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Loan Market Association publishes new loan documentation

The Loan Market Association ("**LMA**") published various new and revised documents for use on loan transactions on 23 December 2011 and 20 January 2012. The key documents comprise new versions of its investment grade loan agreement, defaulting lender and impaired agent provisions, and US dollar and euro swingline facilities. Consequential amendments, reflecting changes to these documents, were made to other LMA documents, including users' guides and the French and German loan agreements.

These amendments follow a period of discussion with the Association of Corporate Treasurers ("**ACT**"). In some cases they reflect changes in law and market practice, while other amendments conform the LMA investment grade loan agreement approach to that in the LMA leveraged loan agreement. This article considers this round of changes.

The Asia Pacific Loan Market Association ("**APLMA**") is currently considering whether corresponding changes should be made to its own template documents.

LMA Investment grade loan agreement

The amendments to the loan agreement likely to be of greatest interest concern the increased costs clause and the accommodation of HMRC's double taxation treaty passport scheme. Other changes cover a wide range of areas, for example from cashless rollovers of revolving facility loans to electronic communications and notices provisions.

Increased costs

The new investment grade loan agreement includes footnotes instructing users to consider how the clause should be drafted in the light of Basel III. The balance of views in the market has been that the increased costs clause is drafted sufficiently widely to cover all circumstances which would increase a lender's costs as a result of a change in law or regulation, including Basel III. Many market participants have therefore not included an express Basel III carve-in. With practice in relation to Dodd-Frank costs tending towards inclusion of an express carve-in for such costs, it may be more likely going forward that an express Basel III carve-in will be included. This would clarify the parties' understanding of how this clause operates in relation to Basel III.

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There has been a concern that if Basel III is implemented through changes to the existing Basel II rules, an exception to the increased costs clause for Basel II costs could inadvertently cover costs arising under Basel III too. The new investment grade loan agreement includes suggested wording to avoid this. This should be included where an existing loan agreement includes a Basel II carve-out, but it is first worth considering deleting the carve-out altogether. Basel II has been fully implemented in the EU, and so this carve-out should not be capable of being triggered in relation to any EU bank. Where a deal involves banks in the US or Asia where Basel II has not been implemented fully, it is not unusual to retain a Basel II carve-out to address this situation. Where the Basel II carve-out is retained, express wording should be included to carve back in any costs in relation to Basel III.

At present the standard form documents published by the APLMA do not contain specific references to Basel III costs. The APLMA documents mirror the LMA increased cost wording and require the borrower to pay to the lender any increased cost incurred as a result of: (i) the introduction of or any change in (or in the interpretation administration or application of) any law or regulation; or (ii) compliance with any law or regulation made after the date of the loan agreement.

Double taxation treaty passport scheme

The new investment grade loan agreement includes provisions to accommodate use of HMRC's treaty passport scheme, reflecting the inclusion of similar provisions in the LMA leveraged loan agreement.

Under the treaty passport scheme, a lender incorporated overseas can apply to HMRC for a "passport", which will typically be valid for five years. If such a lender is granted a passport and notifies a borrower that it wishes a loan to come within the scheme, the borrower then notifies HMRC. HMRC issues a direction to the borrower that it is to pay interest gross (or subject to a reduced rate of withholding) from the date of issue of the direction.

There are differences in approach on this issue between the LMA investment grade and LMA leveraged loan agreements. In particular, the regime governing whether a loan is brought within the scheme is more flexible from a borrower perspective in the new investment grade agreement, following the ACT's input.

Under the leveraged loan agreement, the process is triggered by a lender notifying the borrower that it wishes a loan to come within the scheme, following which the borrower is obliged to make the relevant filings. The trigger for the process is the same under the new investment grade loan agreement. However, following the lender's notification the borrower may then decide whether to make the required filings or whether to require the lender to apply for treaty relief using the conventional certified claim process. This is likely to be welcomed by borrowers since if HMRC's strict deadline on the timing for filings to bring loans within the scheme is not met, a loan would not be eligible for the scheme and an alternative method of seeking a treaty direction required.

Conforming to LMA leveraged loan agreement

The definitions of EURIBOR and LIBOR have been amended, and a new definition of "Reference Bank Rate" added, conforming to the approach in the LMA leveraged loan agreement. Drafting changes to these definitions reflect the British Bankers' Association definition of LIBOR, for the rate provided by a contributing bank under LIBOR to be "the rate at which an individual Contributor Panel bank could borrow funds, were it to do so by asking for and then accepting interbank offers in reasonable market size, just prior to 11.00am London time."

The definition of Majority Lenders has also been conformed to the LMA leveraged loan agreement. As a result, the Majority Lenders are determined by reference only to a lender's/lenders' proportion of total commitments rather than the previous position whereby Majority Lenders were determined by reference to (a) a lender's/lenders' proportion of total commitments while no loans are outstanding or (b) a lender's/lenders' proportion of participations in outstanding loans at any other time. The previous formulation meant that if, for example, the term facility was drawn at a time when the revolving facility was not, the lenders under the revolving facility could be disenfranchised because only term facility loans would be outstanding and undrawn revolving facility commitments would not be taken into account. By referring to commitments, the relative drawings of the facilities no longer have an impact on the Majority Lenders.

Provisions to allow for cashless rollovers of revolving facility loans have been moved from the LMA's defaulting lender and impaired agent drafting annexure to the investment grade loan agreement, again reflecting the approach in the LMA leveraged loan agreement. Cash payments are only required in the context of a rollover loan to the extent there is a difference between the amount of the maturing revolving facility loan and the loan drawn to refinance it.

Tax

The definition of VAT has been amended to be less UK-focussed, reflecting the use of LMA documentation on cross-border transactions. The more international definition now refers to the Council Directive of 28 November 2006 on the common system of value added tax (EC Directive 2006/112), instead of the Value Added Tax Act 1994. Changes have also been made to the VAT clause to take account of the possibility of a VAT reverse charge arising on intra-Finance Party supplies and to include an obligation to provide VAT registration information on request.

Boilerplate clauses

A new footnote has been included in the construction provisions, suggesting that it may be appropriate to define currency terms used in the agreement, with the appropriate definition to be determined on a deal by deal basis. This is a topical issue given current attention on how "euro" may be defined in loan documentation, and the impact this may have on euro-denominated obligations in the context of the ongoing Eurozone crisis. For more

information on this, see Linklaters' Eurozone Bulletin: Do I need a contingency plan?

The scope of the illegality mandatory prepayment trigger has been extended to include a situation where it is illegal for an affiliate of a lender for that lender to perform its obligations or to fund or maintain its participation in any loan.

The provisions concerning rights to replace, repay or cancel lenders in certain circumstances now clarify that the relevant lender is only required to transfer rights and obligations to a new lender once "know your customer" checks are complete. The transferring lender is obliged to perform those checks as soon as reasonably practicable. This reflects the approach to "know your customer" checks taken elsewhere in the investment grade loan agreement, for example in relation to lenders who become party through an assignment or transfer.

The lenders' indemnity to the agent now requires the company to reimburse any lender that makes a payment under the indemnity.

Under the new investment grade loan agreement, notices effective after 5pm in the place of receipt are deemed to be effective on the next working day. This too reflects the use of LMA loan agreements on cross-border transactions where different time zones may affect when notices are actually received.

The notices provisions now permit electronic communications between any parties who agree "to the extent" those parties agree, rather than only between the agent and a lender. This allows parties the flexibility to agree that certain types of notice may be sent electronically, while others may only be sent by fax or letter. For example, the parties may wish utilisation requests not to be sent electronically.

Following the decision in *Tele2 International Card Company SA and others v Post Office Ltd.* [2009] All ER (D) 144 (Jan), in which a delay in terminating a contract following a breach combined with continued performance without any reservation of rights or other communication was held to constitute an election to affirm the contract, the remedies and waivers clause has been amended so that no election to affirm any of the finance documents is effective unless made in writing.

The list of entrenched provisions which require all lender consent to change now includes the requirement that a cancellation of commitments operates rateably.

A number of other minor drafting changes have also been made throughout the investment grade loan agreement.

Defaulting lender and impaired agent provisions

Defaulting lenders

The definition of "Defaulting Lender" now extends to include an issuing bank which has failed to issue a letter of credit, or which has given notice that it will not issue a letter of credit, or which fails to pay a claim on a letter of credit.

This definition is important because where a lender becomes a defaulting lender, there are wide ranging consequences including, among other things, a right for the borrower to cancel that lender's undrawn commitments and to require a transfer of drawn participations to another lender. In the context of the letter of credit provisions, which are considered further below, rights to require cash collateral from a defaulting lender are also triggered.

The scope of the increase lender clause, which allows a borrower to increase the commitments under a facility up to a maximum of their original level if the individual commitments of a lender have been cancelled in certain circumstances, has been made broader. It applies not only to a cancellation of a defaulting lender's commitments and a cancellation on an illegality event, but also to any cancellation of a lender's commitments that follows a lender's claim under the tax gross-up, tax indemnity or increased costs provisions. Amendments have also been made to the provisions concerning fees on such an increase. Previously, the borrower was required to pay a set fee to the agent on the date that an increase took effect. Now, that fee is payable by the lender assuming the additional commitments and is in an amount equal to the fee payable on a standard transfer or assignment in the ordinary course.

The tax provisions that accommodate use of HMRC's double taxation treaty passport scheme have been amended so that an increase lender falls within the scope of the provisions in the same way as a new lender to whom commitments of a non-defaulting lender are transferred in the ordinary course.

The provisions that operate to disenfranchise the available commitment of defaulting lenders from being counted in the context of a request for a consent, waiver, amendment or other vote have been modified so that if that disenfranchisement reduces a defaulting lender's total commitments to zero (i.e. where none of their commitment was drawn) that defaulting lender is deemed not to be a lender for the purpose of the request.

In addition, a new snooze and lose provision has been included so that if a defaulting lender fails to respond to a request for a consent, waiver, amendment or other vote within a specified time, it is disenfranchised from voting in respect of its commitments and is not considered to be a lender for the purpose of the request.

The investment grade loan agreement now expressly provides that a defaulting lender is only obliged to make a transfer to a non-defaulting lender once the necessary "know your customer" checks have been performed and an obligation has been imposed to perform those checks are soon as reasonably practicable. This reflects the approach to "know your customer" checks taken elsewhere in the investment grade loan agreement, as discussed above.

Impaired agents

Where a payment is due to be made to an impaired agent, the paying party may either make the payment directly to the ultimate recipient (rather than through the agent) or into an account. That flexibility is slightly restricted

under the new investment grade loan agreement so that the payment may only be made into an account if it is not reasonably practicable to make a direct payment. The investment grade loan agreement has also been amended to provide that if such a payment is made, the paying party must direct the bank with which the trust account is held to pay the ultimate recipient promptly upon a request from that recipient.

Letters of credit

The regime for cash collateralising letters of credit has changed in the new investment grade loan agreement. If a letter of credit has already been issued, the issuing bank may require a defaulting lender to provide cash collateral in respect of its participation in that letter of credit. If the defaulting lender fails to do so, the issuing bank can require the borrower to provide cash collateral.

Where a letter of credit has been requested but not issued, the issuing bank is still able to require a defaulting lender to provide cash collateral in respect of its participation in that letter of credit. If the defaulting lender fails to do so, the borrower has the option to provide the cash collateral and, if it chooses not to, the issuing bank can reduce the face value of the letter of credit accordingly.

New provisions have been added to allow the borrower to appoint additional issuing banks.

Swingline provisions

The revised LMA defaulting lender and impaired agent provisions now expressly contemplate that the loan agreement includes a euro or U.S dollar swingline facility and provide wording so that the definition of “Defaulting Lender” and the related provisions throughout the loan agreement extend to cover lenders (and their affiliates, since affiliates may be swingline lenders) under the swingline facility.

Euro and U.S. dollar swingline options

The Loan Market Association has replaced its swingline facility drafting annexures with new loan agreements that include those facilities.

A number of amendments have been made to conform the drafting of the swingline provisions to the new investment grade loan agreement, for example so that a utilisation request relating to the swingline facility may be sent by post, fax or, where relevant, electronic mail. The swingline provisions have been integrated further into the loan agreement, so definitions previously found in the operative swingline clauses now sit with the other definitions at the start of the loan agreement.

One of the key changes concerns loss sharing. Previously, if a swingline loan was not repaid, the lenders under the revolving facility would share the loss pro rata to their revolving facility commitments. The new loss sharing clause applies not only to losses suffered when a swingline loan is not repaid, but

also to any revolving facility loan. Swingline lenders must now bear their share of losses suffered by revolving lenders, as well as vice versa.

The drafting of the loss sharing provisions has also been simplified. Previously, each revolving facility lender was required to pay to the agent an amount equal to its pro rata share of the unpaid swingline loan less the actual amount of the unpaid loan owed to that lender. Where the actual amount due to a lender was greater than its pro rata share of the loan in question, no payment was required. The agent would then distribute to each lender an amount equal to the actual amount due to it less its pro rata share of the unpaid swingline loan.

The new loss sharing provisions require the agent to calculate the amounts to be paid or received by each lender, such that it is placed in the same position as it would have been had it participated in the swingline loan pro rata to its revolving commitment.

Trevor Clark, Partner, Hong Kong

Philip Badge, Partner, Singapore

Authors: Trevor Clark, Philip Badge

Contacts

For further information please contact:

Trevor Clark
Partner, Hong Kong

(+852) 2801 5226

trevor.clark@linklaters.com

Philip Badge
Partner, Singapore

(+65) 6890 7331

philip.badge@linklaters.com

10th Floor, Alexandra House

Chater Road

Hong Kong

Telephone
(+852) 2842 4888

Facsimile
(+852) 2810 8133/2810 1695

Linklaters.com