

# LAUNCH OF POLISH TRANSPOSITION OF LMA FACILITY AGREEMENT

On 16 November 2016, the Polish Bank Association (*Związek Banków Polskich* or ZBP) launched an LMA (Loan Market Association) based recommended form Polish law governed facilities agreement in a Polish language version. This form does not have the status of an LMA document, but it has been developed with the LMA's consent. It is the most faithful transposition of an LMA facility agreement into the Polish language and into Polish law to date. Clifford Chance was heavily represented on the working group of the ZBP's Banking Law Council, tasked with delivering the project for close to four years. Grzegorz Namiotkiewicz and Jan Zdzienicki edited this document and advised on Polish law issues and Rafal Zakrzewski provided advice on English law matters. This briefing note provides more information on this document and explains a few of the legal difficulties that had to be overcome by the working group in preparing this document.

## Introduction

Use of loan documentation derived from LMA templates is prevalent on the Polish market, including on Polish law governed deals and in Polish language versions. A difficulty for the market is that a number of local law issues arise and varying approaches have developed as to how they ought to be handled. Consistency is lacking. The potential discrepancies are multiplied many times over when a Polish translation of the documentation needs to be agreed. As continental lawyers will appreciate, it is often not straightforward to transpose common law concepts on which the English law governed LMA recommended form documents are based into a civil law system. For example, remedies are often a point of divergence between the two systems. In Poland, this comes to the fore in respect of acceleration of a loan.

In order to resolve these difficulties, a project was commenced in 2012 under the auspices of the Banking Law Council of the Polish Bank Association (*Związek Banków Polskich* or ZBP) to create an LMA inspired recommended form Polish law governed facilities agreement. The idea behind the project was to replicate some of the benefits brought by the LMA recommended form documents to other markets: efficiency, greater consistency and certainty, and increased liquidity. The working group has now completed its work. The Polish law Polish language multicurrency term and revolving secured syndicated facilities agreement was officially launched by the Polish Bank Association on 16 November 2016.

The document had also been consulted with the Polish Association of Corporate Treasurers (*Stowarzyszenie Polskich Skarbników Korporacyjnych* or the PCTA).

Some of the noteworthy issues – apart from linguistic conundrums – that members of the working group have had to address include those set out below. They reflect areas where the LMA recommended form facilities have traditionally been amended for local use.

### Acceleration vs termination

One area where the requirements of Polish law differ significantly from those of English law is in respect of a lending bank's right to demand early repayment of a bank loan. As a matter of English law it is well settled that 'on demand' means 'on demand'. Where the parties have agreed that a term loan can be accelerated, English law has adopted a 'mechanics of payment' test allowing the borrower only a reasonable time of up to a few hours to transfer the payment, and not a reasonable time to try to obtain the money either through refinancing or disposals.

As a matter of Polish law, a far less bank friendly approach has been taken in Article 75 of the Banking Law. A bank must give the borrower at least thirty days' notice before 'terminating' a credit agreement and demanding early repayment, or at least seven days' notice if the borrower is threatened with bankruptcy. The Polish legislature clearly intended that the borrower be given a chance to somehow find the funds to make the repayment. Moreover, as from November 2015, an additional notice procedure (effectively resulting in an extra grace period of at least fourteen days) was introduced. If the borrower fails to make a scheduled payment, a bank must initially give the borrower fourteen business days' notice allowing the borrower to pay. Within fourteen days from being so notified the borrower may request a restructuring of its indebtedness, which the bank is required to give reasonable consideration to. Arguably, only after this time can the bank give the relevant thirty or, if applicable, seven days' notice to terminate a credit agreement. Mandatory prepayment provisions (usually agreed to apply e.g. upon a change of control) also need to be analysed in this context.

Interestingly, no notice period applies in relation to the lender's right to cancel its commitment to lend following the occurrence of an event of default.

On a related point, standard clauses of the LMA recommended forms dealing with the resignation of a borrower and voluntary prepayment (sometimes associated with prepayment fees) had to be conformed with the somewhat rigid provisions of the Banking Law regulating termination by the borrower who, as a rule, has a statutory right to terminate a loan agreement subject to three months' notice where the duration of the loan exceeds one year.

### Statutory MAC

A quite controversial point in respect of the new recommended form facilities agreement – where the views of lenders and borrowers have diverged most sharply – has been the treatment of the so-called "statutory MAC". The already referred to Article 75 of Poland's Banking Law contains a very bank friendly provision which simply states that a bank may give the requisite notice to terminate a credit agreement if the borrower loses its "creditability", that is, its ability to repay the loan and interest on the scheduled repayment dates. This power, which is conferred only on banks, is quite similar to a material adverse change (MAC) event of default that is usually included in English law leveraged acquisition or project finance facilities agreements. Where the parties have agreed in a term sheet to the use of Polish law, but have also agreed that the loan agreement is to be in LMA form or LMA compliant (which combination is often agreed in term sheets in the Polish market, despite the fact that the LMA has never published a recommended form Polish law facilities agreement), an issue arises whether any material adverse change formulation which the parties have agreed in the term sheet is to be in addition to the bank's statutory rights conferred by Article 75 or in substitution for this statutory MAC. If this is to be expressly regulated in a facilities agreement, rather than being left to the court as a matter of interpretation, the matter will ultimately come down to the relative bargaining strength of the parties. The ZBP recommended form provides for both options.

### Suretyship vs corporate guarantee

Polish law draws a distinction between suretyship obligations in respect of a third party's obligations and guarantees. A "suretyship" is regulated by the Civil Code and, if it relates to future obligations, as is often the case, must be limited in time and amount. It is generally not possible to waive potential defences of the surety in advance, especially those relating to the invalidity of the guaranteed obligation. On the other hand, a Polish law "corporate guarantee" is not regulated by the Civil Code. It is a contractual obligation to pay upon the satisfaction of certain conditions, in some ways similar to an English law covenant to pay or a documentary credit or a Polish law "bank guarantee" (which, however, is not something that can be issued by non-banks).

There is some disagreement in the market as to whether the English law guarantee embodied in the LMA recommended form documents is best replicated in a Polish law governed facility through the use of a "suretyship" concept or a "corporate guarantee" concept. Accordingly,

the ZBP template Polish law facilities agreement provides wording, in the form of alternative clauses, for each option.

### Assignments and transfers

LMA recommended form facilities include two mechanisms for the transfer of participations: assignment agreements and transfer certificates. The former are based on the institution of assignment (statutory or equitable), and the latter on novation. For an English lawyer, novation denotes the extinguishing of an existing contract and the substitution of a new contract in its place, often involving release of an original party and its replacement with another. For a Polish lawyer, novation is a narrower concept. It usually denotes the creation of a new contract between the same persons who are parties to the existing contract (that is, without replacing an existing party with another person). Consequently there are doubts as to whether it can be used as the basis for transfers of loan participations to third parties. Accordingly, the ZBP Polish law facilities agreement only provides for an assignment of rights, which should be accompanied by a corresponding transfer of the existing lender's obligations to the new lender. As a matter of Polish law, a borrower's consent is not required in relation to an assignment of rights, but a transfer of obligations (including a commitment to lend) requires such a consent, as is also the case in relation to the disclosure of data covered by bank secrecy regulations, which are quite restrictive.

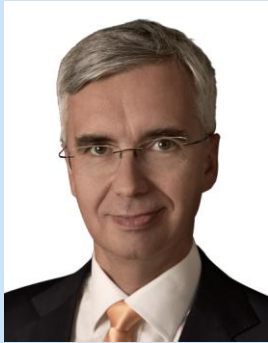
### Other matters

To reflect better the way in which agency provisions are intended to work in the original LMA documentation, the ZBP template regulates certain details relating to the role and powers of the facility agent (such as the grant of a power of attorney by the lenders), which clarifies the role of the facility agent for example in relation to the termination of the agreement. The tax provisions, in particular the withholding tax gross-up clause, have been tailored to local tax requirements. Other matters to consider include the optional addition of an obligation on the borrower to refund the lenders costs of contributing to the Polish Bank Guarantee Fund (*Bankowy Fundusz Gwarancyjny* or the BFG). This is a deposit guarantee scheme that is funded by banks in the Polish banking system. It is common practice for this contribution to be reimbursed by borrowers. Following recent amendments regarding the calculation of the banks' contribution to the BFG, no common approach or drafting convention has developed to address these changes. The ZBP template flags this issue and it is likely to be dealt with in detail in a future update.

### Conclusion

Loan markets in Poland have readily absorbed and adapted LMA based documentation. There are a number of reasons for this. They include the fact that many banks in this market have operated as subsidiaries of foreign banks which were used to dealing with LMA documentation; and there were no suitable local recommended forms for syndicated loans. In Poland, LMA based documentation is well entrenched and here to stay – for both English law and Polish law governed facilities, even in respect of loans for modest amounts. If the Polish Bank Association's initiative to standardise Polish law adaptations and Polish language translations finds traction in the Polish market and the Association's template finds acceptance as a basis for documenting Polish law governed facility agreements, this will bring further material benefits for both lenders and borrowers.

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