

61.NAMA Powers

Rights and Powers

NAMA takes over the rights and powers of the participating institution in relation to the transferred assets. It also has substantial additional powers, which are likely to be controversial. These can only apply to Irish situate assets. See our Separate Guide to Irish loan management and enforcement which deals with these issues in detail.

NAMA takes over all the rights of the participating institution under the facility and security documents. It may therefore take any one or more of the following actions:-

- ❖ personal action to enforce any debt;
- ❖ right to realise any security;
- ❖ right to call in a guarantee;
- ❖ right to participate in any resolution, work out restructuring, arrangement or re-organisation or scheme an insolvency as the institution itself may have had any rights conferred by any security documents

NAMA is entitled to any right of set-off which the institution has against the borrower. It is entitled to direct the participating institution to pay an amount equal to the benefit of the right of set-off to meet any actual or contingent liability of the borrower. The

participating institution may exercise the right of set-off only for the benefit of NAMA and at its direction. NAMA may direct an institution to exercise any right of set-off or combination of accounts and require it to account to NAMA for that purpose.

Issues Under the Facility

If any borrower or a party to a loan or security document alleges that any undertakings, representations or other obligations were made in his favour by the institution or someone on its behalf, which might affect the security, that were not disclosed to NAMA and are not disclosed in the written records of the institution with evidence of the consideration provided in return, then such undertaking is not enforceable against NAMA. It can only be enforced against the institution. There is a right of damages only against the institution by reason of any breach of such representations or side agreements.

Acquisition by NAMA does not affect the terms and conditions of the facility and the security. Where a facility has been acquired by NAMA it is to continue to be subject to the relevant institution's reference interest rate for facilities of that type or at NAMA's discretion another reference rate specified.

If for any reason, compliance with the terms or conditions of a facility is not reasonably practicable, NAMA may by notice in writing change the terms and conditions, so that the new term and condition is as nearly as possible equivalent to the original term or condition.

NAMA is not to have any of the liabilities of the participating institutions by reason of any breach of contract, representation or other terms which it may have committed prior to the transfer. If an institution becomes aware of any dealing, potential dealing, event or circumstances, in relation to the asset which would adversely affect the asset or NAMA's rights, the institution must notify NAMA of the dealing, event or circumstance without delay.

No legal proceedings are to be taken against NAMA in relation to breach of contract, misrepresentation or wrong committed by the institution. The claimant concerned may be able to enforce such right against the institution itself.

NAMA is not required to register in any registers to perfect its security, but it may do so. This would include, for example, obligations to register in the Companies Office or in the Land Registry or Registry of Deeds and other registers. This provision

could not take effect in relation to English assets.

Where NAMA has acquired an asset it is entitled to give directions in relation to it. For example, in the case of a transferred foreign asset, it may give directions to require the enforcement of any security or guarantee. These directions are binding on the institution and its subsidiaries in another State. The Irish situate holding company must ensure its subsidiaries comply notwithstanding that the subsidiary itself is not subject to Irish law being situated outside the jurisdiction.

NAMA Dealing powers

NAMA has wide powers in relation to dealing with assets. Some of these powers could not have effect outside the jurisdiction. However the NAMA powers which are consistent with English law, such as its powers to do what any other person or company could do, will be effective in England and Wales.

Services by Banks for NAMA

Where NAMA has acquired or intends to acquire an asset, the participating institution is to continue to perform the services of management, administration and enforcement until such time as NAMA directs otherwise. NAMA is entitled to direct

an institution to perform services in relation to management, administration and enforcement in connection with the loan.

An institution may be required to enter an arrangement or agreement to perform service with NAMA. NAMA's representatives are to have full access to its books. This arrangement may be revoked at any time.

The services may be for NAMA or another entity. An institution may, but is not obliged, to notify any borrower, guarantor etc. in relation to a direction by which it administers the facility on behalf of NAMA. All receivables and monies recovered are held on trust for NAMA.

Where NAMA has put in place an arrangement for the servicing of the facility, the borrower, guarantor and other relevant persons are obliged to deal with the service provider. The institution is obliged to do all such things as NAMA may direct or require to facilitate the assumption of the services.

NAMA may direct an institution to deal with assets which it has not acquired in a particular way. NAMA may agree, with the consent of the Minister for Finance, the arrangements in relation to servicing or bank assets it acquires. This may include an adjustment to the total acquisition value, performance fees and profits sharing, each

on terms approved by the Department of Finance.

The general banker's duties of confidentiality are modified for the purpose of the acquisition of lands and acts taken by institutions in relation to NAMA. Disclosures to NAMA and disclosures of books, documents and records is not a breach of confidentiality. Institution's advisers can be obliged to provide information to NAMA. The same applies in respect of Data Protection Act.

Lavelle Coleman is an Irish firm of solicitors with an England and Wales legal practice. Our England and Wales qualified and regulated solicitors provide a wide range of legal services from our Dublin offices. We have written legal guides in relation to a broad range of England and Wales legal matters as they relate to Irish based individuals and businesses. These guides are available on our website at <http://www.lavellecoleman.ie/England-Wales-Law.aspx>

This is an extract from our "Legal Guide to the Management and Enforcement of Security in England and Wales for Irish Lenders (2009). The Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. It should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances. While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in it. The reader should rely only on specific legal or taxation advice. This extract is based on the law as of 1st August 2009.

© Paul McMahon, Lavelle Coleman 2009

CONTACTS

Paul McMahon

pmcmahon@lavellecoleman.ie

Phone: (353) 1 6445800

Fax: (353) 1 6614581

Lavelle Coleman
Solicitors
20 On Hatch
Lower Hatch Street
Dublin 2
Ireland

www.lavellecoleman.ie