

# Revisions to LMA Trading Documents To Go Live 16 December 2015

The Loan Market Association ("[LMA](#)") has published revised versions of its Standard Terms and Conditions for Par and Distressed Trade Transactions (Bank Debt/Claims) (the "[Standard Terms and Conditions](#)"), forms of Trade Confirmations and Participation Agreements, and Secondary Debt Trading Documentation Users Guide (the "[Users Guide](#)")<sup>1</sup>. The revised documents are available on the [LMA website](#) and will "go live" beginning 16 December 2015.

The most important revisions to these documents are:

1. the "Allocation of Interest and Fees" condition in the Standard Terms and Conditions has been revised in light of the case [Tael One Partners Limited v Morgan Stanley & Co International plc](#) [2015] UKSC 12;
2. new terms have been added to clarify market uncertainty regarding responsibility for notarial fees;
3. express language has been supplemented to the Standard Terms and Conditions to make it clear that neither party to a trade is a custodian for, or owes any fiduciary duties to, the other party thereto;
4. the User Guide has been updated to explain how negative interest rates would impact the calculation of delayed settlement compensation; and
5. the concept of "ticking fees" has now been included within the defined term "Recurring Fees".

This Client Briefing summarizes these main changes and discusses why they are important to the secondary market loan trading community.

## Allocation of Interest and Fees

Condition 15.9 of the Standard Terms and Conditions has been amended with the addition of a new provision which obligates a party to repay its counterparty in the event of a misdirected payment or an agent clawback. In addition, this condition now includes a provision dealing with the treatment of Non-Cash Distributions. The intent of this new language is to ensure that this condition operates as an all-purpose "sweeper" clause in situations where the parties may not have memorialized their intent at the time of trade.

In the event that the underlying Credit Documentation includes atypical interest, fee or other types of similar arrangements, or if the parties to a trade want to apportion all or any part of the Interest, Recurring Fees or Non-Recurring Fees differently from what is called for under the Standard Terms and Conditions, then the parties should agree on the Trade Date how they plan to do so. The significance of having such terms agreed at the time of trade was highlighted in the *Tael One* case, which involved a

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<sup>1</sup> Terms capitalized but not defined herein shall have the meanings ascribed to them in the Standard Terms and Conditions or Users Guide as the case may be.

discrepancy over the rights to a prepayment premium that was delivered to the Buyer (pursuant to the terms of the Credit Agreement) after the trade closed. In that decision, the court agreed that the Seller was not owed any such prepayment premium.

## Notarial Fees

Condition 18.2 of the current iteration of the LMA Standard Terms and Conditions states that "Any stamp duties, stamp duty reserve tax and any other applicable transfer taxes and duties (including notarial fees) and any costs attributable to the transfer or perfection of collateral are payable by the Buyer." This language was intended to be read in connection with Condition 18.1, which covered responsibility for "Transfer Fees<sup>2</sup>".

However, there has been some uncertainty amongst market participants on the correct interpretation of Condition 18.2 – in particular, which party is responsible for notarial costs that are payable in connection with the transfer of a loan itself (which is recommended in certain jurisdictions such as Spain), not just with respect to any underlying collateral. Such confusion has at times led to post- Trade Date negotiation, particularly in transactions where a borrower is located in a jurisdiction where notarization is substantively important – and could be a costly process.

Therefore, a new Condition 18.3 has been added to the Standard Terms and Conditions to specifically address responsibility for "Contractual Notarial Fees", a new defined term added to the Standard Terms and Conditions. It is now clear that all notarial fees are payable by the Buyer except Contractual Notarial Fees, which are fees attributable to the sale and/or purchase of the Traded Portion (but not any other part of the Purchased Assets or Purchased Obligations or related collateral) and are incurred pursuant to an express requirement to notarize contained in the Credit Agreement. Such Contractual Notarial Fees are payable by Seller and Buyer in equal shares. If a party requests a trade to be allocated across multiple affiliated entities, then that party shall be responsible for any additional Contractual Notarial Fees related thereto.

The new Condition 18.3 will not only record the responsibility for any costs associated with the notarization process, but more fundamentally it will serve the purpose of making parties aware at the time of trade whether notarization of any transaction documents will be a necessary condition to closing (and accordingly whether there will be additional delay and/or expense associated as a result).

Of note, in certain jurisdictions, notarization has significant substantive implications. For example, in Spain, if the process of raising an assignment document to "public status" (*documento publico*) is not completed (and additionally, in a secondary trade, if it was not completed for all predecessor assignments of the subject debt), the new lender may not be eligible to have access to the *procedimiento ejecutivo*, which enables a creditor to pursue automatic attachment of collateral, enabling such creditor to enforce its rights more quickly than in a regular enforcement proceeding under Spanish law. Such right is particularly important in a situation where the value of underlying collateral may be rapidly deteriorating.

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<sup>2</sup> The term "Transfer Fees" is defined under the LMA Standard Terms and Conditions to mean "a recordation, processing, transfer or similar fee payable to the Agent under the Credit Documentation", while the term "Agent" is defined as "any facility, security or other agent, trustee, representative or coordinator under the Credit Documentation".

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## No Fiduciary Duties/Exclusion of Liability with respect to Non-Cash Distributions

New Condition 21.1(c) of the Standard Terms and Conditions makes it abundantly clear that neither party to a trade is acting in the capacity of an agent, fiduciary, trustee or custodian of, to or for the other party thereto unless otherwise expressly agreed to by the parties. Further, a new Condition 21.6 further clarifies that, absent gross negligence or wilful misconduct, no party to a trade can be liable to the other party thereto for taking (or not taking) any action, or exercising (or not exercising) any rights, in connection with any Non-Cash Distribution such party holds<sup>3</sup>.

If a party were deemed to hold a Non-Cash Distribution in the legal capacity of an "agent", it could be held to certain fiduciary duties or other obligations (e.g., to segregate funds or exercise an enhanced standard of care). Thus the Standard Terms and Conditions have been amended to make clear that a party does not hold Non-Cash Distributions as agent for its counterparty. The purpose of these changes to the Standard Terms and Conditions is to memorialize the acknowledgment of each party that it does not hold its counterparty to such standards. Note that these new conditions are similar to the standards applied to an Agent under a Credit Agreement.

## Negative IBOR

In an attempt to jump start the Eurozone economy, the European Central Bank has lowered its deposit rate – effectively charging banks for the privilege of parking money there. As a result, certain relevant interest rates have been falling sharply, with some now down below zero percent.

Condition 11.1(b) of the Standard Terms and Conditions has always contemplated that a Seller could actually be in the position of owing a cost of carry payment to the Buyer. This would arise when the Relevant Benchmark Rate is negative. Given the reality of today's market, the Users Guide now has been updated to explain and provide examples of how and when a Seller could owe a Buyer for cost of carry. Note that parties to a trade can always agree at the time of trade that no such payments will be compulsory despite the pertinent IBOR being negative. Any such agreement should be documented in the Trade Confirmation. The Users Guide contains wording that can be included in the Trade Confirmation.

## Ticking Fees

Finally, the concept of a "ticking fee" is now included within the defined term "Recurring Fees". Ticking fees generally are paid by a borrower to a lender based on a percentage of undrawn amounts committed to the borrower by that lender. Note that only such fees which are specifically called for under the Credit Agreement would fall within this defined term – if the fee is memorialized elsewhere, such as in a commitment letter, it would not be included in this new definition, as such a fee would no longer be payable once the Credit Agreement is live and would accordingly remain for the account of the Seller. As with any deviations from the Standard Terms and Conditions, any non-standard fee arrangements should be agreed at the time of trade and documented in the Trade Confirmation.

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<sup>3</sup> The term "Non-Cash Distribution" is defined under the LMA Standard Terms and Conditions to mean any note, debenture or other financial instrument, noncash asset or right, whether debt, equity or otherwise, issued in satisfaction or purported satisfaction of any obligation of an Obligor to make any payment in respect of the Traded Portion or any part thereof.

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In addition to these substantive changes, there have been other edits to the suite of LMA trading documents and the Users Guide of which market participants should be aware. Should you have any questions on the revisions to these documents or the impact such changes will have on your transactions, please feel free to contact the authors of this Client Briefing or your usual Clifford Chance attorneys.

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