

The Evergreen Dispute And The Bank's Contractual Leverage

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In structured finance, conditions precedent are not administrative formalities. They are the contractual mechanisms through which lenders manage risk in relation to legal, regulatory and operational aspects before capital is released. Their function is straightforward: no funds flow until specified conditions are met, and met on time. Borrowers who treat these timelines as flexible do so at their own risk.

A recent Malaysian Court of Appeal decision underscores this point with unusual clarity. In *Evergreen Corporate Sdn Bhd v Export-Import Bank of Malaysia Bhd* [2025] 4 MLJ 140, the court confirmed that a lender's right to terminate a facility for failure to satisfy conditions precedent survives the mere passage of time, even where the lender continues to engage with the borrower after the deadline has passed.

The dispute arose from a US\$10.35mn Islamic financing facility extended by Export-Import Bank of Malaysia to Evergreen Corporate to part-finance a thermal decomposition plant. The facility agreement imposed 30 conditions precedent to be fulfilled within one month of execution. The consequences of non-compliance were explicit: failure to meet the deadline entitled the bank to suspend or terminate the facility at its absolute discretion.

No Waiver, No Estoppel: Engagement Is Not Consent

Evergreen did not meet all the conditions within the stipulated period. It continued to submit documents and incur costs in an attempt to do so, but no drawdown occurred during the facility's availability period.

More than a year after the deadline had passed, the bank exercised its contractual right to terminate. Evergreen challenged the termination, arguing that the bank's continued engagement amounted to a waiver of strict compliance, or that the bank was estopped from relying on the original timeline.

The Court of Appeal rejected both arguments. Where contractual language is clear, it held, continued administrative engagement does not dilute express rights. Acceptance of late or partial compliance does not amount to waiver absent an unequivocal representation. Silence does not create estoppel.

Delay Does Not Extinguish Termination Rights

Crucially, the court affirmed that a lender is not obliged to enforce its rights immediately. The mere lapse of time does not render contractual termination rights spent. Where conditions precedent remain unfulfilled, the right to terminate may be exercised later, even after prolonged engagement, provided the contract so allows.

What The Ruling Means For Borrowers And Lenders

For borrowers, the implications are practical rather than theoretical. Conditions precedent must be integrated into project planning with realistic timelines and contingency. Delays should be flagged early and, critically, any extension must be documented in writing. Informal understandings and continued correspondence offer no legal shelter.

For lenders, the decision affirms the enforceability of disciplined credit documentation and preserves the commercial value of conditions precedent as risk controls rather than negotiating levers.

Certainty Over Sympathy In Financing Contracts

The Evergreen decision reinforces a commercially orthodox but frequently contested proposition: conditions precedent operate as hard-edged thresholds, not rolling targets. Courts will not infer extensions of time, waivers or modifications from conduct alone where the contract provides otherwise.

In an environment where capital remains cautious and risk allocation matters, the message from the court is unambiguous. When conditions precedent are missed, lenders keep their rights.

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