

ARRANGER LIABILITY IN THE EURO MARKETS

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Arrangers of syndicated loans have welcomed the judgments in IFE Fund SA v. Goldman Sachs International which confirm that participants in the euro-markets will be bound by documents that they enter into and that disclaimers from liability will normally be effective in negating any duty of care of an arranger. This article discusses the effectiveness of exclusion clauses prior to these decisions, the syndication process, potential legal risks for arrangers under English law, and the judgments in this important case.

The legal obligations owed to syndicate members by banks that arrange syndicated loans has been the subject of few reported cases in the English courts. A recent case, *IFE Fund SA v. Goldman Sachs International*,¹ has confirmed that disclaimer clauses typically used in euro-market loan agreements should, generally, negate potential liabilities of arrangers, and offers a rare and important insight into the workings of arrangers and the legal risks associated with loan syndication.

SYNDICATION PROCESS

The process of arranging a syndicated loan has two principal phases. The *pre-mandate* phase is the phase during which the borrower discusses with potential arrangers/lead managers the proposed facility and then appoints or

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mandates one or more banks to act as arranger or lead manager or co-arranger or co-lead managers. The appointment will be on the basis that the lead manager's commitment to undertake the syndication is made on a "best efforts" (or "best endeavours"), "in principle," or "fully underwritten" basis although banks tend to have their own forms to set out the extent of their commitment.

In the case of a "best efforts" or "best endeavours" commitment it is worth noting the different views on what that expression means. The traditional view is that it requires a near absolute commitment; the more modern view, reflected in *Rhodia International Holdings Ltd and Rhodia UK Ltd v. Huntsmann International LLC*³ clearly weighs against the traditional view. In that case it was held that a reasonable endeavours obligation probably only requires the taking of a single reasonable course of action. A best endeavours obligation requires the taking of all reasonable courses of action and that an obligation to use "all reasonable endeavours" equates to using best endeavours. In practical terms a best endeavours obligation requires money spent and real and active effort. Thus it is not an obligation to be entered into lightly. Syndication can also be expressed to be undertaken on the basis of "reasonable commercial efforts" with arrangers only "expressing an interest" to be committed.

The second phase of syndication is the *post-mandate phase*. During this phase the syndication of the loan takes place and facility agreements are negotiated. The second phase for a conventional working capital facility probably lasts between six to eight weeks resulting in the signing of agreements. For more complex facilities, such as project finance loans and acquisition financings, the post-mandate phase is much longer.

During the post-mandate phase, up until the formation of the syndicate, the lead manager is mandated or authorized by the borrower to arrange a syndicate and raises a risk that in so doing it acts as the agent of the borrower. Thereafter, it has been generally considered, it will usually become the agent of the syndicate. The fact that the arranger possibly represents both the borrower and syndicate participants also raises a risk of potential conflicts of interest although some lawyers consider that the arranger is in the position of an independent contractor and is not an agent of either the borrower or the banks. This view is not universally held; others consider that after the grant-

ing of the mandate to the arranger, the relationship between arranger and borrower is one of principal and agent.

In the post-mandate phase the role of the arranger usually also involves selecting (after consulting with the borrower) those banks which will form the syndicate, determining the size of their respective commitments and solicitation of those commitments on a “subject to satisfactory documentation basis” from selected syndicate banks (this process is known as book-running). If an information memorandum giving information regarding the borrower is considered to be appropriate then the arranger will prepare that document in conjunction with the borrower and circulate the same to the banks.

Lastly, the arranger’s role in the post-mandate phase involves the preparation and negotiation with both the borrower and other syndicate members of facility documents and arranging of signing of documents.

POTENTIAL LEGAL RISKS FOR ARRANGERS UNDER ENGLISH LAW

General

The shifting nature of the arranger’s role vis-à-vis the borrower and the banks, reflected in the distribution of an information memorandum by the borrower and the arranger on behalf of the borrower, raises the possibility of misrepresentation risk and liability arising for inaccuracies in the information memorandum or any surrounding information passed to the banking syndicate. Liability under English law can generally arise in four ways:

- the tort of negligence;
- the Misrepresentation Act 1967;
- the tort of deceit; and
- a claim for breach of fiduciary duty.

Market convention is for arrangers to use extensive disclaimers to fend off such risks and potential liabilities.

Tort of Negligence

The basis for potential liability of an arranger in the tort of negligence arises from the case, *Hedley Byrne & Co. Limited v. Heller & Partners Limited*.³ There, the House of Lords held that where economic loss arises from negligent words, a claim in negligence may arise against the maker of the negligent statement if (1) the maker owes a duty to take reasonable care in giving advice to the recipient and (2) such duty was breached even though (3) no contract may exist between them. In *Hedley Byrne*, a bank gave gratuitous advice “without responsibility on the part of the bank or its officials,” effectively relying on a disclaimer or exclusion clause to negate liability arising from any breach of a duty of care. The House of Lords upheld the disclaimer in question.

In *Hedley Byrne*, the House of Lords also said that as a general matter, a person would not be liable in damages for a mere innocent misrepresentation unless there was a “special relationship” between the parties which created a duty of care. This is commonly known as the principle of proximity.

Following *Hedley Byrne* a number of cases wrestled with the principle of proximity culminating in another House of Lords decision, *Caparo Industries plc v. Dickinson & Other*.⁴

In this case, Caparo, a public company, acquired another public company quoted on the stock exchange called Fidelity plc in reliance on accounts prepared by Touche Ross as auditors of Fidelity plc. The accounts were allegedly inaccurate and misleading as stock was said to be overvalued and liabilities not reported correctly. An apparent pre-tax profit of £1.3 million as revealed by the accounts should, it was alleged, be reported as a loss of over £400,000.

Caparo argued that the auditors of Fidelity owed it a duty of care as investors in Fidelity not to produce accounts negligently.

The House of Lords held that the auditors did not owe such a duty to investors. However, they did owe a duty of care to members of the company but the scope of that duty did not extend to losses incurred as investors. It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of that duty by reference to the kind of damage from which A must take care to save B harmless.

The House of Lords drew a distinction between statements put in *general circulation* (which may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate) and those given in the context of a *specific transaction*. In the case of the former to hold the maker of the statement under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it would confer on the world at large an unwarranted entitlement. Of course, in practice, the position would be different if a report or information memorandum were prepared in the context of a specific transaction and it was foreseeable that a plaintiff would rely on it. Liability could attract in such a case.

In the context of syndicated lending, information memoranda are prepared and distributed by arrangers to banks for the purpose of inducing them to join a syndicate. Thus, there is likely to be sufficient proximity between an arranger and syndicate members potentially to found liability for negligent misrepresentation. Indeed a duty to take reasonable care has been held to be applicable to an arranger in an earlier case, *The Sumitomo Bank, Ltd and others v. Banque Bruxelles Lambert S.A.*⁵

The *Sumitomo Bank case* concerned a series of syndicated real estate loans arranged in the late 1990s — just before the last big property price collapse in the United Kingdom. A feature of each loan was that Banque Bruxelles Lambert S.A. (“BBL”) acted as arranger and agent bank. A second feature was that special insurance had been arranged by BBL, who alone entered into the policies for the benefit of the banks, or as agent of the banks, under which, following a borrower default and exercise of powers of sale, either 90 percent or 100 percent of the valuation of the properties would be paid out by the insurer depending upon the terms of the underlying policy. Thus, the credit risk of the borrower and the property price risk effectively transferred to the insurance companies — or so it was thought!

Disputes arose between the insurer, Eagle Star, and BBL as to whether there had been full disclosure under the policies. The syndicate lenders then sued BBL under the Misrepresentation Act 1967, in tort for negligence and for breach of fiduciary duty. They alleged BBL had not exercised reasonable care to see that the conditions precedent to drawdown of the loans were met.

The case dealt with preliminary points only but the court held that BBL owed the banks a duty of care in carrying out the disclosure obligations under the policies, and in so doing it was required to act as a skilled and competent bank; the court did not decide if BBL had actually breached that obligation. *IFE Fund SA v. Goldman Sachs International* elaborates the English law position significantly on in negligence.

Misrepresentation Act 1967

The Misrepresentation Act is the second basis upon which a claim may be made against an arranger in respect of inaccuracies or misleading information in an information memorandum.

Section 2(1) of the Act provides that where a person has entered into a contract after a representation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and he did believe up to the time the contract was made that the facts represented were untrue.

A representor can escape liability if it can establish *reasonable grounds* for believing the representation at the time it was made. This introduces a concept of negligence into Section 2(1) because if an information memorandum contains inaccuracies which the exercise of reasonable care would have avoided, then such failure to exercise reasonable care could trigger liability.

Some critics say that a weakness of Section 2(1) is that it does not *expressly* deal with omissions rather than representations, but in practice, an omission can amount to a representation so this is not an enormous hurdle in using Section 2(1) against arranger banks.

A second provision not much used in practice in the cases is Section 2(2) of the Misrepresentation Act. Section 2(2) provides that where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescind-

ed, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if it is of the opinion that it would be equitable to do so having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

This is a useful fall back provision for a plaintiff if the defendant can establish “innocence” under Section 2(1) since damages awarded under Section 2(2) are discretionary and no innocence defense appears. But Section 2(2) only renders damages available if rescission (being a retrospective cancellation of a contract *ab initio* without impinging on rights and obligations that accrued under the contract) was or is an available remedy.⁶

A few points should be noted regarding Sections 2(1) and (2). Under Section 2(1) damages can be awarded together with rescission. If there is innocence the party making the representation can have neither remedy. Second, the award of damages under Section 2(2) cannot be with an order for rescission. Third, under Section 2(2) damages are discretionary.

The cases also suggest that the manner of calculating damages under Section 2(1) and (2) are different. Consequential loss is covered by Section 2(1) not by 2(2). Damages under Section 2(1) are also likely to be greater than under Section 2(2) (*Thomas Witter Ltd v. TBP Industries*). Section 3 of the Act also renders exclusion clauses subject to the reasonableness test under the Unfair Contract Terms Act 1977 which is discussed herein.

Deceit

The third ground upon which liability could be found against an arranger for inaccuracies in an information memorandum is the tort of deceit. To make out a case of deceit, fraud must be shown which, in the case of a misrepresentation, means that a misrepresentation must have been made (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false — in effect dishonestly. If the maker of a misrepresentation honestly believed in the truth of its statement it would not be liable in deceit.

Fraud was shown to exist in *Smith New Court Securities v. Scrimgeour Vickers (Asset Management) (2) Citibank NA*⁷ where a sharebroker owned by

Citibank fully represented to another sharebroker that two buyers were bidding for shares of a troubled defense company at 81p per share to induce it to pay 82p per share. In fact, no such bids had been received and the court held that actionable fraudulent misrepresentations had been made, the tort of deceit having been committed. This cost the misrepresenter about £11 million.

Fiduciary Duties

A contentious point is whether an arranger owes fiduciary duties to a syndicate member — which the English Court of Appeal said it did in *UBAF Ltd v. European American Banking Corp.* (“EABC”).⁸

In *UBAF Ltd*, EABC invited UBAF to participate in a syndicated loan to two Panamanian shipping companies and information was supplied to UBAF directly by EABC’s assistant secretary. A loan was made of \$500,000 to each company (\$1,000,000 in all). The shipping market collapsed and the two borrowers defaulted leaving \$880,000 owing to UBAF. Amongst the contents of the letter EABC sent to UBAF was the statement that the intended loans were “attractive financing of two companies in a sound and profitable group.”

UBAF sued EABC alleging deceit or fraudulent misrepresentation, misrepresentation under Section 2(1) of the Misrepresentation Act 1967 and negligent misrepresentation under the *Hedley Byrne* principle. The case dealt with preliminary points only and the Court of Appeal seemed to muddle up the roles of arranger and agent. Nevertheless the court suggested that an arranger owed fiduciary duties to a syndicate to disclose inadequacies in the security taken. The case has been heavily criticized and must be treated with caution as a general statement of law. The issues raised probably have more relevance to the position of agent banks than arrangers.

EXCLUSION CLAUSES

In order to reduce the potential liability of an arranger to syndicate members the market practice has evolved of using disclaimers and exclusion clauses in both the information memorandum and the loan agreement.

These clauses typically provide that the arranger:

- has no obligation of any kind to any party under or in connection with any finance document;
- is not a fiduciary or trustee and has no obligation to account for profits;
- may do other business with the borrower and its group;
- is not responsible for the information in the Information Memorandum (including updating the same) or any finance document; and
- is not responsible for each bank's credit appraisal.

EFFECTIVENESS OF EXCLUSION CLAUSES PRIOR TO *IFE FUND SA v. GOLDMAN SACHS*

In assessing the effectiveness of exclusion clauses a few points should be noted. First, there are two principles of English law that reflect a tension in judicial attitudes towards such clauses. One principle is that English courts are inclined to be hostile towards exclusion clauses and construe them against the party relying on them in the case of any ambiguity. Nevertheless, if wording is *clear* and particularly if an exclusion clause is entered into by business people then, on the basis of a second principle, that of freedom of contract, the courts are likely to respect what has been agreed and avoid strained interpretations.

The operation of the principle of freedom of contract was evident in a case involving a US subsidiary of a Dutch bank, Utrecht-America Finance Company, ("UAF") and National Westminster Bank plc ("NatWest").⁹ UAF acquired NatWest's interest under a credit agreement. UAF acknowledged that Nat West should have no liability to it and that UAF should bring no action against NatWest as seller in relation to the non-disclosure of, amongst other things, material non-public information relating to the transferred assets and which may affect the purchase price. In fact, NatWest was alleged by UAF to be aware of irregularities in connection with the affairs of the borrower and related entities and in respect of asset disposals of the borrower: it was also alleged that such irregularities were concealed from UAF. The court

nevertheless upheld the exclusion clause and the “no action” obligation. By virtue of the sale agreement there was no duty to disclose such matters; this was a risk allocation expressly and freely negotiated between sophisticated parties who were of equal bargaining power and that level of disclosure and nature of the exclusion clause were reflected in the price paid for the loan asset. The seller had made no material misrepresentation which induced the contract, whether innocent, negligent, or fraudulent; had it done so the exclusion clause would probably not have operated.

Second, if a misrepresentation is fraudulent an English court will not allow an exclusion clause to extinguish liability of the fraudster! Of course, proof of dishonesty will be required and in at least one case “gross and culpable negligence” was not enough to qualify as dishonesty.¹⁰

Third, a disclaimer was effective in *Hedley Byrne* to absolve the relevant bank from liability and thus such a clause may apply to absolve an arranger who makes a negligent misrepresentation from liability. However, since *Hedley Byrne*, the Unfair Contract Terms Act 1977 (“UCTA”) has come to operate in England and its effects on commercial parties need to be considered.

UCTA restricts the operation of exclusion clauses (other than in cases of death or personal injury) only to the extent that such clauses satisfy a “requirement of reasonableness,”¹¹ having regard, amongst other things, to the parties’ bargaining power and whether the other party knew or ought reasonably to have known of the existence and extent of the term having regard, amongst other things to, trade custom and previous courses of dealing. Commentators have long asserted that controls such as UCTA have no application in arms-length, commercial contracting between financial institutions and the prevailing view in practice is that experienced and sophisticated lenders making investment decisions based on legal advice should not avail themselves of UCTA. Thus, the conventional wisdom, pre *IFE Fund v. Goldman Sachs*, was that generally an exclusion clause should prevail to protect an arranger in respect of the tort of negligence. In *NatWest Bank v. Utrecht-American Finance Co.*, one can see a willingness of the English courts to uphold as “reasonable” exclusion clauses between sophisticated financial parties of equal bargaining power — indeed it was acknowledged that the price paid reflected the commercial risk accepted by the purchaser.

Fourth, in so far as liability under the Misrepresentation Act is concerned, Section 3 of that Act limits exclusion clauses to the extent that they are reasonable under UCTA. Thus exclusion clauses should generally be effective to negate liability of banks in transactions with one another under the Misrepresentation Act on the basis set forth in *NatWest Bank v. Utrecht-American Finance Co.*

Fifth, if *UBAF Ltd v. European American Banking Corporation* is correct and liability as a fiduciary could attach to an arranger could an exclusion clause work to absolve an arranger from such liability? It should, except in cases of fraud given that it is possible by contract to vary and limit fiduciary liabilities.

THE TRICONTINENTAL CORPORATION CASE

One of the best known cases on arrangers' liability prior to *IFE Fund* was the Australian case of *NatWest Australia Bank Ltd v. Tricontinental Corporation Ltd*.¹² The case highlighted that an arranger will not always win a case based on exclusion clauses (even if that may be the general result).

NatWest sued the arranger and agent, Tricontinental Corporation Ltd, of an A\$50 million loan to a media company, Pro-Image Studies Ltd, with operations in Sydney. Tricontinental had done previous lending business with Pro-Image and was aware of two guarantees granted by Pro-Image to the ANZ Banking Group Ltd (\$26M) and to Tricontinental itself (60 percent x \$33M). This information was not included in the information memorandum or accounts of the borrower provided to NatWest. Also, NatWest made an express request to Tricontinental to find out the extent of the borrower's contingent liabilities but was not given information on the guarantees.

When Pro-Image went into insolvency NatWest sued under a specific provision of Australian law¹³ which prohibited misleading and deceptive conduct in business. NatWest also alleged that Tricontinental breached its common law and fiduciary duties in failing to disclose to it the existence of the guarantees because if it had known of them, NatWest said it would not have participated in the financing in the amount of A\$10 million.

Tricontinental was held to be negligent and liable in damages to NatWest. The exclusion clauses in the agreement did not operate to avoid

liability because there had been a specific request made to Tricontinental concerning the contingent liabilities of Pro-Image and McDonald J, in the Supreme Court of Victoria, said: "*Absence of such a specific request may lead to a different conclusion but that is not necessary to consider in the case*" The court found it unnecessary to determine NatWest's other claims against Tricontinental.

IFE FUND v. GOLDMAN SACHS

The English High Court and the English Court of Appeal have now added to the discussion over arranger's duties and liabilities in *IFE Fund SA v. Goldman Sachs International*.¹⁴

IFE Fund was a Belgian vehicle established to invest in mezzanine or intermediate finance opportunities. Goldman Sachs arranged and underwrote a variety of senior and mezzanine finance facilities to Autodis, S.A., a French company, to enable it to acquire an English company, Finelist Group Plc. The Finelist acquisition was a financial disaster. Finelist's accounts had been misrepresented and its auditors had been deceived through intragroup money transfers which presented a false picture of Finelist and its affiliates.

Autodis formally retained Goldman on January 21, 2000 to act as its adviser in connection with the acquisition (Goldman had been informally involved from late 1999). Autodis also formally retained Arthur Andersen on December 6, 1999 to carry out a review of Finelist's financial affairs. In early March 2000, Goldman sent copies of a syndication information memorandum ("SIM") to investors including IFE Fund. It included reports from Arthur Andersen on Finelist dated December 21, 1999 and subsequent to that date.

On May 19, 2000 and May 26, 2000, Arthur Andersen sent draft reports to Goldman on Finelist Group Plc stating financial due diligence work was progressing slowly due to lack of access to the management team. The report of May 19, 2000 contained a bullet point stating "*the engagement was established at risk level 4, on a scale of 1 to 5 where 5 is maximum.*" These reports were not sent to IFE. They aroused concern in Goldman as someone wrote on them "not going to help syndication." Also an email was sent by Goldman to Arthur Andersen indicating that the May 19th report "*does not*

sound too rosy.”

Syndication of mezzanine bonds to be acquired by IFE closed on May 30, 2000. The takeover of Finelist occurred around that time.

On June 27, 2000 and July 20, 2000, Arthur Andersen produced revised reports. On August 23, 2000 and September 29, 2000, Arthur Andersen reported on concerns and inadequacies in Finelist's financial statements. Deliberate manipulation of historic earnings and suppression of debts in the group were identified. On October 5, 2000, Finelist went into administrative receivership.

In July 2001 a restructuring of the capital and debts of the Autodis Group took place. IFE joined Goldman and shareholders and creditors of Autodis and injected a further £4.5 million in equity and new bonds of Autodis pursuant to a Bondholders' Agreement. In clause 16.4 of the Bondholder's Agreement the parties agreed not to sue one another. IFE did not sign the agreement on June 29, 2001 as other creditors did because it sought to reserve its legal position to sue any party whose acts or omissions had contributed to IFE's decision to invest in Autodis. IFE finally did sign on July 3, 2001 but again tried to reserve its position which the Bondholders' representative subsequently rejected. IFE finally made its further injection of capital in Autodis which was approved by the French courts.

IFE subsequently sued Goldman arguing that if it had seen the reports of May 2000 it would not have entered into the syndication. Goldman relied on express disclaimers in the SIM which are customary in the euro markets. (Indeed IFE used the same disclaimers when it acted as an arranger or underwriter of syndicated financings!). These included disclaimers that Goldman: (1) had not independently verified the contents of the SIM; (2) made no representation, warranty or undertaking, express or implied as to the accuracy or completeness of the SIM; and (3) that it was under no obligation to update the information in the SIM. Further, Goldman argued that by virtue of entering into the Bondholders' Agreement, IFE had waived any claims it had against Goldman.

The High Court found for Goldman, as did the Court of Appeal subsequently. The High Court held that a euromarket syndication was a transaction between financially sophisticated parties who should be expected to allocate their own responsibilities and risks. Moreover, the mezzanine syndica-

tion involved several interlocking contractual relationships defined in documents drafted by specialist lawyers. The court should, the judge said, be slow to superimpose obligations going beyond the obligations carefully defined in such documentation.

In the judge's view, the SIM had to be read as a whole to see what a reasonable participant would understand was the scope of Goldman's responsibilities. Goldman had made no implied representation that the SIM was correct and subsequent information received by Goldman from Arthur Andersen did not impose on Goldman a duty to update the SIM, nor to investigate new information received nor to advise potential participants of new information. Indeed, the terms of the SIM prevented any such implied representations or duties from arising. In fact, the evidence of IFE's key employee responsible for its investment in Autodis was unhelpful to IFE as it supported the case that IFE understood that no such implied representation had been made to it. The Court of Appeal agreed with the High Court on this point. Waller LJ (with whom Gage LJ and Lawrence Collins LJ agreed) said that the argument that some "free standing" duty of care was owed by Goldman to IFE was "hopeless" given the disclaimers in the SIM. Waller LJ also said:

"The foundation for liability for negligent misstatements demonstrates that where the terms on which someone is prepared to give advice or make a statement negatives any assumption or responsibility, no duty of care will be owed. Although there might be cases where the law would impose a duty by virtue of a particular state of facts despite an attempt not "to assume responsibility" the relationship between [Goldman] either as arranger or as vendor [of bonds] would not be one of them."¹⁵

Moreover, Waller LJ held that as a contract of sale of bonds was involved between Goldman and IFE, IFE's sole remedy in the event of a misrepresentation was limited to the Misrepresentation Act and there was "*no room*" for IFE to succeed on some other case of negligent misstatement. In any event, no representation had been made or implied by Goldman (as spelled out in the terms of the SIM). As mentioned, the SIM disclaimer wording said that no representations had been made at all by Goldman, rather than trying to

exclude liability for inaccurate representations which had been made. Consequently, UCTA did not apply to such wording as it did not amount to an exclusion under the Act. Moreover, as no representations had been made by Goldman, the Misrepresentation Act 1967 did not apply.

In the High Court, the judge also said that Goldman made an implied representation that it was acting in good faith and that it would not knowingly put forward information likely to mislead IFE. Goldman had no “*actual knowledge*” that the information supplied by it was misleading. Goldman merely had received information that gave rise to a “*possibility*” that the earlier information it had circulated to the syndicate may be misleading. Given the terms of the SIM, Goldman was under no duty to investigate the information in the SIM further or to update potential participants. On the matter of Goldman making an implied misrepresentation of acting in good faith, Gage LJ (with whom Lawrence Collins LJ agreed) in the Court of Appeal also agreed with the High Court. (Waller LJ did not expressly comment) on this point. Gage LJ said that had Goldman had the requisite “*actual knowledge*” referred to by the judge in the High Court, this would have amounted to dishonesty or bad faith which had been never alleged by IFE.

Lastly, both the High Court and Court of Appeal agreed, after considering detailed points of French law, that the terms of the Bondholders’ Agreement were sufficient also to scupper the claim against Goldman, since those terms amounted to a waiver of IFE’s claims against Goldman.

DISCUSSION

Arrangers of syndicated loans have welcomed the judgments in *IFE Fund v. Goldman Sachs* which confirm that participants in the euromarkets will be bound by documents that they enter into and that disclaimers from liability will normally be effective in negating any duty of care of an arranger. Where an arranger has “actual knowledge” that information it holds renders an information memorandum previously circulated materially incorrect it will be bound to make disclosure but not otherwise. The judgment in *IFE Fund* sits well with the *Hedley Byrne* case and *NatWest Bank v. Utrecht-American Finance Co* which emphasize that freedom of contract will be respected between sophisticated financial parties.

For potential participants the case has important commercial implications. It shines a light on the shifting nature, interests and responsibilities of arrangers who cannot, commercially, be considered as representing the interests of the syndicate, particularly when armed with an array of contractual disclaimers negating responsibility. The result in *IFE Fund* points to the conclusion that arrangers should commercially be viewed by syndicate participants as agents of the borrower (a view taken by Toulson J) or as independent contractors whatever the precise legal position may be.

Syndicate members also cannot presume that information identified by an arranger as possibly being detrimental to a successful syndication will be required to be disclosed to them unless non-disclosure constitutes the arranger acting in bad faith by, say, it having actual knowledge that information previously circulated by it was materially misleading. In this regard, Toulson J's comments in the High Court are clear: "*in general a party involved in negotiations towards a commercial venture owes no positive duty of disclosure towards another prospective party.*"⁶ Whilst no legal obligation required Goldman to make disclosure, the failure to disclose proved disastrous for the borrower and syndicate members who may not have otherwise invested in the transaction. Such failure may, itself, be potentially damaging to the reputation of an arranger.

Similar disclaimers to those used in the *IFE Fund* case are used by banks and multilateral agencies in bilateral sub-participations and B loan arrangements with other banks by which loan commitments are "sold down" or transferred. Accordingly, disclaimers in such sub-participation documents are likely to be similarly effective as those in the *IFE Fund* case (although, of course, specific documents require examination to confirm this).

Potential participants will, in general, need to be more vigilant in scrutinizing transactions; for example, some institutions barely read information memoranda presented to them. Had *IFE Fund* asked Goldman, before funding, if the arranger had received any new information regarding the financial status of the target and which indicated that previous reports of investigating accountants were materially incorrect or that might otherwise be detrimental to syndication *IFE Fund* would, no doubt, have received an answer making the Fund pause before investing. Such vigilance, which was a feature of the *Tricontinental* case (and a key reason for liability arising in that case),

often arises in market practice but should become more evident in future. Indeed, arrangers' responses to requests for information by syndicate members remains an area of real potential risk since representations may be made in such responses without the benefit of disclaimers and notwithstanding that loan documentation may state otherwise.

NOTES

¹ [2007] EWCA Civ 811.

² [2007] EWHC 292 (Comm).

³ [1963] 2 All ER 575

⁴ [1990] All ER 568.

⁵ (1996) ECGS 150.

⁶ *See Thomas Witter Ltd v. TBP Industries*, [1996] 2 All ER 573.

⁷ [1996] 4 All ER 769.

⁸ [1984] 2 All ER 226.

⁹ *National Westminster Bank plc v. Utrecht-American Finance Co.* [2001] 3 All ER 733.

¹⁰ *See Armitage v. Nurse* [1997] 2 All ER 705.

¹¹ Section 11, UCTA.

¹² Unreported, No. 2493 of 1990, Supreme Court of Victoria.

¹³ Section 52, Trade Practices Act 1974. The provision was initially introduced as a piece of consumer protection law but has come to be used widely by business interests against one another.

¹⁴ [2006] EWHC 2887 (English High Court) and [2007] EWCA Civ 811 (English Court of Appeal).

¹⁵ [2007] EBV CA CIV 811 (para 28).

¹⁶ [2006] EWHC 2887 (Comm) (para 64).