



THE LEGALITIES OF LOANS

The LMA's developing markets documentation may be useful for borrowers in the GCC, argues Keith Bullen

In May and September 2013, the Loan Market Association (LMA) issued amendments to its recommended forms of primary documentation for use in developing markets. These amendments updated the single currency term facility (first released in September 2012) and provided variations to account for multicurrency, revolving and secured facilities. In its *User Guide to Developing Markets Facility Agreement*, the LMA explains that it produced the developing markets documentation (DMD) in response to demand from the syndicated lending market. The DMD is intended to provide standard drafting for representations, covenants and events of default that may be applicable in developing markets.

An important question is: Which markets is the DMD aimed at? The LMA does not answer this. Since September 2012, it has been our experience that lenders' counsel consider the Gulf Cooperation Council (GCC) to be a developing market while borrowers'

counsel do not. In each case, this approach is to protect their clients' interests rather than being a macro view of the GCC lending market. The DMD is not intended to be slavishly followed – making market consensus unnecessary – but it should be helpful as a means of avoiding what has become an awkward first round of negotiation between legal counsel. Regardless of how this issue ultimately plays out, comparison of the DMD and the LMA's established investment-grade and leveraged-finance documents is a useful exercise. It allows us to understand how the DMD may become a useful tool for finance lawyers operating in the GCC.

In general, when comparing the DMD with its established market counterparts, it is clear the LMA has tried to preserve its existing content where possible. Most of the amendments are to account for the risk profile of developing-market borrowers and to increase lender protection. Examples of the amendments made in the DMD are set out as follows.

Representations and warranties

Lenders have the benefit of a stronger package of representations and warranties in the DMD. Some representations have been made more difficult for a borrower to give, but others are new to the LMA suite of documents.

For example, the representation that the borrower has obtained all authorisations necessary to enter into the loan has the following **bold** amendments:

- (a) *All Authorisations **and any other acts, conditions or things** required or desirable:*
- (i) *to enable it lawfully to enter into, exercise its rights and comply with its obligations in the Finance Documents to which it is a party; and*
- (ii) *to make the Finance Documents to which it is a party admissible in evidence in its jurisdiction of incorporation, have been obtained or, effected, **done, fulfilled or performed** and are in full force and effect [except any Authorisation or other act, condition or thing*

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referred to in paragraph [] of Clause 18.9 (No filing or stamp taxes [and []], which will be promptly obtained, effected, done, fulfilled or performed after the date of this Agreement).

(b) All Authorisations necessary for the conduct of the business, trade and ordinary activities of members of the Group have been obtained or effected and are in full force and effect [if failure to obtain or effect those Authorisations has or is reasonably likely to have a Material Adverse Effect].

(c) [All the Material Licences have been obtained or effected and are in full force and effect.]

The 'other acts, conditions and things' referred to in limb (a) may seem innocuous, but borrowers could argue that they are an unnecessary extension and lack certainty. An alternative solution may be for the lenders to take advice from their local legal counsel and be specific about any necessary additional steps. The wording in brackets is a practical amendment to reflect that certain 'other acts, conditions and things' may need to be performed after the finance documents are signed. For example, the registration of a mortgage or charge would require the inclusion of the bracketed text.

In comparison, the addition of limb (b) represents a shift in risk allocation. One could ask why the LMA considers this wording necessary in developing markets, but not in established markets. On the face of it, the amendment is not developing-market specific.

Limb (c) is typically seen in project rather than corporate finance. The LMA did include this representation in square brackets to reflect that it may not be relevant for borrowers operating in less protective industries and jurisdictions. As with 'other acts, conditions and things', specific drafting may be preferable, either in the representation itself, or in the definition of 'Authorisations', making limb (c) unnecessary.

Other examples of representations contained in the DMD that do not appear in the established market documents include:

- (a) No insolvency;
- (b) No breach of laws having a material adverse effect;
- (c) No materially overdue taxes; and
- (d) No breach of anti-corruption laws.

It is not obvious why the LMA considers it appropriate for developing-market borrowers to represent their compliance with these issues when a borrower in an established market would not. An argument could be made that each of the representations could be required of any borrower, regardless of jurisdiction, because of domestic laws, and, in the case of anti-corruption, because of the UK Bribery Act and the US Foreign Corrupt Practices Act.

Undertakings

As with the representations set out above, amendments to certain borrowers' undertakings seem relevant in both developing and established markets. For example, the DMD obliges borrowers to retain the same auditor for the term of the facility. This is not required in established market documentation, but should be equally applicable regardless of jurisdiction.

The most onerous of the new undertakings would appear to be the requirement that if the lenders believe that an event of default may occur, the borrower must allow the lenders access to its premises, books, accounts, records and management. This position should be consistent across markets since the drafting does not remedy a specific developing markets issue. In any event, the right seems excessive given that lenders may request reasonable information through an obligation contained in both the established market documentation and the DMD.

Assignments and transfers

In recent years, provisions related to assignments and transfers have been subject to scrutiny. Historically, the

market standard was that borrower consent was a condition to an assignment or transfer. During the financial crisis, the LMA revised its position on this. Borrower consent became unnecessary where the assignment or transfer was to an existing lender, an affiliate of an existing lender or if an event of default was continuing. In the DMD, borrower consent is not a requirement at all. The LMA gives no explanation for this amendment.

Conclusion

Historically, lawyers in the GCC have tended to start with the LMA's investment-grade form with amendments to account for the jurisdiction of the borrower and the purpose of the facility. On that basis alone, the LMA's recognition that developing markets deserve special attention is welcome. What must be avoided, however, is the inclusion of provisions that are not developing-market specific. Taking comments from a wider range of stakeholders may help to develop the DMD in the future, particularly as the DMD user guide states that the LMA did not take comments from the borrower community during the drafting process.

It is important to note that the Asia Pacific Loan Market Association has existed for some time, servicing the needs of that region by providing documentation to suit its financial centres. An interesting question for stakeholders in the GCC is to ask how much further this market needs to grow before a GCC loan market association is formed. Hopefully this will occur in the future, providing a forum for discussing and collating GCC-specific issues and developing loan documentation to meet these requirements.



Keith Bullen is an associate at international law firm Baker Botts