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THE LICENSE FEE IN INTERNATIONAL TRANSACTIONS

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IS IT MEETING ITS DEMISE?

St. Maarten, December 19, 2017

1. INTRODUCTION

On November 28, 2017, the Court of First Instance of Sint Maarten rendered a judgment in what can be considered a landmark case, potentially having far-reaching consequences for the banking and financial sectors of both Sint Maarten and Curaçao.

The point in dispute: the 1% license fee which is being charged by a commercial bank in Sint Maarten (the 'Bank') to its clients over – simply put - every international transaction. One of these clients (the 'Travel Agency') took the Bank to court and saw its efforts rewarded. The Court ruled that the Bank is not allowed to pass on the license fee to the Travel Agency, subject to a penalty for each breach of this prohibition. In addition, the Bank was ordered to reimburse the license fees paid by the Travel Agency over the last 5 years plus statutory interest.

The question now remains whether this Judgment will mark the demise of the license fee as charged by commercial banks to their customers or that such license fee can still be revived. As the Judgment has been withheld immediate effect ('uitvoerbaarheid bij voorraad'), such will depend on the outcome of the appeal with the

Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba, which has already been announced by the Bank and the possible subsequent appeal with the Supreme Court in the Netherlands.

2. BACKGROUND AND FACTS

Most commercial banks in Sint Maarten (and in Curaçao) have been authorized by the Central Bank of Curaçao and Sint Maarten (the "Central Bank") to act as so-called foreign exchange banks. In return for this authorization, these commercial banks have a statutory obligation to pay 1% of the amount of any and all international transactions to the Central Bank.

In this specific matter, the Bank facilitates money transfers from the Travel Agency's account with the Bank to the International Air Transport Association ('IATA'). IATA does not have a branch in Sint Maarten. Until July 2012, these payments by the Travel Agency to IATA had, however, been considered domestic payments, for which the license fee was not charged. This changed after the Central Bank indicated that these payments were to be considered payments to a foreign entity, therewith constituting an

international transaction to which the license fee applies.

The Bank as of then started to pass on these fees to the Travel Agency, arguing primarily it would do so on behalf of the Central Bank, to which extent the Bank would merely act as an intermediary between the Central Bank and the Bank's customers.

Alternatively, the Bank argued that it would be entitled to pass on the license fee based on its general terms and conditions.

Ultimately, the Bank stated that the license fee should be considered an expense for the performance of services as meant in article 7:406 of the Civil Code.

3. THE JUDGMENT

The Court dismissed all of the Bank's arguments. The Court considered that, whereas there is a sufficient statutory basis for the obligation of the Bank to pay the license fee to the Central Bank, there is no legal obligation for the Bank to pass on the license fee to its customers.

Furthermore, the Court considered that the Bank could only pass on the license fee to the Travel Agency if the Bank and the Travel Agency

would have agreed upon that, which according to the Court was not the case.

As a last resort, the Bank argued that it is entitled to pass on the license fee based on article 7:406 of the Civil Code which deals with compensation for expenses made by a service provider. The Court considered that the license fee does not qualify as an expense as meant in article 7:406 of the Civil Code, as claimed by the Bank, since the license fee concerns fixed costs ('vaste kosten') rather than incidental expenditures ('onkosten').

Based on these considerations the Court granted the claims to the Travel Agency. However, and although not requested by the Bank, the Court did decide ex officio to not declare the Judgment enforceable until it has become final and binding.

The reasoning thereto applied by the Court is twofold. On the one hand, the Court considered it cannot be ruled out that this Judgment will lead to all kinds of litigation against the Bank – and other banks - by individuals, institutions and companies. In light thereof, the Court deemed it not "helpful" if the Bank would already have reimbursed the Travel Agency and other possible parties during

the appeal proceedings, resulting in substantial recovery risks, should the Bank be successful in its appeal. Secondly, the Court addressed the generally known fact that the economy of Sint Maarten has been severely impacted by the effects of hurricane Irma. The Court has sought to prevent that the enforcement of the Judgment, and the precedent value thereof, would hamper the recovery of the economy of Sint Maarten.

imposed by the Central Bank on the foreign exchange banks in Curaçao, the impact of the Judgment may be even more significant.

4. IMPLICATIONS

In principle, a Judgment only affects the parties to the proceedings. That implies that other commercial banks, that have been authorized to act as foreign exchange banks, and other bank accountholders are in itself not bound by this Judgment. That said, this Judgment nevertheless has the potential to have far-reaching consequences. In the event the Judgment survives the appeal (and possible subsequent appeal to the Supreme Court) and the Court's line of reasoning in this Judgment is being followed, no foreign exchange bank will be allowed to pass on the 1% license fee without contractual or statutory basis. It is certainly not unthinkable that the customers of these banks will then claim reimbursement of the amounts that may have been paid unduly. As the license fee is also



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