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ICMA FORCE MAJEURE CLAUSE AND THE COVID-19 PANDEMIC

The **ICMA Primary Market Handbook** includes in Appendix A9 the following standard force majeure clause for use in subscription agreements for syndicated offers of international bonds in the primary market:

> Notwithstanding anything contained in this Agreement, the [Joint] Lead Manager[s] on behalf of the Managers may by notice to the Issuer [and the Guarantor] terminate this Agreement at any time before the time on the Closing Date when payment would otherwise be due under this Agreement to the Issuer in respect of the Securities if, in the opinion of the Lead Manager, there shall have been such a change in national or international financial, political or economic conditions or currency exchange rates or exchange controls as would in their view be likely to prejudice materially the success of the offering and distribution of the Securities or dealings in the Securities in the secondary market and, upon notice being given, the parties to this Agreement shall (except for the liability of the Issuer [and the Guarantor] in relation to expenses as provided in clause [*number*] and except for any liability arising before or in relation to such termination) be released and discharged from their respective obligations under this Agreement.

In the light of the COVID-19 pandemic, ICMA members and others may wish to note the following points in relation to this clause.

1. *Timing*

The clause is intended to be used in subscription agreements for syndicated primary offers of international bonds that fall within the scope of the ICMA Primary Market Handbook. Usually, such subscription agreements are entered into (and the clause becomes active) three business days after the bond has been priced (T+3), with settlement and closing following two business days later (T+5). Therefore the window in which this clause applies, and could be triggered, is narrow. In addition, new issues of bonds will typically have been allocated to investors by the time the subscription agreement is signed.

2. *Historic use of the clause in practice*

The clause was drafted after the Gulf War of 1990 – 1991 and has been widely used since then. ICMA is not aware that the clause has ever been used by the managers of a syndicated new issue of international bonds in Europe to terminate a subscription agreement. The clause has, however, been discussed by market participants in a number of instances (including the outbreak of SARS, significant terrorist attacks and the collapse of Lehman Brothers). On each occasion, it was decided that no revision to its language was required.

3. *Application of the clause in the context of the COVID-19 pandemic*

It will be for the managers of a new bond issue, in consultation with their legal advisers, to determine whether they believe they have a right to terminate a subscription agreement pursuant to this clause in any given set of circumstances.

By way of general comment, ICMA understands that the clause is interpreted as having two limbs:

- First, there must be an event which constitutes, in the opinion of the lead manager, "a change in national or international financial, political or economic conditions or currency exchange rates or exchange controls".
- Secondly, that event must be of such consequence that it would, in the opinion of the lead manager, be likely to prejudice materially the success of the offering and distribution of the bonds or dealings in the bonds in the secondary market.

This means that a situation or event which is known at the time that the subscription agreement is entered into, but subsequently escalates, could potentially constitute a force majeure event giving the managers the right to terminate the subscription agreement under the clause, if that escalation fulfils the two limbs noted above.

Putting this in the context of the COVID-19 pandemic, the various official and other actions taken up to a particular date in response to the COVID-19 pandemic are known at that date, and investor appetite to purchase securities on that date is also knowable. However, it is possible that there could be a new government action or other developments in the two business days between the signing of a subscription agreement containing the ICMA force majeure clause (T+3) and the closing and settlement of the new bond issue (T+5); and it may be that that new development causes investor appetite to evaporate. Even without a new government action, if investor appetite diminishes significantly in that period, that could itself indicate a change in economic or financial conditions sufficient to trigger the first limb of the clause. In all cases, the question would be whether the development(s), in the opinion of the lead manager:

- constituted, a "change in national or international financial, political or economic conditions"; and
- was (were) likely to affect the success of the distribution of the bonds or dealings in the bonds in the secondary market.

If both these limbs were to be fulfilled, then the managers may consider that they have a right to terminate the subscription agreement (and so not be obliged to subscribe for the bonds) under the clause.

4. *Changes to the clause*

The ICMA Legal & Documentation Committee, together with major international capital markets law firms, have considered the effectiveness of the clause in the context of the COVID-19 pandemic and determined that no changes should be made. Therefore ICMA is not planning to make any changes to the clause.

R10.1 of the ICMA Primary Market Handbook states that documentation for a new bond issue that falls within the scope of the ICMA Primary Market Handbook should contain the force majeure clause set out in Appendix A9 of the ICMA Primary Market Handbook and reproduced above.