Loan Market Association
the authoritative voice of the EMEA market

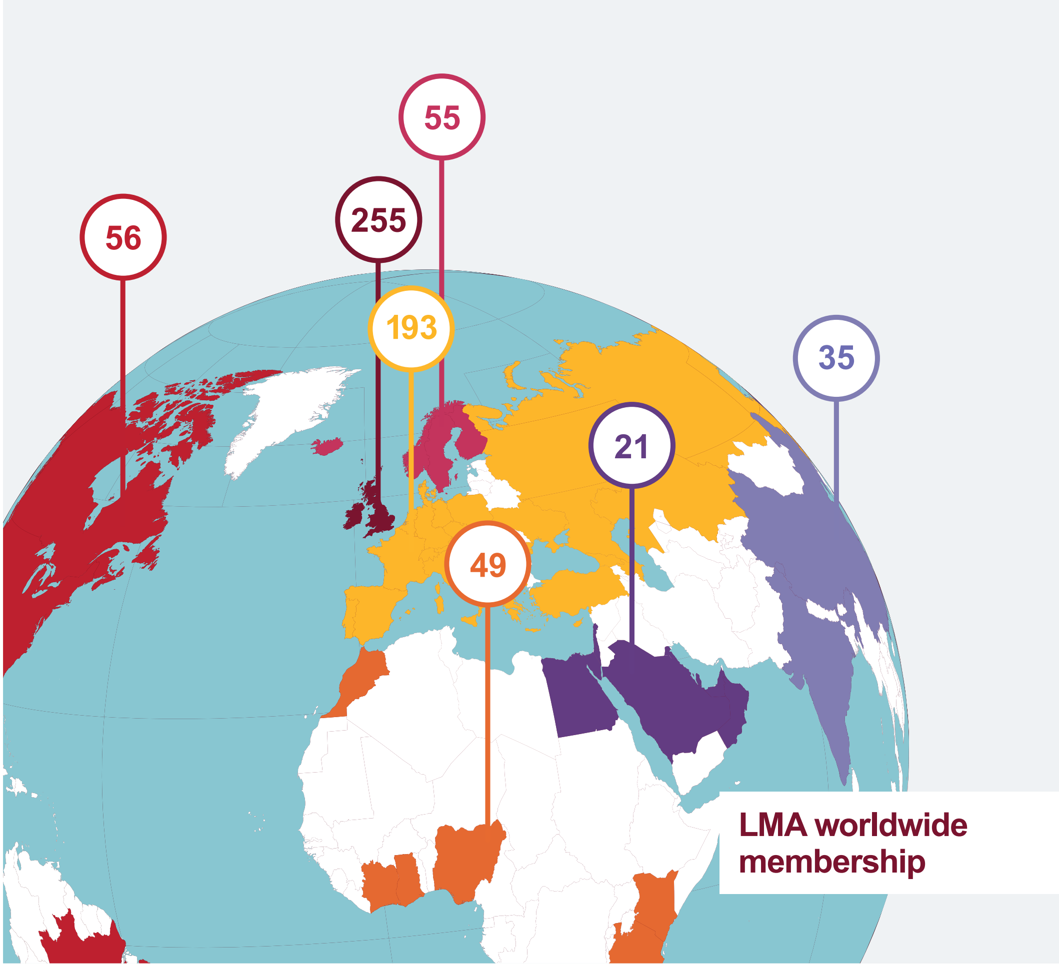
LMANEWS

H2 2017

Inside this issue…

LMA contact
T: +44 (0)20 7006 6007
F: +44 (0)20 7006 3423
lma@lma.eu.com
www.lma.eu.com

Another eventful six months



With summer now upon us, we look back on another six months of political uncertainty and some unexpected outcomes. So far the financial markets seem to have proved remarkably resilient to these challenges, although levels of activity in the syndicated loan market remain lower than many would wish.

Against this backdrop, the LMA has continued to take on new projects and work to maintain the competitiveness of the syndicated loan product. With the number of members continuing to grow – now standing at a record 664 – we are also continuing to expand our web-based training programme, so that all our members across the world have access to high-quality, targeted training.

Work on new documentation also continues. We have made good progress on our ECA Buyer Credit facility agreement, and work on a Unitranche Intercreditor agreement continues. In addition, we have just published revised secondary trading terms and conditions and revisions to the Investment Grade documents, and are in the process of completing an updated Confidentiality Letter for Primary syndication.

Over the last year or so a number of our long-standing board members have retired from the Board, in several cases due to changes in their role at their institution. Following the recent AGM we again have a number of new Board members, and I would like to take this opportunity to thank both retiring and new directors for volunteering their time to the LMA, and ensuring that we continue to have a Board that represents a broad range of our market, both geographically and in terms of type of institution.

This year we will be holding our tenth annual conference. Now firmly established as the largest syndicated loans conference in EMEA, the event offers our membership the opportunity to hear from senior professionals on a wide range of relevant topics, as well as unparalleled networking opportunities. We expect the event to be as popular as ever, so book your place now to avoid disappointment! ■

News in Brief

LMA Surveys

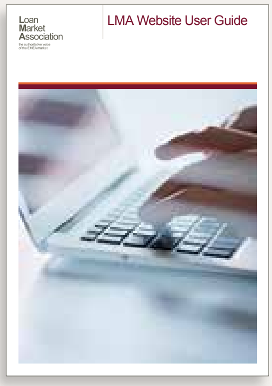
This year we have again conducted the following four surveys on particular sectors and geographies of the loan market with the assistance of our membership:

Developing Markets Survey
published April 2017
Real Estate Finance Survey
published May 2017
Nordic Loan Market Survey
published May 2017
German Loan Market Survey
published June 2017

The results of all the surveys can be found on our website under: www.lma.eu.com/news-publications/press-releases

New Guide

LMA Website User Guide
This guide provides an overview of the content housed on the LMA website and where and how to access it.



Membership update

664

Organisations are currently members of the LMA.

61

Countries within the LMA's membership.

snap|shots

We have created a new series of videos entitled "snapshots", which are short interviews by the LMA with senior market participants.

Snapshot on Political and Economic Risks

We spoke to David Chmiel, Managing Director at Global Torchlight, following our 2017 Developing Markets Conference.
In a survey conducted of LMA members before the conference, global macro-economic and political stability was seen as being the most important factor for growth in the syndicated loan market in developing markets. We asked David for his views.

www.lma.eu.com/developing-markets/video/david-chmiel-global-torchlight

Snapshot on the Real Estate Finance Market

We spoke to Neil Blake, Head of UK and EMEA Research at CBRE, following our 2017 REF Conference.
Neil spoke about some of the key trends impacting the real estate finance market, and what to look out for going forward.

www.lma.eu.com/real-estate-finance/video-snapshots/neil-blake-cbre

Snapshot on the LMA's European Loan Operations Committee

We spoke to Doug Laurie, Director at Barclays and Chair of the LMA's European Loan Operations Committee, following our 2017 Loan Operations Conference.
Doug discusses the committee's current initiatives, and how LMA members can provide their support with the long-term goal of improving operational efficiency and settlement times in the loan market.

www.lma.eu.com/loan-operations/video/european-loan-operations-committee-doug-laurie

Loan market commentaries from around the world

This next section of the newsletter, pages 3–6, features senior market participants answering the following three questions on behalf of their designated country.

1. **What is the greatest challenge impacting the syndicated loan market in your country at the present time?**
2. **What is the market outlook for your country in H2 2017 and beyond?**
3. **How has the LMA assisted with the development of the syndicated loan market in your jurisdiction, whether from a direct or indirect perspective?**

Spain

Itziar Letamendi
Head of Loan Markets, Continental Europe – Banco Santander

Greatest challenge impacting the syndicated loan market

Like neighbouring markets in Europe, the Spanish loan market has seen a sustained decrease in the volume of activity in the last two years. This, together with plentiful liquidity and mounting competitive pressure among investors, has placed the focus on returns.

Accordingly, the challenges facing the Spanish market are essentially those facing other similar markets. Companies are seeking creative and flexible financing solutions, and investors want a profitable, liquid and secure product. In the context of increasing regulation, abundant liquidity, and a trend towards disintermediation, the loan market faces the challenge of becoming a balanced financing alternative, offering investors a fair return, and providing companies with ad hoc and flexible solutions.

Perhaps a distinguishing feature of the Spanish market is that it also faces the challenge of finding a solid institutional investor base beyond leveraged deals. The level of solidity and stability which the Spanish market has attained is fundamental to achieving that goal.

Market outlook in H2 2017 and beyond

2017 commenced very much in line with the end of 2016. Despite sound prospects for economic growth in Spain

(2.8% for 2017), according to Dealogic, activity in the Spanish loan market up to April 2017 decreased by approximately 18%, compared with the same period last year. With a few specific exceptions, there have not been many “new money” deals, most transactions have been self-arranged or club deals and have been heavily oversubscribed, while alternative financing products and markets (MARF, bonds…) are becoming increasingly competitive.

And the prospects aren’t too different for the coming months. Most companies have already refinanced their core facilities for the next four to five years, many will opt for the bond market to finance their investment needs and, despite the excellent market conditions, M&A activity has yet to take off. Based on these premises, we expect competition for banks to remain very strong.

The movements that might alter this trend are, perhaps, an increase in M&A activity and tapering of the ECB’s quantitative easing.

With regard to the first factor, given the favourable situation, companies are already looking for options. As for the second, we will need to wait until further announcements from the ECB.

LMA assisting development

The LMA has contributed significantly to creating a more secure, deeper and more liquid loan market in Spain.

Standard documentation under Spanish law for more domestic transactions, like the contracts under English law, are unquestionably a benchmark for both investors and companies. This means that negotiations can focus on the more commercial and deal-specific aspects. Moreover, the LMA standard documentation has provided greater legal certainty, shortened negotiations and boosted international investors’ confidence.

The guidelines on the main new aspects, as well as training activities, have always provided support, affording efficient access to best practices in a fast-changing environment.

And, more recently, the LMA’s activity in the operations area is substantially reducing execution times in the secondary market, which is fundamental in a market seeking to be increasingly liquid.

Consequently, the role of the LMA has been vital to achieving a more unified and stable market. ■

Netherlands

Wouter Biewinga
Director, Western European Corporates – ING Syndicated Finance

Greatest challenge impacting the syndicated loan market

In today’s borrower friendly market, we see most challenges on the investors’ side. The main theme in the Netherlands is the same as all over Europe: supply and demand disequilibrium. As a result, erosion of terms is the main consequence, both in terms of pricing as well as structures and documentation. A noticeable trend in the Dutch leveraged loan market is the creeping of large cap terms into small and midcap deals, as sponsors

Loan market commentaries from around the world

Continued from page 3

seek to apply precedent terms irrespective of size.

Looking at the borrowers' side, we see corporates struggle to find a fair balance between credit commitment of and ancillary business allocation to investors. With investors willing to commit large tickets, syndicates become flatter and consist of fewer banks with higher ticket levels. With the introduction of negative deposit rates and a sustained negative EURIBOR, the floor is a discussion in almost every corporate transaction.

In the Dutch leveraged market, direct lenders providing unitranches are disintermediating typical bank lenders. Most buy-outs are clubs, with only a few transactions that are sold into the institutional market.

Market outlook in H2 2017 and beyond

In H2 2017, we will see a continuation of the supply and demand disequilibrium. As investors' balance sheets run off and they have ample liquidity to deploy, we do not expect this situation to change anytime soon. The Dutch leveraged syndicated loan market is expected to continue today's trends such as: refinancings, repricings and dividend recaps. With purchase price multiples moving up, we may also see portfolio exits, while public-to-privates may see more demand for new money deals. On the corporate M&A side, we have seen situations with Unilever, Akzo Nobel, NN, Accell, Q-Park and others and this is expected to continue.

Innovation is in the DNA of the Dutch syndicated loan market. With Philips concluding the first sustainable syndicated loan, we expect many more to follow. Other innovation topics are blockchain payment processing for Agents, automated tools for CP checking and artificial intelligence and machine learning to process large and standardised documents.

LMA assisting development

In April 2016, the LMA held its inaugural training day in Amsterdam. With well over 100 people attending, the training was a success and there appeared to be large demand for such sessions in the Dutch market. Many well attended events have since followed with many more in the pipeline. The LMA training

programme is especially useful for new entrants into the loan market. The e-learning programme, webinars and training days provide an introduction to fundamental lending concepts.

The LMA has developed LMA template documentation for Pan-European Private Placements, assisted by a working party which included Dutch market participants. The documentation is based on LMA syndicated loan documentation, adapted for the Private Placement market.

While the Dutch corporate market builds on the LMA templates, sponsor deals are seen to use their own (LMA based) precedent documents or a blend of market precedents, and hence deviate more from the standardised documentation.

With English Law and Dutch Law easily interchangeable, most international law firms active in the Dutch market and the LMA actively supporting the Dutch market, it is very much open for business. This is further evidenced by the number of Lenders in the Dutch syndicated loan market, which is 10% above the 2007 pre-crisis level and 70% above the 2009 crisis level[1]. ■

1.Dealogic

Nordics

Rickard Bosson-Berg,
Head of Syndicated Loans, Debt Capital Markets – Handelsbanken

Greatest challenge impacting the syndicated loan market and H2 2017 market outlook

We believe pricing has generally been stable (ceteris paribus) even though we have seen some, albeit weak, upward pressure in the cross-over-with-limited-ancillary-business segment in the Nordic area. Most new benchmark transactions in Continental Europe seem to have marginally more borrower friendly terms. However since 2015 very little has really changed for the strong Nordic investment grade borrowers with a global presence and a thick wallet. Since the early 90's the volatility in the investment grade Nordic syndicated loan market has been very limited, despite an unruly world with a number of external shocks and high volatility in the bond market. The main reasons for this stability were strong confidence in the banking system, loyal banks in relationship defining transactions rather than short sighted asset investors and the lack of mark to market valuations in the lending books. The only exception was the 2008 crisis, when the banking system had severe problems and lost a lot of investor confidence, which in turn increased funding costs or in some cases cut funding. Then things happened fast and margins and fees went sky high immediately. That could happen again.

Historically, we have seen a medium to strong and persistent correlation between lending margins to investment grade borrowers and banks' funding costs in the Nordic area. What we cannot, by definition, foresee, is the black swan, but supposing it to be something that affected the loan market, I imagine it will be something that has a significant impact on investors' faith in the banking system. An increase in lending margins will be instant should this unusual bird appear.

Syndicated deals with a high proportion of Nordics banks tend to be at higher pricing recently. The main reason for this is that most Nordic banks are fully compliant with the Basel III regulations per 2019, as opposed to most of Europe, where banks are compliant at current requirements i.e. lower, as Basel III capital requirements are increasing over the years. In addition, the Swedish and the Norwegian FSA have both required extra capital on top of Basel III requirements. This means that our internal charges are higher than most of our non-Nordic competitors.

In the slow lane and in the long run, without black swans, this could possibly be interpreted that increased capital requirements will gently contribute to an upward pressure on margins etc. but so far this has been overshadowed by other effects such as large, very liquid and cheap funding markets for banks. However, eventually, higher capital requirements for banks will probably end in higher margins for borrowers.

The leveraged market's greatest challenges are the discrepancies between what the stock market is prepared to pay for corporates and what the sponsors see as a reasonable price. This is not necessarily bad for banks, who would be able to arrange and

participate in IPO financing instead, but it affects the volumes for the leveraged finance market. For the rest of the year we think the market will be stable (again ceteris paribus), but the 2017 pipeline does not seem to be flooded… The PE Funds appear to be better disciplined than they were in 2006/2007, and they seem to view the current purchase price multiples to be stretched and are hesitating to invest.

LMA assisting development

Over the past years the LMA has established unique templates for syndicated lending. By having both banks and lawyers as members, the LMA has managed to make both arrangers and investors, as well as advisors to borrowers, aware that this standard is the benchmark in our market. It is now accepted by all parties. The annual LMA event in Stockholm is a great success and it appears to be much appreciated. ■

Poland

Maciej Skorupka
Director, Team Head Structured Finance, Global Banking & Markets – Bank Zachodni WBK S.A. (Santander Group)

Greatest challenge impacting the syndicated loan market

The Polish market is being constantly challenged by two opposing forces. The first is increased costs borne by lenders (capital charges, taxes and guarantee fund fees), which affect market participants in an unequal manner. The second is constant pressure from borrowers on pricing and structures, resulting from excess liquidity and competition.

Local banks, being used to keeping all exposures until maturity, face a gradual loosening of transaction structures, especially in large cap leveraged deals that follow Western European trends. The Polish market lacks a diversified institutional investor base, as only a few non-banking institutions are interested in long-term PLN lending. For foreign institutional investors, conversion costs and limited secondary liquidity are the issues.

In corporate lending, the prevalence of syndicated transactions is visible only among the top names. It is common that even large companies prefer to take advantage of their direct relationships with banks and enter into a dozen bilateral loans instead of one syndicated facility.

Market outlook in H2 2017 and beyond

The currently observed revival of economic activity should, absent any external shocks, contribute to a positive outlook for the Polish syndicated loan market.

Large cap transactions are an irregular phenomenon in the Polish market. After a couple of long-awaited sizeable deals closed in H1, any future ones are expected to be event driven, as no clear pipeline is visible at this stage. On that basis, we anticipate a return to the usual dominance of mid-size deals.

LMA assisting development

The LMA has been actively present in the Polish financial market since 2013. Each October the Association organises an education event for its Polish and international members focusing on the latest developments in standard documentation and changes in the legal environment. LMA standard documentation is commonly used in most of the corporate financings concluded in the local market, including on Polish law governed deals and in Polish language versions. Even if banks do not use the whole template, transaction documents very often apply clauses and the structure of standard LMA documentation (facility agreements, ICA, mandate letters, NDA's and others). This market practice has been gradually developed by the presence of foreign investors and banks belonging to international financial groups, whose business, legal and risk teams needed to base the legal documentation on commonly understood, standardised clauses.

On 16 November 2016, the Polish Bank Association (PBA) launched an LMA based template of a Polish law governed multicurrency term and revolving secured syndicated facilities agreement in a Polish language version. The working group created for this purpose was composed of representatives from different banks and international law firms, with a remarkable role played by Clifford Chance Warsaw. The objective of this project was to create the most consistent and efficient transposition of the English legal terms into the Polish language and include the minimum of changes required when submitting the document to Polish law. The Polish Corporate Treasurers Association was consulted about the document. The template has not been officially accredited as an "LMA document", but it has been developed with the LMA's consent. To date, it is the most faithful transposition of an LMA facility agreement into the Polish language and Polish law.

In Poland, the LMA templates are predominating standards used to draft syndicated loan transaction documents, regardless of the law (Polish or English) chosen to govern the transaction. ■

Czech Republic

Silvie Horáčková,
Senior Associate – Allen & Overy (Czech Republic) LLP

Greatest challenge impacting the syndicated loan market

In general, the syndicated loan market in the Czech Republic is rather small in comparison with markets in other European countries. The most frequent are deals with two to five banks which take the form of club deals rather than true syndications. The greatest challenges affecting the syndicated loan market in the Czech Republic are lots of liquidity, pressure on fees, low profitability of loan providers and also less demand for financing on the borrowers' side due to the good financial condition of the borrowers and the economy as a whole. After 2015, and especially 2016, when the market saw an increased number of deals, including a large number of re-financings, 2017 has seen a decrease in the number of local transactions, with the exception of real estate finance. We have also seen a higher number of cross-border syndicated deals with Czech obligors and local assets but originated by banks outside the Czech Republic.

Market outlook in H2 2017 and beyond

We expect the second half of 2017 to be in line with the first half and with a rather limited number of refinancing volumes and new deals. We expect to see alternatives to the usual loan facilities, such as covenant lite deals, including

Loan market commentaries from around the world

Continued from page 5

Schuldschein and bonds or notes, and, within the range of loan facilities, more unsecured deals. Due to the on-going pressure on fees, the trend of increased competition among market players, potentially extended by other participants such as insurance companies and funds, is likely to continue. We expect the real estate sector to remain active. As export has always played an important role in the Czech economy, we are curious to see opportunities for export financing in territories such as Cuba, Africa and Iraq (also in light of the expected new Export Credit Agency loan agreement being prepared by the LMA).

LMA assisting development

LMA standard loan documentation represents the market standard for a number of European syndicated loan deals. Czech law documentation is very rarely, if at all, compliant with LMA standard documentation, even though term sheets regularly include a provision that the documentation will be based on the LMA standards adapted to the Czech environment. Bigger local deals are usually based on the template loan agreement prepared by the Czech Banking Association with the participation of a number of local banks and both local international and domestic law firms. This template document was drafted on the basis of the LMA investment grade agreement template and was completed in mid-2014. Even though it reflects amendments from the Czech civil law recodification in 2013, it does not include any drafting options and has not been amended since to reflect various market updates (FATCA, increased costs, modifications in screen rate, etc.). It also includes a number of clauses which market players in Western Europe would be surprised to see, such as threatening default in addition to a default and an event of default. No Czech documents have been prepared yet in respect of leveraged or real estate transactions, or finance documents other than a loan agreement. ■

Nigeria

Kofo Dosekun,
Managing Partner –
Aluko & Oyebode

Greatest challenge impacting the syndicated loan market

A major challenge impacting the syndicated loan market has been the illiquid foreign exchange market. Foreign currency loans which had hitherto been an active product of Nigerian banks have dried up and Naira syndicated loans are not very attractive due to high interest rates, which companies are finding difficult to absorb due to cost dynamics and resistance from consumers.

The scarcity of foreign currency has arisen from low oil prices (Nigeria's main foreign currency earner) over an 18 month period and a continued resistance from the Federal Government to allow the Naira to attain a realistic rate against other foreign currencies. This led to a depletion of Nigeria's revenue and foreign currency reserves and resulted in a depreciation of the Naira and a wide gap between the official Central Bank of Nigeria ("CBN") exchange rate and the actual rate at which foreign currency could be purchased. Oil production was also threatened by unrest in the Niger Delta region. In a bid to stem a free fall of the Naira and prevent speculation, the CBN introduced several foreign exchange policies, some of which stakeholders have described as lacking transparency. In response to the uncertainty in the market, FDI inflows dwindled. Nigeria was confirmed to be in a recession in 2016.

Due to the illiquidity issues in the market, Nigerian banks were unable to source foreign currency for debt/trade obligations of their customers. Foreign currency lines for banks in some cases were reduced and some banks truncated offshore bond issues. The market has also seen more facilities being restructured to avoid defaults and potential provisioning by Nigerian banks.

Market outlook in H2 2017 and beyond

Oil prices continue to hover between US$45 to over US$50 per barrel, due in part to OPEC's restriction on output, reduction in shale production in the US, and increased local oil production, due to better security in the oil producing areas. This has led to an increase in Nigeria's

foreign currency reserves. Ongoing policy interventions by the CBN, which have implicitly led to a devaluation of the Naira to exchange rates that will attract investors, e.g. the establishment of the Investor Exporter Window (willing buyer/ willing seller at agreed rates) for sale of foreign currency, have helped to improve foreign currency liquidity and the interbank sale of foreign currency within the Investor Exporter Window has increased trade volumes within the Window. Finally, a convergence of foreign exchange rates is imminent. Reports indicate that the backlog of outstanding foreign currency obligations has significantly reduced. The 2017 budget, which has been tagged a budget of 'recovery and growth' has been signed and is expected to improve government capital expenditure. Market analysts have predicted modest growth of the economy in 2Q17.

LMA assisting development

The LMA has definitely been instrumental in deepening the syndicated loan market in Nigeria. The introduction of the LMA East Africa, Nigeria and Zambia Facility Agreement, which is tailored to fit Nigerian law requirements, was well received in the market, and the use of the document for both syndicated and bilateral transactions has led to improved timelines for loan documentation and negotiations.

The LMA training sessions are also becoming increasingly popular among participants in the syndicated loan market and the updates assist with keeping us abreast with international best practices. ■

> "The LMA has definitely been instrumental in deepening the syndicated loan market in Nigeria."

Executive Insight

Nicholas Voisey, Managing Director of the LMA, talks to Caroline Stockmann, Chief Executive of the Association of Corporate Treasurers (ACT), about the issues and challenges currently facing its members

Q: What are the main challenges facing your members at the moment?

A: First, I think it's important to provide a breakdown of our membership. The ACT has an active global network of over 7,000 treasury and finance professionals. The membership is split almost equally between three categories: corporate treasurers; financial institutions; and consultants and other organisations.

Many of the challenges and opportunities impacting our members are consistent across the market. We recently conducted a poll during our annual conference, in which the key challenges raised by members included Brexit, increased financial regulation and financial markets volatility. None of these responses are unexpected, and concerns about uncertainty in the current economic and geopolitical landscape are not restricted to our members. However, from a borrower's perspective, our members were especially worried about the time, resources and costs associated with increased regulatory burdens, and these concerns were emphasised at the SME level.

More recently, our members commented on the cost and resource strain resulting from stricter compliance frameworks, and particularly in relation to carrying out "know your customer" (KYC) and "anti-money laundering" (AML) checks, given that the borrower is required to complete these. Other key concerns raised included the quality of financial and business data, banking reforms more broadly, and tax burdens and fiscal policy.

Interestingly, when we ask our members which topics they would like discussed further at our events, the main topics include cybercrime and developments in FinTech. However, neither of these results scored particularly highly within our survey; this indicates that members expect these to be a challenge in the future, but are either less concerned about their impact or unsure of the impact they may have on their business.

Q: You mentioned that Brexit was a particular concern for your members, and this is an area in which the LMA is particularly active. What are the main issues you see for your members, and what opportunities and challenges do you think Brexit presents?

A: It's impossible to say exactly what the impact of Brexit will be on our members until we have

more information on what form the negotiations will take. However, the potential loss of passporting rights arising from Brexit is a particular concern for both lenders and borrowers. Cross-border lending, facilitated by these passporting rights, provides borrowers across Europe with wider access to capital. Where these rights are not protected, or accounted for in some other respect, going forward, borrowers will inevitably take a hit. Our members have also raised concerns about the potential impact that this may have on their ratings. I understand that many of our members are attempting to prepare for this loss of passporting by establishing subsidiaries in European countries, through which they can carry on their treasury business.

One further issue which our members face is uncertainty regarding the continued validity of legal contracts already in place. In this respect, the ideal outcome from negotiations would see consideration given to grandfathering provisions, coupled with arrangements in place to ease the transition and allow parties more time to accommodate any legislative and regulatory changes. Ultimately, and this brings me back to my point about market volatility, the focus should be on facilitating the free flow of capital between the EU and the UK, and giving institutions time to adjust.

Another area which has caused concerns for borrowers, and this is not necessarily related to the loan product, is the ongoing 'war for talent'. Potential immigration changes could see borrowers facing a shortage in specialist roles, such as technology and engineering. There is

"The potential loss of passporting rights arising from Brexit is a particular concern for both lenders and borrowers."

Executive Insight

Continued from page 7

no clear resolution to this, as establishing a subsidiary would mean that talent remains concentrated within particular jurisdictions. We would therefore hope that the UK continues to allow corporates to access European talent, although this remains to be seen.

Finally, irrespective of the outcome of negotiations, it is inevitable that our members will incur costs as a result of Brexit. The ideal position would feature low, if any, barriers to immigration, tariffs maintained at zero, grandfathering of contracts, and the implementation of some equivalent of passporting. The fear in this respect is that information will continue to be kept to a minimum, fuelling volatility and uncertainty in the market, or that the negotiations will result in a complete failure.

Q: Do you believe the relationship between lenders and borrowers is changing and, if so, in what way?

A: It's important to bear in mind that the loan product is unique in the sense that pricing is determined by relationship, as well as risk. In this respect, loans are essentially a loss leader for many institutions and exist for the purpose of attracting ancillary business. The implications of this approach can vary by geography; in the US, banks are more willing to lend, whereas in Europe there is more pressure to justify returns on ancillary business.

Competition is also increasing, particularly from the lenders' perspective, with numerous new entrants appearing since the financial crisis, which allows corporates to be more selective when choosing lenders. This competition is healthy from a borrower standpoint and has resulted in competitive pricing in many markets, resulting in a general abundance of liquidity in the bank lending market. Corporates are also becoming increasingly experienced in managing their own risks, and are more willing to diversify their borrowing by accessing alternative markets. It is here where the importance of a strong borrower/lender relationship can tempt the corporates to maintain the more traditional relationship.

Q: Do you anticipate that technology advances will have an impact on the borrower/lender relationship?

A: It appears inevitable that technology will play a key role in defining parties' relationships and responsibilities going forward. Within the market, we are already beginning to see examples of FinTech companies trading with each other, and this activity threatens the traditional borrower/lender relationship. I mentioned previously that the loan product is priced for relationships, but it is difficult to see how this can be maintained where lending takes place online. In this respect, we could see prices increasing, as these untraditional lenders no longer choose to rely on ancillary business as criteria for lending.

While developments in technology will undoubtedly increase uncertainty in the market, there is also significant potential to improve efficiency. The emergence of digital currencies and distributed ledger technology (DLT) can particularly have an impact, and many of our members stated that they expect to see transactions incorporating DLT occurring within the next five years. Private placements could also be maintained using blockchain. Therefore, while the rate of advancement can be intimidating for borrowers, there are also a number of opportunities associated with technological developments, and these could see the borrower/lender relationship becoming more seamless in the future.

Q: I believe we both agree that the loan is, from a lender's perspective, highly competitive. Do you think borrowers appreciate this?

A: Borrowers do, of course, appreciate this, but the competitive nature of the market can be mutually beneficial. It is still widely seen that participation in the loan gives banks a place at the table for the more valuable business, so lenders continue to see value in the form of ancillary business. Borrower selection can also facilitate stronger relationships between lenders and borrowers, which will only serve as a benefit as new, less traditional, players enter the market.

The competitive nature of the market has also given rise to more sophisticated borrowers, which can ease the negotiation process given that both parties are operating on a more level playing field, and can appreciate what is expected of them. In this respect, disintermediation is back on the agenda, and this is facilitated by technological advancements and standardisation in market practice and loan documentation. ■

“ ”

Corporates are also becoming increasingly experienced in managing their own risks, and are more willing to diversify their borrowing by accessing alternative markets.

“ ”

While developments in technology will undoubtedly increase uncertainty in the market, there is also significant potential to improve efficiency.

Brexit and loan documentation – post Article 50 and the UK election

Following the delivery of the UK's Article 50 notice and the unexpectedly inconclusive UK election result, Matt Dunn and Phillip Souta of Clifford Chance examine what this means for the Brexit process and the implications for loan documentation and the LMA's documentary response.

Matt Dunn
Partner – Clifford Chance

Phillip Souta
Partner – Clifford Chance

The current state of play: a recap of where we are in the process and what is to come

Significance of Article 50 notice

The UK's delivery on 29 March of notice to the European Council under Article 50 of the Treaty on European Union of its intention to leave the European Union started the process which will result in the UK leaving the EU. Its significance is that Brexit is no longer something that may well happen, but has become something that, in the absence of an exceptional event, *will* happen, probably by late March 2019.

However, the Article 50 notice has not in itself changed the status quo: the UK currently remains a full member of the European Union, all the rights and obligations of EU membership remain in force and the shape of the UK's future relationship with the EU remains uncertain.

Significance of the UK election result

The inconclusive outcome of the UK election on 8 June 2017 has not so far called the UK's departure from the EU into question but has increased the uncertainty surrounding the UK's preferred form of that departure. Whilst the main political parties are committed to delivering the UK's departure from the EU, it is questionable whether there is a majority in the House of Commons for any one particular type of approach: in terms of domestic UK politics this means that the debate as to what Brexit should look like – be that staying within the single market or the customs union, moving to an EFTA/EEA model, leaving the EU with no deal or something else – may not be over.

What's next?

Delivery of the Article 50 notice started a two year period under the Treaty on European Union. During that period the EU and the UK must attempt to negotiate a withdrawal agreement. The Treaty provides that the UK will leave the EU on the earlier of: (i) that withdrawal agreement taking effect; and (ii) the end of that period – 29 March 2019. Extension of that longstop date requires agreement between the UK and each EU member state.

What will the exit negotiations cover?

Negotiations began on 19 June 2017 with agreement that priority would be given to agreeing the terms of the withdrawal agreement covering: (i) the status and rights of citizens: (ii) payments due on the UK's departure; and (iii) the EU's new external borders, before any discussion of a long-term agreement governing the trading and other relations between the UK and the EU after the UK's departure from the EU. That long-term agreement would include matters discussed below which are of importance to lending documentation such as mutual recognition of judgments and financial passporting.

Depending on progress on the terms of the withdrawal agreement – and each of the three issues outlined above pose significant challenges – it seems possible that negotiation of the terms of any long-term agreement governing the trading and other relations between the UK and the EU (and the process of any necessary ratification of those terms by each EU member state and the European Parliament) might continue after the UK's departure from the EU.

What if there is no long-term agreement in place by the time of the UK's departure?

If there is no long-term agreement in place transitional arrangements may be needed to avoid a "cliff-edge": the idea being that these might be more straightforward to agree and ratify by virtue of being time limited. Negotiations on transitional arrangements could, to the extent consistent with WTO rules, be included as part of the exit negotiations but there is no guarantee that they will be any less difficult than a long-term agreement.

What else needs to happen?

In parallel with the exit negotiations both the UK and the EU need to prepare their laws both for the UK's withdrawal and for any transitional arrangement and subsequent long-term agreement: the volume and complexity of EU law will make the domestication of EU law a difficult task, which will be further complicated by the effect of the UK's continuing relationship with the EU on the policy choices required.

The UK must also address its future relations with third countries, particularly where those relations are currently conducted under agreement between that third country and the EU (such as EEA member states and Switzerland).

> "Delivery of the Article 50 notice started a two year period under the Treaty on European Union."

Brexit and loan documentation – post Article 50 and the UK election

Continued from page 9

The form of the post-Brexit landscape may well remain opaque until we are nearer the end of the negotiation process than its beginning.

What does all this mean?

The UK's Article 50 notice makes the UK's departure from the EU and the associated negotiations on both withdrawal terms and on-going relations with the EU a near certainty, despite the UK election result. What neither do is to make the likely outcome of those negotiations any clearer: the form of the post-Brexit landscape may well remain opaque until we are nearer the end of the negotiation process than its beginning.

Implications for loan facility documentation and the LMA's documentary response

Introduction

These uncertainties mean that it continues to be difficult to assess implications for loan documentation or to make sensible adaptations. Potential pressure points are discussed below, but it is important to note that the Article 50 notice adds little to the analysis, which remains much the same as in the aftermath of the UK referendum vote.

Governing law

The governing law of documentation in the EMEA syndicated loan markets over the last 20–30 years has, in very general terms, been English law for most large international transactions: a choice based on the perception that English law is suited to financial transactions between commercial parties because of its emphasis on upholding and respecting parties' commercial bargains. This, of course, is reflected in the majority of the LMA's facility documentation. To a certain extent New York law has been used for the same reason (usually where the US is a relevant jurisdiction, for example, because of a New York listing). The borrower's local law may be used in more domestic transactions.

Nothing about the UK's withdrawal from the EU will affect this position or is likely to affect the attractive nature of English law for financial contracts. Under the Rome I Regulation the courts of other EU member states are required to give effect to express choices of law: this will continue to apply to the choice of English law following the UK's withdrawal from the EU.

Jurisdiction and enforcement

Similarly there has tended to be a preference for submission to the jurisdiction of the English courts: a choice based on the perception of their commerciality and relative speed in resolving financial disputes, as well as the natural tendency to align governing law and jurisdiction. Nothing about the UK's withdrawal from the EU will affect this position.

Another advantage that currently attaches to the jurisdiction of the English courts is that a judgment of the English courts is enforceable across the EU under the Brussels I Regulation. That may cease following the UK's withdrawal from the EU as the extent to which an English judgment will be enforceable in an EU member state following the UK's withdrawal from the EU will depend on the terms of the long-term agreement between the UK and the EU. At one end of the spectrum is the absence of agreement on enforcement of judgments: that would leave English judgments in the same position as, for example, New York judgments, whose enforceability in an EU member state depends on the domestic law in that state. At the other is agreement on EU-wide automatic recognition of English judgments. In the middle are a variety of intermediate positions: an example being UK accession to the Hague Convention, which would provide for recognition of judgments of the English courts under exclusive jurisdiction clauses.

The importance of this risk on current transactions will depend on where the Lenders are likely to want to enforce the facility agreement, but jurisdiction of the English courts is not something that seems to be being routinely altered on lending transactions.

References to the EU in documentation

There are a number of references to the EU and to EU legislation in the LMA's facility documentation. Those references to the EU as a geographic area (such as in descriptions of states whose sovereign debt is deemed a cash equivalent investment) have been updated to expressly include the UK. References to EU legislation are more difficult and it is likely that these can be most sensibly addressed when the new legislative landscape becomes clearer.

Article 55 BRRD

Article 55 of the BRRD requires EU financial institutions to include clauses in their non-EU governed law documentation recognising the potential bail-in of their liabilities in the event of their resolution by regulators .

Following the UK's withdrawal from the EU, EU financial institutions may be required to include these provisions in English law documentation on the basis that it will then be governed by a non-EU law. (The reverse might also apply under English law so that English financial institutions may be required to include similar provisions in any non-English law contract).

Currently there appears to be little desire among financial institutions generally to include these provisions in lending documentation governed by the laws of an EU state or by English law. This is likely to be due to a combination of: (i) absence of a current requirement to include these provisions in contracts governed by these laws; (ii) expectations that the terms of the long-term agreement between the UK and the EU (or any transitional arrangements) will mean that the requirement will not be triggered; and (iii) hopes that lobbying efforts around Article 55 BRRD mean that its scope may be reduced more generally.

Lending restrictions and the LMA Designated Entity Clause

Some EU jurisdictions restrict lending by unlicensed entities. Many UK-based lenders have relied on EU "passporting", which allows

“ ”

It is important to appreciate however that a designated entity clause is no panacea for a potential loss of passporting.

them to lend into those jurisdictions by virtue of being UK regulated. Although the LMA and the banking industry generally have made particular efforts to stress the important benefits both to the UK and to the wider EU of preserving UK institutions' freedom of access to the European financial markets, the risk of a loss of passporting has led to increased focus on institutions' ability to restructure their lending obligations under facility documentation.

LMA facility documentation already provides significant flexibility: lenders are able both to change their lending branch (referred to as a "Facility Office") and to transfer their position to affiliates without borrower consent. However, in recent years, additional flexibility has been provided on some transactions through use of a so called "designated entity clause" and the LMA has recently published a form of designated entity clause in response to increased market demand following the UK referendum vote.

It allows a Lender to nominate an affiliate to be on stand-by to take over the lending obligations in respect of specified utilisations (for example, loans to a specified borrower) and the corresponding repayment right. By contrast with a conventional transfer, the Lender retains voting rights, the wider commitment, the obligation to lend to other borrowers and administration of the lending position. In effect, it provides an expedited means of transferring specific lending obligations at short notice and can provide useful flexibility to a lending group, particularly if there is a wide range of potential borrowers under a facility or uncertainty as to future regulatory requirements.

It also contains provisions which address a number of the associated complications for facility agents. These include: (i) optional provision for payments to the affiliate to be made through the relevant Lender; (ii) requiring drawdown notices to be sent to the Lender and not the affiliate; (iii) requirement that affiliates be on-boarded for the Agent's KYC purposes; and (iv) optional provision for payment to the Agent of an appointment fee and a numerical limit on the number of affiliates per Lender.

It is important to appreciate however that a designated entity clause is no panacea for a potential loss of passporting and that it simply provides an extra level of flexibility that may be helpful to some institutions in some circumstances. Most obviously it will only be potentially helpful to institutions which have a suitable locally licensed affiliate in at least one EU member state which is capable of assuming lending obligations. Secondly, the extent to which an affiliate taking over specified lending obligations without a transfer of the lending position as a whole will suffice for local licensing purposes will need to be assessed in each case. ■

LMA Events Programme H2 2017

September

12 September
LMA/APL REF Quarterly Series, London

13 September
Early Evening Seminar, Madrid

19 September
Syndicated Loans Conference, London

26 September
Edinburgh Training

26 September
Dublin Seminar

27 September
Dublin Training

28 September
Moscow Training

September TBC
Early Evening Seminar, London

October

4 October
Early Evening Seminar, Amsterdam

5 October
Warsaw Training

10 October
Early Evening Seminar, Brussels

10 October
Early Evening Seminar, Munich

12 October
Milan Training

16 – 20 October
Certificate Course, London
£1,850 + VAT

31 – 2 October/November
African Loan Documentation Course, Johannesburg
£750 + VAT

31 October
SA Quarterly Series, Johannesburg

November

1–2 November
Syndicated Loans Course for Lawyers, London
£950 + VAT

7–10 November
Loan Documentation Certificate Course, London
£995 + VAT

9 November
LMA/APL REF Quarterly Series, London

9 November
Paris Seminar

15 November
Early Evening Seminar, London

15 November
Regional Training, Birmingham

15 November
Middle East Syndicated Loans Conference, Dubai

16 November
Regional Training, Manchester

22 November
Early Evening Seminar, Frankfurt

29 November
Investment Grade Documentation Training, London

30 November
Leveraged Documentation Training, London

December

1 December
Leveraged Intercreditor Training, London

6 December
Early Evening Seminar, London

KEY

- Conferences
- Courses
- Early Evening Seminars
- Seminars
- Training

Documentation update

Documents & Guidelines homepage:
www.lma.eu.com/documents-guidelines

Loan documentation remains one of the LMA's core functions. This includes not only the publication of new document templates, but also an ongoing review of the existing suite, across all relevant sectors and geographies.

In the last six months, the LMA has expanded its suite of documentation, with the publication of: (1) a mezzanine finance guide for use in leveraged acquisition finance transactions (to be replicated for the real estate finance (REF) market in the coming months); (2) publication of a recommended form of designated entity clause for use in the LMA's senior facilities agreement for leveraged acquisition finance transactions and the investment grade primary documentation; (3) a security agreement for use in REF transactions; (4) a new German law and German language term sheet for use in REF multi-property investment transactions; and (5) a South African law confidentiality agreement. We have also begun work on production of an ECA buyer credit facility agreement and an intercreditor agreement for use alongside combined unitranche and bank lending transactions. Finally, work continues in respect of a fronted underwriting agreement for leveraged deals.

In terms of ongoing review of existing documents, in November 2016, a revised leveraged facility agreement was published, incorporating a large number of amendments. These amendments resulted from an in-depth review of the document by the leveraged working party from both a legal and market practice perspective. They included:

- an option providing for free transferability by lenders to pre-approved entities (otherwise known as a "white list");
- an option for the establishment of additional term loan facilities (referred to in the leveraged document as "incremental facilities");
- various general updates in response to market developments, including:
  - reflection of international financial reporting standards requirements in the presentation of accounts;
  - expansion of the borrower's obligation to provide documentation for "know your customer" (KYC) purposes on a change of status/shareholders to such changes affecting non-obligor holding companies (this was to address the possibility of lenders being required to refresh KYC checks on a change of status of an obligor's holding company which is not itself an obligor);
  - expansion of "all lender consent" matters to cover changes to the drawdown timetable, changes to the illegality clause, and obligor accession/resignation mechanics;
  - updating of the jurisdiction clause to reflect the superseding of the Lugano Convention 1988 by the Lugano Convention 2007;
  - expansion of existing sanctions footnotes to representations and undertakings to address the question of amendment of any sanctions provisions;
  - expansion of the commercial provisions addressing litigation to more expressly cover the making of judgments;
  - redrafting of transfer fee provisions to clarify the transfer fee is only disapplied on transfer to the transferring lender's affiliate/related fund and not to any affiliate or related fund;
  - clarification that the acceleration provisions themselves do not require security to be enforced by way of notice to the borrower;
  - clarification of voting on an operation of the pro rata interest clause (i.e., to make clear that a lender which has transferred its entire commitment but remains entitled, pursuant to the pro rata interest provisions, to receive its share of interest on the following interest payment date, does not have voting rights);
  - a reformulated reference bank rate definition to reflect the new ICE LIBOR submission methodology;
  - the inclusion of protections to address the new UK persons with significant control regime (which is relevant where security is taken over shares in UK companies);
  - a change to the disposals restriction to clarify that the permission relating to an exchange of an asset for a superior or equivalent asset does not include the exchange of a non-cash asset for cash;
  - the removal of alternative reference banks;
  - a clean-up for permitted acquisitions;
  - guarantor resignation (i.e., addition of an option preventing the resignation of specified guarantors);
  - an option to exclude mezzanine fee letters from the senior CPs, and
  - the streamlining of certain tax provisions.

Many of these revisions (as considered appropriate) have also been made to the LMA's REF, Super Senior and PXF templates.

In addition, as part of its ongoing review of other documents, the LMA has published revised versions of its:

- Secondary Terms and Conditions, removing the Pricing Panel mechanism for resolving disputes over the reasonableness of the BISO purchase price. Instead, the Terms and Conditions will require the party entering into the substitute transaction to do so on arm's length terms and in good faith. In addition, the purchase price for the substitute transaction must be reasonable in the circumstances; and
- German, French, and South African law investment grade templates and other local African law loan templates.

We have also updated our investment grade documentation to reflect current market practice, and are updating our developing market templates to include enhanced anti-bribery and anti-corruption provisions, basic sanctions definitions, fixed rate interest language and a letter of credit option. Finally, we are also producing a rider for our private placement documentation, to include provisions likely to be required if the document is to be entered into by US investors as lenders. ■

Spotlights

Video interviews on topical issues impacting the loan market

"Spotlights" are a series of video interviews on topical issues impacting the loan market.

All the following spotlights can be accessed via the LMA website: www.lma.eu.com/legal-regulatory/spotlights

From left to right: Kam Mahil – LMA and Toby Mann – Clifford Chance

From left to right: Matthew Dunn – Clifford Chance and Kam Mahil – LMA

Released on 12 July 2017

Spotlight on restructuring and insolvency reforms in Europe and the Netherlands

Video interview with Niek Biegman, Partner at De Brauw Blackstone Westbroek N.V., which considers reforms to the restructuring and insolvency frameworks in the EU and the Netherlands.

On 27 April 2017, the LMA published a recommended form of designated entity clause and users guide.

Released 1 June 2017

Spotlight on the LMA's recommended form of designated entity clause

Video interview with Mark Campbell, Partner at Clifford Chance LLP, which considers key aspects of the LMA's designated entity clause. In particular, the interview discusses the reasons behind the production of the clause, how it works, how operational issues are dealt with and the limitations of the clause.

On 18 November 2016, the LMA published revised versions of its documentation for leveraged acquisition finance transactions.

Released 28 November 2016

Spotlight on the LMA leveraged documentation: key recent changes

Video interview with Matthew Dunn, Partner at Clifford Chance LLP, which considers the key changes to the leveraged documentation. The interview focuses on the addition of: (i) the option for a pre-approved lender list in respect of lender transfers; (ii) the option for the establishment of incremental facilities; and (iii) provisions in respect of the new PSC register regime in the UK. It is recommended that members watch this interview as well as review the revised versions of the LMA leveraged documentation to aid their understanding of the key changes.

Released 6 June 2016

IFRS 16: The impact of new lease accounting standards on loan agreements

Video interview with Toby Mann, Senior PSL at Clifford Chance LLP, on the impact of IFRS 16 on loan agreements. The interview includes commentary on the recent changes made to the LMA template facility agreements in respect of IFRS 16.

Released 9 May 2016

European cov-lite loans: key structural issues

Video interview with Christopher Kandel, Partner at Latham & Watkins LLP, on the key structural issues that can arise with European cov-lite loans. The interview includes commentary on the type of features that have been incorporated into European cov-lite loans, how US law has influenced US loan terms, and the extent to which structural issues are being reflected in documentation.

Released 11 January 2016

Article 55, BRRD: Contractual recognition of bail-in

Video interview with Mark Campbell, Partner at Clifford Chance LLP, on the Article 55, BRRD requirement. The interview includes commentary on the LMA recommended form of bail-in clause and also considers the impact of the PRA announcement of its modification by consent of the contractual recognition of bail-in rules.

Loan investors: be wary of transfer traps

By the Xtract Legal team

73%

Percentage of 2017 Loans containing express industrial competitor restrictions.

Background

In recent times, European leveraged loans[1] have been rife with borrower friendly terms. Be it term loans with no maintenance financial covenants (nearly 80% of 2017 Loans are cov-lite), ultra-loose incurrence covenants of loans that effectively are 'HY bonds in disguise' (in over 30% of 2017 Loans) or the dramatic increase in "portability" carve-outs in change of control (in nearly 20% of 2017 Loans). Within this deluge of aggressiveness, this article drills down on one particular area of much practical concern to investors: transferability (or rather, the lack thereof).

Restrictions on transferability are on the rise. This piece is to alert you to such documentary traps.

Industrial competitor restrictions

A key area of concern is industrial competitor restrictions.

'Industrial Competitor' restrictions typically prohibit the transfer of loan participations to a 'competitor' without the consent of the borrower/parent (given or denied in its absolute discretion).

As many as 72% of 2016 Loans and 73% of 2017 Loans contained express (and often expansive) industrial competitor restrictions.[2] A vast majority (more than 90%) were sponsor-backed.

The figures reveal that the presence of a competitor restriction is now a standard feature. But what of its extent? And what traps should you watch out for?

The main issues are:

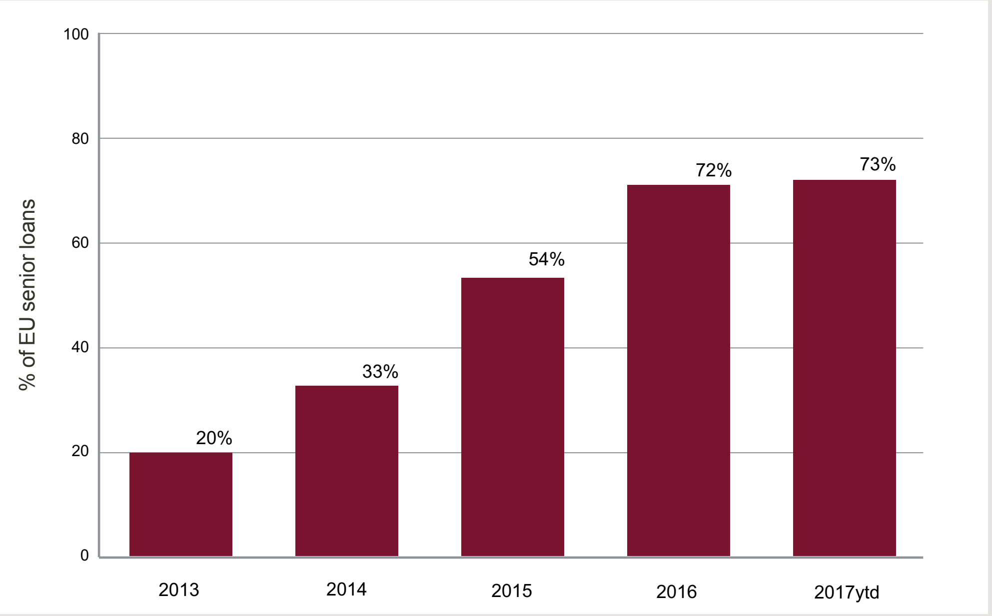
1. Who is a competitor?

'Competitor' will be generically described (rather than named companies) as: entities that compete "in any material activities" or have a similar business with the borrower group.

The term 'competitor' may include entities other than the direct trade competitors. For instance: the defined term commonly includes affiliates of a competitor, including its controlling shareholders. Even persons who would generally not be regarded as competitors, such as suppliers or sub-contractors of the borrower group, may get swept up in the restriction. Very aggressive deals go so far as to include any private equity house competing with the borrowing group's sponsor, as a 'competitor'.

> The term 'competitor' may include entities other than the direct trade competitors.

Competitor restrictions in EU senior loans



In some deals, an effort has been made to rein in the breadth of this definition by including carve-outs – again, the scope of the carve-outs varies. Commonly seen exceptions are independently managed debt funds of the broadly defined competitor group and banks.

2. Will the competitor restriction fall away after a default?
In over 70% of the 2016 Loans and around 63% of 2017 Loans which had competitor restrictions – NO. The second, but not insignificant, pitfall is that the competitor restriction stays put even after an event of default.

In the 2017 Loans where the competitor restriction did cease to apply post default, in more than 20% the fall away was only after certain (not all) events of defaults.

Blacklist/distressed investors

Disallowed transferees may include not only competitors, but also other specific named lenders or a particular category of lenders. The argument of borrowers (often the ones backed by strong sponsors) is that such measures of syndicate control are required to avoid assignments to 'difficult' lenders.

This transfer block is seen in two ways in European loans:

1. by the borrowers producing a 'black list' of entities which are ineligible to become lenders (a concept adopted from US leveraged loans which contain a disqualified/excluded lender list[3]), or

2. more commonly, a specific restriction on transfers to 'distressed funds', 'loan-to-own' funds or to any 'hedge fund' (term undefined). These restrictions crept into a sizeable number of loans in 2016. And this number only grew in 2017.

Distressed debt funds etc.
Around a quarter of 2017 Loans required the borrower's consent for a transfer to a distressed debt fund, loan-to-own or hedge funds. Typically, such consent can be refused without reason (i.e. in borrower's sole discretion). However, this borrower consent requirement ceases to apply after some form of event of default. In around half of the 2017 Loans with this restriction, it fell away only if a certain fundamental default was continuing (e.g. payment default or insolvency) – not on the occurrence of other events of default. Notably, the consent requirement remains if there is an event of default under the cross-default/cross-acceleration provision: in reality, breach of that can be the first trigger of impending distress.

This is an issue ripe for push-back. Such an oppressive transfer restriction should fall away as soon as a default occurs.

"Distressed/Loan-to-Own Funds" may or may not be defined. Where defined, it is commonly "any person whose principal business or material activity is in investment strategies whose primary purpose is the purchase of loans or other debt securities with the intention/view of owning the equity or gaining control of a business". Often, affiliates or related funds of existing lenders (to whom typically participations can be sold without consent) that would fall within the above definition of "Distressed Fund/Loan-to-Own Fund" will also be included in the restriction i.e. consent will be required to transfer to such entities even though they are affiliates/related funds of existing lenders.

Both the above blocking mechanisms are still only in a minority of European loans – but a sizeable minority nevertheless. And their prevalence could increase. As the presence of non-bank lenders/investors in European leveraged loans increases, so too, may the focus of sponsors/borrowers on disqualifying unwelcome investors increase to ensure syndicate control.

Sub-participation restrictions

Sub-participations are behind the scenes methods of transferring credit risk.

Conventionally, loan documents have imposed restrictions only on transfers and assignments, and not on sub-participations. The rationale is that sub-participants do not become lenders of record and do not have a direct relationship with the borrower. The LMA leveraged acquisition finance documentation follows this approach.

Borrowers, however, want to avoid the influence of unknown third parties on lender syndicate voting.

In some recent loans, the scope of transfer provisions has expanded to include restrictions on the granting of sub-participations (or similar means of risk allocation):

1. The most common control is requiring that sub-participations in which voting rights pass, are treated in the same way as a change of the lender-of-record by a transfer or assignment (e.g. borrower consent is required subject to exceptions).

"Around a quarter of 2017 Loans required the borrower's consent for a transfer to a distressed debt fund, loan-to-own or hedge funds."

Loan investors: be wary of transfer traps

Continued from page 15

> An insidious (possibly underappreciated) impact of the dramatic growth of cov-lite is that it may get significantly harder for a default to be triggered.

2. Starting from the second half of 2016, a handful of loans have gone further by legislating a more restrictive regime: unless the sub-participant is a person to whom such rights could be transferred under the consent/ deemed consent/consent exception regime, in a sub-participation the lender of record is required to retain exclusive control of its rights in relation to the participations, free of any agreement or understanding to even consult with the sub-participant as to exercise of voting rights.

Consent

The LMA recommended form provides consultation and consent options for transfers/ assignments. The first option envisages that the borrower must be consulted before a transfer is made. The second is that the borrower's consent is required, unless the new lender is named on the pre-approved list of lenders (the 'white list') or falls within another exception.

A vast majority of 2016 Loans and 2017 Loans (97% of 2017 Loans) utilised the second option – consent of the borrower is required for transfers/assignments. Out of such loans, around 16% in 2016 and similarly 16% in 2017 did not have a white list. The absence of a white list is an off-market omission.

Deemed consent/reasonableness requirement

In loans with a consent requirement, it is standard to have a provision deeming such consent granted if the borrower does not object within a certain time period (usually five business days). Further, it is also a standard provision that such consent not be unreasonably withheld by the borrower.

However in 2016, we did see a handful of loans, where the above 'transfer-easing' mechanisms were omitted. In 2017, more than 15% of 2017 Loans with a consent requirement excluded the deemed consent requirement.

Post event of default

Lenders will want any level of control of the borrower over secondary trading to cease if any event of default is continuing. This is also the point at which borrowers are likely to be more concerned about the identity of their lenders. Accordingly, a lender's right to transfer is being weakened by limiting the fall-away of the consent requirement only to material events of default (e.g. non-payment, financial covenant breach and insolvency).

Conclusion

Although often regarded as 'boiler-plate' or standardised, the transfer provisions are a sensitive and important area deserving closer scrutiny by lenders, especially in the current market where the balance of bargaining power is firmly held in the hands of borrowers.

An insidious (possibly underappreciated) impact of the dramatic growth of cov-lite is that it may get significantly harder for a default to be triggered. This could result in investors being stuck in a deteriorating cov-lite loan (which lacks the early warning of a financial covenant default) – unable to extricate themselves (other than by selling to white list entities or to other existing lenders and related parties) until a payment default or an insolvency occurs.

European leveraged loan investors: be wary of, and strongly resist documentary traps that impede your freedom to sell down. ■

1. Data in this report is based on syndicated European law governed senior facilities agreements reviewed by Xtract Research. The statistics are primarily derived from term loans (minimum €200 mn) in 2016 ("2016 Loans") and 2017 year-to-date ("2017 Loans"). In some cases, the data is derived from draft documentation posted for the syndicate. Unless otherwise stated, the data does not include 'Yankee Loans' (i.e. NY law credit agreements entered into by European borrowers). Statistics in this report for 2017 are as at the date of writing (mid-May 2017).
2. The LMA recommended form of assignment and transfer language (and the established market position) is that existing lenders may assign or transfer their rights to "a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets". There is an argument that this language has the practical effect of limiting transfers to trade competitors of the borrower group.
3. A disqualified lender (black list) in a US leveraged loan would typically consist of two categories of lenders: competitors to the borrower/target and disqualified financial institutions. The latter includes those institutions identified by the borrower/sponsor that cannot buy into the loan, including so-called vulture funds and institutions that the borrower previously has had trouble with or which are notoriously difficult in negotiations. In syndication, the disqualified lender list is disclosed to the arrangers. Typically, the list of competitors can be updated from time to time but the list of other disqualified lenders cannot be updated after closing.

Elazig hospital PPP: how the EBRD and MIGA pioneered an innovative risk mitigation scheme

The infrastructure funding gap for emerging markets is huge, estimated at around €1 trn and growing. The European Bank for Reconstruction and Development (EBRD) and the World Bank's Multilateral Investment Guarantee Agency (MIGA) have developed an innovative risk mitigation instrument, which has enabled the issuance of Turkey's first-ever greenfield infrastructure project bond.

The months preceding the financial close of the €288 mn ELZ Finance private placement of a certified Green & Social bond to finance a state-of-the-art hospital campus in the Turkish city of Elazig, in Eastern Anatolia, were hectic.

Turkey was facing a very challenging time – from terrorist attacks to the refugee crisis – which couldn't go unfelt even by Turkey's exceptionally resilient economy and its investors. Rating downgrades followed. In such an environment a robust financial structure is critical for investors.

It was against this backdrop that the EBRD, together with the World Bank's Multilateral Investment Guarantee Agency (MIGA), pioneered an innovative risk mitigation scheme for the Elazig hospital Public-Private Partnership (PPP). It combined two liquidity facilities from the EBRD and political risk insurance from the World Bank's MIGA and resulted in a project bond rating from Moody's two notches higher than Turkey's sovereign rating. The bond issue was a success and attracted international and local banks and institutional investors. The project was named "Turkish Deal of the Year" by Project Finance International, a Thomson Reuters publication.

Tapping the bond market was the main aim of Meridiam and Ronesans, two well-known global players in the infrastructure PPP market and the majority owners of the Elazig Hospital PPP consortium, when they chose to work with the EBRD and MIGA to develop an innovative funding approach for their 1,038 bed hospital complex. Although financing was available through conventional means, (indeed, the two sponsors had already reached financial close for two other hospital PPPs), they opted to turn to the bond market.

The sponsors were keen to explore new financing sources, in line with the aims of the G20 to tap new funding sources to fill the growing infrastructure investment gap in emerging markets, a gap which is estimated to range between €1–1.5 trn. Given its medium-size, Elazig financing was chosen as a test case in light of the strong global interest in Turkey's hospital facilities management PPP programme.


Elazig Integrated Health Campus Project

Ambitious hospital building programme

Tackling unequal access to health care is a key priority of the Turkish government, where the number of hospital beds falls below the OECD average. As a result, the Government of Turkey put in place the Health Transformation Programme to improve, modernise and expand healthcare services across Turkey. To achieve this aim, the Turkish Ministry of Health (MoH) with support from the IFI community, including the World Bank and the EBRD, developed the Hospital Facilities Management PPP Programme. This ambitious programme is designed to deliver up to 29 new hospital facilities totalling 42,000 high-quality hospital beds at a total estimated investment cost of €14 bn over the next several years.

The hospital PPPs under the programme are structured as design, build, finance and maintenance (DBFM) 3+25 years contracts for


Susan Goeransson
Director for Municipal and Environmental Infrastructure – EBRD


Goncalo Correia
Associate Banker – EBRD


Asli Erden Ozturk
Istanbul-based Senior Banker – EBRD

Elazig hospital PPP: how EBRD and MIGA pioneered an innovative risk mitigation scheme

Continued from page 17

facilities management. Core medical services remain under the sole responsibility of the MoH but facilities management is outsourced to the private sector. The concession contracts entail: (i) availability based revenue streams in Turkish Lira from the MoH with suitable inflation and FX protection mechanisms; (ii) a capped deduction regime for both availability and service payments; and (iii) a favourable termination compensation regime providing full coverage to lenders in all termination scenarios, including project company default, force-majeure and expropriation.

Given the robustness of the PPP structure and Turkey's long PPP history, the Elazig project was a prime candidate to test the bond market. The project company, ELZ Saglik Yatirim A.S, is owned by a consortium consisting of Ronesans Holding, Meridiam Eastern Europe S.a.r.l., Sila, TTT and Sam Yapi. RMİ Rönesans Medikal Taahhut Insaat A.S., a wholly owned subsidiary of Ronesans Holding, is the Engineering, Procurement, and Construction (EPC) Contractor of the project and Ronesans Holding will guarantee the obligations of the EPC Contractor towards the project company. Upon completion, the project company will provide hard and soft facilities management services, as well as clinical support services including laboratories, imaging, sterilisation and disinfection and rehabilitation for the Elazig Integrated Health Campus, which will serve eastern Anatolia, covering Elazig, Malatya, Tunceli and Bingol provinces, with a combined population of 1.6 mn people.

Robust financing structure

The project company was funded at an 80:20 gearing ratio for total project costs of €360 mn. Senior debt was issued in the form of bonds by ELZ Finance, the bond issuer, owned by Meridiam and Ronesans, and the proceeds on-lent to the project company under a classic issuer-borrower arrangement. The €288 mn privately placed, euro-denominated fixed rate long-term project bonds were structured in two tranches. Junior funds are provided by the Consortium through a combination of share capital and a shareholder loan fully drawn at financial close. One of the bond tranches (the Enhanced tranche) benefits from two forms of credit enhancement: (i) two unfunded liquidity facilities provided by the EBRD for the construction and operation period; and (2) political risk insurance (PRI) provided by the MIGA designed to cover currency inconvertibility and non-transferability, expropriation and breach of contract. The Enhanced tranche investors include the Japanese financial institution MUFG, Italy's Intesa Sanpaolo, Germany's Siemens Financial Services, France's Proparco, Dutch FMO and the Industrial and Commercial Bank of China (ICBC). The EBRD and MIGA joint risk mitigation support has enabled Moody's to assign an investment grade rating of Baa2, two notches above the current rating of Turkey. In parallel, the International Finance Corporation (IFC), a member of the World Bank Group, invested in the unenhanced tranche of the bond.

Vigeo EIRIS, a leading global provider of environmental, social and governance research, certified the financing as a "Green & Social" bond, indicating the environmental and social benefits of the project. The project has been structured to comply with the highest environmental and social governance standards. Moreover, Vigeo EIRIS confirmed that the issuance will contribute to the quality and efficiency of the Turkish healthcare system, access to healthcare facilities and job opportunities creation. Moreover reporting commitments are robust, increasing transparency at all levels. From an energy efficiency point of view, the project has been designed to the highest standards.

The project's design and technical specifications encompass advanced energy and water efficiency techniques going beyond market practice in Turkey and in line with best international practice. This includes advanced thermal protection, efficient mechanical and electrical systems, on-site combined heating, cooling and power generation (tri-generation), use of renewable energy and water saving techniques. The project is assessed as having a 34 per cent better energy performance than the national energy performance requirements, resulting in annual final energy savings of 68,420 MWh per annum at the operation stage or the equivalent of annual energy use by 5,500 Turkish

> Tackling unequal access to health care is a key priority of the Turkish government.

Elazig Integrated Health Campus Project

households. Water savings of 5,600 m^3 per annum are the equivalent of 2.3 Olympic size swimming pools.

Ground-breaking risk mitigation structure

An investment grade rating was critical to the bond's successful placement. Two constraining factors were counterparty risk of the contractor and the MoH. Although MIGA's political risk insurance addresses key political risk, lengthy claims periods until arbitral award resulted in a need for additional support to backstop debt service until final compensation could be paid out. Rather than provide a wrap for the entire bond, the EBRD and MIGA through the complementary features of their products were able to address key risks to provide the needed credit rating uplift, resulting in a 20 year bond, the longest for the Turkish PPP market, being placed with European and Asian institutions.

To mitigate contractor counterparty risk during the construction phase, the EBRD developed the Construction Support Facility (CSF) to complement the EPC Contractor's security package. The EBRD's facility is an unfunded liquidity facility issued in a form similar to a standby letter of credit for the benefit of the project company on behalf of the EPC contractor. The CSF can be drawn to fund any breach by the EPC Contractor of its payment obligations towards the project company under the EPC Contract, most likely to occur in the event of: (i) liquidated damages arising out of construction delays; (ii) contractor replacement costs; and (iii) senior bond recovery in case of termination due to EPC Contractor default.

To mitigate counterparty risk during the operations phase, the financing structure includes a subordinated, standby revolving facility – the Revenue Support Facility or RSF– also provided by the EBRD. The facility functions in a form similar to a debt service reserve facility, ensuring timely debt service in case of MoH default on its payment obligations. The RSF is sized appropriately to complement MIGA's PRI by servicing debt payments to bridge MoH's obligations or prepaying bondholders until the arbitration process is completed (a period which is estimated to take on average three years) after which MIGA honours its payment obligations. The RSF can be drawn to fund a default by the MoH in paying lease payments or termination proceeds, as well as the Issuer's maintenance costs to the extent necessary to maintain its going concern status. As the EBRD risk mitigation only covers counterparty non-payment risk, the RSF cannot be used to support debt payments in case of cash flow shortfalls arising from operational issues or underperformance. In the unlikely event the RSF is ever called, it will be repayable from MoH's cure payments, termination proceeds or amounts received by MIGA on a subordinated basis versus the bondholders. EBRD also shares security with the bondholders but on a subordinated basis.

Elazig Integrated Health Campus Project

Scalability potential of risk mitigation scheme

The EBRD and MIGA joint risk mitigation product is one step forward in demonstrating the commitment of IFIs to work together to address the infrastructure gap and to try to crowd in private capital. A key aim going forward will be to roll the product into other PPP markets and to promote standardisation and replication. Elazig Hospital PPP is the first project to benefit from the EBRD/MIGA risk mitigation support; this product could also work in other markets where there is counterparty risk and strong project fundamentals backed by well-defined availability based schemes and transparent termination regimes, which can include projects in the transport and power sectors. While the product was used for a greenfield project, the construction support facility and revenue support facility can be used separately, enabling the product to work for both greenfield and refinancing structures.

While other challenges remain in addressing the infrastructure gap, including poor project preparation and weak procurement, the Elazig project represents one way to address this gap to draw in new money. Moreover, the unfunded type facilities will also provide an answer to IFIs' balance sheet constraints while leveraging the participation of private market funding, much needed to cover the infrastructure financing gap.

Transaction advisors: Financial advisor and bond arranger: HSBC; Bondholders' legal advisor: Clifford Chance; EBRD legal advisor: Freshfields Bruckhaus Deringer; EBRD Turkish legal advisor: Herguner Bilgen Ozeke; and Technical advisor: Mott MacDonald. ■

“”

The EBRD and MIGA joint risk mitigation product is one step forward in demonstrating the commitment of IFIs to work together to address the infrastructure gap and to try to crowd in private capital.

Legal update

The first half of 2017 has been a busy one for the LMA, as regulatory and legislative measures and proposals continue to impact both the market and our members more generally.

Whilst it is pleasing to see that our lobbying efforts are bearing fruit, most recently with regards to the ECB's leveraged guidelines, it is still striking to see the number and variety of regulatory issues that the LMA continues to be involved in, a decade on from the onset of the global financial crisis at the end of 2007.

Here is a brief summary of some of the most recent consultations that the LMA has submitted over the last six months, as well as further detail on our regulatory work.

ECB Leveraged Guidelines

In addition to meeting with ECB representatives and attending the public hearing, the LMA also responded to the ECB's draft guidance on leveraged loan guidelines in January 2017.

Whilst we welcomed the ECB's efforts to strengthen the level playing field for financial institutions by aligning supervisory expectations and practices in the leveraged loan market, we were concerned by some of the initial proposals published in November 2016. We therefore worked with the ECB to identify areas of the guidance which would benefit from further clarification, as well as alignment with the scope and methodology of the US Guidance on Leveraged Lending. Our recommendations centred specifically around the definitions of EBITDA, Total Debt and industry exclusions.

We were pleased to see that the ECB incorporated many of our suggestions into the final guidance, published on 16 May 2017, and we hope to remain in dialogue with regulators over the coming months, with the aim of ensuring that the guidelines do not present unnecessary and burdensome obstacles for those of our members who are active in the leveraged loan market.

Brexit

The LMA has been in active dialogue with UK and European government representatives and regulators in preparation for the start of official negotiations upon the triggering of Article 50. We also formally responded to the Call for Evidence on EU Exit and Transitional Arrangements, published by the Treasury committee in February 2017.

The LMA's response set out the need for, and the importance of, transitional arrangements for the loan market following the UK's exit from the EU, to ensure minimal impact on the syndicated loan market and those participating in it.

The LMA pointed out, in particular, that the loss of the CRD passport – which covers lending – will have a major impact on some loan market activities conducted by banks in and through the UK, unless mitigating measures are agreed, including a transitional period, following exit from the EU. The LMA provided a number of statistics quantifying the current extent of cross-border lending activity to illustrate the mutual benefit of a continued relationship with respect to the loan product. In addition, we noted a number of complications that a complete severing of ties would have, both for UK-based and EU-based lending institutions.

CMU – Securitisation Regulation

In March 2017, the LMA responded to the European Commission's consultation on the Capital Markets Union Mid-Term Review. The consultation set out, amongst other things, the Commission's attempts to facilitate simple, transparent and standardised ("STS") securitisation through its proposed Securitisation Regulation. The LMA used this consultation to raise again a number of areas which required further clarification or amendment with regards to this regulation. In particular, we addressed concerns relating to risk retention and transparency requirements, particularly the proposal to increase risk retention levels from 5% to 10%, with an option for a further increase to 20% pursuant to market circumstances. In addition, we highlighted issues in relation to the additional disclosure requirements, which would have required a secondary market investor in a securitisation to make information available to its competent authority regarding the size of its investment and to which tranche of the securitisation it relates. Although the

Legal & Regulatory homepage:

www.lma.eu.com/legal-regulatory

Brexit microsite:

www.lma.eu.com/brexit

purpose of these proposals was to increase transparency in the market for the benefit of the regulators, we believed that it was difficult to see that any benefit would accrue to the market to justify the cost and time that these proposals would impose on market participants.

We are pleased to note that, following political agreement in relation to the Securitisation Regulation being reached on 30 May 2017, it has been confirmed that headline risk retention levels will stay at 5% for all methodologies. In addition, various proposals relating to investor restrictions and disclosure have been watered down, resulting in much more workable outcomes.

That said, whilst the fact that political agreement has been reached is an important milestone, the process still has some way to go, most notably in relation to the technical discussions. The LMA will remain actively involved in this process and will continue to lobby regulators, as appropriate, in an attempt to reach a satisfactory outcome.

Finally, regulators have confirmed that other proposals which form part of the CMU initiative are likely to be published towards the end of 2017 or early 2018 (including those pertaining to private placements and secondary distressed loan sales). The LMA will continue to keep abreast of these measures, and will respond to regulators as appropriate.

Anti-Money Laundering (“AML”) and Counter Terrorist Financing (“CTF”)

The LMA has submitted various responses to both UK and European bodies in relation to upcoming changes to, and the implementation of, AML and CTF regulations. Most recently, we have been in discussions with the Joint Money Laundering Steering Group (“JMLSG”), responding to its consultation on the revisions to its guidance on AML and CTF in the UK financial services industry.

Our primary concern regarding AML and CTF regulation is that inconsistencies in methodology and assessment of money laundering risk in the syndicated loan market have led to different participants viewing the same business type as having materially different risks, leading to uncertainty and inefficient use of resources, especially for institutions active across numerous jurisdictions and sectors. This has led to the imposition of needless bureaucracy on low risk businesses as well as significant delays in settling loan market transactions.

The LMA has therefore advocated implementation of a single and concise methodology by supervisors, suitably tailored for individual sectors. We have also stressed that governments should engage with global regulators to ensure better alignment of the AML regime internationally. AML and CTF are global threats, and institutions operating across jurisdictions and on cross-border transactions regularly find themselves dedicating resources to understanding the jurisdictional idiosyncrasies of their counterparts, as opposed to focusing on those areas where money laundering poses the greatest actual threat.

We believe that the implementation of AML/CFT measures, with the benefit of global consensus, would help avoid regulatory arbitrage and prevent confusion within the financial markets, allowing the effective allocation of resources to where they are most needed. Furthermore, because it may be difficult to cover off the idiosyncrasies of every individual financial product, sector and non-EU jurisdiction in which financial institutions operate within one piece of global guidance, we highlighted that it would also be worthwhile if institutions could “sense check” or pre-authorise their processes with one supervisory body, particularly in those situations when the usual requirements are not easily satisfied. If such pre-authorisation were possible, then firms would be less likely to impose unnecessarily burdensome/ impractical requirements on their low risk customers.

In order to articulate our concerns in this regard, we have met (and plan to meet with) numerous AML representatives, both from HM Treasury and JMLSG, and hope to work with them proactively in the coming months to find workable and practical solutions to AML and CTF issues.

Register of Beneficial Owners of Overseas Companies and Other Legal Entities that own UK Property

In May 2017, we responded to the UK Department for Business, Energy and Industrial Strategy’s (“BEIS”) Call for Evidence on a register of beneficial owners of overseas companies and other legal entities that own or buy UK property (the “Register”).

Our response raised a number of concerns in relation to the impact of the Register with regard to real estate finance lending and encouraged BEIS to fully consider any impact on lenders, in particular recommending a staged approach to implementation to ease the burden on the UK property market and prevent a negative impact on property transactions. We also highlighted the need to carve out genuine third party lending and security arrangements to ensure that compliance with the Register would not create any undue burden from a time, cost or administration perspective. This was on the basis that, should there be any risk of sanctions (direct or implied) against parties involved in the provision of finance on genuine arm’s length terms, this could have a severely detrimental impact on the availability of finance to the UK real estate sector.

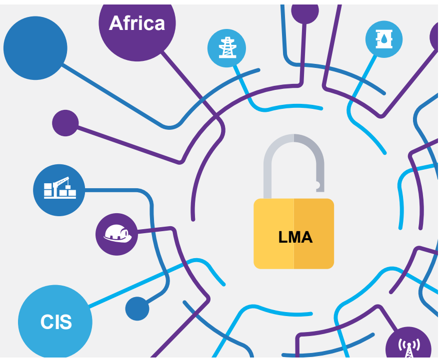
Finally, we also recommended that it would be easier and more efficient to incorporate the Register’s requirements within the Persons with Significant Control (“PSC”) regime. This would remove the possibility of inconsistency and undue administrative burden and also enable the PSC regime to be strengthened and consolidated. Furthermore, we reiterated that we continued to have specific concerns on the current form of definition of PSC (following a separate consultation to which we responded in November 2016). This earlier response centred on the impact of the PSC regime on lenders and security agents, particularly when taking security over shares as part of a syndicated loan transaction. ■

All LMA responses to consultations are available on the LMA website. www.lma.eu.com/legal-regulatory/submission-regulators

LMA conferences

Developing Markets Conference
26 April 2017
London

Unlocking Value



In April, we hosted our fourth annual Developing Markets Conference in London. The event was attended by over 200 industry professionals and featured presentations from, and panel discussions with, over 40 senior market experts. Following feedback from delegates who attended the 2016 conference, two separate breakout sessions were also held, with specialist insights on Africa, and CEE/CIS and the Middle East.
www.lma.eu.com/developing-markets

1

2

4

5

1. Mitigating risk: the means to an end:
From left to right
Andrew Jones (chair) – Linklaters, Mike Emery- IFC, Mark Gubbins – Gallagher London, Matthew Grigg – Clifford Chance, Richard Simon-Lewis – UKEF and Phil Skinner – GuarantCo

2. Thinking outside the box: alternative financing solutions:
From left to right
Henry Kikoyo (chair) – Brown Rudnick, Jonathan de la Pasture – Liberty Group SA, Louise Campion – DLA Piper, Simon Jackson – Access Power and Michael Hoelter – Deutsche Bank

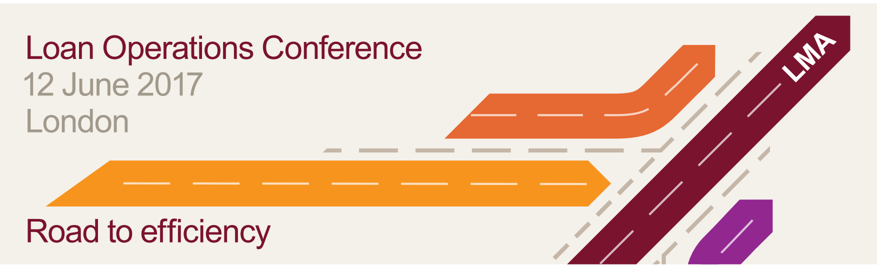
3. Understanding the impact of political and security risk:
David Chmiel – Global Torchlight

4. The Middle East: opportunities and challenges:
From left to right
Atif Hanif (chair) – Allen & Overy, Eric Zimny – SMBC, William Sharpe – Natixis and Raouf Jundi – Bank of Tokyo-Mitsubishi UFJ

5. Africa economic update:
David Cowan – Citi

In May, we held our fifth annual Real Estate Finance Conference in London. With interest in the European real estate market as strong as ever amongst our members, it was another successful conference, with over 400 market participants in attendance. The programme comprised an impressive line-up of speakers who shared their views on the key issues and challenges currently shaping the REF industry.
www.lma.eu.com/real-estate-finance

1. **Documentation trends for 2017:**
   From left to right
   Simon Roberts (chair) – Allen & Overy, Alistair McGillivray – Clifford Chance, Jeffrey Rubinoff – White & Case, Andrew Petersen – K&L Gates and Steve Smith – Linklaters
2. **PRS: a new destination for investment?**
   From left to right
   Andrew Screen (chair) – CBRE, Richard Jackson – Apache Capital Partners, Chiara Zuccon – RBS, Matthew Clark – Deutsche Pfandbriefbank and John German – Invesco Real Estate
3. **Operating in a global economy where uncertainty is the new norm:**
   From left to right
   Simon Kildahl (chair) – Simmons & Simmons, John Feeney – Lloyds Bank, Sharon Quinlan – Barclays, Neil Odom-Haslett – Standard Life Investments, Jamil Farooqi – M&G and Paul Wilson – MetLife Investments
4. **Pre-Brexit developments in the UK real estate finance market:**
   From left to right
   Sebastién Marcelin-Rice (chair) – Baker & McKenzie, Arron Taggart – Cheyne Capital, Craig Prosser – LBBW Real Estate Finance, Russell Gould – Citi and Per Mario Floden – Eastdil Secured



In June, we hosted our third annual Loan Operations Conference in London. With over 250 industry professionals in attendance, the event provided a forum for market participants to discuss the challenges facing loan operations teams, and exchange ideas about how to bring about increased efficiencies in the loan process as a whole.
www.lma.eu.com/loan-operations

1. **Documentation and the divergence of market practice – keeping on the straight and narrow:**
   From left to right
   Gemma Haley (chair) – LMA, Toby Mann – Clifford Chance, Steven Connolly – J.P. Morgan, Penny Neville-Park – SEB, Keith Miller – GLAS and Brian Fraser – Lloyds Banking Group
2. **Developments in blockchain and the impact on the loan market:**
   From left to right
   Nigel Houghton (chair) – LMA, Jacqui Allen – Mandel, Katz & Brosnan, Simon Hurst – Barclays and Martin Bartlam – DLA Piper
3. **LMA Loan Operations Committee introduction:**
   From left to right
   Doug Laurie – Barclays, Raya Brody – Citi and Alan Briggs – RBS
4. **Deep dive into the secondary settlement timeline:**
   From left to right
   Nigel Houghton (chair) – LMA, David Jesson – IHS Markit, Raya Brody – Citi, Stephen Buckler – Bank of America Merrill Lynch International, Laura Cannon – Allied Irish Bank and Paul Day – M&G Investments

E-Learning Programme

Understanding the loan market

All 10 modules of the LMA's E-learning programme 'Understanding the Loan Market', are now available.

Promoting market efficiency has always been one of the key objectives of the Loan Market Association and one we are increasingly looking to achieve via our education initiatives. Working in close collaboration with the LMA's European Loan Operations Committee, we have created this, our first, e-learning programme. Aimed at newcomers to the market, be it from a legal, financial or operations background, this programme looks to create a knowledge benchmark for practitioners in the syndicated loan market – a benchmark that we believe will be key to driving efficiencies going forward.

Free of charge to members, we encourage you to join this initiative – your participation will make a difference!

The full programme:

Module 1
Overview of the loan product
An introduction to the loan product, the main types of syndicated loan transaction and the key parties to a syndicated loan transaction.

Module 2
Types of syndicated loan and credit facilities
An introduction to the main types of credit facilities, including term loans, revolving credit facilities, swingline facilities and letters of credit.

Module 3
Introduction to LMA documentation
An insight into the LMA documents used during the life cycle of a syndicated loan transaction, including a review of what these documents contain and how they function for all parties in a transaction.

Module 4
Transaction timetable
A review of a typical syndicated loan transaction, looking at the interplay of the parties and documents with one another.

Module 5
Pricing and payments
An introduction to the fees, costs and expenses that contribute to the pricing of a syndicated loan, along with some of the mechanisms and systems used to make payments during the life of a loan.

Module 6
Servicing the loan
A look at the flow of funds, and explanation of the treatment of interest, during the life of a loan.

Module 7
Protecting the loan
A look at the series of protections typically contained within the loan agreement, which monitor the borrower's continuing ability to service its ongoing interest obligations and ultimately repay the loan in full.

Module 8
Effecting change
A review of the changes that may take effect during the life of a loan, including changes to the lenders and the obligors, defaulting lenders, removal of an impaired agent as well as amendments and waivers to the loan agreement itself.

Module 9
Introduction to the secondary loan market
An overview of the key features and drivers of the secondary loan market, including the main types of transfer mechanics used and the stages involved in the life of a trade.

Module 10
Improving liquidity in the secondary loan market
A high level summary of the issues which have the potential to impact liquidity in the secondary loan market.

E-learning contacts
Nigel Houghton
Managing Director
E: nigel.houghton@lma.eu.com
T: +44 (0)20 7006 1207

Gemma Haley
Associate Director – Legal
E: gemma.haley@lma.eu.com
T: +44 (0)20 7006 1372

E-learning homepage
www.lma.eu.com/loan-operations/e-learning

LMA e-learning website
https://elma.kineotrack.com

Speaking on the success of the programme, Doug Laurie, Chair of the LMA's European Loan Operations Committee said:
"This has been a fantastic additional training source which complements existing training provided by banks internally. The new e-learning approach has opened up the LMA education programme to all Operational staff globally and, with over 3,500 participants from 58 different countries taking part, this should help drive improved controls and efficiencies in the loan market."

Nigel Houghton, Managing Director of the LMA and Head of the LMA's Operations activities stated:
"From initial discussions early last year through to going live with our first full e-learning programme, we have had incredible support for this initiative, both from the LMA Board and our members, with participation exceeding our expectations. With all ten modules live, we now have a comprehensive package accessible on demand wherever you are. Knowledge is key to driving efficiency and we truly believe this course can make a difference."

Webinar Programme

The LMA runs a highly successful webinar programme, which gives members around the world easy access to training by senior market practitioners on a range of LMA documents and key legal issues. We have created a dedicated webinar homepage on our website, where past webinars are available to watch on demand, and any upcoming new webinars are advertised. There is also an FAQs page to assist with any questions you might have.

Frequently asked questions

I cannot view the webinar on the scheduled release date. Will the webinar be made available on demand?
Yes. Webinars will normally be made available on demand two weeks after the initial release date.

Are the slides available to print before the webinar?
Yes. A link to the slides is included in the reminder emails. The slides will also be made available on the viewing platform under the "Resources" tab.

Are webinars free to access?
Yes, webinars are free for LMA members.

For more FAQs visit www.lma.eu.com/education-events/webinar-faqs

*Please note that for African Single Jurisdiction Members, in line with availability of documentation and relevance to the market, a selection of the webinars will be made available. In particular, the starred webinars above are currently available to view on demand and more will follow.

Webinar Contact
Kam Mahil
Senior Associate Director
E: kam.mahil@lma.eu.com
T: +44 (0)20 7006 6629

Webinar Homepage
www.lma.eu.com/education-events/webinars

Webinars available to watch on demand

Introduction to Syndicated Lending*
Toby Mann, Senior Professional Support Lawyer – Clifford Chance

Introduction to Secondary Trading*
Jacqueline Allen, Partner – Mandel, Katz & Brosnan

Introduction to Real Estate Finance
Simon Roberts, Partner – Allen & Overy

Overview of the LMA Leveraged Facilities Agreement
Edward Aldred, Partner – Linklaters

Introduction to the LMA Leveraged Intercreditor Agreement
Toby Mann, Senior Professional Support Lawyer – Clifford Chance

Introduction to Syndicated Lending (German)
Eva Reudelhuber, Partner – Gleiss Lutz

Introduction to the LMA Pre-Export Finance Facility Agreement
David Leggott and Andrew Taylor, Partners – Hogan Lovells

Types of Facilities in the Suite of LMA Primary Documentation*
Simon Roberts, Partner – Allen & Overy

The OHADA regime and its relevance to the loan market (English and French)*
Thomas Kendra, Counsel; Olivier Fille-Lambie, Partner; Louis-Jerome Laisney, Senior Associate; and Alex Bebe Epale, Associate – Hogan Lovells

Direct lending and non-performing loans: the Italian solution
Riccardo Sallustio and Michael Bray, Partners – Grimaldi

Introduction to Syndicated Lending (French)*
Benjamin de Blegiers, Partner, and Bénédicte Levier, PSL – Clifford Chance

Impact of the UK referendum vote to leave the European Union*
Matthew Dunn and Simon Gleeson, Partners – Clifford Chance

Understanding the Nigerian Foreign Exchange Control Regime and Implications for the Loan Market*
Isa Alade, Senior Associate – Banwo & Ighodalo

Overview of LMA Secondary Trading Terms and Conditions*
Deborah Neale, Managing Senior PSL – Clifford Chance

Introduction to the LMA REF Development Facility Agreement
Simon Roberts, Partner – Allen & Overy

Introduction to Syndicated Lending (Spanish)*
Sebastián Sáenz de Santa María, Partner – Uría Menéndez

Introduction to the LMA German Law REF Investment Facility Agreement (English and German)
Olaf Meisen, Partner – Allen & Overy

LMA Mezzanine Facility Agreement Drafting Guide for Leveraged Finance Transactions
Toby Mann, Senior Professional Support Lawyer – Clifford Chance

Introduction to the LMA REF Intercreditor Agreement
Steve Smith and Mark O'Neill, Partners – Linklaters

Mitigating risk in loan transactions in the Middle East
Natalie Boyd, Partner – K&L Gates

Developments in blockchain and the impact on the loan market
Paul Lewis & Toby Grimstone, Partners – Linklaters and Simon Hurst, Debt Finance-Head of Transaction Management – Barclays Corporate Banking

The Role of the Facility Agent*
Ruth Musgrave, Global Head of Knowledge, Finance – Freshfields Bruckhaus Deringer and Raya Brody, Vice President, EMEA Loans Agency – Citi

US loan market: from headwinds to tailwinds in 12 easy months

Meredith Coffey
Executive Vice President,
Research & Analytics – LSTA

In a reversal from early 2016, when US credit markets were faltering thanks to a swooning energy sector, everything seems to be churning forward aggressively thus far in 2017. In this article, we discuss trends in the US loan market, as well as how regulation has had – or, in the future, may have – an impact on how the US market evolves.

One year ago, the US loan market was facing headwinds on all fronts: technical, fundamental and regulatory. On the technical side, CLO formation was very light (thanks mostly to credit concerns, but partly to risk retention) and loan mutual funds were seeing substantial outflows (thanks to credit worries and few expectations of material interest rate increases). On the fundamental front, the oil & gas and metals & mining sectors were very weak, ultimately leading to non-trivial defaults in the high yield bond space. While exposure to these sectors was modest in the loan space, commodities concerns nonetheless substantially depressed loan prices and issuance. Meanwhile, on the political front, market observers expected that regulation would continue to tighten under a new Democratic president.

My, how things have changed. On the political front, prognostications were up-ended by the election of Donald Trump. While creating considerable uncertainty, his election also has meant a virtual stop to new regulation – and offers the potential for some regulatory rollback. This has buoyed the sentiment in many markets, including the loan market. On the fundamental side, credit pressures in the energy sector have eased substantially, due partly to higher oil prices and partly to the fact that a number of issuers have already defaulted. (To be fair, energy woes have been partly replaced by retail and healthcare concerns.) On the technical side, after a slow start in January, CLO issuance has rebounded, hitting US$36 bn through late May. Meanwhile, loan mutual fund flows turned strongly positive, totaling US$14 bn through mid-May. Thanks to inflows and recovering loan prices, loan mutual fund AUM jumped from US$113 bn in May 2016 to US$153 bn in May 2017.

One thing that hasn't actually changed much? Lending volumes. Despite all the noise about "record" US leveraged loan issuance, the actual amount of loan outstandings has barely moved. As of the end of first quarter 2017, outstandings in the S&P/LSTA Leveraged Loan Index sat at US$881 bn – almost exactly where they were one year earlier. The gulf between issuance statistics and outstanding loans is due to the fact that most early 2017 issuance was refinancings and brought no new paper to market.

With much stronger demand and little new supply, the predictable happened: first, the secondary loan market rallied strongly. The average loan price in the S&P/LSTA US Leveraged Loan Index has climbed nearly ten points, to the 98.3 context, since early 2016. The share of loans bid at or above par soared from 2% in early 2016 to two-thirds of the market by May 2017. In the primary market, all-in spreads (which include amortized OID and any LIBOR floor benefit) have compressed some 200 bps since early last year; they now sit below LIB+300 on BB/BB- loans and below LIB+400 for B+/B rated loans.

The remarkable recovery in the US loan market has created an equally remarkable shift in the difficulties that investors face. In early 2016, problems were credit and default related. Market observers were concerned that, as loan prices fell and the share of CCC assets climbed, CLOs might start failing overcollateralization tests. In contrast, the problem in today's strong market is that loan spreads have compressed so much that CLOs are running into issues with their "Weighted Average Spread" ("WAS") tests. These tests are the minimum spread level of a CLO portfolio; if a CLO falls out of compliance – e.g., the asset spreads fall too low – the manager may lose its ability to actively manage the portfolio. It is a distinctly bull market problem.

The regulatory role

While technicals and fundamentals have played the leading role in the shift in the loan market in the past year, regulation (or the easing thereof) still has a supporting part. Indeed, regulation has shaped the form of CLO issuance and refinancings. In addition, US Leveraged Lending Guidance has put a cap on companies' debt levels since 2013. Both have (some) potential to change in the coming months.

Regulation – specifically risk retention – has redefined the US CLO market. It has determined who can issue, what new CLOs look like and how refinancings are done. Through late May, US CLO activity has been split between refinancings

(US$67 bn), resets (US$11 bn) and new issuance (US$36 bn). Each of these activities has been affected by regulation.

First, the US$67 bn of CLO refinancings have been facilitated by the US Securities & Exchange Commission's ("SEC") 2015 "Crescent No Action Relief Letter". This letter, which responds to an inquiry prepared by Crescent Capital, Cleary Gottlieb and the LSTA, permits CLOs issued prior to 24 December 2014 to be refinanced once within four years of their issuance without requiring risk retention. It does not permit any changes other than a reduction in the spread of the CLO notes. The large majority of this year's US CLO refinancings have been done under the rubric of the Crescent Letter, thus benefiting from this clarification of the rules. CLO resets are another matter. Because they extend the reinvestment period of the CLO, they do not fit within the Crescent Letter criteria and thus do require risk retention. Resets are expected to increase this year as equity investors seek lower spreads on 2015 CLOs, which are not eligible for the Crescent letter. Finally, new CLO issuance now requires risk retention. This has meant that CLO formation has shifted to shops that have found capital (and/or financing) to do risk retention.

Is there any chance that the US risk retention rules could change? Perhaps – but we certainly do not recommend managers make their business plans on the assumption that risk retention goes away. There are three ways that regulation (and risk retention) could change: i) Legislation, ii) Litigation or iii) Executive Order/ Changes by the Regulators.

Legislative fixes will be very challenging. Even though Republicans hold the House of Representatives, the Senate and the Presidency, their majority in the Senate is slight (52 to 48). With such a narrow Republican majority, it will be difficult to get substantial Dodd-Frank fixes through Congress. On the litigation front, in October 2014, the LSTA sued the US Federal Reserve and SEC on the application of risk retention to CLOs. In December 2016, the (lower) District Court ruled in favor of the government on a pure deference argument. In January 2017, the LSTA appealed the ruling to the (higher) Court of Appeals. The LSTA and the government currently are submitting briefs and oral arguments likely will occur in the autumn. The court's decision should come down in early 2018 – and that's when we learn whether risk retention stays or goes.

The last potential regulatory fix comes through the Executive Branch and the regulators themselves. On 3 February, President Trump issued an Executive Order explaining his Administration's "Core Principles for Regulating the United States Financial System". The Executive Order also required the Treasury Secretary to issue a report detailing how existing regulations conformed (or did not conform) with the Core Principles. In response, the always-helpful LSTA sent a letter to Treasury Secretary Mnunchin explaining how the application of the risk retention rules to CLOs did not conform to the Core Principles; in

particular, we noted that the risk retention rules contradicted the principle requiring regulations to be "efficient, effective and appropriately tailored". There's nothing "appropriately tailored" about applying risk retention to actively managed, open market CLOs. But there is an easy fix. Our research shows that the SEC has the unilateral ability to fully or partially waive the risk retention rules for CLO managers that are registered investment advisors and are solely regulated by the SEC. We hope the SEC will utilize its powers and implement this commonsense fix.

Another seismic regulatory change could involve the US Leveraged Lending Guidance. In March 2017, US Senator Patrick Toomey sent a letter to the US Government Accountability Office ("GAO") asking it to determine whether the Leveraged Lending Guidance was a rule for the purposes of the Congressional Review Act ("CRA").

Why does this matter? Under the CRA, Congress has the right to disapprove rules within 60 days of their issuance. Because the US banking agencies did not view the Leveraged Lending Guidance as a rule, they never brought it to Congress for review under the CRA. If the GAO determines that the Guidance is, in fact, a rule, then Congress can vote to disapprove it by a simple majority. If Congress were to do so – and if the President signs the CRA – then the Leveraged Lending Guidance cannot be enforced by the banking regulators. There are a lot of "ifs" here – and few observers expect US Leveraged Lending Guidance to go away in the near term. However, the shot over the bow by Senator Toomey does raise the possibility that US Leveraged Lending Guidance may be softened – just as the EU's Guidance comes into effect.

In conclusion…

Many US market participants expected a swift reversal of regulation following the election of Donald Trump. In reality, regulation generally cannot be overturned with the flick of a pen. However, there are openings to work within Congress, the Courts and the regulators themselves to develop commonsense fixes to particularly ill-fitting rules. The question for the coming year is whether lawmakers, the courts and/or the regulators themselves have the appetite to fix the regulatory overreach affecting the US loan market. ■

“”

There's nothing "appropriately tailored" about applying risk retention to actively managed, open market CLOs.

LMA Syndicated Loans Conference
London, 19 September 2017

Navigating change

Market conditions remain challenging for many of our members. We live in uncertain times, with political turbulence, market volatility, technological innovation and regulatory pressure, to name but a few, causing considerable change. Such change poses risks but can also offer opportunities, if with understanding it is navigated successfully.

This is our 10th annual conference. The first conference was held just before the maelstrom of the 2008 credit crisis, a timely reminder, if any was required, of the benefits of coming together to discuss common issues and their associated challenges.

The LMA conference offers the perfect opportunity to hear key industry experts explore how best to navigate the challenges and source the opportunities. It will give you the opportunity to join the debate and plan your way through the turbulence of our times.

As ever, places will go fast so register now to avoid disappointment and not have to rely on the secondary market!

Registration

Please register online by clicking on the events calendar on the LMA website (www.lma.eu.com) and selecting the LMA Syndicated Loans Conference.

For registration queries, please contact:

Darcie Bone
+44 207 006 2269
registration.lmaconference@lma.eu.com

Expert speakers include

Paul Gibbs, Co-Head, EMEA Loans & Acquisition Financing (Citi)

Nick Jansa, Global Co-Head of Leveraged Debt Capital Markets (Deutsche Bank)

Itziar Letamendi, Head of Loan Markets, Continental Europe (Banco Santander)

Sebastién Marcelin-Rice, Partner (Baker McKenzie)

Mathias Noack, Head of Syndications, Investment Banking Division for EMEA (MUFG)

Terry Shanahan, Global Head of Syndicate (SG CIB)

Keith Taylor, Head of Loan Syndicate, EMEA (Barclays)

Sandra Veseli, Managing Director, Corporate Finance EMEA (Moody's Investors Service)

Trevor Williams, Chair (IEA Shadow Monetary Policy Committee)

Keynote: Yves Gerster, Global Treasury & Shared Services Director (Dufry)

Topics covered

- Heads of Syndication panel: steering the market
- Economic update – spotting the 'icebergs'
- Lenders and the loan product: a borrower's perspective
- Developing markets: finding safe harbours
- Regulatory panel: review of current position – 'headwinds and high seas'
- Liquidity and efficiency: sailing into the wind
- Levfin for buysiders: shallow waters
- Real Estate Finance in a post Brexit world: the winds of change?

Lead sponsors

Baker McKenzie.

Bloomberg

Moody's Investors Service

Lunch sponsor

C/M/S/ Law.Tax

Cocktail sponsor

SLAUGHTER AND MAY

Sponsor

FitchRatings