

NEW YORK APPELLATE COURT PROVIDES GUIDANCE ON WHEN A FINANCING TERM SHEET IS NOT A BINDING AGREEMENT TO LEND

Is a detailed, executed term sheet for financing a binding agreement to lend or an unenforceable agreement to agree? The Appellate Division of the New York Supreme Court recently addressed this question in the case of *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 2010 NY Slip Op. 00786, 2010 WL 375162 (N.Y. App. Div. 1st Dep't Feb. 4, 2010). The court held that a financing term sheet that expressly anticipates that binding terms will be established only upon completion of definitive loan documentation does not create an enforceable agreement to lend.

Amcan Holdings, Inc. ("Amcan") sought a commitment from Canadian Imperial Bank of Commerce ("CIBC") to finance an acquisition and to refinance debt. The parties negotiated a draft summary of terms and conditions and, after further negotiations, executed a detailed term sheet. The executed term sheet contained specifics on a number of items, including the borrowers, detailed descriptions of the credit lines, the amount of the financing, amortization and interest rates, fees, security, a proposed closing date, key definitions and conditions. Each of the two summaries also contained a highlighted box at the top of its first page stating: "The Credit Facilities will only be established upon completion of definitive loan documentation, including a credit agreement . . . which will contain the terms and conditions set forth in this Summary in addition to such other representations . . . and other terms and conditions . . . as CIBC may reasonably require." The executed term sheet did not contain any express provision requiring CIBC to undertake good faith negotiations to enter into definitive loan documentation.

The court noted that the executed term sheet also provided for a \$500,000 fee to CIBC, with \$50,000 payable upon acceptance of the first draft summary, \$150,000 payable upon acceptance of the executed term sheet and \$300,000 payable upon the closing of the financing. Amcan paid the first two installments, which were not refunded by CIBC when the deal terminated.

Prior to the execution of the final credit agreement and other loan documentation CIBC discovered that Amcan had failed to disclose that it was subject to a preliminary injunction which prohibited it from providing certain stock as collateral for the loans, a condition precedent to closing the deal. CIBC also discovered that an affiliate of Amcan had been held in contempt for violating the injunction, which fact CIBC claimed Amcan had not disclosed. CIBC broke off negotiations, and definitive loan documents were never executed. After a period of several years, the plaintiffs commenced the action against CIBC asserting various causes of action including for breach of contract based on CIBC's failure to close the loan. CIBC argued that the executed term sheet was not a binding agreement but a mere agreement to agree, and that the defendants did not act arbitrarily in breaking off negotiations after discovering the preliminary injunction and the contempt order.

In determining whether an enforceable contract existed between Amcan and CIBC, the court centered its inquiry upon the parties' intent to be bound. The court cited precedent for the proposition that generally, where the parties anticipate that a signed writing is required, there is no contract until one is delivered. Here, the court observed, each of the two term sheets expressly stated that the credit facilities would be established only upon completion of definitive loan documentation containing not only the terms and conditions in the term sheet, but also such other terms and conditions as CIBC reasonably required. Although the court referred to the payment of fees in its decision, it did not appear to assign weight to that fact in arriving at its conclusion. At no point, the court observed, did the parties explicitly state that they intended to be bound by the executed term sheet pending the final credit agreement, nor did they waive the finalization of such agreement. In finding for CIBC, the court stated: "The fact that the [executed term sheet] was extensive and contained specific information regarding many of the terms to be contained in the ultimate loan documents and credit agreements does not change the fact that defendants clearly expressed an intent not to be bound until those documents were actually executed."

The court's decision underscores the need when negotiating a term sheet for a financing transaction expressly to set forth in the term sheet whether or to what extent the term sheet is intended to create an enforceable agreement or is nonbinding and subject to the execution of definitive documentation.

* * * * *

If you have any questions regarding this memorandum, please contact William N. Dye (212-728-8219, wdye@willkie.com), William E. Hiller (212-728-8228, whiller@willkie.com), Michael I. Zinder (212-728-8298, mzinder@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, DC 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, DC telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at www.willkie.com.

February 25, 2010

Copyright © 2010 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information. Under New York's Code of Professional Responsibility, this material may constitute attorney advertising. Prior results do not guarantee a similar outcome.