

Fund Finance Friday



Problems with 'Promptly'

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In commercial arrangements under English law, it is vital that the times allowed for a party to perform its obligation are clear. This is especially true in facility/credit agreements and other financial contracts. Lack of clarity results in mismatched expectations between counterparties and uncertainty as to whether counterparties are in compliance with an agreement.

In an ideal world, a contract will specify precisely how much time is allowed for each obligation to be fulfilled or step to be taken. Wherever practicable, this should be the general approach in preparing agreements. Unsurprisingly, however, contracting parties are often reluctant to commit to hard deadlines for certain obligations which they consider to be less important in the context of the overall transaction. Hard deadlines bring certainty but also create the possibility of default resulting from minor delays beyond a party's control. Borrowers, in particular, are sensitive to this because a Lender's remedies for a default, regardless of the cause or severity of the default, usually include the ability to accelerate an entire facility.

For these reasons, it is common for contracts to specify that certain actions must be taken within less precise timeframes. Contracts, including the LMA standard templates, frequently state that actions must be taken "promptly," "as soon as is reasonably practicable," or "as soon as possible." Such terms are useful, but parties must be aware of the sometimes significant uncertainties that they create.

Where an obligation must be performed within a "reasonable time" or "promptly" or "immediately," the question of what precisely these expressions mean will, under English law, depend on the particular facts and circumstances. It is impossible to establish clear rules as to exactly what those terms will mean in practice. For example, courts have previously held that an action taken within four or five days was not taken "promptly," but also, in very different circumstances, that an action taken after almost two months was taken "promptly."

Nevertheless, parties should be aware of certain general principles:

- There is no material legal difference between "immediate" and "forthwith." Both mean that something must be done as soon as possible in the circumstances, with the nature of the act being taken into account.
- "Directly" means speedily, or at least as soon as practicable.
- "On" or "upon" may mean simultaneously with the related act, or within a reasonable time after it, according to the circumstances.
- "Within a reasonable time" does not impose any specific timeline.
- "Promptly," as above, can mean almost any period of time, depending on the particular circumstances.

Accuracy and certainty in relation to time periods are of particular importance in finance transactions. While it will not always be appropriate to specify absolute deadlines for every action to be taken under a contract, parties should be aware of the inherent uncertainties of many terms that are frequently included in their place so that appropriate decisions can be taken about what terms are appropriate to use.