

February 8, 2010

## **WEATHERING THE STORM**

### **Conditions Precedent in Term Sheets Matter**

In a decision that is not surprising, but that should be welcomed by lenders (but perhaps not by borrowers), the Appellate Division of the New York Supreme Court held in *Amcan Holdings, Inc., et al. vs. Canadian Imperial Bank of Commerce, et al.*, Case No. 603393/07, that a detailed, executed term sheet was not a binding contract to lend.

Amcan sought financing from CIBC to finance an acquisition and refinance certain existing debt. The parties negotiated a draft summary of terms, and, after further negotiation, executed a summary of terms and conditions that contained specifics on a number of the proposed financing terms, including amount, amortization, interest rate, fees, security and definitions of key terms. The executed term sheet contained a number of conditions precedent, including the "execution and delivery of an acceptable formal loan agreement and security . . . documentation, which embodies the terms and conditions contained in this Summary." Amcan paid CIBC fees upon the finalization of the draft summary of terms and upon execution of the summary of terms and conditions and agreed to pay a further fee upon closing.

Prior to the execution of the contemplated formal loan agreement and security documentation, CIBC discovered that, due to an existing injunction, Amcan was prohibited from pledging certain stock to CIBC, which pledge was a condition precedent to the closing of the financing under the executed summary of terms and conditions, and which fact CIBC claimed should have been disclosed by Amcan. Negotiations for the financing broke off and the financing was never closed. Six years later, Amcan brought suit against CIBC for, among other things, breach of contract and breach of the implied covenant of good faith and fair dealing.

In affirming and reversing holdings of the trial court, the Appellate Division of the New York Supreme Court held that, under New York law, the executed summary of terms and conditions was an agreement to agree and was not a binding contract to lend, notwithstanding the specificity of the executed summary of terms and conditions, because CIBC clearly expressed an intent in the executed summary of terms and conditions not to be bound until definitive documentation was executed. The court also affirmed the holding of the lower court that the claim of Amcan for breach of the implied covenant of good faith and fair dealing was duplicative of Amcan's breach of contract claim.

Interestingly, the court noted but apparently gave little weight to the fees paid by Amcan in connection with the draft summary of terms and the executed summary of terms and conditions, or to the fact that a stated condition precedent to the financing could not have been satisfied due to the inability of Amcan to pledge certain collateral.

Lenders and borrowers typically negotiate and execute term sheets and commitment letters prior to negotiating definitive credit documentation. Such term sheets and commitment letters are often very detailed and provide the salutary effect of facilitating the drafting and negotiation of the definitive credit documentation.

From the perspective of lenders, well written term sheets and commitment letters, like the summary of terms and conditions executed by Amcan and CIBC, contain a number of conditions precedent, including the execution and delivery of definitive credit documentation, the absence of misrepresentations by the borrower and the absence of a material adverse change. While the court in the *Amcan* case did not focus on the non-satisfaction of the latter two conditions precedent as a basis for its decision, its decision validates the usefulness of comprehensive conditions precedent in term sheets and commitment letters.

If you have any questions, please contact:

[Kenneth Rogers](#)

214.651.5951

[kenneth.rogers@haynesboone.com](mailto:kenneth.rogers@haynesboone.com)

[Lenard Parkins](#)

212.659.4966

[lenard.parkins@haynesboone.com](mailto:lenard.parkins@haynesboone.com)

[Sue Murphy](#)

214.651.5602

[sue.murphy@haynesboone.com](mailto:sue.murphy@haynesboone.com)

[Kenric Kattner](#)

713.547.2518

[kenric.kattner@haynesboone.com](mailto:kenric.kattner@haynesboone.com)

[Stephen Pezanosky](#)

817.347.6601

[stephen.pezanosky@haynesboone.com](mailto:stephen.pezanosky@haynesboone.com)

[Sarah Foster](#)

512.867.8412

[sarah.foster@haynesboone.com](mailto:sarah.foster@haynesboone.com)

[Eric Terry](#)

210.978.7424

[eric.terry@haynesboone.com](mailto:eric.terry@haynesboone.com)