

LMA vs. LSTA loan trading

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Table of contents

3. LMA vs. LSTA
4. Standard trade structure and recourse (LMA vs. LSTA)
5. Timetable (Par)
6. Timetable (Distressed)
7. Documentation
8. Pre-trade
9. LMA Trade Confirmation
10. LSTA Trade Confirmation
11. LMA Standard Terms and Conditions
12. LMA Representations and Warranties
13. LSTA PSA Standard Terms and Conditions
14. LSTA PSA Standard Terms and Conditions (cont...)
15. Participations
16. Participations (cont...)
17. Summary

LMA vs. LSTA

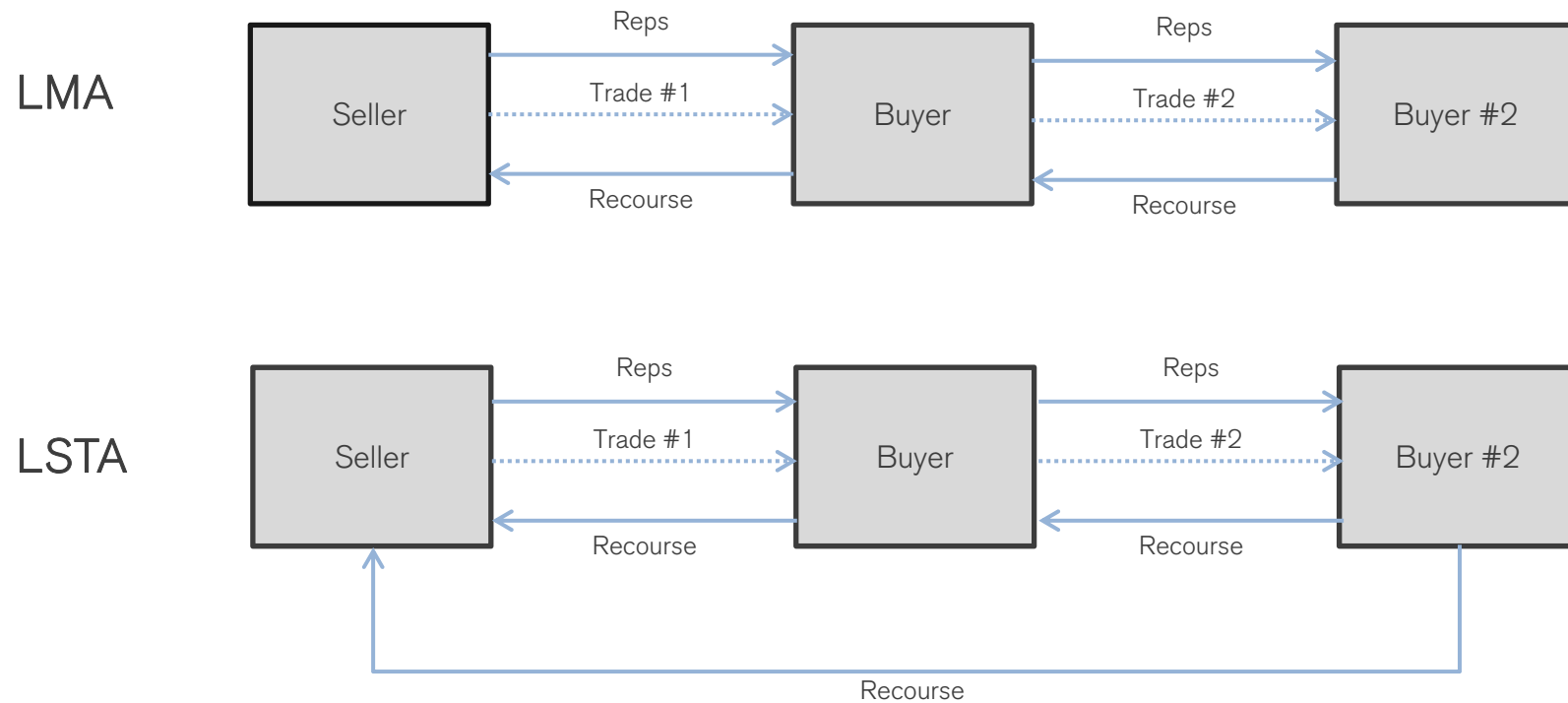
- Loan Market Association (“**LMA**”) is based in London. Governing law is English law
- Loan Syndications & Trading Association (“**LSTA**”) is based in New York. Governing law is New York law.

- Trade structure:
 - LMA Trade Confirmation: core document which survives execution of settlement documentation
 - LSTA Trade Confirmation: superseded by the Purchase and Sale Agreement and settlement documentation

- Rights of recourse:
 - Under LMA: Seller gives representations as to itself and its Predecessors-in-Title and recourse is directly against the Seller. The Seller may then have direct recourse to its upstream seller, and so on, resulting in a chain of litigation. No Predecessor Transfer Agreements are provided by Seller to Buyer.
 - Under LSTA: Seller transfers its rights against upstream sellers (so recourse may be directly against an upstream seller). Seller steps-up for its upstream sellers only if upstream docs are incorrect or incorrectly done on Par docs

- Representations and Warranties: certain differences

Standard trade structure and recourse (LMA vs. LSTA)



Timetable (Par)

	LMA	LSTA
T-X	KYC satisfied Parties exchange NDA if required	
T	Trade Date (phone or otherwise)	Trade Date
T+1	Parties agree NDA Seller sends Credit Documentation as promptly as practicable Seller requests Agent to request any required Borrower's consent	Responsible party sends confirmation to counterparty
T+2	Responsible Party sends LMA Trade Confirmation to Other Party	Counterparty returns confirmation to responsible Party
T+3		Responsible party sends draft settlement documents to counterparty
T+4	Other Party executes and returns LMA Trade Confirmation to Responsible Party	Responsible party/counterparty delivers executed assignment to Agent
T+5	Responsible Party sends settlement documentation to Other Party - to be executed as soon as reasonably practicable	
T+7	Borrower consent received (if required) Buyer and Seller execute settlement documentation and deliver to Agent	Agent completes assignment and Buyer becomes legal owner of record Delayed Settlement Compensation begins
T+10	Settlement Date Delayed Settlement Compensation accrues if applicable	

Timetable (Distressed)

	LMA	LSTA
T-X	KYC satisfied Parties exchange NDA if required	
T	Trade Date (phone or otherwise)	Trade Date
T+1	Parties agree NDA Seller sends Credit Documentation as promptly as practicable Seller requests Agent to request any required Borrower's consent	Responsible party sends confirmation to counterparty
T+2	Responsible Party sends LMA Trade Confirmation to Other Party Agent requests Borrower consent (if required)	Counterparty returns confirmation to responsible party
T+3		
T+4	Other Party executes and returns LMA Trade Confirmation to Responsible Party	
T+5	Responsible Party sends settlement documentation to Other Party - to be executed as soon as reasonably practicable	
		Seller delivers predecessor transfer agreements to Buyer Responsible party delivers draft settlement documents to counterparty
T+7	Borrower consent received (if required)	
T+15	Buyer and Seller execute settlement documentation and deliver to Agent Agreement on representations and warranties (if necessary)	
T+20	Settlement Date Delayed Settlement Compensation accrues if applicable	Parties deliver executed assignment to Agent Delayed Settlement Compensation begins

Documentation

LMA

- LMA Trade Confirmation
- Standard Terms and Conditions
 - Settlement Amount calculation
 - Interest treatment
 - Delayed Settlement Compensation
 - No Breakfunding by default
 - Confidentiality clause and non-reliance reps
 - BISO - trigger date 60 BDs, applies to legal transfer and participation
 - Termination on insolvency of one of the parties
 - Representations and warranties of Seller and Buyer (including Predecessor-in-Title representations)
- Transfer Certificate / Assignment Agreement / LMA Assignment
- Participation Agreement
- Pricing Letter

LSTA

- LSTA Trade Confirmation
- LSTA Purchase and Sale Agreement (PSA)
 - Standard Terms and Conditions
 - Purchase Price calculation
 - Interest treatment
 - Delayed Settlement Compensation (NB LSTA has proposed changes from a "no fault" model to a "requirements" based model)
 - No Breakfunding by default
 - No collateral by default (for participations)
 - Confidentiality clause and non-reliance reps
 - "Riskless principal" (trade subject to successful completion of purchase/sale to/from third party)
 - BISO - trigger date 15 BDs, does not apply to trades settling by participation from outset or falling back to part (note distinction for Early Day Trades)
 - No termination on insolvency of one of the parties
- Assignment Agreement
 - Representations and warranties of Seller and Buyer (no Seller Predecessor-in-Title representations)
- Participation
- Purchase Price Letter / Proceeds Letter

Pre-trade

- If either LMA or LSTA docs are preferred - must be stipulated at time of trade
- When is a trade a trade (English law)
 - *Bear Stearns v. Forum Global Equity Limited (2007)*
 - Court held there was a binding oral contract when the parties agreed on the price for certain bonds (despite other terms not being discussed)
 - As best practice agree orally (and evidence in a trade recap): LMA/LSTA, Par/Distressed, Borrower, Traded Portion, Purchase Rate, interest treatment, form of purchase, voting rights, Delayed Settlement Compensation
- When is a trade a trade (NY law)?
 - Certain agreements are usually only enforceable when in writing (Statute of Frauds)
 - "QFC" exemption passed in October 2002 for loan trade transactions - oral trades enforceable
 - LSTA standard terms and conditions - if parties enter into an LSTA Trade Confirmation, they agree to be bound on all prior and subsequent oral trades between such parties
- What can evidence an oral trade?
 - Must demonstrate that the parties entered into a contract (probably with the same requirements as the *Bears Stearns* case)
 - May be evidenced by:
 - Trade confirmation received within 5BDs of trade date (that wasn't objected to within 3BDs)
 - Taped phone line
 - Email
 - Trade ticket or blotter

LMA Trade Confirmation

- Definitive record of terms of trade - which survives execution of settlement documentation
- Incorporates the LMA Standard Terms and Conditions (Par/Distressed) as in effect on the Trade Date
- LMA precedent Confirmations - for Bank Debt and Claims
- Evidences the verbal agreement of the parties and the terms of trade, i.e. Trade Date, Credit Agreement, Traded Portion, Purchase Rate, interest treatment, form of purchase, other terms of trade
- Incorporates standard Representations and Warranties (Par/Distressed)

LSTA Trade Confirmation

- One form for Par and one form for Distressed
- Evidences the verbal agreement of the parties and the terms of trade, i.e. Trade Date, Credit Agreement, Form of Purchase, Amount, Purchase Rate, accrued interest treatment, other terms of trade (subject to completion of Buy-in/sell-out of assets, flip reps)
- Standard terms and conditions for Distressed trades additionally include:
 - Flip reps - used for broker-dealers:
 - Seller must be acting as "Riskless Principal" (i.e., sale is subject to successful completion of purchase by Seller from immediate prior seller)
 - If settlement of buy-in trade and subsequent sell-out trade by broker-dealer occur within 1 BD of each other and Seller is acting as Riskless Principal - LSTA PSA reps and warranties 4.1(d) (*title*), (f) (*outstanding principal amount*), (g) (*future funding obligations*) and (v) (*proof of claim*), if applicable, are limited by assuming truth and accuracy of the reps and warranties made to Seller by its immediate prior seller
 - Buyer must have the opportunity to review and comment on Seller's upstream docs prior to execution
- LSTA Trade Confirmation is satisfied and superseded when the LSTA PSA and Assignment Agreement become effective
- Transfer effected by Assignment Agreement or LSTA Participation
- Seller must disclose upstream transfer docs to Buyer
- Step-up reps automatically apply if prior seller sold on Par docs when it should have sold on Distressed

LMA Standard Terms and Conditions

- LMA Trade Confirmation: incorporates LMA Terms and Conditions (Par/Distressed) - last updated 16 December 2015
- Counterparty insolvency (Condition 3): prior to Settlement Date allows termination by the other party (with the amount due being the difference between the Early Termination Amount (based on broker-dealer quotations obtained by the non-insolvent party) and the Settlement Amount
- Purchased Assets definition: include the Traded Portion, the Ancillary Rights and Claims (Condition 5) and Non-Cash Distributions
- Non-reliance and independent investigation (Condition 21):
 - “Big boy” language (which can be supplemented in the Other Terms of Trade e.g. where the Seller is a CoCom)
 - No liability or obligation to repurchase relating to: effectiveness of Credit Documentation, non-performance by the parties thereto, or Obligor financial condition
 - No liability if one party possesses material information unknown to the other (except if it results in a breach of representation)
- Indemnities by Buyer/Seller (Condition 23):
 - For breach of LMA Confirmation, Transaction Documentation or LMA representations, failure to perform obligations, and for any required disgorgement/reimbursement
 - E.g. under sharing provisions in the Credit Documentation or following a successful insolvency officer challenge of a payment under the Traded Portion
- Binding amendment and debt restructuring (Condition 26): Buyer bears the risk from Trade Date
- Tax and withholding (Condition 29.1):
 - Buyer is responsible for making its own tax analysis
 - All payments under the LMA transaction are free and clear of tax (i.e. payer gross-up is required)
 - All interest/fees under the Credit Documentation are net of tax (i.e. payee bears the tax risk)

LMA Representations and Warranties

- Seller makes representations on behalf of itself and its predecessors at Trade Date and/or Settlement Date - in substitution for a limited amount of due diligence
- Par representations:
 - No acceleration or default and no set-off rights
- Par and Distressed representations:
 - Unencumbered title
 - No other relevant undisclosed documents
 - No material defaults as lender
 - Assets capable of being novated/assigned/participated
 - Pricing letter amounts are true and accurate
- Distressed representations:
 - All material credit documentation provided (if agreed)
 - Not "connected" to any obligor under Insolvency Act 1986 or equivalent
 - No bad acts resulting in a claim impairment or proportionately lower recovery
 - No rights of set-off exist and Seller has not set off
 - No notice of claim impairment or invalidity
 - No further obligations to extend credit
 - No litigation against Seller

LSTA PSA Standard Terms and Conditions

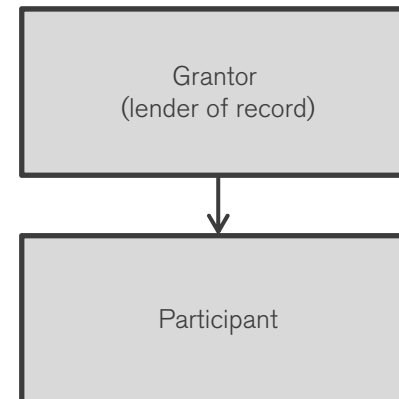
- Transaction Summary - trade details such as:
 - Trade Date
 - Purchase Amount
 - Interest treatment
 - Original/secondary assignment
 - Borrower in bankruptcy
 - Flip reps
 - Step-up reps
- Assignment and Assumption clause (i.e. the sale/purchase clause) for Transferred Rights and Assumed Obligations (LMA only has this for the Ancillary Rights and Claims - the Transfer Certificate and Funded Participation deal with transfer/participation)
- Conditions Precedent clause (no such clause in LMA deals)
- Representations and warranties: generally given by Seller only; however step-up reps are given if:
 - A prior seller transferred on Par docs (i.e. without an LSTA PSA) when it should have been transferred on Distressed docs
 - If the upstream transfer docs are deficient in some way
 - If not all (or some) the upstream docs are provided or are missing

LSTA PSA Standard Terms and Conditions (cont...)

- Requires due diligence on all upstream transfer docs for content and that correct documentation (i.e. Par/Distressed) was used
- Important representations:
 - 4.1(d) Title
 - 4.1(e) Actual/Threatened Proceedings
 - 4.1(f) Outstanding principal amount and commitment
 - 4.1(h) Acts/Omissions
 - 4.1(i) Performance of Obligations
 - 4.1(l) No set off
- The LSTA PSA also provides a check box for step-up representations with respect to:
 - Retained Obligations definition
 - Sellers reps: 4.1(e),(g) (*future funding*), (h),(i),(l),(t) (*consents and waivers*) & (u) (*other documents*)
 - Disgorgement indemnity
 - Distributions - Section 8.2
- Further transfer provision - Buyer can transfer rights/participate without consent. Need consent for transferring obligations

Participations

- An undivided interest in a loan that entitles a participant to an equivalent *pro rata* share of all payments of principal and interest and obligates the participant to share in the expenses of the loan
- Under English law, the relationship between Grantor and Participant is that of debtor and creditor with the right of the Participant to receive monies from the Grantor restricted to the extent of an amount equal to the relevant portion of any monies received by the Grantor from any Borrower/Obligor - operates as an unsecured limited recourse loan
- Under New York law, the relationship between Seller and Participant is that of seller and buyer - a proprietary interest in the underlying asset is transferred to Buyer



Participations (cont...)

- Can the Grantor take a participation off of its balance sheet?
- UK GAAP v US GAAP
 - UK GAAP - contract to pass on amounts received in relation to loan to a third party will obtain off-balance sheet treatment (derivative accounting) even though the Grantor retains an interest in the loan
 - US GAAP - must be a "true sale" in order to obtain off-balance sheet treatment, Participant must not have credit risk against the Grantor
- Can the Grantor limit voting rights?
 - LMA - yes
 - LSTA - can specify voting rights
- LSTA Form of Participation released 2014. Based on the LSTA PSA but amended so that the Transferred Rights relate to a participation interest in the loans rather than outright assignment
- Temporary Participation (using modified LSTA PSA)

Summary

- The key difference between LMA v. LSTA is the relationship between the parties with respect to upstream transfer document review, representations and warranties, and governing law
- There are other differences in methodology regarding the calculation of Delayed Settlement Compensation for example, but the net result is the same (NB. under new LMA docs, LMA Par Delayed Settlement Compensation is different to LSTA Par Delayed Settlement Compensation)
- Changes (February 6th 2009) to the LSTA documentation have now brought the treatment of PIK Loans in line with the LMA, and also provided for "Buy in - Sell-out" option under the LSTA Par trade, which is a concept borrowed from the LMA

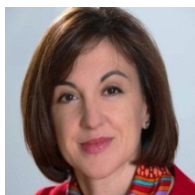
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- Louisa Watt is a partner in Cadwalader's Financial Restructuring Department and heads the firm's Debt and Claims Trading practice.
- Louisa has more than 10 years' experience representing investment funds, bank lenders, brokerage firms and other financial institutions in the acquisition and sale of syndicated bank loans, debt instruments, derivatives claims, bond claims and deposit related trades throughout Europe, the United States and Asia. She is recognised as a leading authority on secondary loan trading in distressed situations and has extensive experience in the creation of bespoke documentation for complex cross-border trading transactions
- Recent significant engagements include the representation of:
- Creditors of the insolvent Icelandic banks formerly known as Glitnir Banki hf., Landsbanki Íslands hf. and Kaupthing Bank hf.; Lehman Brothers International (Europe) In Administration and other Lehman entities; Arcapita Bank BSC; the Spanish real estate companies Alteco and Mag Import S.L. (Gecina); and MF Global U.K. (in Special Administration), MF Global Holdings Ltd. (in Chapter 11 proceedings), MF Global Australia Limited (in Liquidation) and MF Global Singapore Pte. Limited;
- Funds in the acquisition of Greek and German Schuldscheindarlehen and Genussscheine;
- Acquirers of par and distressed debt in Asia, Australia, Germany, France, Italy, Spain and Scandinavia, as well as the U.K. and U.S.;
- Goldman Sachs in the creation of its bespoke LMA trading documentation

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- Assia Damianova is Special Counsel in the Financial Services Group
 - Assia focuses on derivatives (including credit default swaps, total return swaps, equity swaps and commodity derivatives), structured transactions (including collateralised loan and debt obligations, CMBS, and securitisations of aircraft leases, trade receivables and mortgages), lending transactions and secondary debt trading, prime brokerage arrangements and hedge-fund/investment management issues
 - Assia advises broker-dealers and buy-side clients on issues relating to central clearing and EMIR, client asset protection and counterparty risk. Assia has worked on numerous issues relating to the restructuring of complex structures. She has also advised on distressed debt claims (including claims against LBIE and MF Global) and other exposures to distressed situations, through CDS and TRS positions

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- David represents investment funds, bank lenders, brokerage firms and other financial institutions in the acquisition and sale of syndicated bank loans, debt instruments, bank deposits, derivatives and insolvency claims in par/distressed scenarios throughout Europe, the U.S. and Asia. He has extensive experience in the creation of bespoke LMA documentation for complex cross-border transactions.
- His private practice and in-house experience includes structuring and negotiating non-performing loan (NPL) portfolio sales and related pass-through swap (PTSC) arrangements, syndicated loan/bond intercreditor documentation from a hedging perspective, bespoke collateral/security arrangements, portfolio auction mandates and brokerage agreements facing corporates, financial institutions and sovereigns in financing/refinancing/restructuring scenarios in jurisdictions including central and eastern Europe, Russia, the Middle East and Africa.
- Before joining Cadwalader David was a Vice President (CEEMEA Emerging Markets) at Citigroup, and prior to that an associate at Richards, Kibbe & Orbe LLP (a boutique distressed debt law firm). He has also previously spent a year in total on secondment in the trading floor structured credit teams at Lehman Brothers and JP Morgan.

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