



Emily Woodwark
Associate, Dispute Resolution

Contract interpretation of equity commitment letter (Lopesan Touristik v Apollo European Principal Finance Fund)

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Commercial analysis: This case concerned the interpretation of an equity commitment letter (ECL) governed by English law under which the defendant had agreed to provide €93m to its indirect subsidiary for it to purchase a hotel business from a third party. The share purchase agreement governing the underlying transaction never completed due to the coronavirus (COVID-19) pandemic and is now the subject of Spanish litigation. The parties asked the High Court to consider seven issues of interpretation of the ECL including whether the defendant was obliged to put its indirect subsidiary in funds in circumstances where there was a dispute regarding the underlying transaction. The High Court found against the defendant on all issues bar one. Written by Emily Woodwark, associate, Payne Hicks Beach.

Lopesan Touristik SA v Apollo European Principal Finance Fund III (Dollar A) LP and others [2021] EWHC 2141 (Comm)

What are the practical implications of this case?

M&A lawyers will no doubt be following this case with interest. The coronavirus pandemic has caused significant damage to a number of industries. Consequently, parties may well find themselves locked into purchasing assets that have significantly fallen in value since the sale and purchase agreement was signed. Paying parties are likely to be scrutinising the terms of their agreements carefully seeking ways in which they may be lawfully terminated.

In this case, the court interpreted the ECL in accordance with the established principles of construction, giving the language its natural meaning in the context of the factual matrix, despite some of the more strained interpretations suggested by the parties. It found against the defendant on all issues bar one suggesting that it

may struggle to avoid its obligations under the ECL. However, this was a decision on the preliminary issues only and it remains to be seen whether the parties will continue with the case or reach a negotiated settlement.

When parties enter into a transaction, there is always a risk that the value of the asset will decrease prior to completion. Nevertheless, parties must have certainty when they enter into agreements and this decision demonstrates that the courts will follow the normal rules of contractual interpretation even against the backdrop of the pandemic.

What was the background?

Oldavia (the indirect subsidiary of Apollo) entered into a Share Purchase Agreement (SPA) with Lopesan to purchase shares in a company which owned a hotel. The price payable under the SPA was €93m and the SPA is governed by Spanish law. In order to fund the purchase of the shares, Oldavia entered into the ECL with various Apollo entities (Apollo). The ECL is governed by English law and gives Lopesan a right (under the [Contracts \(Rights of Third Parties\) Act 1999](#)) to enforce Apollo's obligations to provide funding to Oldavia.

The Spanish tourist industry has been crippled by the coronavirus pandemic and the hotel business which was the subject of the SPA was no exception. Oldavia did not complete on the SPA and Lopesan commenced proceedings against Oldavia for specific performance of the SPA in the Spanish courts. Those proceedings have been significantly delayed by the pandemic and are currently ongoing. Oldavia is arguing that it is not obliged to complete because (among other things) Lopesan could not fulfil various warranties in the SPA due to the coronavirus pandemic and/or that the SPA had been terminated.

Against the backdrop of the Spanish proceedings, Lopesan wrote to the defendants seeking confirmation that they either had or would comply with their commitments under the ECL and put Oldavia in funds to complete the SPA. The defendants refused to provide those confirmations. As a result, Lopesan issued proceedings in the English High Court seeking an order that the defendants transfer the funds to Oldavia pursuant to the ECL. The pleadings for the English proceedings included numerous issues relating to Spanish law. The court therefore decided that there should be a non-expedited trial dealing with various preliminary issues relating to the interpretation of the ECL. The parties set out seven preliminary issues on which they wished to have a ruling. This judgment is the court's decision on those preliminary issues.

What did the court decide?

The court considered seven issues relating to the interpretation of the ECL and found against Apollo on all issues bar one: it agreed with Apollo that the only remedy available to Lopesan under the ECL was specific performance. The other main issues the court considered were as follows:

- When the funding obligation is discharged. The court considered the interplay between various scenarios including whether the obligation would be discharged upon termination of the SPA in accordance with its terms, the defendant not being unconditionally obliged to complete the SPA and failure to complete by 1 January 2021 (as specified in the ECL termination provisions). The court found that if the SPA is validly terminated in accordance with its terms, the funding obligation will also come to an end. The judge noted that the wording of the termination provisions in the ECL were not sufficiently clear to overcome the normal principle that a party cannot rely on a provision to terminate a contract if it has been triggered by the wrongful conduct of that party. Therefore, termination by Oldavia triggered by their breach would not be a valid termination
- whether Apollo would be obliged to pay the funds under the ECL if those funds were not to be used for the purposes of funding completion. The court considered that this question could not be answered definitively. It considered that the ECL was clear that funds were to be used only for the purposes of completion but the time for payment would have been at 23.59 on the day before the completion date. If the completion date had already happened (which it was suggested it had) then the question did not arise as Apollo should have already paid Oldavia the funds
- whether Apollo were obliged to pay sums under the ECL in circumstances where there was a bona fide dispute between Lopesan and Oldavia which was being considered in the Spanish Courts. The court gave this argument short shrift. Apollo could not justify its failure to comply with its obligation under the ECL by reference to the fact that Oldavia had raised a dispute under the SPA. If Oldavia establishes in the Spanish proceedings that it is not obliged to effect completion under the SPA then any funds paid to it by Apollo can be returned
- whether Lopesan had a right to require Apollo to pay the funds under the ECL to Oldavia for the purposes of enabling Oldavia to meet any claim for damages under the ECL. The court reiterated that it considered that Apollo had to fund

- Oldavia to put it in a position to complete but beyond that the court felt that this was a question for the Spanish Courts

Case details

- Court: England & Wales Commercial Court
- Judge: Christopher Hancock QC (sitting as a High Court judge)
- Date of judgment: 6 August 2021

Written by Emily Woodwark an associate at Payne Hicks Beach. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.

Payne Hicks Beach LLP
10 New Square, Lincoln's Inn, London WC2A 3QG
DX 40 London/Chancery Lane
Tel: 020 7465 4300 Fax: 020 7465 4400 www.phb.co.uk

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