

## A matter of choice

In May 2007, the Association of Corporate Treasurers ("ACT") published comments in response to the Financial Reporting Council's ("FRC") discussion paper relating to the choice in the UK audit market.

In particular, the ACT was concerned with the fact that many banks will insist that a borrower will use a particular firm of auditors (often one of the "Big Four"). In preparing its comments, the ACT canvassed the opinion of its members who work in corporate treasury, risk and corporate finance. Whilst ACT's comments are interesting, it must be remembered that these were written in the context of a response to a consultation process.

The ACT's position is that it broadly supports the initiative of the FRC in seeking to increase the choice of auditors available to public interest entities and removing the dominance of the banks.

In particular, ACT's position is that it strongly believes that banks should expect prudent and appropriate standards of corporate governance. However this should not extend to banks requiring restrictive covenants or contractual terms with respect to the appointment of audit firms, unless after proper consideration there are demonstrably good reasons for such a restriction to be imposed. The reason for this assertion is that the FRC discussion paper analysed the number of quoted companies which were audited by the big four accountants and further considered the issue that, in certain circumstances, advisors may recommend or require the use of a big four accounting firm. It was felt that this was particularly linked to banks advising use of big four auditors or even imposing conditions as part of loan documentation.

ACT's position is that although in certain instances loan documentation may include conditions such that the client company must switch to one of the big four accounting auditors, in general it is more common that a bank's officer may simply indicate to a company that they would be more comfortable with a switch to a big four auditor. Although this is not a contractual condition, it can be difficult for the borrower to reject such a "recommendation" from its bank and it is ACT's view that bank officers should not automatically urge a switch to one of a selected group of audit firms. ACT's position is that such a recommendation should only be given after mature consideration of the specific contingencies applicable in the particular case.

As a result of its involvement in the consultation process, ACT has urged the market participants group of the FRC to address the relevant banks directly (the number of banks directly involved with medium sized firms when the issue arises is small) and also to consider the position with their representative body. Due to the ever increasing importance of auditing to the UK economy, it will be interesting to see what action, if any, the FRC takes in setting, monitoring and enforcing accounting and auditing standards and overseeing the regulatory activities of the accountancy and actuarial professions.

It has not been a particularly good time for auditors recently and, in addition to the consultation discussed above, the Courts have also been considering the "client's freedom of

choice" in the recent case of AKAI Holdings Limited (in compulsory liquidation) (a company incorporated under the laws of Bermuda) v. RSM Robson Rhodes LLP (i) and another.

The position was that AKAI was suing its auditors for professional negligence. It had, in those proceedings, retained RSM Robson Rhodes LLP to act as its expert. During the proceedings Robson Rhodes announced that it was going to merge with Grant Thornton. However, Grant Thornton was acting as an expert on behalf of the auditors being sued by AKAI. AKAI took the view that such a merger would cause conflict of interest for Robson Rhodes and asked the Court to restrain it from merging. After careful consideration the Court decided that there was a conflict of interest and was prepared to grant an interim injunction to restrain the merger unless the accountants involved gave AKAI appropriate undertakings.

Whilst this case is probably a one off, it is useful to show that clients do not always have to accept the position lying down. When considering your choice of auditor you should do so entirely independently of any third party interests.

(i) [2007] EWHC 1641 (Ch)

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