

Young ICCA Skills Training Workshop Introduction to Financial Market Disputes

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What is a financial market dispute?

- Investment arbitration (*Poštová banka a.s. and Istrokapital SE v The Hellenic Republic*, ICSID Case No. ARB/13/8)
- Commercial arbitration and ADR proceedings
- Litigation before national courts (*Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch))
- Antitrust proceedings (EC Decision in Case AT.39914 – Euro Interest Rate Derivatives)

Some Key Themes

- Transnational and jurisdictional conflicts (*Lehman Brothers Special Financing Inc. v. BNY Corporate Trustee Services Ltd.*, Bankr. S.D.N.Y. (2010); *Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd & Anor* [2011] UKSC 38; *UBS AG and UBS Securities LLC v HSH Nordbank AG* [2009] EWCA Civ 585)
- Contractual interpretation (*Lehman Brothers Special Financing Inc. v Metavante Corp.* Bankr. S.D.N.Y. (2009); *Lomas & Ors v JFB Firth Rixson Inc & Ors* [2012] EWCA Civ 419 [2011] UKSC 38)
- Disputed valuations on close-out (*Peregrine Fixed Income Ltd v. Robinson Department Store Public Co. Ltd* [2000] EWHC 99; *Australia and New Zealand Banking Group Ltd v Société Générale* [2000] 1 All ER (Comm) 682)

Close-out Valuation Disputes Under ISDA Master Agreement

- 1992 ISDA Master Agreement: Loss/Market Quotation, First/Second Method;
2002 ISDA Master Agreement: Close-out Amount
- Under 1992 ISDA Master Agreement, Loss is defined as:
 - *"... an amount that [the determining party] reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as a negative number) in connection with this Agreement or that Terminated Transaction or group of Terminated Transactions, as the case may be, including any loss of bargain, cost of funding or, at the election of such party but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining or re-establishing any hedge or related trading position (or any gain resulting from any of them)."*
 - Loss to be determined *"as of the relevant Early Termination Date, or, if that is not reasonably practicable, as of the earliest date thereafter as is reasonably practicable. A party may (but need not) determine its Loss by reference to quotations of relevant rates or prices from one or more leading dealers in the relevant markets."*

Fondazione Enasarco v Lehman Brothers Finance SA and another *[2015] EWHC 1307 (Ch)*

- Enasarco had to replace a put option with LBF which protected capital invested in hedge fund assets, and which had terminated on 15 September 2008
- Enasarco calculated Loss of \$61,507,902 due to it from LBF by reference to replacement transaction executed with Credit Suisse on 6 May 2009
- LBF said Enasarco could have entered into replacement transaction in October 2008 and, had it done so, \$42,059,565 would have been due to it from Enasarco
- Was this as soon as reasonably practicable after the Early Termination Date? In any event, did LBF suffer prejudice as a result of the delay, such that Enasarco had not "*reasonably determine[d]*" its Loss?
- Non-defaulting party not required to comply with objective standard of care as in negligence, but rather must not arrive at determination which no reasonable non-defaulting party could come to. Essentially a test of rationality similar to that applicable in public law: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

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- Unique for a litigation firm, our practice is truly international. We have offices in New York, Los Angeles, San Francisco, Silicon Valley, Chicago, Washington, D.C., Houston, Seattle, Tokyo, London, Mannheim, Hamburg, Paris, Hong Kong, Munich, Sydney, Brussels, Zurich, Shanghai, Perth, and Stuttgart.
- We have tried over 2,645 cases, winning 88% of them.
- We have obtained five 9-figure jury verdicts, thirty-four 9-figure settlements, and fifteen 10-figure settlements.
- We are ranked among the top five firms in virtually every category of business litigation.
- We have been named "International Law Firm of the Year" by *The Lawyer* and named "US Law Firm of the Year" by *Legal Business* three times.
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