EMMI Workshop

Developing a roadmap for further analysis
27 May 2016, Brussels
Variables to be considered - overview

I. Type of transaction
- Loans, capital market instruments, securitisation, derivatives and deposits

II. Type of documentation
- Market standard documents or bespoke documents
- Various versions of standard documents (legacy)

III. Governing law (and jurisdiction)
- English law, New York law or other national laws

IV. Type of counterparty
- Financial institutions, corporates, individuals
I. Type of transaction

- Loans
  - Syndicated loans
  - Corporate loans (bilateral)
  - Retail loans
  - Mortgages

- Capital market instruments
  - Floating rate notes
  - Variable rate notes
  - Covered bonds

- Securitised products
  - RMBS
  - CMBS
  - ABS
  - CDO

- Derivatives
  - OTC derivatives
  - Exchange traded derivatives

- Deposits
  - Retail deposits
  - Corporate deposits
  - SME deposits
Previous overview is not exhaustive, also various other types of transactions to be taken into account

- Money market instruments
- Securities lending
- Repo transactions and reverse repo
- Capital leases
- Trade finance
- Commercial leases
- Subordinated debt
II. Type of documentation

- Market standard documentation
  - Current version
  - Historical (legacy documents)

- Bespoke documentation
  - Typically used clauses
III. Governing law

**Governing law**
- English law
- New York law
- National European laws
- Foreign non-European laws

**Jurisdiction**
- England and Wales
- New York
- National courts
- Foreign non-European courts
- Arbitration clauses

**Public policy**
- Law offorum in jurisdiction of the issuer/borrower
- Law offorum in jurisdiction outside the jurisdiction of the issuer/borrower
- Consider regulatory overlay and regulatory intervention
IV. Type of counterparty

- Type of counterparty
  - Financial institutions
  - Large corporates
  - SMEs
  - Consumers

  Regulatory aspects
Closer look at certain transactions

1) Loans

2) Derivatives

3) Debt Securities
1) Closer look – loans (in general)

Governing law of loans varies across jurisdiction

However, across most jurisdictions syndicated loans incorporate Loan Market Association (LMA) market standard terms

In addition, many bilateral commercial loans and commercial mortgages will be drafted to replicate key LMA market standard terms
## 1) Closer look – loans - LMA

<table>
<thead>
<tr>
<th>Type of standard documentation</th>
<th>Governing law</th>
</tr>
</thead>
<tbody>
<tr>
<td>LMA Facility Agreement</td>
<td>English law</td>
</tr>
<tr>
<td>French Law LMA Multicurrency Term and Revolving Facilities Agreement (English)</td>
<td>French law</td>
</tr>
<tr>
<td>German Law LMA Multicurrency Term and Revolving Facility Agreement</td>
<td>German law</td>
</tr>
<tr>
<td>Spanish Law LMA Multicurrency Term and Revolving Facility Agreement (in Spanish)</td>
<td>Spanish law</td>
</tr>
<tr>
<td>LMA Standard Terms &amp; Conditions for Par &amp; Distressed Trade Transactions (Bank Debt/Claims)</td>
<td>English law</td>
</tr>
</tbody>
</table>
2) Closer look – consumer loans

- Relevancy of national law (limited harmonisation)
- Impact national regulators
- Impact of other stakeholders
2) Closer look – OTC derivatives

<table>
<thead>
<tr>
<th>Trade body Jurisdiction</th>
<th>Document</th>
<th>Governing law</th>
</tr>
</thead>
<tbody>
<tr>
<td>ISDA</td>
<td>2002 ISDA Master Agreement (Multicurrency – Cross Border)</td>
<td>English/NY law</td>
</tr>
<tr>
<td>ISDA</td>
<td>1992 ISDA Master Agreement (Multicurrency – Cross Border)</td>
<td>English/NY law</td>
</tr>
<tr>
<td>ISDA</td>
<td>2006 ISDA Definitions</td>
<td>English/NY law</td>
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<tr>
<td>ISDA</td>
<td>Annex to the 2000 ISDA Definitions (June 2000 version)</td>
<td>English/NY law</td>
</tr>
<tr>
<td>Bankenverband</td>
<td>German Master Agreement for Financial Derivatives Transactions (Deutscher Rahmenvertrag für Finanztermingeschäfte – DRV)</td>
<td>German law</td>
</tr>
<tr>
<td>Swiss Bankers Association</td>
<td>Swiss Master Agreement for Over-The-Counter (OTC) derivative instruments (Schweizer Rahmenvertrag für OTC-Derivate)</td>
<td>Swiss law</td>
</tr>
</tbody>
</table>
2) Closer look – OTC derivatives

- There are a number of other master agreements not listed above which do not include a standard EURIBOR clause although, in some cases they incorporate by reference the 2006 ISDA definitions
2) Closer look – traded/cleared derivatives

- Need to consider rulebooks in respect of specific instruments
3) Closer look – debt securities

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<tr>
<td>ICMA</td>
<td>ICMA Standard Form of Multicurrency Bearer Permanent Global Note</td>
<td>Law of underlying documentation</td>
</tr>
<tr>
<td>ICMA</td>
<td>ICMA pro forma Final Terms - (wholesale)</td>
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Developing framework for review

- **Product profile**
  - Derivatives, loans, bonds, other products

- **Doctrinal features of the governing law**
  - Contractual construction and fall back
  - Frustration
  - Implied terms

- **Mitigation**
  - Market led approach
  - Transition hypothesis

- **Regulation**
  - Existing regulatory overlay
  - Regulatory intervention
Questions?

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