NYC Standby & Guarantee Forum 2018

Trade Instruments and Restructuring

25 October 2018

Lorna Strong

Reorganisations of assets or non-merger restructuring

- When a reorganisation of banks does not result in a merger of the old bank with the new bank, the obligations of the issuing bank remain with the original issuer.
- The exception is if both beneficiary and applicant agree otherwise, or the instrument contemplates the assignment to a new obligor. This may result in risk.
- It is important to consider how the relationship between applicant, issuer, successor and beneficiary might change.
- This needs to be considered for DC's, Standby DC's and Demand Guarantees, especially any counter-standby's or counter-guarantees that supported local issuance.

Reorganisations of assets or non-merger restructuring

- Problems and Risks that may arise:
  - If customer relationship (account and security) is transferred to the new bank, but trade instrument obligations stay with old issuing bank, the issuing bank may have difficulty enforcing reimbursement claims against customer security.
  - The new bank may be unable to make a complying demand on a counter standby / counter guarantee issued to the benefit of the old bank (whether or not the old bank is dissolved) .
  - A beneficiary may be unable to make a complying demand against a trade instrument issued, if the offices of the old bank close, or it the old bank is dissolved. Can it be dissolved?
  - What about trade instruments issued prior to the reorg, to the benefit of others, or to the benefit of the old bank?

Interim instruments issued

- Counter Standby's / Counter Guarantees issued to the old local issuing bank.

  - ✓ The old bank should explain to the issuer that the bank will be reorganised, and therefore the counter-guarantee/SBLC will need to provide that the demand on the counter-guarantee/SBLC may be made by the old bank itself or by the new bank.

  - ✓ Wording to this effect should be included in the counter-guarantee/SBLC to remove any doubt.

Example:

> Any [demand][presentation] to be made in respect of this counter-[guarantee][standby [letter of] credit] may be made by new bank or old bank [or new bank on behalf of old bank]

Interim instruments issued

- DC's / Counter Standby's / Counter Guarantees issued by the old local issuing bank.
  - ✓ The old bank should ensure any reference to a form of presentation / demand and/or place of presentation / demand includes a reference to the old issuing bank and the new issuing bank and/ or office location.

Example 1: Form of [presentation][demand]: Your first demand sent by authenticated SWIFT to old bank or new bank on behalf of old bank (SWIFT: [*insert*]; Att: [*insert*]).

Example 2: Place of presentation: old bank or new bank on behalf of old bank.

Example 3: Each [demand] shall be in writing, and, unless otherwise stated, may be made by letter or authenticated SWIFT and must be received in legible form at the following address and by the particular department or office (if any) as follows:

Prior instruments issued

- DC's / Counter Standby's / Counter Guarantees issued to the old local issuing bank.
  - ✓ You will need to get the consent of the issuer to accept, as complying, a demand from the new bank.
  - ✓ The issuer will need to get the consent of their customer applicant.
- DC's / Counter Standby's / Counter Guarantees issued by the old local issuing bank.
  - ✓ If the issuer obligations do not transfer to the new bank, can the old bank be dissolved?
  - ✓ Ensure customer agreements are modified to contemplate reimbursement of both new bank and old bank for instruments previously issued.
  - ✓ It is easier for new bank to enforce upon the security it holds and so if the old bank continues to exist, the new bank should provide a general reimbursement obligation for payments by the old bank under outstanding instruments.