

THE REVIEW OF SECURITIES & COMMODITIES REGULATION

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 58 No. 20 November 19, 2025

VALUING TERMINATED CREDIT DEFAULT SWAPS: LBIE V. ASSURED GUARANTY

The recent decision in LBIE v. Assured Guaranty is a rare case in which a court has addressed how to value terminated credit default swap contracts (“CDS”) governed by ISDA documentation. The plaintiff argued in that litigation that the only reasonable way to calculate loss under the 1992 ISDA Master Agreement is to use market prices and market inputs. But following a trial on the merits, the New York Supreme Court rejected that position and affirmed the significant flexibility and broad discretion given to a non-defaulting party. The court specifically concluded that the cash-flow method that Assured used to value its terminated CDS was reasonable in light of the text of the 1992 ISDA Master Agreement, and that there is no single uniform industry practice for doing such a valuation. The factors considered by the Trial Court include the market conditions at the time and the specific economic bargain that Assured agreed to when it sold protection under the CDS contracts. The decision has been affirmed by the Appellate Division, First Department on appeal, and the New York Court of Appeals has declined to consider the issues further.

By Roger A. Cooper and Sara Watson *

There is relatively little case law in the United States addressing squarely how to value terminated credit default swap contracts governed by ISDA documentation. The post-trial decision in *LBIE v. Assured Guaranty*, recently affirmed on appeal, is one important exception. Following a five-week bench trial, the New York Supreme Court (the “Trial Court”) issued a thorough and detailed analysis of the 1992 ISDA Master Agreement on this point and considered Lehman Brothers International Europe’s (“LBIE”) argument that there is only one way to value terminated CDS, which is by using market prices and market inputs, to determine a market value. The Trial Court rejected that argument; it

did so based on the text of the 1992 ISDA Master Agreement (the “1992 Agreement”), industry practice, Assured’s economic bargain in the CDS it wrote, and the lack of availability of any reliable market prices or valuations on these CDS at the height of the financial crisis. The Trial Court’s decision highlighted instead the significant flexibility and broad discretion that a non-defaulting party has in calculating Loss¹ under the 1992 ISDA Master Agreement, so long as the calculation is prepared reasonably and in good faith.

¹ Any capitalized terms not defined have the same meaning as in the 1992 ISDA Master Agreement.

* ROGER A. COOPER is a partner and SARA WATSON an associate at Cleary Gottlieb Steen & Hamilton LLP’s New York City office. Their e-mail addresses are racooper@cgsh.com and sawatson@cgsh.com.