

P.R.I.M.E. Finance
Panel of Recognized International Market Experts in Finance

UNHAPPY ARRANGEMENTS?

An Arranging Bank's Duties in a Securitisation



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Basic principles of English commercial law

- Where sophisticated parties have chosen to govern their relationship through arms-length commercial contracts, the scope and nature of the duties owed between the parties are shaped by the terms of, and the language used in, those contracts: *Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm)
- This reflects the general approach of the English courts to complicated financial transactional documents, in relation to which there is a particularly strong case for giving effect to the contract the parties have agreed.
- Certainty is of great importance in a commercial context - "the English courts have time and again asserted the need for certainty in commercial transactions – for the simple reason that parties to such transactions are entitled to know where they stand, and to act accordingly.": *The Scaptrade* [1983] 1 QB 529



Golden Belt v BNP Paribas [2017] EWHC 3182 (Comm)

- Bank retained by Saad Group to arrange a Sukuk financing transaction under which Sharia-compliant notes to be issued in the capital markets.
- Claimants were the issuer of the notes together with noteholders who acquired after the Saad Group's collapse.
- Claimants said something went wrong in the execution of the transaction, causing them loss.
- Promissory Note to be issued by Saad for noteholders' benefit was invalid.
- Claimants sued the arranging bank in the tort of negligence.
- English Commercial Court (Males J) held the arranging bank owed a duty of care to the noteholders, including future noteholders, but not the Issuer.
- Also held that the arranging bank was in breach of that duty, and had caused loss, though quantum was to be assessed.
- Decision is subject of an appeal to the English Court of Appeal.



Is arranging bank's duty in Golden Belt consistent with basic principles?

- Contractual structure is starting point.
- Usual panoply of transactional documents, including legal opinions.
- Arranger is retained by Saad Group.
- No agreement by the arranger in any document that it owed any duty of care to the issuer or noteholders.
- Usual transactional disclaimers limiting responsibility of arranger.
- Market participants would anticipate rights to be documented.
- Broad and uncertain scope of duty.
- Lack of support in precedent.





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