**Documentation- mandate letter, information memorandum and potential liabilities of an arranger and agent**

This element explores some of the preliminary documentation involved in syndicated lending, namely the mandate letter and information memorandum. It also considers some potential liabilities of an arranger and an agent, and how they protect themselves.

N.B. clause references throughout this element are to the LMA Agreement.

**Syndicated Loan Structure (pre-signing)**

[Diagram showing a box marked “Single loan agreement signed”. Above this are 4 boxes marked Lender A, Lender B, Lender C and Lender D. An arrow from each box points towards a single box marked “Arranger” (this section is labelled “the Syndicate”). There is an arrow from “Arranger” to a box marked “XYZ Plc (Borrower)”].

**Mandate letter**

A term sheet will generally be the starting point for both bilateral and syndicated loans (see Element 4).

Where a syndicated loan is used, additional provisions relating to the arranging of the loan may be included in a separate letter known as a mandate letter (also known as a commitment letter). There is an LMA standard form mandate letter which is widely accepted in the market.

The mandate letter will be provided by the Arranger (see element 2) and will set out the terms on which the borrower appoints it and on the basis of which the Arranger has agreed to arrange the syndicated loan (either on a best efforts or underwritten basis - see Element 2).

It will also include provisions designed to assist the Arranger in marketing the loan/setting up the syndicate (see below). The term sheet will usually be attached to the mandate letter, with any legally binding provisions set out in the mandate letter rather than in the term sheet.

As mentioned previously, the mandate letter will make it clear whether the Arranger has been appointed on a best efforts or underwritten basis. It is important for the Arranger that the syndication is successful, so the mandate letter will contain a number of provisions to facilitate syndication, including:

A '**clear market**' clause in which the borrower is restricted from issuing any other finance whilst this facility is being arranged. This is to ensure the Arranger is not competing with other attempted financing by the same borrower;

A '**market flex**' clause in which the Arranger can change terms of the facility to attract other banks to participate. This could include increasing the pricing and/or fees of the loan (and sometimes changing provisions such as the structure of the facility) to enhance the prospects of successful syndication. These clauses are unpopular amongst borrowers but have become more accepted and widespread. It is in a borrower’s interest to try to limit the changes the Arranger can make to pricing only (with a cap on any rise in pricing); and

A '**material adverse change'** provision (not to be confused with a ‘MAC’ event of default). A material adverse change provision in a mandate letter effectively enables the Arranger to terminate its mandate and walk away from the deal if either:

• there has been an event in the syndicated loan markets which has materially and adversely impacted the primary syndicate; or

• something happens which has an adverse impact on the business or financial condition of the borrower.

**Information Memorandum**

The information memorandum is the main marketing document prepared by the borrower and the Arranger and sent by the Arranger to potential syndicate members. The Arranger will assist the borrower in writing the information memorandum on the basis of information provided by the borrower during the due diligence process.

As the lenders are lending to a particular business for a particular purpose, they need to assess the risk of doing so. To do this they need to know all they can about the business. The information memorandum sets out the details of the borrower’s business, management and accounts, as well as the details of the proposed loan facility and any security and inter-creditor arrangements. It is not a public document and all potential lenders (whether pre- or post-signing of the loan agreement) who wish to receive it must sign a confidentiality undertaking.

The confidentiality undertaking tends to be drafted by the Arranger, although the LMA has produced forms of confidentiality letters which are common in the market.

[Pen Symbol] **Task:** Having considered the Arranger’s role set out in Element 2 and also in relation to the Information Memorandum, can you think of any areas of potential liabilities for the Arranger?

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• The Arranger could be liable for **fraudulent / negligent misrepresentation** or **negligent misstatement** (Hedley Byrne v Heller) in relation to any misinformation about the borrower provided to syndicate lenders.

• The Arranger could have potential liability to the syndicate lenders if it were acting as their agent and breached its **fiduciary duties**.

**Potential liabilities of Arranger and Protections**

Misinformation about the borrower to the syndicate lenders:

If the Arranger has provided inaccurate information to the lenders, it is likely that there will also be a misrepresentation event of default by the borrower (to be considered in Workshop 3). The facility could therefore be accelerated, and any funds advanced to the borrower immediately reclaimed.

However, it may be that the borrower is insolvent or in serious financial difficulties by then. Hence the syndicate lenders’ attention will turn to the Arranger, to see if it is liable to pay compensation for misrepresenting the borrower’s financial condition in the information memorandum, claiming fraudulent/negligent misrepresentation or negligent misstatement.

**Exclusion of liability**

The Arranger’s mandate is to organise the syndicate, and not to take responsibility for the information in the information memorandum or for syndicate lenders’ investment decisions. The Arranger will therefore attempt to exclude liability. At the start of the info memo is a disclaimer entitled ‘Important Notice’, stating that:

• the borrower is solely responsible for the information memorandum, and the Arranger is not responsible for the information contained in it;

• the Arranger has not independently verified the contents;

• the syndicate lenders will not rely on the memorandum to make their investment decision, and each bank should undertake its own assessment in deciding whether to participate in the loan; and

• the Arranger is not responsible for updating the information.

**Protections under the loan agreement**

**Indemnity**: The Arranger may take an indemnity from the borrower for any liability it may incur as a result of the borrower's action or default.

**Exclusion of fiduciary duties**: The Arranger is not a fiduciary of the syndicate lenders. Therefore, the Arranger's only duty is not to withhold any information from the syndicate.

**Waiver of conflict of interests**: This enables the Arranger to pursue other business with the borrower.

**Waiver of any requirement to account for any profit made**: This enables the Arranger to avoid any allegations of secret profit.

The agent has the following potential liabilities to the syndicate lenders:

• Breach of fiduciary duties including:

o No conflict of interest – the agent should not put itself in a position where its duty conflicts with its own self-interest or the interest of a syndicate member;

o Not to make a secret profit; and

o Due diligence in the exercise of its powers.

• Breach of terms of the loan agreement.

• Negligence – breach of duty to act with reasonable skill and care.

**Agency fees are low and do not reflect the risks involved. The agent will therefore seek to protect itself by limiting the scope of its duties and its potential liabilities in the facility agreement, as follows:**

**Duties narrowly defined**: and are expressed to be solely mechanical and administrative in nature (clause 33.3(a)).

**Fiduciary duties excluded**: (clause 33.5(a)), so that, for instance, the agent does not have to account to the lenders for any profit (clause 33.5(b)) and can carry on other business with the borrower (clause 33.6).

**Majority Lender instructions**: the loan agreement expressly provides that the agent is protected if it acts in accordance with these instructions (clause 33.2(a)).

**Conditions precedent (‘CPs’)**: the agent will want the advice of lawyers (clause 33.7(c)) and the instructions of the lenders as to any commercial CPs before confirming the CPs are satisfactory.

**Professional advisers**: in all matters the agent will want the right to appoint professional advisers if it considers this necessary to carry out its duties (and be compensated for the legal expenses) (clause 33.7(c) to (e)).

**No responsibility for checking accuracy/adequacy of documents**: the agent is simply acting as a postman in relation to any documents it forwards or information it supplies to other parties (clauses 33.3(d) & 33.8).

**Exclusion of liability**: (subject to the reasonableness test) for all liability except gross negligence or wilful misconduct (clause 33.10(a)(i)).

**Indemnity from lenders**: for all liability, costs and expenses incurred in the carrying out of its duties (clause 33.11).

**Indemnity from borrower**: e.g. for investigating Defaults (clause 21.3).

**Summary**

• The terms of the Arranger’s appointment are set out in the mandate letter.

• The mandate letter includes terms to assist the Arranger achieve a successful syndication, such as clear market and market flex clauses. In addition, the material adverse change clause gives the Arranger an exit if syndication does not go well.

• The information memorandum is the marketing document prepared by the borrower and Arranger. This contains information about the borrower to help potential syndicate lenders in their investment decision.

• The Arranger will protect itself against liability for misinformation by including the Important Notice disclaimer in the information memorandum as well as exculpatory provisions in the loan agreement. It may also seek an indemnity from the borrower.

• The Agent will also seek to protect itself from potential liability for the consequences of any decisions it takes in performance of its role by narrowly defining its role and through 'exculpatory provisions' in the loan agreement.