Enforceability of Tail Fee Provision in Engagement Letter (Underwriting and Corporate Securities) April 24, 2017

In a recent breach of contract action involving the failure to pay an investment banking tail fee, the New York Supreme Court Appellate Division unanimously affirmed the order of the lower court granting a motion for summary judgment in favor of StormHarbour Securities LP ("StormHarbour") against IIG Trade Opportunities Fund N.V. (the "Fund") requiring the Fund to pay a $3,410,000 tail fee to StormHarbour pursuant to its engagement letter[1]. The specifics of the case are as follows.

On July 11, 2011, StormHarbour and the Fund entered into an engagement letter (the "Engagement Letter") whereby StormHarbour served as exclusive arranger and placement agent for the placement on a best efforts basis with institutional investors of up to $150 million of first-lien and second-lien financing secured by trade finance (the "Transaction"). The Engagement Letter was initially to expire on December 31, 2011, but was amended several times so that the final expiration date was March 31, 2013. The Engagement Letter contained a tail fee provision that provided that if the engagement was terminated for any reason prior to the consummation of the full Transaction and if the Fund consummated the transaction or a substantially similar transaction within 12 months of such termination with prospective investors introduced by StormHarbour prior to such termination, then StormHarbour was entitled to the remaining portion of any fees that would have applied had the Transaction or substantially similar transaction been consummated under the Engagement Letter.

On May, 9, 2013, the Fund entered into an agreement with Deutsche Bank for the bank to act as structuring and placement agent with respect to the Fund's assets. On November 13, 2013, Deutsche Bank purchased $110 million of senior notes and $77

the senior notes to BlueMoutain Capital Management, LLC ("BlueMountain") and $40 million of the junior notes to KKR & Co. L.P. ("KKR"). During its engagement period, StormHarbour had previously brought a proposed transaction to BlueMountain, which had been rejected in October 2011, and to KKR, which had been rejected in February 2012. In addition, in June 2012 with the Fund's consent, StormHarbour had also approached Deutsche Bank as a possible investor. Deutsche Bank withdrew as a possible investor in January 2013 indicating that it would consider being engaged to structure and place the entire offering with others. Upon learning of the transaction, StormHarbour demanded to be paid pursuant to the tail fee provision, which the Fund refused. StormHarbour then commenced a single claim breach of contract action.

In opposition to StormHarbour's breach of contract claim, the Fund argued that (i) StormHarbour was not entitled to a tail fee because Deutsche Bank acted as "a placement agent or underwriter" for the notes and was not a "prospective investor," (ii) the Deutche Bank transaction was not substantially similar because it was a collateralized loan obligation, and (iii) KKR and BlueMountain were not prospective investors since they had rejected StormHarbour's proposals before the termination of the Engagement Letter.

Applying several precedential maxims of contract interpretation - "words and phrases" used in a contract must "be given their plain meaning" and a "contract is not rendered ambiguous simply because one of the parties attaches a different, subjective meaning to one of its terms" - the court held that StormHarbour had established prima facie that the Deutsche Bank transaction had closed within the one-year tail period following the termination of the Engagement Letter and that the Deutsche Bank transaction was substantially similar to the transaction defined in the Engagement Letter since both transactions involved the placement of up to $250 million of first-lien and second-lien financing placed with institutional investors and secured by trade finance instruments. The court found that (i) nothing in the Engagement Letter excluded the application of the tail fee provision to Deutsche Bank simply because Deutsche Bank purchased the instruments initially as an underwriter for later sale to end investors, (ii) the notes were sold to Deutsche Bank, and (iii) Deutsche Bank, BlueMountain, and KKR were "prospective investors" under the Engagement Letter.

[1] StormHarbour Sec. LP v IIG Trade Opportunities Fund N.V., Supreme Court, Appellate Division, First Department, New York, December 08, 2016, 145 A.D.3d 497, 43 N.Y.S.3d 302, 2016 N.Y. Slip Op. 08306 [Prior Case History: 2015 NY Slip Op 31829(U)].