registration. Such registration shall be done in a different section of the register set out in Article 35 of TUF, and the Bank of Italy, after hearing CONSOB, registers and deletes the Italian persons that meet the conditions set out in the EU regulations No. 345 and No. 346 of 2013. After the registration, CONSOB carries out the notifications towards the competent authorities within the Member States in which the Italian persons registered, according to the EU regulations No. 345 and No. 346 of 2013, intend to market such investments funds.

The European funds' managers meeting the requirements set out in the two EU regulations willing to market in Italy the said funds, must send to CONSOB, the notifications set out by Article 16 of the EU regulation No. 345/2013 and Article 17 of the EU regulation No. 346/2013, via the competent authority of the home country, after having obtained the registration according to the same regulations.

Libya: Law No. 1 of 2013 on the prohibition of interest-based financing transactions

LIBYA

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On 7 January 2013, the Libyan General National Congress adopted Law No. 1 of 2013 concerning the prohibition of interest-based financing transactions. Law No. 1 of 2013 essentially bans interest in all civil and commercial transactions. When implemented as from 1 January 2015, it will have far-reaching effects on the Libyan banking sector.

The issue of interest was first raised by Mustafa Abdul Jalil, the chairman of the National Transitional Committee and Libyan interim leader after the 2011 revolution, on the occasion of the Celebration of Free Libya on 23 October 2011. Mr Abdul Jalil declared in his speech that anything contradicting Islamic law, the Sharia, should be banned, thereby giving two examples: the law curtailing polygamy and the laws permitting interest.

The background to this is the Islamic prohibition of usury (*riba*). Sura II: 275 of the Qur'an states: 'God hath permitted sale but prohibited usury.' The majority of Islamic jurists understand this to prohibit interest paid in consideration for the lending of money. A return on an investment is permissible only if the investor also participates in the business risk of a venture or project. Money has no time value and the deferral of payment may not result in an increase of the amount due.

In the campaign for the July 2012 elections in Libya, many independent candidates and the Islamist Justice and Solidarity Party supported the abrogation and ban of all forms of interest. The Transitional National Congress approached this matter as one of the priorities to restart private economic initiatives in Libya and in order to reconcile the country.

The prohibition of interest

Article 1 (1) contains a prohibition of interest of general application:

> 'Interest on deposits and loans in all civil and commercial transactions between natural and legal entities shall be prohibited. All usurious interest, whether evident or concealed, earned from such transactions shall be invalidated on an absolute basis.'

At present in Libya, a cap of 10 per cent applies for interest payments, which has been set by the Central Bank; such an interest rate cap is fairly common in Arab jurisdictions. Article 1 (1) makes a radical break with this approach by prohibiting all kinds of interest payments. Most notably, there is no exemption for financial institutions. In addition, the prohibition extends to concealed interest payments, which are defined in Article 1 (2):

> 'Forms of concealed usurious interests shall include the charging by the creditor of a commission or benefit, of whatever type and nature; if it is proven that no actual and legitimate benefit or service has been provided by the creditor in return for obtaining such commission or benefit.'

Article 5 extends the prohibition of interest by providing that statutory provisions on interest in all other laws shall be invalidated:

> 'All concerned entities shall be obligated to regulate and re-organize all its civil, commercial and banking transactions to be compliant with the Islamic Sharia law.'

Although many Arab jurisdictions restrict interest bearing transactions, the Libyan prohibition is exceptionally far-reaching and strict. In Saudi Arabia, for example, where interest payments are prohibited, there are far reaching, de facto exemptions applicable to the financial sector. In other countries, there would be a general exemption of all commercial transactions, for example, in the UAE. This means that where jurisdictions enforce the Islamic prohibition of interest, they normally exempt certain areas.

Civil and penal sanctions

Article 2 provides that a clause stipulating interest cannot be enforced – even in cases where a court has rendered a final judgment in the matter. This means that as from the effective date of Law No. 1 of 2013, no interest of whatever kind can be collected under Libyan law, irrespective of when the transaction was concluded.

Article 3 clarifies that the law only invalidates the promise to pay interest; under an interest bearing loan, the borrower remains obliged to repay the principal.

In addition, Article 6 (1) provides that a penalty of not less than one year of detention or a fine in the range of 1,000 to 5,000 Libyan Dinars (LD) shall be imposed on whoever violates the prohibition of interest in the law. According to Article 6 (2), a creditor who exploits the need, weakness or tendency of the debtor to his own advantage, or who habitually makes usurious loans shall be punishable by not less than two years imprisonment or by a fine of not less than 5,000 LD and not more than 10,000 LD.

The way in which the penal sanctions are implemented, in particular, in relation to international financial institutions, remains to be seen. A key question will be the scope of application of the penal provisions. According to general principles, they can only apply to acts in Libya. When it comes to cross border lending transactions, the question of when a financial institution is doing business in Libya is not easily determined.

Effects on international financing transactions

Libyan courts will almost certainly consider the prohibition of interest in Law No. 1 of 2013 to be part of Libyan public order. This means that a Libyan court is expected to invalidate an interest clause also if an international lending transaction is governed by foreign law. In addition, a Libyan court is not expected to recognise a foreign court decision or arbitral award to the extent it provides for the payment of interest.

This, however, does not mean that a court or arbitral tribunal outside Libya will be bound by this prohibition, where a transaction is governed by foreign, not Libyan, law. A court or arbitral tribunal will only be bound by the mandatory provisions at the place of performance under certain, narrowly defined conditions. Article 9 (3) of the Rome I Regulation, for example, requires that the prohibition is based on 'shared values'. Although many jurisdictions in the world – Muslim and non-Muslim – will, to a certain extent, limit interest payments in lending transactions, a radical and absolute prohibition of interest will be considered to conflict with the fundamentals of economic freedom. This means that there is little likelihood that a court or arbitral tribunal outside Libya will apply the prohibition of interest to a transaction that is not governed by Libyan law.

How to react?

Law No. 1 of 2013 has potentially far-reaching effects on financing transactions in and with Libya. It should be noted that the effective date of the prohibition of interest still is more than a year down the road, and that it would not be the first time that a law in Libya is revoked or amended before it actually has entered into force. Nevertheless, it is strongly advisable for international banks active in the Libyan market to consider alternative structures in a timely manner.

Interest free 'goodwill' loans

Article 4 provides that a 'Goodwill Lending Fund' (the 'Fund') shall be set up under the supervision of the Libyan Central Bank. The Fund will provide interest free loans (*Qard Hassan*) and thus offer a substitute for commercial lending transactions. The implementation and operation of this concept is not elaborated in detail in the law and details are awaited. In any event, the Fund will not provide an alternative for international financial institutions active in the Libyan market.

Islamic Finance

A more feasible option is to use Islamic financing structures, such as loans based on a profit sale (*murabaha*) or leasing structures. These structures have in common that they are asset based and work without a declared stipulation of interest. Under a *murabaha* structure, a bank would buy and resell an asset with a predetermined profit. Under an Islamic lease, the bank would acquire an asset and lease it to the customer, who may also be granted a purchase option.

These structures have been tested for many years in Islamic financial markets and most international banks are familiar with them. It should be noted, however, that the Libyan prohibition of interest in Law No. 1 of 2013 is exceptionally strict. This means that also some of the 'interest-free' transactions of Islamic banks may be considered to conflict with the prohibition of interest, because they are deemed to contain concealed interest.

Offshore Structures

A further alternative is the use of offshore structures. As explained above, the Libyan prohibition of interest, correctly applied, is limited to the territory of Libya. This means that it should not impact an offshore structure, which provides for interest payments outside Libya. One option is to grant a loan through an offshore special purpose vehicle (SPV). Another option is to provide for an 'interest shortfall guarantee', which is enforceable outside Libya. It remains to be seen how these structures will be accepted in the Libyan market and how the regulator will respond.

MAURITIUS

How the Supreme Court of Mauritius controls the implied terms of the contract between the bank and its customer

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There are no books or materials entitled 'Banking Laws in Mauritius' that would assist a law student or a legal practitioner in research work. The sources of our banking laws are scattered in various legislations and the expert usually has recourse to the civil code, *code de commerce* and various legislations that are voted by the parliament, among others. Our judges are, however, well trained to look into the terms of the contracts between the bank and its customers and, more specifically, the implied ones, as may be seen in some recent judgments referred to below.

All written contracts embody both the express and the implied terms. An express term is a provision agreed to by the parties in words, written or spoken. An implied term means a provision not agreed to by the parties in words, but either regarded by the courts as necessary to give effect to their presumed intentions or introduced in the contract by statutes.

In Mauritius, a bank defines and establishes itself and secures its banking license under the Banking Act 2004 (the 'Act'). The Act also provides for the revocation of the license and once it is revoked, such a bank will not be