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The ACT Borrower's Guide to LMA Loan Documentation for Investment Grade Borrowers

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Introduction

Since the publication of the last edition of the ACT Borrower's Guide to LMA Loan Documentation for Investment Grade Borrowers in April 2013 (the "**ACT Guide**"), the LMA has revised its recommended forms of facility agreement for investment grade borrowers (the "**Investment Grade Agreements**") four times, on each occasion following discussions with the ACT.

The key changes include:

- Amendments to the definitions of "LIBOR", "Euribor" and related provisions to address the implementation of reforms to the benchmark process and administration and the incorporation of an optional "zero floor".

- An optional adjustment to the Borrower's right to prepay a Defaulting Lender.

- The incorporation into the tax clauses of provisions permitting affected parties to withhold where applicable pursuant to the US legislation known as the Foreign Account Tax Compliance Act ("**FATCA**") and imposing information-sharing obligations on all parties for the purpose of complying with FATCA and similar legislation.

- Updates to the footnotes to the increased costs clause which highlight that the parties may wish to amend the clause expressly to reflect their commercial agreement with regard to the costs associated with Basel III.

- A significant re-write of the agency provisions, offering clearer and more comprehensive protection against the risk of the Agent incurring liabilities in the discharge of its function.

- The addition of a number of matters to the list of amendments and waivers requiring unanimous Lender consent.

- The Mandatory Costs provisions being marked as optional provisions.

- A number of smaller amendments to reflect changes that Borrowers often seek to make to the template in negotiations.

- The incorporation into the suite of a new multicurrency term and revolving facilities agreement incorporating a letter of credit facility, bringing the total number of different iterations of the Investment Grade Agreement to 11.

Some of these recent updates to the Investment Grade Agreements relate to regulatory developments affecting the loan market, for example, the changes to the LIBOR and Euribor definitions, and have been made to all of the LMA's recommended forms.

Of the others, a number bring aspects of the Investment Grade Agreements closer into line with the LMA's recommended form of facility agreement for senior/mezzanine leveraged acquisition financing transactions (the "**Leveraged Agreement**").

The changes to the agency provisions and the additions to the amendments and waivers clause, for example, are based on provisions which have been part of the Leveraged Agreement for some time, developed in response to events in the leveraged loan market following the financial crisis.

Lenders might point out that these changes, in the main, are unlikely to disadvantage investment grade Borrowers (as they will most likely never be invoked) and that consistency in loan documentation across the market aids efficiency. Treasurers, on the other hand, might question whether such provisions are necessary in investment grade loan documentation.

Regardless of the practical impact, these amendments must be reviewed and their implications digested.

This supplement to the ACT Guide summarises these changes and comments on their implications for investment grade Borrowers. The issues are addressed in the order in which the relevant clauses appear in the Investment Grade Agreements, as in the ACT Guide.

Clause references are to the LMA's multicurrency term and revolving facilities agreement for investment grade borrowers unless otherwise indicated and capitalised terms have the meanings given in that agreement.

Slaughter and May, 23 June 2014

CLAUSE 1: (DEFINITIONS AND INTERPRETATION) AND CLAUSE 9: INTEREST - "LIBOR", "EURIBOR", "SCREEN RATE" AND REFERENCE BANKS

Benchmark reform

The LMA has made a number of adjustments to the definitions of LIBOR, Euribor and related provisions to address the changes that have been made to LIBOR, and are proposed to be made to Euribor, as a result of the global regulatory review of the use of benchmarks in the financial markets.

The amendments, which were originally published by the LMA in a series of notes to members, cater for changes to the administration of LIBOR and Euribor. ICE Benchmark Administration ("**ICE**"), part of the IntercontinentalExchange Group (NYSE:ICE), took over as the new administrator of LIBOR on 1 February 2014. This has primarily affected the definition of "Screen Rate" in which the previous reference to the "British Bankers' Association Interest Settlement Rate" has been replaced with a reference to ICE.

The Investment Grade Agreements have also been amended to cater for the discontinuation of certain LIBOR and Euribor maturities. All of the LMA's recommended forms now make express provision for the calculation of interpolated rates for periods for which LIBOR or Euribor is unavailable. The revised definitions provide that if no Screen Rate is available for the relevant interest period, an "Interpolated Screen Rate" shall apply, a rate interpolated from available LIBOR or Euribor maturities on a straight line basis.

Borrower Notes

The LMA's revised definitions are being used in new loan documentation. ICE has confirmed that for now, it does not intend to make any changes to the calculation of LIBOR[1] and indications are that the transition to ICE LIBOR has generally been uneventful.

1 See https://www.theice.com/publicdocs/IBA_LIBOR_FAQ.pdf: "ICE is a continuation of what was previously known as BBA LIBOR and there are no changes to how the rate is calculated or how the submissions are collected at present".

Legacy documentation on pre-existing LMA terms is not generally being reopened to update the LIBOR definitions notwithstanding that the previous LMA definition of "Screen Rate" references the BBA. The likelihood of disputes arising was thought by many to depend primarily on what, if any, changes the new administrator chose to make to the composition of the rate. The LMA has received advice from counsel, summarised in a note to members published in January 2013, which confirms the generally held view that provided LIBOR remains essentially the same rate, an English court "would interpret the reference to BBA LIBOR...as a reference to a renamed LIBOR administered by ICE"[2].

However, not all loan agreements use the LMA form or track the LMA definitions precisely, so whether amendment is necessary must be considered on a case by case basis.

The aspect of the interest rate mechanics that is being negotiated in current transactions (although the LMA has not made changes to the templates) is the provision for a Reference Bank Rate fallback to apply if Screen Rate LIBOR/Euribor is unavailable.

The ACT Guide notes the UK government recommendation that trade associations (including the LMA) should reconsider the practice of using LIBOR panel bank quotes as a fallback rate in documentation. The circumstances in which the Reference Bank fallback will be invoked and the exposure of banks who agree to act as Reference Banks have become sensitive topics for some Lenders.

Some banks are willing to act as Reference Banks only if the circumstances in which they might be required to quote are minimised as far as possible (for example by looking to alternative interest periods or historic screen rates before Reference Bank Rates are invoked).

Such provisions may be an effective means of limiting the role of Reference Bank Rates and as such, are not necessarily objectionable to Borrowers. However, they add a further layer to provisions which are already quite complex so require careful drafting.

LIBOR or Euribor panel banks may also be concerned about their regulatory obligations to keep their LIBOR submissions confidential. Additional confidentiality and disclosure obligations, designed to address this issue have started to appear in loan agreements involving certain banks as a result.

[2] For further information on LIBOR transition, and links to the LMA materials please see the ACT's Briefing Note on LIBOR transition, available from http://www.treasurers.org/node/9825.

Some banks are also concerned about potential liability to the Borrower and the other Finance Parties in respect of the Reference Bank role. The Reference Bank role is an administrative role, similar to that of the Agent. As such, the Borrower might accept that Reference Banks might wish to limit their liability. However, as in relation to the Agent (and other administrative parties, see further below), the Borrower may be reluctant for Reference Banks to be exculpated from any responsibility for the rates produced.

In certain cases, banks have simply determined that as a policy matter, they will not act as Reference Banks. If no Lenders are willing to volunteer on the date of the Agreement, the practical solution is to provide for the Reference Banks to be appointed by the Agent (in consultation with the Borrower) as and when required. This solution has been adopted in a number of recent transactions.

Optional LIBOR/Euribor zero floor

The LMA has added an optional "zero floor" to the definitions of LIBOR and Euribor, with the effect that if LIBOR is negative, it will be deemed to be zero for the purposes of the Agreement.

Borrower Notes

This language has been in the market for some time; in a note to LMA members published in late 2011 and in the LMA's Leveraged Agreement and other recommended forms. As a result the zero floor has become quite widely adopted by Lenders and is commonly included in first draft loan documentation.

The ACT Guide highlights that if this language is included and there is a concern that the relevant rate could drop below zero, Borrowers will want to ensure that the zero floor is matched in any associated interest rate hedging arrangements.

CLAUSE 7.2: REPAYMENT OF FACILITY B LOANS

The provisions which permit the term-out of a Defaulting Lender's drawn participation in any revolving facility (discussed at Clause 7.2: Repayment of Facility B Loans in the ACT Guide), have been amended to provide, optionally, that such termed-out loan may only be voluntarily prepaid if the Borrower makes a voluntary prepayment of a Facility B Utilisation.

Previously, such termed-out loans could be voluntarily prepaid at any time. According to the new optional wording, if the termed-out loan is to benefit from the voluntary prepayment, it may do so only in the same proportion as the prepaid Facility B Utilisation bears to the total Facility B Utilisations.

The LMA's view is that the Borrower should not be permitted to prepay the Defaulting Lender unless the other Lenders also benefit from the prepayment.

Borrower Notes

The new provision is optional, but the Borrower may prefer to retain the flexibility to prepay the termed-out loan and cancel the Defaulting Lender's commitments so it can reinstate a revolving commitment in the same amount from a new Lender, using the "facility increase" mechanic that operates following the removal of a Defaulting Lender (discussed at Clause 2.2: Increase in the ACT Guide).

CLAUSE 13: TAX GROSS-UP AND INDEMNITIES

Following the enactment of FATCA in 2010, the LMA did not make any recommendations as to how the implications of FATCA should be addressed in the Investment Grade Agreements. Instead it provided guidance to the market in the form of a note to members, containing alternative options for the allocation of FATCA withholding risk between the Finance Parties and the Borrower (the "**FATCA Riders**").

The FATCA Riders initially comprised two alternative options, neither of which was particularly attractive from the Borrower's perspective.

A third option, Rider 3, was added to the FATCA Riders in July 2013 and was significantly more favourable to Borrowers. Rider 3 entitled all Parties to make any required FATCA withholding, but made clear that should withholding arise, no Party would be obliged to gross-up or compensate any other Party in respect of the relevant deduction. Rider 3 also excluded the possibility of claims relating to any FATCA deduction being pursued against the Borrower via the tax indemnity or the increased costs clause.

Since the FATCA Riders were first published, the UK and a number of other key jurisdictions have entered into inter-governmental agreements ("**IGAs**") with the US, which have the effect of largely eliminating FATCA withholding risk for Lenders in those jurisdictions. As a result, Rider 3 has become the standard way of dealing with FATCA in European loan documentation, regardless of whether the Borrower group includes a US entity or has US source income.

This widespread adoption of Rider 3 prompted the LMA to incorporate the text of Rider 3 (with some minor adjustments) into the most recent versions of the Investment Grade Agreements published on 16 June 2014.

The FATCA Riders also included certain "common provisions", to be used in conjunction with each of the three Riders. These were essentially information sharing provisions, which require each Party to confirm its FATCA status to the others to facilitate compliance. These common provisions also provided a mechanism for replacing the Agent if at risk of triggering FATCA withholding. These "common provisions" were incorporated into the Investment Grade Agreements on 16 June 2014 alongside the text of Rider 3 (again with some minor modifications).

CLAUSE 14: INCREASED COSTS

It has become common for Lenders to seek to reserve their rights to claim increased costs relating to Basel III from the Borrower since the prospect of Basel III was first announced.

The LMA increased costs clause entitles Lenders to recover "Increased Costs" from the Borrower, in summary, to the extent they arise out of a change in law that occurs after the date of the Agreement. As the Basel III papers themselves do not have the force of law and require implementation by EU and national legislators to have binding effect, initially Lenders often assumed that Basel III costs were potentially recoverable without further amendment to the clause. However, the legislation implementing Basel III in the EU (the fourth Capital Requirements Directive[3] and the Capital Requirements Regulation[4], together, "**CRD IV**") is now in force, prompting a change in approach.

The LMA increased costs clause does not express a view on whether Basel III costs should be included or excluded from the Borrower's indemnity obligation. It refers to Basel III only in a footnote, reminding the parties that they may wish to address it specifically. The LMA has amended its footnote to the increased costs clause to note that CRD IV is in force and to highlight that users may wish to supplement the clause to address the extent to which both Basel III costs and CRD IV costs are intended to be within, or outside, its scope.

Borrower Notes

In many current transactions Lenders are still seeking to reserve their rights to claim Basel III (and CRD IV) costs. The most common proposal is an amendment to the clause which clarifies that Basel III related costs, notwithstanding that they may no longer constitute a change in law, will nonetheless fall within the scope of the clause.

Borrowers may argue that despite the fact that certain detailed aspects of CRD IV remain work in progress, most banks in the EU should by now be able to quantify their increased costs. Accordingly, Borrowers should be entitled to assume that Basel III costs have been factored into the pricing of the facility (as was the case when Basel II was implemented).

[3] Directive 2013/36/EU.
[4] Regulation 575/2013.

However, market conditions over the past 18 months have emphasised the mismatch between the pricing of certain types of loan facility and their cost to the banks, perhaps further than ever before. Pricing has, in general, fallen quite significantly in the investment grade market, perhaps making Lenders more reluctant to concede their ability to recoup (at least in theory) their increasing operational costs from the Borrower.

Some Borrowers may accept this, valuing the margins currently on offer above a more favourable contractual arrangement on increased costs. They may also feel that their lending relationships are such that the risk of claims being made in practice is unlikely, and do not pursue the point on that basis.

Others, however, feel strongly that this is not consistent with the concept of relationship lending and may choose to pursue an exclusion of Basel III/CRD IV costs from the scope of the clause entirely. Stronger Borrowers with a close bank group or who borrow bilaterally are sometimes able to achieve an exclusion.

What is achievable is variable and may often depend on relationships and bargaining strength rather than the policies of individual Lenders.

In the face of general resistance from Lenders to the concept of excluding Basel III/CRD IV costs, the focus for Borrowers shifts to ways to mitigate the likelihood of claims, some of which are discussed in the ACT Guide.

A compromise that has gained traction more recently, is limiting recoverable costs to those arising out of Basel III/CRD IV which are not reasonably foreseeable on the date of the Agreement, acknowledging that while the impact of these measures may not be precisely quantifiable in all respects, many of the key elements are in final form.

CLAUSE 15: INDEMNITY TO THE AGENT

Pursuant to this Clause, the Borrower agrees to indemnify the Agent in relation to matters which are deemed to be within the Borrower's control or are accepted to be a Borrower risk for example, investigating potential Defaults and transaction, enforcement and amendment costs (see Clause 17).

The LMA added a new limb to the Borrower's indemnity obligation as part of the package of changes to the agency provisions in the Investment Grade Agreements made on 16 June 2014, to the effect that the Borrower will indemnify the Agent in respect of the costs of instructing lawyers, accountants and other advisers.

Borrower Notes

Costs of instructing advisers

It might be argued that the Agent was entitled to cover the costs of instructing professional advisers pursuant to the pre-existing indemnity language in relation to specific tasks; for example under Clause 15.3(a) as part of the costs of investigating any event which the Agent believes to be a Default or under the Borrower's general obligation to indemnify the Agent in respect of costs and expenses reasonably incurred in connection with an amendment or waiver process, or the Finance Parties (including the Agent), in respect of costs and expenses incurred in connection with any enforcement (see Clause 17). In practice therefore, this new provision may not represent a significant change.

The template does not, however, place any limitation on the Agent's ability to instruct advisers on behalf of the Lenders: Clause 26.7(c) (not a new provision) provides that the Agent is generally entitled to do so at its discretion. Borrowers may wish to build some protection into this provision along the lines that the Agent may instruct advisers at the Borrower's cost only if the Agent, in its reasonable opinion, deems this to be necessary. This protection is included as standard in new Clause 26.7(d), which entitles the Agent to appoint its own independent lawyers.

In transactions where specialist types of advice might be required during the life of the deal, the obvious example being in real estate financing where valuations might be required from time to time, it is customary to make express provision for who is to bear the costs of such advice. The Lenders might be entitled to appoint such advisers at the Borrower's cost in specified circumstances and/or a specified number of times. Where applicable, care must be taken to ensure that the Borrower's general indemnity obligations do not cut through any more specific provisions.

Indemnity obligations in the Leveraged Agreement

Borrowers should note that although many of the changes to the agency provisions in the Investment Grade Agreements on 16 June 2014 bring the provisions largely into line with those that have been in the Leveraged Agreement since September 2012 (discussed further at Clause 26 below), the agency provisions in the two agreements are not identical in all respects. In particular, the scope of the Borrower's indemnity obligations to the Agent are wider under the terms of the Leveraged Agreement.

Pursuant to the current version of the Leveraged Agreement, the Borrower's indemnity obligations to the Agent are identical in scope to the Lenders' indemnity to the Agent. Thus the Borrower is obliged to indemnify the Agent for all costs, liabilities and expenses it incurs in its capacity as such, save to the extent the Agent is grossly negligent or wilfully defaults. Further, if a Lender makes a payment to the Agent in accordance with the Lenders' indemnity obligations, that Lender is entitled to claim reimbursement of that amount from the Borrower.

As noted in the ACT Guide, there is a distinction between the scope of the Agency role in an investment grade loan and a leveraged loan. Clearly, the difference in the Borrower's assumed credit quality is relevant, but in addition, the greater complexity and typically longer tenor of leveraged loans, makes them more likely to be amended and restructured. Further, the likelihood that a leveraged loan will be held more widely means that the administrative input required from the Agent (and the risk of liability in the absence of contractual protection) is generally more significant.

The indemnity obligations of the Borrower in the Investment Grade Agreements, acknowledging that the demands placed on an Agent are likely to be less extensive in a straightforward investment grade financing, have not been similarly widened.

Mandate terms and indemnities

Loan mandate letters often include indemnity obligations which survive entry into the facility agreement and can be broad ranging. It is important to ensure that any such indemnity obligations are drafted such that they are superseded by overlapping obligations in the facility agreement, and do not, in effect, override any limitations agreed in the loan documentation itself.

CLAUSE 26: THE ROLE OF THE AGENT AND THE ARRANGER

Liability of the Agent

The volume of consent requests and restructurings that occurred in the aftermath of the financial crisis, often involving difficult issues of contractual interpretation, led Agents to focus more closely on the scope of their contractual protection under LMA terms. This clause, which defines the role and liabilities of the Agent (and the Arranger) has been comprehensively re-drafted, re-ordered and in some respects, supplemented as a result. Many of the changes bring the Investment Grade Agreements into line with the changes made by the LMA to the agency provisions in the Leveraged Agreement in September 2012.

Borrower Notes

The LMA recommended forms have always acknowledged that the role of the Agent is administrative. The market has long accepted that the Agent should be protected from liability in respect of substantive obligations which are the responsibility of the Lenders (or indeed the Borrower) and that its liability under the Finance Documents should be limited to gross negligence and wilful default in the performance of its limited and specified administrative functions. The Agent's liability is excluded completely, save to the extent of its own fraud, if the Agent's performance is inhibited by a "Disruption Event", in summary, a "force majeure" disruption to payment or communications systems beyond its control.

At first sight, the additions to the agency provisions appear extensive. However, many of the new provisions can be viewed as an extrapolation of the commercial position that applied previously.

For example, the new language specifies in a number of places in the agreement that the Agent expects to incur no liability in relation to services provided with the authority of the Lenders or in reliance on the work of advisers. To the extent the new provisions provide more specific examples of circumstances in which the Agent will not be liable for judgments it is tasked with fronting on the Lenders' behalf (eg a decision as to whether a particular amendment requires Majority Lender or unanimous consent on which it takes legal advice), they do not constitute a material departure from the principles reflected in the more general terms they replace. They simply extend the length of the documents.

In some areas, the new LMA language does appear to constitute a substantive narrowing of the scope of the Agent's liability.

For example, pursuant to the revised terms, the Agent's liability is excluded entirely for certain actions which involve the exercise of discretion, most notably, for confirming the satisfaction of the conditions precedent (see eg Clause 4.1). In addition, the Agent's liability for loss of profit damages and other indirect or consequential losses is excluded.

These provisions have been added because (in the view of the agency community) such risks are not proportionate to the rewards of the Agent's role. They also bring the LMA agency provisions closer towards the LSTA agency provisions used in the US market. Borrowers may not object to these changes for as long as Agency fees are set at a level which reflects the Agent's limited exposure.

CLAUSE 26.12: RESIGNATION OF THE AGENT

A notable change to the agency provisions in the Investment Grade Agreements relates to the circumstances in which the Agent can resign.

If the Agent wishes to resign, the Lenders, in consultation with the Borrower, have 20 days to appoint a successor Agent. If they fail to do so within that period, the resigning Agent may appoint a successor itself.

Under the revised provisions, where the Agent becomes entitled to appoint a successor, it is permitted, to the extent it considers necessary, to agree with the incoming Agent changes to the rights and obligations of the Agent under the agreement "*consistent with then current market practice*" together with "*any reasonable amendments to the agency fee payable under this Agreement which are consistent with the successor Agent's normal fee rates…*".

Borrower Notes

The thrust of this modification is unattractive to Borrowers, essentially permitting the outgoing Agent unilaterally to change the terms of the Agreement, most likely not in the Borrower's favour. However, some Agent banks who have found themselves in difficult positions – for example, faced with a conflict of interests – and who need to make a swift exit feel this to be important protection. Borrowers might take some comfort from the requirement on the outgoing Agent to act reasonably and in accordance with market practice.

The new provisions are, in any event, optional in the Investment Grade Agreements reflecting that provisions along these lines may be unnecessary in the investment grade market.

CLAUSE 29.4: CLAWBACK AND PRE-FUNDING

It is not uncommon in the syndicated loan market for the Agent to advance funds to the Borrower prior to being put in funds by the Lenders.

Perhaps surprisingly, the LMA recommended forms (prior to the most recent update) did not contain any specific protections for the Agent in the event that it found itself out of pocket as a result of pre-funding.

Paragraph (c) has been added to this clause, which provides that if the Agent has agreed to advance funds to the Borrower prior to being put in funds by the Lender, the risk and cost of a Lender defaulting on its obligation to reimburse the Agent fall on the Borrower. The Borrower is obliged to pay back to the Agent the sum advanced, and, to the extent the defaulting Lender fails to do so, reimburse the Agent any resulting costs.

Borrower Notes

Pre-funding potentially confers a benefit on the Borrower for example, a reduction in the amount of notice required to draw the facility or even just assurance that it will get its funds in time if one Lender is delayed for some reason. Further, an agreement by the Agent to "pre-fund" is a departure from the administrative role, to a commercial "fronting" role.

From the Borrower's point of view therefore, it might seem reasonable that the Agent would wish to ensure it incurs no liability as a result. The defaulting Lender is also probably in breach of contract in that instance meaning that the Borrower may have a claim against it for its resulting losses.

However, a Borrower may not want to incorporate a clause that contemplates Lender default without the rights to manage "Defaulting Lenders" set out in the LMA's Finance Party Default and Market Disruption Provisions (the "Market Conditions Provisions", discussed in Part I of the ACT Guide). It is suggested that this new clause, if incorporated, should be used in conjunction with those provisions.

CLAUSE 35: AMENDMENTS AND WAIVERS

A number of alterations have been made to the list of amendments and waivers that require all Lender, rather than Majority Lender, consent:

- Extension to Availability Period: An increase or extension to any Commitment has always been an all-Lender decision. The clause has been amended to provide that this includes the extension of an Availability Period. It is debatable whether the original words were broad enough to encompass this in any event.

- Clause 8.2 (Change of control): The list of clauses which require unanimous Lender consent if altered now includes the change of control clause (ie the clause which specifies in what circumstances the facilities must be prepaid and cancelled upon a change of control of the Group, see commentary on Clause 8.2 in the ACT Guide).

- Clause 8.8 (Application of prepayments): Amendments to this clause now require all-Lender consent. Clause 8.8 is a new, and provides that voluntary prepayments and prepayments which apply to all Lenders as a result of a change of control shall be applied pro rata to their respective participations, a point that was not previously addressed explicitly.

- Clause 28 (Sharing among Lenders): Amendments to the sharing clause have been elevated to the list of matters requiring all-Lender consent. This is presumably to avoid situations where Majority Lenders may have for example, set-off rights against the Borrower which they would be able to exercise for their own benefit if they were also able to effect an amendment of the requirement to share all recoveries with the other Lenders pro rata.

- Clause 38 (Governing law) and Clause 39.1 (Jurisdiction): As noted in the ACT Guide, the importance of these provisions was brought into focus by the Eurozone crisis and perceived re-denomination risk. In addition, and more significantly, English law and jurisdiction can be a factor which determines the availability of an English law scheme of arrangement to a foreign company. Accordingly, these are important provisions from the point of view of the availability of Lenders' preferred restructuring processes where the Borrower is not a UK company.

Borrower Notes

The addition of the change of control clause to the list of clauses which require unanimous Lender consent if altered is an optional amendment because it will most likely be of concern where the change of control clause confers an individual right on Lenders to require prepayment, which may not always be the case. Where the change of control clause confers an individual right on Lenders to require prepayment, Lenders may feel that individual decision should not be capable of removal or amendment by Majority Lenders.

In general, the rest of these amendments, which bring the Investment Grade Agreements into line with the LMA's Leveraged Agreement, close off routes which certain Borrowers have exploited to their advantage in the course of restructurings, in particular in the leveraged market. The principle behind making changes to these provisions decisions that require unanimous Lender consent (the desire to avoid back-door avoidance and perceived abuse of the minority) is quite difficult to dispute.

However, additions to the list might be resisted by some investment grade Borrowers on the basis that these provisions are aimed at events in the leveraged market. They are likely to have no practical impact in the investment grade market and are thus unnecessary. For this reason, all of the amendments above except the addition of the governing law and jurisdiction provisions to the list of all Lender decisions (a point to which some Lenders are particularly sensitive) are presented as optional by the LMA.

OTHER BORROWER-FRIENDLY CHANGES

The Investment Grade Agreements have been amended to address a number of other smaller points commonly negotiated by Borrowers, most of which are highlighted in the ACT Guide:

- Some minor adjustments have been made to the definition of "Financial Indebtedness" in Clause 1.1 (Definitions), to bring it more into line with the slightly slimmer equivalent definition in the Leveraged Agreement.

- The "yank the bank" provisions which entitle the Borrower to replace Lenders in specified circumstances have been extended to apply where the illegality prepayment event has been triggered, as an alternative to prepayment (see Clause 8.7(d)).

- Clause 22.5, the "No Merger" covenant, is broadly drafted and is often negotiated by Borrowers. As touched on in the ACT Guide, it can overlap with other provisions, in particular Clause 22.4 (the "No Disposals" covenant, which will permit certain disposals) and Clause 23.7 (the insolvency proceedings Event of Default which will permit certain solvent reorganisations). The LMA has accepted that permitted disposals should not fall within the scope of the No Merger covenant and added an exception to that effect.

- Clause 23.6, the insolvency Event of Default has been narrowed slightly so as not to apply where a Borrower commences discussions with a Finance Party creditor, a point that is commonly negotiated (see paragraph (a)(iii)).

- In Clause 29, the payment mechanics, minor adjustments regarding the Agent's discretion as to the place of payments in euro (which first appeared in the Leveraged Agreement in 2012 with a view to further protecting euro-denominated loans in a euro break-up scenario) have been adopted.

All of these changes are positive developments for Borrowers.

SCHEDULE 4: MANDATORY COSTS

In early 2013, Agent banks expressed concern about the operational difficulties experienced in the administration of the LMA's "Mandatory Costs" formula, the mechanic which entitles Lenders to pass on their supervisory costs to Borrowers. These concerns led the LMA in March 2013 to withdraw its Mandatory Costs formula and highlight in a note to members some possible alternative approaches to Mandatory Costs.

In late April 2013, all of the LMA's recommended forms were amended to make the charging of Mandatory Costs optional.

Borrower Notes

Since the LMA's announcement, it has become common in loan documentation to dispense with the concept of Mandatory Costs altogether (the assumption being that to the extent necessary, Lenders have taken account of such costs in the pricing arrangements).

In a few cases, Lenders have sought to reserve their rights to claims such costs, based on the old LMA formula.

In a few instances, Lenders have proposed other alternatives but this is rare.

LETTERS OF CREDIT

The LMA letters of credit provisions contemplate letters of credit being fronted by an "Issuing Bank", whose exposure is offset by counter-indemnities from the Obligors and the Lenders. The Lenders are paid a letter of credit fee on utilisations by way of letters of credit and the Issuing Bank is paid a fronting fee for its role.

These provisions have existed for some years as a slot-in option, to be added to any of the Investment Grade Agreements which incorporate a revolving facility as required (the "**Letter of Credit Option**").

The LMA has revised and updated the letter of credit provisions. As part of this process on 16 June 2014, it added a form of term and revolving facility agreement incorporating the updated letter of credit language to the suite of Investment Grade Agreements (the "**L/C Agreement**").

This section highlights the key differences between the letter of credit provisions in the new L/C Agreement and the pre-existing Letter of Credit Option. Clause references in this section are to clauses of the L/C Agreement.

Borrower Notes

The changes to the letter of credit provisions are largely mechanical.

Of the more substantive changes, some are positive news for Borrowers, for example:

- Borrowers often argue that the fronting fee should not be payable on the Issuing Bank's own participation in the L/C as Lender. This amendment has now been made to the template (see Clause 14.4(a)).

- The L/C Agreement provides for the appointment of more than one Issuing Bank, which can be a useful fallback in the event that an Issuing Bank is downgraded or runs into financial difficulties. This language previously formed part of the LMA's Market Conditions Provisions.

Less Borrower-friendly aspects of the updated provisions include the following:

- The L/C Agreement does not make provision for any reduction in the letter of credit or fronting fee to the extent the Issuing Bank's exposure is cash collateralised, although the relevant Borrower is entitled to withdraw interest accrued on any cash collateral to pay such fees.

- The Borrower is not permitted to withdraw any collateral provided to the extent it exceeds the amount of outstanding Letters of Credit from time to time.

- The option of revaluation of letters of credit at three monthly intervals has been removed. However, six monthly revaluation is the most commonly agreed period and the provision is optional in any event.

- Although rarely applicable, Clause 14.4(e) contemplates (optionally) the payment of an administrative/issuance fee to the Issuing Bank on top of the fronting fee.

- The consent of the Issuing Bank is required for any assignment or transfer by an Existing Lender of any of its rights or obligations under the revolving facility (Clause 26.2(d)). The Issuing Bank has an obvious interest in the identity of the incoming Lender, but Borrowers may wish to provide for deemed consent if certain conditions (eg a minimum credit rating) are satisfied.

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