

Issue № 2
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GANADO
ADVOCATES

STRUCTURED FINANCE NEWSLETTER

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COMMENT

We go to press on the eve of a general election and potentially, if polls are to be believed, a change in the political party in power for the first time in nearly 25 years save for the brief Labour administration of 1996-1998. Nevertheless, both major political parties, the *Partit Laburista* and *Partit Nazzjonalista* have promised in their manifestos to continue to promote the growth of Malta as a financial services centre.

In January, Standard & Poor's downgraded the country's long-term rating to BBB+ to put it on a par with Italy and Ireland, albeit without their negative outlook. Malta has kept its A3 and A+ ratings from Moody's and Fitch respectively. S&P stated that the downgrade was in large part a factor of Parliament's failure to pass a budget last year in the face of the political impasse leading to the upcoming election as well as concerns about government indebtedness, including the debt of state owned enterprises such as Enemalta Corporation. Unfortunately therefore, neither a budget for which there was broad political support, nor the major restructuring of Enemalta's debt highlighted below were arguably taken fully into account in the agency's decision.

On a more upbeat note, in January the German Chancellor, Angela Merkel, praised Malta for its "excellent" economic performance; saying how it had proved that positive results can still be achieved in a difficult environment. Positive results have certainly been proven; according to statistics issued by Eurostat and the National Statistics Office, in 2012 Malta had the second best performing economy out of the 17 Eurozone member states (surpassed only by Estonia). All of the country's major economic sectors registered growth, including retail and wholesale, financial services, manufacturing, tourism and real estate.

Similarly, the European Central Bank recently reported that Malta recorded the Eurozone's highest increase in financial institutions in 2012 against an overall decline for the region of 6.3%. There was a particularly pronounced reduction in institutions resident in Luxembourg (126 fewer authorised units or -22%). Prof. Joe Bannister, Chairman of the Malta Financial Services Authority, has stated that he is delighted that both new financial institutions looking to grow and international groups seeking a bridgehead into the European Union see establishment in Malta as realising these opportunities.

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STRUCTURED FINANCE VAULTS TO THE FORE IN MALTESE UTILITY DEBT SPV

A project to rationalise the bank debt of Enemalta Corporation, Malta's state-owned single generator and distributor of electricity, finally came to fruition after a lengthy and intense commercial and governmental process leading to the transaction documents being signed on the last day of 2012. What the transaction parties dubbed "Project Vault" represented probably both the largest ever transfer of Government immovable property and domestically arranged debt financing in Maltese history.

The final commercial terms of the syndicate banks' lending package having been sealed earlier, the transaction moved fast to a conclusion once the approval of the House of Representatives required by law for the transfer of property was given early in December, 2012.

Project Vault involved the transfer to a special purpose corporate vehicle of a sizeable portfolio of assets (land and plant) occupied and currently used by Enemalta for the generation and distribution of electrical energy. To finance the acquisition, the SPV raised €318.5m in the syndicated loan market under a facility arranged by Bank of Valletta p.l.c. The property transferred to the SPV under a 45 year deed of emphyteusis (similar in nature to a long lease under English law) was then leased back to Enemalta for the same period, the rental income being applied by the SPV to pay off and eventually settle the loan in accordance with predetermined and calibrated payment schedules. Being strategic assets, Government retained the option to eventually recover legal title to the properties by the effluxion of time or earlier by a discretionary and selective process of reacquisition.

As agent for the syndicated financing, Bank of Valletta evidently required that the assets being financed were placed in a bankruptcy remote special purpose vehicle. This created a tension between optimising the position of the syndicated creditors under the €318.5m loan and the problem of placing some of the country's strategic assets in an entity on "autopilot". To deal with the latter, a new purpose foundation was created to fulfil the role of the SPV's sole director, while the foundation's Board of Administrators and Supervisory Council are required to act by the terms of its Statute strictly to realise the purposes and objectives of Project Vault.

NEWS IN BRIEF

€318.5m Refinancing of Enemalta through Vault Finance SPV

Number of Maltese financial institutions increasing in spite of Eurozone decline - ECB

Maltese securitisation vehicles and investor trustees could be employed in growing Scandinavian high yield bond market.

HMRC grants EWSM admitted securities "listed" status.

IFSP establishes Structured Finance Committee.

Enemalta Corporation was advised on Project Vault by PriceWaterhouse Coopers, Malta and GANADO Advocates. Bank of Valletta plc was advised by Camilleri Preziosi, Advocates.

For further information about the SPV structure employed in Project Vault available to the public, please contact Dr Adrian Gabarretta (agabarretta@ganadoadvocates.com) or Richard Ambery (rambery@ganadoadvocates.com).

The transaction was challenging for all advisers, encompassing an extremely broad range of legal and financial issues, from the impact on Enemalta's existing borrowings, national accounting and sovereign immunity concerns, tax and VAT liability issues, to a plethora of civil, commercial and property law questions, including emphyteusis, lease, easements and security such as pledges and hypothecs, as well as carriage of risk and insurance.

NEW FINANCIAL INSTITUTIONS FOR MALTA, MARKET CONSOLIDATING / SHRINKING ELSEWHERE

In January 2012 the European Central Bank announced (<http://www.ecb.int/press/pr/date/2013/html/pr130121.en.html>) that Malta was the most popular jurisdiction in the Eurozone last year to establish new monetary financial institutions (overwhelmingly, banks). It is perhaps no surprise that the trend across the Eurozone was down, with a decrease of 474 institutions, or 6%. EU wide, an overall decrease of 511 units was recorded.

Admittedly from a small base, Malta bucked this trend with a doubling in the number of institutions licensed between May 2004 and January 2013 and a further growth of 3% last year. This contrasts with, in relative terms, a particularly pronounced decrease in Slovakia (-30%), Luxembourg (-22%), France (-9%), Spain and Finland (both -8%). In absolute terms, Luxembourg (-124), France (-105) and Italy (-55) were the main contributors to the net decrease of 474 units in the Eurozone.

The ECB's announcement also highlights a steady decline of the number of licensed financial institutions in the United Kingdom – down 27% over the last 14 years. What isn't clear yet is the effect of increasing pressure from the British Government on institutions to ring fence or separate entirely their retail and investment banking operations and where and how emergent specialised investment banks will choose to establish themselves.

MEDITERRANEAN HYBRID LAWS COULD PREPARE NORDIC BONDS FOR GLOBAL MARKETS

For those of us that battled snow storms to reach the excellent Scandinavian High Yield Bond Conference hosted by Euromoney in Stockholm last December, it was clear that that market is still in a relatively early stage of growth. That's not to say it's a small market: According to Henrik Hvidt-Karlsson, Director at CorpNordic (www.corpnordic.com), the Swedish market has seen SEK 900m of new issuance in the last six to eight months, with a similar volume in the current pipeline. This sits against the more mature Norwegian market, dominated by issuers in the oil and offshore industry with over NOK 7bn of bonds currently outstanding. Outside of traditional covered bond issuance, the Danish market is most nascent, but international debt capital markets are increasingly expected to fill the funding gap resulting from capital constraints on the country's numerous savings banks. CorpNordic also reported heightened interest in more widely distributed quoted offerings as opposed to more traditional private placements or club deals limited to Scandinavian investors.

Two important factors were obvious to us as outsiders however: First, if the market is going to continue to grow and develop as it has in the last five years, then the investor base for securities will have to expand significantly beyond the Nordic region. That will inevitably require the structure and documentation of issues to integrate further with those familiar to investors in the Euromarket and possibly also institutional buyers in the United States. Second, the absence of certainty (and in some jurisdictions, any law at all!) around the role, rights and powers of bond trustees and bankruptcy remoteness of issuers in Scandinavian jurisdictions continues to spook some potential investors.

Together with contacts in the region, particularly trust corporations established there, GANADO Advocates has begun to explore with Malta's trusts and trustee legislation, Civil Code provisions on fiduciary duties and perhaps even the provisions of the Securitisation Act reinforcing limited recourse and non-petition provisions, could ride to the assistance of the Scandinavian market. Whilst legislation

IFSP ESTABLISHES CAPITAL MARKETS SUB- COMMITTEE

The Institute of Financial Services Professionals in Malta (www.ifsp.org.mt) has formally recognised Malta's potential in the structured finance arena by establishing a Capital Markets Sub-committee under the stewardship of IFSP President Andrew Manduca (Chairman and Tax Service Line Leader, Deloitte Malta). The committee's brief is to explore the next key stages in Malta's growth as a centre for issuance of capital markets instruments as well as how best to exploit the jurisdiction's relative advantages for issuers of and investors in asset-backed securities and loan participation notes.

The Capital Markets Sub-committee has been charged with analysing all aspects of Malta's legislative, regulatory and business environment, but will be concentrating in forthcoming sessions on specific asset classes as well as example cross-border arrangements. IFSP members are welcome to suggest case studies for the group's development. The Sub-committee is composed of practice area leaders from a number of accountancy and law firms in Malta with extensive structured finance experience. GANADO Advocates is represented on the Sub-committee by Richard Ambery.

the need for which has already been recognised in Norway and Denmark is awaited, it is possible that the introduction of a trustee for bondholders in Malta whether or not coupled with a statutory securitisation vehicle as issuer, could help Scandinavian corporates tap investors further afield. This could go hand-in-hand with further development and standardisation of bond and offering documents for Scandinavian deals.

In an initiative to develop further Malta's capabilities in this area, the MFSA last December issued a consultation document comprising proposed amendments to the Trusts and Trustees Act (Chapter 331 of the Laws of Malta), which is the main body of law that regulates trusts and trustees under Maltese law, and other related legislation. See the article by our colleague, Dr Liana Micallef (lmicallef@ganadoadvocates.com) referred to below for further details.

HMRC OFFICIALLY RECOGNISES EUROPEAN WHOLESALE SECURITIES MARKET

The final seal of approval awaited by Malta's European Wholesale Securities Market (see Issue No.1 of GANADO Advocates Structured Finance Newsletter [Link] was granted in mid January by HM Revenue and Customs in the UK (<http://www.hmrc.gov.uk/fid/rse-new.htm>). With effect from last month, the EWSM was designated as a recognised stock exchange for the purposes of s.1005 of the UK Income Tax Act 2007

Most significantly, debt securities admitted to trading on the EWSM are now able to qualify as "quoted eurobonds" making issuers potentially exempt from the liability to withhold for or on account of UK income tax in respect of interest with a UK source under s.874 Income Tax Act. That HMRC now regards EWSM in the same way for withholding tax purposes as it does more established exchanges for listing asset-backed securities in the European Union should bode well for the development of this new specialist market.

NOTICE FOR APPLICATION OF SECURITISATION ACT

Resolving some confusion, the MFSA recently brought to our attention that it duly published an official notice (Gazette Notice) specifying that the provisions of the Securitisation Act apply to securitisation transactions or instruments issued by securitisation transactions whose value exceeds €1,000,000.

Article 24. of the Securitisation Act (Cap.484, Laws of Malta) provides that the Act shall only apply to securitisations or securitisation transactions where the minimum value of the securitisation transaction or the financial instruments issued by the securitisation vehicle exceeds such value as may be stated in a notice issued by the competent authority from time to time under Article 24.(a) or is otherwise approved in writing by the competent authority under Article 24.(b). The Maltese Act and attendant special tax rules for securitisation vehicles therefore apply to transactions with a much lower minimum size than their equivalents in Ireland (€10,000,000) and the UK (£10,000,000 or £50,000,000 to be excepted from the Enterprise Act 2002 insolvency regime).

CCP RULES ANTICIPATE IMPLEMENTATION OF EMIR

On 29 November 2012, the Malta Financial Services Authority (“MFSA”) (www.mfsa.com.mt) published a circular to the financial services industry (<http://bit.ly/127HSIlg>) attaching a draft Legal Notice promulgating a new Central Counterparties Regulation (the “CCP Regulation”) and accompanying guidance notes. The CCP Regulation interprets the application of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, commonly known as the European Markets Infrastructure Regulation or “EMIR” in Malta.

The implications of EMIR for the trading of over the counter or “OTC” derivatives in the EU by obliging certain of them to be cleared through regulated central counterparties or “CCPs” has been widely reported elsewhere. It is intended that the CCP Regulation interprets EMIR’s direct application and anticipates its coming into force as early as August this year by prohibiting the operation of a CCP in or from within Malta in the intervening period without the granting of a registration from the MFSA as competent authority. The CCP Regulation will also empower the MFSA to issue and publish Financial Market Rules directly binding upon CCPs and trade repositories operating in Malta for the better carrying out of EMIR’s provisions.

The draft Guidance Notes to accompany the CCP Regulation contemplate applications to the MFSA for registration as a CCP before as well as after EMIR coming into force. Watch this space.

CAPTIVE LIVE UK 2013

Dr Beppe Sammut and Dr Matthew Mizzi attended the Captive Live UK 2013 conference held in London during February 2013. The conference included several sessions and talks on the latest developments in the insurance, reinsurance and captive industry and was attended by many of the larger insurers, reinsurers, captives, captive managers, insurance brokers, actuary's, international law-firms, investment managers, ICT specialist firms and specialist tax advisors

15TH ANNUAL GLOBAL AIRFINANCE CONFERENCE

Dr Daniel Aquilina and Dr George Bugeja participated in the 15th Annual Global Airfinance Conference held in Dublin during January 2013. This conference featured senior representatives from the world's largest airlines, leasing companies, commercial banks, export credit agencies, private equity firms, investment banks, manufacturers, law firms and many other organisations involved in aircraft financing.

SEMINAR ON THE CAPITAL MARKETS SECTOR BY MFSA

At going to press the MFSA has announced that it will be hosting a seminar on the capital markets sector in Malta in late March at the Malta High Commission in London. If you are interested in attending, please let us know as soon as possible using the contact details below.

IMN GLOBAL ABS CONFERENCE

Lawyers from GANADO Advocates are registering to attend the IMN Global ABS Conference in Brussels between 18 and 20 June 2013 (<http://www.imn.org/Conference/Global-ABS-Conference/Home.html>). Please let us know in advance whether we can look forward to meeting up with you there or include you in an event we are organising.

FIDUCIARY OBLIGATIONS UNDER MALTESE LAW

Dr Max Ganado will soon be published in “Trusts & Attività fiduciarie”, a learned journal published in Italy with an article entitled “Fiduciary Obligations Under Maltese Law”. The article presents a fairly detailed exposition of the obligations of all fiduciaries under Malta’s Civil Code (including bond trustees and SPV foundation administrators therefore) as well as the principles of tracing into fiduciary property embodied in parallel provisions of the Code and under judge made law. It should be of interest to all practitioners considering both the extent of a trustee’s liability and the rights of creditors in an issuer’s insolvency estate.

TRUSTS AND TRUSTEES ACT AND OTHER RELATED LEGISLATION

Dr Liana Micallef has prepared an article on the MFSA consultation on the proposed amendments to the Trusts and Trustees Act and other related legislation. This article will be published on the GA website in the coming weeks. Dr Micallef can be contacted on lmicallef@ganadoadvocates.com

We trust that this issue of our Structured Finance Newsletter was of interest to our readers, however, should you have any queries or suggestions to make, please feel free to contact **Mr. Richard Ambery** at rambery@ganoadvocates.com or **Dr Conrad Portanier** at cportanier@ganoadvocates.com. We would be pleased to hear from you.

Further, should you wish to stop receiving the **GA Structured Finance Newsletter** please let us know by contacting rmizzi@ganoadvocates.com.

DISCLAIMER

This update is not intended to impart advice; readers are advised to seek confirmation of statements made herein before acting upon them. Specialist advice should always be sought on specific issues.