P.R.I.M.E. Finance

Panel of Recognized International Market Experts in Finance

Topic III: Admissibility of Expert Evidence to Aid Contract Construction

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New York Law On Contract Interpretation

- Contract interpretation is a question of law and the province of the Court.
- "Plain meaning" analysis
  - A contract is construed according to the plain meaning of its terms.
  - The rule applies with "greater force to commercial contracts negotiated at arm's length by sophisticated, counselled business people."
    - *Ashwood Capital, Inc. v. OTG Mgmt., Inc*., 99 A.D.3d 1, 7, 948 N.Y.S.2d 292, 297 (1st Dep't 2012)
- The intent of the parties is gathered from the whole instrument
  - In an unambiguous contract, a court will consider the terms of the overall contract to determine the parties' manifested intent.
    - *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009)

New York Law On Contract Interpretation

- "Four corners" analysis
  - A court will look within the four corners of the document
    - Extrinsic evidence is generally disfavoured
  - In a clear, unambiguous contract, the intent of the parties must be found within the four corners of the document
    - 2 Glen Banks, *N.Y. Prac. Series – New York Contract Law* § 9:2 (2018)
- Each word of the contract must be given meaning
  - Courts prefer interpretations of a contract that do not leave any term "useless," "inexplicable," or "superfluous."
    - *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 558 (2d Cir. 2000)

New York Law On Contract Interpretation

- What then is an ambiguity?
  - When the terms "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the ***customs, practices, usages and terminology as generally understood in the particular trade or business***."
    - *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp*., 595 F.3d 458, 466 (2d Cir. 2010) (emphasis added)
  - If there is ambiguity, a court will look to extrinsic evidence as to the parties' intent.
    - *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009)
    - *SR Int'l Business Ins. Co., Ltd. V World Trade Center Properties, LLC*, 467 F. 3d 107, 134-35 (2d Cir. 2006)
  - Does this include the drafting history of the document?
  - Generally no

Evidence of Custom And Usage

- In New York, evidence of custom and usage of a term is admissible but only if the proponent of the evidence can demonstrate:
  - "The term in question has a fixed and invariable usage."
  - "The party sought to be bound was aware of the custom, or that the custom's existence was so notorious that it should have been aware."
    - *SR Int'l Business Ins. Co., Ltd. V World Trade Center Properties, LLC*, 467 F. 3d 107, 134 (2d Cir. 2006)
- Such custom and usage can be established through expert testimony
  - Once the evidence is deemed admissible by the Court as a matter of evidentiary law, it is up to the fact finder to determine whether (and to what extent) such usage exists as a question of fact. *SR Int'l Business Ins. Co., Ltd. V World Trade Center Properties, LLC*, 467 F. 3d 107, 134 (2d Cir. 2006)

Evidence of Drafting History Of Standardized Contracts

- In the ISDA context, parties frequently have sought to introduce evidence of drafting history of ISDA terms and definitions to advance particular arguments. *See, generally, In re Lehman Brothers Holdings, Inc.*
  - Generally, such ISDA experts do not purport to offer custom and usage evidence.
  - Rather, these experts have sought to introduce drafting history couched as custom and usage.
- Throughout *Lehman*, many ISDA experts submitted affidavits and expert reports concerning the construction of particular ISDA terms and practices under those ISDA terms.
  - These experts, all steeped in ISDA experience, often offered differing views on the drafting history and took diametrically opposite views on the construction of those terms.
- The Court generally did not allow such testimony as evidence it would consider in construing the standard ISDA terms.

Admissibility of Drafting History

- *Lehman Brothers Special Financing Inc. v. Federal Home Loan Bank of Cincinnati*, No.13-01330-SCC (Bankr. S.D.N.Y. 2013)
  - Expert testimony regarding ISDA construction was profferred, but none was admitted.
  - ISDA experts submitted expert reports and affidavits and were deposed, but none were called to the stand.
  - Case settled mid-trial, so the issue was never definitively addressed.
- Judge Chapman on ISDA expert testimony:
  - "The point is this, though. I don't -- I am [sic] to going to hear or use expert testimony in order to interpret the meaning of the language in the ISDA, period. Just not -- that's my job. It's a contact, I'm going to interpret it." Hearing Tr. 42:17-20 (Nov. 22, 2016)
  - "I mean, I will cut -- if an examination begins to tell me how to construe, as a legal matter, the words, not really going to -- I'm not going to be interested in that. It's not what an expert -- not what's appropriate for an expert to do." Hearing Tr. 43:9-13 (Nov. 22, 2016)
- *But see In re Lehman Bros Holdings Inc*., No. 08-13555 SCC, 2015 WL 7194609, at *12, n. 75 (S.D.N.Y. Sept. 16, 2015) (citing Golden Expert Report at ¶¶ 38, 39, 41.)
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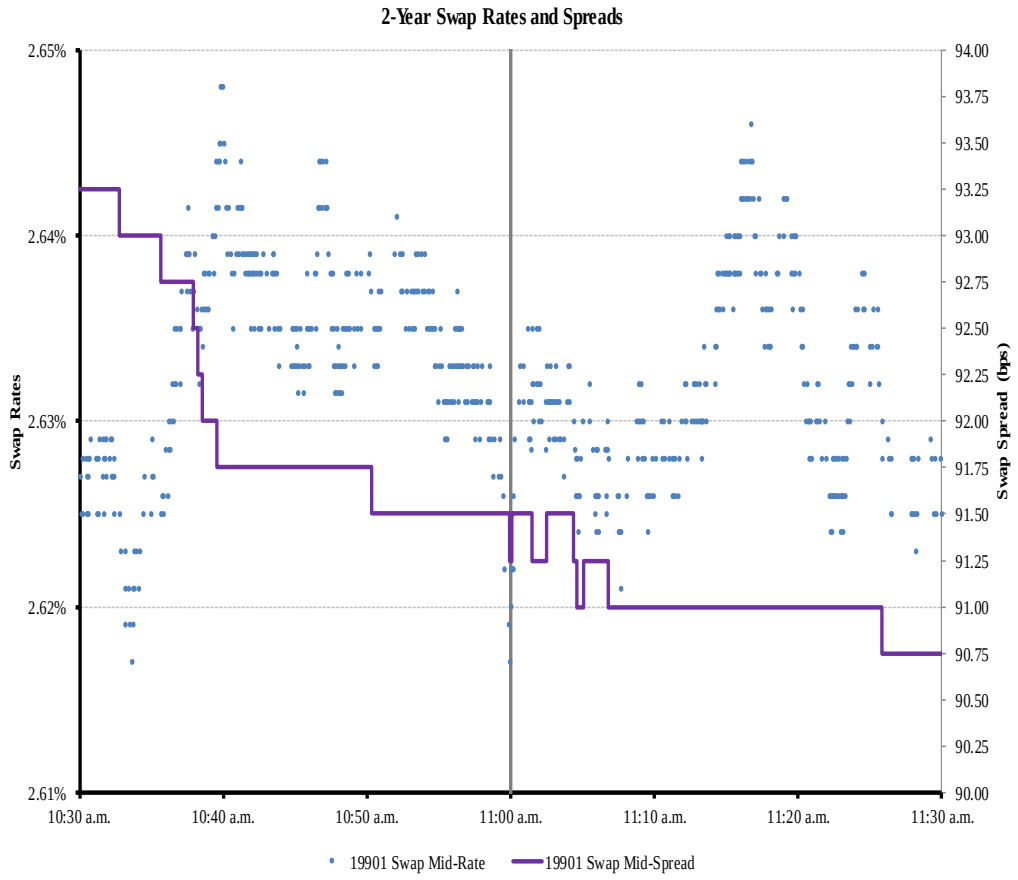
Admissibility of Drafting History

- "A second commercial objective on our part in drafting the ISDA standard-form documents was mitigating the risk of fact-specific disputes and the attendant risk of protracted litigation .... Setting specific fixing times or prices was not the game. Neither was searching for the 'correct' or 'perfect' (or even 'best') answers. The goal was to stay within acceptable parameters based on the particular objectives of the parties. In 1992, this goal was reflected in the general terms of reasonableness and good faith.…The drafters intended to build into the definition of Loss a contractual privilege for the non-defaulting party to make its own determination, and we assumed that the situations when a court would interfere with the exercise of that contractual discretion would be extremely limited."
  - *In re Lehman Bros Holdings Inc*. *(Intel),* No. 08-13555 SCC, 2015 WL 7194609, at *12, n. 75 (S.D.N.Y. Sept. 16, 2015) (citing Golden Expert Report at ¶¶ 38, 39, 41.)
- *Intel* also cites ISDA's *amicus* brief. *Id.* at n. 71.

Admissibility of Drafting History

- There may be a broader role for drafting history in arbitrations and proceedings before the ISDA determinations committee. *See* The External Review Panel, U.S. Determinations Committee for Issue # 2018101502 (Sears).
- "We believe that the definition of Consent Required Loan ***is deliberately general***, but we do not believe that makes the definition ambiguous. It is the nature of a relational contract, like the ISDA Master and the transactional confirmations and the terms incorporated by them, that ***it will include language that is general to accommodate the variety of fact patterns to which such language will apply***. In order to ascertain the meaning of Consent Required Loan, therefore, the business purpose sought to be achieved by the drafters of the ISDA standard documentation is relevant."
  - The External Review Panel of the U.S. Determinations Committee for DC Issue 2018101502 (Sears), ¶ 3 (December 21, 2018)
  - Panel Members: Andy Brindle, Jeffrey Golden, Charles Whitehead

An Economist's Perspective



Notes and Sources:
Data from Reuters page 19901.

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