ROUNDTABLE

Who's Who Legal brings together four leading experts to discuss issues facing banking lawyers and their clients in the industry today.

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WWL: What have been the most important developments in the banking market in your jurisdiction in the last 12 months?

PS: The legislation that caps lending interest rates, and sets minimum deposit interest rates, has been the most significant development in the Kenyan banking market. This has led to a significant contraction in credit to the private sector, and particularly to the SME and personal banking sector. Banks are unable to price-risk properly. Therefore, there has been a significant shift to banks investing in government debt, this starving the private sector of credit. Overall banking sector profitability and private-sector loans have significantly reduced. Clearly, this legislation is not sustainable in the long run, and there is a push from banks to revoke the law. On the flipside, banks have adopted significant cost-cutting measures, moved to digital platforms and created efficiencies – which are positive. We would also note that the failings of two medium-sized banks in 2015–2016 have had a significant adverse impact on depositor confidence in the banking sector – resulting in a "flight to quality" – and starved smaller banks of deposits and credit lines. This will no doubt lead to consolidation of players in the banking sector.

AB: In Singapore, one of the key developments has been the introduction of a new insolvency law. As part of Singapore's drive to become a regional hub for restructuring, the government has introduced a number of new provisions in order to provide a wider range of rehabilitation options. These include extending the jurisdiction of the Singapore courts in such matters to any company which has a "substantial connection" with Singapore, enhanced moratorium provisions similar to US Chapter 11, and rules to promote and regulate super-senior rescue financing. These changes have generally been well received by restructuring practitioners, and have also led to much debate among the creditor community and their lawyers as to whether changes in loan documentation are required to protect lenders' interests.

BdM: There is still a high volume of new laws and regulations addressing the problems that arose in the context of the financial crisis, at both Belgian and EU levels. In addition, a series of new provisions has been implemented at the Belgian level, aimed at protecting the consumer of financial goods and services. Such new laws and regulations have increased the demand for non-contentious regulatory advice. The new insolvency code will also change how restructuring is done in Belgium. In addition, a recent theme in the European securitisation market has been the move towards securitised warehouse financing facilities as a means of providing funding for originators of mortgage loans, auto leases and other consumer assets. While the use of warehouse financing is not of itself a new phenomenon and has been an important funding source for a variety of originators for many years, the current changeable nature of the public markets, combined with lenders willing to lend on an asset-backed basis has made warehouse financing an increasingly attractive option.

CO: There have been two significant developments in the banking market. The first is that banks across the ASEAN region, including in Brunei and Singapore, have been embracing more data management and security technologies. This increase in digitalisation in the banking industry has led to an increased need for more comprehensive risk-management issues. There are more demands for scrutiny on cybersecurity as Brunei has strict banking secrecy laws. Banks and financial institutions have had to seek regulatory endorsement from the financial regulators before implementing new systems and this has in turn led to more legal work on the banking regulatory end. The second development is that as a direct result of steady decline in demand and the agreed oil production cuts among major exporting countries, the government of Brunei has been spending more on infrastructure development including the ongoing construction of major bridges and roads linking the two separate halves of Brunei. This has benefited banks who are heavily involved in such projects and are connected with the major contractors from China and Korea.

WWL: Have you noticed any significant growth areas in your practice over the last 12 months? What has been main driving force behind this?

PS: We have seen a growth in large syndicated or club loan deals to large corporates. The main driving force has been the desire of these borrowers to streamline their borrowings, and have multiple banking relationships. There has also been a significant growth in debt restructuring (due to the weak state of the private economy in Kenya).

AB: We have seen significant growth in our acquisition and leveraged finance practice over the last year. This appears to be driven by a combination of global macroeconomic trends and local conditions in South East Asia. On one hand, investors have large amounts of capital and face pressure to deploy this; on the other, the valuation gap that has undermined the expected growth of Asian M&A over the last few years has narrowed significantly. We have also seen developments in particular sectors contribute to this broader trend. These include the energy space, in which we have seen consolidation and disposal of assets as a result of the downturn in oil prices, with local players sometimes taking advantage of strategic reviews by the large multinationals in order to significantly grow their businesses.

BdM: With continuing uncertainty around Brexit, various elections, the Chinese slowdown, volatile oil and commodity prices, and a substantial increase in regulatory scrutiny all weighing on investor sentiment, 2017 saw choppy financial markets and a more challenging dealmaking climate. However, key drivers in the form of low-cost capital, the need to supplement limited organic growth with M&A, and investors looking to capitalise on favourable valuations and currency movements presented by these tumultuous times, have continued to support dealmaking and M&A activity. Shares in listed companies being used as acquisition currency – with stock prices having thrived alongside the M&A boom, more flexibility for incremental, additional and replacement debt in leveraged deals, and increased sophistication to navigate the stronger scrutiny by competition regulators and the stricter rules on tax inversions, were the most important themes. Over the past year we noticed an increase in ECM activity and experienced a high amount of "rescue rights issues" by companies in financial distress. It was also a busy 2017 for the private equity market, which remains dominated by exits. One of the growth stories in securitisation markets over the past few years has been the re-emergence of synthetic securitisation. Synthetic securitisation had been very popular in the years leading up to the global financial crisis in 2008, but in the aftermath of the crisis, activity levels dropped off dramatically. However, in recent years the industry began to rediscover synthetic securitisation and it has become one of the key portfolio management techniques being used by banks to manage their credit exposures and the capital requirements of their lending activities.

CO: Due to the past two years of slow economic growth caused by the drop in oil and gas prices, there has been a significant growth in debt restructuring work in Brunei. This has also let to more negotiations with creditors and securitisation work.

WWL: Recent political developments around the world have led to a great deal of economic instability. How has this affected the level of cross-border transactions and international investments?

PS: Interestingly, global political and economic stability – problems in West and Southern African economies have led to increased appetite for investment in East Africa (which was seen as relatively more stable and offering better returns). However, recent local political problems in Kenya, and government policy in Tanzania, have eroded previous gains made in attracting foreign investors.

AB: Singapore is very much a hub for transactions across South and South East Asia. Broadly speaking, we have seen the volume of international investment into the region, and cross-border transactions within it, hold up very well despite the headwinds from various other parts of the globe. The business community is of course watching developments carefully, particularly in China and the Korean peninsula where the proximity and potential magnitude of events might be expected to have an immediate impact on the rest of Asia.

BdM: In the aftermath of the UK's decision to leave the European Union, shockwaves continue to reverberate across both financial markets. The key risk to financial services is the loss of various passporting regimes for corporate (as well as retail) banking and investment banking, but other issues may also arise. Key drivers in the form of low-cost capital, the need to supplement limited organic growth with M&A, and investors looking to capitalise on favourable valuations and currency movements presented by tumultuous markets, have continued to support dealmaking and M&A activity. Shares in listed companies being used as acquisition currency – with stock prices having thrived alongside the M&A boom, more flexibility for incremental, additional and replacement debt in leveraged deals, and increased sophistication to navigate the stronger scrutiny by competition regulators and the stricter rules on tax inversions, were the most important themes.

CO: Recent global political developments that have caused political uncertainties to cross-border investments and banking transactions in ASEAN countries include the UK's Brexit and the US election. Any negative impact on the UK economy after Brexit will influence the economy of many of the ASEAN countries who export goods and services to the UK. The impact of Brexit is likely to cause a more negative impact on ASEAN countries such as Indonesia and Singapore, as any negative economic impact of Brexit on the UK will be felt mostly in the trade sector. Brunei investors tend to invest surplus funds outside Brunei and will likely take advantage of the lower exchange rates in the UK. Observers in non-Islamic countries including the UK have been concerned by the implementation of dual sharia law and common law systems in Brunei in 2014. However, since investors from non-sharia law countries tend not to invest in Brunei, Brexit and the new Trump policies will have minimal impact on Brunei.

WWL: Client demand for regulatory advice has noticeably increased. Are there any particular areas in which they are seeking this type of counsel?

PS: We are seeing increased demand for advice on listed company regulatory work (particularly for clients who are in some distress), as well as new insolvency laws.

AB: We have seen significant growth in fintech-related advice over the last couple of years. Singapore is positioning itself as an Asian hub for fintech initiatives, with significant government support, and this has given rise to a proliferation of fintech ventures, involving new start-ups but also incubators and discrete projects within our more traditional financial institution clients. The regulatory regime globally in respect of fintech is relatively nascent, and Singapore has adopted a sandbox approach in order to facilitate and empower innovation, which looks set to drive further growth in this area over the coming years.

BdM: We have been advising international financial institutions on the scope of the bank recovery and resolution directive, and in particular the bail-in rules, and the impact of those rules on their transactions. We have also been advising Belgian investment firms and banks on the interpretation and implementation of MiFID II provisions in Belgium in relation to suitability, impact on the continuance of the third country registration and forthcoming ban on inducements as part of MiFID II. Furthermore, we have advised various international credit institutions on derivative instruments involving collateral over securities in Euroclear. These complex transactions are implemented in a changing legal and regulatory environment and give rise to a number of legal and regulatory questions. In particular, the transactions seek to mitigate the credit risk which the collateral-giver takes on the collateral-taker with respect to the collateral securities and cash (in addition to the risk which the collateral-taker takes on the collateral-giver as part of the underlying transaction). This novel feature reflects a rising concern among market participants and stems from the recent financial crisis. This feature of those transactions gives rise to interesting legal questions on financial collateral arrangements and "possession of control". Finally, in 2014 Belgium expanded the scope of its consumer protection legislation to cover financial instruments. While the consumer protection legislation can easily be understood and applied in the context of the sale of consumer goods, such legislation is not easily comprehensible in the context of financial instruments. In order to address this issue, the Belgian regulator issued a position paper in January 2017 describing its interpretation of the relevant provisions when applied to financial instruments. We have advised both "manufacturers" of financial instruments and "distributors" of those instruments on the interpretation of this legislation, on adjustments required to their products, and on liability questions. The position adopted by the Belgian regulator is unique (within the EU), and has raised a significant number of questions and problems (including on conflicts of laws, interaction between the consumer protection legislation and other pieces of legislation, etc).

CO: The need for regulatory advice across the entire banking sector in Brunei and Singapore has continued to rise. While regulatory advice is still much sought after for anti-money laundering and anti-terrorism issues, there are many requests for counsel to advise on fintech and also on the interface of technology and regulation, as these are both internal compliance issues (as well as regulatory compliance issues) that need to be met.

WWL: Where do you see the biggest expansions in the financial services industry over the next five years?

PS: This has to be in the digital and fintech space generally; and in Kenya, to the micro and SME sectors. Kenya is already a global leader in mobile banking and mobile money usage, and there is tremendous opportunity in both fintech and digital and mobile banking in Kenya.

AB: In South East Asia we expect to see continued growth in the alternative lending space. Increasingly, the needs of mid-cap corporates and larger family-owned businesses will be met by credit funds and similar vehicles that can operate more nimbly than the banks, and who are willing to pursue higher-risk transactions in the expectation of higher returns. This is particularly the case in the context of event-driven transactions at the holding company level, as opposed to financing at the operating company level – which remains largely the purview of more traditional lenders. We have already seen significant growth of funds as credit providers over recent years, including an increased use of genuine mezzanine financing in Asia which is primarily provided by debt funds, and we expect this trend to continue going forward.

BdM: As Brexit unfolds over the coming years, various financial institutions currently based in and operating out of the UK will relocate to the European Union. Non-bank lending and payment services, cybersecurity and fintech solutions will be the most important themes that will shape the future of the financial services industry.

CO: To address technology and regulatory (regtech) issues and challenges will likely be among the biggest growth areas in the financial services industry in the ASEAN. While the growth of technology-enabled financial services has had a phenomenal growth across the world, it has also come with greatly increased financial risk and regulatory risk. RegTech has been cutting down the costs of manual reporting and compliance processes, and is starting to speed up the opening of new accounts and compliance issues including know-your-customer requirements.