



Examining the implications

Our Banking team consider how Brexit will affect loan documentation

Introduction

This note sets out our views on the likely implications for loan documentation in the short and medium term as a result of Britain's vote to leave the EU. We recognise that many existing deals may mature before the UK ceases to be a member of the EU.

In line with most practitioners, we believe that Brexit has limited impact on loan documentation and there is no reason for existing documentation to be immediately revisited. That said, market practice will obviously evolve over the coming months and years as the political and legal position becomes clearer and we will update this guidance accordingly.

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Current documentation issues

- **General:** For typical loan facilities, the leave vote will have no immediate impact. The LMA, ISDA and LSTA have all issued statements to this effect.
- **Enforceability:** The leave vote will have no impact on the enforceability of existing loans and Brexit specific amendments are unlikely to be required.
- **Contract law:** English contract law is largely unaffected by EU law. Normal rules of contractual interpretation will apply e.g. around territorial terms such as “European Union”.
- **MAC event of default:** the leave vote itself is highly unlikely to trigger an event of default based on a material adverse change. At the point the UK actually ceases to be a member of the EU, circumstances may be such that a material adverse change can be said to have occurred – this will depend on the impact on a particular borrower’s business and the terms of the relevant clause. A MAC will be more likely where the relevant clause is forward looking, i.e. refers to a borrower’s “prospects”. Lenders should carefully monitor any Borrower requests for the impact of Brexit to be expressly carved-out of any MAE/MAC provisions.
- **Covenants:** any deterioration in a borrower’s financial performance should be caught by existing protections in facility agreement, such as the financial covenants.
- **Increased costs:** existing increased costs clauses already contemplate making the lender whole for a variety of increased regulatory costs and this will include any future costs associated with Brexit, assuming such cost arises as a result of a change in law or its interpretation, administration or application.
- **Mandatory prepayment:** few existing documents contemplate Brexit. The vote result will not trigger existing mandatory prepayment provisions (e.g. based on illegality, unlawfulness, misrep re enforceability etc.)
- **Choice of governing law:** non-UK courts will continue to recognise as valid the parties’ choice of English law as the governing law of the contract and the jurisdiction of English courts to resolve disputes. There is no suggestion that the judgment of an English court will no longer be enforceable outside the UK.
- **Credit down-grades:** The impact of any credit down-grade relating to the borrower will be limited outside the context of bond issues.

Medium term documentation issues

- **Market appetite:** A period of uncertainty and volatility may put activity on hold for a period and we have already seen some proposed deals pulled (particularly event-driven financings). There is likely to be reduced appetite for underwriting new event-driven deals until the market settles down.
- **Existing EU law:** The UK remains bound by EU law until it formally exits the EU (e.g. increased costs under CRD IV, EU sanctions, Market Abuse Regulation, Financial Collateral Regulations, passporting under MiFID II).
- **Mandate letters - MAC and market flex:** whether a MAC will allow termination of underwritten commitments will depend on the wording of the clause. The leave vote is unlikely to constitute a MAC and lenders should exercise caution here. Lenders may try and use market flex clause to increase pricing depending on exact wording of the clause.
- **Pricing and tenor:** may see more shorter tenors (e.g. to force refinancing before the expiration of the two year exit negotiation period triggered by the exercise of Article 50) and increased pricing.
- **Covenants:** may see more conservative covenants (to prevent risk taking).
- **Hedging:** may see more requirements for currency hedging (to protect against likely volatility of sterling during exit negotiations).
- **Drafting of events of default and mandatory prepayment events:** borrowers are unlikely to accept Brexit related events of default or mandatory prepayment events. Similarly, lenders are unlikely to accept carve outs from standard events of default and mandatory prepayment events where Brexit has a material adverse effect on the Borrower’s ability to perform under the documents.
- **Choice of governing law:** parties are unlikely to move away from a choice of English law in commercial contracts – English contract law is largely unaffected by EU law and English governing law and jurisdiction remain sensible choices.
- **Withholding tax:** there will potentially be more withholding tax on cash moving between UK and EU member states. This will be mitigated by the tax treaties the UK negotiates and the terms of its withdrawal from the EU.

If you wish to learn more about Brexit please visit our [Brexit hub](#).



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