1. The LMA in Africa

The majority of English law syndicated loans are documented based on the collection of primary syndicated loan documentation produced by the Loan Market Association (“LMA”). 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 is also increasingly used in the domestic markets in other Western European countries and in the Asia-Pacific region. More recently, the use of LMA-style loan documentation appears to have become more widespread in larger African transactions, in particular in South Africa following the establishment of the Africa Loan Market Association (the “ALMA”) in 2011.

If, as expected, the interest of international banks in investment opportunities in Africa continues to grow, the influence of LMA terms is likely to become stronger, as those banks seek to impose on borrowers the terms with which they are familiar in their home jurisdictions. To that end, the LMA has produced two 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 LMA produced the first of its English law template loan agreements for use in loan transactions involving borrowers established in developing markets (the “Developing Markets Agreements”) in 2012, a collection which has subsequently been expanded quite significantly. The LMA did not identify precisely the markets at which the Developing Markets Agreements are aimed, although the book the LMA published to accompany them1, discusses 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.

Following the integration of the operations of the ALMA with those of the LMA in November 2013, the LMA launched a suite of documentation governed by the laws of various African jurisdictions. These comprise a variety of 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”).

The South Africa Agreements and the KNTUZ 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.
The table below summarises the key features of each of these LMA documentation suites and their derivation.

<table>
<thead>
<tr>
<th>LMA Documentation Suites</th>
<th>Credit Rating</th>
<th>Security</th>
<th>Facility Options</th>
<th>Derivation</th>
<th>Governing Law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Investment Grade Agreements (IGAs)</strong></td>
<td>Investment grade</td>
<td>Unsecured</td>
<td>Term/revolving term</td>
<td>N/A</td>
<td>English</td>
</tr>
<tr>
<td></td>
<td>Sub-investment grade</td>
<td>Secured</td>
<td>Term/revolving multi-currency</td>
<td>IGAs adapted for a leveraged acquisition financing</td>
<td>English</td>
</tr>
<tr>
<td></td>
<td>Not specified</td>
<td>Secured/unsecured</td>
<td>Term/revolving single or dual currency</td>
<td>IGAs</td>
<td>English</td>
</tr>
<tr>
<td><strong>Leveraged Agreements</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td><strong>Developing Markets Agreements (DMAs)</strong></td>
<td>Investment grade</td>
<td>Secured/unsecured</td>
<td>Term/revolving single currency</td>
<td>DMAs (adapted for South African law and market practice)</td>
<td>South African</td>
</tr>
<tr>
<td></td>
<td>Not specified</td>
<td>Secured/unsecured</td>
<td>Term</td>
<td>DMAs (adapted for relevant law and market practice)</td>
<td>Kenyan/Ugandan/Tanzanian/Nigerian/Zambian</td>
</tr>
</tbody>
</table>

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. The jurisdictions in Africa with more developed loan markets are also already familiar with the English law LMA templates. The LMA have organised a number of education and training events both in Europe and in Africa to promote the Developing Markets Agreements and the Africa Suite. As a result it seems likely that LMA terms will continue to gain traction, in particular for larger facilities involving African borrowers.

A key question for African loan market participants is likely to be which of the LMA templates is the most appropriate starting point: in other words, whether to use the local or English law version. 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. There may also be some mixing and matching of provisions from various of the LMA’s 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 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 5 April 2016. References to the LMA’s recommended forms are to the forms current as at that date.

Slaughter and May
5 April 2016
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. 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 corporate 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 require amendment and supplement 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, 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\(^2\). 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, for more than 10 years we have published 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\(^3\)”). 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 and related supplements for explanatory commentary on particular topics.

5. **Loan documentation in Europe: recent developments**

Many of the documentation points that have arisen over the past five years are the product of the global financial crisis and other adverse events that have affected the financial sector since then. For example, the implications of Basel III and its implementation by national regulators, the ever-increasing network of sanctions and anti-corruption laws in force around the world and the US Foreign Account Tax Compliance Act (“FATCA”) have all had to be taken into account. The process of reforming LIBOR, Euribor and other benchmarks remains ongoing but has resulted in changes to loan documentation.

Managing the impact of new legislative and regulatory measures remains an ongoing challenge for the loan market and the financial sector generally. Lenders’ regulatory costs and compliance and the allocation of those costs and risks as between the lenders and the borrower continues to be a focus of discussion in most current loan transactions.

The recessionary period also brought to light a number of risks that were not previously catered for specifically in loan documentation. For example, the repercussions of a defaulting or insolvent Finance Party on a loan transaction, the implications of negative interest rates (a recent phenomenon in Europe), the prospect of the break-up of the euro, the impact of market disruption and the unavailability of benchmark rates are all issues that had not been focused on in any detail previously. The adequacy of the

\(^2\) [http://www.lma.eu.com](http://www.lma.eu.com)

contractual protection afforded to Agent banks in syndicated loan agreements (who, in the wake of the
global crisis found themselves increasingly occupied with consent requests and restructurings) has been
another topic of concern.

The emergence of new regulatory requirements and commercial risks, in some cases, has 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 they are addressed both in the English law LMA templates
(including the Developing Markets Agreements) 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 below, readers are referred to the ACT Guide and
our July 2014 booklet, “Recent Trends and Current Issues affecting Loan Documentation in Europe”\(^4\),
produced in conjunction with our Best Friend firms in Europe. This contains a detailed commentary on
a variety of topical issues affecting the loan market including all of those listed above. The new LMA
provisions relating to benchmarks are discussed in detail in our November 2014 Benchmarks Supplement to
the ACT Guide\(^5\).

documentation-in-europe-recent-trends-and-current-issues.aspx

\(^5\) http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-
act-borrowers-guide-to-lma-loan-documentation-for-investment-grade-borrowers-benchmarks-supplement.aspx
<table>
<thead>
<tr>
<th><strong>Basel III and related measures</strong></th>
<th><strong>Sanctions and anti-corruption laws</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>All of the LMA templates contain an increased costs indemnity, pursuant to which (in summary) the borrower must reimburse the lenders 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, it may no longer constitute a change in law meaning 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.</td>
<td>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. 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.</td>
</tr>
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</table>

<p>| <strong>Africa Suite</strong> | The increased costs indemnities in the Africa Suite follow the English law LMA templates. The KNTUZ Agreement and the South Africa Agreements contain footnotes highlighting that the terms of the indemnity may be negotiated in light of Basel III. | Representations and undertakings relating to compliance with both sanctions and anti-corruption laws are included in all of the documents comprising the Africa Suite. |</p>
<table>
<thead>
<tr>
<th><strong>English law documentation</strong></th>
<th><strong>Africa Suite</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FATCA</strong></td>
<td></td>
</tr>
<tr>
<td>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.</td>
<td>The tax provisions in the Africa Suite documents do not address FATCA specifically, although a footnote highlights that consideration should be given to whether or not FATCA is relevant.</td>
</tr>
<tr>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>It has become 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) has therefore been incorporated into the Investment Grade Agreements and certain other of the LMA templates.</td>
<td></td>
</tr>
<tr>
<td>It has not, however, been 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.</td>
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<tr>
<td>See further section 1 of Part II.</td>
<td></td>
</tr>
<tr>
<td><strong>Benchmark reform and market disruption</strong></td>
<td></td>
</tr>
<tr>
<td>Reforms to LIBOR, Euribor and other benchmarks used in loan documentation prompted the LMA to make quite 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.</td>
<td>The Africa Suite documents were updated to incorporate many of LMA’s revised benchmark provisions in June 2015.</td>
</tr>
<tr>
<td>In general, the LMA’s revised benchmark provisions are used in most transactions subject to discussion on some points of detail.</td>
<td>See Part II for further comments on this topic.</td>
</tr>
<tr>
<td>If a benchmark rate falls below zero, under LMA terms the Margin payable to the Lenders will be reduced.</td>
<td></td>
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<tr>
<td>As a result, an optional “zero floor” features in each of the benchmark definitions in the English law LMA templates.</td>
<td>As a result of revisions to the Africa Suite in June 2015, all of the benchmark definitions include a zero floor. In the documents comprising the Africa Suite, the zero floor is not marked as optional language.</td>
</tr>
<tr>
<td>The zero floor language is quite often adopted (and indeed certain banks insist on it as a policy matter). However it has become more controversial recently in light of benchmark rates for certain European currencies falling into negative territory.</td>
<td></td>
</tr>
</tbody>
</table>
Following the collapse of Lehman Brothers, 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 clauses for dealing with “Finance Party Default and Market Disruption” (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.

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.

<table>
<thead>
<tr>
<th>Defaulting Lenders</th>
<th>English law documentation</th>
<th>Africa Suite</th>
</tr>
</thead>
<tbody>
<tr>
<td>Following the collapse of Lehman Brothers, it became apparent that LMA loan documentation did not cater sufficiently for the possibility of lender default and insolvency.</td>
<td></td>
<td>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.</td>
</tr>
<tr>
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<td></td>
<td></td>
</tr>
<tr>
<td>The Market Conditions Provisions dealing with Defaulting Lenders and Impaired Agents are commonly used in English law transactions and tend not to be controversial.</td>
<td></td>
<td>The agency provisions in the Africa Suite documents follow the provisions in the Investment Grade Agreements subject to some adjustments.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Position of Agent bank</th>
<th>English law documentation</th>
<th>Africa Suite</th>
</tr>
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</tbody>
</table>
Part II: The Developing Markets Agreements and the Africa Suite

1. The Developing Markets Agreements

1.1 Overview

The LMA launched the first of its Developing Markets Agreements in September 2012, followed by further variations during the course of 2013. 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 facility agreement
- Unsecured dual currency term facility agreement
- Secured single currency term facility agreement
- User Guide

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.

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. 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.

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.

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1.2 Key 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 Lenders” 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 six 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 and, as of 1 January 2016, Zambia. 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 African 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, Angola and Cabo Verde have concluded an IGA with the US. 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 at Clause 13 in the ACT Guide and in the June 2014 Supplement to 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.

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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 as such is expected to be negotiated, often quite extensively. In relation in particular to those aspects of the Developing Markets Agreements based on the Leveraged Agreement, borrowers should give careful thought to whether all of these provisions are warranted and if so, to the exceptions and qualifications that 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 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 new, 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.

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 by borrowers who are able to.
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 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.

In European corporate lending transactions financial covenants are generally tested semi-annually, although for weaker credits, lenders may look for more frequent (quarterly) testing. Quarterly testing is the norm in the European 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.

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.
All LMA loan documentation contains some restrictions in terms of assignments and transfers (i.e., changes to the Lenders of record who have a direct relationship with the borrower), but not 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 investment grade borrowers who are keen to maintain control of their banking relationships.

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 does not confer any right on the borrower to veto transfers and assignments, instead providing only a right for the borrower to be consulted for a limited period.\footnote{Although this is a point that is regularly negotiated by private equity sponsors.}

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 is expressed to be “for the benefit of the Finance Parties” only, as is the case in 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.\footnote{Save in transactions with a connection to France, where caselaw has cast doubt on the efficacy of such clauses; see Loan Documentation in Europe: Recent Trends and Current Issues (http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/l/loan-documentation-in-europe-recent-trends-and-current-issues.aspx) for further discussion on this topic.}

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 set forth in a Schedule to the Agreements, as is the case in all LMA templates, comprising largely the customary corporate authorisations and 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.

2. **The South Africa Agreements**

2.1 **Overview**

The South Africa Agreements might be viewed as an update rather than a new documentation suite for the South African loan market. South African law forms of investment grade loan agreement based on the LMA’s recommended forms were first published by the ALMA following its launch in 2011.

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 local requirements of South African law. Aspects of local practice have also been retained from the ALMA forms. This section therefore 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 to the collection. This is based on the unsecured South Africa Agreements, adjusted to take account of local law requirements for secured facilities. However, it (as a secured facility) contains more extensive representations, undertakings and Events of Default than the unsecured South Africa Agreements, which are based on those in the secured version of the Developing Markets Agreements.

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.

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 Rates11) is not included in the South Africa Agreements.

A key point to note is that, 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.

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2.2 Key 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 follow those in the Developing Markets Agreement, subject to minor modifications assumed to relate to South African law.

Other indemnity obligations

The borrower’s indemnity obligations are slightly broader than in the equivalent clauses of the Developing Markets Agreement. 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 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:

- 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 does the same, see section 3 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 the ordinary course of banking business, often an important point for borrowers, is omitted.

• **Sanctions:** The South Africa Agreements (and the KNTUZ Agreement), unlike any of the other LMA templates, contain 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 South Africa Agreements and 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**

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

The South Africa Agreements do, 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 submission is for the benefit of the Finance Parties only 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, contrary to English law practice as described in section 1 above.

Other issues

• “Material Adverse Effect”: This is an important definition from the borrower’s perspective, which 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 Agreement (and in the KNTUZ 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, 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.

- **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**

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 (it was further adapted for the requirements of Zambian law in June 2015). This section therefore focuses on those aspects of the KNTUZ Agreement that differ from the provisions of the Developing Markets Agreements discussed in section 1 above.

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.

Interestingly, 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 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.\(^\text{12}\)

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

### 3.2 Key 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 English law templates. 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 African 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 the same sanctions undertaking as the South Africa Agreement, discussed in section 2.

**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 submission is for the benefit of the Finance Parties only 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, contrary to English law practice as described in section 1.
Other issues

- **“Material Adverse Effect”**: This definition follows the formulation in the South Africa Agreements (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.
## Comparison of key terms

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<td>Borrower may replace individual Lenders if tax/increased costs claims or illegality provisions apply.</td>
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<td>Changes to Lenders</td>
<td>Governing law/dispute resolution</td>
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<tr>
<td><strong>Leveraged Agreements</strong></td>
<td>As in Investment Grade Agreements.</td>
<td>As in Investment Grade Agreements.</td>
<td>Representations, covenants and Events of Default significantly more extensive than Investment Grade Agreements.</td>
<td>Quarterly financial statements. Financial covenants (tested quarterly) comprise Leverage, Interest Cover, Cashflow Cover and limits on capital expenditure.</td>
<td>Changes to Lenders requires prior consultation with borrower (unless to Lender Affiliates/Related Funds or an Event of Default outstanding).</td>
<td></td>
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<tr>
<td><strong>Developing Markets Agreements</strong></td>
<td>As in Investment Grade Agreements.</td>
<td>Borrower gross-up obligation not limited to “Qualifying Lenders”. Tax indemnity as in Investment Grade Agreements. FATCA withholding risk to be allocated as agreed.</td>
<td>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 new, designed specifically for the Developing Markets Agreements.</td>
<td>As in Investment Grade Agreements (and anticipates negotiation).</td>
<td>No consent or consultation right for borrower on change to Lenders.</td>
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</tbody>
</table>

English law and jurisdiction. Includes submission to arbitration as an alternative to the courts.
<table>
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<th>Prepayment/cancellation</th>
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</tr>
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<tr>
<td><strong>South Africa Agreements</strong></td>
<td>As in Developing Markets Agreements. Includes optional marker for insertion of prepayment/early settlement fee.</td>
<td>As in Developing Markets Agreements subject to minor modifications assumed to be for South African law.</td>
<td>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). Includes sanctions undertaking.</td>
<td>Information undertakings require, optionally, monthly financial statements in addition to half-yearly. Contains framework for half yearly financial covenant testing but no covenants.</td>
<td>Broadly as in Developing Markets Agreements.</td>
<td>South African law and jurisdiction.</td>
</tr>
<tr>
<td><strong>KNTUZ Agreement</strong></td>
<td>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.</td>
<td>As in Developing Markets Agreements subject to minor modifications for local law.</td>
<td>As in Developing Markets Agreements subject to local law adjustments. Includes sanctions undertaking.</td>
<td>As in South Africa Agreements (although drafting differs in some respects).</td>
<td>As in Developing Markets Agreements.</td>
<td>Kenyan/ Ugandan/ Tanzanian/ Nigerian/ Zambian law and jurisdiction.</td>
</tr>
</tbody>
</table>
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:

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>ACT</td>
<td>The UK Association of Corporate Treasurers.</td>
</tr>
<tr>
<td>Africa Suite</td>
<td>The KNTUZ Agreement and the South Africa Agreements.</td>
</tr>
<tr>
<td>ALMA</td>
<td>The Africa Loan Market Association (whose operations were integrated with the LMA in November 2013).</td>
</tr>
<tr>
<td>Developing Markets Agreements</td>
<td>The LMA's five recommended forms of facility agreement for use in developing markets jurisdictions, last revised in November 2015.</td>
</tr>
<tr>
<td>KNTUZ Agreement</td>
<td>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 revised in June, October and November 2015.</td>
</tr>
<tr>
<td>Investment Grade Agreement</td>
<td>LMA recommended form of multi-currency term and revolving facilities agreement for multiple borrowers and guarantors, last revised in November 2015.</td>
</tr>
<tr>
<td>Leveraged Agreement</td>
<td>LMA senior multi-currency term and revolving facilities agreement for senior/mezzanine leveraged acquisition finance transactions, last revised in November 2015.</td>
</tr>
<tr>
<td>LMA</td>
<td>Loan Market Association.</td>
</tr>
<tr>
<td>Market Conditions Provisions</td>
<td>The Users’ Guide to LMA Finance Party Default and Market Disruption Clauses in conjunction with the recommended form of primary documents, last revised in December 2014.</td>
</tr>
<tr>
<td>South Africa Agreements</td>
<td>The LMA's five recommended forms of South African Law Investment Grade facility agreement, first published in July 2014 and revised in June and November 2015.</td>
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</tbody>
</table>
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. They 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.
Contact details for all of Slaughter and May’s financing partners are available at www.slaughterandmay.com.

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