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A legal guide to bond execution in 2013

Author: Gemma Varriale | Published: 22 Nov 2012

Senior lawyers have warned that recent regulatory developments are complicating bond execution and documentation, making it slower and less efficient.

Anti money laundering and the Office of Foreign Assets Control (Ofac) were named as particular challenges for international finance.

Ofac administers and enforces economic and trade sanctions based on US foreign policy and national security goals. The Office imposes controls on transactions and freezes assets under US jurisdiction.

But Bruce Duncan of Citigroup said that international banks' focus isn't just on Ofac, there are EU sanctions to consider too. The UK also has its own sanctions. It's crucial to view all of these as a package.

The Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act are additional concerns.

"Sometimes US lawyers in particular tend to focus just on Ofac, whereas we need to focus on EU sanctions as well," said Duncan.

Duncan was on the panel of in-house and private practice that gathered at the International Capital market Association (ICMA) 6th primary market forum on November 15 to discuss the challenges the bond market faces at the end of 2012.

One of the big problems is that sanctions, particularly in relation to Iran, change on an almost weekly basis. "If you're looking at the Turkish market, from which there have been many deals this year, you quickly have to look at what the latest view on Turkey coming out of Ofac is," said Duncan.

Issuers that have a medium terms note (MTN) programme have been sorely disappointed. They had hoped, when they set up the programme, that all they had to each year would be renew the financial and business description and everything else would carry forward.

Kate Craven, director of legal at Barclays, said there was a new way that the pain and cost of issuers' programmes were exacerbated each year. "There's a lot of responsibility on banks to educate and justify why these things are necessary," she said.

Asymmetric jurisdiction clauses

Asymmetric jurisdiction clauses were named as another important cause of uncertainty that the industry needed to focus on in the coming months.

This year, the cour de cassation in France held that a clause that required one party to sue only in a named court but allowed the other to sue anywhere, did not comply with article 23 of the Brussels regulation.

But because this was a French court decision, it's not binding under English law. Indeed, many suspect that the English courts would interpret the contract differently and allow it to stand.

However, if the EU court of justice decides that this is enforceable, other EU countries will have to take note. The outcome hangs on future case-law.

Even so, Melanie Czarra, managing director and head of primary debt markets at Mizuho, predicted increasing reliance on the bond market, thanks in part to a wave of new rules being put in place that will impede lending, at a time when Basel III is already reducing such activity for some clients.

"It could be that these rules are being set up without taking into account that issuers need to go to the bond market for liquidity," she said. "They may well have difficulty getting it because documentation itself is stopping it."

See also:

'US sanctions regime: beware of Ofac'

'How Standard Chartered changes the rules for foreign banks'

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Has the Prospectus Directive regime permanently damaged European ECM?

Author: Gemma Varriale | Published: 22 Nov 2012

The introduction of Europe's revised Prospectus Directive has prompted issuers in the region to consider alternative listing venues. But market participants are divided as to whether the market has been permanently damaged.

Europe's Prospectus Directive regime was this year changed through an amending directive, which gave member states until July 1 to implement the measures.

Many believe the changes have dramatically increased cost, time and uncertainty.

Despite the potential red flags looking to list in an alternative jurisdiction can raise, Melanie Czarra, Mizuho's managing director and head of primary debt markets, said the pressure not to list in Europe was understandable.

"European issuers are looking further afield and list in places like Singapore or Bermuda," she said.

Inconsistencies in the regulation have led different competent authorities to apply it in slightly different ways. Eric Phillips, knowledge management lawyer at Freshfields, said it had been a difficult process for market participants to understand exactly what these differences are and why they are there at all.

Speaking at last week's International Capital Market Association (ICMA) primary market forum, Ruari Ewing, ICMA director of market practice and regulatory policy, said that his over-riding concern was the inability of the European authorities to draft laws clearly.

Ewing would like to see consultation on policy with the opportunity for market participants to feedback on the policy before moving on to a full consultation of the drafting.

Citigroup's Bruce Duncan said a lot of the big retail programmes were now costing significantly more from a legal fee perspective.

"We don't need any more fiddling with the legislation in the coming years because the market needs to get used to it," he said.

Indeed, issues arising from such regulatory uncertainty are so intense that issuers are now reconsidering the retail option because of the extra work and disclosure involved in producing a retail-compliant prospectus.

Bank issuers are being forced to revisit their programmes which often provided a vast range of products, and break them down into distinct programmes.

Kate Craven, director of legal at Barclays, said this meant having multiple programmes, some of which might be listed, some of which will be unlisted, some of which will permit only one kind of structure. "So we see a multiplication of cost and risk because banks then need to harmonise disclosure across the multiple platforms as opposed to a single offering document," she said.

Another key consideration is that issuers have a limited number of windows in which to issue each year. Czarra complained the process became very costly when you add on these extra delays. "Issuers can actually miss the window they need to go to market as a result," she said.

What's more, she said it was hard to give certainty to issuers because it was quite clear that the competent authorities were reserving their position on a number of points and the answer for one deal might not be the same answer next time.

Craven said the market had concluded that the new Prospectus Directive regime was neither efficient nor cost effective yet. "Still we're not able to deliver the level of certainty and confidence to issuers about what exactly is required in the prospectus to get them comfortably across the finishing line in a tight timetable," she said.

See also:

'CBI: how to improve PD disclosure regime'

'How successful are the latest EU prospectus framework changes?'

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How to prepare bond documents for a Eurozone break-up

Author: Gemma Varriale | Published: 22 Nov 2012

Lawyers in London have called for banks and law firms to consider recognising redenomination as a risk factor in deal documentation.

The question of whether to include redenomination risk is still politically sensitive.

Previously, issuers have shied away from the move because of an unwillingness to mention it explicitly in deal documentation. But investors' reluctance to recognise it as a risk factor in documentation has calmed in recent months.

Speaking at last week's International Capital Market Association (ICMA) primary market forum Citi's Bruce Duncan said market players needed to consider this in more detail because it was something investors were very interested in.

To-date, lawyers have not seen efforts to contractually provide for what would happen if the eurozone did break up.

Eric Phillips, knowledge management lawyer at Freshfields, said these things were politically, rather than legally, driven. "Primary legislation, rather than contractual provisions, will determine what happens," he said.

How to prepare

In the meantime, some provisions can be inserted into contracts, however. The definition of euro should not be the currency in place in a country from time to time. Instead, it should be the currency introduced at the first stage of monetary union.

Making sure that English or New York law is the governing law and looking at place of payment are also important factors.

Duncan said it was far more unpalatable from a European political perspective for issuers to include redomination risk factors because no one wanted to be one of the first companies in that market to include one.

"It should be considered for specific issuers in specific markets," he said. "But not on a generic basis as a blanket clause for all European issuers."

What's more, Duncan believed that it could work both ways. For a Greek company that has all its

earnings in dollars, any kind of redenomination could work very well.

According to Melanie Czarra, managing director and head of primary debt markets, redenomination risk and currency definitions are still among the most frequent questions she hears from US issuers coming to Europe.

Kate Craven, director of legal at Barclays agreed. Whereas at one stage it was completely unpalatable to even contemplate a risk factor, she believed that the mood was now softening among banks in eurozone countries.

See also:

'Banking sector reform: a definitive guide to the latest developments'

'Bilateral investment treaties for foreigners holding Greek debt'

'Euro exit and redenomination risks: a UK perspective'

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How 2012 regulation has changed syndicate deal execution

Author: Gemma Varriale | Published: 29 Nov 2012

2012 may have been a positive year in terms of deal size, pricing and structure, thanks to significant levels of oversubscription, it was also a year in which the market faced significant regulatory challenges. Here's how that has impacted deal execution.

BNP Paribas' head of the emerging markets (EM) syndicate business, Nick Darrant, has warned high-profile Financial Services Authority (FSA) penalties had hampered the efficacy of so-called pre-sounding.

Pre-sounding refers to discussions with investors that take place before the announcement of a transaction to gauge their interest in a potential structure or transaction. According to a recent briefing from Linklaters, one risk of these discussions is that non-public, price-sensitive or inside information may be disclosed to the investor.

"A lot of investors have been unnerved this year and are not willing to be pre-sounded, a lot of them decline to be wall-crossed," said Darrant.

What's changed

High-profile penalties imposed by the Financial Services Authority (FSA) on David Einhorn, Greenlight Capital and others for market abuse have had a major impact on the practice.

Darrant added that even those who do pre-sound, aren't committing to the same extent they were 18 months ago.

This is fine when the markets are strong because syndicate desks are a lot more confident in their convictions. But when the markets are more challenging it means they have to take a view.

"That's where the risk lies going into next year," said Darrant. "Where very few investors are willing to be wall-crossed but you still have to make that judgement call as to whether a certain deal works at a certain spread."

In terms of communicating how the deal is progressing during the book-build, it used to be common practice for syndicate desks to send out regular updates.

"It was almost to fuel the inflow of orders and encourage a trade to go well," said Darrant.

But this isn't allowed any more. "We have to be very factual and do things by the letter of the

law," he said.

Releases have to be in a public format and sharing information internally among sales people and certain investors is not allowed.

Too many cooks

Speaking at the International Capital Market Association (ICMA) primary market forum this month, Darrant also drew attention to the potential issues posed by having different regulations and different supervisory bodies in place. Among other things, this can lead to conflicting views on what can and can't be communicated to investors.

At present, UK and US practice differs with regards to whether key information has to be communicated on either an informal or a formal, public basis so that everybody has access to the data at the same time.

"If you're printing a global deal there's a conflict there because we're meant to be marketing the transaction to investors in both Europe and the US so it's unclear which rules you have to abide by," said Darrant.

Non-deal road-shows are another aspect of transactions where the rules have tightened.

In previous years, if issuers didn't want to commit to print a trade, they could say they were going to engage in a non-deal road-show to meet investors. If they liked the feedback they would print a trade the next day.

The requirement for a cooling off period means this can no longer happen.

Although the length of time isn't set in stone, most banks have a two week cooling off period between the end of a non-deal road-show and the time the issuer can print a transaction.

The work-arounds

Syndicate desks have found new ways to respond to regulation in their search for a middle ground, however.

"Issuers will announce investor meetings with 'potential transaction to follow', or hedge their bets even more and say a transaction may or may not follow, or may follow within the next 12 months," Darrant told the conference.

Worth the risk

At the beginning of the year, the environment was much more challenging and syndicate desks and issuers had to take much more risks to get the same results.

But, although the market in the first quarter of the year required syndicate businesses to be nimble when guiding issuers into the market, ambitious trades still got done.

BNP Paribas did a deal for Russian telecom Vimpelcom. "Vimpelcom is the kind of issuer that typically includes a leverage covenant in its documentation," said Darrant.

But in the first quarter Vimpelcom asked BNP Paribas whether it could issue in the market with an aggressive structure that didn't include this covenant.

“We estimated that it would probably cost them up to 50 basis points to go to market without the covenant, in order to insure us against some of the market headwinds,” said the BNP Paribas EM syndicate head.

“As it turned out, because the wall of cash was so high, we were able to print that transaction with effectively a zero basis point concession for that feature not being present,” he added.

In other words, investors were still keen to commit cash in the right window of issuance, in spite of all the headwinds that the market was facing. “There are a lot of other examples where syndicate desks that took the risks got good results,” said Darrant.

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