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The Development of Regulation and its Impact on Syndicated Lending in Africa

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Financial Services

We take a look at the development of regulation and its impact on syndicated lending in Africa, with particular reference to the Loan Market Association's (**LMA's**) suite of Africa and developing markets loan documentation.

Regulation and its Impact on Syndicated Lending in Africa

There has been a proliferation of regulation over the last two decades affecting finance transactions in Africa and across the globe. Some of this regulation is domestic, applying to specific African countries or regions, others are extra-territorial and originate from jurisdictions such as the United States of America (**U.S.**), the United Kingdom (**UK**) and the European Union (**EU**).

Examples include:

- Anti-money Laundering and Countering the Financing of Terrorism
- Sanctions / Bribery (e.g. OFAC)
- EU Bail-in Legislation
- Dodd-Frank Act
- Competition / Anti-trust Law
- Insider Dealing / Market Abuse
- FATCA / Withholding Tax Regimes
- LIBOR / IBOR replacement
- Exchange Control Restrictions
- Limits on Interest and Fees
- Basel II and III
- Business Rescue
- Environment / Social Sustainability
- ESG Reporting Requirements

The LMA has published a number of loan agreements and other finance documents for use by its members in relation to syndicated lending in Africa and other developing markets, including:

(i) term and revolving facilities agreements for use in developing market jurisdictions (**Developing Markets Loan Agreements**);

(ii) term and revolving facilities agreements for use in South Africa (**SA Loan Agreements**);

(iii) term facility agreement for use in Nigeria, East Africa and Zambia (**NEAZ Loan Agreement**);

(iv) term facility agreement for use in Zimbabwe (**Zimbabwe Loan Agreement**).

We examine these regulatory developments in the context of the abovementioned documents.

ITEM 1. Anti-money Laundering and Terrorist Financing

Banks and financial institutions are under pressure to comply with ever evolving regulation governing money laundering and terrorist financing.

In this context, the Financial Action Task Force (**FATF**) was set up by the G7 31 years ago to produce international standards for financial systems on anti-money laundering (**AML**), and more recently, countering the financing of terrorism (**CFT**). These standards include recommendations for financial institutions to implement programmes against money laundering and terrorist financing on a global and group-wide basis, as well as the development of policies and procedures for sharing information on a cross-border basis.

The FATF standards are of global significance and regulators from around the world have responded with the expansion of regulatory and supervisory regimes and greater cross-border supervisory co-operation.

This includes the EU's and the UK's AML and CFT regulatory frameworks, adopted through the Fourth and Fifth Money Laundering Directives (**MLD4** and **MLD5**).[1]

South Africa's AML and CFT compliance framework is built around delivering domestic compliance with global standards for AML and CFT regulations. The Financial Intelligence Centre Act, 2001 (**FICA**) is the primary legislation governing South Africa's AML and CFT

[1] MLD5 is the most recent EU Directive to be transposed into UK law by amendment to the Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payor) Regulations 2017. The Sanctions and Anti-Money Laundering Act 2018 (Commencement No 2) Regulations 2020 (SI 2020/1535) were made on 14 December 2020. These regulations bring into force a number of provisions of the Sanctions and Anti-Money Laundering Act 2018, which is the enabling legislation for the UK to be able to impose economic and other sanctions and money laundering regulations following on from the UK's departure from the EU.

framework.[2] The Financial Intelligence Centre (**Centre**) is positioned as the supervisory body responsible for overseeing AML and CFT compliance.[3]

Other relevant regulation in Africa includes the Anti-Corruption and Economic Crimes Act, Chapter 65 of the Laws of Kenya, the Money Laundering (Prohibition) Act No. 11 of 2011 (as amended), Economic and Financial Crimes Commission (Establishment) Act 2004, CAP E1, of the Laws of the Federation of Nigeria 2004; the Corrupt Practices and Other Related Offences Act 2003, CAP C31, of the Laws of the Federation of Nigeria 2004, the Prevention and Combating of Corruption Act, chapter 329 of the Laws of Tanzania, the Anti-corruption Act 2009 of the Republic of Uganda, The Bank of Zambia Anti-Money Laundering Directives 2004 and the Prohibition and Prevention of Money Laundering Act 2001 and the Anti-Corruption Commission Act, No. 3 of 2012 of the Republic of Zambia and the Anti-Corruption Commission Act [Chapter 9:22], Prevention of Corruption Act [9:16], the Bank Use Promotion Act [Chapter 24:24] and the Money Laundering and Proceeds of Crime Act [Chapter 9:24] of the Republic of Zimbabwe.

Recommendation 18 of the FATF 2012 standards is of particular interest in the context of domestic law, as it requires foreign branches and majority-owned subsidiaries of financial institutions to apply AML and CFT measures consistent with their home country requirements, directly impacting international or regional banking groups operating across Africa, over and above any domestic law to which they may be subject.

In the U.S., the key AML/CFT legislative framework is set forth in the Bank Secrecy Act, USA PATRIOT ACT, and the recently enacted Anti-Money Laundering Act of 2020. Another key aspect of financial crimes compliance under U.S. law is economic sanctions, where the principal regulator is the Department of Treasury's Office of Foreign Assets Control (**OFAC**). U.S. sanctions are of particular significance to Africa given the flow of USD across the continent and the practice of electronic transfers of USD clearing through correspondent accounts in the U.S., which may give rise to U.S. jurisdiction under relevant sanctions laws and regulations, as well as other financial crime legislation.

The consequence for breach of AML and CFT laws and regulations can be extremely onerous and financial institutions need to carefully manage the relationships they have with borrowers / obligors and their investments in Africa. Part of this is dealt with in terms of good due diligence and "know your customer" procedures as well as appropriate monitoring of clients and their business; part is dealt with by good documentation.

In furtherance of these objectives, the LMA's Developing Markets Loan Agreements[4] include recommended language to assist financial institutions in ensuring their clients meet certain standards in this regard.

This includes, among other things, definitions for sanctions as restrictive measures enacted, administered, implemented and/or enforced from time to time by any of the United Nations, the

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[2] FICA complements the Prevention of Organized Crime Act, 1998; the Protection of Constitutional Democracy Against Terrorism Related Activities Act, 2004; and the Prevention and Combating of Corrupt Activities Act.

[3] FICA gives the Centre authority over banks, financial institutions, estate agents, brokers and other i intermediaries in the financial system operating in South Africa. Under that authority, the Centre monitors South Africa's financial markets and institutions, issuing registrations for participants in the industry and conducting periodic audits to ensure ongoing compliance with FICA.

[4] The NEAZ Loan Agreement, the Zimbabwe Loan Agreement and the South African Loan Agreements are all in the process of being updated by the LMA and will follow the Developing Markets Loan Agreements in this regard.

EU, the government of the U.S. and the government of the UK; references to various anti-corruption laws (including the UK Bribery Act 2010 and the U.S. Foreign Corrupt Practices Act of 1977) as well as reference to various regulatory bodies or sanctioning bodies such as Her Majesty's Treasury of the United Kingdom (**HMT**) and **OFAC**.

These agreements also define "Sanctionable Activity" (being a U.S. sanctions concept designed to cover activity by non-U.S. persons which would not technically breach sanctions but which may lead to them being designated as targets) as well as "Sanctioned Territories" and "Sanctions Lists"; Sanctions Lists include lists of designated sanctions targets maintained by sanctions authorities from time to time, including:

- in the case of OFAC:
  - the Specially Designated Nationals and Blocked Persons List; and
  - the Consolidated Sanctions List;[5]
- in the case of the United States Department of State or the United States Department of Commerce:
  - the Denied Persons List;
  - the List of Statutorily Debarred Parties;
  - the Entity List; and
  - the Terrorist Exclusion List;
- in the case of HMT:
  - the Consolidated List of Financial Sanctions Targets; and
  - the List of Persons Subject to Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine; and
- in the case of the EU, the Consolidated List of Persons, Groups and Entities Subject to EU Financial Sanctions.

Having defined the main regulations and sanctioning bodies applicable to syndicated debt in developing markets, the recommended form of the LMA's Developing Markets Loan Agreements, go on to include specific representations and undertakings to help address AML concerns such as:

[5] OFAC issued a statement in December 2016 that all of its non-SDN sanctions lists will be contained in a consolidated set of data files known as "the Consolidated Sanctions List" going forward and that, if it creates a new non-SDN style list in the future, it will add the new data associated with that list to the Consolidated Sanctions List, if appropriate.

A) Anti-Corruption Laws

A representation that:

a. relevant entities have conducted their businesses in compliance with anti-corruption laws and have instituted and maintain policies and procedures designed to promote and achieve compliance with such laws; and

b. relevant entities have not made or received, or directed or authorised any other person to make or receive, any offer, payment or promise to pay, of any money, gift or other thing of value, directly or indirectly, to or for the use or benefit of any person, where this violates or would violate, or creates or would create liability for it or any other person under, any anti-corruption laws.

c. no relevant entities are being investigated by any agency, or party to any proceedings, in each case in relation to any anti-corruption laws.

B) Public Procurement Rules

A representation that all public procurement rules which are applicable to its entry into and the exercise of its rights and performance of its obligations under the relevant finance documents have been complied with or have been irrevocably and unconditionally waived by the relevant authorities in its jurisdiction of incorporation.

C) Information Undertakings

Undertakings by the borrower to supply the finance parties with (a) details of any actual or potential violation by, or creation of liability for, any member of the borrower group or any agent, director, employee or officer of any member of the borrower group (or any counterparty of any such person in relation to any transaction contemplated by a finance document) of or in relation to any anti-corruption laws, or of any investigation or proceedings thereto; (b) copies of correspondence delivered to, or received from, any regulatory authorities in relation to any the violation of anti-corruption laws; and (c) and ongoing "know your customer" information.

D) General Undertakings

The documentation also includes general undertakings requiring the borrower and other members of the borrower group to comply with laws and regulations of general application and, more particularly, to ensure that they do not directly or indirectly use the proceeds of any loans for any purpose which would breach any anti-corruption laws.

The recommended form of agreement also requires obligors to:

a. conduct their businesses in compliance with anti-corruption laws;

b. maintain policies and procedures designed to promote and achieve compliance with such laws; and

c. take all reasonable and prudent steps to ensure that each of its agents, directors, employees and officers comply with such laws.

E) Disclosure Rights

Rights of disclosure of confidential information, enabling finance parties to disclose information to any court of competent jurisdiction or any governmental, banking, taxation or other regulatory authority or similar body, the rules of any relevant stock exchange or pursuant to any applicable law or regulation without breaching any banking related confidentiality requirements. This would include, by way of example, disclosures to bodies such as HMT, OFAC and FSCA.

The Approach Taken by Banks and Other Financial Institutions

It should be remembered that the recommended form of LMA documentation is non-binding and individual parties to the documents are always free to depart from their terms. Many banks and financial institutions therefore have their own preferred language to address AML and CFT concerns or apply other domestic or international standards, amending the standard form of LMA language accordingly. [6]

ITEM 2. EU Bail-in Legislation

The bank recovery and resolution directive (**BRRD**) was adopted in the UK and EU in response to the 2007-2009 global financial crisis to provide authorities with:

a. comprehensive and effective arrangements to deal with failing banks at national level; and

b. co-operation arrangements to tackle cross-border banking failures.

In short, EU regulators have been given the right, among other things, to cancel certain liabilities owed by a European Economic Area (**EEA**) bank or other financial institution to another person and to convert those liabilities into equity in that bank or financial institution should the relevant bank or financial institution become subject to financial distress. This legislation was designed specifically to reduce the pressure on European Governments and tax-payers to bail out financial institutions, again following on from the global financial crisis.

The bail-in obligations currently arise by way of operation of law in the EEA and, accordingly, it is not technically necessary to include specific bail-in language to reflect this in any EU law governed facility agreement. For non-EU law governed facility agreements, Article 55 of the BRRD requires financial institutions subject to BRRD to include a mandatory term in those agreements, under which the relevant parties agree to be subject to EU bail-in legislation (a "**Contractual Recognition Provision**").

From a pan-African perspective, EU bail-in legislation becomes relevant in the context of syndicated loan agreements involving EEA financial institutions (or could involve EEA financial institutions) if that financing is not governed by EU law. If this is this case, the relevant financial institutions should ensure that Contractual Recognition Provisions are properly included in local

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[6] An example of such a standard may be the International Standards Organisation (ISO) 37001, which requires the relevant entity to establish an anti-bribery management system, with a view to improving its ability to prevent, identify and respond to bribery and to comply with certain anti-bribery laws issued by the U.S. Department of Justice, the Securities and Exchange Commission (SEC) and the Ministry of Justice in the UK.

law facility documentation together with other contractual rights and obligations protecting the various parties should such a bail-in scenario occur.

One consideration here is Brexit, where it is important to note that following on from the end of the Brexit transition period (see Item 11 (*Brexit*) below), English law has become the law of a third country insofar as the EEA is concerned and English law governed loan agreements will therefore be required to include a Contractual Recognition Provision if any EEA financial institutions subject to BRRD are participating (or could be participating) in the relevant financing.

The BRRD was 'on-shored' (i.e. made domestic UK law pursuant to a statutory instrument—the BRRD SI[7] with amendments, meaning that:

a. UK financial institutions will also need to consider the inclusion of bail-in clauses into financial contracts governed by an EEA law. This should not be something entirely new to UK financial institutions as pursuant to rules already set out in the Financial Conduct Authority Handbook and the Prudential Regulatory Authority Rulebook UK financial institutions are already required to include bail-in clauses in relevant contracts governed by a non-EEA law. The BRRD SI will amend the Handbook and Rulebook to also include those contracts governed by EEA law; and

b. Financial contracts governed by English law with counterparties in countries outside the UK (including the EEA and Africa) will include BRRD SI bail-in provisions by operation of law (similar to the English law position prior to Brexit).

In this context, the LMA has helpfully produced a BRRD note which is available to its members that includes a bail-in clause for inclusion in its documentation, as well as narrative as to when it is relevant. The LMA has also published revisions to its secondary debt trading documents on 21 December 2020 to incorporate bail-in clauses.

These documents are available to members of the LMA on the "pending before live date" page in the Documents & Guidelines section of the LMA website.

ITEM 3. Dodd-Frank Act

Like the EU Bail-in legislation, the Dodd Frank Wall Street Reform and Consumer Protection Act 2010 (the **Dodd-Frank Act**) was passed in response to the 2007-2009 global financial crisis.

The Dodd-Frank Act had a major impact in the U.S. and was designed, among other things, to (i) address lapses in financial sector regulation that contributed to the economic crisis in the U.S. and (ii) enhance the monitoring and financial stability of systemically important financial institutions that were deemed, as part of the U.S. economy, too big to fail. The Dodd-Frank Act also gave authorities the power to break up certain financial institutions that were considered sufficiently large to pose systemic risk to the financial system and to require those financial institutions to increase their capital reserves.

[7] Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2018.

Although the impact of the Dodd-Frank Act on the syndicated lending market in Africa is limited, it does purport to have extra-territorial effect and regulate entities in the following circumstances:

A) Swaps with U.S. Counterparties outside of the U.S.

If a bank or other financial institution enters into swap transactions with a U.S. person,[8] there may be requirements (subject to a *de minimus* threshold) for that bank or financial institution to be registered as swap execution facilities (**SEFs**) in the U.S. and for that bank or other financial institution to be subject to compliance with prescribed minimum capital requirements and/or initial and variation margin requirements.

In this context, guidelines have been issued by The Commodities Futures Trading Commission (**CFTC**) stating that any non-security-based swap entered into with a U.S. person is subject to the "Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act" rules unless a substituted compliance determination permits compliance with the home jurisdiction of the non-U.S. counterparty to the swap. For these purposes, a U.S. person includes any branch of a U.S. bank located in any country outside the U.S., including Africa.[9]

Accordingly, banks and financial institutions participating in swaps in Africa need to ensure they are in compliance with the Act and should take advice from U.S. qualified lawyers as to the need for such registration.

B) Human Rights

In addition to the effort to prevent another financial crisis, another Section of the Dodd-Frank Act called "Section 1504" requires certain extractive companies listed on a U.S. stock exchange to examine their supply chains for tin, tantalum, tungsten and gold mined out of the Democratic Republic of the Congo ("**conflict minerals**")[10] and to provide details of payments arising from commercial development of extractive sectors made to the U.S. and foreign governments and to declare annually that all minerals in their supply chain are conflict free and were not mined, sold, taxed or otherwise used for the benefit of armed groups in the DRC or a neighboring country.

Section 1504 was implemented by the U.S. Securities and Exchange Commission (**SEC**) in 2012 to support transparency, security, and the rule of law in the mining sector and places statutory disclosure requirements on "resource extraction issuers" in their annual reports, including the payment of any taxes, royalties, fees, bonuses, etc. arising from the commercial development of extractive sectors.

The Dodd-Frank Act is credited with the initial development to improve extractive sector governance and pressure is now being placed on countries around the globe to harmonize domestic legislation and guidelines on the disclosure of extractive sector payments with Dodd-Frank 1504 and to honour international treaty commitments on extractive sector transparency, human rights and anti-corruption.

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[8] One difficulty with the Dodd-Frank Act is that the definition of U.S. person is not limited to a person that is resident or domiciled in the U.S. Guideline have been issued by The Commodities Futures Trading Commission (CFTC) suggesting that a U.S. person for these purposes may be a foreign business on whose behalf a U.S. owner has issued a guarantee or other obligation in relation to a swap.

[9] Nearly all G20 jurisdictions have adopted similar swap regulations to the U.S..

[10] https://www.bsr.org/reports/BSR_Conflict_Minerals_and_the_DRC.pdf.

In this regard the Organization for Economic Cooperation and Development (OECD) has since developed international standards based on the United Nations Guiding Principles of Business and Human Rights and introduced a practical five-step framework for all companies for this kind of supply chain due diligence and, in June 2017, the EU adopted regulation requiring companies importing conflict minerals into the EU to carry out supply chain checks, regardless of where in the world they source from. The Democratic Republic of the Congo and Rwanda have passed similar laws.

The LMA language covers the basic requirements for compliance by borrowers and other obligors with applicable laws (which would include laws relating to conflict minerals). For more sophisticated requirements, the international development finance institutions such as the IFC and AfDB have led the way in developing markets and it is typical to see their documentation include additional requirements in their documentation, setting standards of conduct concerning environmental, social, labor, health and safety and security risks.

ITEM 4. Competition / Anti-Trust Law

The last two decades have seen the enactment of laws and regulations intended to address anti-trust or anti-competitive behaviour in the financial markets and other markets.

Breaches of anti-trust or competition law can give rise to significant fines and, in some circumstances, can lead to the imprisonment of directors or other officers of the relevant bank or financial institution concerned.

Syndicated lenders are not exempt from anti-trust or competition law and are treated in the same way as other businesses. Indeed, syndicated lending involves a number of potential “touch points” in terms of anti-trust or anti-competition law and regulations and lenders need to be extremely careful in this context.

The relevant law in the EU and the UK is contained in Article 101(1) of the Treaty on the Functioning of the EU (enacted, by way of example, into UK law under Chapter I Prohibition under the UK Competition Act 1998 as amended by the Enterprise and Regulatory Reform Act 2013 (the **1998 Act**)).

The 1998 Act introduces restrictions on anti-competitive agreements and concerted practices between two or more undertakings which have as their object or effect “the prevention, restriction or distortion of competition”.

Prohibitions include arrangements to:

- fix prices (including discounts, margins, credit terms, etc.)
- share markets or customers
- fix or limit capacity
- rig bids (i.e. agreeing to manipulate a competitive tender process)
- exchange of non-public competitively sensitive information.

Breach of these "hard core" prohibitions can attract hefty fines of up to 10% of group worldwide turnover.

Similar legislation is enacted in many other countries including the Republic of South Africa through the Competition Act 89 of 1998 and through regional treaties such as The Common Market for Eastern and Southern Africa "COMESA".

The LMA provides some advice to its members in this regard and recommends that any steps and procedures introduced to mitigate against the risk of a breach should include, at the very least, caution in the following areas:

- general market soundings;
- conduct during the arranger bidding phase to ensure there is no inappropriate contact between competing origination desks that may raise the possibility of the unacceptable exchange of competitively sensitive information, price fixing or market manipulation etc.;
- dealing with the receipt of any unsolicited competitively sensitive information;
- interaction between members of a syndicate related to the establishment or flexing of terms;
- conduct between banks in the context of refinancing or distressed arrangements;
- whenever practicable (i) seeking, and keeping a record of, the prior consent of the borrower to any proposed contact with competitors whether in contemplation or following the appointment of the lead arranger / underwriter and formation of the banking group and (ii) being careful to act only within the terms of the consent to help mitigate against the risk of UK criminal prosecution should any contact be questioned.

The LMA's Competition Law Compliance Policy also includes other recommendations and members can access the following resources:

(i) LMA Notice on the Application of Competition Law to Syndicated Loan Arrangements 30 May 2014; and

(ii) Loan Market Association Competition Law Compliance Policy for further information.

For completeness, it should again be remembered that the use of standard LMA documentation is entirely voluntary. The rationale for the preparation of the LMA standard documentation is so that it may be used as a starting point for negotiation. The LMA standard documentation is non-binding and individual parties to the documents are always free to depart from their terms.

ITEM 5. Insider Dealing / Market Abuse Regime

Another area where banks and financial institutions need to be careful is in relation to syndicated lending arrangements that involving borrowers or obligors that are (i) companies listed on a public stock exchange or (ii) are companies that issue other publically listed securities. In this context, the potential disclosure of price-sensitive information must be carefully managed.

The confidentiality provisions within the Developing Market's Loan Agreements include a number of helpful clauses in this regard which are designed to mitigate the risk of such disclosure, including:

- a representation by the relevant borrower or obligors that information permitted to be disclosed to numbering service providers ("**NSPs**") is, nor will at any time be, unpublished price-sensitive information;
- an acknowledgement by each finance party that some or all of the information disclosed to them under the relevant documentation is or may be price-sensitive information;
- an acknowledgement that the use of such information may be regulated or prohibited by applicable legislation, including securities law relating to insider-dealing and market abuse; and
- an undertaking not to use any confidential information obtained in connection with a Developing Market's Loan Agreement for any unlawful purpose.

The intention here is to limit the risk of that information being unpublished price-sensitive or inside-information (meaning, if it were known to the public it would be likely to have an effect on the price of securities issued by the relevant borrower or obligor that are publicly traded).

If unpublished price-sensitive or inside information were to be disclosed to a person (with or without the consent of the relevant borrower or other obligor) by a lender in circumstances where that information will be disclosed only to that person (and not to the public), that lender and the individuals concerned could be guilty of an offence under applicable insider dealing/market abuse regimes. This can again give rise to significant fines and, in many jurisdictions, lead to imprisonment. Some further guidance is provided by the LMA on this in the suite of LMA documents and supporting user guides.

ITEM 6. Exchange Control

Currency control or exchange control law and regulation has been enacted in a number of jurisdictions regionally and impacts directly on cross-border loan transactions.

Examples include:

Nigeria

In Nigeria, if a loan constitutes external indebtedness and/or is in a foreign currency, certificates of capital importation may be required. Parties intending to access the official foreign exchange market, e.g. for the purpose of remitting interest, fees or capital, must obtain a Certificate of Capital Importation (**CCI**) as evidence that their initial loan or investment was brought into Nigeria.

CCIs are issued by authorized dealers (that is, banks licensed by the Central Bank of Nigeria to deal in foreign exchange) after the foreign investment has been brought into Nigeria and converted into Naira.

South Africa

South Africa's exchange control regime is governed by the Exchange Control Regulations 1961, together with the Currency and Exchange Manual for Authorised Dealers.

South Africa's exchange control regime regulates any transaction in foreign exchange that is authorised by the Financial Surveillance Department (**FinSurv**) of the SARB. Where a loan

constitutes external indebtedness and/or is in a foreign currency, exchange control approval may be required.

Parties intending to access the official foreign exchange market, e.g. for the purpose of remitting interest, fees or capital, must obtain approval from SARB. Exchange control authorisations are issued by authorized dealers (that is, banks authorized by SARB to deal in foreign exchange).

Tanzania

Restrictions apply in Tanzania where any payment is made in Tanzanian Shillings to, or for the credit of, a person resident outside Tanzania. Restrictions also apply in relation to the repayment of principal and interest or premium on foreign loans. Foreign loans, overdrafts, financial facilities or guarantees by residents, individuals or companies, the term of which exceeds 365 days, must also be registered with the Bank of Tanzania (**BoT**). The rules are set out in the Foreign Exchange Act of the Republic of Tanzania.

Zimbabwe

The Reserve Bank of Zimbabwe (**RBZ**) has established various controls on current and capital account transactions (including a foreign exchange priority list to guide banks in the distribution of foreign currency concerning competing demands for foreign currency in light of Zimbabwe's liquidity issues). The Exchange Control Act of Zimbabwe confers powers, and imposes duties and restrictions, in relation to currency, securities, exchange transactions, payments and debts. Parties intending to access the official foreign exchange market, e.g. for the purpose of remitting interest, fees or capital, must obtain approval from the RBZ. Like South Africa, exchange control approvals are issued by authorized dealers (that is, banks authorized by RBZ to deal in foreign exchange) or through the RBZ itself.

Kenya

The Central Bank of Kenya (**CBK**) regulates currency flows through the requirement that any transaction to or from a foreign recipient or within the republic of Kenya must be made through an authorised bank in the Republic of Kenya, save for those otherwise approved by the CBK. Authorised banks are required to report all foreign exchange transactions over USD 10,000 to the CBK, and Authorised Dealers (as defined in the Proceeds of Crime and Anti-Money Laundering Act) must report the same to the Financial Reporting Centre (FRC). There have otherwise been no currency controls in Kenya since 1995, when the Exchange Control Act of the Republic of Kenya was repealed.

Treatment in the LMA's Africa and Developing Markets Suite of Documents

The need for exchange control authorisations is dealt with generally in the Developing Markets Loan Agreements, the NEAZ Loan Agreement, the Zimbabwe Loan Agreement and the South African Loan Agreements by way of a blanket need for all authorizations to be in place as a condition precedent to the relevant facilities being made available for disbursement combined with a general undertaking to maintain applicable authorisations throughout the term of the relevant facility.

The reason there is not specific reference to the exchange control related approvals mentioned above is that the NEAZ Loan Agreement, the Zimbabwe Loan Agreement and the South African Loan Agreements are intended for domestic syndicated local currency transactions rather than cross-border or foreign currency transactions and, as such, these approvals would not ordinarily

be relevant in this context. If there is a cross-border or foreign currency element to a transaction, the relevant approvals should be included in the loan documentation as applicable.

In addition to the need for any foreign exchange approvals to be listed as a condition precedent in a loan agreement, the LMA documentation also includes an optional "Convertibility/Transferability" provision which provides that if there is any foreign exchange law is amended, enacted or introduced or is reasonably likely to be amended, enacted or introduced in the relevant jurisdiction that (in the opinion of the Majority Lenders):

a. has or is reasonably likely to have the effect of prohibiting, or restricting or delaying in any material respect any payment that any Obligor is required to make pursuant to the terms of any of the Finance Documents; or

b. is materially prejudicial to the interests of the Finance Parties under or in connection with any of the Finance Documents,

that event will be treated as an Event of Default under the relevant documentation.

This provision is clearly helpful in circumstances where transferability or convertibility could be a risk in terms of a particular transaction.

ITEM 7. Cap on Interest Rates and Fees

In some jurisdictions, regulation has been passed to ensure that the rate of interest and/or related fees under a loan agreement do not exceed a maximum allowable limit prescribed by law. This is an issue, for example, in the Republic of Kenya, the Republic of Zambia and, in the context of cross-border deals, the Republic of South Africa.

In Zambia, licenced banks have to ensure that the actual lending rate is determined using the parameters prescribed by the Bank of Zambia. Users of the LMA's NEAZ Loan Agreement in Zambia must therefore be careful to note the formula prescribed by the Bank of Zambia (currently being (AxB) + C, where A is the factor, B is the margin and C is the policy rate).[11] The LMA provides some useful guidance on this in the NEAZ Loan Agreement.

In South Africa, approvals from SARB's financial surveillance unit (**FinSurv**) may be required if there is a cross-border aspect to a financing. In these circumstances FinSurv may actively reject an exchange control approval for a financing transaction in circumstances where they deem a rate of interest or fees to be too high.

In circumstances where there is a general risk that local law limits may be breached in any jurisdiction, but this is not clear at the outset of a transaction, the LMA recommend the insertion of the following clause: "*Notwithstanding any other provisions in this Agreement, the rate of interest payable to the Lenders by the Borrower under this Agreement shall not at any time exceed the maximum rate of interest prescribed by law*".

[11] Users of the NEAZ Loan Agreement precedent must decide, in consultation with a duly qualified Zambian lawyer, whether it is appropriate to include a liquidity premium into the formula.

The LMA also note that if language is to be inserted into the agreement to this effect, lenders should carefully consider whether a specific mandatory prepayment event should be included in the relevant loan agreement to deal with this specific situation as it will no longer fall under the usual "Illegality" mandatory prepayment clause.

In most other circumstances, where there is a change in law restricting the amount of interest that may be charged, the mandatory prepayment provisions and Events of Default provisions in the LMA suite of Africa and Developing Markets documentation will be triggered and lenders will be entitled to terminate their commitments.

ITEM 8. Business Rescue

A number of countries around the world have adopted, or are in the process of adopting, business rescue regimes based on the Chapter 11 regime of the United States Bankruptcy Code (Title 11 of the United States Code) and the Administration regime governed by the Insolvency Act 1986, as amended by the Enterprise Act 2002 of the UK.

The Republic of South Africa, by way of example, introduced a business rescue regime in 2008 through Chapter 6 of its Companies Act 2008.

To address this development, the South African Loan Agreements were updated in 2008 to provide for business rescue type events of default, representations and undertakings. If lenders are working on a loan with a borrower or guarantor incorporated in South Africa, and are using the LMA's Developing Markets Document, they can include the standard insolvency / business rescue provisions from the South African law suite of documents to address this.

Aside from this, lenders also need to be aware that business rescue laws and regulations may impact on the ability of lenders to enforce all their rights under their suite of security or other finance documents in circumstances where their borrower or other obligor is financially distressed or insolvent. Advice should always be taken from legal counsel in the relevant jurisdiction on the impact of similar laws and regulations in the country concerned.

ITEM 9. FATCA and Other Withholding Taxes

FATCA

A number of countries have introduced withholding tax regimes that impact directly on syndicated loan transactions. The most significant of these regimes is the Foreign Account Tax Compliance Act (**FATCA**) which was passed into U.S. Law on 18 March 2010 as part of the U.S. Hiring Incentives to Restore Employment (HIRE) Act. This Act was passed into law to combat U.S. tax evasion and has far reaching extra-jurisdictional consequences.

In short, if a foreign bank or other financial institution is subject to the requirements of the FATCA legislation, then certain documentation must have been put in place to conform with the FATCA requirements and to ensure that the relevant bank or financial institution is not subject to FATCA withholding tax obligations under U.S. law.

These regulations require certain foreign financial institutions (**FFIs**) to register and enter into an agreement (directly, or collectively through their Government by way of an intergovernmental agreement (**IGA**)) with the U.S. Inland Revenue Service (**IRS**) requiring them to:

- identify U.S. accounts
- comply with verification and due diligence procedures specified by the U.S. Treasury
- report on U.S. accounts to the IRS annually
- deduct and withhold 30% tax on certain payments to recalcitrant account holders and non-participating FFIs
- provide further information to the IRS / U.S. Treasury on request
- obtain a waiver to authorise reporting, if a foreign law prevents the reporting of the required information.

Failure to have these requirements in place results in a 30% withholding tax obligation on payments to FFIs that fail to comply with prescribed disclosure requirements. Furthermore, account holders who fail to provide the FFI with the necessary FATCA-related documentation will be deemed recalcitrant and the FFI will be obliged to withhold 30% tax on any withholdable payment credited to their accounts.

To help address this issue for domestic banks, many countries have entered into an intergovernmental agreement or other treaty with the U.S. to cover their respective FFIs under a single umbrella agreement. For example, South Africa and the U.S. entered into an IGA on 9 June 2014[12], which came into force on 28 October 2014. In terms of the IGA, FATCA is incorporated into South African domestic law and domestic FFIs are required to comply with the necessary requirements of FATCA through domestic South African law (incl. information disclosure to SARS/IRS).

In response to the introduction of FATCA, the LMA developed a number of riders for use with their suite of loan documents. These riders allowed for the risk of any withholding tax to be allocated between the parties on a contractual basis. A number of LMA documents now include FATCA language in their provisions allocating the balance of risk to FFIs (now that a number of IGA's are in place and FFIs are better able to manage this risk) rather than the borrower and providing for different protections depending on whether the relevant party is a FATCA exempt party or not. The LMA documentation also includes various information undertakings specifically linked to FATCA information requirements as well as language dealing with changes in any parties participating in a syndicated loan (e.g. a new lender acquiring a commitment or participation under a loan or a new agent being appointed to act as a facility agent or security agent on behalf of the relevant finance parties).

The position is slightly different for other developing markets loan documentation. The Developing Markets Loan Agreements, the NEAZ Loan Agreement and the Zimbabwe Loan Agreement each have clean "gross-up" obligations on the borrower and guarantors to reflect

[12] The IGA between the U.S. and South Africa is based on the Model 1 IGA.

market practice in these jurisdictions. Unless negotiated, then the risk of any withholding tax (FATCA or otherwise) is passed to the borrower and guarantors.

It is therefore up to the borrower and guarantors to negotiate appropriate FATCA protections in circumstances where the relevant FFI is in a better position to manage the risks associated with FATCA and ensure the relevant finance parties are FATCA exempt.

For members of the LMA, please see the LMA *2014 Summary Note on FATCA* (on the https://www.lma.eu.com/documents-guidelines/documents) for further information.

Withholding Taxes on Domestic Transfers

A number of countries in Africa have also introduced withholding taxes on domestic transactions. In this context, Zimbabwe has enacted law introducing a tax upon domestic electronic fund transfers. This law provides that any qualifying electronic transfer of funds from one party to another party shall incur a tax of 2 per cent of the amount transferred unless exempted. Unlike VAT or other general service taxation, which applies an “end user pays” principle, Zimbabwe charges a flat rate of 2% on all domestic transfers as a withholding tax.

The Zimbabwe Loan Agreement makes it clear that this type of withholding tax is to be grossed-up by the borrower to ensure the finance parties are put back into the position they would have been had no such tax applied.

ITEM 10. LIBOR

Many loan agreements used in Africa involve the use of the London interbank offered rate (**LIBOR**) to help determine interest rates for floating rate loans and foreign currencies, including USD and Euro denominated loans.

In July 2017, the UK Financial Conduct Authority (**FCA**) announced the proposed discontinuation of LIBOR by 31 December 2021. As from that date, banks financial institutions and borrowers will need to use other benchmark or fallback rates to determine floating rates of interest for LIBOR currencies as the LIBOR rate for those currencies either will no longer be published or may no longer be used for new or refinanced loans. In this regard, ICE Benchmark Administration Limited, the LIBOR administrator, launched a consultation in December 2020 where it proposed to cease publishing GBP, EUR, CHF, JPY LIBOR and the 1-week and 2-month USD LIBOR settings after 31 December 2021; and (ii) the remaining USD LIBOR settings after 30 June 2023. The consultation closed on 25 January 2021. The extended publication of the more common 1-month, 3-month and 6-month U.S. dollar LIBOR tenors is designed to help with the reduction of the legacy book and to reduce the risk of banks and other financial institutions from having to resort to benchmark / fallback rates or cost of funds certifications (if they have not transitioned to Risk Free Rates (**RFRs**)) for the more common 1-month, 3-month and 6-month U.S. dollar LIBOR legacy loans). However, those USD LIBOR tenors are not intended to be available for new transactions after the end of 2021.

Accordingly, there are many initiatives underway to find replacement benchmarks or fall back rates.[13] This is an on-going exercise and various bodies (particularly in the UK, U.S., Japan and EU) have established working groups and have been actively consulting and introducing alternative rates together with the financial industry.

The following initiatives, recently highlighted by the LMA, are an example of this:

- the EU's amendments of the EU Benchmarks Regulation to give the European Commission power to replace references to LIBOR in financial instruments between EU counterparties. [14]
- the ECB's involvement in a public consultation exercise in relation to the publication of compounded €STR rates, including a daily index;
- the Euro Working Group on RFRs publication of a consultation on Euro Short Term Rate (€STR)-based EURIBOR fallbacks;
- the Sterling RFR Working Group's publication of recommendations (as well as various supporting materials) on conventions for referencing the Sterling Overnight Index Average (**SONIA**) compounded in arrears in the Sterling loan market;
- the Sterling RFR Working Group's publication of a paper on the active transition of legacy GBP LIBOR loans. This was drafted by the LMA with input from the Cash Market Legacy Transition Task Force and provides a helpful checklist of steps for parties to consider when transitioning their legacy loan agreements;
- the publication by ARRC of conventions for syndicated loans for SOFR in arrears, covering both daily simple SOFR and daily SOFR compounded in arrears;
- the ARRC released requests for proposals in respect of: (i) the administrator of forward-looking term SOFR rates; and (ii) the administration of spread adjustments for contractual fallbacks;
- the publication by Bloomberg of indicative credit adjustment spreads for certain IBORs (including GBP, USD and CHF LIBOR and EURIBOR); and
- in relation to IBA and Refinitiv, the publication of SONIA term rates for users in the GBP market needing a forward-looking term rate.

In terms of activism, the LMA has been at the forefront of the LIBOR debate and has been influencing policy decisions and recommending practical approaches to the LIBOR issue on behalf of its members.

The LMA has also produced documentation providing for the inclusion of contractual arrangements in all new and re-financed LIBOR-referencing loan products to facilitate conversion to RFRs through pre-agreed conversion terms or an "agreed process for

[13] On 18 November 2020, the FCA published consultations on its proposed approach to designating benchmarks under new Article 23A of the UK BMR and imposing requirements on the administrator of a critical benchmark under new Article 23D.

[14] This is due to be published in the official journal on 12 February.

renegotiation" to the financial markets (this is in line with the recommendations set out by the Sterling RFR Working Group).[15]

In this respect, the LMA has published notes on the "screen rate replacement clause", which provide supplemental language together with observations in relation to the possible approaches to the LIBOR issue over and above the screen rate replacement clause found in the current suite of LMA documents.

Most recently, the LMA has published new and updated loan documentation in respect of LIBOR transition based on the Sterling RFR Working Group recommended conventions. This includes:

- **Rate Switch Documentation:**
  - an updated exposure draft multicurrency term and revolving facilities agreement incorporating rate switch provisions (lookback without observation shift), which is designed to provide a documentary reflection of the SONIA conventions for market participants to consider and comment on, and also provides a way to satisfy the recommendation by the Sterling RFR Working Group for inclusion of "pre-agreed conversion terms" in loan agreements;
  - a new exposure draft multicurrency term and revolving facilities agreement incorporating rate switch provisions (lookback with observation shift), which is designed to facilitate choice by market participants; and
  - a form of term sheet for each of these rate switch facility agreements together with commentary.
- **Multicurrency Compounded Rate/Term Rate Documentation:**
  - a new exposure draft of multicurrency compounded rate/term rate facilities agreement (lookback without observation shift) incorporating backward-looking compounded rates, forward looking interbank term rates and rate switch mechanics;
  - a new exposure draft of multicurrency compounded rate/term rate facilities agreement (lookback with observation shift) incorporating backward-looking compounded rates, forward looking interbank term rates and rate switch mechanics; and
  - a form of term sheet for each of these compounded rate/term facility together with commentary.

[15] The LMA provides its members with a specific supplement to the LMA's revised replacement of screen rate clause designed to facilitate one means of potential satisfaction of the recommendations, the "agreed process for renegotiation" option.

Although these documents are exposure drafts rather than formal documentation recommended by the LMA, they are extremely helpful and will guide the path of legal drafting as the transition process for LIBOR continues. As the above loan documentation is based on and LMA's English law investment grade facility agreement, the LMA has also published notes outlining LIBOR transition considerations for the LMA's wider suite of documentation (including for its developing markets and export finance documentation). The above loan documentation and notes have been made available on the LMA website under the LIBOR category of the Documentation index. Members of the LMA may also access the latest information on LIBOR developments here.

From an African perspective, most foreign currency loans are denominated in USD or Euros. In this context, EURIBOR will continue to operate for now, with the focus on inclusion of more robust fallbacks. Further clarity on fallbacks is pending completion of the EUs consultation exercise. In terms of USD, many loans are currently being offered on a fixed rate of interest on a bi-lateral or coordinated bi-lateral basis. We would expect to see conventions for syndicated loans with SOFR in arrears start to appear on the continent through international banks following on from the successful financial close of a number of multi-currency revolving credit facilities in Europe and North America, which adopted a similar approach to the working group mentioned above, whilst the Alternative Reference Rate Committee (**ARRC**) are targeting 30 June 2021 as the date from which no business loans using U.S. dollar LIBOR and maturing after 2021 should be originated. It should be noted that, whilst the ARRC did conduct an RfP process for a provider of forward-looking term SOFR rates, a provider has not yet been selected, there are currently no beta rates published and the creation of a robust term rate will depend on liquidity improving in the underlying SOFR derivatives market.

JIBAR and NIBOR

Of additional concern to Africa are domestic interbank rates such as JIBAR and NIBOR. These rates face structurally similar issues to those that were faced by LIBOR prior to the regulatory change and, invariably, these benchmarks have come under similar pressure in South Africa and Nigeria.

With this in mind, it is recommended that banks and financial institutions carry out a due diligence of their loan portfolio and identify finance documents which use interbank rates such as LIBOR, JIBAR and NIBOR and to assess (where possible) whether it is prudent to make anticipatory changes to any financing arrangements at this point in time. Banks and financial institutions should also take steps (if they have not done so already) to establish systems and procedures necessary to enable their transition to new RFRs for future loans in USD, Euro and Sterling.

ITEM 11. Brexit

The UK officially ceased to be a Member State of the EU on 31 January 2020 and completed the process of its transition out of the EU on 31 December 2020.

In terms of its impact on syndicated loan transactions in Africa, many financings in Africa use English law as the governing law for such transactions. Many African participants in the syndicated market are therefore concerned about whether loan agreements and other financing documents governed by English law and/or subject to the English courts will, as a result of Brexit, continue to be valid, effective and enforceable at the end of this period.

As a general observation in this regard, English commercial contract law is largely unaffected by EU law and so the withdrawal of the UK from the EU does not, in principle, affect the general contractual position. Indeed, the courts of countries around the world (including the EU member states, who are subject to the Rome I Regulation) will continue to give effect to English law as a valid choice of law in the same manner as they did before Brexit. This is important, as there are many attractions for using English law as the governing law of a financing contract. This includes strong jurisprudence, efficient courts and a system of binding precedent (whereby the superior courts bind the lower courts) in English law that is not present in pure civil code jurisdictions. This means that there is much greater certainty of outcome in disputes in the English courts as a result. This is the reason why English law is adopted by counterparties to many contracts—not just the LMA documentation—but also the International Swaps and Derivatives Association (ISDA), The International Securities Lending Association (ISLA) and others.[16]

In addition, there is no reason to think that the courts of countries in Africa will not continue to give effect to judgements awarded by the English court in the same manner as they do currently. This may occur through the Hague Convention on Choice of Court Agreement (in terms of which the UK will transition from an EU member to a member of the Convention in its own right), national laws or other existing arrangements.

With specific reference to African syndicated financing, one limited area where there will be an issue is in terms of syndicated financing involving an EEA bank or EEA borrower/guarantor and asymmetric jurisdiction clauses (rather than an exclusive choice of court agreement). In these circumstances, arbitration may be necessary as a forum for disputes if the relevant EEA entity comes from a jurisdiction within the EEA that does not have (i) reciprocal enforcement arrangements with the UK through their respective national laws or (ii) does not satisfy the requirements of the 2007 Lugano Convention (depending on where the UK ultimately ends up in relation to its application to accede to the 2007 Lugano Convention). In these circumstances, arbitration through the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Arbitration Foundation of Southern Africa (AFSA) in South Africa or other local, regional or international arbitration centres should be considered as an alternative to the English courts.[17]

The LMA continues to issue updates on Brexit and its impact on the LMA suite of documentation. They are also expected to publish a new optional “two-way exclusive jurisdiction clause” pursuant to the Hague Convention for use where the parties consider such a jurisdiction clause to be appropriate for their transaction.

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[16] For further information see Edition 1 of “Developing Loan Markets”, Chapter 21 “Using English Law in Developing Markets Transaction” by Gemma Haley and Amelia Slocombe, p.191, Loan Market Association (2013).

[17] In this context, arbitration awards are recognised under Treaty by those countries in Africa that are a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was signed at New York in 1958 (New York Convention). This includes Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Comoroa, Côte d'Ivoire, Djibouti, Egypt, Ethiopia, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Maldives, Mali, Mauritania, Mauritius, Morocco, Mozambique, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Sudan, Tanzania, Tunisia, Uganda, Zambia and Zimbabwe.

ITEM 12. Basel II and III

Basel II and III are in the process of being adopted by a number of countries across the globe. The introduction of Basel II or III in any country involves the introduction of specific banking regulation and supervision, requiring countries to establish levels of compliance with the relevant Basel core principles and rules.

Banks and financial institutions therefore need to be mindful of the possible adoption of Basel II or III within their respective jurisdictions and to adopt procedures and policies to ensure capital adequacy requirements under any newly proposed regime are properly understood and addressed. In this context, banks and financial institutions may be required to look closely at matters such as (i) the credit standing of their borrower / guarantors, (ii) possible capital cost to be incurred by lenders in respect of the facility concerned; and (iii) alternative means by which any Basel related costs may be addressed (e.g. through a margin ratchet, mandatory pre-payment or other provision mitigating the risk of a borrower's risk weighting changing during the tenor of a syndicated facility).

In terms of the LMA documentation, the adoption of Basel II or III by a country could trigger a right in favour of a lender to make an "increased cost" claim arising from (i) a change in law and (ii) an obligation, on the part of the borrower, to indemnify the finance parties for any loss they incur as a result of that change.

It is therefore important for borrowers to understand whether any potential changes in law have been priced into their margin and to ensure that any increased costs clause adequately deals with any new regulation that is in the process of being introduced. If lenders are in a position to determine what these costs are and have already included them in their margin, then those changes should be expressly carved out of the increased costs clause.

The LMA documentation provides some useful guidance and suggested language to assist members with this type of scenario.

ITEM 13. Environmental and Social Protection

Regulation in terms of sustainability and environmental or social protection is being introduced in many countries together with recent developments in case law and the introduction of new international standards.

Equator Principles

Of particular interest to banks and financial institutions operating in Africa is the adoption by the Equator Principles Association (**EPA**) of the latest EP4 Equator Principles. The EP4 Equator Principles came into full effect on 1 October 2021, following on from a 3 month grace period for Equator Principle Financial Institutions (**EPFIs**) that were unable to fully implement EP4 from the original effective date of 1 July 2020 due to Covid-19.

The Equator Principles are a voluntary international standard subscribed to by EPFIs (including domestic banks such as Absa, FirstRand, Access Bank, Nedbank, Standard Bank and Arab African International Bank) that must be achieved in the context of projects that are being financed by them. The new principles include protections in terms of human rights, climate change, indigenous peoples and biodiversity.

A comprehensive suite of guidance designed to be a practical aid to EPFIs, clients, consultants and technical experts has been released by the EPA to enable them to best implement the requirements of the latest version of EP4—see here.

Environmental and Social Protection

In addition to the international standards set by the EPA, environmental and social protection law and regulation is gaining traction across all financial markets and Africa is no exception. The consequence for breach of environmental laws and regulations can be extremely onerous and financial institutions need to carefully manage the relationships they have with borrowers / sponsors and their projects in Africa. Part of this is dealt with in terms of good due diligence as well as appropriate reporting and monitoring of clients and their projects. Part, is also dealt with by good documentation.

In furtherance of these objectives, the LMA's Developing Markets Loan Agreements include optional language to assist financial institutions to ensure their clients meet basic standards in this regard.

Although the LMA does not include Equator Principle wording in its Africa documentation, the documentation does include various optional provisions relating to the environment and compliance with environmental law.

This includes, among other things, definitions for:

"**Environment**" means humans, animals, plants and all other living organisms including the ecological systems of which they form part and the following media:

a. air (including, without limitation, air within natural or man-made structures, whether above or below ground);

b. water (including, without limitation, territorial, coastal and inland waters, water under or within land and water in drains and sewers); and

c. land (including, without limitation, land under water).

"**Environmental Claim**" means any claim, proceeding, formal notice or investigation by any person in respect of any Environmental Law.

"**Environmental Law**" means any applicable law or regulation which relates to:

a. the pollution or protection of the Environment;

b. the conditions of the workplace; or

c. the generation, handling, storage, use, release or spillage of any substance which, alone or in combination with any other, is capable of causing harm to the Environment, including, without limitation, any waste.

"**Environmental Permits**" means any permit and other Authorisation and the filing of any notification, report or assessment required under any Environmental Law for the operation of the

business of any member of the borrower group conducted on or from the properties owned or used by any member of the borrower group.

Having introduced basic environmental definitions applicable to syndicated debt in developing markets, the recommended form of the LMA's Developing Markets Loan Agreements, go on to include specific representations and undertakings to help address environmental concerns as follows:

Non-Conflict with Other Obligations

A representation that the entry into and performance by it of, and the transactions contemplated by, the relevant finance documents do not and will not conflict with any law or regulation applicable to it (which would include, without limitation, any Environmental Law references above).

No Breach of Laws

Representations that:

a. the borrower has not breached any law or regulation which breach has or is reasonably likely to have a material adverse effect; and

b. no labour disputes are current or, to the best of its knowledge and belief (having made due and careful enquiry), threatened against any member of the borrower group which have or are reasonably likely to have a material adverse effect.

Environmental Laws

Representations that:

a. each member of the borrower group is in compliance with the environmental undertakings mentioned immediately below and, to the best of its knowledge and belief (having made due and careful enquiry), no circumstances have occurred which would prevent such compliance in a manner or to an extent which has or is reasonably likely to have a material adverse effect; and

b. no Environmental Claim has been commenced or (to the best of its knowledge and belief (having made due and careful enquiry)) is threatened against any member of the borrower group where that claim has or is reasonably likely, if determined against that member of the borrower group, to have a material adverse effect.

Undertakings, including a requirement to:

a. comply with all Environmental Laws;

b. obtain, maintain and ensure compliance with all requisite Environmental Permits; and

c. implement procedures to monitor compliance with and to prevent liability under any Environmental Law,

where failure to do so has or is reasonably likely to have a material adverse effect.

Environmental Claims

An undertaking to inform the finance parties of:

a. any Environmental Claim against any member of the borrower group which is current, pending or threatened; and

b. any facts or circumstances which are reasonably likely to result in any Environmental Claim being commenced or threatened against any member of the borrower group,

where the claim, if determined against that member of the Group, has or is reasonably likely to have a material adverse effect.

The LMA language therefore covers the basic requirements under applicable law. For more sophisticated social and environmental sustainability requirements, the international development finance institutions such as the International Finance Corporation (**IFC**) and the African Development Bank (**AfDB**) have led the way in developing markets and it is typical to see their documentation include the following requirements (i) social and environmental assessment of the borrower group, (ii) the setting of performance standards (often based on World Bank policies and guidelines), (iii) action plans setting out specific social and environmental measures to be undertaken by the borrower to enable the borrower (and other members of the borrower group) to achieve those standards, (iv) the scheduling of various prohibited activities, (v) the involvement of officers dedicated to social and environmental monitoring, (vi) independent accountability mechanisms, (vii) the introduction of management systems and (viii) comprehensive reporting standards. The Chancery Lane Project has also been at the forefront of publishing helpful precedent clauses and model laws for environmental, social and governance (**ESG**) impact. See “Growth in Green / Sustainable Financial Products / ESG Reporting Requirements” below.

We can expect to see these requirements increasingly migrate to finance documentation in Africa as the risks and benefits associated with ESG become more apparent.

Lifting of the Corporate Veil

In parallel with new environmental regulation, there have also been a number of high profile cases of interest to banks and other financial institutions where national courts have considered “piercing the corporate veil” and finding transnational corporations liable for social or environmental disasters involving a subsidiary undertaking. These have arisen in circumstances where (a) the relevant holding company had “operational control” of the subsidiary undertaking or (b) the failure by the relevant company to adopt minimum international standards.

The most high profile case in Africa is currently an appeal to the UK Supreme Court by the Ogale and Bille communities of the Niger Delta against Royal Dutch Shell, where the oil major could be at risk of being found liable for alleged oil leaks and contamination of water sources, land and fish habitats caused by the pipelines of Shell Petroleum Development Company of Nigeria (a company incorporated in Nigeria in which Royal Dutch Shell is understood to have only a minority 30% shareholding). Although this case is ongoing, the UK Supreme Court recently allowed an appeal by the two communities in light of an earlier April 2019 judgement by the UK Supreme Court that found that a Zambian community could sue Vedanta Resources (a London-headquartered global metals and mining company) over alleged toxic emissions by Konkola Copper Mines (its Zambian subsidiary).

In the U.S., violations of the Clean Water Act (CWA) have been imputed to an entity's holding company where such entity was found to be a mere "alter ego" of the holding company, in circumstances where the parent corporation wholly owned, controlled, managed, operated and supervised, in all ways, the operation of the subsidiaries.

Further legal developments in this regard will be of importance to banks and financial institutions not only because of the risk to their borrower and possible reputational damage, but also potential exposure to the bank or financial institution itself as the regulation and case law around social and environmental standards develop further.

Growth in Green / Sustainable Financial Products / ESG Reporting Requirements

Another recent development over the last few years has been the growth in demand for sustainable / green financial products. The development of this market has been stimulated by the UNFCCC Climate Agreement 2016 (the **Paris Agreement**) and the publication of the UN Sustainable Development Goals (**SDGs**) in 2015 and typically takes the form of sustainability-linked bonds or loans, whose interest rates or coupons are dependent on the borrower and/or its subsidiaries meeting certain green / sustainability targets.

The wave of regulation and policy from governments around the world will see banks and financial institutions that invest in debt portfolios and related financial products come under increasing pressure to invest in products that meet certain green / sustainable standards through the primary and secondary markets.

In this regard, the EU has recently commenced a consultation on the EUs Renewed Sustainable Finance Strategy as part of its undertaking to deliver on the goals of the Paris Agreement and/or SDGs, which is likely to result in (i) certain recommendations or regulations governing sustainability and green action and (ii) more standards for financial products. This regulation is to be supported by new EU ESG reporting requirements such as the EU's Sustainable Finance Disclosure Requirements (**SFDR**), which will come into effect on 10 March 2021. The SFDR will require certain companies to comply with disclosures in relation to green and sustainable products designed to (i) prevent "greenwashing", (ii) consider sustainability risk when making investment decisions and (iii) evaluate the potential adverse effect of making any corporate decisions.

The UK government has also taken an aggressive stance on climate risk and improving governance and reporting by large occupational pension schemes and listed companies, with the aim of putting in place effective governance, strategy, risk management and accompanying metrics for the assessment and management of climate risks and opportunities. In this regard, the Financial Conduct Authority (**FCA**) has recently published a policy statement promoting better climate-related financial disclosures for certain UK listed commercial companies, who will be required to publish disclosures that are consistent with the recommendations of the Taskforce on Climate-related Financial Disclosures (**TCFD**).

In terms of documentation, there is currently no LMA approved template wording available for use in green loan / sustainable finance documentation due to the varied nature of this market. That said, examples of green loan clauses designed for use with LMA type loan documentation are available through the Chancery Lane Project.[18]

In terms of its commitment to support the development of green and sustainable finance markets throughout the European, Middle East and African area (**EMEA**), the LMA has endeavored to develop consistent market standards and guidelines through the "Green Loan Principles" and the "Sustainability-Linked Loan Principles". The Green Loan Principles were originally published in March 2018, with the Sustainability-Linked Loan Principles following a year later in March 2019, and aim to provide its members with a high-level framework with which to align their loan products and through which it is hoped that the integrity of these loan products will be preserved. [19]

Common categories of sustainability-linked projects / goals include: energy efficiency, greenhouse gas emissions, renewable energy, water consumption, affordable housing, sustainable sourcing, sustainable farming and food biodiversity, global ESG assessment, reductions in greenhouse gas emissions, use of recycled raw materials / supplies, improvements in conservation and protection of biodiversity, improvements in the borrower's ESG rating and/or achievement of a recognised ESG certification, etc.[20]

The LMA has also just launched a joint publication entitled "Guide for Company Advisers to ESG Disclosure in Leveraged Finance Transactions" (the **ESG Guide**) with the European Leveraged Finance Association (**ELFA**). The ESG Guide looks at how to best integrate ESG information into offering materials and ongoing company reporting and can be accessed by members here.

Members of the LMA may access additional information on sustainability and green developments here.

[18] See for example - "Harrison's Clause - Green Loan "Starter Pack"" and "Casper's Clause - Sustainability-Linked Loans" respectively - published on an open source basis by the Chancery Lane Project here.

[19] For further information on the Green Loan Principles, members of the LMA may access the high-level framework of market standards and guidelines here.

[20] For examples of international and national initiatives taxonomies related to the Sustainability-Linked Loan Principles, see ICMA's Compendium of international policy initiatives here.

Conclusion

With the proliferation of domestic and international regulatory changes affecting the syndicated loan markets in Africa, it can be difficult for banks and financial institutions operating within the continent to monitor all regulatory developments on their compliance radar (especially international regulatory changes with extra-territorial effect, where the risk of non-compliance may be extremely severe). That said, an awareness of regulatory risks across the global debt market is becoming an ever increasing necessity for banks and financial institutions operating in Africa.

This article is not intended to be exhaustive, but it hopefully provides readers with useful guidance on some of the main developments in this exciting market over the last few years and the direction of new regulation and case law. If readers have specific queries on any of the developments or regulations mentioned above, or wish to discuss the availability of tools to mitigate this risk, we would be delighted to discuss these with you.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Financial Services practice:

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Many thanks to the Loan Market Association for allowing the authors to reference the suite of developing markets / Africa loan documents and to use certain copyright material in the preparation of this article. The LMA provides an excellent resource to its members in relation to the syndicated loan markets in the EMEA region. Enquires about the association and its activities in Africa can be addressed to Amelia Slocombe, Managing Director, Loan Market Association, 10 Upper Bank Street, London, E14 5JJ - e: amelia.slocombe@lma.eu.com / w: lma.eu.com.

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