ONE ESSEX COURT

RECENT DEVELOPMENTS IN BANKING LAW AND PRACTICE

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INTRODUCTION

ONE ESSEX COURT

Many recent developments. Some hot topics:

- LIBOR allegations
- Swaps
- Jurisdiction
- Recent ISDA cases
- Libyan Investment Authority cases

LIBOR ALLEGATIONS

ONE ESSEX COURT

- Increasingly topical, following the decision in *Graiseley Properties Ltd & Ors v Barclays Bank plc* [2013] EWHC 67 (Comm), Claimants are making LIBOR allegations in the context of banking disputes, even where such allegations are not obviously relevant to the dispute.
- For example, in a recent claim for misrepresentation against a bank **not** involved in setting LIBOR/STIBOR, the Claimants included allegations that by including a reference to LIBOR in the contracts, the financial institution impliedly represented:
  - That it had no reason to believe that LIBOR might not be accurate.
  - That it was not involved in making any false or misleading LIBOR submissions.
  - That it was not aware that any other banks made false submissions.
- In turn, these bare allegations are relied upon to make wide-ranging disclosure requests.

LIBOR ALLEGATIONS

ONE ESSEX COURT

- In *Deutsche Bank AG v Unitech Ltd* [2016] EWCA Civ 119 the Court of Appeal upheld Teare J's refusal to allow the defendants to amend in relation to five intended defences, including:
    - That the Bank failed to disclose to the guarantor unusual features (e.g. LIBOR manipulation) of the credit facility agreement and the guarantee was therefore discharged.
    - That the Bank's breaches of the agreements (e.g. by manipulating LIBOR) discharged the guarantor from liability under the guarantee.
- Also of interest: the Court of Appeal's statement that the court had the power to order the Ds to make an interim payment of $120m or to make leave to defend conditional on payment in of the same sum (that being the lowest possible amount owed by the Ds to the Cs). At first instance Teare J had considered (incorrectly) that he did not have the power to make either order.

LIBOR ALLEGATIONS

ONE ESSEX COURT

- *Property Alliance Group v RBS* is another LIBOR case which went to trial in June 2016: still awaiting judgment.
- Between 2004 and 2008 the claimant property investor and developer (PAG) entered into four interest rate swaps with RBS which were set by reference to the three month GBP LIBOR rate. PAG alleges that by proposing such swaps, RBS made fraudulent misrepresentations that it was not rigging the relevant LIBOR rate. RBS has admitted that it was involved in rigging the Japanese yen and Swiss franc LIBOR rates but denies misconduct in relation to the setting of any GBP LIBOR rates.

ITALIAN SWAPS

ONE ESSEX COURT

Barclays Bank Plc v ENPAM [2015] EWHC 2857 (Comm)

- ENPAM, an Italian pension fund, entered into a number of asset exchange transactions with Barclays relating to certain CDOs, each including an submission to the exclusive jurisdiction of the English courts.
- ENPAM brought (torpedo) proceedings in Italy seeking:
  - As its "main claim", compensation for pre-contractual liability (i.e. tort).
  - As "secondary claims", nullity, alternatively cancellation, alternatively termination of the transactions.
- Barclays, in turn, commenced proceedings in the English courts seeking damages / an indemnity for breach of the exclusive English jurisdiction clauses.

ITALIAN SWAPS

ONE ESSEX COURT

***Barclays Bank Plc v ENPAM* [2015] EWHC 2857 (Comm)**

BLAIR J:-

- Considered whether the English Proceedings should be stayed under Article 27 or Article 28 of the Judgments Regulation, and if not, whether Barclays should be granted summary judgment.

  - **Article 27**, the "primary" claim in tort in the Italian Proceedings was not the "same cause of action" as the claim in the English proceedings for breach of the jurisdiction clauses (at [75]).

  - Equally, the "secondary" Italian claims were not the same as the English claims: the jurisdiction clauses were severable and would not be affected by the nullity / termination of the transactions (at [80] and [81]).

ITALIAN SWAPS

ONE ESSEX COURT

***Barclays Bank Plc v ENPAM* [2015] EWHC 2857 (Comm)**

BLAIR J:-

- **<u>Article 28</u>:** Blair J refused to exercise his discretion to stay the English proceedings, on the basis of: (a) the existence of an exclusive jurisdiction clause: (b) likely delays in Italy; and (c) the structure of the Italian claims (i.e. the primary claim was non-contractual) (at [96] and [97]).

- On that basis, Blair J considered that there was no reason not to grant summary judgment to Barclays. However, indemnity not quantified summarily.

ITALIAN SWAPS

ONE ESSEX COURT

Barclays Bank Plc v ENPAM [2015] EWHC 2857 (Comm)

- The decision was appealed to the Court of Appeal.
- ENPAM sought permission to adduce new evidence of a further pleading in the Italian Proceedings – which ENPAM contended "related back" to the original pleading served and which now included the mirror image claims to those brought in the English Proceedings.
- The point raised difficult questions of seisin and amendments.
- Decision awaited.

ITALIAN SWAPS

ONE ESSEX COURT

***Dexia Credipop Spa v Comune di Prato* [2015] EWHC 1746 (Comm)**

- Interest rate swaps entered between Dexia and an Italian *Comune*, under an ISDA Master Agreement. Swaps governed by English law / English jurisdiction clauses.
- Dexia brought English proceedings seeking payment due under the Swaps. The *Comune* raised a number of defences:
  - that the Swaps were null and void under English law because the *Comune* had no capacity under Italian law;
  - that the obligations under the Swaps were unenforceable under English law as enforcing them required the *Comune* to act illegally in Italy;
  - that mandatory rules of Italian financial services law and civil law were applicable under the Rome Convention, and rendered the Swaps void;
  - other English law defences alleging misrepresentations / set-off.

ITALIAN SWAPS

ONE ESSEX COURT

***Dexia Credipop Spa v Comune di Prato* [2015] EWHC 1746 (Comm)**

Walker J:-

- Rejected the arguments that the Swaps were illegal / that the *Comune* did not have capacity to enter into the Swaps (at [42]).

- Considered that the key question was whether mandatory provisions of Italian financial services law & civil law rendered the Swaps null and void.

ITALIAN SWAPS

ONE ESSEX COURT

Dexia Credipop Spa v Comune di Prato [2015] EWHC 1746 (Comm)

- As to the applicability of mandatory Italian law:
  - Under the Rome Convention on the Law Applicable to Contractual Obligations (incorporated into English law pursuant to the Contracts (Applicable Law) Act 1990), mandatory provisions of Italian law apply if, except for an English jurisdiction clause, all other relevant elements at the time of contracting point to Italy (at [208]).
  - On the facts of the case, all elements pointed to Italy, and therefore Italian mandatory rules applied (at [211] and [212]).

ITALIAN SWAPS

ONE ESSEX COURT

***Dexia Credipop Spa v Comune di Prato* [2015] EWHC 1746 (Comm)**

- As to the validity of the swaps:
  - Based on expert evidence of Italian law, Walker J concluded that under Italy's consolidated law on financial markets and investment services (TUF), the swaps documentation should have expressly stated that the *Comune* had a 7 days grace period to withdraw from the swaps.
  - As the swaps documentation did not include such a statement, the *Comune* had the right under Article 30.7 of TUF to treat the contract as null and void.
  - Walker J did not decide whether a restitution claim would arise if the contract is null and void (at [253] to [259]), which he indicated he would consider after further submissions from the parties.
  - A further judgment from Walker J ([2016] EWHC 2824 (Comm)) held that a restitution claim by Dexia would arise, but would need to be offset against *Comune*'*s* own restitution claim in relation to the swaps under which it had paid sums to Dexia.
  - Appeal pending (scheduled May 2017).

PORTUGUESE SWAPS

ONE ESSEX COURT

***Banco Santander Totta SA v Companhia De Carris De Ferro De Lisboa SA* [2016] EWHC 465 (Comm)**

- The decision in *Dexia* was expressly not followed by Blair J, although the defendant transport companies said that it was effectively on the same facts. See particularly paragraphs 357 to 411.
- In this case all the parties were Portuguese and had entered into an ISDA Master Agreement, choosing English law and jurisdiction. The swaps were snowball swaps, with a mark-to-market value at trial of €1.3bn.
- The defendant transport companies raised the following defences:
  - They lacked capacity to enter the swaps under Portuguese law.
  - Portuguese mandatory rules applied under Article 3(3), giving rise to two specific defences: (1) the swaps were unlawful games of chance; (2) the swaps were liable to be terminated following the “abnormal change of circumstances” represented by the aftermath of the financial crisis.
  - Santander had breached the Portuguese Securities Code.

PORTUGUESE SWAPS

ONE ESSEX COURT

***Banco Santander Totta SA v Companhia De Carris De Ferro De Lisboa SA* [2016] EWHC 465 (Comm)**

- Blair J observed:
  - In international capital markets, the market is inherently international – hence parties' choice of law is very important.
  - Certainty is also particularly important, which points to a narrow interpretation of Article 3(3).

PORTUGUESE SWAPS

ONE ESSEX COURT

***Banco Santander Totta SA v Companhia De Carris De Ferro De Lisboa SA* [2016] EWHC 465 (Comm)**

- Blair J expressly disagreed with the decision in *Dexia* in holding that the following points were relevant to the determination under Article 3(3):
  - The use of ISDA or other standard international documentation.
  - The fact that the transactions were part of a back-to-back chain involving other countries.
- He also considered it relevant that:
  - Santander Portugal had the right to assign to a non-Portuguese bank, and this was important given that Santander is an international bank.
  - There was a practical necessity for a relationship with a non-Portuguese Bank.

PORTUGUESE SWAPS

ONE ESSEX COURT

***Banco Santander Totta SA v Companhia De Carris De Ferro De Lisboa SA* [2016] EWHC 465 (Comm)**

- Blair J thus held that Article 3(3) was not engaged.
- The questions of the transport companies' capacity and whether Santander had breached the Portuguese Securities Code, which were nevertheless governed by Portuguese law, were resolved in favour of the bank.
- Blair J also noted that the Portuguese Supreme Court has referred to the CJEU (in February 2016) the question of whether a swap entered into on an ISDA Master between two nationals of the same Member State has sufficient external or international elements to trigger the application of the Brussels Regulation.

JURISDICTION

ONE ESSEX COURT

- Brussels I jurisdiction
  - Recast
  - Exclusive jurisdiction clauses
  - Jurisdiction on other bases
  - Stays of related proceedings

- Common law jurisdiction (forum non conveniens)

RECAST REGULATION

ONE ESSEX COURT

- Brussels I 1215/2012 (“Recast”) applies to proceedings commenced since 10 January 2015.
- It is now being applied regularly, e.g.:
  - *Goldman Sachs International v Novo Banco SA [2016] EWCA Civ 1092*
  - *XL Insurance Company SE v AXA Corporate Solutions Assurance* [2015] EWHC 3431 (Comm)
- Impact of Recast Regulation felt in *Perella Weinberg Partners UK LLP v Codere SA* [2016] EWHC 1182 (Comm):
  - Defendant filed proceedings in Spain; Claimant challenged jurisdiction in Spain and issued proceedings in England.
  - There was a jurisdiction clause in favour of England.
  - Spanish court stayed proceedings, permitting the English court to determine whether it had exclusive jurisdiction.
  - It concluded that it did not – the clause was non-exclusive.
- Demonstrates art 31.2 (anti-torpedo provision) in action.

EXCLUSIVE JURISDICTION CLAUSES

ONE ESSEX COURT

KEY ISSUES

- Does it bind the relevant party?
  - Secondary purchasers
  - Transferees
- Does it apply to the dispute?
- Consequences of breach

SECONDARY PURCHASERS

ONE ESSEX COURT

Profit Investment Sim SpA v Ossi (C-366/13) [2016] 1 W.L.R. 3832

- A German bank (Commerzbank) issued securities indexed to credit risk, “credit linked notes” (CLNs), the conditions for which were set out in a prospectus or “Information Memorandum”.
- The prospectus contained an exclusive English jurisdiction clause.
- An English intermediary subscribed to all the CLNs available which were then purchased by the Italian claimant and its parent company.
- The reference entity for the CLNs became insolvent and the claimant brought proceedings in Italy seeking a declaration of nullity.
- There was a reference to the CJEU on whether the exclusive jurisdiction clause bound future purchasers of the bond under art 23 of Council Regulation (EC) No 44/2001 (“Brussels I Regulation”)

SECONDARY PURCHASERS

ONE ESSEX COURT

Profit Investment Sim SpA v Ossi (C-366/13) [2016] 1 W.L.R. 3832

- The CJEU held that the requirements of art 23 would only be met if the contract signed by the parties upon the issue of the bonds on the primary market expressly mentioned the acceptance of that clause or contained an express reference to that prospectus.
- Such a clause could be relied on against a third party who acquired those bonds from a financial intermediary if it was established that:
  - (i) that clause was valid in the relationship between the issuer and the financial intermediary;
  - (ii) the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds under the applicable national law; and
  - (iii) the third party had the opportunity to acquaint himself with the prospectus containing that clause.

SECONDARY PURCHASERS

ONE ESSEX COURT

Profit Investment Sim SpA v Ossi (C-366/13) [2016] 1 W.L.R. 3832

- Additionally: a jurisdiction clause could be regarded as being in a form which accorded with a usage in international trade or commerce (art 23(1)(c)), allowing the consent of the person against whom it was relied upon to be presumed, provided that it was established that:
  - (i) such conduct was generally and regularly followed by the operators in the sector concerned when contracts of that type were concluded; and
  - (ii) either the parties had previously had commercial or trade relations between themselves or with other parties operating in the sector in question, or the conduct in question was sufficiently well known to be considered an established practice.

TRANSFERRED LIABILITIES

ONE ESSEX COURT

***Goldman Sachs International v Novo Banco SA* [2016] EWCA Civ 1092**

- A finance company had loaned a Portuguese bank, Banco Espírito Santo S.A. (“BES”), US$800m.
- The bank suffered financial difficulties. As a result, in August 2014 the Portuguese central bank established Novo Banco S.A. (“NBS”) to which most, but not all, the assets and liabilities of BES were transferred.
- The claimants (assignees of the finance company) brought proceedings against NBS in England on the basis of the exclusive jurisdiction clause in the facility agreement.
- NBS challenged jurisdiction on the basis that the loan (and therefore the exclusive jurisdiction clause) had not been transferred to it.

TRANSFERRED LIABILITIES

ONE ESSEX COURT

***Goldman Sachs International v Novo Banco SA* [2016] EWCA Civ 1092**

- The issue was whether the English court had to recognise (by virtue of Directives 2001/24/EC and 2014/59/EU) a decision by the Portuguese central bank in December 2014, which purported to declare that the liability had not been transferred by the August decision.
- Hamblen J rejected NB's argument ([2015] EWHC 2371):
  - The August decision had the effect that NBS replaced BES and the December decision of the central bank did not change that.
  - (However, rejected the argument that this was not a "civil and commercial matter" within the meaning of Art 1(1) of the Recast Regulation)

TRANSFERRED LIABILITIES

ONE ESSEX COURT

- Overruled by the Court of Appeal:
  - Hamblen J proceeded on the basis that nothing less than a decision to transfer the liability back to BES which complied with Directive 2014/59 in December would be effective ([27]).
  - This was incorrect.
  - The obligation on the English courts was to give the August decision the effect it had in Portuguese law ([28]).
    - As a result of the December decision, the August decision had a more limited effect in Portuguese law than it might otherwise have had.
  - English courts were obliged to give effect to it as it constituted a “reorganisation measure” under Directive 2001/24 ([34]).

DOES IT APPLY TO THE DISPUTE? COMPETING CLAUSES

ONE ESSEX COURT

***Black Diamond Offshore Ltd v Fomento de Construcciones y Contratas SA* [2015] EWHC 1035 (Ch)**

- FCC had issued unsecured convertible notes which were subject to English law and exclusive English jurisdiction.
- FCC had also borrowed under a syndicated finance agreement subject to Spanish law and the jurisdiction of the Madrid courts.
- The claimants were both noteholders and creditors under the finance agreement.
- The finance agreement was being restructured in the Spanish courts. The claimants were opposed to this, but needed to show they would suffer “disproportionate sacrifice” if the restructure went ahead.
- Claimants sought to show this by getting a declaration from the English court that the Spanish restructuring proceedings constituted an event of default on the Notes.

DOES IT APPLY TO THE DISPUTE? COMPETING CLAUSES

ONE ESSEX COURT

***Black Diamond Offshore Ltd v Fomento de Construcciones y Contratas SA* [2015] EWHC 1035 (Ch)**

- FCC argued that:
  - The real motivation for seeking the declaration in relation to the Notes was to obtain a benefit in relation to the finance agreement.
  - The finance agreement had a Spanish exclusive jurisdiction clause, which the declaration would circumvent.
  - The dispute fell within both the jurisdiction clauses in the Notes and the finance agreement, but the latter should be given effect as it was the "commercial centre" of the transaction (applying *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585).

DOES IT APPLY TO THE DISPUTE? COMPETING CLAUSES

ONE ESSEX COURT

***Black Diamond Offshore Ltd v Fomento de Construcciones y Contratas SA* [2015] EWHC 1035 (Ch)**

- Held:
  - "*Where the dispute in question can be said to 'arise out of or in connection with' either of two different contracts which contain different jurisdiction provisions, whether it falls within one or the other depends on the intention of the parties as revealed by the agreements in the light of the transaction as a whole*" ([42]).
  - However, here there was no overlap in the jurisdiction clauses.
  - The declaration sought in relation to the notes was separate to the finance agreement, under which the issue of "event of default" did not arise at all ([44]).
  - Even if there was an overlap, the clause which was closest to the issue was that under the Notes.
- Following acceptance of jurisdiction, the claimants successfully obtained summary judgment, which was upheld on appeal: [2016] EWCA Civ 1141

BREACH OF JURISDICTION CLAUSE

ONE ESSEX COURT

- No anti-suit if Brussels I applies:
  - But theoretically possible if the claim falls outside Brussels I – e.g. matters related to insolvency: *SwissMarine Corp Ltd v OW Supply & Trading A/S* [2015] EWHC 1571 (Comm).

- Damages/indemnity
  - *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] EWCA Civ 1010 held that claims for damages/indemnity for breach of an exclusive jurisdiction clause by suing in a member state were not inconsistent with Brussels I.
  - Applied in *Barclays Bank Plc v ENPAM* [2015] EWHC 2857 (Comm) at [112]-[122].

STAYS OF PROCEEDINGS

ONE ESSEX COURT

***Marme Inversiones 2007 SL v Royal Bank of Scotland Plc* [2016] EWHC 1570 (Comm)**

- The claimant Spanish company was granted a substantial loan by a syndicate of banks, including the defendants.
- It also entered swaps with the defendants, governed by English law and subject to an exclusive English jurisdiction clause. These resulted in large losses for the claimant.
- The claimant was placed into voluntary insolvency in Spain and later liquidation. The defendant banks commenced a claim in the Spanish liquidation, challenging the way the Administrator proposed to deal with the swaps payments.
- The claimant brought proceedings in England seeking rescission of the swaps for misrepresentations relating to the manipulation of Euribor.
- The defendants sought declarations in England that they had lawfully terminated the swaps and that the claimant was liable for a certain amount.

STAYS OF PROCEEDINGS

ONE ESSEX COURT

***Marme Inversiones 2007 SL v Royal Bank of Scotland Plc* [2016] EWHC 1570 (Comm)**

- In the Spanish insolvency proceedings, the claimant brought a counterclaim under the Spanish Insolvency Law 22/2003 art.61.2, which allowed for the termination of reciprocal contracts if that was in the interests of the estate/insolvency, with the court then deciding what amount should be paid to the creditor (if any).
  - The claimant argued that there should be no payment to the defendants upon termination of the swaps.
- The claimant sought a stay of the English proceedings under art 28 of Brussels I.

STAYS OF PROCEEDINGS

ONE ESSEX COURT

***Marme Inversiones 2007 SL v Royal Bank of Scotland Plc* [2016] EWHC 1570 (Comm)**

- Argument was rejected by Blair J because:
  - The cases were concerned with different issues and had no conceptual overlap:
    - The English proceedings concerned the meaning and operation of contractual rights as a matter of English law;
    - The Spanish proceedings concerned whether the Spanish court should exercise its discretion to terminate the swaps for the good of the insolvent estate and, if so, on what terms ([57], [60]).
  - The claims had different objectives: a declaration as to contractual entitlements compared to a specific insolvency remedy ([58]).
  - There was an English exclusive jurisdiction clause which was a powerful factor against the granting of a stay ([66]).
  - The Spanish court would be assisted by the decision of the English court ([60]).
  - Therefore, it was not appropriate to stay the English proceedings.

FUTURE?

ONE ESSEX COURT

- Brussels I is an EU regulation
- What law will apply in England & Wales after Brexit?
  - Possible options:
    - New agreement with EU to apply the Recast Regulation (like Denmark)
    - Sign up to the Lugano Convention 2007
    - Hague Convention on Choice of Court Agreements 2005
    - Common law
- Of possibly greater concern, will the courts of the remaining Member States continue to respect jurisdiction clauses in favour of England?
  - Absent an additional agreement, the UK will become a “third state”.

ISDA CASES

ONE ESSEX COURT

***Goldman Sachs International v Videocon Global Limited* [2014] EWHC 4267 (Comm)**

- 2nd SJ application: The issue was the requirement of clause 6(d) of the ISDA Master Agreement that notice of such details be provided "on or as soon as reasonably practicable" following the Early Termination Date.

- Teare J held –

    - The lateness of the notice did not render it ineffective. (NB the analysis of the purpose of the notice was key to this finding – see para 12)

    - A late notice was a breach of contract and so may found an action in damages if the lateness has caused loss.

    - C was entitled to summary judgment on its claim.

- Videocon appealed.

ISDA CASES

ONE ESSEX COURT

***Videocon Global Limited v Goldman Sachs International* [2016] EWCA Civ 130**

- Court of Appeal dismissed the appeal.
- Gloster LJ reached the following conclusions about section 6:
  - The *debt* obligation arises on the Early Termination Date.
  - The amount due becomes *payable* on the day that notice of the amount payable is effective, not once adequate details had been provided (here differing from Teare J).
  - The amount due in this case therefore became payable in December 2011, after the first notice was served.
- Gloster LJ rejected Videocon's submission that this stripped the obligation to serve a statement of calculations as soon as reasonably practicable of any legal consequence, saying (in agreement with Teare J) that it was possible to conceive of actions for damages founded on late service of the calculations.

ISDA CASES

ONE ESSEX COURT

KSF v UBS AG [2016] EWCA Civ 319

- During trial KSF sought leave to amend its particulars to add several arguments attacking UBS's compliance with section 6 of IMA (In particular challenging the *reasonableness* of UBS' calculations).
- At the end of the trial, Andrew Smith J refused leave to amend and found in favour of UBS. KSF appealed, saying that it should have been allowed to amend. At the appeal, it submitted that two of its arguments were on questions of law, which it should have been allowed to argue.
- The CA dismissed the appeal. Longmore LJ issued a firm warning to practitioners that if they wanted to make arguments about the construction of the IMA in the Commercial Court, the points they were arguing had to be clear before the start of the trial.

ISDA CASES

ONE ESSEX COURT

***Lehman Brothers International (Europe) (In Administration)* [2016] EWHC 2417 (Ch)**

- Issue of contractual interest rate on early termination sums due under ISDA master agreements.
- The issue arose because in [2015] EWCA Civ 485, the Court of Appeal held that statutory interest payable under the Insolvency Rules should be distributed first out of LBIE's surplus (which existed after its provable debts had been discharged).
- IR r 2.88(9) provided that interest would be payable at either 8% or at the "rate applicable to the debt apart from the administration" – i.e. the contractual rate of interest under the ISDA agreements.
- The ISDA agreements provided for interest to be paid at a "default rate", which was defined as: "*a rate per annum equal to the cost (without proof or evidence of any actual cost) to the relevant payee (as certified by it) if it were to fund or of funding the relevant amount plus 1% per annum*"

ISDA CASES

ONE ESSEX COURT

Lehman Brothers International (Europe) (In Administration) [2016] EWHC 2417 (Ch)

- Hildyard J held that ([114]-[147]):
  - The "*cost … of funding*" referred to the cost of borrowing the relevant amount under a loan for the relevant period – either the actual cost where a party entered such a transaction or the hypothetical cost where it did not.
    - The focus was not on the cost of funding the relevant payee's assets: equity funding was excluded; hybrid means of funding could be included but only if it was possible to disentangle the interest rate element.
    - It also excluded the costs or financial consequences of carrying a defaulted LBIE receivable on the payee's balance sheet.

ISDA CASES

ONE ESSEX COURT

***Lehman Brothers International (Europe) (In Administration)* [2016] EWHC 2417 (Ch)**

- The payee's certification of its cost of funding was conclusive except where:
  - It was irrational; ([194])
  - It had not been made in good faith ([194]);
  - It included manifest numerical or mathematical error ([206]-[208]).
- The "relevant payee" was the original contractual counterparty – the sum due was limited to that which "*had become payable and would become payable to the transferor as at the time immediately before the transfer, in each case measured according to the position of the transferor*" ([261]).
  - So subsequent transfers to third party purchasers of rights against LBIE could not affect the interest rate payable.

ISDA CASES

ONE ESSEX COURT

***LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm)**

- The defendant entered an interest rate swap with a bank in connection with a loan facility. The confirmation adopted the 1992 ISDA master agreement.
- The loans were restructured and the parties executed a ISDA master agreement 2002
- There was a subsequent restructuring of the swap.
  - The restructured swap confirmation still referred to ISDA master agreement 1992.
- The bank sought to rely on termination event provisions which appeared in the 2002 master agreement but not the 1992 agreement.
- The bank assigned its right to the termination amount to the claimant.
- The claimant sought a declaration as to the construction of the interest rate swap agreement or alternatively, rectification.

ISDA CASES

ONE ESSEX COURT

***LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm)**

- Cooke J rejected the construction argument but accepted the rectification claim.
- In relation to construction ([62]), while the reference in the restructured swap confirmation to the 1992 master agreement had been a mistake, it could not be concluded that the parties' objectively expressed intention had been for the restructured swap to be governed by the 2002 master agreement:
  - "*On the face of the documents themselves, there is no ambiguity, no syntactical difficulty in construing the language used and the reference to the 1992 form of ISDA Agreement cannot be said to be such a commercial nonsense as to make it absurd for the parties to refer to it*."

ISDA CASES

ONE ESSEX COURT

***LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm)**

- In relation to rectification ([74]):
  - There was an objective common continuing intention to which the restructured swap confirmation failed to give effect.
    - There was a clear outward expression of accord that it should be governed by the 2002 ISDA master agreement.
    - This was also the subjective intention of the defendant.
  - As a result, rectification was granted.

- Shows the limits of fixing drafting errors through construction and the continued importance of rectification.

- There is an appeal outstanding.

LIBYAN INVESTMENT AUTHORITY

ONE ESSEX COURT

***Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch)**

- The Libyan Investment Authority brought a claim against Goldman Sachs International seeking to set aside a series of derivative transactions entered into in 2007 and 2008.
- The transactions were synthetic derivatives (comprising a put and a forward) used to gain leveraged exposure to shares in a number of underlying companies.
- In total, the LIA paid premiums of approximately US$1.2 billion.
- The maturity dates of all the trades were in 2011. At those dates, the relevant share prices were considerably lower than they had been in 2007/2008 and the LIA lost all its premiums.
- The LIA sought to set aside the trades on the basis that they were produced by the exercise of undue influence by GSI and were unconscionable bargains.

LIBYAN INVESTMENT AUTHORITY

ONE ESSEX COURT

***Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch)**

- The LIA's case was that GSI had taken advantage of its position as a naïve and unsophisticated institution, which did not understand the trades it had executed.

- It alleged that a relationship of trust and confidence had developed which was outside the usual banker-customer relationship.

- It also complained that the trades were priced unfairly and excessive profits had been made by the bank, and that and it had improperly influenced the claimant's deputy chairman by offering his brother an internship in London.

LIBYAN INVESTMENT AUTHORITY

ONE ESSEX COURT

***Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch)**

- Rose J dismissed the claim in its entirety:
  - There was no relationship of trust and confidence – it was a normal cordial and mutually beneficial banker-customer relationship ([278]).
  - GSI did not become a trusted adviser.
  - The relevant decisions had been made by two individuals who had experience in and a good understanding of financial concepts ([210], [212]).
    - The other LIA staff had exaggerated their lack of financial sophistication ([214]).
    - They must have understood that even in mutually beneficial commercial relationships, the parties' interests were in conflict ([225]).
  - This was not changed by the fact that the bank went "the extra mile" and built a strategic partnership with training, corporate hospitality and gifts ([278]).
  - The internship did not have a material influence on the LIA's decision to enter the transactions ([193]).

LIBYAN INVESTMENT AUTHORITY

ONE ESSEX COURT

***Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch)**

- Consequently there was no actual undue influence ([349]).
- There could also be no "presumed" undue influence because there was not a protected relationship.
  - Additionally, the transactions did not call for an explanation: there were no grounds for concluding that the banks profits were excessive ([380]) or that they were more unsuitable than other investments which the LIA had made in the same period ([424])
- As a result, the claim that the transactions were unconscionable bargains also failed.

- The decision shows that it is very difficult (but not impossible: see *Lloyds Bank v Bundy* [1975] QB 326) for undue influence to exist in a relationship between banker and customer.

LIBYAN INVESTMENT AUTHORITY

ONE ESSEX COURT

- There are a number of related proceedings concerning the LIA:
  - *Libyan Investment Authority v Societe Generale SA*: concerns allegedly fraudulent payments by SG to members of the LIA – trial expected in 2017.
  - *Libyan Investment Authority v Maud* [2016] EWCA Civ 788: held that the High Court was wrong to set aside a statutory demand on the grounds that payment of the debt would contravene the Libya (Asset-Freezing) Regulations 2011.
- There is also an ongoing issue over who is the proper person authorised by the Libyan government to act on behalf of the LIA (caused by the political issues in Libya). The litigation is currently being managed by a litigation receiver.
  - Flaux J recently refused to determine who was the proper chairman of the LIA: *Libyan Investment Authority v Codeis Securities SA* (2 November 2016)