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FOREIGN PARTIES - IGNORE ENGLISH PROCEEDINGS? BEWARE...

The Court of Appeal has dismissed the appeal of the Italian public authority, Regione Piemonte in its protracted litigation with Dexia Crediop S.p.A. concerning Swaps derivative contracts entered into in 2006.

The Court of Appeal upheld the Orders of Mr Justice Cooke and Mr Justice Eder made in the Commercial Court in July 2012 and July 2013, who confirmed the full validity and efficacy of those contracts, ordering Regione Piemonte to pay a sum of over Euro 16 million to Dexia.

The issue on appeal

On 16 November 2006 Regione Piemonte, an Italian Regional Authority, entered into certain derivative transactions with two Italian banks, in connection with the issue by it of two bonds. One of the transactions was with Dexia Crediop S.p.A ("Dexia"). The agreements for the transactions provided that they were to be governed by English law and each party irrevocably submitted to the jurisdiction of the English Courts.

In August 2011 the banks brought two separate actions seeking declarations as to the validity of the transactions. The proceedings were served on Regione Piemonte which did not file any Acknowledgment of Service form in response. On 24 July 2012, Cooke J made the declarations sought by the banks, following which in February 2013 the banks brought new actions against Regione Piemonte, claiming substantial sums said to be due under the transactions and sought summary judgment. Shortly before the hearing Regione Piemonte applied to set aside the judgment of Cooke J. In July 2013, Eder J declined to do so and gave monetary judgments in favour of the banks. The question in the appeal was whether the Judge was in error in so doing.

The leading judgment of Lord Justice Clarke raises the following significant considerations:

1. The test for setting aside a default judgment and the application of Civil Procedure Rules (CPR)13: in particular, the promptness with which the defendant makes an application to set aside a default judgment will always be a factor of considerable significance: if there has been a marked failure to make the application promptly, a court may well be justified in refusing relief, notwithstanding the possibility that the defendant may well succeed at trial. It is such an important factor because of the public interest in the finality of litigation, the need under the CPR to act expeditiously, and the requirement to have regard to the proper allocation of courts' resources.

   CPR 13 makes clear that (i) the power to set aside a default judgment is discretionary; (ii) that the question as to whether the application has been made promptly is a mandatory and important consideration. It follows that a court may be entitled to refuse to set a judgment aside even if the defendant shows a real prospect that it may or might succeed in its defence at trial.

   However, there is no arbitrary time limit and each application to set aside will be decided on its own facts. Furthermore, this does not mean that the Court will not to some extent, take into consideration the merits of any defence. The stronger the merits (and any justification for the delay) the more likely it is that the Court may be prepared to exercise its discretion to set aside a judgment regularly obtained despite the delay, and *vice versa*. That is not to say that a real or even a good case on the merits will usually lead to the judgment being set aside despite

significant delay, since delay is now a much more potent factor than previously. If there is a marked and unjustified lack of promptness, that itself, may now justify a refusal of relief because the delay is a factor that outweighs the defendants' prospects of success.

2. The Court of Appeal rejected Regione Piemonte's argument that it had acted reasonably in deciding not to file an acknowledgment of service form and not engage in the English proceedings, which decision was based on the view taken by its Italian legal advisors, the advice received from the Corte dei Conti that Italian local authorities should exercise their self-redress powers (*autotutela*) and because the validity of *autotutela* was a question of Italian law.

   The Judge was quite entitled to take the view that a defendant who deliberately ignored proceedings duly instituted and properly served did so at its peril, particularly where that defendant had expressly and irrevocably agreed on English law and jurisdiction to govern the relationship. Whatever merits might exist in the Italian self-redress process provided no justification for the decision of Piemonte to ignore the English proceedings.

3. The delay was sizeable and its character provided cogent reason not to exercise the discretion in Piemonte's favour.

4. Nonetheless, the Court of Appeal then went to consider whether the defences put forward by Piemonte had real prospects of success and concluded that, on the evidence, there did not appear to be such prospects. Furthermore, as Piemonte had expressly agreed in the derivative contracts to the application of English law and jurisdiction, this gave rise to a contractual estoppel, which was an influential factor in the Court of Appeal's view on the defences.

It will be interesting to see what repercussions, if any, the Court of Appeal's views on the defences might have on other cases involving Swaps contracts entered into by Italian public authorities, pending before the English Commercial Court.

This is only a brief introduction and does not constitute or replace legal advice.

If you require further detailed information or assistance, please do not hesitate to contact us.

PINI FRANCO LLP

22-24 Ely Place, London EC1N 6TE

Tel: 0207 566 3140

Fax: 0207 566 3144

Email: info@pinifranco.com **www.pinifranco.com**