

MAYER | BROWN

# WORKING ON SOVEREIGN CAPITAL MARKETS TRANSACTIONS

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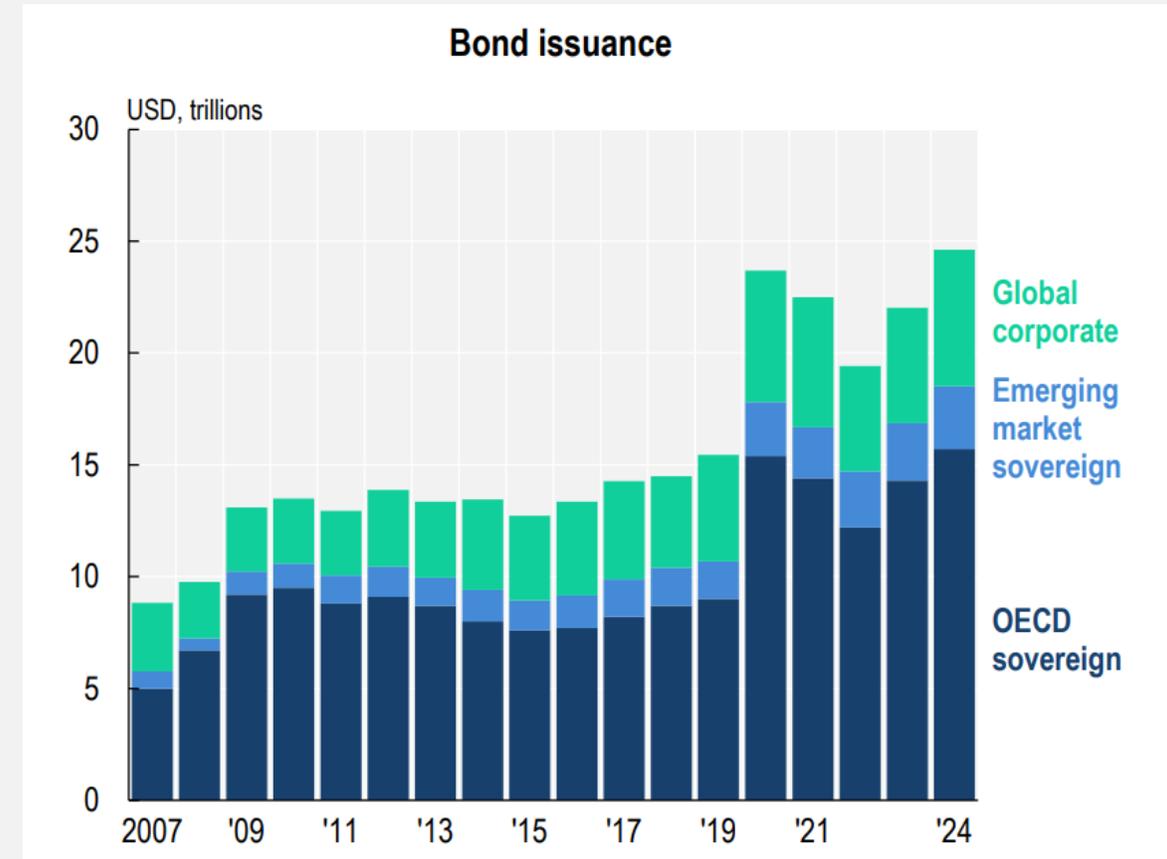
## WHAT ARE WE GOING TO DISCUSS TODAY?

- Introduction and Overview
- Common Transaction Considerations
- Disclosure
- Diligence and Certain Deal Execution Issues
- Switch Tender Offers
- Collective Action Clauses
- Sovereign Immunity
- Sovereign Sukuk
- Q&A

# INTRODUCTION AND OVERVIEW

## MARKET SNAPSHOT AND TRENDS

- Global bond market borrowing has tripled since 2007; sovereign issuances have followed the same trajectory
- In 2025, total sovereign bond issuance levels reached c. U.S.\$3tn (*Preliminary IMF 2025 Data*)
- Emerging and frontier sovereigns accounted for roughly U.S.\$350bn, a double digit increase year-on-year (*Preliminary IMF 2025 Data*)
- 2026 projections suggest sovereign issuance will remain steady with key trends emerging:
  - Debut issuers and issuers with multi-year gaps are increasingly looking to the international capital markets
  - Growing popularity of Sukuk structures
  - Sustainable sovereign issuance; over 60 sovereigns have issued green, social or sustainability bonds, current outstanding issues are c. U.S.\$750bn
  - Debt for Impact Swaps

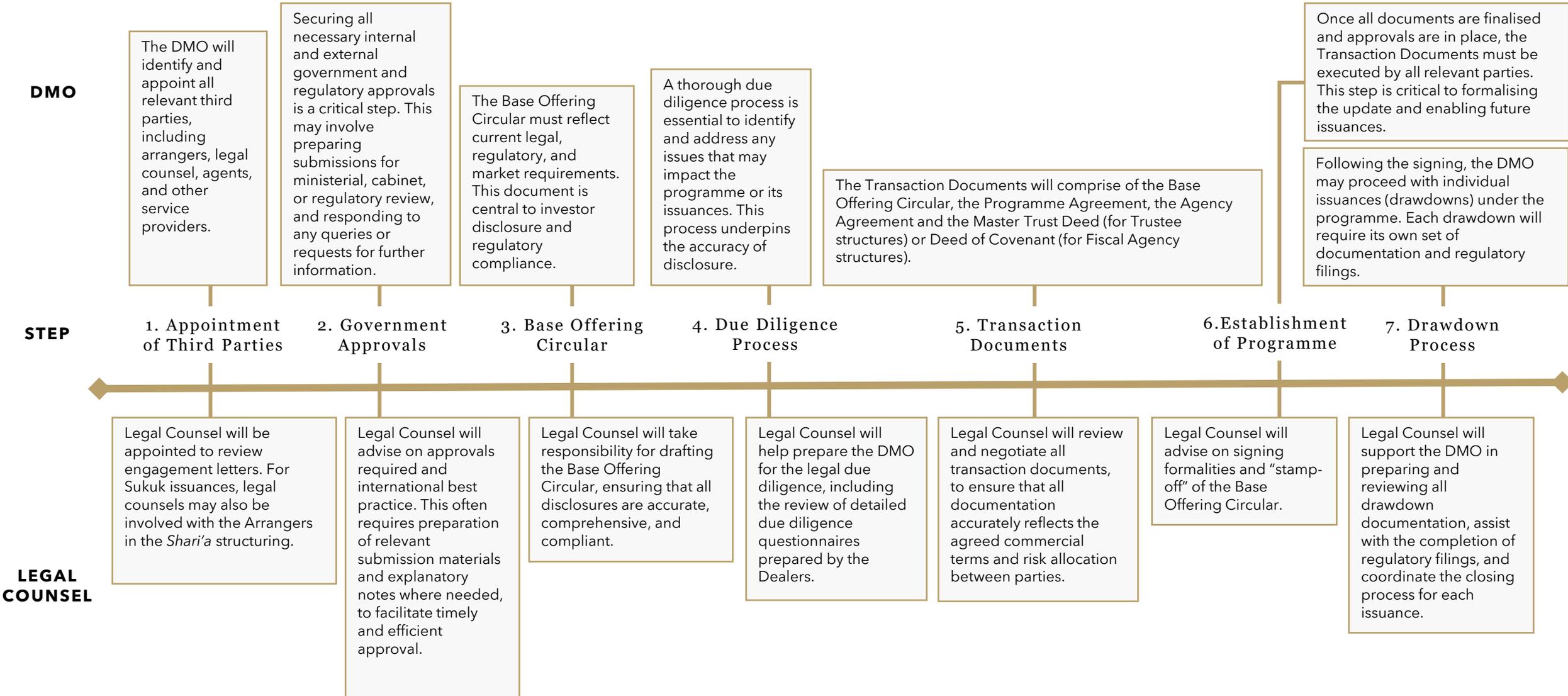


Source: OECD Global Debt Report March 2025

## INTRODUCTION TO SOVEREIGN CAPITAL MARKETS

- Sovereign capital markets; a fundraise by a national government in the public or private debt markets
- Use of proceeds tend to be general budgetary purposes; but issuance also serves broader policy and financial objectives
- Different types of instruments include senior unsecured, inflation-linked bonds, treasury bills and Sukuk
- Legal framework looks at capital markets infrastructure, domestic law, enforceability of foreign law judgments and immunity

# EXAMPLE TIMELINE





**COMMON TRANSACTION  
CONSIDERATIONS**



## COMMON TRANSACTION CONSIDERATIONS

- **Identify the correct sovereign entity or agency within the state with authority to bind the state.** Often the Ministry of Finance (or similar) but sometimes a central bank or public agency or fund
- **Capacity and authority of a Sovereign** – *Law Debenture Trust Plc v Ukraine [2023] UKSC 11*
- Is the debt required **to be included in the budget of the relevant sovereign** or is **Parliamentary and/or Presidential approval required**? How long does this take? Important to arrange at start of transaction.
- **Who can opine?** Attorney General, Head of Legal of Ministry of Finance, Minister of Justice? How many opinions?
- **Who can sign and what do they need to sign?**
- **Importance of obtaining good advice from counsel in the relevant jurisdiction at an early stage**
- **The relationship between the sovereign and its central bank** is critical. Do you need central bank approval or an undertaking?
- Capacity and authority issues can arise on **foreign law, arbitration and courts provisions**
- **What is the tax status of the transaction?** For debut issuers, there may be an exemption for local issuances but not external debt

## COMMON TRANSACTION CONSIDERATIONS

- Events of Default:
  - Cross Acceleration v Cross Default
  - External Indebtedness v Public External Indebtedness
  - No Insolvency EoD
  - IMF Membership
- ICMA Pari Passu Clause
- Negative Pledge
- Collective Action Clauses
- Governing Law and Jurisdiction – English or NY (not local)
- Ability to repurchase in open market but typically no tax call

(d) *IMF*: the Issuer ceases to be a member of the International Monetary Fund (the “IMF”), or ceases to be eligible to use the general resources of the IMF; or

(e) *Moratorium*: a moratorium on the payment of principal of, or interest on, the External Indebtedness of the Issuer shall be declared by the Issuer; or

“**External Indebtedness**” means any Indebtedness expressed or denominated or payable or which, at the option of the relevant creditor may be payable, in any currency other than the lawful currency from time to time of The Republic

“**Public External Indebtedness**” means any External Indebtedness which is in the form of, or is represented by, bonds, notes or other securities with a stated maturity of more than one year from the date of issue which are, or are capable of being, quoted, listed or ordinarily purchased or sold on any stock exchange, automated trading system, over the counter or other securities market; and

The Notes are the direct, unconditional and unsecured obligations of the Issuer and rank and will rank *pari passu*, without preference among themselves, with all other unsecured External Indebtedness of the Issuer, from time to time outstanding, *provided, further, that the Issuer shall have no obligation to effect equal or rateable payment(s) at any time with respect to any such other External Indebtedness and, in particular, shall have no obligation to pay other External Indebtedness at the same time or as a condition of paying sums due on the Notes and vice versa.*

DISCLOSURE

## APPROACHES TO DISCLOSURE - EXEMPTIONS

Sovereign disclosure is different to disclosure of a corporate or bank and, in most cases, is subject to some type of disclosure exemption under local rules. This can be helpful in structuring and documenting transactions.

The securities are backed by the full faith and credit of a foreign government;



(b) non-equity securities issued by a Member State or by one of a Member State's regional or local authorities, by public international bodies of which one or more Member States are members, by the European Central Bank or by the central banks of the Member States;



(2) *non-equity securities*:

(a) issued by any of the following:

- (i) the government of any country or territory;
- (ii) a local or regional authority of any country or territory;
- (iii) a *public international body*; or
- (iv) the European Central Bank or the central bank of any State; or



(b) that are instruments of Islamic finance issued by a special purpose vehicle established by the government of any country or territory or by the European Central Bank or the central bank of any State where the *non-equity securities* are backed by the relevant government or central bank in such a way that the economic effect is the same as though the relevant government or central bank were the *issuer* of the *non-equity securities*;



## APPROACHES TO DISCLOSURE – LEVEL OF DISCLOSURE

Remember, the correct approach to disclosure depends on several factors such as **stock exchange requirements, jurisdictional requirements, credit rating of the Issuer, the frequency of Issuance** and **investor requirements**.

### DISCLOSURE-LIGHT

Frequent Issuer

Highly rated

Often Reg S

May rely on ongoing disclosure

### FULL DISCLOSURE

Emerging Market

Debut Issuer

SEC Registered/Rule 144A Issuance

### OTHER ROUTES

Reg S, regular (often European)  
Issuer

Incorporation by reference of the  
Investor Presentation may be  
possible in lieu of fuller disclosure

# ANATOMY OF SOVEREIGN DISCLOSURE

Sovereign offering documents may include, among other things, the following disclosure information:

- **Overview** - territory, population, history, constitution, government, political system, judiciary, legislative developments, health care systems, education systems, international relations, and partnerships with international financial organisations
- **Economy** - main macroeconomic indicators and structure of the economy, supported by figures from national databases and external sources. Data and narrative commentary covering industry, transportation, employment, tourism, construction, services, retail trade, agriculture, energy sector, labour market, diversification and privatisation
- **Public Finances** - government revenues and expenditures, budget balance and fiscal policy framework
- **Public Debt** - total indebtedness, external and domestic debt composition, maturity profile and debt management strategy
- **Foreign Trade** - trade in goods, imports and exports, trading partners and foreign direct investment
- **Monetary and Financial System** - covering monetary policy, liquidity, reserves, inflation, and the structure of the banking sector

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# DILIGENCE AND CERTAIN DEAL EXECUTION ISSUES

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## DILIGENCE AND PRACTICAL GUIDANCE

- Levels of diligence will be driven by offering structure such as US registered, 144A or Regulations S
- US registered and 144A will require the most robust diligence approach as 10b-5 negative assurance letters will be provide by both issuer and arranger counsels.
- Sovereign DD is different from “standard” corporate DD as you are examining macro economic policies and indicators (GDP, monetary policy, inflation), budgets, expenditures, fiscal policy along, government relations and affairs of state, politics, population dynamics and many other sovereign related topics.
- Usually just a done through an extensive DD session with various government officials and line ministries
  - Practice Tip: Important to set up DD session with a government point person to be sure you have all of the relevant ministries and right individuals answers questions for particular topics. ID and note speakers at the start of every Q&A sessions.
  - The sessions are long – multiple days and sometimes full day sessions, so make the session as “user friendly” as possible and streamline questions without omitting key items.
- Documentary DD is fact checking against public sources and spotting red flags.
  - Beware: Just because it is a public source does not mean it is correct. Sometimes public data is wrong.

**SWITCH TENDER OFFER**

## WHAT IS A SWITCH TENDER OFFER?

- A liability management transaction that combines a tender offer with an issue of new bonds
- Switch tender offer unique to sovereign issuers as Schedule B filers under the US SEC Rules.
- Sovereigns use switch tender offer to manage debt maturity profiles, reduce volatility risk and efficiently raise capital by simultaneously buying back old debt and issuing new debt
- Typically executed intra day (exempt of US TO timing requirements (i.e., 5 days) as a Schedule B filer) and are conditioned on the successful pricing of new bonds on the same day
  - This accelerated timeline minimises issuers' exposure to market volatility during the tender period

## PREFERRED TENDER VS NON-PREFERRED TENDER

- Bondholders can either (a) tender the bonds for cash (“non-preferred tender”) or (b) tender the bonds with a concurrent indication of interest/a firm bid to purchase equivalent amount of the new bonds (“preferred tender”)
- **Preferred tender:** the tender that is submitted concurrently with the submission of indication of interest
  - **Indication of interest:** a firm bid for a certain principal amount of new bonds equal to the principal amount of old bonds
- **Non-preferred tender:** the tender that is submitted for cash and without concurrent submission of an indication of interest
- In practice, issuers only accept preferred tenders and rarely accept non-preferred tenders for cash

## SWITCH PROCESS AND TIMELINE

- Generally, follows same documentation as standard cash tender offer, main difference is timing gap between settlement of TO and settlement of new issuance.
- Timeline:
  - Switch and new issuance launched same day (T)
  - Switch settles and closes within same day and payment is made within +2-3 days of TO settlement.
  - New issuance prices same day (T) and closes +5 business days later (assuming T+5 settlement for new issuance)
  - Gap of 2 or 3 days between payment of TO by B&D bank and receipt of proceeds from new issuance.
  - B&D bank carries new issuance risk and tendered bonds risk for this time period.

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# COLLECTIVE ACTION CLAUSES

## WHAT ARE COLLECTIVE ACTION CLAUSES (“CACs”)?

- Collective Action Clauses (“CACs”) allow a majority of bondholders to override a dissenting minority that could disrupt a sovereign debt restructuring and the country's economic recovery.
- A CAC allows a supermajority of bondholders to agree to a debt restructuring that is legally binding on all holders of the bond, including those who vote against the restructuring
- Purpose: assist countries facing financial difficulties to seek an accommodation with their bondholders in a constructive manner, prevent small groups of holdout creditors from blocking restructuring, mitigate holdout risk and facilitate orderly restructurings/liability management
- ICMA’s CACs offer a sovereign three options to modify reserved matters restructure its debts
  - Single series reserved matter modification
  - Cross-series modification with single aggregated voting
  - Cross-series modification with two tier voting

## SINGLE SERIES RESERVED MATTER MODIFICATION

- **ICMA's CACs** Any Modification constituting or including a Reserve Matter Modification to the terms and conditions of the Bonds of a single series, or to the Governing Instrument insofar as it affects the Bonds of a single series, may be made, and future compliance therewith may be waived, with the written consent of the Issuer and the affirmative vote or consent of holders of more than **75%** of the aggregate principal amount of the outstanding Bonds of that series.
- ICMA's CACs set the required majority for significant changes (e.g. the dates, amounts and currency of payment) at 75%.
- **Reserved matter** means any modification that would change the dates on which any amount is payable on the bonds, principal amount, interest rate, calculation method, currency of payment, modify issuer's obligation to make any other payment of the bonds (including any redemption price), the identity of the obligor under the bonds, etc.

## CROSS-SERIES MODIFICATION WITH SINGLE AGGREGATED VOTING

**ICMA's CACs:** Any Cross-Series Modification constituting or including a Reserve Matter Modification that is Uniformly Applicable to the terms and conditions of the Bonds of two or more series, or to the Governing Instrument insofar as it affects the Bonds of two or more series, may be made, and future compliance therewith may be waived, with the written consent of the Issuer and the affirmative vote or consent of holders of more than 75% of the aggregate principal amount of the outstanding Bonds of all the series affected by the proposed Modification (taken in the aggregate).

This method allows a proposal for any modification or action with respect to multiple series of bonds to be approved in a single vote amongst the holders of all notes affected by the proposal. The majority required is 75% of the aggregate principal amount outstanding of all the affected series.

**Uniformly Applicable** means that after the restructuring, all bondholders must hold the same instruments (or have had the option to hold the same instruments). The Uniformly Applicable requirement allows for different series of notes to be amended provided that the result of the amendments is that the amended instruments have identical provisions.

## CROSS-SERIES MODIFICATIONS WITH TWO-TIER VOTING

- **ICMA's CACs:** Any Cross-Series Modification constituting or including a Reserve Matter Modification to the terms and conditions of the Bonds of two or more series may be made, and future compliance therewith may be waived, with the written consent of the Issuer and:
  - (i) the affirmative vote or consent of holders of more than 66 2/ 3% of the aggregate principal amount of the outstanding Bonds of **all** the series affected by that proposed Modification (taken in the aggregate), and
  - (ii) the affirmative vote or consent of holders of more than 50% of the aggregate principal amount of the outstanding Bonds of **each** series affected by that proposed Modification (taken individually).
- The requirement for majorities across both the bonds as a whole and within each series offers protection to bondholders. A majority of the sovereign's bondholders as a whole cannot force on an individual series terms that are unacceptable to the majority of the holders of that series.

## SOME UNIQUE CAC PROVISIONS

Unique CAC provisions emerged out of Argentina's restructuring to address two main issues:

- (1) managing orderly restructurings through a re-designation provision; and
- (2) prohibiting multiple single limb amendments (known as a "pac man" approach) for a period of time to the extent an issuer has already completed certain categories of other amendments.

## SOME UNIQUE CAC PROVISIONS

### Re-designation

- Standard ICMA CACs allow a vote to be aggregated across multiple series of bonds. For example, if 75% or more of the holders in principal amount across all of the bonds having been selected for restructuring agreed, the dissenters would be forced to accept the same terms.
- Re-designation reserves the issuer's right to exclude a bond series from a voting pool and change the applicable voting mechanism after the votes have been cast.
- This means the issuer has the ability to "re-designate" some of the series that voted against the restructuring as if they hadn't been included in the vote in the first place. This is a powerful tool to manage holdouts.

### "Pac Man"

Standard ICMA CACs give the debtor three voting options to change payment and other key terms:

- single limb (requires supermajority of multiple series voting together as a pool, akin to popular vote);
- two-limb (requires supermajority of a pool plus clearing a lower threshold for each bond series, akin to popular vote plus electoral college); or
- series-by-series (requires supermajority of each bond series, akin to electoral college only).

Pac Man is a pro-issuer right that allows the issuer to use a single limb procedure multiple times in succession on all bonds issued under its indenture.

# SOVEREIGN IMMUNITY

## OVERVIEW

- Immunity is a key risk issue on deals:
  - If a sovereign is immune, it may mean that a claimant is left **without a legal remedy** in the event of a breach or non-payment as it may not be able to secure a judgment or award
  - Even if a claimant secures a judgment (or an arbitral award) against a sovereign/state entity, it may **not be able to execute against the state's assets** because the sovereign claims immunity over those assets
- Sovereigns may have **internal policies** on governing law/dispute resolution/waiver clauses and may not want to set a precedent by agreeing to an extensive waiver and/or a particular disputes clause
- Issues concerning the **authority** and **capacity** should be considered together with waivers
- International organisations (**IOs**), in particular Multilateral Development Banks (**MDBs**), may have immunities and privileges

## STATE IMMUNITY

- Take an international perspective –
  - National courts tend to apply their own national laws on immunity, whatever the foreign state involved and whatever the applicable law of the contract
  - So, if you are before the English courts, they will apply UK immunity law **State Immunity Act 1978 (SIA)** and if you are before the US courts, they will apply the **US Foreign Sovereign Immunities Act 1976 (FSIA)**
  - Some courts may consider the provisions of the UN Convention on the Jurisdictional Immunities of States and their Property (2004) but this treaty is not yet in force
  - Commercial parties should assume enforcement/execution in the courts of the sovereign's home state will be difficult and may need to consider the position in multiple jurisdictions as a sovereign's assets may be dispersed

## ANALYSING IMMUNITY

- Immunity from suit (jurisdictional/adjudicative immunity)
- Immunity from recognition of foreign judgments
- Immunity from enforcement and execution
  
- A waiver of adjudicative immunity (suit) does **not** constitute a waiver of immunity from enforcement

## WHO CAN CLAIM IMMUNITY?

Under **UK SIA**, immunity can be claimed by:

- Sovereign or other head of state acting in public capacity
- Government and any department of that government
- BUT ***not a separate entity***
- **EXCEPTION:** *if* proceedings against a ***separate entity*** relate to an action done by that entity ***exercising sovereign authority*** (and a state would have been immune) then a separate entity can claim immunity
- Difficult test to apply in practice – mixture of local law and fact
- The **US FSIA** provides that a '*foreign state*' includes a political subdivision of a state or an **agency or instrumentality** of a foreign state.
- Even if an entity has a separate legal personality from the state, it may be found to be part of the state if it is **closely linked** to the state
- The position regarding the immunity of foreign officials which generally extends to heads of state and to individuals acting on behalf of a foreign government during their time in office is complex

## EXCEPTIONS TO IMMUNITY UNDER UK LAW

Three core exceptions to immunity *from suit*:

1. **Submission to jurisdiction** (s2(1) of SIA) (choice of English law insufficient)

2. **Commercial transaction** (s3(1)(a) of SIA)

Widely defined in the SIA.

Sovereigns may be asked to provide a **representation it is a commercial transaction**

3. Proceedings relate to an **arbitration** (s9(1) of SIA)

Immunity is not directly engaged as arbitration is a private, contract-based dispute resolution mechanism but parties may need the supervisory court's help to enforce the arbitration agreement and/or keep the arbitration on track.

s9(2) of SIA provides a sovereign with a right to **reserve its immunity**

Similar exceptions found in other legal systems eg in FSIA but always check with local counsel

## IMMUNITY FROM ENFORCEMENT/EXECUTION UNDER UK LAW

- A state's assets are immune from enforcement under UK SIA save where those assets are **in use for commercial purposes** OR there is a **waiver/consent**
- Injunctions or orders for specific performance against a state – you need a waiver/consent
- Commercial purposes test can be difficult to apply in practice and in the UK, an Ambassador's certificate declaring assets in use for state purposes (i.e. not in commercial use) can be determinative
- Position of Central Banks
  - “super immunity” (even though a separate entity)
  - assets presumed NOT to be in use for commercial purposes
- States may offer a waiver BUT then include material carve outs

Similar provisions are seen in other legal systems but always check with local counsel

## LITIGATING AGAINST SOVEREIGNS

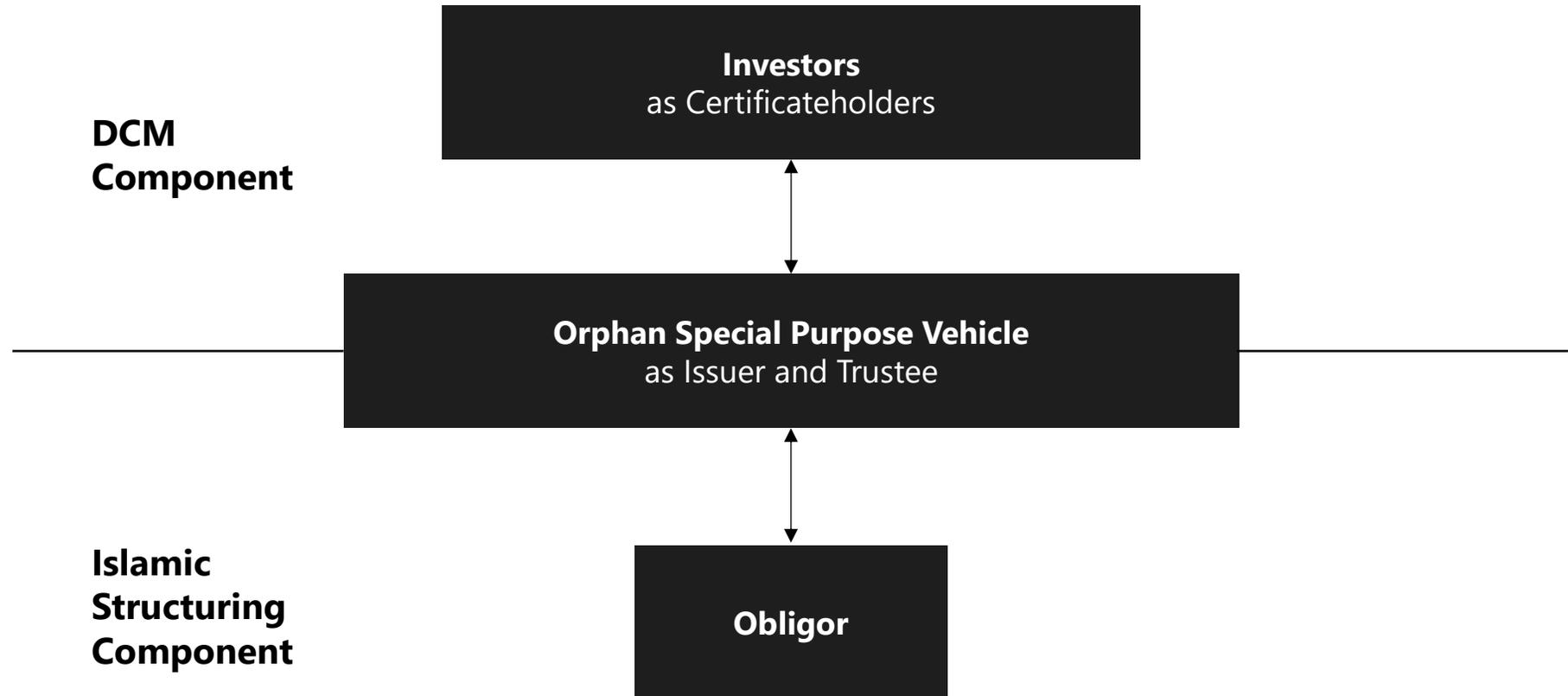
- Immunity issues can make litigation a lot more expensive, lengthy and uncertain – recent examples include Argentina’s long running litigation in US
- Service of process on a sovereign can be time consuming and expensive unless **a process agent provision** is included in transaction documents
- Section 12 (1) of the SIA requires a claim form to be transmitted by UK Foreign office (which involves as a first step lodging with the Foreign Process Section) to the Foreign Ministry of the receiving state
- Process agent provision important even where arbitration clause included for arbitration related claims

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# SOVEREIGN SUKUK

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# SUKUK BASIC STRUCTURE

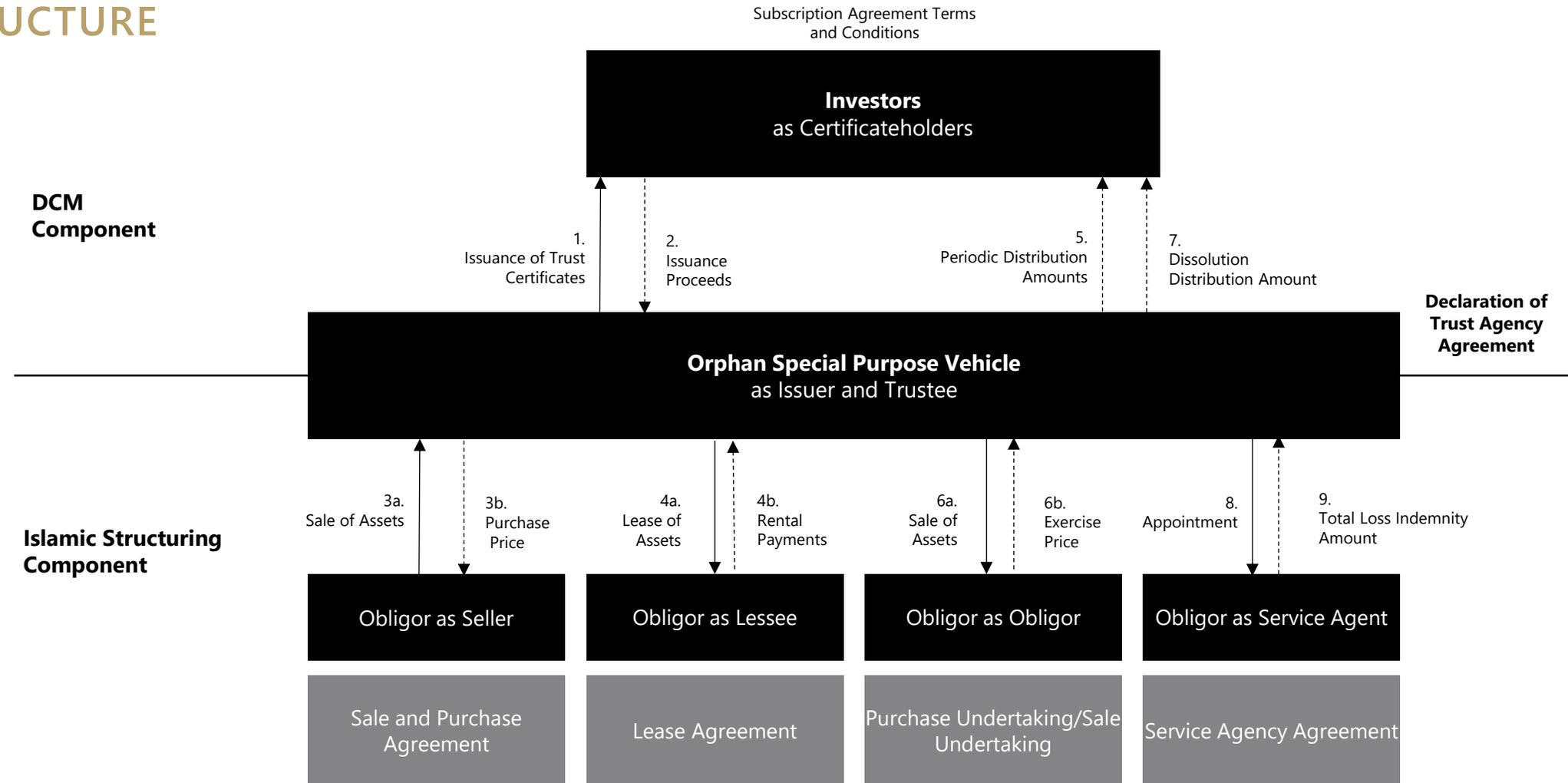


## IJARA DEFINITION

The transfer of the usufruct of a particular property by one entity to another entity in exchange for a rental payment.

**Islamic equivalent of a lease**

# SUKUK AL IJARA STRUCTURE



## COMMON SOVEREIGN SUKUK CONSIDERATIONS

- **Identify the assets:** Are there sufficient eligible assets available to underpin the structure?
- **Capacity and Authority.** Who currently owns the assets? What approvals will the Government require to “sell” those assets?
- **Issuer:** Orphan SPVs are preferred by Shari’a; but not always possible in the context of sovereign issuances.
- **Legal framework.** Are the Sukuk Certificates envisaged as part of the Government’s debt framework?

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Q&A

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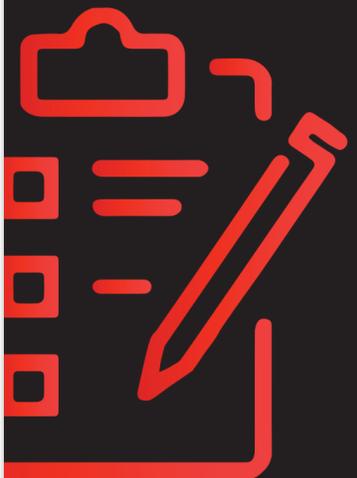



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