Amcan Holdings, Inc. v. *Canadian Imperial Bank of Commerce*: Appellate Division Distinguishes Enforceable Contracts from Agreements to Agree

On February 4, 2010, the Appellate Division, First Department, of the Supreme Court of New York issued a decision in *Amcan Holdings, Inc.* v. *Canadian Imperial Bank of Commerce*[1] holding that an executed "Summary of Terms and Conditions" setting forth a detailed description of the parties' financing transaction was not an enforceable agreement, but rather merely an agreement to agree dependent on a future definitive agreement.

I. Facts and Procedural History

In 2001, Amcan Holdings, Inc. and its affiliates began negotiating with Canadian Imperial Bank of Commerce ("CIBC") to obtain financing for an acquisition, working capital, and debt refinancing.[2] After negotiating a "Draft Summary of Terms and Conditions" outlining the proposed terms of the deal (the "Draft Summary"), the parties executed a fifteen-page "Summary of Terms and Conditions" (the "Summary"), which contained detailed information about the transaction, including the borrowers, the credit lines, the loan amounts, interest and amortization rates, fees and a schedule of payments,[3] security, and key terms and conditions. The first page of each document contained highlighted text stating that "[t]he Credit Facilities will only be established upon completion of definitive loan documentation, including a credit agreement . . . which will contain the terms and conditions set out in this Summary in addition to such other representations . . . and other terms and conditions . . . as CIBC may reasonably require."[4] Additionally, the "Conditions Precedent" section of the Summary included the "[e]xecution and delivery of an acceptable formal loan agreement and security . . . documentation, which embodies the terms and conditions contained in this Summary."[5]

The final loan documentation and credit agreement were never executed.[6] Six years later plaintiffs sued CIBC and its affiliates for breach of contract, breach of the duty of good faith and fair dealing and fraud. Defendants brought a motion to dismiss pursuant to CPLR 3211(a)(1) and (7), arguing that the Summary was not a binding agreement and that, even assuming enforceability, plaintiffs had not indicated which provisions were breached and therefore failed to state a cause of action.[7]

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1 *Amcan Holdings, Inc.* v. *Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 894 N.Y.S.2d 47 (N.Y. App. Div. 1st Dep't 2010).

2 "Plaintiff companies are all controlled by one Richard Gray". *Id.* at *48.

3 The Summary provided for a $500,000 fee to CIBC payable in three installments: $50,000 payable upon acceptance of the Draft Summary, $150,000 payable upon acceptance of the Summary and $300,000 at closing. The first two payments were made after the Summary was executed. See *Id.* at *49.

4 *Id.* at *48.

5 *Id.* at *49.

6 The court noted that CIBC broke off negotiations after discovering that a preliminary injunction issued by the New York County Supreme Court enjoined plaintiffs from assigning certain shares as security for the loan and that Richard Gray had been held in contempt for violating this injunction. See *Id.* at * 49.

7 Defendants also argued that one plaintiff company, which was neither a party to the Summary nor a third-party beneficiary, lacked standing. The trial court held that this claim was premature. The First Department reversed, dismissing the claim for lack of standing. The fraud claim was not addressed by the trial court and was summarily dismissed on appeal.

Defendants' motion to dismiss was granted in part and denied in part. The trial court dismissed the claims against the CIBC affiliates, which were not parties to the agreement, and dismissed the claims for breach of good faith and fair dealing as duplicative of the breach of contract claims. The court allowed the remaining breach of contract claim to proceed, holding that an enforceability determination was premature.

II. Decision of the Appellate Division

On appeal, the Appellate Division affirmed and modified the trial court's decision, holding that the motion to dismiss should have been granted in its entirety on the grounds that the Summary was not an enforceable contract.

Emphasizing that enforceability hinges upon the parties' intent, which must be assessed by the substance of the agreement, not its form, the court noted that both the Draft Summary and the Summary were expressly conditioned upon the future completion of definitive loan documentation: "Although the Summary was detailed in its terms, it was clearly dependent on a future definitive agreement, including a credit agreement."[8] The court was unpersuaded by the substantial completeness of the Summary, holding that the "fact that the Summary was extensive and contained specific information regarding many of the terms to be contained in the ultimate loan documents and credit agreements does not change the fact that the defendants clearly expressed an intent not to be bound until those documents were actually executed."[9]

In reaching its conclusion, the court rejected the "Type I/Type II" test commonly used by federal courts which distinguishes between fully negotiated contracts and those in which there are terms still to be negotiated, employing instead the methodology set out by the New York Court of Appeals in *IDT Corp.* v. *Tyco Group, S.A.R.L.*, 13 N.Y.3d 203, 213 n3 (2009), which assesses enforceability based on "whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreement was a precondition to a party's performance."

III. Significance of the Decision

Amcan reinforces the principle that the enforceability of an instrument rests upon the parties' intent to be bound. The decision provides greater certainty that a court will not treat parties as being bound when they clearly express an intention to make their agreement subject to future definitive documentation.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; or Christine Mott at 212.701.3015 or cmott@cahill.com.

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[8] *Id.* at * 50.

[9] *Id.*