SLAUGHTER AND MAY

LMA loan documentation in Africa

July 2019

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Introduction

1. The Loan Market Association ("LMA") in Africa

In the English law market, LMA facility agreement templates have been in existence for almost 20 years. They are used as a starting point for the vast majority of syndicated loan agreements and are also adapted to form the basis of many bilateral loan agreements. The acceptance and development of LMA terms has contributed significantly to the efficiency of the negotiation and execution process in the UK and international English law loan market. LMA-based documentation has also become familiar, and has a significant influence on loan documentation terms in domestic markets in other Western European countries and in the Asia-Pacific region.

The use of LMA-based documentation in transactions involving African borrowers has developed alongside the emergence of syndicated lending on the continent and the establishment of the African Loan Market Association (the "**ALMA**") in 2011. The ALMA focussed initially on documentation for South Africa, the largest and most developed syndicated loan market in Africa. After the operations of the ALMA were integrated with the LMA's in 2013, the LMA's collection of loan documentation for transactions in Africa began to develop further. It currently comprises three collections of documentation aimed specifically at borrowers in certain African jurisdictions as well as a suite of English law loan agreements aimed at borrowers in less developed economies more generally (the **"Developing Markets Agreements"**).

The LMA produced the first of its Developing Markets Agreements in 2012, a collection which has subsequently been expanded quite significantly. The LMA does not identify precisely the markets at which the Developing Markets Agreements are aimed, although the book the LMA published to accompany their launch[1], discussed the loan product in Central and Eastern Europe, Latin America, the Caribbean and China as well as North and Sub-Saharan Africa. These agreements can provide a useful starting point in certain African transactions where English law is the chosen governing law.

The LMA launched documentation governed by the laws of a number of African jurisdictions in 2013. Templates comprised recommended forms of facility agreement governed by the laws of South Africa (the **"South Africa Agreements"**), plus a single facility agreement designed to be governed by the laws of any of Kenya, Nigeria, Tanzania, Uganda and Zambia (the **"KNTUZ Agreement"**). In September 2016, the LMA added a single currency secured term facility agreement governed by Zimbabwean law to the collection (the **"Zimbabwean Agreement"**).

The South Africa Agreements, the KNTUZ Agreement and the Zimbabwean Agreement (together, the **"Africa Suite"**) are based on the LMA's Developing Markets Agreements, adapted as required for the relevant local law and market. The Developing Markets Agreements, in turn, are broadly based on the LMA's English law forms of facility agreement for investment grade borrowers (the **"Investment Grade Agreements"**), while also incorporating a certain amount of drafting borrowed from the LMA's English law forms of facility agreement for leveraged transactions.

[1] "Developing Loan Markets", published by the LMA in 2013.

Key features and derivation of LMA documentation suites

	Credit rating	Security	Facility options	Derivation	Governing law
Investment Grade Agreements (IGAs)	Investment grade	Unsecured	Term/revolving Single currency/ multi-currency	N/A	English
Leveraged Agreements	Sub-investment grade	Secured	Term/revolving Multi-currency	IGAs adapted for a leveraged acquisition financing	English
Developing Markets Agreements (DMAs)	Not specified	Secured/ unsecured	Term/revolving Single or dual currency	IGAs More extensive representations, covenants and Events of Default, some derived from Leveraged Agreements, some new	English
South Africa Agreements	Investment grade	Secured/ unsecured	Term/revolving Single currency	DMAs adapted for South African law and market practice	South African
KNTUZ Agreement	Not specified	Secured/ unsecured	Term Single currency	DMAs adapted for relevant law and market practice	Kenyan / Ugandan / Tanzanian / Nigerian / Zambian
Zimbabwean Agreement	Not specified[2]	Secured	Term Single currency	DMAs adapted for Zimbabwean law and practice	Zimbabwean

[2] Footnotes to the Zimbabwean Agreement suggest that it is intended for an investment grade borrower, but this is not confirmed in the associated Users' Guide.

2. Adoption of the LMA templates in Africa

The LMA templates, having been built up over a number of years to address most currently conceivable contingencies, bring a level of complexity that may not be warranted in some transactions. However, the standardisation of lending terms can bring significant benefits to lenders and borrowers in terms of costs and speed of execution.

In South Africa, we understand, law firm templates tend to prevail, but for syndicated loans, those law firm templates often adopt the LMA style. Market participants in other jurisdictions in Africa with more developed loan markets are also familiar with the English law LMA templates. Awareness of LMA terms has increased significantly as a result of the education and training events organised by the LMA both in Europe and in Africa to promote the Developing Markets Agreements and the Africa Suite. It seems likely that LMA terms will continue to gain traction, in particular for larger facilities involving African borrowers.

A key question in relation to African transactions, is whether to use a local law or English law template, where it is agreed to document the loan on LMA terms. That choice, it is suggested, is likely to depend in most instances on whether the facility is to be syndicated to international or domestic banks, and how broadly.

Outside South Africa, most syndicated loans are documented under English law as the preferred option of international investors. However, there may also be some mixing and matching of provisions from the LMA's local law templates and customary local documentation, to reflect the characteristics of the loan, the borrower group and the composition of the syndicate.

3. Structure of this booklet

The Africa Suite has been drafted on the assumption that syndication takes place in the relevant local market. However, the parentage of the Developing Markets Agreements and the Africa Suite is likely to influence how international banks will approach and negotiate those agreements. As a result, market participants in Africa may find it useful to have some awareness of market practice in relation to the English law LMA agreements. This booklet aims to provide lenders, borrowers and their advisers in Africa with that background.

It is organised as follows:

- Part I outlines the evolution and usage of the LMA's recommended forms in Europe. It also describes some key developments in the European and international markets that have prompted changes to the LMA's recommended forms in recent years and/or are commonly the subject of discussion in loan negotiations.

- Part II focuses on the Developing Markets Agreements and the Africa Suite. It contains an overview of the components of each collection and highlights the key features of each as well as the main differences between those documents and the English law documentation used in the international syndicated loan market, on which they are based.

A tabular comparison of the key terms of the various LMA agreements discussed in Part II and a glossary of terms are included at the end of this booklet for ease of reference, together with our contact information should you require further information about any of the matters discussed.

In this booklet, capitalised terms not otherwise defined have the meanings given in the Developing Markets Agreements. Statements of law and practice reflect the position as at July 2019. References to the LMA's recommended forms are to the forms current as at that date.

Slaughter and May
July 2019

Part I:
LMA documentation: evolution and usage

1. The Investment Grade Agreements

The LMA was initially established in Europe by a group of banks to foster the development of the secondary loan market. One of the factors hampering the development of that market was the range of differences in the terms of the underlying primary loan agreements. The LMA's aim in publishing a form of facility agreement was to promote greater efficiency in both primary and secondary markets.

The first English law Investment Grade Agreement was published in 1999. The text was settled by a working party of banks and solicitors, and included representatives of the British Bankers' Association, the UK trade association for banks and the Association of Corporate Treasurers (**"ACT"**), the leading professional body for international treasury and, in effect, the voice of the borrower community.

There are now eleven different English law permutations of the Investment Grade Agreement. The Investment Grade Agreement is available in single currency or multi-currency versions, incorporating term and/or revolving facilities. Revolving facility templates that include euro and dollar swinglines and permit drawings by way of letters of credit are also available.

In addition the LMA has produced French, German and Spanish law versions of the Investment Grade Agreement (the multi-currency term and revolving facility). These documents follow the terms of the English law Investment Grade Agreements save for changes necessitated by the governing law.

2. Beyond the investment grade market

The LMA's first area of focus outside investment grade lending was the leveraged loan market, which in the mid-2000s had reached a reasonably sophisticated stage of development in Europe. The LMA Senior Multicurrency Term and Revolving Facilities Agreement for Senior/Mezzanine Leveraged Transactions (the "**Leveraged Agreement**") was published in 2004.

The Leveraged Agreement provides a starting point for the documentation of a (most likely) private equity-backed secured acquisition financing. It contains the terms of the senior loans funding the assumed transaction, comprising term facilities divided into three tranches plus a revolving facility. However, the mechanics of the Leveraged Agreement can be adapted and are used for other types of acquisition facilities and the lender-friendly set of representations, undertakings and Events of Default have over the years increasingly been adopted to some degree in corporate facilities for sub-investment grade and cross over credits and for project finance. The commercial terms are quite often used as a type of "clause library" to supplement the provisions of the Investment Grade Agreements in transactions involving borrowers lower down the credit spectrum.

More recent additions to the LMA's documentation suite, in addition to the Developing Markets Agreements and the Africa Suite, include an extensive collection of English law recommended forms of primary document for specialist loan products. These include real estate lending, pre-export finance and private placement debt. As the leveraged market has developed and lending structures have evolved beyond all-loan structures, the LMA has also expanded significantly its collection of documentation for leveraged transactions.

All LMA documentation follows a common style and format but the terms of each agreement are tailored to the structure and anticipated terms of the product in question (and where relevant, the applicable governing law). The LMA devotes significant resources to its documentation projects and the advancement of its collection is expected to continue.

3. A starting point for negotiations

As the LMA's reach expands, it is important for users to be aware that while all of the primary documents take the familiar LMA form, only the Investment Grade Agreements have the benefit of borrower-side endorsement, by virtue of being discussed between the LMA and a separately represented borrower-side trade association (the ACT) before being revised. LMA documentation is therefore presented as a starting point for negotiations with the expectation that each agreement will require amendment, quite significant in some cases, to reflect both the transaction structure and the commercial terms agreed between the parties.

The ACT's endorsement of the English law Investment Grade Agreements as a starting point for negotiations means that on the whole, the Investment Grade Agreements represent a reasonable balance between the interests of the lenders and the interests of the borrower group. Nonetheless, they contain a number of provisions which are commonly negotiated by well-advised borrowers and should be treated as a starting point in the same way as the other LMA recommended forms.

The negotiable status of all LMA documentation is emphasised in the following wording which appears on the front page of each LMA agreement:

"For the avoidance of doubt, this document is in a non-binding, recommended form. Its intention is to be used as a starting point for negotiation only. Individual parties are free to depart from its terms and should always satisfy themselves of the regulatory implications of its use."

In short, LMA agreements always require adjustment to fit the circumstances of the transaction and the credit, in particular as regards the representations, undertakings and Events of Default.

4. Commentary and guidance on the use of LMA terms

In addition to its facility agreements, the LMA's documentation suite includes related loan documentation (for example, slot-in clauses for particular purposes, mandate letters, termsheets, confidentiality undertakings, intercreditor agreements and other ancillary documents), user guides and other guidance material. The LMA also maintains a collection of secondary loan documentation, to facilitate loan trading.

LMA loan documentation is available only to its members on the LMA website[3]. The LMA's membership is comprised largely of lenders and law firms so the borrower community does not generally have direct access to LMA resources.

As mentioned above, the ACT, assisted by Slaughter and May, has worked with the LMA on the Investment Grade Agreement since inception and continues to be involved in all substantive revisions to the Investment Grade Agreements. In conjunction with the ACT, we also publish guidance for borrowers on the LMA's documentation suite and the changes made to the templates from time to time.

Our main publication is the ACT Borrower's Guide to LMA Loan Documentation for Investment Grade Borrowers (**"ACT Guide"**)[4]. The ACT Guide outlines the most important features of the Investment Grade Agreements and the key points for negotiation, together with a clause by clause commentary on the mechanics and how certain aspects of the agreement might be approached by investment grade borrowers.

Part II of this booklet includes a number of cross-references to the ACT Guide for explanatory commentary on particular topics.

[3] http://www.lma.eu.com

[4] The ACT Guide is available from http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-act-borrowers-guide-to-the-lma-s-investment-grade-agreements//

5. Recent developments

All of the LMA's templates are regularly amended to keep pace with legal and regulatory developments and changes in the market environment. Some of the more significant developments affecting the global loan markets in recent years include:

- the absorption and allocation of costs arising out of the implementation of Basel III
- the repercussions of the involvement of a defaulting or insolvent Finance Party on a syndicated loan transaction
- the adequacy of the contractual protection afforded to Agent banks in syndicated loan agreements (who following the global financial crisis, found themselves increasingly occupied with consent requests and restructurings)
- the reform – and potential withdrawal – of LIBOR and other major benchmarks
- increased focus on the impact of sanctions and anti-corruption laws on lending relationships
- the accommodation in lending documentation of the US Foreign Account Tax Compliance Act (**"FATCA"**)
- the finalisation and application of new lease accounting standards (including IFRS 16)
- the impact on banks' balance sheets and lending capacity of IFRS 9

The emergence of new regulatory requirements and commercial risks which are capable of being addressed in loan documentation has in some cases, resulted in adjustments to the LMA templates. Where there remains insufficient consensus as to how the risk should be allocated to enable the LMA to address the relevant topic in its templates, the contractual treatment of those risks is left to be agreed on a transaction by transaction basis.

These issues are likely to be of interest to users in Africa who may need to anticipate the policies that have been developed by internationally active banks to address them. The table below contains a summary of the key issues and how (if at all) they are addressed both in the English law LMA templates and in practice.

The table also indicates briefly the extent to which the relevant issue has been addressed by the LMA in the documents comprising the Africa Suite. Part II comments in more detail on the position taken by the LMA in the Africa Suite.

For further background on all of the points mentioned above, readers are referred to the ACT Guide which contains detailed commentary on a variety of topical issues affecting the loan market.

Recent developments affecting syndicated lending

	English law documentation	Africa Suite
Basel III and related measures	All of the LMA templates contain an increased costs indemnity, pursuant to which (in summary) the borrower must reimburse the lenders for any increased costs they incur in relation to their participation in the facilities as a result of a change in law or regulation after the date of the agreement. Basel III has been implemented in Europe and many other countries. As a result, in relation to most international banks, it may no longer constitute a change in law. The result is that any costs arising out of it may fall outside the LMA's increased costs indemnity. Lenders quite commonly seek to adjust the terms of the LMA's increased costs indemnity to provide expressly that costs relating to Basel III and related domestic measures shall fall within its scope notwithstanding that they are in force at the date of the agreement. A footnote in the English law LMA templates highlights that this is a point to be negotiated.	The increased costs indemnities in the Africa Suite follow the English law LMA templates. The KNTUZ Agreement, the Zimbabwean Agreement and the South Africa Agreements contain footnotes highlighting that the terms of the indemnity may be negotiated in light of Basel III.
Defaulting Lenders	Following the collapse of Lehman Brothers in 2008, it became apparent that LMA loan documentation did not cater sufficiently for the possibility of lender default and insolvency. In response, the LMA developed a set of optional "Finance Party Default" clauses (the "**Market Conditions Provisions**"). These are often colloquially referred to as the "Lehman" provisions. The Market Conditions Provisions were incorporated in full into the Leveraged Agreement and certain other of the LMA's recommended forms shortly after publication. In relation to the Investment Grade Agreements and the Developing Market Agreements, they remain as optional slot-in clauses. The Market Conditions Provisions dealing with Defaulting Lenders and Impaired Agents are commonly used in English law transactions and tend not to be controversial.	The Market Conditions Provisions have not been included in the Africa Suite although they are available as slot-in provisions as is the case in relation to the Investment Grade Agreements and the Developing Markets Agreements.

	English law documentation	Africa Suite
Position of Agent bank	Extensive changes were made to the agency provisions in all LMA documentation during 2013/14 to improve the position of the Agent. In broad terms, these changes ensure that the Agent bank is fully protected from liability for its administrative role, absent gross negligence or wilful default. The revised agency provisions are used in most transactions subject to discussion on some points of detail.	The agency provisions in the Africa Suite documents follow the provisions in the Investment Grade Agreements subject to some adjustments.
Benchmark reform	Reforms to LIBOR, Euribor and other benchmarks used in loan documentation prompted the LMA to make comprehensive revisions to the benchmark provisions in all of its English law recommended forms (including the Developing Markets Agreements) in November 2014. For example, definitions were amended to cater for changes to the administration and manner of publication (or cessation of publication) of the relevant Screen Rates, fallback arrangements in the event the agreed Screen Rate is unavailable were made more robust and new confidentiality obligations were inserted to protect Reference Bank Rates and Lenders' individual funding rates. In general, the LMA's revised benchmark provisions are used in most transactions subject to discussion on some points of detail.	The Africa Suite documents were updated to incorporate many of the LMA's revised benchmark provisions in June 2015, with further revisions published in July 2017. See Part II for further comments on this topic.

	English law documentation	Africa Suite
IBOR transition	More recently, the conclusions of global regulators that the financial markets should reduce or eliminate their reliance on LIBOR and other similar benchmarks have shifted attention to how the floating rate loan market might be transitioned to an appropriate successor rate or rates. Intensive efforts to progress this project are ongoing around the world. It is currently anticipated that LIBOR will cease to exist in its current form at the end of 2021, but as yet, there is no consensus as to the nature of the rate or rates that might replace the various LIEOR rates in loan transactions. A number of consultations are ongoing and it is hoped that the picture will become clearer over the course of 2018. At the time of writing, the only adjustments that are being made to loan documentation in the English law market are aimed at ensuring that any amendments to loan agreements that are required to accommodate any successor rate, as and when identified, can be made as easily as possible. In May 2018, the LMA published some slot-in optional provisions (the **"Revised Replacement of Screen Rate clause"**) which in summary, facilitate the replacement of the relevant benchmark and related amendments to the Agreement in an emergency situation (eg if the relevant benchmark ceases to be published), by providing that the same can be effected with Majority Lender consent. This Revised Replacement of Screen Rate clause is being used in some transactions, but there are a range of views on whether such amendments should be a Majority Lender decision and on some of the optional aspects of the clause.	No changes have yet been made to the Africa Suite, although parties should consider the Revised Replacement of Screen Rate clause in transactions using LIBOR or other similar benchmarks.

	English law documentation	Africa Suite
Sanctions and anti-corruption laws	Increasingly aggressive enforcement action, in particular by the US sanctions authorities, has led many lenders to seek contractual assurances from borrowers regarding the borrower group's compliance with all sanctions and anti-corruption laws to which both the borrower and the lenders are subject. None of the English law LMA templates include specific provisions relating to sanctions compliance, although footnotes have been added to the representations and undertakings clauses to remind users to consider whether express contractual protection is required. The Developing Markets Agreements were amended in 2016 to incorporate a framework for sanctions provisions, although no actual representations and undertakings. Specific representations on anti-corruption laws feature in some of the English law LMA templates, including the Developing Markets Agreements although they are not included in the Investment Grade Agreements. Representations and undertakings regarding compliance with sanctions and anti-corruption laws are nonetheless common in all sectors of the European loan market, although formulations vary quite widely and tend to be heavily negotiated.	Representations and undertakings relating to compliance with anti-corruption laws are included in the, the KNTUZ Agreement and the Zimbabwean Agreement. Both the KNTUZ Agreement and the Zimbabwean Agreement also include light touch undertakings relating to sanctions. A sanctions undertaking was originally included in the South Africa Agreements, but was removed in November 2016. See further comments in Part II.

	English law documentation	Africa Suite
FATCA	Participation in a loan transaction by parties which are not FATCA compliant may result in withholding tax liabilities. Lack of information about other parties' FATCA status may inhibit the parties' ability to comply with FATCA. In response to FATCA, in 2012 the LMA produced a series of "FATCA Riders", a menu of slot-in provisions for loan documentation, which set forth various options for allocating FATCA risk in accordance with the commercially agreed position and which have since been updated a number of times. These provisions also oblige the parties to share information about their FATCA status with each other. It subsequently became customary in the European market to provide that each party shall be responsible for its own FATCA status and no party shall be obliged to take withholding tax risk on any other. The LMA FATCA Rider providing to that effect (Rider 3) was therefore incorporated into the Investment Grade Agreements and certain other of the LMA templates. RIDER 3 was not included in the Developing Market Agreements, reflecting that the treatment of FATCA risk may be different in transactions that may involve countries which have not entered into inter-governmental arrangements with the US to mitigate the impact of FATCA. See further section 1 of Part II.	The South Africa Agreements were updated to include the LMA's FATCA Rider 3 in November 2016. The tax provisions in the Zimbabwean Agreement and KNTUZ Agreement do not address FATCA specifically, although a footnote highlights that consideration should be given to whether or not FATCA is relevant.

	English law documentation	Africa Suite
IFRS 16	IFRS 16, which becomes mandatory in 2019, represents a major alteration in the approach to lessee accounting. Under the new standard, most leases, including leases that are currently classified as operating leases, must be accounted for on-balance sheet. This has implications for a number of aspects of loan documentation, including measures of indebtedness (which have customarily included finance leases only) and financial covenant provisions. In June 2016, the LMA removed references to "finance lease" from the definitions of "Financial Indebtedness" and other relevant provisions across its documentation suite, replacing them with a reference to leases excluding those (to paraphrase) that in accordance with current GAAP, would be treated as operating leases. The intention of this new wording (which reflects the position that had been negotiated in practice for some time) is to avoid loan documentation becoming incapable of interpretation – or at worst, breached as a result of the new accounting standard. However, its effect is to maintain the distinction between finance leases and operating leases for the purposes of the agreement, which means that borrowers will need to continue to make calculations and provide financial information to lenders on that basis. This may be untenable other than on a short term basis. Longer term solutions for the accommodation of IFRS 16 in loan documentation remain under discussion. In general, expectations are that affected covenants and baskets will need to be re-set on a case by case basis once borrowers have adopted the new standard and digested how their lending terms might be affected.	References to "finance lease" in the definitions of "Financial Indebtedness" in the Africa Suite were removed in accordance with the wording adopted across the LMA's other templates in 2016.

	English law documentation	Africa Suite
IFRS 9	IFRS 9 is a major accounting change for the financial sector, which in essence requires that from 2018, adopters take a more prudent approach to the classification and measurement of financial assets and liabilities. The impact of IFRS 9 is in essence, commercial. It thus has the potential to affect loan pricing and availability but does not directly impact documentation. It requires lenders to monitor loan assets more closely, which could suggest changes to loan terms applicable to certain borrowers, for example, lenders' rights to information and the appropriate extent of the negotiated covenant package. However, it has not prompted any changes to the LMA's templates.	No changes have been made to the Africa Suite for IFRS 9.

Part II:
The Developing Markets Agreements and the Africa Suite

1. The Developing Markets Agreements

1.1 Overview

Scope of suite

The LMA launched the first of its Developing Markets Agreements in September 2012, followed by further variations during the course of 2013. In 2017, a new revolving credit facility incorporating a letter of credit facility was published. The collection currently comprises the following:

- Unsecured single currency term facility agreement
- Unsecured single currency revolving credit facility agreement
- Unsecured single currency term and revolving credit facilities agreement
- Unsecured dual currency term facility agreement
- Secured single currency term facility agreement
- Unsecured single currency revolving credit facility incorporating a letter of credit facility
- User Guide

Approach

In general terms, the Developing Markets Agreements follow the Investment Grade Agreements, with additional provisions from the Leveraged Agreement and bespoke drafting to accommodate applicable local law issues that might arise.

The Developing Markets Agreements assume the borrower(s) are companies incorporated in the relevant developing markets jurisdiction, the facilities are guaranteed by one or more guarantors and, with the exception of the dual currency variation, funding is in a hard currency.

The dual currency agreement combines the option to fund in a hard currency and the relevant local currency. If the local currency option is adopted, a framework to be completed provides for the insertion of the appropriate benchmark rates and related calculation and payment conventions.

The treatment of interest varies between the agreements. The single currency revolving credit facility agreement and the single currency revolving credit facility (incorporating a letter of credit facility) agreement contemplate that interest is the sum of a Screen Rate benchmark and the Margin.

The benchmark provisions in the Developing Markets Agreements were updated in November 2014 in the same way as the rest of the LMA's English law templates[5] and have tracked subsequent amendments to the English law templates . Accordingly, the Screen Rate may be LIBOR, Euribor or another benchmark rate as agreed. Provision is made for a variety of fallback options (including interpolated and historic Screen Rates, Reference Bank Rates and individual Lenders' cost of funds or a weighted average thereof), should the Screen Rate be unavailable.

The single currency term and revolving credit facility agreement, the dual currency term facility agreement, and the two single currency term facility agreements (secured and unsecured) contemplate that interest will be either the sum of Margin and a Screen Rate benchmark or the sum of margin and a pre-agreed fixed rate. This alternative was introduced in December 2017.

[5] See the ACT Guide.

As the names suggest, all of the Developing Markets Agreements, save one, are unsecured, although the provisions of more than one agreement can be easily amalgamated should, for example, a secured revolving credit facility agreement be required.

Updates

The agreements are updated periodically: substantive amendments were made in July 2017, to include facility increase mechanics and changes to the benchmark provisions (reflecting corresponding changes made to the Investment Grade Agreements). In December 2017 amendments were made to introduce an optional fixed rate of interest, and include more detailed anti-corruption and sanctions related provisions.

1.2 Points of interest

Repayment, prepayment and cancellation

The repayment, prepayment and cancellation provisions follow closely the equivalent provisions in the Investment Grade Agreements.

The Developing Markets Agreements provide the option for term debt to amortise or to be repaid in a single bullet.

Revolving facility loans are repaid on the last day of the relevant Interest Period. Revolving facility drawings can be rolled over into a further Interest Period (a "Rollover Loan" in LMA terminology) and optional provision is made for Rollover Loans to be effected by book entry on a cashless basis. This option is commonly adopted in the European loan market as, in general, it reflects how Rollover Loans are managed in practice.

Borrower(s) may voluntarily prepay and cancel the facilities or agreed amounts of the facilities at any time. If the prepayment is made other than on an Interest Payment Date, the borrower is obliged to pay the Lenders any applicable Break Costs, but otherwise, no provision is made for the payment of any prepayment or early settlement fee. Borrowers may also prepay and cancel the commitments of individual Lenders who claim under the tax gross-up or increased costs clauses on the same basis.

Individual Lenders have the right to require the prepayment and cancellation of their participation for illegality (if it becomes unlawful for that Lender to lend). Cancellation and prepayment of the facilities upon a Change of Control may be on an individual Lender basis or a Majority Lender basis, the agreements provide both options. In our experience it is increasingly the case that Lenders are insisting on individual rights to exit following a Change of Control, to retain control of their compliance with internal lending policies and applicable regulatory requirements.

The borrower may replace rather than prepay and cancel a Lender that claims under the tax gross-up or increased costs clauses or requires prepayment for illegality. The replacement mechanic is potentially valuable and widely included in English law agreements, but requires the borrower to find a willing replacement Lender. This provision is also often extended to enable the borrower to replace Defaulting Lenders (this extension forms part of the Market Conditions Provisions). More unusually, the borrower's replacement right may be negotiated to extend to other circumstances, for example, to enable the replacement of a Lender who wishes to be prepaid following a Change of Control.

These provisions (Clauses 7 and 8 in the Investment Grade Agreements) are discussed in the ACT Guide.

Tax provisions

Lenders expect any withholding tax on payments under the Finance Documents to be borne by the borrower. Accordingly, all of the LMA agreements oblige the borrower to gross up the amount payable to the Lenders should the borrower be required to deduct tax from any amounts due. A tax indemnity covering any tax, cost or loss suffered by a Lender in relation to the facilities, other than a tax on net income, is also standard.

The tax provisions in the Developing Markets Agreements are in the same form as those in the Investment Grade Agreements, with one important difference. The tax gross-up obligation in the English law agreements applies only to Lenders who are "Qualifying Lenders" on the date of the agreement.

The definition of "Qualifying Lender" in essence captures those Lenders who, on the date of the agreement can be paid without any deduction for UK withholding tax. This includes UK banks and UK non-bank Lenders as defined in the relevant tax legislation, as well as Lenders resident in a jurisdiction that has a double tax treaty in place with the UK. The effect of this language is to limit the circumstances in which the borrower might become obliged to deduct tax and gross-up any payment to a Lender to a change in law which results in a "Qualifying Lender" ceasing to be exempt from UK withholding tax. It provides significant protection to the borrower.

The allocation of withholding tax risk in this way is long established in relation to UK borrowers and is based on the UK tax regime. It may or may not be appropriate in other jurisdictions; the appropriate way to allocate withholding tax risk must be addressed in light of the applicable tax regime(s).

The Developing Markets Agreements do not contain an equivalent Qualifying Lender concept because (as stated in the LMA's related User Guide) the parties to developing markets transactions may not be in jurisdictions which are party to double tax treaties enabling payments to be made without tax deductions. This is the case in relation to a number of African jurisdictions. For example, of the seven African countries targeted by the LMA's Africa Suite, only South Africa currently has in place a double taxation treaty with the UK that makes full provision for exemption from UK withholding tax. There are more limited treaties in place between the UK and Kenya, Nigeria, Uganda, Zambia and Zimbabwe. A treaty with Tanzania remains in the process of negotiation.

The tax provisions in the Developing Markets Agreements will therefore need to be considered in light of the circumstances and countries involved to determine whether exemptions apply and thus a "Qualifying Lender" or similar concept is appropriate. In some transactions, the potential for such provisions to limit the investor base may be a relevant consideration. However, in others, for example, facilities involving only domestic Lenders, it may be appropriate to allocate the risk of withholding tax along the lines of the Investment Grade Agreements.

The tax provisions in the Investment Grade Agreements (Clause 13) are discussed in the ACT Guide.

FATCA

In summary, the US FATCA legislation requires foreign financial institutions to provide detailed information to the IRS regarding US account holders or suffer a 30% withholding tax on, among other things, their US source income. FATCA withholding started to apply to payments of US source income on 1 July 2014.

The conclusion of intergovernmental agreements ("**IGAs**") between the US and a number of countries, including the UK and most of Europe, has had the effect of largely eliminating the risk of FATCA withholding for financial institutions within the scope of those agreements. As a result, lenders in jurisdictions covered by an IGA have become more comfortable with FATCA and practice for addressing the withholding and compliance risk in loan documentation has become more settled.

As mentioned in Part I, the LMA has produced a series of Riders for use with its facility documentation to allocate the risk of FATCA compliance and any tax deductions as agreed. The Rider (Rider 3) which entitles all parties to withhold as required but imposes no gross-up or indemnity obligation on the borrower, has become the standard way of dealing with FATCA risk in loan documentation in Europe, regardless of whether the borrower group includes a US entity or has US source income. In 2014 the Rider 3 wording was incorporated into the Investment Grade Agreements and certain other of the LMA's templates.

However, the contractual treatment of FATCA risk still requires discussion in transactions involving lenders in non-IGA jurisdictions, where there remains some variation in the agreed position. This is why, as mentioned in Part 1, the tax provisions in the Developing Markets Agreement make no provision for FATCA.

Africa is a notable gap in the map of FATCA IGAs. To date, only South Africa, Mauritius, Algeria and Angola have concluded an IGA with the US. Another three countries (Cabo Verde, Seychelles and Tunisia) have each reached an "agreement in substance" with the US and are currently treated as having an IGA in effect, but this status can be lost if they fail to show the US they are making progress towards signing and bringing the IGA into force. It is understood that the difficulty for banks in many African and other developing markets jurisdictions is that the costs of FATCA compliance might be argued to be disproportionate, so IGAs have not been pursued. Nonetheless, international banks entering into transactions with African borrowers may wish to consider whether to address FATCA and, if so, how.

The impact of FATCA on the loan market is discussed in Part II (Recent Developments) and at Clause 13 in the ACT Guide.

Other indemnity obligations

The borrower's other indemnity obligations to the Finance Parties follow those in the Investment Grade Agreements. These include an increased costs indemnity (quite often negotiated in current European loan transactions as mentioned in Part I), a currency indemnity plus a variety of other obligations aimed at ensuring that the Finance Parties are not out of pocket as a result of their participation in the facilities.

These indemnities are considered in detail from the borrower's perspective in the ACT Guide (Clauses 14 and 15).

Representations, undertakings and Events of Default

The representations, undertakings and Events of Default in the Investment Grade Agreements are outlined at Clauses 19-23 in the ACT Guide. The Developing Markets Agreements contain the same representations, undertakings and Events of Default as the Investment Grade Agreements, plus a number of additional provisions, reflecting that the status of the borrower(s) may be below investment grade. In very broad terms, the topics addressed in the Developing Markets Agreement are in line with what might be expected in a loan agreement for a cross-over or sub-investment grade credit in Western Europe, although the detail would be negotiated on a case by case basis.

Many of the additional representations, covenants and Events of Default replicate the drafting used in the Leveraged Agreement, a document often used as a source of supplemental drafting for borrowers below investment grade. As mentioned in Part I, the Leveraged Agreement does not carry the same endorsement of a borrower-side organisation as the Investment Grade Agreements, and is expected to be negotiated quite extensively. In relation to the Developing Markets Agreements, borrowers should give careful thought to whether all of the provisions are warranted and, if so, which exceptions and qualifications might be required to make them workable.

Examples of provisions carried over from the Leveraged Agreement into the Developing Markets Agreement (and which do not feature in the Investment Grade Agreements) include the following:

- **Representations**: Additional representations cover the validity of authorisations necessary for the conduct of the business, trade and ordinary activities of members of the Group, the absence of insolvency proceedings, compliance with laws and regulations and the absence of labour disputes, compliance with environmental laws, tax matters, compliance with anti-corruption laws, no security and indebtedness (save as permitted), plus confirmation that no Finance Party needs to be authorised or entitled to carry on business in an Obligors' jurisdiction of incorporation to enter into the facilities, nor will be deemed resident, domiciled or carrying on business in that jurisdiction by reason only of its involvement in the facilities.

- **Information**: Undertakings require an annual budget containing the prescribed information (which is in some respects more detailed than in the Leveraged Agreement) to be provided to Lenders.

- **Restrictive covenants**: In addition to the restrictive covenants governing the grant of security, disposals, mergers and changes of business (which follow the Investment Grade Agreement), the Group is restricted from entry into non-arms' length transactions, granting loans or credit, providing guarantees and indemnities, paying dividends and redeeming shares, incurring Financial Indebtedness and making acquisitions.

  The formulation of these restrictions follows the Leveraged Agreement and contemplates exceptions. The difference is that the Developing Markets Agreements make no attempt to presuppose the nature of the exceptions that might be required, leaving instead a blank for the parties to insert the agreed provisions. Although the exceptions included as part of the relevant covenants in the Leveraged Agreement are not comprehensive and may not be relevant in all respects to other types of transaction, users of the Developing Markets Agreement might find the exceptions provided in the Leveraged Agreement to be a helpful source of ideas as to the types of exception that might be required.

- **Compliance and other issues**: The Developing Markets Agreements import the more extensive and granular compliance undertakings that appear in the Leveraged Agreement, relating to environmental matters, anti-corruption laws and tax matters. Undertakings also encompass the maintenance of appropriate insurance arrangements, the pari passu ranking of the Finance Parties' claims against the Obligors under the facilities and (optionally), access for the Agent and its advisers to the premises and management of the Group.

- **Events of Default**: The Events of Default extend beyond the Investment Grade Agreements in relation to unlawfulness and invalidity, repudiation and rescission, cessation of business, audit qualification, expropriation and the Material Adverse Change Event of Default. The Material Adverse Change Event of Default is particularly broad ranging. As drafted, the existence of a Material Adverse Change is left to the Lenders to determine (in their reasonable opinion). The Investment Grade Agreements contemplate a Material Adverse Change Event of Default, but do not provide drafting, reflecting that in the investment grade market, if included, the "MAC" Event of Default is likely to be significantly narrower.

Other provisions are designed specifically for the Developing Markets Agreements. In the main, these provisions address the increased risk factors for Lenders that are perceived to be inherent in developing markets investments, for example, economic and political instability and increased legal risk. Such provisions include:

- **Material Licences**: The concept of "Material Licences" does not feature in any of the other LMA English law templates. The Developing Markets Agreements contain representations, undertakings and Events of Default which are triggered if any "Material Licences" (to be identified) are not in force or are altered or cease to be in place. These provisions provide the Lenders with rights to take action under the Agreement if any authorisations which are important for the running of the Group's business are lost or impaired.

- **Procurement and immunity from suit**: The Agreements contain representations regarding compliance with applicable public procurement rules and the absence of immunity from suit, reflecting that borrowers in developing markets jurisdictions might more commonly have a state or sovereign connection.

- **Additional Events of Default**: These are largely aimed at enforcement and country risks. They include the Group's failure to comply with a court judgment or arbitral award, the imposition or likelihood of exchange or currency controls, the impairment of any Material Licence, a debt moratorium affecting the Obligors and any deterioration in the political or economic situation in the relevant jurisdiction(s) which has or would have a Material Adverse Effect.

- **Anti-corruption/Sanctions**: The Developing Markets Agreements were updated in December 2017 to include more detailed anti-corruption and sanctions-related provisions. Previously, the Developing Markets anti-corruption provisions mirrored those included in the Leveraged Agreement; however, the December 2017 update expanded the detail of both the representation and undertaking, and included a new information undertaking requiring disclosure of information relating to actual or potential anti-corruption law breaches. In relation to sanctions, the Developing Markets Agreements now include suggested definitions, on the basis that this is an area where market standards have developed. Suggested representations and undertakings have not been included because this is still an area where market practice diverges, which requires fact-specific analysis and where lenders will commonly have their own bespoke requirements.

Some of these provisions are presented in square brackets as optional so not all will be relevant. A number are quite broadly drafted and might be expected to be negotiated.

Financial covenants

The Developing Markets Agreements, like the Investment Grade Agreements, contain a marker for the insertion of financial covenant provisions, but no drafting. The expectation is that appropriate covenant provisions will be inserted as unrated or sub-investment grade corporate borrowers will generally only be able to borrow on terms which include financial covenants. Even in the European investment grade market, financial covenants are more common than used to be the case. The nature and extent of the financial covenants in a loan to a rated investment grade corporate will, however, be limited, and the terms, in general, less restrictive than would apply to a leveraged or unrated financing.

Which financial covenants are appropriate in any given situation will vary, depending on, among other things, the quality of the credit, the nature of its business, its accounting policies and systems and the purpose and tenor of the financing. The covenants most often seen in corporate loans are interest cover ratios (which compare the borrower's interest expenses to its profits or EBITDA) and leverage ratios (which compare the borrower's debt to its profits or EBITDA). Other asset-based covenants, in particular, relating to tangible net worth are also encountered with reasonable frequency.

At the time the Leveraged Agreement was published, European leveraged loan agreements generally included four maintenance covenants: a leverage ratio, an interest cover ratio, a cashflow cover ratio and limits on capital expenditure[6] and the LMA developed a set of financial covenant provisions for leveraged transactions which includes those four covenants. Although the detail of the definitions vary from deal to deal, most financial covenants comprise variations on one or more of five basic types of ratio: leverage, interest cover, controls on cashflow or liquidity, limits on capital expenditure and minimum net worth or net asset value requirements. Accordingly, elements of the LMA's provisions designed for leveraged transactions are quite often used in various types of loan transaction and, as highlighted by the LMA in a footnote in the Developing Markets Agreement, may be the Lenders' starting point for drafting if covenants of that nature are required.

[6] In recent years, with the advent of so called "covenant loose" transactions in the European leveraged market, the number of covenants required in leveraged transactions has diminished at the upper end of the market. Specifically, the use of cashflow cover covenants and limits on capital expenditure has become less widespread. Some "covenant-lite" transactions for stronger, larger or more popular leveraged credits omit financial maintenance covenants altogether.

In investment grade corporate lending transactions, the European norm, reflected in the Investment Grade Agreements, is to test financial covenants semi-annually. For weaker credits, lenders may look for more frequent (eg quarterly or monthly) testing. Quarterly testing is the norm in the leveraged loan market.

Changes to the parties

All LMA loan documentation makes provision for Lenders to trade their participation in the facilities. As discussed in the ACT Guide (at Clause 24), this may involve a change to the Lender or record (by novation or assignment) or a sub-participation or other "behind the scenes" transaction, whereby the original Lender retains its direct relationship with the borrower but enters into a back-to-back transaction with another investor who effectively takes on the original Lender's risk and reward relating to the loan.

All LMA loan documentation contains some restrictions on assignments and transfers (ie changes to the Lenders of record who have a direct relationship with the borrower), but not on sub-participation. These restrictions are most stringent in the Investment Grade Agreements. Under the Investment Grade Agreements, assignments and transfers require the consent of the borrower, unless an Event of Default is continuing or the new Lender is an Affiliate of the outgoing Lender. This is regarded as an important protection by European investment grade borrowers who are keen to maintain control of their banking relationships.

The Leveraged Agreement contains two options:

- the first requires the parent to be consulted before an assignment or transfer is made; and
- the second requires the parent's consent to be obtained unless the new Lender is included on a pre-approved list of permitted transferees, an Event of Default is continuing or the new Lender is an affiliate of the outgoing Lender.

The options reflect the variations in practice in the leveraged market, where restrictions on transfer are often negotiated.

The Developing Markets Agreements specify the assignment and transfer process but do not contain the same consent requirements as the Investment Grade Agreements. The absence of such restrictions, we assume reflects the LMA's desire to encourage the development of a secondary loan market in developing markets jurisdictions. It also reflects that restrictions on assignment and transfer in general tend to loosen depending on the credit status of the borrower. In Europe, many investment grade loans are viewed as relationship transactions and are not regularly traded. The existence of consent requirements therefore may not present a significant issue for Lenders. In contrast, loans to sub-investment grade borrowers, in particular larger leveraged loans, are generally traded. This is why the LMA's Leveraged Agreement includes consent as an optional mechanic, and contemplates that, where included, there will be a list of pre-approved Lenders to whom it will not apply.

The Developing Markets Agreements do not contemplate the accession of additional borrowers, subject to the satisfaction of applicable conditions precedent, unlike the Investment Grade Agreements, although provision is made for the accession of additional guarantors.

Governing law and dispute resolution

The Developing Markets Agreements are governed by English law. The parties submit to the exclusive jurisdiction of the English courts.

The parties' submission to the exclusive jurisdiction of the chosen courts does not prevent the Finance Parties from taking proceedings in the courts of any other jurisdiction, in line with most of the LMA's facility documentation. The effect of this language in an English law agreement is that the parties' choice of the exclusive jurisdiction of the English courts applies only to the borrower-side parties to the Agreement (the Obligors). The Finance Parties remain permitted to bring proceedings before whichever courts they choose. This position is long established and customary in English law loan documentation[7].

The Developing Markets Agreements include this standard one-sided jurisdiction clause, but also provide an alternative dispute resolution clause, the only LMA templates to do so. This provides for arbitration in London subject to the London Court of International Arbitration rules. The clause also provides an option to use a hybrid arrangement whereby the Agent (on the instructions of Majority Lenders) may decide to revert to the jurisdiction of the courts in place of arbitration.

The alternative dispute resolution clause is likely to be appropriate in jurisdictions where the enforcement of English court judgments may be problematic.

Conditions precedent and legal opinions

The conditions precedent to utilisation of the facilities are in a Schedule to the Agreements, as in all LMA templates. The conditions precedent comprise the customary corporate authorisations, constitutional documents and legal opinions.

The Developing Markets Agreements reflect English law opinions practice. English loan market practice is generally that the English law advisers to the Arrangers and the Agent will deliver the main legal opinion on the enforceability of the Agreement to their clients. Advisers to the Obligors will generally only be required to deliver an opinion if those Obligors are incorporated outside England and Wales – as is assumed to be the case under the Developing Markets Agreements. The Obligors' advisers' opinion will normally be limited to matters of capacity and the validity of the choice of English law under the laws of each Obligor's jurisdiction of incorporation. The Obligors' English law advisers would not typically be asked to deliver a duplicate English law legal opinion.

Market practice requires all legal opinions to be addressed to and capable of reliance by the Arrangers, the Agent and the Lenders forming part of the primary syndicate. The opinion may provide for the disclosure of its contents to Lenders who join the syndicate on the secondary market but that is typically strictly on a non-reliance basis.

[7] A few decisions of courts of other EU jurisdictions (most notably France) have cast doubt on the efficacy of such clauses. However, no English decision has held such a clause to be invalid and in 2017, an English court upheld the validity of this language.

2. The South Africa Agreements

2.1 Overview

Scope of suite

The South Africa Agreements were first published by the ALMA in 2011. They are investment grade agreements based on the LMA's recommended terms.

After the operations of the ALMA were integrated with those of the LMA, the LMA reviewed and updated the ALMA's recommended forms. It used the Developing Markets Agreements as a reference point, adapted to address the requirements of South African law. Aspects of local practice have also been retained from the ALMA forms. This section focuses on those aspects of the South Africa Agreements that differ from the provisions of the Developing Markets Agreements discussed in section 1 above.

The LMA's South Africa suite originally comprised the following:

- Unsecured single currency single borrower term facility agreement
- Unsecured single currency multiple borrower term facility agreement
- Unsecured single currency single borrower term and revolving facilities agreement
- Unsecured single currency multiple borrower term and revolving facilities agreement
- User Guide.

In June 2015, a form of secured term loan facility agreement was added. It is based on the unsecured South Africa Agreements, but (as a secured facility) contains more extensive representations, undertakings and Events of Default. These additional provisions are based on the secured Developing Markets Agreement.

The LMA's recent focus has been on creating ancillary documents for use in conjunction with the South African law templates:

- In May 2017, a form of confidentiality undertaking for primary syndication was published together with riders relating to front running and information barriers and standstill.
- In March 2018, the LMA published two forms of mandate letter, one for use where the facility is fully underwritten, and one for use where the facility is to be arranged on a best efforts basis.

All of these documents broadly reflect the equivalent LMA forms for use in conjunction with the Investment Grade Agreements.

Approach

The South Africa Agreements assume that the borrower is a company incorporated in South Africa, the facility is guaranteed by one or more guarantors and funding is in ZAR.

Interest is the sum of JIBAR and the Margin.

In contrast to the Developing Markets Agreements and the KNTUZ Agreement, the unsecured South Africa Agreements are designed for investment grade borrowers. As a result, although the contractual protections available to the Lenders are more extensive than the English law Investment Grade Agreements, they are slightly less extensive than those in the Developing Markets Agreement (and indeed, the KNTUZ Agreement). It is assumed that this reflects practice and expectations in the South African investment grade market. As already mentioned, the representations, undertakings and Events of Default in the secured South Africa Agreement are modelled more closely on the Developing Markets Agreement.

Updates

The benchmark provisions in the South Africa Agreements were updated in June 2015 to align them more closely with those in the LMA's English law templates. If the JIBAR Screen Rate is unavailable, the Agreements provide a waterfall of fallback options: the use of Interpolated Screen Rates, failing which, Reference Bank Rates and if those are not available, individual Lenders' cost of funds or a weighted average thereof. The alternative and more complex Screen Rate fallback option that features in the English law templates (which provides for the use of Screen Rates for shortened interest periods and historic Screen Rates, before resorting to Reference Bank Rates[8]) is not included in the South Africa Agreements.

2.2 Points of interest

Repayment, prepayment and cancellation

The repayment, prepayment and cancellation provisions in the South Africa Agreements generally follow those in the Developing Markets Agreements outlined above. It is noted that a blank in square brackets contemplates the inclusion of an optional "early settlement" (prepayment) fee. Such fees are unusual in the English law investment grade market.

Tax provisions and FATCA

The tax provisions largely follow those in the Developing Markets Agreement, subject to minor modifications assumed to relate to South African law.

The South Africa Agreements were updated in November 2016 to include the LMA's "FATCA Rider 3" (see Part I above). This provides that each party shall be responsible for its own FATCA status and no party shall be obliged to take withholding tax risk on any other. This differs from the approach in the Development Markets Agreements which are silent on the allocation of FATCA withholding risk, but reflects the position under the English Law Investment Grade Agreements.

Other indemnity obligations

The borrower's indemnity obligations are slightly broader than in the equivalent clauses of the Developing Markets Agreements. The borrower's indemnity to the Finance Parties covers costs and expenses etc. attributable to the occurrence of a Default (rather than an Event of Default as in the English law templates). In addition, the indemnity relating to amendment costs, which in the English law templates is limited to the costs of amendments requested by the borrower or required as a result of a change of currency, includes an additional obligation for the borrower to reimburse costs incurred as a result of a change in law which requires any amendment, waiver or consent under the Finance Documents. This seems to be aimed at ensuring that the borrower will bear the costs of any amendment requested by the Lenders as a result of a change in law.

Representations, undertakings and Events of Default

The representations, undertakings and Events of Default in the South Africa Agreements broadly follow the Developing Markets Agreements, subject to local law adjustments. However, the unsecured templates are, in certain respects slightly less extensive, as mentioned above, most likely reflecting the assumption that the South African borrower is an investment grade credit. The Agreements do, however, contain markers for the addition of further representations, undertakings and Events of Default.

Other points of interest are noted below:

[8] See the ACT Guide.

- **Clean binding obligations representation**: It is customary in the English law market to qualify the "binding obligations" representation, to the effect that the obligations of each Obligor under the Finance Documents are legal, valid, binding and enforceable, by reference to the same legal qualifications that would appear in the legal opinions delivered in relation to the transaction. No such qualification applies to this representation in the South Africa Agreements.

- **Monthly financial statements**: The information undertakings, optionally, require the delivery to the Agent of monthly financial statements. Financial statements are generally delivered semi-annually in the European investment grade market.

- **Financial covenants**: The financial covenants clause includes framework definitions for half yearly covenant testing but no actual covenant provisions (the KNTUZ Agreement and the Zimbabwean Agreement do the same, see section 3 and section 4 below).

- **Compliance with laws**: The general undertaking regarding compliance with laws is not qualified by materiality. A materiality qualification is customary in the English law market and reflected in the English law templates.

- **Negative pledge**: The negative pledge in the English law templates restricts the creation of "Security", widely defined to include security interests as well as "any other agreement or arrangement having a similar effect", as well as "Quasi-Security". The broad-ranging nature of the restriction (discussed at some length in the ACT Guide at Clause 22.3) means that borrowers often need to negotiate exceptions, in addition to those specified in the template. The negative pledge in the South Africa Agreements generally follows the same formulation, save that one of the standard exceptions, for set off and netting arrangements in relation to any hedging transaction.

Changes to the parties

The substance of the transfer provisions is the same as in the Developing Markets Agreements, although the formulation is slightly different.

The South Africa Agreements, like the Investment Grade Agreements, contemplate the accession of additional Borrowers (which is not the case in the Developing Markets Agreements or the KNTUZ Agreement).

Governing law and dispute resolution

The South Africa Agreements are governed by South African law. The parties submit, optionally, to the non-exclusive jurisdiction of the High Court of South Africa, Gauteng Local Division. A footnote reminds the parties to consider whether this is the appropriate forum.

Interestingly, although the submission to jurisdiction is expressed to be non-exclusive, the clause also goes on to provide that the Finance Parties are not prevented from taking proceedings in the courts of any other jurisdiction, in the same way as the equivalent in the English law templates.

The South Africa Agreements do not include an arbitration option.

Conditions precedent and legal opinions

The conditions precedent have been adapted to address local requirements. The Agreements appear to contemplate the provision of legal opinions in relation to the South African Obligors by the South African advisers to both parties. This differs from English law practice as described in section 1 above.

Other issues

- **"Material Adverse Effect"**: This is an important definition from the borrower's perspective, as it is used to qualify various representations, undertakings and Events of Default in the LMA templates, as well as (sometimes) in the drafting of the Material Adverse Change Event of Default. In the Investment Grade Agreements, the definition is left blank for the parties to agree. The Leveraged Agreement contains a definition, which depending on the options chosen, could operate adversely or extremely favourably for the borrower. The flexible definition presented in the Leveraged Agreement is also used in the Developing Markets Agreements.

  In the South Africa Agreements (and in the KNTUZ Agreement and the Zimbabwean Agreement), a definition of "Material Adverse Effect" is provided, but it includes less optionality than the definition in the Developing Markets and Leveraged Agreements. For example, the borrower friendly option to limit the second limb of the definition to a material adverse effect on the Obligors' ability to comply with the financial covenants or perform their payment obligations, is not included. As a result, the definition in the South Africa Agreements is potentially less favourable to borrowers.

- **"Continuing"**: In English law loan agreements, Lenders generally have the right to take action to accelerate the facilities only in respect of an Event of Default that is "continuing". In all of the English law LMA templates, the parties are given the option to define "continuing" in relation to an Event of Default, as either an Event of Default that has not been waived, or an Event of Default that has not been remedied or waived. If an Event of Default is continuing until it is waived by the Lenders, that could put the borrower at a significant disadvantage. As discussed in the ACT Guide (at Clause 1.2), most borrowers, whether investment grade or not, achieve the more favourable formulation of "continuing", an Event of Default that has not been remedied or waived. The South Africa Agreements (but not the KNTUZ Agreement and the Zimbabwean Agreement, see further below) provide the same two options for defining "continuing". However, the term "continuing" is not used in the acceleration clause in the South Africa Agreements. Accordingly, the Lenders are seemingly able to accelerate the facilities at any time after the occurrence of an Event of Default, whether or not it has been remedied.

- **Amendments and waivers**: The list of amendments and waivers requiring unanimous Lender consent is slightly different to that in the English law templates. For example, it includes changes to the purpose clause, the tax indemnity and the increased costs clauses. This obviously affords less flexibility to the borrower, although we would note that alterations to those clauses, in the English law market at least, are not commonly made. The South Africa Agreements also contemplate that any amendment or waiver must be in writing and signed by all relevant parties (often referred to as "no oral modification" clause), a provision not included in the LMA's Investment Grade Agreements.

- **Entire agreement**: The South Africa Agreements contain a series of provisions which amount to what is referred to in English law as an "entire agreement clause". It appears that no party is entitled to rely on terms not recorded in the Finance Documents. Such provisions are not included in English law loan agreements, meaning Lenders potentially retain the right to take action against the borrower based on representations outside the contract.

3. The KNTUZ Agreement

3.1 Overview

Scope of suite

It is understood that the ALMA had started work on the KNTUZ Agreement when it was absorbed into the LMA in 2013. When the LMA took over the project, it decided to base the KNTUZ Agreement on the Developing Markets Agreements, adapted to address the local requirements of Kenyan, Nigerian, Tanzanian and Ugandan law. The agreement was further adapted for the requirements of Zambian law in June 2015. This section focuses on those aspects of the KNTUZ Agreement that differ from the provisions of the Developing Markets Agreements discussed in section 1 above.

Approach

The KNTUZ Agreement is a single currency secured and unsecured term facility agreement for use in Kenya, Nigeria, Tanzania, Uganda and Zambia. The LMA's KNTUZ suite currently comprises this single document and a related User Guide.

The KNTUZ Agreement assumes that the borrower (a single borrower, the agreement includes no mechanics for the inclusion or accession of further borrowers) is a company incorporated in one of the relevant jurisdictions, the facility is guaranteed by one or more guarantors and that funding is in either the relevant local currency or US dollars.

Interest is the sum of the relevant local benchmark rate (or, for US Dollars, LIBOR) and the Margin. The benchmark for each local currency is as follows:

- **KES**: either the rate for 182-day treasury bills issued by the Central Bank of Kenya or the Kenya Banks' Reference Rate issued by the Central Bank of Kenya
- **NGN**: the Nigerian inter-bank offered rate
- **TZS**: the rate for 182-day treasury bills issued by the Central Bank of Tanzania
- **UGX**: the rate for 182-day treasury bills issued by the Central Bank of Uganda
- **ZMW**: the policy rate applicable to Zambian licensed commercial banks for local currency facilities issued by the Bank of Zambia.

The KNTUZ Agreement provides for the benchmark rates for relevant currency to be adjusted semi-annually and interest periods are the fixed periods specified in the Agreement (three months is suggested) unless otherwise agreed by the Borrower and the Agent acting on the instructions of all of the Lender. It is assumed these provisions reflect local market convention.

The template includes optional security provisions which may be deleted if the facility is to be provided on an unsecured basis.

Updates

The KNTUZ Agreement was updated in June 2015 to incorporate most of the updated benchmark provisions that were added to the English law templates in 2014, although as in the case of the South Africa Agreements, the more complex Screen Rate fallback options are not included[9]. Subsequent updates reflect changes made to the definition of

[9] See the ACT Guide.

Reference Bank Rate (reflected across the entire LMA suite) and some other local law amendments.

3.2 Points of interest

Repayment, prepayment and cancellation

The repayment, prepayment and cancellation provisions of the KNTUZ Agreement follow those in the Developing Markets Agreements outlined in section 1. However, it is noted that the templates do not provide the borrower with the right to replace a lender for cause in lieu of prepayment/cancellation.

As in the South Africa Agreements, the Agreement contains a blank for the insertion of an optional prepayment fee.

Tax provisions and FATCA

The tax provisions in substance follow those in the Developing Markets Agreement, subject to minor optional modifications relating to certain provisions of Kenyan and Tanzanian law.

Other indemnity obligations

The borrower's indemnity obligations to the Finance Parties are broader than in the Investment Grade Agreements and the Developing Markets Agreements. For example, they include a specific indemnity for losses arising out of the Information Memorandum or other information provided by the borrower being or being alleged to be misleading and/or deceptive. The indemnity relating to amendment costs also follows the formulation used in the South Africa Agreements, outlined in section 2 above.

Representations, undertakings and Events of Default

The representations, undertakings and Events of Default in the KNTUZ Agreement broadly follow the Developing Markets Agreements, subject to local law adjustments. Like the South Africa Agreements, the KNTUZ Agreement contains markers for the addition of further representations, undertakings and Events of Default.

Other points of interest are noted below:

- **Monthly financial statements**: The information undertakings, optionally, contain a marker for the provision of management accounts.

- **Financial covenants**: The financial covenants clause includes framework provisions for half yearly covenant testing but no actual covenant provisions (the South Africa Agreements do the same, see section 2).

- **Sanctions**: The KNTUZ Agreement contains undertakings that the proceeds of the facilities will not be used for the purpose of financing the activities of a sanctioned person, entity or country, nor will the proceeds be contributed to a person or entity if the borrower has actual knowledge that such party intends to use the proceeds for a sanctioned purpose. As noted in Part I, sanctions representations and undertakings are not part of the English law LMA templates but are becoming increasingly prevalent in English law loan documentation and tend to be quite heavily negotiated.

  We would note that the sanctions undertaking in the KNTUZ Agreement is more limited than lenders sometimes request. It extends to US sanctions only (although a footnote invites users to consider whether other regimes are relevant) and a knowledge qualification is built into the second limb. There is also no related representation relating to sanctions compliance.

Changes to the parties

These provisions follow those in the Developing Markets Agreements outlined in section 1.

Governing law and dispute resolution

The KNTUZ Agreement may be governed by Kenyan, Nigerian, Tanzanian, Ugandan or Zambian law. The parties submit to the exclusive jurisdiction of the courts of the relevant country and the jurisdiction clause also goes on to provide that the Finance Parties are not prevented from taking proceedings in the courts of any other jurisdiction in the same way as the equivalent in the English law templates.

The KNTUZ Agreement does not include an arbitration option.

Conditions precedent and legal opinions

The conditions precedent have been adapted to address local requirements. Like the South Africa Agreements, the Agreement appears to contemplate the provision of legal opinions in relation to the Obligors by the advisers to both parties in the jurisdiction of the chosen governing law. This differs from English law practice as described in section 1.

Other issues

- **"Material Adverse Effect"**: This definition follows the formulation in the South Africa Agreements and is potentially less favourable to borrowers, see section 2.

- **"Continuing"**: As noted in relation to the South Africa Agreements in section 2 above, in English law loan agreements, Lenders generally have the right to take action to accelerate the facilities only in respect of an Event of Default that is "continuing". In all of the English law LMA templates, the parties are given the option to define "continuing" in relation to an Event of Default, as either an Event of Default that has not been waived, or an Event of Default that has not been remedied or waived. The KNTUZ Agreement does not contain the option to define an Event of Default as one that has not been remedied or waived. It is possible this may have been a drafting oversight as the related User Guide indicates that the KNTUZ Agreement contains both options.

4. The Zimbabwean Agreement

4.1 Overview

Scope of suite

The LMA launched the Zimbabwean Agreement in September 2016, using the secured Developing Markets Agreement as its base, adapted to reflect local law requirements and market practice in Zimbabwe. This section focuses on those aspects of the Zimbabwean Agreement that differ from the Developing Markets Agreements.

The Zimbabwean Agreement is a single currency secured term facility, with optionality included to allow the security to be held by either a bond holding company (on behalf of the Lenders) or a security SPV company (on its own behalf as an Obligor). Footnotes to the document suggest that it is intended for an investment grade borrower. The Zimbabwean suite currently comprises this single agreement and a related User Guide.

Approach

The Zimbabwean Agreement assumes that the borrower (a single borrower, the Zimbabwean Agreement makes no provision for the accession of additional borrowers, in the same way as the Developing Markets Agreements and the KNTUZ Agreement) is incorporated in Zimbabwe and that the facility is guaranteed by one or more guarantors (also incorporated in Zimbabwe). Funding is envisaged to be in US dollars.

The Zimbabwean Agreement provides for interest to be charged at either a fixed or floating rate. If a fixed rate is to be used, interest will accrue at the commercially agreed rate. If a floating rate is to be used, interest will be the sum of the margin, LIBOR and a pre-agreed Liquidity Premium. Accordingly, the Screen Rate is LIBOR and provision is made for the waterfall fallback option of an Interpolated Screen Rate, followed by a Reference Bank Rate and lastly Lenders' cost of funds. Unlike the Developing Markets Agreement (but similar to the South Africa Agreements and KNTUZ Agreement) the more complex of the LMA's two Screen Rate fallback options is not included in the Zimbabwean Agreement.

Updates

The Zimbabwean Agreement was updated in November 2016 to reflect changes made across the LMA's documentation suite relating to the definition of Reference Bank Rate. In July 2017, further changes were made to the benchmark provisions (specifically, relating to the Cost of Funds mechanics) mirroring changes made to the LMA's Investment Grade Agreements at the same time, alongside other minor changes.

4.2 Points of interest

Repayment, prepayment and cancellation

The Zimbabwean Agreement follows the repayment, prepayment and cancellation provisions of the Developing Markets Agreements (discussed in section 1), save that there is no right to replace a lender for cause in lieu of prepayment or cancellation.

As in the KNTUZ Agreement and the South Africa Agreements, the Zimbabwean Agreement contemplates that a prepayment fee may apply.

Tax provisions and FATCA

The tax provisions follow those in the Developing Markets Agreements, subject to minor modifications to reflect Zimbabwean law. FATCA is not dealt with in the document, although a footnote directs users to consider whether it is relevant.

Other indemnity obligations

As in the KNTUZ Agreement and the South Africa Agreements, the indemnity obligations are wider than in the Investment Grade Agreements and the Developing Markets Agreements. For example, a specific indemnity relating to losses arising from any inaccuracies in the Information Memorandum is included, and the indemnity relating to amendment costs also includes change of law amendments (discussed in relation to the South Africa Agreements in section 2 above).

Representations, undertakings and Events of Default

The representations, undertakings and Events of Default broadly replicate those in the Developing Markets Agreements, subject to local law amendments. Points of interest to note include:

- **Validity and admissibility in evidence**: It is generally common in loan documentation to qualify the representation that all Authorisations necessary have been obtained by limiting breaches to those which would have a Material Adverse Effect. The Developing Markets Agreements and KNTUZ Agreement include this qualification but it is not found in the Zimbabwean Agreement (or the South Africa Agreements).

- **Financial statements**: The information undertakings require (optionally) the delivery of monthly financial statements, as in the South Africa Agreements (this is discussed in section 2).

- **Financial covenants**: As in the South Africa and KNTUZ Agreements, framework mechanics for half-yearly testing are included, but the details of the financial covenants themselves are left blank.

- **Compliance with laws**: The compliance with laws undertaking is not subject to the qualification that a breach must materially impair the Obligors' ability to perform the obligations under the Transaction Documents. This qualification is included in the Developing Markets Agreements and the KNTUZ Agreement (but not the South Africa Agreements).

- **Negative pledge**: As in the South Africa Agreements, the negative pledge does not include the standard exclusion for Security or Quasi-Security arising in relation to payment or close-out netting or set-off arrangements relating to any hedging transaction.

- **Anti-corruption and sanctions**: An anti-corruption representation is included in the Zimbabwean Agreement. This reflects the representation included in the Leveraged Agreement and is, as a result, less extensive than the anti-corruption representation in the Developing Markets Agreements, which was expanded in December 2017 (after the last update to the Zimbabwean Agreement). Whether the Zimbabwean Agreement will follow the approach of the Developing Markets Agreements in future updates remains to be seen. Like the KNTUZ Agreement (but not the Developing Markets or South Africa Agreements), a sanctions undertaking is included. See section 3 above.

Changes to parties

The changes to the parties mechanics in the Zimbabwean Agreement broadly follow those in the Developing Markets Agreements subject to amendments to reflect Zimbabwean law and practice.

Governing law and dispute resolution

The document is governed by Zimbabwean law, and the parties submit to the exclusive jurisdiction of the Zimbabwean courts. In line with most of the LMA's primary documents, this exclusive jurisdiction clause is for the benefit of the Finance Parties only, and provides that they are not prevented from taking proceedings in the courts of any other jurisdiction.

There is no arbitration option in the Zimbabwean Agreement.

Conditions precedent and legal opinions

The conditions precedent broadly follow those in the Developing Markets Agreements, save for amendments to reflect Zimbabwean law (for example, any required exchange control approvals must be provided). As in the South Africa and KNTUZ Agreements, the Zimbabwean Agreement contemplates that legal opinions will be provided by both the Lenders' and the Obligor's legal advisers, which differs from market practice under English law.

Other issues

- **"Material Adverse Effect"**: This definition uses the same formulation as the South Africa Agreements (discussed in section 2), which is less flexible for borrowers.

- **"Continuing"**: Like the KNTUZ Agreement, the Zimbabwean Agreement does not include the option for an Event of Default to be "continuing" if it has been remedied or waived, instead providing that it will be "continuing" if it has not been waived. As discussed in relation to the South Africa Agreements in Section 2, this is disadvantageous for the borrower. However, the Zimbabwean Users' Guide suggests that the Zimbabwean Agreement contains both options and so this may be a drafting oversight (this is the same as the KNTUZ Agreement). It is also worth noting that, like the South Africa Agreements, the acceleration clause does not reference the word "continuing", which may allow Lenders to accelerate the facilities any time after the occurrence of an Event of Default whether or not it has been waived.

- **Amendments and waivers**: As in the South Africa Agreements, the list of matters which are subject to all lender consent is longer than the Developing Markets Agreements and includes, for example, changes to the purpose clause, the increased costs mechanics and the tax indemnity. In addition, the Zimbabwean Agreement contemplates that all amendments and waivers must be in writing and signed by all relevant parties in order to take effect (a so-called "no oral modification" clause), a provision which is not included in the Investment Grade Agreements.

- **Entire agreement**: The Zimbabwean Agreement includes clauses designed to ensure that only terms included in the agreement are binding (the Sole Agreement and No Implied Terms clauses), following the approach of the South Africa Agreements.

Comparison of key terms

	Prepayment/ cancellation	Tax provisions	Representations, undertakings and Events of Default	Financial information/ covenants	Changes to Lenders	Governing law/dispute resolution
Investment Grade Agreements	Voluntary prepayment/ cancellation subject to Break Costs. Borrower may prepay/cancel individual Lenders if tax/ increased costs claims. Borrower may replace individual Lenders if tax/increased costs claims or illegality provisions apply. Prepayment/ cancellation at option of Lender under illegality provisions. Prepayment/ cancellation at option of individual Lenders/ Majority Lenders on Change of Control.	Borrower gross-up obligation applies only to “Qualifying Lenders”. Broad tax indemnity. No party obliged to gross-up any other party in respect of deductions for FATCA withholding tax.	Representations: status, binding obligations, non-conflict with other obligations, power and authority, validity and admissibility in evidence, governing law and enforcement, deduction of tax, no filing or stamp taxes, no default, no misleading information, financial statements, ranking, no proceedings pending or threatened. Undertakings: authorisations, compliance with laws, negative pledge, disposals, merger, change of business. Events of Default: non-payment, financial covenant breach, breach of other obligations, misrepresentation, cross-default, insolvency, insolvency proceedings, creditors’ process, ownership of the Obligors, unlawfulness, repudiation, MAC (blank).	Half yearly financial statements. No financial covenant provisions (clause left blank as marker).	Changes to Lenders subject to borrower’s consent (unless to Lender Affiliates or an Event of Default outstanding).	English law and jurisdiction.

	Prepayment/ cancellation	Tax provisions	Representations, undertakings and Events of Default	Financial information/ covenants	Changes to Lenders	Governing law/dispute resolution
Leveraged Agreements	As in Investment Grade Agreements. Extensive additional mandatory prepayment provisions requiring prepayments out of eg disposal proceeds, insurance proceeds and excess cashflow.	As in Investment Grade Agreements.	Quarterly financial statements. Financial covenants (tested quarterly) comprise Leverage,	Quarterly financial statements. Financial covenants (tested quarterly) comprise Leverage, Interest Cover, Cashflow Cover and limits on capital expenditure.	Changes to Lenders includes an optional requirement for consent of the borrower (unless to Lender Affiliates / Related Funds, to a bank on a pre-approved list of permitted transferees or an Event of Default is outstanding).	English law and jurisdiction.
Developing Markets Agreements	As in Investment Grade Agreements.	Borrower gross-up obligation not limited to "Qualifying Lenders". Tax indemnity as in Investment Grade Agreements. FATCA withholding risk to be allocated as agreed.	Representations, covenants and Events of Default more extensive than Investment Grade Agreements. Many of the additional provisions are carried over from the Leveraged Agreements. Others are designed specifically for the Developing Markets Agreements.	As in Investment Grade Agreements (and anticipates negotiation).	No consent or consultation right for borrower on change to Lenders.	English law and jurisdiction. Includes submission to arbitration as an alternative to the courts.

	Prepayment/ cancellation	Tax provisions	Representations, undertakings and Events of Default	Financial information/ covenants	Changes to Lenders	Governing law/dispute resolution
South Africa Agreements	As in Developing Markets Agreements. Includes optional marker for insertion of prepayment/ early settlement fee.	As in Developing Markets Agreements subject to minor modifications assumed to be for South African law. FATCA provisions as in the Investment Grade Agreements	Broadly as in Developing Markets Agreements subject to local law adjustments. Provisions of unsecured templates are slightly less extensive than Developing Markets Agreements in some respects (South Africa Agreements aimed at investment grade borrowers).	Information undertakings require, optionally, monthly financial statements in addition to half-yearly. Contains framework for half yearly financial covenant testing but no covenants.	Broadly as in Developing Markets Agreements.	South African law and jurisdiction.
KNTUZ Agreement	As in Developing Markets Agreements save that borrower has no right to replace Lender in lieu of prepayment/ cancellation. Includes optional marker for insertion of prepayment fee.	As in Developing Markets Agreements subject to minor modifications for local law.	As in Developing Markets Agreements subject to local law adjustments. Includes sanctions undertaking.	As in South Africa Agreements (although drafting differs in some respects).	As in Developing Markets Agreements.	Kenyan / Ugandan / Tanzanian / Nigerian / Zambian law and jurisdiction.
Zimbabwean Agreement	As in KNTUZ Agreement.	As in Developing Markets Agreements subject to minor modifications for local law.	As in KNTUZ Agreement.	As in South Africa Agreements and KNTUZ Agreement.	As in Developing Markets Agreements.	Zimbabwean law and jurisdiction.

Glossary

Terms defined in the Developing Markets Agreements have the same meanings in this booklet save where otherwise specified.

The terms specified below have the following meanings:

ACT	The UK Association of Corporate Treasurers.
ACT Guide	The ACT Borrower's Guide to LMA Loan Documentation for Investment Grade Borrowers, fifth edition, April 2017.
Africa Suite	The KNTUZ Agreement, the Zimbabwean Agreement and the South Africa Agreements.
ALMA	The African Loan Market Association (whose operations were integrated with the LMA in November 2013).
Developing Markets Agreements	The LMA's recommended forms of facility agreement for use in developing markets jurisdictions, last revised in December 2017.
KNTUZ Agreement	The LMA's recommended form of East Africa, Nigeria and Zambia single currency secured and unsecured term facilities agreement, first published in July 2014 and last revised in July 2017.
Investment Grade Agreement	LMA recommended form of multi-currency term and revolving facilities agreement for multiple borrowers and guarantors, last revised in July 2017.
Leveraged Agreement	LMA senior multi-currency term and revolving facilities agreement for senior/mezzanine leveraged acquisition finance transactions, last revised in August 2017.
LMA	Loan Market Association.
Market Conditions Provisions	The Users' Guide to LMA Finance Party Default and Market Disruption Clauses in conjunction with the recommended form of primary documents, last revised in July 2017.
South Africa Agreements	The LMA's recommended forms of South African Law Investment Grade facility agreement, first published in July 2014 and revised in July 2017.
Zimbabwean Agreement	The LMA's recommended form of single currency secured term facility agreement for use in Zimbabwe, first published in September 2016 and last revised in July 2017.

About Slaughter and May

Slaughter and May is a leading international law firm that advises on a wide range of often groundbreaking transactions and has a varied client list that includes major corporations, financial institutions and governments.

Our loan finance practice advises both investment grade and sub-investment grade borrowers in all industry sectors which gives us a depth of understanding of borrowers' needs. We provide ongoing advice to the ACT in relation to the LMA's investment grade loan documentation and related issues. We also act for leading financial, commercial and industry players and banks, providing us with a wide perspective on the market.

Our Africa Practice Group comprises lawyers across our London, Hong Kong and Beijing offices who provide a full service across all key sectors, including banking and finance, telecommunications, infrastructure, energy, mining and projects. We support African clients working in Africa and elsewhere, as well as non African clients working across the world.

The breadth and duration of our experience in Africa has provided us with a deep understanding of legal systems, local cultures and socio-economic considerations. This, combined with our strong track record as a leading international firm, enables us to provide a real value added service to clients doing business on the continent.

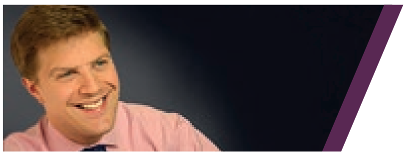
We welcome discussing with clients, potential clients and independent law firms how we can work together and provide pre-eminent expertise and a comprehensive package of legal excellence.

Further information about Slaughter and May is available at www.slaughterandmay.com.

Slaughter and May contacts

Contact details for all of Slaughter and May's financing partners are available at www.slaughterandmay.com.

Steven Galbraith
Partner – Infrastructure, Energy and Natural Resources, Financing
T +44 (0)20 7090 3099
E steven.galbraith@slaughterandmay.com



Robert Byk
Partner – Financing
T +44 (0)20 7090 3435
E robert.byk@slaughterandmay.com

Caroline Phillips
Partner – Financing
T +44 (0)20 7090 3884
E caroline.phillips@slaughterandmay.com

Kathrine Meloni
Special Adviser – Financing
T +44 (0)20 7090 3491
E kathrine.meloni@slaughterandmay.com

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