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Loan Commitments and Agreements to Agree Under New York Law

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The recent decision in Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 2010 NY Slip Op 00786, ("*Amcan*") makes it difficult for borrowers to enforce commitments of lenders under term sheets. The Appellate Division of the Supreme Court of New York concluded that an executed "Summary of Terms and Conditions" describing a proposed financing formed only a non-binding agreement to agree, not a binding agreement obligating the lender to provide financing.

A Summary of Terms and Conditions between Canadian Imperial Bank of Commerce ("CIBC") and CWD Division and BF Rich (the "Borrower") specified terms such as the amount of the proposed financing, amortization, interest rates, fees, security, a proposed closing date and certain definitions. Conditions precedent were described in the Summary of Terms and Conditions as "Usual and customary for transactions of this type", including "Execution and delivery of an acceptable formal loan agreement and security…documentation, which embodies the terms and conditions contained in this Summary." The Borrower paid to CIBC the first two installments of non-refundable fees aggregating $300,000.

Before documentation for the proposed transaction was finalized, CIBC learned that the Borrower had not completely disclosed relevant facts, such as the fact that there was a preliminary injunction prohibiting the pledge to CIBC of shares in BF Rich as contemplated by the parties. Eventually, CIBC broke off negotiations with the Borrower and six years later, a lawsuit was brought against CIBC alleging breach of contract, breach of the obligation of good faith and fair dealing and fraud. On appeal from a decision on the defendant's motion to dismiss the complaint, the fundamental question faced by the Appellate Division of the Supreme Court of New York was whether there was a binding agreement between CIBC and the Borrower.

The Summary of Terms and Conditions contained a highlighted statement to the effect that "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 out in this Summary in addition to such other representations…and other terms and conditions…as CIBC may reasonably require." The *Amcan* decision points out that "At no point did the parties explicitly state that they intended to be bound by the Summary pending the final Credit Agreement, nor did they waive the finalization of such agreement."

Federal cases cited by the Court indicated that there are two types of preliminary contracts. "One occurs when the parties have reached complete agreement (including the agreement to be bound) on all the issues perceived to require negotiation….The second and different sort of preliminary binding agreement is one that expresses mutual commitment to a contract on agreed major terms, while recognizing the existence of open terms that remain to be negotiated." Teachers Insurance and Annuity Association Of America v. Tribune Company, 270 F. Supp. 491, 498 (SD NY 1987) ("*Tribune*"). The first type of contract binds the parties; the second only obligates the parties to negotiate open issues in good faith. Rejecting this Federal approach in favor of the approach taken in a prior decision by the New York Court of

Appeals (IDT Corp. v. Tyco Group, S.A.R.L., 13 N.Y. 3d 209 (2009)), the *Amcan* case considered only whether subsequent agreements were contemplated by the Summary of Terms and Conditions and if their consummation was a condition to performance. Because the Summary of Terms and Conditions expressly contemplated additional terms and documentation, the *Amcan* court found that the parties did not intend to be bound until documentation was final.

The Federal court deciding the *Tribune* case might have reached the same decision but probably for different reasons. The *Tribune* court said that if open terms prevent a preliminary agreement from creating a binding commitment, then preliminary binding commitments could never be binding, which is not the law. *Tribune* at 499. In that case, the preliminary commitment was found to be a binding commitment requiring the parties to negotiate "in good faith to resolve such additional terms as are customary in such agreement…." Id "The fact that countless pages of relatively conventional minor clauses remained to be negotiated does not render the agreement unenforceable." Id at 501.

However, the *Tribune* court was careful to distinguish the facts before it from situations in which preliminary agreements are not intended to bind the parties. "A primary concern for courts in such disputes is to avoid trapping parties in surprise contractual obligations that are never intended." Id at 497. The Summary of Terms and Conditions in the *Amcan* case appears to have contained terms on which the parties could not have consummated the contemplated transaction. For example, the proposed collateral could not be pledged. Under such circumstances, a court applying the standards articulated in the *Tribune* case could have concluded that enforcement of the Summary of Terms and Conditions would have been contrary to the intent of both parties.

Regardless of judicial approach, the *Amcan* case reminds lenders that careful attention to the wording of terms and conditions and commitment letters can be helpful in the event of later disputes. However, rather than treating the wording of CIBC's Summary of Terms and Conditions as a silver bullet to prevent unintended commitments, cautious lenders may want to think through whether the *Tribune* case suggests additional precautions to be taken.

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