

ALERTS

LMA Revises EMEA Secondary Debt Trading Documents

14 January 2016

Following recent court decisions, the Loan Market Association ('LMA') has updated its Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank/Claims) ('STC') and relevant secondary trading documents. The revised documents 'went live' on and apply to trades agreed on or after 16 December 2015. The existing LMA secondary documents will continue to apply to all trades undertaken before 16 December 2015 that are subject to LMA terms.

Allocation of Interest, Recurring Fees/Non-Recurring Fees and Other Fees

Condition 15.9 of the STC has been updated to address allocations of interest, recurring fees and non-recurring fees between buyers and sellers, where the trade confirmation or the STC does not otherwise address them — for instance, if the parties haven't chosen an interest treatment in Section 9 of the trade confirmation. In these cases, any accrued interest or recurring fees relating to the period before settlement will be allocated to the seller, and those relating to the period after settlement will be allocated to the buyer. Any non-recurring fees paid or capitalised on or after the trade date will be allocated to the buyer.

If the buyer or seller receives a payment of interest, recurring fees or non-recurring fees that the other party should have received, it must forward such payment to the other party within two business days of receipt. However, these payments must be paid back to the original party if subsequently clawed back by the agent. Finally, if either party receives a

non-cash distribution in satisfaction of an obligation of the debtor to pay interest, recurring fees or non-recurring fees that belongs to the other party pursuant to Condition 15.9, the receiving party shall, as soon as reasonably practicable following receipt of such non-cash distribution (but not before the settlement date), transfer the non-cash distribution to and register it in the name of the other party. (This process is also in line with the amendments to the STC's non-cash distributions language, discussed below in the Turnover Provisions section.)

If the parties want to allocate all or any part of the interest, recurring fees or non-recurring fees differently from the allocation in the STC or if the credit documentation includes unusual interest or fees that don't readily fit within the STC's relevant definitions, they must agree on how to allocate these amounts at the time of trade and expressly include their agreement in the 'Other Terms of Trade' section of the trade confirmation. The UK Supreme Court's recent holding in *Tael One Partners Limited v. Morgan Stanley & Co International PLC* [2015] UKSC 12^[1] that a loan prepayment premium paid after the settlement date is for the account of the buyer and not for the account of the seller or the seller's predecessor-in-title underscores the importance of correctly allocating payments that don't fit within the STC's definitions.

The LMA has also updated the definition of recurring fees to include ticking fees. As with other fees that fall under the term 'Recurring Fees' in the STC, the credit documentation must expressly refer to ticking fees. As a result, a ticking fee documented in the commitment letter will not fall under 'Recurring Fees'.

Turnover Provisions

The market viewed previous provisions of the STC relating to non-cash distributions as ambiguous, as they could potentially have been interpreted to require the establishment of a trust structure. The new provisions clarify that if the seller receives a non-cash distribution that is for the account of the buyer, the seller must transfer it to and register it in the name of the buyer as soon as reasonably practicable after receiving it.

The LMA has tried to ensure a consistent approach between trading instruments (i.e. bank debt and claims) by updating Clause 15 ('Interest Payments and Fees') as well as Clause 9 ('Insolvency Proceedings') regarding the turnover provisions. Now, if a seller receives a distribution

that belongs to the buyer, the seller must turn it over within two business days.

Notarial Fees/Notarial Perfection of Security and Collateral

Prior to these changes, counterparties had argued that in certain jurisdictions it was unclear who was responsible for paying notarial fees or specific fees associated with loan transfers or collateral perfection. Most market participants believed that the buyer and seller should split such fees. However, the STC and the secondary documents now state which party is responsible for the for payment of these fees at time of trade, splitting them into contractual notarial fees[2] and any other notarial fees associated with the transfer of the Traded Portion. Each type of notarial fee is treated differently by the STC:

Contractual Notarial Fees

Contractual notarial fees will be split equally between the buyer and seller. However, each counterparty is only responsible for half of *one* notarial fee. Therefore if a counterparty is either selling or purchasing via multiple entities, that counterparty is responsible for all of the additional notarial fees due.

Any Other Notarial Fees

Any non-contractual notarial fees relating to the purchase or sale of the Traded Portion will be payable by the buyer. If the parties want a different arrangement, they need to agree so at time of trade and reflect the same in the trade confirmation.

Jurisdictions where parties might encounter notarial fees or similar types of perfection fees for registering security for loans or for transferring claims include France,[3] Spain[4] and Germany.[5]

Acting as Custodian

The LMA's updated documents also clarify that unless otherwise specified in the trade confirmation, a party does not act as a trustee, agent, custodian or fiduciary for the other party.

Calculating Delayed Settlement Compensation

Unless the parties agree otherwise at time of trade, delayed settlement compensation applies to trades. Delayed settlement compensation puts the parties in the economic position they would have been in had the trade settled within the LMA's contemplated settlement timeframe (i.e. T+20 for distressed trades and T+10 for par trades). If the trade settles on a date that is after T+20 for distressed trades and T+10 for par trades (the 'Delay Period Commencement Date'), the seller must pay the buyer accrued interest up to (but excluding) the settlement date. The buyer must pay the seller the cost of funding the traded portion past the Delay Period Commencement Date (also referred to as 'Cost of Carry').

However, in some instances the seller is required to pay the Cost of Carry to the buyer — when, for example, the interbank offered rate used for the calculation of the Cost of Carry is negative. The LMA has also updated its user guide to explain how a negative interbank offered rate could impact payments of delayed settlement compensation. The guide now offers proposed drafting that parties can include in their trade confirmations to address the issue.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

We offer clients of the firm access to the SRZ Distressed Debt & Claims Trading Client Resource Center, which contains a frequently updated collection of U.S. and European distressed debt education and training materials. Please contact one of the authors to request access.

[1] For a detailed account of the case, please see the SRZ *Alerts* 'UK Supreme Court Clarifies Allocation of Prepayment Premiums for Debt Traders' and 'English High Court Clarifies Post-Settlement Treatment of Interest and Fees for Secondary Market Participants'.

[2] 'Contractual notarial fee' is defined as any notarial fee which must be paid in connection with the purchase or sale of the Traded Portion as an express requirement in the credit agreement (including where such express requirement is exercised at the discretion of the Agent or any

other party to the credit agreement). However, counterparties should note that contractual notarial fees exclude any other part of the Purchased Assets and Purchased Obligations or related Collateral posted.

[3] In order to perfect a transfer of bank debt and/or security in France, the purchaser is required to notify the borrower of the transfer through a French huissier or bailiff. Non-compliance may result in the security being unenforceable against third parties.

[4] In Spain, a borrower should be notified of a transfer of bank debt. The usual method of notification is to notarise the assignment, which usually allows a new lender to enforce its rights directly against the borrower. Also, in Spain, each piece of security granted over real estate will need to be perfected in accordance with individual local Spanish Public Registries. Where a security is granted in multiple local Spanish Public Registries, this can be very time consuming and costly for a buyer, as each registry may have different fee structures, time frames and local processes for finalising registration.

[5] In Germany, if a claim is being purchased in an insolvent estate and the insolvency register has already been published, the purchaser will need to ask the court's permission to update the register. This involves having an assignment agreement notarised (and in some cases apostilled) in order for the court to recognise the perfection of a valid assignment.

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