

"We're caught in a trap, I can't walk out" – the latest on continuing guarantees

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PRACTICES International Arbitration

In *Euler Hermes SA v Mackays Stores Group Ltd* [2022] EWHC 1918 (Comm), the Commercial Court has considered whether a guarantor still had to pay against a demand made two months after the guarantee had been terminated. The decision helps to illustrate when guarantors remain on the hook for continuing or contingent liabilities that have arisen after the term of their guarantee has come to an end. The decision also addresses the enforceability of clauses which state that the beneficiary of a guarantee can self-certify the amount that the guarantor has to pay – so-called ‘conclusive evidence’ provisions.

The facts

The case concerned the Mackays group, a retail company which operates a chain of retail stores now trading under the “M&Co” name. In December 2013, Mackays entered into bond and guarantee facility agreement with Euler Hermes SA (“Euler”), a provider of trade credit, insurance and other financial services. This facility agreement was for the benefit of certain subsidiaries in the Mackays group, whose liabilities Euler would guarantee by entering into separate surety agreements with the subsidiaries’ counterparties. The facility agreement said that Euler would guarantee “... *the contractual obligation of* [the Mackays subsidiaries] *as required by parties contracting with ...*” them. The parties agreed that the facility agreement would remain in force until it was either (i) terminated in writing by Euler or (ii) “... *as and when Euler has been released from all liabilities and obligations under any Bonds issued under the Facility.*”

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