

The French LMA standard and French law specifics with respect to international syndications



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The French LMA standard

The French LMA standard : a close copy of the English law standard

- The French law version of the LMA Primary Documents was developed by a working party made up of representatives of major French banks and a number of Paris-based law firms
- The objective was to adapt the LMA Primary Documents to meet the requirements of French law and banking practice whilst retaining the form and substance of the LMA English law documents

The French LMA standard

How it differs from the English law standard

- Clauses required under French law, in particular regarding:
 - calculation of default interest
 - indication of the overall cost of the credit (*taux effectif global*); and
 - specific provisions of French insolvency law
- Amendments to the mechanics:
 - definition of “Business Day”
 - use of EURIBOR
 - amendments to timetables

The French LMA standard

The LMA standard is now the standard on the French market

- According to a recent study by the *Association Française des Trésoriers d'Entreprises* (AFTE)*, French law is used for most primary loan agreements and even for large syndications
- On the French market, the LMA standard is proposed for 55% of primary loan transactions and applied to 42% of transactions and used for nearly all large syndications
- However, when the LMA standard is not used, contracts proposed by banks are very similar to the LMA standard, and are generally a simplified version of it

*Association of French Company Treasurers

Administration of security interests for lenders under French law

The security agent

A specific mandate must be granted to the security agent allowing it to register, manage and enforce security interests in the name and on behalf of the lenders

- Disadvantages of the French security agent mechanism:
 - the security agent is not the beneficiary of the security interests
 - this mechanism can only be used for security *in rem*, not for personal guarantees
 - difficulties when a lender transfers or assigns its participation for security interest requiring the beneficiary to be registered
 - no ring-fenced patrimony/estate (*patrimoine d'affectation*) and no bankruptcy remote dedicated patrimony/estate in case of security agent's insolvency
 - the security agent is not entitled to register the secured claim in its own name during an insolvency procedure.

Administration of security interests for lenders under French law

The trust institution is not used in France

Until recently, the trust was not a recognized institution under French law. Even today, the introduction of the *fiducie-sûreté* has not solved all issues and is very seldom used

- France has not ratified the Hague Convention on the law applicable to trusts and their recognition (1985)
- The French Supreme Court has, however, recently recognized the effectiveness of parallel debt and trusts created under the law of another country (i.e. the USA)
- Parallel debt was held not to be contrary to French international public policy (*ordre public international*)

Administration of security interests for lenders under French law

- The Court recognized that, when benefiting from a parallel debt, the security agent alone was entitled to register the whole secured claim during an insolvency procedure, prior to the enforcement of security interests
- In 2007, French law introduced the *fiducie*, also known as the French trust, which purports to implement some provisos of the Anglo-Saxon trust
- The *fiducie* allows a fiduciary (like a trustee) to register and manage all of the security interests and guarantees, that it owns in a separate estate which is bankruptcy remote
- However, the *fiducie* is subject to heavy formalities and legal publicity requirements and costs, making it an uncommon practice

Administration of security interests for lenders under French law

The legal framework established for the security agent does not meet market practice requirements

- Ad hoc regime introduced by Article 2328-1 of the French Civil Code in order to facilitate multi-lender and syndicated loans:

“Each type of security interest may be granted, registered, managed and enforced on behalf of secured creditors by the security agent”

- This mechanism is not often used in France because the scope of the powers of a security agent remains unclear
- This legal framework may soon be amended

Transfer of loans by lenders under French law

Difficulties of transferring a participation in large syndicated transactions

- Under French law rights can only be assigned in accordance with Article 1689 et seq. of the French Civil Code: notification by a bailiff is required to render the transfer enforceable against third parties
- This requirement applies when the debtor is French, even if the applicable law of the contract is not French law
- Under French law no specific mechanism is provided for the assignment of contracts. However, the LMA standard refers to the assignment of contracts.

Transfer of loans by lenders under French law

Difficulties of transferring a participation in a large syndicated transaction

- The assignment of contracts is not firmly established from a legal point of view but remains easy to carry out
- French courts require at least two conditions to be satisfied:
 - the debtor's consent; and
 - a notification by a bailiff
- What is the risk ? If a contract is assigned, there is a risk of it being deemed to constitute a transfer (by novation). This would invalidate the security package if the lender has not expressly reserved its rights under the security package (Articles 1278 (security interest) and 1281 (guarantees) of the French Civil Code)

Tax gross-up

New tax regime prevents lenders and agent from being located in certain tax havens

- French rules on money laundering require the inclusion of specific provisions in a facility agreement preventing the lenders and the agent from acting through offices located in countries considered non-cooperative from a tax point of view by the French tax authorities. A borrower paying into an account located in such a country is subject to substantial withholding taxes
- The current list of countries concerned: Botswana, Brunei, Guatemala, Marshall Islands, Montserrat, Nauru, Niue and Philippines