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Essential Considerations in Navigating Agency Replacements

In times of economic growth, lending opportunities are aplenty and there is often a flurry of activity to close deals quickly and put credit to work. Borrowers, lenders, advisors, counsels, facility agents and security agents work in synergy in settling the documentation and setting up the ancillary operative systems and processes. The common intention and hope are that loan facilities are duly serviced, and each interest payment or loan repayment is settled on time. There are many instances where this does happen, and all is well. However, some transactions do fall behind for various reasons. COVID-19, for instance, has shown how the world can change drastically in a short span of time and catch us off guard.

If in the unfortunate situation that a borrower is running the risk of a default, lenders – especially those in a syndicate or club deal – must be able to confidently turn to the agents on the transaction. Agents are entrusted to administer the transaction with heightened scrutiny and must be ready to take prompt and decisive action to accelerate the loan facility if necessary and enforce on security rights. There is usually a flurry of consent and waiver requests, amendment exercises, calculation of principal and/or default interest, and other special actions. Agents need to be sufficiently nimble and well-versed in the documentation to manage any issues in a fair, decisive and proactive manner.

Unfortunately, many existing agents may find themselves ill-equipped or disinclined to handle the complexities of distressed and special situations. Parties often find themselves with an urgent need to appoint commercially capable replacements on top of managing their own credit issues and/or restructurings. Agency replacements are unlikely at the top of most parties' agenda, but agents do play a key crucial role in facilitating any resolution ahead.

Any agency replacement starts from the requirements in the loan document. Set out below are some essential issues that parties may wish to consider, either when negotiating the original loan, or at the replacement stage.

- (i) ***Consultation with the Borrower.*** APLMA loan facility documents provide that a facility or security agent “*may resign by giving 30 days’ notice to the other Finance Parties and the [Borrower], in which case the Majority Lenders (after consultation with the other Finance Parties and the [Borrower]) may appoint a successor Agent or Security Agent (as applicable).*” At the outset, parties are advised to consider introducing a carve out to the consultation requirement when negotiating the loan documents. Consultation should not be required if an event of default has occurred and is continuing, as in our experience, Finance Parties may find it difficult to consult with borrowers who are in distress and default. While consultation does not amount to requiring positive consent, a carve-out prevent any ambiguity or potential challenges raised by the Borrower that it was not consulted in any agency replacement.

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- (ii) **Resignation and Appointment Deed.** It is important to note that the “*resignation notice of the Agent or Security Agent (as applicable) shall only take effect upon the appointment of a successor, and additionally in the case of the Security Agent, upon the transfer of the Security Property to the successor*”. As soon as the successor agents have been identified, parties are advised to prepare and enter into a separate resignation and appointment deed (or similar) to document the key resignation and appointment provisions. The resignation and appointment deed can be an excellent opportunity to implement any waivers or consents that may be required. For instance, if the resigning agents have not provided requisite notice, the borrower and the lenders may wish to be party to provide their consent and/or waiver to rectify defects in the appointment process. The resignation and appointment deed may also sometimes be used to contain certain logistical or mechanical amendments that accompany the agency replacement. For instance, if the replacement facility agent utilizes Bloomberg instead of Reuters, then parties can set out an amendment within the resignation and appointment deed instead of preparing a standalone amendment deed to the main loan facility agreement which incurs unnecessary time and costs.
- (iii) **Handover Logistics.** APLMA loan facility documents provide that a retiring Agent or Security Agent shall “*make available to the successor Agent or Security Agent (as applicable) such documents and records and provide such assistance as the successor Agent or Security Agent (as applicable) may reasonably request for the purposes of performing its functions as Agent or Security Agent (as applicable) under the Finance Documents*”. In practice, we have found that resigning agents are often no longer incentivized to provide assistance after the agency replacement. As such, while parties are sometimes eager to push through the agency replacements as quickly as possible on paper, they are advised to consider whether the successor agent will be able to effectively discharge its duties if the resigning agent does not provide sufficient historical information. Parties may consider building in effective date and documentary evidence provisions (akin to condition precedent mechanisms for loan utilizations) into the resignation and appointment deed to streamline handover efforts.
- (iv) **Implications on Security Interests.** In security agency replacements particularly, parties are advised to consider what steps are required to ensure continuing validity of their security interests – this entails an analysis of both the asset type and jurisdictional requirements. For instance, in the case of a pledge over a bank account, it would be important for the account bank to be notified of the identity of the successor security agent so that there is no gap in the chain of enforcement (if it becomes necessary). Another example is if the rights to an insurance policy have been assigned as security, then the insurer should necessarily be notified of the change of the loss payee being the successor security agent. Certain jurisdictions such as Indonesia may require filings and/or registrations with local regulatory offices to update regulatory records with the identity of the successor security agent. Lenders are encouraged to appoint appropriate local counsel to review the security package and advise on the necessary legal or market requirements to implement an effective replacement.

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The agency replacement process is fraught with its own complexities both legally and commercially. Successor agents will have to get up to speed extremely quickly especially in volatile situations, and be able to effectively manage and work with incumbent or incoming advisors and counsel in order to move the transaction forward. Parties are advised to appoint an able service provider to act as facility agent and security agent at the outset. Whilst not all transactions will turn sour, not all transactions will remain peachy. Rather than scrambling for a replacement service provider should the unfortunate occur, it would be in all parties' interests to have well equipped agents to manage the loan, whether it is performing or in distress. This will allow the parties can focus on the core commercial elements of the transaction.

As an established corporate trust and agency provider within the debt capital markets, Madison Pacific has serviced a significant number of both “fresh money” deals and distressed facilities in the region. We have significant experience in taking over distressed facilities and navigating the minutiae of agency replacements and continuing administration and assisting in any eventual restructuring. We are extremely nimble and commercially minded, and tailor our services to meet the needs of our clients.