WHITE & CASE

Insight: Bank Finance

September 2013 Update

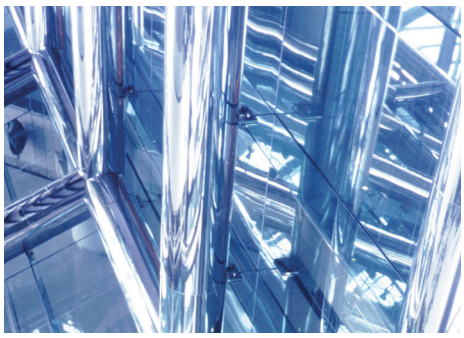
Dodd-Frank and Swap Guarantees

The Commodity Futures Trading Commission (the **"CFTC"**) has issued a rule jointly with the Securities Exchange Commission further defining the term "swap" and "security-based swaps". In that rule, CFTC has taken the view that the guarantee of a swap is itself a "swap" for purposes of the Commodity Exchange Act, as amended (**"CEA"**), including by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (**"Dodd-Frank"**). Under the CEA it is illegal for any person other than an "eligible contract participant" (**"ECP"**) to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated by the CFTC as a contract market. As a result, the guarantee of a swap by a guarantor that is not an ECP—even if the direct counterparty to the swap is an ECP—raises significant issues. The CFTC is asserting broad jurisdiction, even extra-territorially, so caution needs to be applied even where the swap provider and/or its counterparty are not US persons.

Under many secured loan facilities, swaps entered into by a borrower (or one of its subsidiaries) benefit from the same credit support as the direct obligations under the loan facilities, including security and guarantees from the borrower group. Under the CEA, if any member of the borrower group which provides a guarantee or security of a swap is not an ECP, then the guarantee of the swap by such subsidiary would not be enforceable. Amendments to existing swaps and/or guarantees may raise similar issues in this respect.

The LSTA (a trade association the aim of which, among others, is to set standards for corporate lending and loan trading in the US) recommended approach to dealing with this issue, which has been generally accepted in the US market, is to draft any guarantees (and security documents) so as to exclude any guarantee of (or security for) swap obligations by an entity that is not an ECP at the time the swap is entered into. This helps to eliminate the risk that the guarantee (or security) as it applies to the loan obligations may also be tainted, which is a risk given that the credit support for the swaps is usually provided pursuant to the same documentation supporting the loan obligations. The LSTA also recommends, for added protection, the inclusion of "keepwell" arrangements in the documentation pursuant to which ECPs effectively confer ECP status on non-ECPs, thereby making them eligible under the CEA to guarantee swap obligations.

Given the potential extraterritorial application of the Title VII of Dodd-Frank amendments to the CEA, and the practical risk that a US institution directly subject to the CEA may provide a swap to the borrower group in the future, it is recommended that the LSTA approach is followed in all loan facilities (whether or not US institutions are initial lenders) to eliminate the risk of a violation of the CEA with respect to the credit support provided for the swaps themselves, as well as any risk of tainting the credit support for the direct loan obligations.



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LIBOR Timeline

31 December 2012	February 2013	31 March 2013	2 April 2013	31 May 2013
GBP Repo benchmark discontinued	NZD LIBOR Screen Rate discontinuedd	DKK and SEK LIBOR Screen Rates discontinued	The administering and providing of information in relation to benchmarks (LIBOR only) becomes an activity regulated by the Financial Conduct Authority	AUD and CAD LIBOR Screen Rates discontinued and 2 week, 4, 5, 7, 8, 9, 10 and 11 month tenors discontinued for remaining currencies

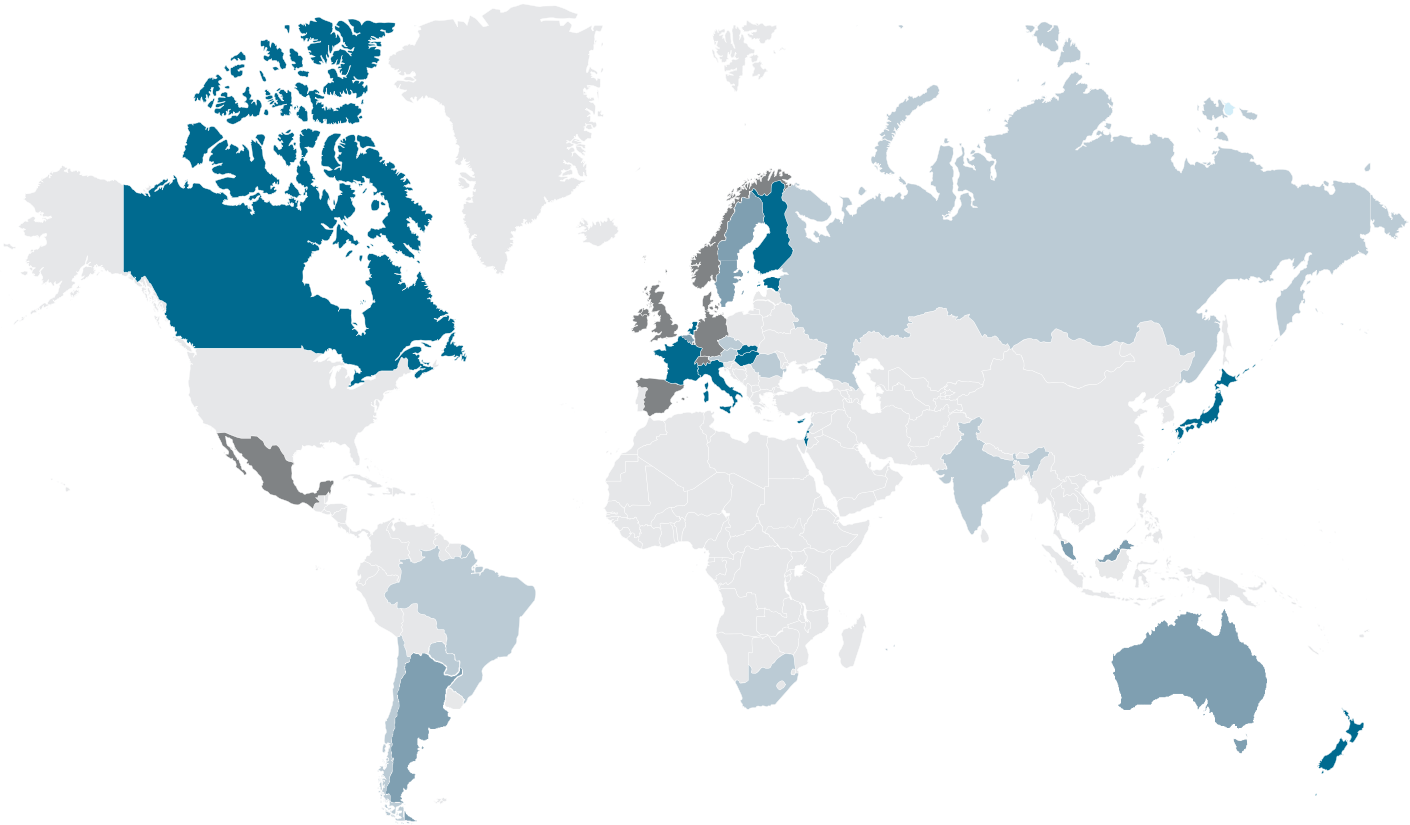
1 July 2013	9 July 2013	30 July 2013	1 October 2013	Early 2014
Publication of individual LIBOR submissions was embargoed for 3 months	BBA announced its approval of NYSE Euronext as the new administrator of LIBOR to take effect in 2014	LMA published revised recommended form documents with LIBOR related changes	Individual bank submissions to start being published reflecting submission rates from 3 months prior i.e. 1 July 2013	Completion of the handover of the administration of LIBOR from BBA to NYSE Euronext

Going forward the main concern is the impact on historical loan agreements where the definition of LIBOR/Screen Rate refers solely to the BBA and not an alternative provider so as to capture NYSE Euronext. Consider making amendments prior to 2014 to ensure LIBOR can be provided by NYSE Euronext or an alternative provider.

FATCA

Some concerns in respect of the implementation of FATCA, which was designed to counter tax evasion by US taxpayers, have been eased with the roll out of Intergovernmental Agreements (**IGAs**). The IRS also gave some welcome relief by pushing the effective date for FATCA withholding out to July 1, 2014 (or in the case of pass-thru payment withholding, the later of June 30, 2014 and the date that is six months after the date the term "foreign pass-thru payment" is defined in US Treasury regulations) (the **"Grandfathering Date"**). Beware though any material amendments to loan agreements on or after the Grandfathering Date may affect the grandfathering protection afforded to such loans. This map sets out the current status of IGAs.

Reuters – Intergovernmental Agreement Map



Source: REUTERS - August 29,2013

IGA agreed: Denmark, Germany, Ireland, Mexico, Norway, Singapore, Spain, Switzerland and United Kingdom.

Conclude IGA negotiations: Canada, France, Finland, Guernsey, Isle of Man, Italy, Japan, Jersey, the Netherlands and New Zealand.

Engaged in dialogue towards IGA conclusion: Argentina, Australia, Belgium, the Cayman Islands, Cyprus, Estonia, Hungary, Israel, Korea, Liechtenstein, Luxembourg, Malaysia, Malta, the Slovak Republic and Sweden.

Exploring IGA options: Bermuda, Brazil, the British Virgin Islands, Chile, the Czech Republic, Gibraltar, India, Lebanon, Romania, Russia, Seychelles, Sint Maarten, Slovenia and South Africa.

One-sided Jurisdiction Clauses

In *X v Banque Privée Edmond de Rothschild Europe*, Cass. Civ. (1ère) the French Cour de cassation held that a one-sided jurisdictional clause violated the purpose of Article 23 of the Brussels Regulation and should not be applied.

The English courts however have not been swayed by the decision in Rothschild. In *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and Another* [2013] EWHC 1328 (Comm) the Commercial Court confirmed that one-way or unilateral jurisdiction clauses are valid as a matter of English law.

Whilst the decision in *Mauritius v Hestia* provides comfort in relation to the use of such clauses where proceedings are to be heard (and any necessary enforcement carried out) in England, the decision in X v Rothschild (and the decision in *CJSC Russian Telephone Company v. Sony Ericsson Mobile Telecommunication Rus LLC* which rendered one sided optional dispute resolution clauses invalid in the Russian courts) means that local law advice should be taken before using these clauses, particularly in respect of jurisdictions such as France and Russia where the court decisions have highlighted issues.

Mandatory Costs

The Loan Market Association (**"LMA"**) caught some of the market by surprise when it removed the Mandatory Costs Schedule in April 2013 from its database of recommended form documents. This left a potential gap for new loan agreements where reference to the FSA was no longer appropriate (although technically still workable). The impact of the removal of the LMA Mandatory Costs schedule has been fragmented. Some institutions have elected to dispense with them, preferring to factor any potential costs into the margin. Others have either used an amended version of the last form of LMA Mandatory Costs Schedule or determined a formula based on their internal calculations.

The Competition Commission and the Big Four

The Competition Commission (**CC**), in its Provisional Decision on Remedies, has recommended the prohibition of using 'Big Four' auditor clauses in loan documentation (including bond prospectuses). The CC considered such clauses to reduce competitiveness as they restrict a company's choice of auditors. These changes are unlikely to be passed into law until October 2014 and, if passed, will only apply to UK companies required to file accounts under Part 16 of the Companies Act 2006. However, sponsors and borrowers may prefer to remove the provision from loan documentation, particularly where there is a UK entity within the group. Loan agreements entered into prior to the effective date of any legislation are expected to be grandfathered.

MACs

Invoking a MAC is always likely to be considered a last port of call but following the case of *Grupo Hotelero Urvasco SA v Carey Value Added SL* there are now some take away points we can consider when negotiating MACs in the context of loan financings:

- A MAC on the financial condition versus the business of an obligor – the *Grupo* case indicates that financial condition will be construed narrowly, generally by reference to the latest available accounts. The LMA has always provided an option to refer to the business of the group or an obligor and we might now see some further negotiation on this point, particularly when wanting to rely on a MAC for a drawstop event as the term "business" is not tied to when the last set of accounts was required to be delivered.
- In certain cases, the MAC representation may be required to be repeated at appropriate times – the LMA has made amendments to address this issue.
- Change must not be temporary – consider setting time limits after which the MAC will no longer be considered temporary.
- The MAC clause cannot be invoked for pre-existing circumstances – consider agreeing issues known to the arrangers/lenders in a side letter.

Selected White & Case Experience

EP Energy	**Elior Finance & Co**	**WIND Acquisition Finance S.A.**	**Sanitec Oyj**	**Welcome Break No. 1 Limited**
Advised J.P. Morgan, Société Générale, Royal Bank of Scotland and UniCredit Bank	Advised J.P. Morgan, Crédit Agricole, HSBC and Nomura	Advised the WIND Group	Advised Sanitec Oyj	AdvisedGSO Capital Partners LP
New Look Finance II plc	**Doncasters Group Limited**	**Minimax**	**Cabot Financial (Luxembourg) S.A.**	**Fresenius**
Advised a number of the PIK Lenders	Advised Credit Suisse and Bank of America Merrill Lynch	Advised Deutsche Bank AG, London Branch, Commerzbank Aktiengesellschaft, UniCredit Bank AG and HSBC Bank PLC	Advised Cabot Financial (Luxembourg) S.A. and Cabot Credit Management Limited	Advised Bank of America Merrill Lynch, Deutsche Bank and J.P. Morgan

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