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Dear Sir

Proposal for adoption of the UNCITRAL Model Law on Cross-Border Insolvency in Tanzania

The Loan Market Association (LMA), as the trade body for the syndicated loan markets in Europe, the Middle East and Africa (EMEA), seeks to bring about increased efficiencies and standardisation in developing markets.

The LMA's core aim is to encourage liquidity in both the primary and secondary loan markets by promoting efficiency and transparency, as well as by developing standards of documentation and codes of market practice, which are widely used and adopted. Membership of the LMA currently stands at over 550 institutions, embracing 54 nationalities and consists of banks, non-bank loan investors, law firms, rating agencies and service providers.

As part of its wider developing markets mandate, the LMA also encourages appropriate regulatory interventions that will facilitate inward investment and enhance economic growth in Sub-Saharan Africa.

Since being founded in 1996 the LMA has gained substantial recognition in the market and has expanded its activities to include all aspects of the primary and secondary syndicated loan markets. It sees its overall mission as acting as the authoritative voice of the EMEA loan market for lenders, borrowers, regulators and other interested parties. Our website (www.lma.eu.com) provides more detailed information on our global activities.

1 Executive summary

1.1 In 1997, UNCITRAL adopted a model law on cross-border insolvency (**Model Law**).

1.2 The Model Law is a template legislative text which provides for cross-border co-operation in multi-jurisdictional insolvency cases. It is designed to be incorporated into the domestic law of States, with a view to streamlining the administration of such insolvencies and returning a better result for creditors.

1.3 The Model Law represents best practice legislation on cross-border insolvency. Its enactment encourages foreign investment and the extension of credit in the enacting State. In the view of the LMA (supported by Norton Rose Fulbright SA[1]), Tanzania would benefit from the adoption of the Model Law into its own domestic insolvency framework.

[1] The LMA has been assisted in the formulation of this proposal by the Dar es Salaam office of the law firm, Norton Rose Fulbright SA, and their colleagues in associated offices specialising in international insolvency.

2 Introduction

2.1 In 1997, UNCITRAL adopted a model law on cross-border insolvency (**Model Law**). To date, 19 countries, including South Africa, Uganda, Eretria, the United Kingdom and the United States of America, are recorded by UNCITRAL as having enacted domestic legislation based on the Model Law. This is an ongoing trend.

2.2 It is the view of the LMA that Tanzania would benefit from the adoption of the Model Law in its own domestic insolvency framework. The purpose of this document is to provide the Attorney General's Chambers with an overview of the origins, purpose and content of the Model Law, together with a summary of the benefits of its adoption for Tanzania, so that it might give due consideration to its enactment.

2.3 Such consideration would be consistent with the United Nation's 1997 request that "all States review their legislation on cross-border aspects of insolvency to determine whether the legislation meets the objectives of a modern and efficient insolvency system and, in that review, give favourable consideration to the Model Law, bearing in mind the need for an internationally harmonized legislation governing instances of cross-border insolvency".[2]

2.4 We and Norton Rose Fulbright SA would be pleased to discuss the contents of this document with you in some depth once you have had the opportunity to fully consider it.

3 UNCITRAL Model Law on Cross-Border Insolvency ("The Model Law")

Origins of the Model Law

3.1 In 1966, the United Nations established UNCITRAL, the United Nations Commission on International Trade Law. UNCITRAL is popularly known as the private arm of the United Nations and is its specialist commercial law reform body.[3]

3.2 UNCITRAL exists to promote the progressive harmonisation and unification of international trade law and thus, trade and investment across borders. In the words of UNCITRAL, trade means "faster growth, higher living standards, and new opportunities through commerce".[4]

3.3 UNCITRAL represents the United Nation's effort to further international development by way of trade law reform. In 1997, UNCITRAL formally adopted the Model Law.[5]

3.4 The Model Law is the culmination of efforts by both UNCITRAL and INSOL International[6] to remedy various issues insolvency practitioners face when confronted with cross-border insolvencies. As became apparent following a series of large international collapses in the 1980s and early 1990s, these issues hamper the rescue of financially troubled businesses, leaving the assets of the insolvent debtor vulnerable to dissipation and hindering the maximisation of the value of those assets.[7] Prior to insolvency, such issues may also act as a disincentive to foreign investment.

Status of the Model Law

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2 Paragraph 3 of UN GA resolution 52/158 dated 15 December 1997.

3 A fuller overview of UNCITRAL, its origins, mandate and organisational structure, together with a description of the work it has undertaken, can be found online at: http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf (accessed 02.12.13).

4 http://www.uncitral.org/uncitral/en/about_us.html.

5 The Model Law was produced by UNCITRAL's working group on insolvency law, comprised of various insolvency experts, over the course of 1995 to 1997. The final text was formally adopted on 30 May 1997 by UNCITRAL and agreed to by the General Assembly to the United Nations on 15 December 1997.

6 The leading global association of insolvency practitioners and advisors.

7 Tanner DeWitt "Challenges of Cross-Border Insolvencies" (2013), available online at http://www.tannerdewitt.com/?page_id=372, accessed 06.11.13.

As a model law, the Model Law has no binding force. Rather, it is simply a suggested legislative text, or template law, which States can elect to introduce into their domestic law. Introduction can be in whole or in part and with or without amendment: a State is free to diverge from the suggested text of the Model Law and might do so in order to eliminate inconsistency between the text as drafted and its existing laws, or to take into account the particular social, cultural or economic background against which the Model Law will operate. Like all model laws however, the Model Law is intended to be capable of wholesale enactment into domestic legislation, without modification or exclusion. Indeed, much of the benefit of the Model Law derives from its uniform adoption.

Purpose of the Model Law

3.5 A cross-border insolvency is one in which an insolvent entity, or group of entities, has assets or creditors in more than one jurisdiction. A common example is an insolvent company incorporated and in liquidation in jurisdiction A, which has assets and creditors in both jurisdictions A and B.

3.6 In the above example, without the benefit of cross-border insolvency legislation in jurisdiction B, a liquidator appointed in jurisdiction A may face issues in getting in and realising the assets of company held in that jurisdiction. The liquidator's position may not be recognised in jurisdiction B, he may otherwise have no power to deal with company assets in jurisdiction B, or for example, to examine persons with knowledge of the whereabouts of assets present in that jurisdiction. Although the liquidator may ultimately be able to secure the co-operation of jurisdiction B's courts and sell company assets, assistance is not guaranteed and the process will likely take time. Amongst other things, this time affords the company directors the opportunity to put company assets beyond the reach of its creditors and in the case of market-sensitive or perishable assets, may lead to a diminution in their value pre-sale or jeopardise a sale already in place.

3.7 The Model Law is designed to avoid issues of the type just described. It makes provision for how instances of cross-border insolvency are to be dealt with in the enacting State. It affords foreign insolvency office-holders access to the courts of the enacting State and empowers the courts of that State to (1) recognise the foreign insolvency and if appropriate, (2) grant certain relief as a consequence of that recognition. It also makes provision for how concurrent insolvency proceedings regarding the same debtor in a foreign State and the enacting State are to be dealt with and for co-operation between States more generally.

3.8 UNCITRAL describes the problems to which the Model Law is directed to resolving as follows[8]:

> *Although the number of cross-border insolvency cases has increased significantly since the 1990s, the adoption of legal regimes, either domestic or international, equipped to address cases of a cross-border nature has not kept pace. The lack of such regimes has often resulted in inadequate and uncoordinated approaches that have not only hampered the rescue of financially troubled businesses and the fair and efficient administration of cross-border insolvency proceedings, but have also impeded the protection and maximization of the value of the assets of the insolvent debtor and are unpredictable in their application. Moreover, the disparities and, in some cases, conflicts between national laws have created unnecessary obstacles to the achievement of the basic economic and social goals of insolvency proceedings. There has often been a lack of transparency, with no clear rules on recognition of the rights and priorities of existing creditors, the treatment of foreign creditors and the law applicable to cross-border issues. While many of these inadequacies are also apparent in domestic insolvency regimes, their impact is potentially much greater in cross-border cases, particularly where reorganization is involved.*

[8] UNCITRAL Practical Guide on Cross-Border Insolvency Legislation (2009), http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf (accessed 02.12.13).

In addition to the inadequacy of existing laws, the absence of predictability as to how they will be applied and the potential cost and delay involved in application has added a further layer of uncertainty that can impact on capital flows and cross-border investment.

3.9 As regards the Model Law itself, UNCITRAL continues:

> *The UNCITRAL Model Law was adopted by the Commission in 1997. As stated in its preamble, it focuses on the legislative framework needed to facilitate cooperation and coordination in cross-border insolvency cases, with a view to promoting the general objectives of:*
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> *(a) Cooperation between the courts and other competent authorities of the enacting State and foreign States involved in cases of cross-border insolvency;*
> *(b) Greater legal certainty for trade and investment;*
> *(c) Fair and efficient administration of cross-border insolvency proceedings that protects the interests of all creditors and other interested persons, including the debtor;*
> *(d) Protection and maximization of the value of the debtor's assets;*
> *(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.*
>
> *...The text of the UNCITRAL Model Law offers solutions that help in several modest but significant ways, including the following:*
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> *(a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency proceedings;*
> *(b) Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be, including the relief available to assist the foreign proceeding;*
> *(c) Establishing simplified procedures for recognition;*
> *(d) Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;*
> *(e) Permitting courts and insolvency representatives in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in insolvency proceedings;*
> *(f) Authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;*
> *(g) Establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with insolvency proceedings in foreign States.*
>
> *...the ability of courts, with the appropriate involvement of the parties, to communicate "directly" and to request information and assistance "directly" from foreign courts or foreign representatives is intended to avoid the use of time-consuming procedures traditionally in use, such as letters rogatory.* ***As insolvency proceedings are inherently chaotic and value evaporates quickly with the passage of time, this ability is critical when courts consider that they should act with urgency.***[9] (emphasis added)

3.10 UNCITRAL goes on to describe the purpose of the Model Law in general terms as being "to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings...", noting that the text "focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws."[10]

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[9] Ibid.

[10] http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (accessed 02.12.13).

3.11 In summary then, the Model Law serves to facilitate the efficient administration of cross-border insolvencies, ensuring an insolvent debtor has the best chance of survival and, where this is not possible, that its assets are realised for the maximum value and in the shortest time possible and its creditors treated equitably, irrespective of geographic locale.

Content of the Model Law

3.12 It is useful at this juncture to consider the substance of the Model Law itself. At a mere 32 articles length, the law is brief. It is accompanied by an explanatory guide to enactment.

3.13 Key concepts

3.14 In order to properly understand how the Model Law operates, it is necessary to understand the definitions on which it is based. These are as follows.

(a) Foreign proceeding

(i) A collective judicial or administrative proceeding in a foreign State.pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;

(b) Foreign representative

A person or body authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(c) Foreign main proceeding

A foreign proceeding taking place in the State where the debtor has the centre of its main interest (presumed, in the absence of evidence to the contrary, to be the jurisdiction in which its registered office is located);

(d) Foreign non-main proceeding

A foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an Establishment; and

(e) Establishment

Any place of operations where the debtor carries out a non-transitory economic activity with human means and goods and services.

Application

3.15 The Model Law applies in four situations. These are where:

(a) assistance is sought in a foreign State in connection with a proceeding under the insolvency laws of the enacting State;

(b) assistance in sought in the enacting State by a foreign court or foreign representative in connection with a foreign proceeding;

(c) a foreign proceeding and a proceeding under local insolvency laws in respect of the same debtor are taking place concurrently; and

(d) creditors (or other interested persons) in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under local insolvency laws.

3.16 It need not apply to proceedings concerning entities that are already subject to specialist insolvency regimes in the enacting State. In the United States and United Kingdom for example, the Model Law has no application to proceedings regarding insolvent banks, which are instead governed by their own specialist regimes.

Substantive provisions

3.17 Substantially, the Model Law provides for 4 things: access, recognition, relief and co-operation. Pursuant to the Model Law:

(a) Access to Courts (Chapter 2, Articles 9 – 14)

foreign representatives of foreign (main and non-main) proceedings are entitled to apply directly to the courts of an enacting State in which they can seek 'recognition' and accompanying relief.

(b) Recognition of foreign proceedings (Chapter 3, Articles 15 – 18)

subject to the satisfaction of specified criteria, courts are obliged to recognise foreign proceedings as either foreign main or non-main proceedings.

(c) Relief upon recognition (Chapter 3, Articles 19 – 24)

(i) upon the granting of recognition and subject always to the condition that the court is satisfied that the interests of the creditors and other interested persons are adequately protected, certain 'relief' in the case of foreign main proceedings automatically follows. This relief includes:

(A) a stay against individual actions or proceedings concerning the debtor's assets, rights, obligations and liabilities;

(B) a stay against execution against the debtor's assets; and

(C) the suspension of the debtor's right to transfer, encumber or otherwise dispose of its assets

(ii) relief which is discretionary in both main and non-main proceedings (and subject to the condition just discussed) includes:

(A) in the case of a non-main proceeding, the relief immediately above;

(B) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(C) entrusting the administration or realisation of all or party of the debtor's assets in the jurisdiction to the foreign representative; and

(D) any other additional relief that may be available under the laws of the enacting State.

(d) Co-operation and co-ordination (Chapters 4 and 5, Articles 25 -32)

(i) the Courts of an enacting State are obliged to co-operate to the maximum extent possible with foreign courts and foreign representatives;

(ii) the Courts of an enacting State are empowered to communicate directly with or request information or assistance directly from foreign courts or foreign representatives;

(iii) co-operation may take the form of, *inter alia*:

(A) the appointment of a person or body to act at the direction of the court;

(B) coordination of the administration and supervision of the debtor's assets and affairs;

(C) approval or implementation of agreements concerning the coordination of proceedings;

(D) coordination of concurrent proceedings regarding the same debtor.

(iv) Chapter 5 of the law provides for how concurrent insolvency proceedings in different jurisdictions are to be managed. In particular, it provides that:

(A) after recognition of a foreign main proceeding is granted in the enacting State, a proceeding under the local insolvency regime of the enacting State may only be commenced if the debtor has assets in that State and in that case, provided the effect of the proceeding is limited to the assets of the debtor so located. The remaining assets of the debtor (i.e. its assets outside of the jurisdiction) shall be administered in the foreign main proceeding;

(B) if a foreign proceeding and a proceeding are taking place concurrently:

(1) where the proceeding in the enacting State is already taking place at the time the application for recognition of the foreign proceeding is filed:

(I) any relief granted with respect to the foreign proceeding must be consistent with the proceeding in the enacting State; and

(II) if the foreign proceeding is recognised as a foreign main proceeding, automatic relief does not operate

(2) where the proceeding in the enacting State commences after an application for recognition of a foreign proceeding is made or has been granted:

(I) any relief already granted with respect to the foreign proceeding shall be reviewed and modified or terminated if inconsistent with the proceeding in the enacting State; and

(II) if the foreign proceeding is a foreign main proceeding, the stay and suspension components of automatic relief will would otherwise follow are modified or terminated if inconsistent with the proceeding in the enacting State.

Reciprocity

3.18 The Model Law is not premised upon reciprocity. If a State has enacted the Model Law without modification, its courts are obliged to co-operate with the courts of a foreign State regarding a foreign proceeding irrespective of whether that foreign State has itself enacted the Model Law (or would otherwise afford or extend co-operation).

3.19 A State may elect to impose a requirement for reciprocity when enacting the Model Law. The majority of States, including the UK, the US and Uganda, have declined to do so - presumably so as to encourage other States to do the same and maximise the benefit of the Model Law in that State.

3.20 The South African enactment is premised on reciprocity. It applies only to those countries designed by the South African Minister of Justice as beneficiaries of South Africa's model law. The Minister is empowered to designate countries as beneficiaries when he or she is satisfied that the recognition accorded by the law of a country to insolvency proceedings under the laws of South Africa justifies the application of the South African model law to that country.

3.21 In contrast, the Uganda enactment of the Model Law applies without restriction. The enactment also contains additional provisions however, which offer significant supplemental assistance to foreign officeholders and Courts, which apply only to countries which have been acknowledged as having enacted similar provisions in their own domestic legislation. Uganda's insolvency legislation is thus a two-tier system which also, at least in part, based on the notion of reciprocity. (The United Kingdom similarly has a two-tier approach whereby the Model Law operates in parallel with a pre-existing jurisdiction to act in aid of designated countries. This is all in addition to the common law jurisdiction referred to below).

3.22 As Uganda and South Africa are natural trading partners of Tanzania, Tanzania would benefit from implementing the Model Law. It would allow – subject to recognition of its enactment by those States – Tanzania to have the benefit of the Model Law (and potentially, in the case of Uganda, additional beneficial provisions) in those countries, thus greatly streamlining and rationalising Tanzanian insolvencies which touch either of those jurisdictions.

4 Benefits of the Model Law for Tanzania

4.1 Tanzania's judicial system is based on the English common law system.

4.2 Notably, the common law in force in England as at 22 July 1920 was incorporated into the laws of Tanzania in 1920 by section 2(3) of the *Judicature and Application Laws Act* (Chapter 358 of the Laws of Tanzania).

4.3 The English courts have long had jurisdiction at common law, at their discretion, to render assistance to foreign insolvency practitioners when so requested. As this jurisdiction pre-dates 1920, it follows that the Tanzanian courts – subject to any contrary enactment - also have jurisdiction to render such assistance when so requested.

4.4 Unlike the United Kingdom where the courts' jurisdiction to assist foreign insolvency practitioners has been the subject of significant legislative expansion, Tanzania has not formalised its jurisdiction to assist foreign insolvency officeholders. Indeed, the Tanzanian *Companies Act 2002* makes no provision for assisting foreign officeholders, or for how instances of cross-border insolvency are to be dealt with. Enacting the Model Law would remedy this.

4.5 A question arises as to how best to express the Tanzanian judiciary's power to assist foreign officeholders. In this regard, there are a number of advantages to Tanzania relying on a statute enacting the Model Law, expressly defining the powers of Tanzanian courts, over relying on its common law, to render assistance to foreign officeholders. The precise boundaries of the common law are unclear and subject to dispute. Insofar as the position can be ascertained, a significant degree of time and expense much be expended each time any party which wishes to understand and rely on Tanzania's common law jurisdiction. This is inefficient.

4.6 Enacting the Model Law would give Tanzania an express legal framework within which to grant assistance to foreign insolvency practitioners. This framework would conform with international norms, mirroring the framework in place in a number of other jurisdictions, and offer a much higher degree of certainty to such practitioners regarding assistance they might receive. It would also offer clarify to Tanzania's own courts regarding the process of aiding foreign officeholders and instil confidence in foreign investors as to the level of judicial assistance to be afforded in the event the beneficiary of credit enters insolvency with assets or creditors in Tanzania.

4.7 In our view, it is demonstrably preferable for Tanzania to formalise its jurisdiction to assist foreign insolvency officers by way of enactment of the Model Law. There are two significant benefits Tanzania would enjoy as a consequence of enacting the Model Law:

(a) it would demonstrate that Tanzania is concerned to enact best-practice commercial legislation and create a welcoming business environment, in turn encouraging foreign investment and generating local wealth; and

(b) it would serve to protect Tanzanian creditors of foreign companies operating in Tanzania - by affording assistance to foreign insolvency practitioners of such companies, those practitioners can more readily locate and realise the assets of those companies situated in Tanzania, benefitting the estate and creditors as a whole. In addition, by imposing a stay on proceedings against the company in Tanzania whilst its administration or liquidation is carried out, its assets in Tanzania can be preserved for the benefit of creditors as a whole instead of those with the time and resources to pursue legal action.

4.8 More generally, the Model Law facilitates the rescue of financially troubled businesses, protects the assets of an insolvent debtor located outside its jurisdiction of incorporation from dissipation and assists in the maximisation of the value of those assets.[11] When such businesses operate in Tanzania, in the case where a rescue is possible, this will help preserve local jobs and continuity of service/supply to local businesses and where rescue is not possible, will serve to ensure Tanzanian creditors receive as many cents in the dollar as possible on their claims against the debtor.

4.9 As mentioned above, both Uganda and South Africa have enacted the Model Law.

5 Conclusion

5.1 The Model Law was adopted by the UN in late 1997. Since then, some 19 countries have enacted domestic laws based on the Model Law. These countries include the United States, the United Kingdom, Canada, Australia, and in Africa, Uganda and South Africa. The process of administering cross-border insolvencies across these jurisdictions is now much simpler, quicker and fairer. Tanzania would similarly benefit from the adoption of the Model Law and incidentally, send a strong message to the international community regarding its commitment to establishing a legal environment that supports inward investment and collaboration among nations.

We would be pleased to discuss any aspect of this letter with you in more detail. If we can be of any further assistance, please do not hesitate to contact us via Adam Lovett of Norton Rose Fulbright, by telephone (+255 76 470 0901) or email (Adam.Lovett@nortonrosefulbright.com).

Yours faithfully

Clare Dawson

Clare Dawson
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The Loan Market Association

[11] Tanner DeWitt "Challenges of Cross-Border Insolvencies" (2013), available online at http://www.tannerdewitt.com/?page_id=372, accessed 06.11.13.