**Loan Agreement provisions – Representations**

This element explains the nature, purpose and effect of representations within a loan agreement

Note: Clause references throughout this element are to the LMA Agreement. Unless specifically indicated, you are only required to familiarise yourself with the structure of the LMA Agreement. You are **not** required to read the clauses in the LMA Agreement in full.

**Representations: overview (Clause 25)**

Representations are **statements of fact** about the borrower and its business – they are **based on the day of signing and certified as true** by the borrower as at that date.

Representations constitute the **contractual basis** on which a lender makes and continues to make a loan available.

‘Representations’ and ‘warranties’ are **interchangeable terms** in respect of loan agreements. These are treated in the same way since the loan agreement provides a contractual remedy for both under what would be a misrepresentation at common law.

The difference between representations and warranties at common law is very important where common law and/or statutory remedies are relied on, but this is only rarely the case under a loan agreement. Under a loan agreement, a **breach of any of the representations and warranties is an event of default** which has **specific contractual remedies**.

**Representations are split into two basic categories:**

**Legal matters**

These representations cover:

• a borrower’s legal status;

• its capacity to enter into the agreement; and

• the validityor enforceability of the agreement

**Commercial matters**

These representations cover the credit standing and financial condition of the borrower.

**Representations: the basics**

Certain representations occur in every loan agreement. For example:

The borrower stating that there is no current, threatened or pending litigation against it as this is fundamental information.

Other matters are deal specific and relate to the particular borrower’s business. These are linked to the lender’s decision to lend or might have arisen as a result of due diligence and are viewed as problematic.

**What if the borrower cannot make the representation as it is untrue?**

If a borrower is unable at the outset of the loan to make a certain representation (namely because it is untrue), it will need to qualify the drafting of the representation in the loan agreement itself. Sometimes a borrower will disclose a problem to the lender in a disclosure letter prior to signing the loan agreement, but this is less common.

As a misrepresentation will trigger an **event of default**, the borrower will want to limit the scope of the representations.

**Examples of representations**

Status (i.e., that the borrower has been duly incorporated)

All information provided by the borrower is correct and is not misleading

There is no litigation either ongoing, threatened or pending against the borrower

Power and authority (i.e. that the borrower has the power and authority to enter into the loan agreement)

No event of default currently exists in respect of the borrower

[Pen Symbol]

**Task:** Read the following representations in clause 25 of the LMA Agreement: Status (25.2), Power and authority (25.5), No default (25.11), No misleading information (25.12) and No proceedings (25.14).

Who is giving these representations?

**Representations: Repetition**

The lender will want some or all of the representations to be **repeated at regular intervals** (given that there is an ongoing relationship between the lender and the borrower through the loan agreement).

Typically, the representations are made on the **date of the signing of the loan agreement,** and they are then usually repeated:

on the **date of each request for a loan** (a utilisation request); and

on the **first day of each Interest Period** (see Element 4 for more details on an interest period).

There will be a **balancing exercise** between the lender wanting as many representations repeated as possible; and the borrower seeking to limit the number of representations being repeated (for both practical and factual reasons).

In relation to repetition of representations, the **borrower will commonly argue** that:

- certain matters cannot or are **unlikely to change** (e.g. that it is validly incorporated);

- some statements are **only relevant upon signing,** such as information contained within original financial statements;

- the content of the representation is covered under a **separate undertaking**; and/or

- the lender is afforded **protection by an indemnity** (particularly relevant in the case of withholding of tax whereby if the law is changed leading to a deduction, the lender is protected through a ‘gross-up’ provision within the loan agreement).

**Representations: Lender's perspective**

For the lender, a representation helps to **reduce the risk** of entering into the loan. It forces the borrower to disclose certain information about itself under the representation (and this is done ahead of signing the loan agreement).

The lender also **gains control** here as a breach of any representation leads to an **event of default.**

The borrower’s inability to repeat any representation also **triggers a drawstop event** which leads to the borrower being **suspended** from any further borrowing under the loan agreement (see clause 4.2(b)).

**Representations: Borrower perspective**

A borrower should try to **resist repetition** as much as possible. It should always refuse to repeat the representation that there is no ‘potential event of default’ (note that a ‘Default’ in the LMA Agreement includes both an actual event of default and a potential event of default). An inability to say there is no potential event of default will then amount to an actual event of default for misrepresentation. See Topic- Loan agreements (II) Element 2 (Lender's options) for more detail on potential events of default.

A borrower should also **be wary of making absolute statements** – as it will not want an immaterial inaccuracy to be a misrepresentation.

Any borrower with a **significant number of subsidiaries** will need to ensure that, if required to make the same representations about these subsidiaries, that they are able to establish adequate reporting lines and to carry out the required due diligence.

An objection may arise from the borrower to make a representation on behalf of minor or irrelevant group companies. A compromise, in those circumstances, is to limit the representation to only specific subsidiaries or **‘Material Subsidiaries’**.

The borrower then has less administrative obligations to monitor all subsidiaries. The lender does, however, still gain comfort that the more important subsidiaries comply with the representation.

‘Material Subsidiaries’ are often defined as the Obligors and any company that constitutes a **certain percentage of the group’s turnover, profit or asset value** (each of these being specific to the deal).

A common response from the borrower is to also attempt to limit its representations and warranties with a **knowledge qualification** (i.e., such as stating that each representation is ‘**to the best of its knowledge and belief’**).

A lender is often **reluctant** to accept this, other than in very specific situations. This is because it undermines the very object of representations; the borrower should accept the risk and monitor both itself and any subsidiaries to ensure that it stays roughly the same entity throughout the loan period (therefore keeping the lender comfortable).

**Summary**

• Representations are **statements of fact** about the borrower and its business – they are **based on the day of signing and certified as true** by the borrower as at that date.

• Representations constitute the **contractual basis** on which a lender makes (and continues to make) a loan available.

• Certain representations occur in every loan agreement while others are ‘deal specific’ and are linked to the commercial elements of a particular deal.

• Representations are typically made on the **date of the signing of the loan agreement,** and they are then usually repeated (1) on the **date of each request for a loan** (a utilisation request) and (2) on the **first day of each Interest Period.**

• There will be a **balancing exercise** between (1) the lender wanting as many representations repeated as possible (2) the borrower seeking to limit the number of representations being repeated for practical and factual reasons and (3) the borrower seeking to limit the scope of the representations through, for example, materiality qualifications.