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The Euro Odyssey: An Epic Journey or a Greek Tragedy in the Making?

The future of the European single currency stands precariously balanced. While hoping for the best outcome, prudent financial planning requires businesses to at least consider once unthinkable thoughts about the possible withdrawal of one or more member states from the single currency or even its demise altogether. This possibility has recently become more than just fanciful, since the recent failed election of the new Greek government has called into question Greece's willingness and ability to adhere to the significant policy reforms and austerity measures required as conditions to the second bail-out[1]. Should Greece fail to install a government in the forthcoming re-election which will adhere to these measures, European authorities may refuse to pay the next bail-out payment, which in turn may result in Greece's accelerated exit from the single currency.

This update provides some background regarding the stringent bail-out conditions which Greece has been required to implement and the potential impact this may have on the future of the single currency.

Bail-out Conditions

The conditions attached to the second bail-out required not only the implementation of stringent austerity measures including significant cuts in public sector pay and broad-ranging increases in taxes and excise duties, but also the participation by Greece in a sovereign debt write down of approximately €100 billion, via an initiative known as private sector involvement ("PSI").

PSI & CACs

The PSI resulted in an exchange of outstanding Greek sovereign bonds for new, replacement bonds at a discount of 53.5% of their face value. The replacement bonds are made up of a combination of short-dated bonds issued by the European Financial Stability Facility ("EFSF") and English law-governed bonds issued by Greece, with longer term maturities ranging between 11 and 30 years in length. Such exchange was partly facilitated by the ability of the Greek government (by amending Greek law) to compel holders of existing Greek law sovereign bonds to accept the exchange through the activation of so-called collective action clauses ("CACs"), retroactively applied to the existing sovereign bonds. CACs are provisions which provide for a specified majority of bondholders to be able to change certain specified terms (including those which affect maturity and the repayment of principal and interest) of a particular bond. Although it was controversial for the CACs to have been applied retrospectively to change the terms of existing bonds, it is worth noting that the language used in the Greek CACs is viewed by the International

[1] The European Union, the European Central Bank and the International Monetary Fund (the so-called 'Troika') agreed to lend approximately €130 billion in March 2012 (the "second bail-out") following an initial package of loans amounting to €110 billion in 2010.

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Capital Market Association[2] ("ICMA") to be broadly consistent with a new model CAC recently published by the Economic and Financial Committee ("EFC")[3] Sub-Committee on EU Sovereign Debt Markets. The model CAC will be mandatory in all sovereign debt securities (with maturities exceeding 1 year) issued after 1 January 2013, but is not intended to be applied on a retroactive basis.

Credit Default Swaps

A significant knock-on effect of the employment of retroactive CACs was that this triggered credit events in respect of a substantial number of credit default swaps (and other credit-linked financial transactions) referencing such sovereign bonds. An ISDA Determinations Committee opined, in March 2012, that the use of CACs did constitute a credit event under the 2003 ISDA Credit Derivatives Definitions. This was on the basis that the definition of Restructuring Credit Event included a reduction in the rate of interest or amount of principal payable (a "haircut"). Since the activation of the retroactive CACs involved bondholders being forced to take a haircut, the ISDA Determinations Committee determined that a credit event had occurred. Accordingly, an auction was held to determine the recovery value of Greek sovereign bonds. This recovery value (which was ultimately determined to be 21.5% of each bond's face value) resulted in net payouts to protection buyers under relevant credit default swap contracts.

Contagion

Whether or not the Greek populace will elect a government which will continue to implement the reforms demanded by the European authorities remains to be seen. However, with excessively high debt levels, the credit ratings of banks in some member states being downgraded across the board and sovereign yields on new sovereign debt remaining at unsustainably high levels in Greece and other European member state countries, the risk of financial contagion is real and growing. To that end, many commentators have called for the building of a 'firewall' in the form of a heavily-capitalised European Stability Mechanism, with resources of €500 billion in addition to the €200 billion already committed by the EFSF. It is questionable, however, whether this money will ever be made available by member states and even if it were, whether it would ever be disbursed, given the difficulties, for some nations in need of those funds, in meeting the stringent conditions likely to be attached to the use of those funds. Regrettably therefore, the risk of a withdrawal of one or more member states from the single currency has not dissipated at all since our previous client alert on this topic.

We have therefore set out again, our analysis of the legal effects of a possible fragmentation or indeed, complete dissolution, of the single currency on certain financial contracts and arrangements.

Impact on Financial Documentation

For the purpose of this briefing, we have concentrated on two possible scenarios – the withdrawal by one or more member states ("Departing Member State" or "DMS") from the single currency and subsequent redenomination of the Departing Member State's national currency (a "fragmentation"), or the complete dissolution of the single currency of the Eurozone ("dissolution").

A fragmentation, while resulting in a change of currency for the Departing Member State, would see the Euro continue to exist as the legal currency for the Member States remaining in the EMU. It is possible that fragmentation, as well as involving the redenomination of the relevant national currency, would necessitate the imposition of exchange controls and restrictions on the use of the single currency in order to help stabilise the new currency of the Departing Member State.

[2] See Issue 25 (Second Quarter 2012) of ICMA's quarterly report.
[3] The EFC is a committee of the European Union set up to promote policy coordination among member states.

In contrast, a dissolution of the single currency (albeit a much less likely event) could result in all the countries that currently use the single currency having to revert to their former currencies or implement new versions of those currencies. From a practical viewpoint, it seems inconceivable that dissolution could happen without the implementation of one or more EU treaties which would establish provisions for effective currency redenominations in the participating Member States.

While it would be impracticable (if not impossible) to consider every possible legal and contractual ramification of a fragmentation or dissolution, this update aims to provide an overview of some of the main provisions which might be relevant to parties who have entered into Euro-denominated or Euro-linked financial contracts. Consideration is also given to the broader legal principles which may assist parties as they seek to determine their rights amid the inevitable confusion that would ensue if one of these events were to occur.

For those who are party to financial contracts (e.g., loans, derivatives or securities such as bonds), the first point of analysis will always be the detailed provisions of the financial contracts themselves. Discussed below are a number of key provisions which will be relevant to determining a party's rights in the event of either fragmentation or dissolution of the Euro.

Governing Law

When reviewing a financial contract to determine the currency of payment, it is important to consider the governing law of the contract because this is the law which is relevant for the purpose of construing the terms of the agreement reached between the parties.

English law will give effect firstly to the express provisions of the contract. Where the contract is silent or ambiguous as regards the currency of payment which would apply in the event of a fragmentation or dissolution, English law will require that a determination is made of the intention of the parties at the time the contract was entered into. Often this is not a simple task. When, for example, a German bank enters into a Euro-denominated loan arrangement with a Dutch borrower, doubtless little thought is given to whether it was intended that a specification of payments in "Euro" should be taken to mean the currency of Germany or the Netherlands or the single currency of the EMU (since at the time of the agreement they are all the same currency). However, in the context of fragmentation or dissolution, it is a very important question. This is because once the governing law of the contract has been applied to determine which currency is the relevant currency of payment, it is actually the law of the country which issues that currency which determines the composition, character and value of that money, or in other words determines what is legal tender to discharge a debt expressed to be payable in such currency. This is known as the *lex monetae* principle.

Where the governing law of a financial contract is that of a Departing Member State, it seems, at first glance, likely that such law would give effect to any legal redenomination by such Departing Member State. However, is also possible that DMS law could conclude that the intended currency of payment was the single currency of the EMU, and therefore that DMS law, since it was not the *lex monetae* of the relevant contract, would not be applied to the question of what was legal tender for payment obligations under that contract. If the English courts had jurisdiction (see "Jurisdiction" below), they would generally give effect to a choice of DMS law as the governing law of the contract under the Rome I Regulation[4], unless the choice were contrary to English public policy or unless this would conflict with an English law of mandatory application.

Jurisdiction

In addition to considering the governing law of the contract, the jurisdiction of the proceedings is also highly relevant. The courts of a particular country may have jurisdiction by reason of the domicile of one or more of the

[4] Regulation (EC) No. 593/2008.

parties to the contract, or by virtue of an express provision in the contract, agreeing to submit to the jurisdiction of those courts.

If the courts of the DMS were to have jurisdiction, it is possible that these courts would, or may be required to, give effect to any redenomination legislation by the DMS, irrespective of the law chosen by the parties to govern the contract and irrespective of the way in which the currency of payment is defined in the contract.

Even if this were to result in a decision contrary to what the English courts would have decided, the English courts would generally be required to recognise and enforce the judgment of the DMS courts under the Brussels I Regulation[5] (presuming the DMS had not terminated its membership of the European Union as well as withdrawing from the EMU), unless such recognition would be manifestly contrary to English public policy.

Currency of Payment - Definition of Euro (€)

Assuming that a contract is governed by English law and subject to the exclusive jurisdiction of the English courts, the starting point for any party to a Euro-denominated financial contract that is concerned about its rights and obligations following the fragmentation of the Euro, will be the provisions of the relevant contract itself. In particular, in many cases there will be a definition of what is meant by references to the Euro. Typical examples include a statement that references to "Euro" or "€" are to "the currency introduced at the third stage of European economic and monetary union pursuant to the Treaty establishing the European Community, as amended".

As mentioned above, if the contract does not contain a clear definition of the currency of payment, an English court (assuming English law were the governing law of the contract) would look to establish the intention of the parties as to the currency definition.

Place of Payment

In deducing the parties' intentions in this case, English law would make a presumption that if the place of payment is inside the DMS, the parties intended the currency of payment to be the currency of the DMS. However, this is a rebuttable presumption, so that if there are other factors which point to the parties having intended to pay in the single currency of the EMU, this presumption could be overridden.

However, even if the presumption were rebutted, a specification that the specified place of payment is the Departing Member State would still give rise to complications. This is because even if it were decided by the court that the single currency were the agreed currency of payment, it is possible that the party in the DMS would be prohibited by DMS law from making payments within the DMS in the single currency. The English courts will generally not enforce an obligation which would be unlawful in the place where the obligation is to be performed.

Default and Termination Provisions

In the vast majority of cases, financial documents will not expressly contemplate the possibility of either fragmentation or dissolution and therefore are unlikely to have drafted any provisions dealing with their consequences, such as a termination of the contract. However, there are standard form contracts which are commonly used in the market (such as the ISDA Master Agreement) which contain provisions relating to events of illegality and force majeure, and we will consider some of these provisions in more detail in the hypothetical examples provided below.

[5] Council Regulation (EC) No. 44/2001.

Currency Indemnity

Currency indemnities are commonly contained in certain contracts, such as loan agreements. They are used to alleviate the concern that the judgment of a court or tribunal is rendered in a currency other than the currency of payment of the contract and that when the sum received is exchanged into the contractual currency, the resulting sum is insufficient to pay the creditor in full. A typical currency indemnity will provide that amounts of local currency received from the debtor pursuant to the relevant judgment, will only discharge the debt obligation to the extent of the amount of the contractual currency of payment that can be purchased by the creditor in exchange for the local currency provided. Any shortfall between the contract debt and the amount of contractual currency received upon conversion by the creditor will be subject to an indemnity provided by the debtor. It is therefore possible in respect of a Euro-denominated contract containing a currency indemnity, that if a court renders a judgment against a debtor to be paid in a currency other than Euro, a creditor could have a claim for the difference in value between the judgment amount in local currency and value of the contract in Euros. However, it should be noted that under many laws, including English law, the enforceability of these types of provisions is not free from doubt.

Redenomination Provisions

Just after the introduction of the single currency in 2002, it was not unusual for UK issuers of securities denominated in pounds sterling to provide that upon designation of a particular date, obligations could be redenominated from sterling into Euros. This was on the basis of the perceived risk that the UK might opt at some unknown date to join the single currency.

It is not yet common for the terms of financial contracts to provide for redenomination from the single currency. However, many U.S. issuers, who have issued Euro-denominated debt securities into the European markets, have included in the relevant bond indenture, or form of note that represents the obligation, provisions which explain what will occur if the Euro is unavailable[6]. For example, under one frequently-used type of provision, the issuer would be entitled to make payments on the debt securities in U.S. dollars, based upon an exchange rate determined by the bond trustee or calculation agent.

A Few Hypothetical Questions

Clearly, the peculiarities of specific financial contracts, even where based on industry-standard model forms, such as the ISDA Master Agreement or the LMA standard form loan documents, will mean that the concepts and provisions referred to above can in no way be viewed as exhaustive. We have therefore provided a number of hypothetical examples of situations where particular financial contracts will require analysis in addition to the principles referred to above. In each case, we assume that the governing law of the contract is English law, and there is an exclusive submission to the jurisdiction of the English courts.

Derivative Contracts

- **A party has entered into a number of Euro-denominated derivative Transactions under an ISDA Master Agreement (the "Master Agreement"[7]) with a company domiciled in a Departing Member State that has exited the single currency on a unilateral basis. Can the counterparty to the contract satisfy its payment obligations in the new currency of that Departing Member State?**

[6] These instruments are frequently governed by New York State law.

[7] Where we refer to Master Agreement, we are referring generally to both the 2002 and 1992 versions; however, a number of relevant differences do exist between the two standard forms and we have highlighted where relevant distinctions apply.

As always, the starting point for analysis will be the contractual documentation, including the Master Agreement, schedule and each of the relevant confirmations. For simplicity, we shall assume that the confirmations and schedule are silent as regards any fallbacks or remedies which might exist in addition to the standard drafting of the Master Agreement form.[8] The Master Agreement provides, at Section 8(a), that parties must make payments in the currency specified for payment (the "Contractual Currency"). Any attempt to make payments that are not denominated in the Contractual Currency will not satisfy the relevant payment obligations, unless the payee can, using commercially reasonable procedures, convert the money received into an amount of the Contractual Currency equal to the amount owed. To the extent that there is any shortfall after the end of any applicable grace period, an Event of Default would have occurred for failure to pay, unless it could be demonstrated that an Illegality had occurred (see below).

Assuming that an English court were of the view that the currency of payment was the single currency[9] (and assuming that no exchange controls had been put in place by the Departing Member State), such court is likely to require that payments from the party in the Departing State continue to be made in the single currency. However, if payments are specified to be made within the Departing Member State and the DMS has passed laws rendering it unlawful for payments to be made in the single currency in that jurisdiction, then the English courts may not enforce the specification of the single currency, because an English court will generally not enforce an obligation that is unlawful under the laws of the place where it is to be performed. In this case it is possible that the English courts might apply the laws of the DMS, which would mean that the new currency of the DMS would apply. However, it also conceivable that an English court might find that it would be contrary to public policy to uphold the provision of a foreign law where that foreign law had been passed in contravention of the foreign country's obligations to the United Kingdom (e.g., under the various EU treaties, in circumstances where the DMS had withdrawn from the EMU without the consent of the other member states).

- **A party is due to receive and make payments in EUR in respect of various Transactions entered into with a counterparty under a Master Agreement. If the single currency has been completely disbanded, what will happen to the parties' respective payment obligations?**

Here it would not matter that Section 8(a) of the Master Agreement requires payment in the single currency, since the single currency would no longer exist. Clearly in these circumstances, much will depend upon economic and political solutions found at the European level, but one would expect that, in the event of the dissolution of the single currency, a new EU treaty would be enacted which would legislate for the dissolution, including setting rates at which Euros would be substituted for the new currencies of the member states of the EMU. The variety of potential scenarios and outcomes, however, makes it almost impossible to predict an outcome with any certainty at this stage.

In these circumstances, one would need to consider whether or not the contract had been frustrated, according to the English law doctrine of frustration. This doctrine broadly provides that the parties to a contract will be discharged if an event occurs that renders it impossible to perform the contract, or transforms the obligations under the contract into obligations that are radically different from those envisaged at the time of the contract.

However, the test of whether a contract has been frustrated is a very stringent one and, assuming the existence of an EU treaty effecting rates of substitution for the new currencies of the EMU member states, it may well be the case that an English court would conclude that the changed obligation is not sufficiently

[8] That said, it is important to always review ISDA documentation in the round and consider whether there might be any relevant bespoke provisions contained in the schedule or in the confirmations themselves.
[9] The 2000 and 2006 ISDA Definitions (assuming that they are incorporated into a confirmation and not expressly overridden) broadly define the Euro as "*the lawful currency of the member states of the European Union that adopt the single currency in accordance with the EC Treaty.*"

radically different from the obligation originally envisaged to discharge the parties from their agreed obligations.

- **Would it make a difference to either of the two questions above, if exchange controls had been put in place in the relevant payer's jurisdiction?**

In the event of either fragmentation or complete dissolution of the single currency, any 'new' currencies that are introduced in the Departing Member States, may become subject to exchange controls. As a consequence, it may be illegal or impossible for the relevant party to satisfy its obligations in a currency other than the re-designated currency of account for its member state. In these circumstances, as discussed above, an English court is unlikely to require such party to act in way that is in contravention of its local laws, although this may depend on whether the new currency has been substituted for the Euro in accordance with EU law (which is more likely to be the case in the event of a dissolution of the Euro).

An English Court will, in these circumstances, look to the contract to determine the ways(if any) in which it addresses the circumstances at hand. Section 6(b)(i) of the Master Agreement, provides that a Termination Event arises if an Illegality exists. This is where it becomes unlawful under any applicable law, for the party or (in the case of the 2002 ISDA Master Agreement) the office through which a party makes or receives payment, to actually make or receive any such payments or to comply with material provisions in the Master Agreement. A similar provision applies with respect to a party's Credit Support Provider, such as a guarantor[10]. This is an anticipatory provision, meaning that a party can terminate if it would be unlawful to make payment, if payment were to be required. As such, the Illegality can and typically will, occur before the date payment is due under the Master Agreement.

The 1992 and 2002 ISDA Master Agreements contain very different provisions concerning the circumstances and conditions under which a party can rely on an Illegality to terminate the transactions under the Master Agreement, and so a party would need to consider the provisions of its particular Master Agreement. In very broad terms, the provisions of the 2002 Master Agreement make it simpler and quicker to terminate the transactions which are affected by that Illegality.

Under the 1992 ISDA Master Agreement provisions, if a party in the DMS were only restricted from making payments in the single currency within the DMS, but not from offices outside, then it may be less clear whether an Illegality had occurred and they would have to use "all reasonable efforts" to transfer the affected transactions to an office or affiliate which was not affected by the Illegality. However, under the 2002 ISDA Master Agreement provisions, if the nominated office of the counterparty were prevented by law from making payments in the single currency, then the Illegality would have occurred and no transfer obligation would apply, even if other offices of the counterparty were unaffected by the exchange controls.

Under both the 1992 and 2002 ISDA Master Agreements, the failure to make a payment due in the single currency would not constitute an Event of Default if it constituted an Illegality. However, where the Illegality could be avoided by obtaining governmental consents or authorisations, Section 4(b) of each Master Agreement would require the parties to use all reasonable efforts to obtain these consents or authorisations, and failure to use all reasonable efforts would constitute an Event of Default.

In addition to Illegality, the 2002 (but not the 1992) Master Agreement also provides a second Termination Event for situations of Force Majeure. This covers situations which do not cause an obligation to be unlawful and therefore fall outside the scope of Illegality, but which still serve to make performance of a party's obligations impossible. While exchange controls are likely to fall into the

[10] In the 2002 Master Agreement, Illegality should only be applied after giving effect to any disruption fallbacks or remedies in any relevant Confirmation (although for the purpose of these examples we have assumed that the Confirmations are silent, as we consider they generally would be with regard to a fragmentation or dissolution of the Euro). This clarification is not applicable to the 1992 version.

Illegality category, if there were a complete dissolution of the single currency then the Force Majeure event wording of the relevant contract would need to be consulted. However, the dissolution would not constitute a Force Majeure event if it would be overcome by using all reasonable efforts, and in circumstances where the dissolution were accompanied by one or more treaties establishing the substitution rates and provisions for the replacement national currencies, it is likely that the potential Force Majeure event could be overcome by making payment in accordance with those treaties.

- **A party entered into a standalone forward sale of USD in exchange for Euros in mid 2012. If the single currency continues to exist, but its counterparty is domiciled in a Departing Member State that has implemented exchange controls after the date of the contract, would the contract have been frustrated?**

  The distinguishing factor in this example is that the derivatives trade has not been executed under an ISDA Master Agreement. If making payment in Euros were impossible for the counterparty to do lawfully, then if there were no contractual provision which provided for what should happen in these circumstances, an English court would then have to consider whether the contract had been frustrated. As discussed earlier, the test for frustration is a stringent one, but the above circumstances might, depending on the other facts of the case, qualify. A finding on this basis would mean that both parties to the derivatives trade would be discharged from any further performance.

- **How would the answer to the above question differ if the forward sale were documented under an ISDA Master Agreement which incorporated the ISDA 1998 FX and Currency Option Definitions?**

  In these circumstances, the 1998 definitions provide for various Disruption Fallback options to be specified by the parties where a Disruption Event occurs. Depending on the nature and extent of any exchange controls, it is possible that a Specific or General Non-Transferability Event or a Specific or General Inconvertibility Event, might occur. Under the ISDA Master Agreement, any agreed fallback options would have to be effected (or attempted to be effected) before any finding of an Illegality or Force Majeure event (see discussion above) would be made.

- **A party buys protection under a Credit Default Swap, incorporating the ISDA 2003 Credit Derivatives Definitions, which references debt obligations of a Greek corporate entity. Will a Credit Event have occurred if Greece becomes a Departing Member State and passes a law redenominating Euro obligations of Greek entities into obligations denominated in a new drachma?**

  The most likely Credit Event to be considered in these circumstances is the Restructuring event (if specified by the parties to be applicable to their contract). Under this event, if a change in the currency of payment of interest or principal of an underlying obligation is decreed by a Governmental Authority, such that it binds the holders of such obligation and the change of currency is to a currency of a country that is neither a G-7 country nor a AAA-rated OECD country, then this could constitute a Restructuring Credit Event. In practice, many parties to CDS contracts agree to submit to the determinations of the applicable ISDA credit derivatives determination committee as to whether the factual circumstances required for a particular Credit Event are present.

  It should also be noted that even if a Restructuring Credit Event were not present, it may be that one of the other Credit Events specified in the 2003 Definitions could become applicable, whether directly due to a redenomination or indirectly as a knock-on effect of the fragmentation of the Euro, such as Bankruptcy, Failure to Pay, Obligation Default/Acceleration, etc.

- **A party sells certain securities to a buyer in exchange for Euros under a repurchase transaction (or 'repo') in the form of the Global Master Repurchase Agreement published by the International Capital Market Association ("GMRA"). The buyer is domiciled in a Departing Member State and is now requiring that I buy back the securities in the new currency. What are the seller's rights in this regard?**

  In this example, the Purchase Price (as defined in the GMRA) is denominated in Euros. Clause 7 of the GMRA ("Contractual Currency") operates in a similar way to Section 8(a) of the Master Agreement and other currency indemnity provisions referred to above. Here, the currency of the Purchase Price (Euros) is deemed to be the Contractual Currency of the contract and the Seller, in accordance with Clause 7, is required to repurchase the Securities in the same currency as the Purchase Price. Assuming the English courts are applying English law as the governing law of the contract, as with other financial contracts, an analysis would need to be made as to whether the parties had indicated their intentions as to whether Euros meant the single currency of the EMU, or not, as well as the place for payments to be made by the parties.

Capital Markets

- **A party is holding a Euro-denominated note, issued off the EMTN Programme of an Issuer that is domiciled in a Departing Member State. What are the party's rights if the Issuer chooses either not to pay any outstanding interest or principal, or makes payment in another currency?**

  Assuming that the English courts have jurisdiction, that English law is the governing law of the bonds and that Euros are defined clearly in the EMTN Programme as the single currency of the EMU, then the only remaining factor to consider is the place specified for payment in the terms of the bonds. EMTNs are usually held through clearing systems, such as Euroclear and Clearstream, with payments being made by the issuer to the common depository for the clearing systems. Assuming that the common depository has specified an account for payment outside the DMS, the English courts would enforce the obligation to make payment in the single currency.

  In circumstances where the notes are in definitive bearer form, the notes would typically have to be presented for payment at the offices of one of the issuer's paying agents. Assuming at least one of those were outside the DMS, there would be no presumption of the currency being that of the DMS.

  If the definitive notes were in registered form, payments would typically be made to the accounts specified by the registered holders, and this would therefore also not give rise to any presumption of the currency being that of the DMS.

- **If a party is able to obtain a judgment from an English court, confirming that it is entitled to receive payments of its EUR-denominated notes in EUR, will it be able to enforce this judgment against the Issuer's assets?**

  The answer to this question will depend largely on the jurisdiction where any enforcement action is intended to take place. If the Issuer has assets located in the UK, then the English court will have jurisdiction to permit recovery or enforcement action against those assets.

  However, if the party wishes to enforce its English judgment in the Departing Member State, the Brussels Regulation will be relevant (assuming that the DMS remains a member state of the EU). Under this regulation the judgment of a court of a member state must generally be recognised and enforced by the courts of another member state, except where recognition would be manifestly contrary to public policy in

the member state in which recognition is sought. One would expect that the courts of the DMS would consider it contrary to public policy to recognise the English judgment if this would compel the Issuer to make payment in the single currency where, for example, the laws of the DMS prescribed that it was unlawful to do so. However, recognition of the English judgment should be possible against the Issuer and its assets in other member states under the Brussels Regulation. For countries outside the EU, one would need to examine the laws of the jurisdiction in which enforcement is sought.

- **Would it make any difference to the question above, if the Issuer of the notes were a sovereign entity?**

  Under many countries' systems of law, including the UK, sovereign entities enjoy certain immunities from being sued and/or from having their assets seized. The English courts may have jurisdiction to hear a case and issue judgment against a sovereign entity, on the basis that the issuance of the bonds constituted a commercial transaction – one of the exceptions under the State Immunity Act 1978 to a defence of sovereign immunity from suit. However, under that Act, the English courts would have no ability to grant any order of attachment or enforcement against any assets of the DMS within the UK, unless the DMS had expressly consented in writing to such actions (mere submission to the jurisdiction of the English courts would not be sufficient for this purpose), or unless the assets within the UK were used for commercial purposes.

  The prospects of enforcing a judgment against the DMS itself in the DMS would probably be nil, and enforcement against assets of the DMS in another country would depend on the scope of that other country's sovereign immunity laws.

Loans

- **A party provides a Euro-denominated loan based on the Loan Market Association Single Currency Term and Revolving Facilities Agreement, to a borrower incorporated in a Departing Member State. Is the borrower still obliged to make its repayments in the single currency?**

  Similar considerations would apply in these circumstances as for rights against the issuer of a bond. Assuming that the English courts have jurisdiction and that English law is the governing law of the contract, English law would need to decide what would be the *lex monetae*. The LMA standard form does not provide for a definition of Euro, but assuming the parties had specified that this would be the single currency of the EMU, it would then be necessary to look at the place of payment of the loan.

  Clause 28.1 of the standard form agreement provides for payments in Euro to be made to a bank account in a participating member state of the EMU, or in London. Therefore, if the parties had not made any change to these provisions, it would be clear that there would be no presumption of the *lex monetae* of the contract being that of the Departing Member State.

  Further, Clause 14 of the same LMA standard form, also provides for a currency indemnity (discussed above) in the event that payment is received in a currency other than the single currency, and also provides for an express waiver by the borrower of any right it may have, in any jurisdiction, to make payment in a currency other than that in which payment is expressed to be made.

  Therefore, it is likely that the English courts would rule that payments were to be made in the single currency.

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Finally, it is also worth highlighting that Clause 28.9(b) of the LMA standard form provides a very broad right of the lender's agent (acting reasonably and after consultation with the borrower) to make any changes to the agreement which are necessary to reflect the generally accepted conventions and market practice of the European Interbank Market, following a change in the currency of "a country". However, given the breadth of the clause and in the absence of knowledge of any actual circumstances at the relevant time, it is difficult to predict how an English court would construe this language and the extent to which it would alter the analysis above.

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