Feature

KEY POINTS

- LMA facility agreement templates have been in existence for almost 20 years. They are used as a starting point for the vast majority of English law 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 material influence on loan documentation terms, in domestic markets in other Western European countries and in the Asia-Pacific region.
- The LMA's geographic focus has expanded over the last five years to include Africa. It has developed a suite of documentation suitable for transactions involving African borrowers.

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Spot the difference: how does the LMA's documentation for East African borrowers compare to its English law counterparts?

This article outlines the current scope of the LMA's "Africa Suite" and considers the development, key features and usage of the LMA's template for borrowers in Kenya, Nigeria, Tanzania, Uganda and Zambia.

THE LMA IN AFRICA

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 (ALMA) in 2011. The ALMA focussed initially on documentation for South Africa, as the largest and most developed syndicated loan market. Since the operations of the ALMA were integrated with the LMA's in 2013, the LMA's collection of loan documentation for transactions in Africa has been significantly developed. It currently comprises:

- a suite of English law governed loan agreements aimed at borrowers in generally less developed economies (Developing Markets Agreements); and
- three collections of local law documentation aimed specifically at borrowers in certain African jurisdictions, namely South Africa (South Africa Agreements), Kenya, Nigeria, Tanzania, Uganda and Zambia (KNTUZ Agreement) and Zimbabwe (Zimbabwean Agreement).

The Developing Markets Agreements are broadly based on the LMA's English law forms of facility agreement for investment grade borrowers (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 (Leveraged Agreements).

The South Africa Agreements, the KNTUZ Agreement and the Zimbabwean Agreement are based on the LMA's Developing Markets Agreements, adapted as required for the relevant local law and market.

DEVELOPMENT OF THE KNTUZ AGREEMENT

This article focusses on the KNTUZ Agreement, which was first produced in 2013 by the ALMA and reviewed by an East African Working Group involving Anjarwalla & Khanna.

The drafting committee was invited to take into account certain principles, such as the desire to standardise loan documentation in East Africa and Nigeria including provisions such as agency clauses and transfer mechanics for syndication, reducing the need to negotiate different forms of agreement as well as reducing documentation risk and costs. A standardised document would enable in-house and external lawyers familiar with the document to better advise lender and borrower clients alike, help facilitate the growth of the secondary loan market and increase the sophistication of finance documentation in the regional market.

THE KNTUZ AGREEMENT

The resulting KNTUZ Agreement is a single currency term facility agreement for use in Kenya, Nigeria, Tanzania, Uganda and Zambia. The optional security provisions may be deleted if the facility is to be provided on an unsecured basis.

The template assumes that the borrower is a company incorporated in one of the relevant jurisdictions, the facility is guaranteed by one or more guarantors, that funding is in either the relevant local currency or US dollars and that the agreement will be governed by the relevant local law.

The KNTUZ Agreement is designed to be governed by the laws of any of the relevant jurisdictions. It is also capable of adaptation for use in relation to borrowers at various points in the credit spectrum, from quasi-investment grade to sub-investment grade entities. As a result, it contains significant optionality and differs from the LMA's English law templates in a number of ways.

KNTUZ AGREEMENT v ENGLISH LAW LMA

Repayment, prepayment and cancellation

The bulk of these aspects of the KNTUZ Agreement reflect the familiar terms of the English law templates:

- The Agreement provides the option for the term debt to amortise or to be repaid in a single bullet.
- The borrower may voluntarily prepay and cancel the facilities or agreed amounts of the facilities at any time, without penalty, subject to any Break Costs.
- Individual Lenders may be prepaid and their commitments cancelled if they claim under the tax gross-up or increased costs clauses or if the illegality provisions apply (if it becomes unlawful for that Lender to lend).

The only material difference between these aspects of the KNTUZ Agreement and the English law template is that the borrower does not benefit from a mechanic which allows it to replace, rather than prepay and cancel a Lender that claims under the tax gross-up or increased costs clauses or requires prepayment for illegality. While rarely exercised in practice, this replacement option is potentially useful and is widely included in English law agreements.

Interest

The KNTUZ Agreement, in common with the vast majority of the LMA's syndicated loan agreements, provides only for the payment of floating rate interest. As the facility may be borrowed in the relevant local currency or US Dollars, "Interest" is the sum of the relevant local benchmark rate (or, for US Dollars, LIBOR) and a Margin.

The English law templates do not make further provision for the adjustment of the specified benchmark rate, unless that benchmark ceases to be available or needs to be replaced. The KNTUZ Agreement, however, provides for the benchmark rates for the relevant currency to be adjusted semi-annually.

Tax provisions

The KNTUZ Agreement obliges the borrower to gross up the amount payable to the Lenders should the borrower be required to deduct tax from any amounts due. It also includes the standard tax indemnity covering any tax, cost or loss suffered by a Lender in relation to the facilities, other than a tax on net income.

Subject to minor optional modifications relating to certain provisions of Kenyan and Tanzanian law, which reflect specific exemptions under the Income Tax laws in Kenya concerning the making of interest payments to licenced financial institutions, this reflects the position in the English law templates, subject to one important difference. In the KNTUZ Agreement the borrower's gross-up obligation for withholding tax is not limited to payments to "Qualifying Lenders".

"Qualifying Lenders" are defined in the English law templates to comprise Lenders who, for the purposes of current UK tax legislation, can be paid free of UK withholding tax. If the borrower's gross-up obligation is limited to "Qualifying Lenders", its tax risk is, in effect, largely limited to a situation where there is a change in the existence of scope of the relevant exemptions from withholding tax. This 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) – for example, whether relevant double tax treaties exist that would enable payments to be made without deductions.

Well-advised borrowers may seek to adjust these aspects of the KNTUZ Agreement to accommodate a Qualifying Lender concept, where possible, although for now, it remains uncommon for this language to be altered in the regional market.

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FATCA

The US Foreign Account Tax Compliance Act (FATCA), in summary, 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, any US source income.

The KNTUZ Agreement makes no specific provision for FATCA. The risk of withholding tax becoming payable under FATCA, which is catered for extensively in the Investment Grade Agreements and other of the LMA's English law templates, is left to be allocated by the parties.

In many countries around the world, intergovernmental agreements (IGAs) have been put in place to facilitate compliance with FATCA and in effect, mitigate FATCA risk almost entirely. 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.

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.

FATCA risk therefore needs to be assessed and addressed on a case by case basis, with more help from the tax lawyers. If there is no "foreign financial institution" (as defined for the purposes of FATCA) in the borrower

Group and the Finance Parties will not be receiving (or making) US source payments, the transaction is likely to have little or no exposure to FATCA.

If a loan is made to a purely African group with no US business and the loan agreement makes no provision for the accession of additional borrowers, lenders may therefore take a commercial view not to complicate the agreement with unnecessary protections.

REPRESENTATIONS, UNDERTAKINGS AND EVENTS OF DEFAULT

The representations, undertakings and Events of Default in the KNTUZ Agreement cover a range of topics in line with what might be expected in a loan agreement for a sub-investment grade credit in Western Europe, subject to local law adjustments. They are thus justifiably broader than the equivalent provisions in the Investment Grade Agreements and in many respects, are closer to the provisions of the Leveraged Agreements.

The Developing Markets Agreements were updated in December 2017 to include more detailed anti-corruption and sanctions-related provisions, reflected in the KNTUZ.

Some of the commercial terms of the KNTUZ Agreement are, however, more extensive than the equivalent English law terms. These provisions stem from the Developing Markets Agreements and address the increased risk factors for Lenders that are perceived to be inherent in developing markets investments such as economic and political instability and increased legal risk. For example:

- **Material Licences**: 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**: representations regarding compliance with applicable public procurement rules and the absence of immunity from suit, reflecting that borrowers in relevant 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, which are reflected in the KNTUZ.
  - Previously, the 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, sanctions-related definitions, have been added. Market practice tends to diverge (and require fact-specific analysis) in relation to sanctions representations and undertakings, where lenders will commonly have their own bespoke requirements. The KNTUZ Agreement, however, includes as a starting point, a "minimum" undertaking 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.

Changes to the Lenders

All LMA loan documentation makes provision for Lenders to trade their participation in the facilities. This may involve a change to the Lender of 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 sub-participation. These restrictions are most stringent in the Investment Grade Agreements, where 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 KNTUZ Agreement follows the Developing Markets Agreements regarding changes to the parties. It makes provision for Lenders, without consent or consultation with the borrower, to trade their participation in the facilities. This is unlikely to be a material issue in practical terms as it is not common for lenders to trade participations in the relevant jurisdictions. It may become an issue that borrowers begin to focus on as the syndicated loan market develops.

Biog box
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ADOPTION OF THE LMA TEMPLATES IN AFRICA

Although 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, adoption across the continent has been varied. For South African law transactions law firm templates tend to prevail, but for syndicated loans, those law firm templates increasingly adopt the LMA style. The same is the case for loan facilities documented under the laws of East African jurisdictions.

There may also be some mixing and matching of provisions from the relevant Africa Suite templates and customary local documentation, to reflect the characteristics of the loan, the borrower group and the composition of the syndicate.

The choice of whether to use a local law or an English law template (or indeed base the facilities on any kind of LMA template) is likely to depend on whether the facility is to be syndicated to international or domestic banks, and how broadly. Agreements are likely to be local law governed if only domestic banks are lending and English law in other cases.

The slow adoption of LMA terms in many African jurisdictions reflects the still-developing syndicated loan market and existing sophisticated loan agreements for bilateral loans. Most local banks have their own standardised letter of offer which they use as the basis of their lending for all transactions, large or small and these are produced in-house. External lawyers are typically only used for preparing security documents save in the case of high value or complex transactions.

In Kenya, for example, East Africa's largest economy, syndicated lending is confined largely to project financings, sovereign and infrastructure transactions. These deals, a number of which have been very successful, tend to involve international syndicates and foreign currency and as a result, are typically documented on LMA-based terms under English law. As local banks and larger corporates become more comfortable with the concept of syndicated lending and the advantages of consistency and more detailed risk allocation offered by LMA terms, it is anticipated that the LMA templates governed by the laws of other African jurisdictions, including the KNTUZ Agreement, might garner some further momentum. ■

Further Reading:

- OHADA: Cementing the role of the security agent in Africa (2015) 4 JIBFL 216.
- Taking security in West and Central Africa (2013) 11 JIBFL 712.
- LexisPSL: Banking & Finance: Overviews: Africa cross-border guides – overview.