

# Using the LMA Senior Multicurrency Term and Revolving Facilities Agreement (Leveraged Acquisition Finance): Ireland

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Checklists | [Law stated as at 28-Jun-2020](#) | Ireland

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A practical guide to points arising from the point of view of Irish law where an agreement based on the LMA Senior Multicurrency Term and Revolving Facilities Agreement is being prepared and one or more of the borrowers is a company incorporated in Ireland or the governing law of the agreement is to be Irish law.

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## Scope of this checklist

This checklist is a practical guide to points which arise from the point of view of Irish law where an agreement based on the LMA Senior Multicurrency Term and Revolving Facilities Agreement is being prepared and one or more of the borrowers is a company incorporated in Ireland or the governing law of the agreement is to be Irish law. It sets out clause by clause, in question and answer format, the changes which need to be made when utilising the LMA form of agreement in those situations, together with comments in relation to the efficacy or appropriateness of certain of the provisions in relation to an Irish borrower or in an agreement governed by Irish law.

This note addresses the majority of points relating to the use of the LMA Senior Multicurrency Term and Revolving Facilities Agreement in the situations referred to, but should not be taken to be exhaustive.

Useful additional information in relation to loan agreements in Ireland may be found in the [Corporate loan facilities Q&A: Ireland](#).

## Clause 1.1 (Definitions) - What adjustments would be appropriate in the following definitions?

### Accession Deed

Accession deeds in the form set out in Schedule 7 to the LMA Agreement are used in Ireland. Clearly, where the underlying facility agreement and intercreditor agreement are governed by Irish law, the corresponding accession deed will also be governed by Irish law.

### Accounting Principles

Accounting Principles are typically defined by reference to generally accepted accounting principles in Ireland (GAAP) or IFRS. The applicable principle will depend on the nature or circumstances of the corporate entity entering into the LMA Agreement. For instance, companies with debt or equity securities listed on a regulated EU market,

for example, the main market of the Irish Stock Exchange, are required to prepare their financial statements in accordance with EU adopted IFRS.

### **Additional Borrower**

Companies incorporated in Ireland can validly accede to the LMA Agreement based on this form.

### **Audit Law**

The Audit Laws are defined by reference to EU Regulation (537/2014) and the EU Directive (2014/56/EU) (the "Directive") and any domestic legislation implementing this Directive. Regulations have direct effect in all member states. Directives are implemented using implementing legislation in the relevant member states however, as noted above, the definition is drafted widely enough to allow its use for a borrower incorporated in Ireland.

Notwithstanding the above, in Ireland the Directive was transposed in June 2016 by way of a statutory instrument – European Union (Statutory Audits) (Directive 2006/43/EC, as amended by Directive 2014/56/EC, and Regulation (EU) No 537/2014) Regulations 2016 – SI No 312 of 2016. This statutory instrument was elevated into primary legislation to provide a single, comprehensive framework for statutory audit in the Companies Act 2014 pursuant to the Companies (Statutory Audits) Act 2018 (No 22 of 2018).

### **Business Day**

Where the LMA Agreement is governed by Irish law and relates to Irish obligors only, the definition will need to be amended to refer to days (other than Saturday or Sunday) on which the banks are open for general business in Dublin (and in relation to a euro facility) and any Target Day. Where the facility is being provided in euro only, paragraphs (a) and (c) should be deleted.

### **Certificate of Title**

Where the "Property(ies)" are located in Ireland the reference to "English legal counsel" should be amended to refer to "Irish legal counsel" or the specific name of the solicitors firm who will be completing the certificate of title. Otherwise, the definition is suitable for use in relation to Irish property. Whether the definition is used or not will depend on the circumstances of the transaction and whether a certificate or report on title is being provided.

### **Change of Control**

The definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to Irish entities. The percentage to be inserted is 50.

### **Contribution Notice**

The power to issue a contribution notice against an employer with a defined benefit scheme and/or its associated or connected entities is specific to the UK Pensions Regulator in respect of UK regulated defined benefit pension schemes. The Irish regulator, the Pensions Authority, does not have any equivalent power in respect of Irish regulated defined benefit pension schemes. This definition can therefore be deleted (where appropriate – that is, where there is no UK defined benefit scheme operated by the borrower or its connected or associated entities).

### **CTA**

Where Irish law governs the LMA Agreement or the term relates to an Irish obligor, references to "CTA" should be changed to "TCA" (being the Taxes Consolidation Act 1997 of Ireland). In these circumstances, a new definition of "TCA" should be included in the LMA Agreement as follows: ""TCA" means the Taxes Consolidation Act 1997 (as

amended) of Ireland". The further references to the provisions of the CTA would also need to be considered and amended in the context of the TCA.

### **Defaulting Lender**

The definition (including paragraph (b)) is suitable for use in an LMA Agreement which is governed by Irish law.

### **Delegate**

The definition (including the reference to a co-trustee) is suitable for use in an LMA Agreement which is governed by Irish law.

### **Dormant Subsidiary**

The definition (including the reference to legal and beneficial ownership) is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

### **Finance Lease**

The definition (including the reference to "leased") is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

### **Financial Indebtedness**

This definition does, by its nature, require some amendment on a case-by-case basis but is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

### **Financial Support Direction**

The power to issue a financial support direction against an employer with a defined benefit scheme and/or its associated or connected entities is specific to the UK Pensions Regulator in respect of UK regulated defined benefit pension schemes. The Irish regulator, the Pensions Authority, does not have any equivalent power in respect of Irish regulated defined benefit pension schemes. This definition can therefore be deleted (where appropriate – that is, where there is no UK defined benefit scheme operated by the borrower or its connected or associated entities).

### **Group**

The definition is suitable for use in an LMA Agreement which is governed by Irish law.

### **Impaired Agent**

The definition is suitable for use in an LMA Agreement which is governed by Irish law.

### **Insolvency Event**

This definition will need to be amended according to insolvency laws of the relevant jurisdictions in which the parties are incorporated. While the definition has been drafted in general terms to cover insolvency procedures and laws in relevant jurisdictions, reference to the appointment of an examiner and examinership should be included where an Irish corporate entity is a party to the LMA Agreement. Paragraph (f) could also be deleted where the definition is referable solely to an Irish entity.

### **Intellectual Property**

The definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

### **Joint Venture**

The definition is suitable for use in an LMA Agreement which is governed by Irish law.

### **Legal Reservations**

In relation to an Irish obligor:

- The reference to UK stamp duty should be amended to refer to "Irish stamp duty".
- See below in relation to the definition of "Limitation Acts".

### **Letter of Credit**

The definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish borrower.

### **Limitation Acts**

Where Irish law governs the LMA Agreement, this definition should be amended to refer collectively to the Statute of Limitations 1957 and 1991 and the Statute of Limitations (Amendment) Act, 2000.

### **Material Adverse Effect**

The definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

### **Original Financial Statements**

The definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor, albeit that the definition will often require amendment in accordance with the requirements of the Agent and the availability of statements from the obligors.

### **Pensions Regulator**

The definition is only applicable where a UK defined benefit pension scheme is operated by the borrower or any of its associated or connected entities in respect of which the UK Pensions Regulator could issue a contribution notice or a financial support direction.

### **Pension Report**

The definition is suitable for use in an LMA Agreement, which is governed by Irish law or in relation to an Irish obligor.

### **Permitted Acquisition**

Notwithstanding that this definition will require amendment on a case-by-case basis, the definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

### **Permitted Distribution**

Notwithstanding that this definition will require amendment on a case-by-case basis, the definition is suitable for use in an LMA Agreement which is governed by Irish law. If the Parent is an Irish entity, it may or may not have

Articles of Association and this reference may need to be amended. For example, a Limited Liability Company which has updated its constitutional documents following the coming into force of the Companies Act 2014 will not have Articles of Association and instead will have a constitution, while a Designated Activity Company will.

#### **Permitted Guarantee**

The definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

#### **Permitted Joint Venture**

Notwithstanding that this definition will require amendment on a case-by-case basis, the definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

#### **Permitted Loan**

Notwithstanding that this definition will require amendment on a case-by-case basis, the definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

#### **Permitted Security**

Notwithstanding that this definition will require amendment on a case-by-case basis, the definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

#### **Permitted Share Issue**

Notwithstanding that this definition will require amendment on a case-by-case basis, the definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

#### **Permitted Transaction**

Notwithstanding that this definition will require amendment on a case-by-case basis, the definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

#### **Real Property**

This definition is suitable for use where referable to Irish real property.

#### **Receiver**

There is no concept of an administrative receivership in Ireland. Therefore, this can be deleted (where appropriate).

#### **Report on Title**

The definition is suitable for use in relation to property located in Ireland. It is generally understood, when referring to a report on title as distinct from a certificate of title, that this is prepared by lender's counsel.

#### **Secured Parties**

The definition is suitable for use in an LMA Agreement which is governed by Irish law.

#### **Security**

The definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

### **Sponsor Affiliate**

Notwithstanding that this definition will require amendment on a case-by-case basis, the definition is suitable for use in an LMA Agreement which is governed by Irish law.

### **Subsidiary**

Where it is referable to an Irish incorporated company, this definition can be amended as follows:

"Subsidiary" means a subsidiary within the meaning of section 7 of the Companies Act 2014 or a wholly owned subsidiary within the meaning of section 8 of the Companies Act 2014.

### **Trade Instruments**

The definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

### **Treasury Transactions**

Notwithstanding that this definition will require amendment on a case-by-case basis, the definition is suitable for use in an LMA Agreement which is governed by Irish law or in relation to an Irish obligor.

### **VAT**

An extra limb should be added to this definition where it is referable to an Irish obligor, which reads "any value added tax as provided for in the VATCA (or any replacement Act) as amended from time to time and any other tax of a similar nature". VATCA should be defined in the LMA Agreement as follows: "'VATCA" means the Value Added Tax Consolidation Act (as amended) of Ireland".

### **Clause 1.4 (Third party rights) – Is this (or a similar provision) required under the law of your jurisdiction?**

There is no equivalent legislation in Ireland to the Contracts (Rights of Third Parties) Act 1999 and therefore this clause can be deleted in its entirety where the LMA Agreement is governed by Irish law.

### **Clause 2.1(b) (The Facilities) – Is the cross-reference in this clause to a separate Funds Flow Statement or Structure Memorandum satisfactory, if the agreement is governed by the law of your jurisdiction?**

Yes.

### **Clause 2.5 (Obligors' Agent) – Are these provisions enforceable against a borrower (or guarantor) incorporated in your jurisdiction, or if the governing law of the agreement is the law of your jurisdiction?**

These provisions are enforceable against a borrower (or guarantor) incorporated in Ireland, or if the governing law of the agreement is Irish law.

**Clause 3 (Purpose) – Under the law of your jurisdiction, can a lender be prejudiced if the borrower applies borrowed funds to an illegal purpose?**

Under Irish law, a lender could be prejudiced where the borrower applies funds for an illegal purpose. For instance if a borrower applied funds in contravention of section 82 (Financial Assistance) or section 239 (Prohibition of loans, etc., to directors and connected persons) of the Companies Act 2014, the transaction would (subject to section 246 in respect of a breach of section 239) be voidable at the instance of the company against lender where it had notice of the facts which constituted such a contravention. A lender could be similarly prejudiced where the transaction contravened any relevant Sanctions Regime.

**Clause 4.3 (Conditions relating to Optional Currencies), Clause 5.3 and Clause 6.4 (Currency and amount) and Clause 8 (Optional Currencies) – Is there any restriction, in the case of a borrower incorporated in your jurisdiction, on borrowing in currencies other than the currency of your jurisdiction?**

There are no restrictions, in the case of an Irish borrower, on borrowing in currencies other than euro.

**Clauses 7.3(e), 7.4, 7.5 and 7.6 (Letters of Credit) (with Clause 1.2(e) (cash cover)) and Clause 18.5 (Fees payable in respect of Letters of Credit) – Are the cash cover arrangements set out in these provisions enforceable under the law of your jurisdiction? Do particular procedures need to be complied with (such as, for example, application by the lender for the registration of a security interest in a public register)?**

The cash cover arrangements set out in clauses 7.3(e), 7.4, 7.5 and 7.6 (Letters of Credit) (with clause 1.2(e) (cash cover)) and clause 18.5 (Fees payable in respect of Letters of Credit) are enforceable under Irish law.

It should be noted that in Ireland the issuing of letters of credit for the benefit of Irish recipients is deemed to constitute unauthorised insurance business unless undertaken by either:

- An Irish licensed bank.
- A foreign bank through "back to back" arrangements whereby an Irish licensed bank issues the letter of credit and then obtains an equivalent letter of credit itself from the foreign bank.
- An EU/EEA Bank passporting an appropriate authorisation into Ireland.
- Q. Clause 7.3 (Indemnities) – Does this sub-clause require to be adjusted, in order to be enforceable, if the governing law of the agreement is the law of your jurisdiction? If so, what adjustments are needed?

This sub-clause does not require adjustment in order to be enforceable if the LMA Agreement is governed by Irish law.

**Clause 9.3(b)(i) (Terms of Ancillary Facilities) – If the law of your jurisdiction were the governing law of the agreement, would the effect of this paragraph be clear? If so, would it add anything to sub-clause 9.3(a)?**

Yes, in an LMA Agreement governed by Irish law, the effect of this paragraph would be clear.

**Clause 12.1(c) (and Clauses 12.2(c) and 12.6(c)) (Illegality, voluntary prepayment and cancellation) – Are these provisions enforceable if the law of your jurisdiction is the governing law of the agreement?**

These provisions are enforceable if the LMA Agreement is governed by Irish law.

**Clause 13 (Mandatory prepayment and cancellation) – Do any of the provisions of this clause require to be adjusted, in order to be enforceable, if the law of your jurisdiction is the governing law of the agreement, or if the borrower is incorporated in your jurisdiction? Might any of them contravene public policy in your jurisdiction? What changes would you make to Clause 13.1(a) to describe a listing of the borrower in your jurisdiction?**

Where referable to an Irish flotation the definition of "Flotation" should be amended to refer to the official list of the Irish Stock Exchange Limited.

Subject to the amendment above, the provisions do not require adjustment in order to be enforceable if Irish law governs the LMA Agreement.

**Clause 14.1 (Notices of Cancellation or Prepayment) – Could notices referred to in this provision be revoked, notwithstanding that they are agreed to be irrevocable, if the governing law of the agreement were the law of your jurisdiction?**

The Irish courts would give effect to the contractual terms of the notice and underlying LMA Agreement and thus the notice could not be unilaterally revoked where it was expressed to be irrevocable.

**Clause 15.3 (Default interest) – Does this provision require to be adjusted, in order to be enforceable, if the law of your jurisdiction is the governing law of the agreement? Is there any limit on the figure which can be entered as the rate in line 4?**

Clause 15.3 does not require to be adjusted in order to be enforceable in Ireland. There is no specific limit on the figure which can be entered as the rate in line 4. However, under Irish law, for default interest to be enforceable it must be payable at a rate which is a genuine attempt by the parties to estimate in advance the loss which will result from the breach.

**Clause 16.3 (Interest Periods) - Would you make the currency of your jurisdiction a "Non-LIBOR Currency" if the borrower or the lender was incorporated or carrying on business in your jurisdiction, or if the governing law of the facility agreement was the law of your jurisdiction, and what would you insert in Schedule 18 in relation to that currency?**

As EURIBOR is addressed separately within the LMA Agreement we would not make euro a "Non-LIBOR Currency" if the borrower or lender was incorporated or carrying on business in Ireland or if Irish law governed the LMA



Agreement. Therefore, provided multi-currency facilities are not being provided which included a "Non-Libor Currency", Schedule 17 (Other Benchmarks) can be deleted.

**Clause 19.1 (Tax gross-up and indemnities) (Definitions) – What needs to be changed in these definitions if a borrower or lender is incorporated in your jurisdiction, or is resident in your jurisdiction for tax purposes, or is otherwise subject in some way to the tax laws of your jurisdiction?**

This sub-clause would need to be amended along the following lines where the LMA Agreement is governed by Irish law or relates to an Irish obligor:

- The definition of "Borrower DTTP Filing" should be deleted, together with subsequent references to same throughout clause 19 (please see further below), as there is no equivalent filing in Ireland.
- The definition of "Qualifying Lender" should be deleted and replaced with the following definition:

"Qualifying Lender" means a Lender which is:

(a) a bank which is authorised or licensed to carry on banking business in Ireland and which is carrying on a bona fide banking business in Ireland;

(b) a building society (within the meaning of section 256(1) of the TCA) which is carrying on a bona fide banking business in Ireland;

(c) an authorised credit institution (under the terms of Directive 2013/36/EU) which has duly established a branch in Ireland, having made all necessary notifications to its home state competent authorities (as required under Directive 2013/36/EU and, where applicable, under Council Regulation No. 1024/2013) in relation to its intention to carry on banking business in Ireland, and which is carrying on a bona fide banking business in Ireland;

(d) a company (within the meaning of section 246 of the TCA):

- (i) which is resident for the purposes of Tax in a Relevant Territory (for these purposes residence is to be determined in accordance with the Relevant Territory of which the Lender claims to be resident) where that Relevant Territory imposes a Tax that generally applies to interest receivable in that Relevant Territory or payable into an account located in the Relevant Territory by companies from sources outside that Relevant Territory; or
- (ii) where interest payable under a Finance Document:
  - (A) is exempted from the charge to Irish income tax under a Tax Treaty in force on the date the relevant interest is paid; or
  - (B) would be exempted from the charge to Irish income tax if a Tax Treaty which has been signed but is not yet in force had the force of law on the date the interest is paid;

provided that, in the case of both paragraphs (i) and (ii) above, such company does not provide its commitment in connection with a trade or business which is carried on in Ireland through a branch or agency in Ireland;

(e) a US corporation that is incorporated in the US and is subject to federal income tax in the US on its worldwide income provided that such interest is not paid to such US corporation in connection with a trade or business which is carried on in Ireland through a branch or agency in Ireland;

(f) a US limited liability company (an "LLC") where (I) the ultimate recipients of the interest payable under the Finance Document would themselves be Qualifying Lenders under (d) or (e) above, and (II) the business conducted through the LLC is so structured for market reasons and not for tax avoidance purposes;

(g) a company (within the meaning of section 246 of the TCA):

- (i) which advances money in the ordinary course of a trade which includes the lending of money; and
- (ii) in whose hands any interest payable under this Agreement is taken into account in computing the trading income of that company; and
- (iii) which has complied with the notification requirements under section 246(5) of the TCA;

(h) a qualifying company (within the meaning of section 110 of the TCA);

(i) an investment undertaking (within the meaning of section 739B of the TCA);

(j) an exempt approved scheme (within the meaning of section 774 of the TCA); or

(k) a Treaty Lender.

- See the definition of TCA in the comments in relation to the definition of CTA.
- In relation to replacement paragraph (d)(i) above, the following definition should be used for "Relevant Territory":

"Relevant Territory" means:

- a member state of the European Union (other than Ireland); or
  - to the extent not a member state of the European Union, a jurisdiction with which Ireland has entered into a Tax Treaty that has the force of law by virtue of section 826(1) of the TCA or a jurisdiction with which Ireland has entered into a Tax Treaty where that treaty will (on completion of necessary procedures set out in section 826(1) of the TCA) have the force of law.
- In relation to replacement paragraph (d)(ii) and the definition of "Relevant Territory" above, the following definition should be used for Tax Treaty:  
  
"Tax Treaty" means a double taxation treaty into which Ireland has entered which contains an article dealing with interest or income from debt claims.
  - The definition of "Tax Confirmation" should be deleted on the basis that such term will not be used in clause 19 (following the deletions indicated below).
  - The definition of "UK Non-Bank Lender" should be deleted on the basis that such term will not be used in clause 19 (following the deletions indicated below).

The above are meant as a guide only and the provisions of clause 19.1 will need to be carefully considered on a case-by-case basis to ensure they are appropriate for the transaction and the underlying obligors. Tax advice should always be taken when marking up the tax provisions of the LMA.

**Clause 19.2 to clause 19.9 (Tax gross-up and indemnities) – What needs to be changed in these sub-clauses if a borrower or lender is incorporated in your jurisdiction, or is resident in your jurisdiction for tax purposes, or is otherwise subject in some way to the tax laws of your jurisdiction?**

These sub-clauses would need to be amended along the following lines where the LMA Agreement is governed by Irish law or relates to an Irish obligor:

- Clause 19.2(d) – limbs (ii) and (iii) of clause 19.2(d) should be deleted as these are not relevant for Irish purposes. The reference to clause 19.2(h) in limb (iv) of clause 19.2(d) should be deleted (please see further below).
- Clause 19.2(f) – the reference to a statement under section 976 of the ITA in clause 19.2(f) should be deleted, such that the Obligor should only be required to provide the Agent for the Finance Party with evidence reasonably satisfactory to that Finance Party that the Tax Deduction has been made or (as applicable) any appropriate payment has been paid to the relevant taxing authority.
- Clause 19.2(g) – limb (ii) of clause 19.2(g) should be deleted as this is not relevant for Irish purposes (with the reference to limb (ii) in limb (i) of clause 19.2(g) deleted accordingly).
- Clauses 19.2(h), (i), (j), (k) and (l) – these clauses should be deleted as they are not relevant for Irish purposes.
- Clause 19.7(d) – "the term "representative member" to have the same meaning as in the Value Added Tax Act 1994" in clause 19.7(d) should be deleted and replaced with the following language: "the term "representative member" to have the same meaning in Ireland as the group member notified to the Irish Revenue Commissioners in accordance with section 15(1)(a) of the VATCA". Please see the definition of VATCA in the comments in relation to the definition of VAT above.

The above are meant as a guide only and the provisions of clause 19.2 to clause 19.9 will need to be carefully considered on a case-by-case basis to ensure they are appropriate for the transaction and the underlying obligors. Tax advice should always be taken when marking up the tax provisions of the LMA.

**Clause 21 (Other indemnities) - Does this clause need to be adjusted, in order to be enforceable, if the governing law of the agreement is the law of your jurisdiction? If so, what adjustments are needed?**

This clause is suitable where an LMA Agreement is governed by Irish law.

**Clause 23.3(c) (Security Agent's management time and additional remuneration) – What should the reference in this clause to "the President of the Law Society of England and Wales" be changed to if, instead, a person or entity in your jurisdiction would be more appropriate (perhaps because the arranger and the principal borrower are incorporated or arranging the facility there)?**

This reference should be amended to refer to "the President of the Law Society of Ireland".

**Clause 24 (Guarantee and indemnity) – Is the guarantee in this clause enforceable under the law of your jurisdiction, and is it satisfactory from the lenders' point of view without any adjustment?**

The cross company guarantee contained in clause 24 is enforceable under Irish law and does not need to be set out in a separate document. Irish law recognises cross guarantees within a group (both upstream and downstream). The provision of a guarantee from a non-group company will be subject to corporate benefit analysis.

As the guarantee within the LMA Agreement is joint and several, the unenforceability of the guarantee against one guarantor should not affect the validity of the cross-guarantee against the remaining guarantors.

In Ireland, a limitation clause will typically be inserted at the end of clause 24 in order to limit the guarantee's effect where it is given in breach of either (a) section 82 (Financial Assistance) or (b) section 239 (Prohibition of loans, etc., to directors and connected persons). Furthermore, where an Irish company is executing the LMA Agreement in its capacity as guarantor, the document will typically be executed as a deed in order to mitigate any potential absence of consideration.

**Clause 25 (Representations) – Should there be any adjustment of this clause against the background of the points alluded to in footnote 82, in relation to a borrower incorporated in your jurisdiction?**

In Ireland, the necessity for documentary protections which address sanctions legislation will be considered on a case-by-case basis and will be driven by (amongst other things) the parties, the extent of the parties' compliance obligations under sanctions regimes and the details of the particular transaction. Certain lenders may also have their own requirements in the context of sanctions regimes and documentary protections in relation thereto. The necessity for documentary protections may be identified by particular lenders during their due diligence phase of a transaction.

**Clause 25.2 (Status) – Should there be any adjustment of paragraphs (a) and (b) in this sub-clause in relation to a borrower incorporated in your jurisdiction?**

This may require adjustment in certain circumstances for borrowers incorporated in Ireland (for instance, in the case of unlimited companies).

**Clause 25.3 (Binding obligations) - What changes should be made to this clause (and to the "Legal Reservations" definition in Clause 1.1) in relation to any Transaction Document governed by the law of your jurisdiction?**

See comments above regarding the definition of Legal Reservations. No changes to clause 25.3 are necessary in relation to a Transaction Document governed by Irish law.

**Clause 25.5(a) (Power and authority) – Can a lender be adversely affected by an irregularity in the procedures (or the appointment) of the individuals who exercise the powers of a company incorporated in your jurisdiction? Additionally, would you adjust the references to "deliver" and "delivery" in this clause?**

A lender could be adversely affected by an irregularity in the procedures (or the appointment) of the directors, committees or attorneys who exercise the powers of a company incorporated in Ireland if a lender was aware or on notice of such irregularity.

No adjustment is required to the references to "deliver" or "delivery" in clause 25.5(a).

**Clause 25.7 (Governing law and enforcement) – What qualifications should be inserted in this sub-clause if your jurisdiction is a Relevant Jurisdiction?**

No qualification is necessary where Irish law governs the LMA Agreement.

**Clause 25.8 (Insolvency) – What adjustments should be made to this sub-clause in relation to a borrower incorporated in your jurisdiction?**

See comments below re clauses 29.6 and 29.7. No adjustments are required in relation to clause 25.8.

**Clause 25.9 (No filing or stamp taxes)– What exceptions to the representation in this clause should be included in relation to a borrower incorporated in your jurisdiction or an agreement which is governed by the law of your jurisdiction?**

Certain amendments will be required to clause 25.9 to accommodate any necessary filings of the Transaction Security in:

- The Irish Companies Registration Office under section 409 of the Companies Act 2014.
- The Property Registration Authority of Ireland in relation to security over real property located in Ireland.
- The Trade Marks Registry at the Patent Office in Ireland.
- Any other relevant asset specific registries.

Finance Documents governed by the laws of Ireland and creating security over assets located in Ireland are not currently subject to the payment of any stamp duty or tax.

**Clause 25.10 (Deduction of Tax) – What adjustments need to be made to this sub-clause in relation to a borrower incorporated in your jurisdiction?**

The provision in clause 25.10 can generally be simplified as follows:

"It is not required to make any Tax Deduction (as defined in Clause 19.1 (Definitions)) for or on account of Tax from any payment it may make under any Finance Document to a Lender which is a Qualifying Lender."

In an Irish context, the following additional representation is typically sought by the lender in clause 25.10:

"No Rental Income payable to the Borrower is subject to a requirement to make a deduction or withholding for or on account of Tax from that Rental Income."

**Clause 25.13 (Original Financial Statements) – Do any adjustments need to be made to this sub-clause in relation to a borrower incorporated in your jurisdiction (such as, for example, adjustment of the expression "true and fair view" in paragraph (c))?**

Where the representation is referable to audited financial statements, "present" in clause 25.13 is typically replaced by "give a true and fair view".

Where the representation is referable to unaudited financial statements, the use of "fairly present" in clause 25.13 is typically amended to "fairly represent".

Where any of the financial statements to be delivered during the term of the facilities will be unaudited, the beginning of clause 25.13(f)(ii) will typically be amended to say "give a true and fair view (if audited) or fairly represent (if unaudited).....".

**Clause 25.16 (Environmental laws) – Do any adjustments need to be made to this sub-clause in relation to a borrower incorporated in your jurisdiction?**

No adjustments need to be made to this clause in relation to a borrower incorporated in Ireland.

**Clause 25.18 (Anti-corruption law) - What (if any) legislation or laws of your jurisdiction should be specifically mentioned in this paragraph, if a borrower or any of its subsidiaries is incorporated in your jurisdiction, or if the agreement is governed by the law of your jurisdiction?**

This clause has purposely been drafted in general terms and does not require amendment to refer to specific legislation.

**Clause 25.20 (Ranking) – In so far as the law of your jurisdiction might have a bearing on the ranking of any of the Transaction Security, what qualifications should be inserted in this sub-clause?**

No specific Irish law qualifications are required to clause 25.20 (Ranking).

**Clauses 25.22 (Legal and beneficial ownership) and 25.24 (Intellectual Property) – Do the references to "legal and beneficial" ownership need to be adjusted in relation to assets located in your jurisdiction, or assets owned by a borrower incorporated in your jurisdiction?**

The references to "legal and beneficial" ownership do not need to be adjusted in relation to assets located in Ireland, or assets owned by a borrower incorporated in Ireland.

**Clause 25.23 (Shares) – What adjustments should be made to this sub-clause in relation to borrowers incorporated in your jurisdiction?**

No adjustments are required to clause 25.23 in relation to borrowers incorporated in Ireland.

**Clause 25.26(b) (Obligors) – What adjustments should be made to this sub-clause in relation to borrowers incorporated in your jurisdiction?**

Notwithstanding that this clause will require amendment on a case-by-case basis, it is suitable for use in an Irish-law governed LMA Agreement, save that the reference to the United Kingdom may require amending to refer to Ireland.

**Clause 25.29 (Centre of main interests and establishments) – Would this sub-clause be omitted (or adjusted) if none of the borrowers has a place of business (or administration) in an EU member state?**

The representation provided in clause 25.29 is given by each Obligor (rather than just the borrowers). To the extent that no Obligor has a "centre of main interests" or "establishment" in an EU member state, this can be deleted.

**Clause 25.30 (Pensions) - What adjustments need to be made to this sub-clause in relation to a borrower incorporated in your jurisdiction?**

The clause is suitable for use in relation to a borrower which is part of a group which operates UK pension arrangements.

Under Irish law, only those employers that have formally adhered to a defined benefit scheme and are participating in it will be potentially liable for any deficits arising under the scheme. The concept of a general group liability which exists in the UK under the Pensions Act 2004 does not apply in Ireland.

Notwithstanding this, the representation is suitable, subject to the amendments below, for use in relation to a borrower incorporated in Ireland where there are no (and never have been any) defined benefit schemes operated by any group entity and the lenders want this position confirmed at the outset.

If included in relation to a borrower incorporated in Ireland, the provision should read:

"Except for [specify any existing defined benefit pension schemes in which any member of the group is or has previously been participating], neither it nor any of its Subsidiaries is or has at any time been participating in an occupational pension scheme which is a defined benefit scheme (both terms as defined in the Pensions Act, 1990)."

**Clause 26.1 (Financial statements) – Does the expression "audited consolidated financial statements" need to be adjusted in relation to companies incorporated in your jurisdiction?**

The term "audited consolidated financial statements" does not need to be adjusted in relation to companies incorporated in Ireland.

**Clause 26.3(a) and (b) (Requirements as to financial statements) – Should there be any adjustment of these paragraphs in relation to a borrower incorporated in your jurisdiction?**

See comments above in relation to clause 25.13 relating to the use of the word "present".

No other specific adjustments are required in relation to a borrower incorporated in Ireland. However, this clause will require some adjustment on a case-by-case basis to reflect the requirements of the lenders.

**Clause 26.5 (Group companies) – Should there be any adjustment of this sub-clause in relation to companies incorporated in your jurisdiction?**

The clause will need to be adjusted depending on the requirements of the lenders. However, no Irish law specific adjustments are required.

**Clause 27 (Financial covenants) – What adjustments need to be made to this sub-clause in relation to a borrower incorporated in your jurisdiction?**

This clause will need to be adjusted depending on the requirements of the lenders as agreed with the borrowers at the term sheet stage. However, no Irish law specific adjustments are required.

**Clause 28.1 (Authorisations) – What Authorisations are needed by a borrower incorporated in your jurisdiction?**

The Authorisations referred to in clause 28.1(b)(i) relate to corporate authorisations. In Ireland, the entry into the Transaction Documents and the transaction itself will be approved during a meeting of the board of directors or by way of a written resolution of the board of directors (where permitted). While not typically required in Ireland, the entry by the company into the Transaction Documents and the transaction itself may also be approved by the shareholder(s) where there are corporate benefit concerns or where required by statute (for example, the Summary Approval Procedure pursuant to section 202 of the Companies Act 2014).

The Authorisations referred to in clause 28.1(b)(ii) relate to certain filings that may be required to be made in the Irish Companies Registration Office, Property Registration Authority or certain other asset specific registers (for example, the Trade Marks Registry at the Patent Office in Ireland).

In relation to clause 28.1(iii), the Authorisations required (if any) will depend on the nature of the business being conducted.

**Clause 28.5(a) (Anti-corruption law) – What (if any) legislation or laws of your jurisdiction should be specifically mentioned in this paragraph, if a borrower or lender is incorporated in your jurisdiction, or if the agreement is governed by the law of your jurisdiction?**

The Criminal Justice (Corruption Offences) Act 2018 of Ireland and the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 should be referred to in the context of an Irish obligor.



**Clause 28.7 (Merger) – Should there be any adjustment of this sub-clause in relation to companies incorporated in your jurisdiction?**

No adjustment is required to clause 28.7 in relation to companies incorporated in Ireland.

**Clause 28.14 (Pari passu ranking) - In so far as the law of your jurisdiction might have a bearing on the ranking of claims under any of the Finance Documents, should there be any adjustment of this sub-clause?**

No Irish law specific adjustment is required to clause 28.14.

**Clause 28.16 (Negative pledge) – Should there be any adjustment of this sub-clause in relation to companies incorporated in your jurisdiction or assets located in your jurisdiction?**

No adjustment is required to clause 28.16 in relation to companies incorporated or assets located in Ireland.

**Clause 28.18(b) (Arm's length basis) – What adjustments should be made to this sub-clause were the agreement to be governed by the law of your jurisdiction?**

No adjustment is required to clause 28.18(b) in an LMA Agreement which is governed by Irish law.

**Clause 28.21 (Dividends and share redemption) - What adjustments need to be made to this sub-clause in relation to companies incorporated in your jurisdiction?**

No adjustment is required to clause 28.21 in relation to companies incorporated in Ireland.

**Clause 28.25 (Share capital) – Does the concept of the issuing of shares apply in the case of companies incorporated in your jurisdiction, and (if not) what is the equivalent?**

The concept of issuing shares applies to companies incorporated in Ireland.

**Clause 28.27 (Pensions) – What adjustments need to be made to this sub-clause in relation to companies incorporated in your jurisdiction?**

The clause is suitable for use in relation to a borrower which is part of a group which operates UK pension arrangements.

The clause would need to be amended along the following lines where the LMA Agreement relates solely to borrowers which operate Irish pension schemes only:

- Paragraph (a) – where included in relation to a company incorporated in Ireland, references to the statutory funding objective under the Pensions Act 2004 should be changed to the statutory funding standards under Part IV of the Pensions Act 1990.

- Paragraph (b) – where included in relation to a company incorporated in Ireland, this provision should be amended to read "Except for [specify any existing defined benefit pension schemes], the Parent shall ensure that no member of the Group is or has at any time been participating in an occupational pension scheme which is a defined benefit scheme (both terms as defined in the Pensions Act, 1990)."
- Paragraphs (c) and (d) – no adjustment is required in relation to companies incorporated in Ireland.
- Paragraphs (e) and (f) – the concepts of contribution notices and financial support directions are specific to UK pensions legislation and do not have an equivalent under Irish law. These provisions therefore will only be relevant where the borrower or any member of the borrower Group participates or has participated in a UK regulated defined benefit scheme.

**Clause 28.33 (Financial assistance) – Are there rules in your jurisdiction relating to the provision of assistance by subsidiaries for the benefit of their parent companies? If so, when do they apply, what is their effect, and what are they called, and how should this sub-clause be adjusted to accommodate them?**

Section 82 of the Companies Act 2014 states that, subject to certain exceptions, it shall not be lawful for a company to give any financial assistance for the purchase of shares in the company or in the company's holding company (if applicable) whether the assistance is given directly or indirectly or is by means of a loan or guarantee, the provision of security or otherwise. Any transaction in contravention of section 82 shall be voidable at the instance of the company against any person (whether a party to the transaction or not) who had notice of the facts which constitute such contravention.

It should also be noted that pursuant to section 239 of the Companies Act 2014 a company shall not (subject to certain exceptions) (i) make a loan or quasi-loan (ii) enter into a credit transaction as creditor or (iii) enter into a guarantee or provide any security in connection with a loan, quasi-loan or credit transaction, to a director of the company or of its holding company or to a person connected with such a director.

The reference to Financial Assistance in the heading of clause 28.33 should be amended to include "Prohibition of loans, etc., to directors and connected persons".

The reference in clause 28.33 to "sections 678 and 679 of the Companies Act 2006" should be amended to refer to "sections 82 and 239 of the Companies Act 2014".

**Clause 28.34 (Group bank accounts) – Would this provision be enforceable under the law of your jurisdiction, what period would be a reasonable period for the opening of accounts, and what form of security would the security over the accounts take? What rights would the lenders have under such security?**

This provision would be enforceable under the laws of Ireland.

A 30-day period would be reasonable for the opening of the bank accounts. However, this will depend on the bank's internal processes and the account holder's satisfaction of the bank's AML and KYC requirements.

In Ireland, a bank account is secured by way of a charge and assignment. A charge can be categorised as fixed or floating, and the category (regardless of how it is described) will depend on the level of control the charge exercises

over the relevant account. Where the secured account is held with a third-party bank, security is created by way of a security assignment. Notice is served on the relevant bank to perfect a legal (rather than equitable) assignment and certain acknowledgments are requested from such bank. Where the secured account is held with the chargee, security is created by way of a charge, which (as noted above) can be either fixed or floating.

The rights which the security agent will have under the security will typically depend on the purpose of the account and the nature of the security which has been provided (see above). For instance, the Mandatory Prepayment Account and Holding Account referred to in this clause will typically be blocked and therefore only the security agent or agent will have authority to withdraw monies credited to this account.

**Clause 28.37(a) (Cash management) - Would the obligations set out in this paragraph be enforceable under the law of your jurisdiction? If not, is there an alternative mechanism which could be used for dealing with surplus cash (and, if so, what is it called and how would it work)?**

The provisions of this clause are commercial in nature and may require adjustment on a case-by-case basis. However, the clause would be enforceable under Irish law.

**Clause 28.38 (Guarantors) – What adjustments need to be made to this sub-clause in relation to companies incorporated in your jurisdiction?**

No Irish-law specific adjustments are required in relation to companies incorporated in Ireland.

**Clause 28.39 (Further assurance) – Should there be any adjustment of this sub-clause in relation to companies incorporated in your jurisdiction or assets located in your jurisdiction?**

No Irish-law specific adjustments are required in relation to companies incorporated or assets located in Ireland.

**Clause 28.41(b) and (c) (Additional Obligors) – Should there be any adjustment of this sub-clause, or of the Agreed Security Principles set out in Schedule 14, in relation to companies incorporated in your jurisdiction or assets located in your jurisdiction, or otherwise in relation to Transaction Security Documents which would be governed by the law of your jurisdiction?**

No adjustment to clause 28.41(b) and (c) (Additional Obligors) of the LMA Agreement is required in relation to companies incorporated or assets located in Ireland, or otherwise in relation to Transaction Security Documents which are governed by Irish law.

See comments above as regards clauses 3 (Purpose) and 28.33 (Financial assistance) of the LMA Agreement in relation to section 82 (Financial Assistance) or section 239 (Prohibition of loans, etc., to directors and connected persons) of the Companies Act 2014. In Schedule 13, paragraphs A(a) (Considerations) and B(2.1) (Obligations to be secured) should also include an exception for any potential breach of section 239.

**Clause 29 (Events of Default) – Is there any objection in your jurisdiction to agreed events (whatever they might be) entitling the lenders to early repayment of outstanding amounts and entitling them to terminate the agreement?**

Save for agreed events which may be contrary to public policy, there is no objection in Ireland to agreed events entitling the lenders to early repayment of outstanding amounts and entitling them to terminate the LMA Agreement.

**Clause 29.1 (Non-payment) – Are grace periods (for payments) typically allowed for in your jurisdiction, and (if so) is there a normal number of days/Business Days for such grace periods?**

Grace periods are typically used in Ireland. The grace periods will vary from transaction to transaction. Grace periods provided for a non-payment default will typically allow a very short timeframe for payment (for example, two to three Business Days) in the event that the non-payment was caused by administrative or technical error or a Disruption Event.

**Clause 29.3 (Other obligations) – Is there a typical number of days allowed in your jurisdiction for remedying an event so that it does not become an Event of Default?**

Defaults under clause 29.3 may provide for longer grace periods than a non-payment default (for example, five to ten Business Days). However, again, this will vary from transaction to transaction.

**Clauses 29.6 (Insolvency), 29.7 (Insolvency proceedings), 29.8 (Creditors' process) and 29.12 (Change of ownership) – What should be adjusted, or listed additionally, in these provisions in relation to a borrower incorporated in your jurisdiction (or assets located in your jurisdiction)?**

Clause 29.7 should be amended to include "examinership" in limb (a) and the appointment of an "examiner" in limb (b) in relation to any member of the Group, Material Company or Obligor (as appropriate) incorporated in Ireland.

**Clause 29.15 (Expropriation) – What adjustments would need to be made to this sub-clause in relation to companies incorporated in your jurisdiction?**

No Irish-law-specific adjustments would be required to this sub-clause in relation to companies incorporated in Ireland.

**Clause 29.16 (Repudiation and rescission of agreements) – Should the references to "rescission" and "repudiation" be altered if the agreement is governed by the law of your jurisdiction?**

There is no requirement to alter the references to "rescission" or "repudiation".

**Clause 29.18 (Pensions) – What adjustments need to be made to this sub-clause in relation to companies incorporated in your jurisdiction?**

The power to issue contribution notices and financial support directions against an employer with a defined benefit scheme or its associated or connected entities is specific to the UK Pensions Regulator in respect of UK regulated defined benefit schemes. The Irish regulator, the Pensions Authority, does not have any equivalent power.

This clause is therefore only relevant where the borrower or any member of the borrower group participates or has participated in a UK-regulated defined benefit scheme.

### **Clauses 25 to 29 - Should any additional representations, undertakings (covenants) or events of default be included in relation to borrowers incorporated in your jurisdiction?**

Save for transaction-specific representations, undertakings or events of default, no Irish-specific inclusions are required in relation to borrowers incorporated in Ireland.

### **Clause 30 (Changes to the Lenders) – What adjustments need to be made to this clause if the agreement is governed by the law of your jurisdiction?**

The position in Ireland in relation to the transfer of contractual rights and obligations is similar to that applying under English law. Therefore, clause 30 does not require amendment if Irish law governs the LMA Agreement. In Ireland the most common methods for a lender to transfer its participation in a loan are to either:

- Transfer by novation.
- Assign.
- Sub-participate.

Assignment involves the transfer of an interest or benefit from one person to another. However, the "burdens", or obligations, under a contract cannot be transferred.

Novation, on the other hand, transfers the benefits and the burdens under a contract. However, its effect is to terminate the old agreement and give rise to a new contractual relationship on the same terms. For this reason, where the loans are novated, the underlying Transaction Security will need to be retaken.

In the case of a funded sub-participation, the lender enters into a sub-participation agreement with another financial institution (the "Participant") pursuant to which the Participant will fund the lender's participation in the loan and the lender will pay the capital and interest payments it receives from the borrower to the Participant following receipt. In the case of a risk participation, the Participant does not fund the participation but instead reimburses the lender for any unpaid amounts due from the borrower. Both arrangements are subject to the payment of fees from the lender to the Participant and the Participant does not benefit from the Transaction Security.

### **Clause 33 (Role of the Agent, the Arranger, the Issuing Bank and others) – Should there be any adjustments of this clause if the agreement is governed by the law of your jurisdiction or if the Agent is incorporated in your jurisdiction?**

The references to the Third Parties Act should be deleted where the LMA Agreement is governed by Irish law.

**Clause 37 (Set-off) - What adjustments should be made to this clause if the agreement is to be governed by the law of your jurisdiction? Does a right of set-off granted by a borrower incorporated in your jurisdiction constitute a form of security which needs to be notified to a public registry?**

No adjustments are required to clause 37 in an LMA Agreement governed by Irish law.

A right of set-off granted by an Irish borrower does not constitute a form of security giving rise to a registration requirement in the Irish Companies Registration Office.

**Clause 47 (Governing law) – In your jurisdiction, what are the reasons for not giving effect to an express choice of law? Have you seen the LMA’s French, German or Spanish law version of the LMA’s investment grade agreement being utilised?**

In Ireland, a choice of law provision specifying the governing law of the LMA Agreement would generally be upheld by the Irish courts unless it was considered contrary to public policy, illegal or made in bad faith.

We have not seen the LMA’s French, German or Spanish law version of the LMA’s investment grade agreement being utilised in Ireland.

**Clause 48 (Enforcement) – How should this clause be amended if the courts of your jurisdiction are to be granted exclusive jurisdiction by the parties?**

The clause is appropriately worded other than the necessity to amend the reference to the "courts of England and Wales" to the "courts of Ireland".

**Sch.2, Part IA, section 1 and Sch.2, Part II – What conditions should be set out in these sections in respect of a borrower or an Additional Obligor incorporated in your jurisdiction?**

Examples of conditions which may need to be included in relation to Irish borrowers or Irish Additional Obligors include:

- Evidence or documentation to the satisfaction of the agent demonstrating that the transaction and the security do not contravene sections 82 (Financial assistance for acquisition of shares), 238 (Substantial transactions in respect of non-cash assets and involving directors, etc.) and 239 (Prohibition of loans, etc., to directors and connected persons) of the Companies Act 2014.
- An agreed form template security registration form (Form C1) in relation to any Transaction Security which is to be lodged in the Irish Companies Registration Office.
- Where the agent’s legal advisors are to complete the registration of the Transaction Security in the Irish Companies Registration Office, written authorisation from the relevant Obligors authorising the agent’s legal advisors to sign such forms on their behalf.
- Confirmation of Competition and Consumer Protection Commission approval in relation to the Acquisition in form and substance satisfactory to the agent (where required).

- A Land Registry Form 52 (Specific Charge) duly executed by the relevant Obligor in relation to any Transaction Security over real property located in Ireland and registered or to be registered in the Irish Land Registry.
- Searches in all appropriate registers in relation to each Irish obligor.
- Such other additional conditions as may be required in Ireland in relation to any Irish real property which is secured under the Transaction Security.

**Sch.14(A) and Sch.14(B) – What terms used in sub-paragraph (a) in section (A) of Schedule 14, or in paragraph 2 in section (B) of that Schedule, need to be changed, and what should they be replaced with? Does the requirement in paragraph 1 in section (B) that security is to be granted in favour of the Security Agent need to be changed?**

See the comments above regarding Agreed Security Principles in relation to clause 28.41.

The requirement in paragraph 1 in section (B) that security is to be granted in favour of the security agent does not need to be changed, as Irish law recognises the ability of the security agent to hold the security on trust for the secured parties.

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