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Preliminary documents (loan financing) Q&A: Ireland

by *Alma O'Sullivan and Sarah Francis, Maples and Calder LLP*

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This Q&A provides jurisdiction-specific commentary on *Practice note: Preliminary documents (finance): Cross-border* and forms part of *Cross-border loan financing*.

RESOURCE INFORMATION

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Country Q&A

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JURISDICTION
Ireland

Confidentiality agreement

1. How frequently do you find that confidentiality agreements are put in place in your jurisdiction in the context of proposed loan facilities?

Confidentiality agreements are commonly used in very large scale financings, especially where the financing is for a specific purpose, such as the acquisition of a company, business or asset by the borrower, or where the project is one of particular commercial sensitivity. Accordingly, in large acquisition finance transactions, a confidentiality agreement frequently features in the lead-up to the provision of finance.

2. In the context of a proposed loan facility, would contractual obligations on the lender set out in a confidentiality agreement, not to disclose confidential information supplied by the borrower, restricting the making of copies and the method of storage of the information, and requiring the return or destruction of papers and materials, be enforceable obligations?

These obligations would be enforceable in accordance with their terms. This would apply where either the lender or borrower is incorporated in Ireland and/or the agreement is governed by Irish law (subject to any overriding provisions applicable to the lender or borrower if not incorporated in Ireland).

3. Would contractual obligations set out in a confidentiality agreement which is governed by the law of your jurisdiction be additional to legally-imposed obligations of confidence (such as banker-customer confidentiality obligations), or would they replace them?

Under Irish case law it is an implied term that a bank must observe confidentiality of information which relates to a client and the client's affairs, where the bank obtained that information in the course of the banking relationship with the client. This is subject to exceptions, such as where disclosure is otherwise required by law. Although the matter has not been definitively ruled on in any Irish reported case, it is likely that this term would continue to be implied, provided that there was no express term which was inconsistent with it, or which qualified it.

No partnership or agency

4. What types of information (i) cannot, under the law of your jurisdiction, be protected by a confidentiality agreement or (ii) are usually excluded from the definition of confidential information contained in a confidentiality agreement governed by the law of your jurisdiction?

As a matter of public policy, it would not be possible for parties to agree to keep confidential any information which concerned the commission of a criminal offence or other serious unlawful act. The type of information usually excluded from the definition of confidential information includes information already in the public domain, or information which the recipient obtained otherwise than through its relationship with the disclosing party.

5. Is information which is held electronically treated differently from information on paper under the law of your jurisdiction?

Irish law does not prevent parties from agreeing that electronically held information is to be kept in the same way as physical documents.

6. Can findings, data or analysis derived from confidential information itself constitute confidential information under the law of your jurisdiction?

Yes, it is possible for the parties to agree this.

7. Is an undertaking by a lender not to disclose the fact that a confidentiality agreement has been entered into, or the fact that confidential information has been made available, enforceable?

In principle, it is possible for a lender to agree not to disclose the fact that a confidentiality agreement has been entered into, and that confidential information has been provided to it. However, in practical terms this could present difficulties, especially in the context of a regulatory investigation. A lender would be well advised to ensure that, if it were requested to agree to such a term, there was a sufficiently broad exception to enable it to comply with its regulatory obligations or to disclose these facts where disclosure is necessary in the context of litigation or arbitration to which it is party.

8. Is it necessary for "consideration" (that is, value, of some kind) to be given by a borrower in order for a confidentiality agreement to be binding on a lender under the law of your jurisdiction? If so, does agreement by the borrower that it will provide confidential information after a confidentiality agreement has been entered into constitute such consideration?

Consideration is necessary to enforce a contract executed under hand by a lender to keep confidential information about the borrower. Consideration must consist in some value provided by the promisee, or a detriment suffered by it. Although an Irish court would be receptive to finding consideration where the parties are in a commercial relationship with each other, it is unclear if the mere disclosure of confidential information of itself would constitute a detriment for this purpose. Acceptable alternatives would be for the borrower to provide nominal consideration to the lender, or for the document to be executed under the seal of the lender.

9. What are the remedies available in your jurisdiction in the case of a breach, or an anticipated breach, of obligations set out in a confidentiality agreement, or confidentiality obligations imposed by the general law of your jurisdiction?

If the borrower can prove that it has suffered loss as a result of the breach of contract by the lender, then it will recover damages to compensate for that loss.

In this context it can often be difficult for the disclosing party to show direct monetary loss as a result of a breach of confidence. Where the disclosing party can show that the recipient of the information will commit a breach of confidence, it may be entitled to an injunction to restrain disclosure of the information. To obtain such an injunction, the disclosing party must show that it has an arguable case, that damages would not be an adequate remedy, and that the balance of justice favours granting an injunction.

The disclosing party will have to give an undertaking to the court to make good any damage suffered by the recipient as a result of the injunction, should it ultimately fail in its claim. Subject to the same preconditions, the disclosing party could obtain a mandatory injunction, but in those circumstances it would have to show that it had a strong case.

10. Does the law of your jurisdiction impose a limit on the time during which the obligations set out in a confidentiality agreement may continue to apply?

Where the agreement is executed by the parties under hand, any claim for breach of contract must be brought within six years of the date of breach. Where the agreement is under seal, this period is extended to 12 years.

11. What would be the typical list of permitted disclosees in a confidentiality agreement governed by the law of your jurisdiction?

This is an issue for negotiation between the parties. It would be market practice to allow disclosure to legal advisors, other group companies and as required by law or regulatory intervention.

12. What would be the typical list of situations under the law of your jurisdiction in which a lender might be compelled to disclose confidential information supplied by a borrower (and which should therefore form express exceptions to an undertaking to keep them confidential)?

Express exceptions all focus on disclosure as required by law or regulatory compliance.

13. Would undertakings not to entice away officers or employees or not to solicit customers of the disclosing party be enforceable?

Such an undertaking would be enforceable if it was reasonable in the circumstances and was necessary to protect a legitimate business interest, such as goodwill or proprietary confidential information. However, any case would be considered on its own particular merits.

14. Could members of the borrower's group enforce a confidentiality agreement, without being parties to the agreement?

Under Irish law a group member would need to be a party to the agreement in order to enforce it. Therefore, if the agreement is governed by Irish law,

a group member which is not party to the agreement would be unable to enforce it. However, if the agreement is governed by the law of a jurisdiction which allowed non-parties to enforce the agreement, then an Irish incorporated party would be able to benefit from such a provision.

15. Could a borrower enforce a confidentiality agreement under the law of your jurisdiction against permitted disclosees, without those disclosees being parties to the agreement?

Under Irish law unless the permitted disclosee had acceded to and was a party to the confidentiality agreement, a party to the agreement would be unable to enforce the agreement against that person. Its remedies (if any) would be exercisable only against a party to the agreement.

16. Does a written confidentiality agreement which is governed by the law of your jurisdiction need to be signed by all the parties on one and the same document? If not, what procedure needs to be followed if signature of separate (but identical) documents is to be effective?

No, if the parties agree a counterparts clause within the agreement, then each signed counterpart is treated as a single agreement.

17. Under the law of your jurisdiction, can the law chosen as the governing law of a confidentiality agreement restrict the parties' choice of law in respect of the subsequent transaction documents?

The point has not been tested in Irish law. It is likely, however, that if a party acting in a commercial context with the benefit of legal advice chooses a legal system which itself binds that party in respect of future choices of law in respect of subsequent transaction documents, a court would hold that party to its agreement. Having said that, such an eventuality seems remote.

To date, reluctance to choose English law as the governing law of a confidentiality agreement, and English courts as the exclusive forum to litigate disputes arising under such an agreement, has not been encountered. Equally, a rise in the use of clauses referring such disputes to arbitration has not been encountered.

Term sheet

18. Would a fairly detailed term sheet normally be contractually binding? Is there anything specific (for example, by way of labelling, express qualification or content) which can prevent such a term sheet from being binding or, conversely, anything specific which can make it legally binding?

Whether a term sheet is considered to be legally binding will depend on its overall construction in context. If the term sheet is silent on the issue, the fact that it contains significant amounts of detail would support the proposition that it is intended to be legally binding. If the term sheet is sparse as to detail, this will suggest that it was not intended to be legally binding. In this regard context is all important.

If the parties intend the term sheet to be legally binding this should be expressly stated.

19. Where a term sheet is contractually binding under the law of your jurisdiction, how does your law deal with those points which would be covered in a detailed facility agreement and which do not appear in the term sheet?

The term sheet, whether or not it is legally binding, may inform the interpretation of the facility letter where the terms of the facility agreement are unclear. Where the term sheet is legally binding, to the extent that there are gaps in the facility agreement that are provided for in the term sheet, the term sheet will apply.

There is no general obligation under Irish law to negotiate terms in good faith.

20. Where there is a duty to negotiate terms in good faith under the law of your jurisdiction, what does that duty entail, and what are the possible sanctions for breach of that duty?

There is no such general duty under Irish law.

21. Can a term sheet be partially binding and partially non-binding under the law of your jurisdiction? If so, how should that be achieved?

Term sheets are, in general, not legally binding. However some contain certain legally binding clauses relating to, for example, costs and confidentiality. Any such clauses should be clearly stated to be legally binding.

22. Does the amount of detail contained in a term sheet affect the requirements (if any) imposed by the law of your jurisdiction on the parties, whether or not the term sheet is binding, as regards their conduct in negotiating the detailed finance documents?

Aside from the law relating to misrepresentation, Irish law does not impose general obligations on parties as regards their conduct in the course of negotiations.

23. Would a term sheet typically be discussed and adjusted between the lender and the borrower, and then finalised, or would it typically be accepted by the borrower once issued by the lender (subject to any points agreed separately between them)? Does the position vary according to the circumstances in each case?

This all depends on the bargaining power of the borrower. A borrower with significant bargaining power will be able to negotiate the content of the term sheet to a certain extent. Where this occurs, however, changes tend to be limited to ensuring that the terms reflect the commercial deal, and such changes as are required in terms of the mechanics of the transaction, for example interest payments, treatment of receivables in the hands of the borrower and so on.

24. Would a term sheet typically be signed by the parties, or not, and would such signing have any specific legal effect?

Practice can vary with regard to signature of a term sheet. If it is signed then this indicates clearly that the parties have accepted that the signed version is a definitive statement of the terms. Furthermore, signature is consistent with the proposition that the term sheet is intended to be legally binding, albeit that signature on its own is not dispositive of this issue. Equally, however, acceptance that the terms of a particular version of the document is definitive of the parties' intentions can be inferred from a course of negotiation (for example, by email) where it is clear that the parties consider that no further changes to the document are required.

25. Would you refer, in a term sheet drafted by you, to the conditions which need to be satisfied before a borrower can draw down a loan as "drawdown conditions" or "conditions precedent"?

The general practice in Ireland would be to refer to them as "conditions precedent". However, most finance lawyers would understand that the phrase "drawdown conditions" means the same thing.

Contributor details

Alma O'Sullivan, Lawyer
Maples and Calder LLP
T *+353 (0) 1 619 2055*
E *alma.osullivan@maples.com*
Areas of practice: Finance.

Sarah Francis, Lawyer
Maples and Calder LLP
T *+353 (0) 1 619 2753*
E *sarah.francis@maples.com*
Areas of practice: Finance