

Financial List decision favours commercial approach to interpretation of LMA standard terms

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GSO Credit - A Partners LP & others v Barclays Bank & HCC International Insurance Company Plc is only the second case to come before the new Financial List.

It has allowed the Court to provide welcome clarity on the interpretation of key terms in the May 2012 version of the LMA Standard Terms and Conditions for Par and Distressed Trade Transactions (the "LMA Standard Terms"). In doing so, the Court has put down a clear marker that it will interpret such documents in a way that seeks to (i) respect the parties' choice, (ii) understand the commercial context, and (iii) provide certainty and consistency in business matters.

Facts

In October 2007, Codere SA entered into a Senior Facilities Agreement ("SFA"), pursuant to which a number of lenders (including HCC) were required to provide credit facilities and a surety bond facility. HCC was entitled to assign any of its rights under the SFA.

In June 2013, HCC sold a €23,790,371.45 portion of its commitment under the surety bond facility to Barclays, and Barclays sold it, via back-to-back trades, to a number of Blackstone funds (including GSO Credit and the other claimants in this case ("GSO")).

The parties had different views in relation to the meaning of key terms in the LMA Standard Terms, and as a result a dispute arose as to the effects of the trades and the trades did not settle. In particular, HCC argued it had only sold its rights, and not its obligations under the SFA, whilst GSO contended that in buying a "position" under the SFA, it had bought HCC's rights and its obligations. The meaning of the term "Purchased Assets" in the LMA Standard Terms was at the heart of this aspect of the dispute.

Secondly, the interpretation of the terms "funded" and "unfunded" in the LMA Standard Terms was called into question. HCC argued that the surety bonds were funded on the basis that the facility had been drawn down by Codere. GSO disagreed, arguing the mere fact that the bonds had been issued did not mean they were funded because no money had been paid out.

The difference between the contentions of the parties set out above affected the calculation of the Settlement Amount and, indeed, whether a payment was due to or from GSO. If GSO was correct it would be entitled to be paid €5.4 million, whereas if HCC was right it would be paid €18 million. Barclays' only concern was to ensure that the LMA Standard Terms were interpreted consistently so that its back-to-back trades were truly on matching terms.

Decision

The Court's key conclusions as to the interpretation of the LMA Standard Terms were:

1. The trade will, generally speaking, include the economic burden of the seller's obligations under issued surety bonds. Whilst a trade in which a lender sells only part of a commitment under a surety bond facility, and not the surety bonds already issued under that facility is feasible, the more commercial representation of a trade of a "position" under a SFA is one extending to the rights and obligations of the lender, and that was the case in relation to the trade in dispute. The Court's decision was supported by guidance provided in the November 2012 LMA Secondary Debt Trading Documentation (Par and Distressed) User's Guide.
2. Surety bonds are generally "funded" to the extent that money has been paid by the seller under issued surety bonds, rather than to the extent that surety bonds have been issued.

Comment

The LMA Standard Terms are extremely widely used, and so this decision is welcome simply in that it provides clarity as to the meaning of its key terms. It is also of particular interest as an early Financial List judgment. The Court was clear about its obligation to interpret the LMA terms commercially and to give effect to the parties' choice. It will be interesting to see whether such a deliberately commercial approach is adopted in future cases that make their way through this specialist list.

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