

Loan documentation - A Beginners Guide: Five steps to preparing for the negotiation

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0. Background

Make sure you have an experienced and current legal advisor. Proceed with care and preparation - having good legal advice does not mean abdication to the advisor. Consider your relative negotiating strength *vis à vis* the bank(s).

1. Preliminary

- 1(a) Make sure you and your legal advisor each have a copy of the existing loan documentation for the company(ies) (including any guarantors). Existing documentation may be versions of varying antiquity of your own documentation or a mish-mash of bank/arranger documents. Where any of the guarantors or intended borrowers are overseas companies, ensure that relevant legal advisors are available.
- 1(b) New loan documentation, whether for syndicated or bilateral loans may be based on LMA primary documents for investment grade syndicated facilities. The LMA publishes a "users' guide" as well. The documents are available electronically only to LMA Members.
- 1(c) The ACT publishes a 132 page commentary on the primary documents, *The ACT Borrower's Guide to the LMA Loan Documentation for Investment Grade Borrowers (February 2010)*, produced by Slaughter and May. Download it, free, from www.treasurers.org/loandocumentation, but you will need to print it out so you can highlight passages and make notes.
- 1(d) Make sure you have the short article *An introduction to loan finance* written by Clifford Chance LLP in the ACT International Treasurer's Handbook 2011 (pp. 28-30).

2. Preparation

- 2(a) Read the ACT International Treasurer's Handbook 2011 article (1(d) above).
- 2(a) Familiarise yourself with your existing loan documentation. If any parts are unclear mark them and see if step 2(b) clarifies them. Discuss with colleagues within the company/group as necessary whether there are any particular inconveniences in the existing documentation – both operationally and as regards covenants, default conditions etc. (are they really suited to the business as it now is and will develop over the years – and what may be more appropriate).
- 2(b) Read through the LMA primary documentation (1(b) above), reading in parallel the *ACT Guides* (1(c) above) and referring to the LMA user's guide (1(b) above) where this seems useful. Particularly make a note of where you will want better than the primary documents provide for the borrower/guarantors. Note that while the LMA primary document in places includes alternatives and passages marked "optional", *nothing* is mandatory – the agreement between the company/group and the its bankers is, in its entirety, a negotiation.
- 2(c) If any matters are unclear, discuss them with your legal advisor. Also consider with your legal advisor factors special to your company/group which may affect an agreement generally and especially in relation to covenants, representations and warranties, undertakings, etc. And agree where you will realistically look to improve (from the borrowers point of view) on the LMA document wordings. [Make a note too of some where such improvement would be unrealistic... you will need points to concede in negotiation to make the banks' negotiators feel they have done a good job.]

You have now done your homework.

You have a good idea of your existing documentation and what you might expect from any new documentation. Remember that your degree of control over the negotiation and final documentation will be a matter of your relative negotiating strength.

3. **New documentation?**

3(a) You may like your existing documentation. In going through the preparation, you may have seen ways in which your documentation can be updated (again) and your legal advisor may have ideas on this too. If extensive updating is needed, a new document, probably based on the LMA primary documents, should be considered.

3(b) The arranger, or the lender for a bi-lateral facility, will probably want to supply their own new documentation, possibly based in some way on the LMA primary documents and which they may call "standard". You are now ready to receive that – if you are prepared to contemplate it at all.

4. **Considering new documents**

4(a) The LMA user's guide says that in presenting new documentation based on the primary documents, a mark-up of the presented documents against the primary documents themselves should be provided (as well as a "clean" document). The recipient then can more easily see what changes have been made, what choices have been made when alternative or optional text is involved, and what additions have been inserted.

If the arranger or bank (for a bi-lateral) has presented new documents, insist on receiving the mark-up against the LMA primary documents *at the same time*.

If the company has had new documents prepared, don't overlook the need to provide mark-up when supplying it to banks/the arranger.

4(b) Be particularly suspicious if given documentation characterised as "LMA compliant".

4(c) If receiving documents from a bank/arranger, read it through, observing the mark-up showing changes from the LMA primary documents and referring throughout to the *ACT Guides*, noting sections to review with your legal advisor. Consider all representations, warranties, covenants, undertakings and events of default very carefully with appropriate colleagues within the company/group and your legal advisor as regards their practicality and the potential effects on the company/group of such obligations.

Review the entire document with your legal advisor and decide how to respond overall and in respect of each individual element.

5. **The negotiation**

You are now well prepared.

Good luck!