WORKSHOP EXCERCISE
LEGAL ASPECTS OF INTERNATIONAL FINANCE

1. LMA STANDARD TERM FACILITY AND PARTY LIABILITY

A large Greek shipping company specialising in crude oil transportation wishes to purchase a number of new vessels for its fleet. Part of the funds will also be used for general working capital purposes. The company is looking to borrow $60m over 10 years (to be allocated with $50m to fleet expansion and $10m to working capital). The company has previously obtained funds through local Greek banks or other financial groups although it now wishes to use the London markets to try to obtain the best rates available.

The company approaches Morgan Bank which is the subsidiary of a major US investment house operating in London. Morgan Bank recommends that the company consider borrowing under a syndicated euro-dollar facility in light of the specialised nature of the funding required and the possible lack of investor interest in the Eurobond markets in light of recent losses suffered in the shipping industry as a result of the global financial crisis.

The company issues Morgan Bank with an appropriate mandate letter. Morgan Bank approaches four other banks operating out of London and invites them to join the lending group. A basic term sheet is agreed with the company providing the information necessary for the information memorandum which Morgan Bank sends to the other lenders. A draft syndicated facility agreement is prepared using the LMA standard single currency agreement.

Due to a clerical error, Morgan Bank's standard liability disclaimers are not incorporated into either the information memorandum or the final facility agreement. These include a no duty clause, a no confirmation of accuracy clause, an own credit assessment clause, a no inducement clause and a no fiduciary duty clause. The provisions would also have included an exclusion of liability for all innocent, negligent and fraudulent misrepresentation, criminal liability and statutory duty as well as a full indemnity clause in Morgan Bank's favour in the event of any cost or losses arising as a result of any of the foregoing.

The facility agreement is duly signed and the shipping company draws down the full amount within the initial three-month commitment period. Unfortunately, trading conditions are difficult in light of the continued global recession. One of the company's crude oil tankers is also involved with a collision with another ship off the Californian coast and the US government is threatening to sue the company for the commercial and environmental damage and clean-up costs involved. The information memorandum had expressly stated that the company's existing fleet of ships was all seaworthy and that no litigation was imminent although it was quickly revealed following the collision that the ship concerned had been in a previous collision and was not in a condition to carry major oil loads.

The company subsequently defaults on its next interest payment and each of the syndicate member banks become very concerned with the shipping company's continued ability to pay and solvency. Morgan Bank has already transferred its lending commitments under the facility to Singapore Bank.

Your law firm is asked to advise on the following with reference to specific clauses within the standard LMA documentation used:

(1) Explain the nature of the liability of each of the original syndicate members to provide funds under the facility during the initial commitment period.

(2) Explain the legal effect of the transfer of interest by Morgan Bank to Singapore Bank.

(3) Outline any potential heads of liability under which Morgan Bank and/or Singapore Bank may be sued.

(4) Explain the effect of the failure to include Morgan Bank's standard disclaimers in the final documentation agreed.

(5) Explain the extent to which the disclaimers may otherwise have protected Morgan Bank if they had been duly incorporated.

(6) Outline any potential liability of the agent bank under the facility.

Students may wish to refer to the decision in *Re Colocotronis Tanker Securities Litigation* 420 F Supp 998 (Sdny 1976).

WORKSHOP EXCERCISE
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2. EUROBOND ISSUE AND PARTY LIABILITY

A large US hotel group specialising in corporate and luxury bespoke holiday facilities wishes to construct a new 120 tower ion Shanghai. The first forty nine floors will be used for office rental purposes and the rest for the hotel with the reception on the 50th floor. The hotel is to be called 'Shanghai 50'. The company is looking to borrow $110m over 20 years (with $100m for construction purposes and the rest for working capital)). The company has previously obtained funds through east coast US banks or other financial groups although it now wishes to use the London markets to try to obtain the best rates available.

The company approaches Merrill Bank which advises that the cheapest facilities would be available through a Multiple Option Funding Facility (MOFF) with a combination of a medium term note programme (MTNP) and shorter commercial paper and a swing line currency conversion facility. Merrill Bank recommends trying to obtain $100m under the MTNP facility and $10m through commercial paper for working capital purposes.

After it obtains its mandate, Merrill Bank approaches four other investment firms in London to act as co-managers and co-dealers under the programme agreement. Merrill Bank prepares the draft offering circular with a subscription agreement, a trustee agreement and a fiscal agency agreement. The notes and paper are to be issued in an electronic form with no global note or paper.

Merrill Bank decides to place its allocation of the bonds and paper with one of the investment trusts managed on behalf of a wealthy Asian country as part of its Global Sovereign Wealth portfolio which is looking for a high but safe return. The sales department of Merrill Bank had had a continuing relationship with the trust for a number of years with the trust purchasing a large number of securities through them.

Merrill Bank's standard liability disclaimers are duly incorporated into the standard documentation used. These include a no duty clause, a no confirmation of accuracy clause, an own credit assessment clause, a no inducement clause and a no fiduciary duty clause. The provisions include an exclusion of liability for all innocent, negligent and fraudulent misrepresentation, criminal liability and statutory duty as well as a full indemnity clause in Merrill Bank's favour in the event of any cost or losses arising as a result of any of the foregoing.

The notes and bonds are duly issued and the hotel group receives the full amount issued on closing. Unfortunately, trading conditions are difficult in light of the continued global recession. One of the group's other hotels also suffers damage as a result of a hurricane in Florida and the US government is threatening to sue the parent company for faulty construction by failing to incorporate necessary safety measures. The offering circular had expressly stated that the group's hotel portfolio were all build to the highest of standards although it had become clear immediately following the hurricane in Florida that many short cuts had been taken in construction for money savings purposes. The parent company subsequently defaults on its next interest payment and the investment trust managers acting on behalf of the trust become very concerned with the group's continued ability to pay and solvency.

Your law firm is asked to advise on the following with reference to specific clauses within the standard ICMA documentation used:

(1) Outline the main documents that would have been signed to allow the shipping company to obtain its initial $100m.

(2) Explain the main heads of liability under which the lead bank may be sued in the event that the parent company or hotel group fail to make payments under either the notes or commercial paper.

(3) Advise on the main defences that may be available by Merrill Bank against the investment trust.

(4) Explain the effect of the main disclaimers incorporated into the final documentation.

(5) Confirm the extent to which either the agent bank or trustee may be under any separate liability following default on the bonds or paper.

Students may wish to refer to the decision in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 2848 (Comm).