEVAG for the purpose of the dispute.

On February 16, 2017, Bankruptcy Judge Martin Glenn issued a decision disagreeing with Immigon's analyses and denying its motion to dismiss, finding that personal jurisdiction over Immigon existed for at least three distinct reasons. First, while disputed on Immigon's motion to dismiss, the Bankruptcy Court concluded that documents submitted on the motion showed that OEVAG's purchases of its interest in the term loan were in fact "formal assignments" of those interests under the terms of the Term Loan Agreement. Under the provisions of the Term Loan Agreement, upon execution and recording of such assignments, which the Bankruptcy Court concluded had been accomplished, the assignee became *a party* to the Term Loan

Agreement and had “the rights and obligations of a Lender under this Agreement.”[1] Under section 10.11(a) of the Term Loan Agreement, each loan party, including assignees, “irrevocably and unconditionally submits . . . to the nonexclusive jurisdiction of any New York state court or Federal court of the United States sitting in New York City . . . in any action or proceeding arising out of this Agreement” and that each loan party “agrees that all claims in respect of any such action or proceeding may be heard and determined in such New York State court or, to the extent permitted by law, in such Federal court.”[2] Section 10.11(b) further provided that each loan party “irrevocably and unconditionally waives . . . any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement in any New York State or Federal Court. . . .”[3]

Based upon its conclusion that OEVAG had become a party to the Term Loan Agreement by virtue of the assignment to it, Judge Glen concluded that Immigon had consented to the jurisdiction of the New York court. Since OEVAG had enjoyed “the benefits and protections of New York law in connection with [the Term Loan Agreement],” it should be “held to the consent to jurisdiction and New York forum choice.”[4] Because AAT’s rights against Immigon flowed from the payments made to OEVAG under the Term Loan Agreement, the Court held that the Term Loan Agreement’s forum selection clause with OEVAG’s consent to jurisdiction should control.

The Bankruptcy Court also concluded that OEVAG consented to jurisdiction in New York pursuant to the DIP Order. The DIP order granted AAT the right to prosecute the action for recovery against the Prepetition Senior Facilities Secured Parties, which included OEVAG. The Court found that OEVAG, having accepted payment after the Petition Date, had consented to the jurisdiction of the Court under the terms of the DIP Order, which included an express consent to the jurisdiction of the Bankruptcy Court. The Court concluded that OEVAG had received notice and reviewed the DIP Order before receiving payment. By knowingly accepting the transfer of funds post-petition, the Court found that OEVAG had accordingly knowingly consented to the jurisdiction of the Bankruptcy Court under the provisions of the DIP Order.

Finally, even if Immigon had not consented to the jurisdiction of the Court, Judge Glenn found that AAT had established sufficient minimum contacts with New York to support specific personal jurisdiction over OEVAG. In support of his conclusion, Judge Glenn pointed out that: (i) all payments were to be made by the Lender in New York; (ii) OEVAG purchased the interests in the term loan in New York from the Lender, (iii) OEVAG agreed to New York law governing the transaction; (iv) OEVAG selected New York Mellon for its correspondent bank account for use in connection with the loan transactions as well as other transactions; and (v) the Lender made the payment to OEVAG’s New York bank account. Based upon these facts, Judge Glenn concluded that OEVAG had purposefully availed itself of the jurisdiction of New York for the purpose of the transaction in dispute, justifying specific jurisdiction being found to exist over OEVAG on claims arising from this transaction. In this regard, the Bankruptcy Judge further concluded that subjecting Immigon to personal jurisdiction in New York comported with traditional notions of fair play and substantial justice and, accordingly, satisfied constitutional due process requirements. The Court noted: (i) its strong interest in adjudicating claims brought under the Bankruptcy Code; (ii) the AAR’s strong interest in obtaining convenient and effective relief in New York; (iii) any burden on Immigon in litigating in New York was substantially mitigated by modern communication and transportation; and (iv) the fact that Immigon would have to defend itself in a foreign legal system and foreign language was inconsequential.

On the one hand, the Bankruptcy Court’s jurisdictional findings are far from groundbreaking, applying well established law to the facts at issue. The decision, however, does reveal, yet again, that a financial institution should pay particular attention to forum selection and governing law clauses — often wrongly regarded as “mere boilerplate” — to ensure that they will perform as expected.

For More Information

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1 *Motor Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A., et al.*, Case No. 09-00504 (Bankr. S.D.N.Y. February 16, 2017), at p. 6.

2 *Id.* at 7.

3 *Id.*

4 *Id.* at 19.

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