

# Insight

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## Syndicated credit facilities – provision of information by arranger

Earlier this week, a judgment of the Commercial Court provided a useful example of the risks faced by arrangers where they receive information relating to an investment after the date of the information memorandum.

Assuming that the information memorandum includes disclaimer wording in the common form, the only implied representation given by an arranger to a participant is that it is not knowingly providing information that is likely to mislead. This representation is a continuing one and so brings with it a duty of disclosure in appropriate circumstances.

The difficulty faced by arrangers will be to determine whether information received after the date of the memorandum renders previously disclosed information misleading or whether it merely gives rise to a possibility that it is misleading. If the latter, there is not a duty to a participant to investigate or to disclose.

In this case, Goldman Sachs International ("Goldman"), was the arranger and underwriter of syndicated credit facilities provided to a French company, Autodis SA ("Autodis") in order to finance its takeover of an English company, Finelist Group plc ("Finelist"). The Claimant, IFE Fund SA ("IFE"), participated in the mezzanine facility, acquiring certain Autodis bonds and warrants from Goldman.

Autodis' acquisition of Finelist proved to be disastrous. It transpired that Finelist's financial position was worse than had been shown in its audited accounts and that it had deceived its auditors in order to present a

false picture of the group's financial position. In October 2000 Finelist was put into receivership.

IFE claimed that it had been induced to enter into the transaction by information provided by Goldman which was misleading and was not corrected or qualified after Goldman had cause to doubt its reliability. It sought damages for misrepresentation and negligence (the negligence being either in the form of negligent misstatement or breach of a duty of care to inform).

### IFE's involvement in the mezzanine syndication

Goldman sent IFE a syndication information memorandum ("SIM") which contained an overview of Finelist, presenting a positive view of the company. The SIM also contained a summary of financial information drawn from IFE's audited accounts, senior management and reports prepared by Arthur Andersen ("AA's First Reports").

The SIM began with an "Important Notice" (running to three pages) which included the following: *"the Arranger [Goldman Sachs] has not independently verified the information set out in this memorandum. Accordingly, no representation, warranty or undertaking, express or implied, is made and no responsibility is accepted by Goldman Sachs International...as to or in relation to the*



### In Brief

- An information memorandum will be read on its own terms: would a reasonable person (with the relevant market sophistication) understand it to be making representations (express or implied) on behalf of the arranger?
- A duty to investigate and/or disclose arises where the arranger becomes aware that previously supplied information is misleading: an implied and continuing "good faith" representation.
- In general, a court will not impose a duty of care upon an arranger towards a participant.

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accuracy or completeness or otherwise of this Memorandum or as to the reasonableness of any assumption contained therein or any other information made available in connection with the Facilities (whether in writing or orally) to any interested party (or its advisors)..."

The "Important Notice" went on to state that "the arranger does not undertake to review the financial condition, status or affairs of Autodistribution, Finelist or any of their affiliates or any obligor in respect of the facilities, at any time or to advise any potential or actual participant in the Facilities of any information coming to the attention of the Arranger."

Subsequent to the SIM, Goldman received two further reports from Arthur Andersen. IFE claimed that these reports should have caused Goldman to doubt the reliability of the First AA Reports. The Court accepted IFE's position that it would not have acquired the Autodis bonds and warrants if these further reports had been disclosed to it.

#### IFE's claim

IFE claimed that by referring to Finelist's financial performance and to AA's First Reports in the SIM, and by subsequently arranging for Arthur Andersen to provide these reports to IFE, Goldman impliedly represented that it was not aware of any facts which showed that the statements made about Finelist's financial performance in the SIM, or the facts or opinions stated in AA's First Reports, were or might be inaccurate in any material way.

#### The decision

The Judge observed that it was clear from Arthur Andersen's reports that Arthur Andersen had limited information about Finelist. Without the complete picture, it could be difficult to judge whether some particular piece of information "might" make the statements about Finelist's financial performance incorrect, and if so, "in a material way." The Judge also observed that an implied representation of the scope contended for by IFE would potentially require Goldman

to carry out an evaluation in order to decide what information it was required to disclose. This would be inconsistent with the express language of notice in the SIM.

The Judge concluded that IFE's evidence did not support its case that a reasonable person would have understood that Goldman was making the alleged implied representations. He did state, however, that it was not the case that Goldman made no implied representations at all. There was an implied representation that "in supplying the SIM it [Goldman] was acting in good faith, that is, not knowingly putting forward information likely to mislead."

The Judge drew a distinction between a situation where Goldman had "actual knowledge" that the information previously supplied was misleading and one where Goldman acquired information merely giving rise to a "possibility" that the information previously supplied was misleading. He held that in this latter case Goldman would not be under a duty to investigate the matter further, or to advise the potential participant, in view of the terms of the SIM.

In addition to rejecting IFE's allegation of misrepresentation and negligent misstatement, the Judge rejected IFE's claim that Goldman owed it a duty to take reasonable care to inform it if, before it acquired the Autodis bonds and warrants, Goldman became aware of any facts and matters which showed that the statements and opinions set out in the SIM and/or AA's First Reports were or might be incorrect in any material way. The Judge stressed that Goldman was not acting as an adviser to IFE or purporting to carry out any professional service for IFE, as the terms of the SIM made plain. Goldman was acting for the sponsors and not on behalf of the recipients of the SIM. In these circumstances there was no ground on which it would be fair to impose on Goldman the duty of care contended for by IFE.

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