



C L I F F O R D  
C H A N C E

Loan trading across  
the globe



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# Introduction

The global financial markets have suffered much volatility since the onset of the financial crisis in 2008. This has impacted secondary loan trading volumes, however, 2013 saw the highest volume of loan trading activity (par and distressed) in both the US and EMEA secondary loan markets since the onset of the financial crisis. The LMA and the LSTA have reported that in 2013 loan trading volumes in the US came close to \$517 billion and in the EMEA regions were just over €78 billion.

The secondary loan markets attract a wide and diverse range of investor and as non-bank entities continue to fill the lending gap in the financial markets generally, the secondary loan market is no exception to this. Irrespective of the type of investor, the trading of loans can raise complex legal issues particularly in relation to guarantees and security, withholding tax, confidentiality and regulation. On cross border transactions, the local laws of each relevant jurisdiction need to be considered.

This loan trading guide is intended to provide all secondary loan market participants (whether a financial institution, fund or other non financial entity, on the buy side, the sell side or acting as a broker/dealer) with an insight into the principal local law issues to consider when trading loans in the secondary loan markets across various jurisdictions. There are, of course, other issues which may affect a loan trade and any related collateral, particularly in multi-jurisdictional transactions (such as financial assistance, corporate benefit, sanctions and intercreditor issues). These sorts of issues should be investigated as part of the due diligence process carried out on the asset and appropriate advice sought. Our global debt and claims trading practice is uniquely placed to offer our clients a seamless and fully integrated experience helping our clients navigate through the myriad of local law issues that arise in multi-jurisdictional debt and claims trades. Should any questions arise out of this guide, please do not hesitate to get in touch with any one of the contacts listed at the back of this guide or your usual Clifford Chance contact.

This is the second publication of this guide, which incorporates 13 additional jurisdictions. We intend to add more jurisdictions to future publications.

# Belgium



## Main Methods of Transferring Loans

<b>Assignment</b>	Only rights under a contract are assignable: obligations under a contract cannot be assigned. Accordingly, rights of an existing lender under a loan agreement, such as the right to receive principal and interest and the right to repayment, can generally be assigned to a new lender. The obligation of the existing lender to advance monies cannot be assigned. In practice, where rights under a loan agreement are assigned, it is common for there to be a corresponding assumption of obligations by the assignee with the borrower's consent.
<b>Novation</b>	<p>This operates by extinguishing all the rights and obligations of an existing lender and substituting them with identical rights and obligations on the part of a new lender. It requires the consent of all parties to the loan agreement and is usually achieved through a mechanic set out in the loan agreement involving the existing lender, the new lender and the facility agent signing a transfer certificate with the consent of all other parties obtained in advance in the loan agreement.</p> <p>Under Belgian law, transfers are generally made by way of assignment, with a corresponding assumption of obligations although LMA-type loan agreements governed by Belgian law usually provide that loans can be transferred either by way of assignment or novation.</p>
<b>Participations</b>	Funded and risk participations are also available in Belgium (see the section on England below).

## Guarantees and Security

If a loan is assigned, the assignee automatically benefits from any security and guarantees, while in the case of a novation, an express provision to maintain security should be included in the loan agreement and/or the transfer documentation. However, there is no trust concept under Belgian law and foreign security trusts over assets located in Belgium would not create valid and enforceable security under Belgian law. Two structures are commonly used to address this issue: a parallel debt structure and a trust-like structure. In the case of a parallel debt structure, all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time, thereby creating a parallel debt *vis-à-vis* the security agent in respect of which security is granted. If security is to be taken over receivables or financial instruments, a trust-like structure can be used where a representative holds the security on behalf of the lenders from time to time and may exercise all rights of those lenders in relation to the secured assets (including enforcement rights).

In the case of guarantees, the loan agreement usually provides for them to be granted in favour of "finance parties" which includes any transferees/assignees who become lenders of record.

In the case of a funded or risk participation, since the grantor remains the lender of record, the participant has no direct entitlement to the security and guarantees.

## Confidentiality

Confidentiality issues should be dealt with in the loan agreement. Generally, a lender has a duty of confidentiality to its customer and disclosure by a lender of borrower confidential information requires the borrower's consent.

## Standard Contractual Restrictions/Issues

For LMA style loan agreements, please refer to the section on England. Non-LMA style loan agreements, which are sometimes used in bilateral transactions involving relatively limited amounts, tend to be more lender-friendly and impose fewer restrictions on transfers of a lender's rights under a loan agreement.

# Belgium



## Tax

<b>Withholding Tax</b>	<p>A 25% withholding tax applies on certain payments of Belgian source interest by the borrower to the lender. If the lender is a company (bank or non-bank) resident in Belgium, Luxembourg, the Netherlands, Germany, the US or the UK, or a bank established in the European Economic Area or in a country with which Belgium has concluded a double tax treaty, (these different categories of lenders are commonly referred to as a “Qualifying Lender” in the loan agreement), it may be exempt from withholding tax, provided that certain other conditions are satisfied. If no exemption applies, several double tax treaties do provide for reduced withholding tax rates for interest payments made to lenders in the relevant treaty country.</p> <p>It is usual for the loan agreement to provide for the borrower to gross up payments of interest. There are common exceptions to this, including where a transferee is not a Qualifying Lender.</p> <p>In the case of a funded participation, payments from the grantor to the participant could in certain situations be treated as interest for Belgian tax purposes and hence be subject to withholding tax if they have a Belgian source. The above exemptions may apply, however, if they do not, the participation agreement does not usually provide for a gross-up by the grantor.</p> <p>In the case of a risk participation, no interest is paid so withholding tax should not apply.</p>
<b>Stamp duty</b>	<p>This is not usually payable on loan transfers. If new security is taken as a result of the loan transfer, registration duties may become due.</p>

## Compliance

Loan agreements and the trading of loans in the secondary loan market have generally not been regarded as regulated instruments for the purposes of Belgian financial regulation.

However, the market abuse regime (e.g. insider trading) and the anti-money laundering regime (e.g. KYC) are relevant and must be complied with.

# Czech Republic



## Main Methods of Transferring Loans

<b>Assignment</b>	Only rights under a contract are assignable: obligations under a contract cannot be assigned. Accordingly, rights of an existing lender under a loan agreement, such as the right to receive interest and the right to repayment, can be assigned to a new lender but the obligation of the existing lender to advance monies cannot be assigned but can only be transferred by way of an assumption (transfer) of debt (see below). In order for the assignment to be binding and enforceable against the borrower, the assignment must either be (i) notified to the borrower by the assignor; or (ii) proven to the borrower by the assignee by, for example, presenting the assignment agreement to them. The assigned rights need to be precisely specified otherwise the assignment may be invalid.
<b>Assumption (transfer) of debt</b>	A debt (e.g. the obligation of a lender to advance a loan) can only be transferred by a lender to a third party with the borrower's consent. In the context of loan transfers, an assignment of rights under a loan agreement is usually combined with a corresponding assumption (transfer) of obligations through a mechanism set out in the loan agreement involving the lender, the new lender, the facility agent and the borrower signing a transfer certificate. The transferred debts need to be precisely specified otherwise the transfer may be invalid.
<b>Transfer of contract</b>	The new Czech civil code which came into effect in January 2014 now expressly recognises that a contract may be transferred by one party to another party without the contract being novated or otherwise amended. The consent of all parties to the contract is required for such a transfer to take effect. This is a new area of law and it remains unclear whether this method will be relied upon in place of an assignment of loan receivables or a combination of an assignment of loan receivables and an assumption (transfer) of obligations (debts), which are the methods usually used in the Czech market.
<b>Participations</b>	Funded and risk participations are also used in the Czech Republic (see the section on England below). They are typically used intra-group (between the lender and its parent company) to mitigate credit exposure of the relevant lender.

## Guarantees and Security

In general, if rights under a loan agreement are assigned, the benefit of any security will automatically pass to the assignee. However, security trusts are generally not recognised under Czech law. Two structures are commonly used to address this: joint creditorship and parallel debt.

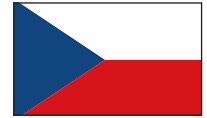
In syndicated or club loan agreements governed by Czech law, security and guarantees are typically held by a security agent (who is one of the lenders) on the basis of a joint creditorship structure. As a joint creditor with each other lender, the security agent has a receivable against each borrower/guarantor corresponding to the aggregate receivables of all lenders *vis-à-vis* such borrower/guarantor. The debts owed to the security agent are secured by the security interests and guarantees to which the security agent is a party. Other lenders benefit from the security and guarantees held by the security agent through the relevant security agency provisions. If a lender assigns its rights under the loan agreement, it would not affect the security and guarantees.

In English/US law governed loan agreements secured by Czech assets, a parallel debt structure is typically used (i.e. a structure where all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time thereby creating a parallel debt *vis-à-vis* the security agent in respect of which security is granted). Although the parallel debt structure has not yet been tested in the Czech courts, it is generally used in the Czech market.

In the case of guarantees granted by Czech guarantors in English/US law governed loan agreements, they are usually granted in favour of "finance parties" which includes any transferees/assignees who become lenders of record.

In the case of a funded or risk participation, since the grantor remains the lender of record, the participant has no direct entitlement to the security and guarantees.

# Czech Republic



## Confidentiality

Generally, a bank has a duty of confidentiality (bank secrecy) to its customer and disclosure by a lender of borrower confidential information requires the borrower's consent. However, following a payment default by the borrower, the bank's statutory or contractual duty of confidentiality will not prevent the lender from assigning its rights under the defaulted loan agreement to a third party (unless the borrower's prior consent is expressly required under the loan agreement for an assignment). In any case, confidentiality is usually modified by the parties in the loan agreement (see *Standard Contractual Restrictions/Issues* below).

## Standard Contractual Restrictions/Issues (LMA style loan agreement)

It is usual under Czech law governed loan documentation based on LMA terms that borrower consent is required for an assignment/transfer of a lender's receivables under the loan agreement, unless it is to an affiliate of a lender or to a bank licensed in the Czech/EU market or unless an event of default has occurred and is continuing.

The identity of the transferee/assignee is usually prescribed: transfers and assignments must be to a "bank or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets". The parties sometimes agree on restricted counterparties, i.e. excluded transferees/assignees (typically competitors of the borrower).

Lenders are under an obligation of confidentiality to the borrower which is subject to various disclosure permissions including disclosure of confidential information to potential and actual transferees and assignees (subject to receipt of a confidentiality obligation).

Because the participant does not become a party to or acquire rights under the loan agreement, participations are not usually regulated in Czech loan agreements.

## Tax

**Withholding Tax** A 15% withholding tax applies on interest payments by Czech borrowers to non-Czech lenders under Czech tax law. If the lender is a tax resident in a jurisdiction which has entered into a double tax treaty with the Czech Republic (commonly referred to as a "Qualifying Lender" in the loan agreement), it may be exempt from Czech withholding tax, provided that certain other conditions are satisfied. Czech borrowers are entitled to apply the withholding tax exemption under a double tax treaty automatically. For this purpose, the Czech borrower should request from the non-Czech lender a copy of its tax residency certificate and a declaration of the beneficial ownership of the interest.

Interest payments made to tax residents of certain "tax havens" are subject to a 35% withholding tax rate. Tax haven is defined as any jurisdiction which does not have a double tax treaty or a tax information exchange agreement with the Czech Republic.

It is usual for the loan agreement to provide for the borrower to gross up payments of interest. There are common exceptions to this, including where a transferee is not a Qualifying Lender.

In the case of a funded participation, payments from the grantor to the participant may be subject to withholding tax as they are separate payments of interest (subject to the above exemption under an applicable double tax treaty). In the case of a risk participation, no interest is paid so withholding tax should not apply.

**Stamp duty** No stamp duties or other similar documentary taxes are payable under Czech tax law.

## Compliance

Loan agreements and the trading of loans in the secondary loan market have generally not been regarded as regulated instruments for the purposes of Czech financial regulation.

However, the market abuse regime (e.g. insider trading) and the anti-money laundering regime (e.g. KYC) are relevant and must be complied with.

# England



## Main Methods of Transferring Loans

<b>Novation</b>	This operates by extinguishing all the rights and obligations of an existing lender and substituting them with identical rights and obligations on the part of a new lender. It requires the consent of all parties to the loan agreement and is usually achieved through a mechanic set out in the loan agreement involving the existing lender, the new lender and the facility agent signing a transfer certificate. The consent of all other parties is obtained in advance in the loan agreement.
<b>Assignment</b>	Only rights under a contract are assignable: obligations under a contract cannot be assigned. Accordingly, rights of an existing lender under a loan agreement, such as the right to receive interest and the right to repayment, can be assigned to a new lender but the obligation of the existing lender to advance monies cannot be assigned. In practice, where rights under a loan agreement are assigned, it is common for there to be a corresponding assumption of obligations by the assignee. Notice of the assignment is usually given to the borrower although this is not necessary to make an assignment enforceable.
<b>Funded and Risk participations</b>	These are funding arrangements between the grantor (the lender under the loan agreement) and the participant and no actual transfer of the loan occurs. The grantor remains the lender of record under the loan agreement and the participant therefore has no rights under it (e.g. the right to vote, receive information etc). The borrower does not need to be made aware of a participation and it is therefore a useful method to circumvent any restrictions on transfers or assignments in the loan agreement. In the case of a funded participation, the participant deposits an amount equal to the loan with the grantor in return for payments from the grantor equal to interest, principal and commissions under the loan agreement, if and when received from the borrower. Because the participation is a “back to back” arrangement, the participant takes a double credit risk against the borrower and the grantor (although it may be possible to mitigate this vis-à-vis the grantor e.g. by the provision of collateral). In the case of a risk participation, the participant does not deposit an amount equal to the loan with the grantor. Instead, the participant agrees to reimburse the grantor (the lender of record) in the event of a payment default by the borrower and in return the grantor pays a fee to the participant. The grantor takes credit risk on the participant.
<b>Observations</b>	Where debt is traded at par, novation (subject to local law issues) would be the usual method of transfer. Where distressed debt is traded, assignment or participation would be the usual methods of transfer.  Note that where there are non-English Obligors, the above methods of transfer may not be effective in their jurisdictions or may give rise to issues (see for example Guarantees and Security below).

## Guarantees and Security

A transferee/assignee does not automatically get the benefit of any security and guarantees. However, in practice, this is addressed in the loan agreement and related documentation. In the case of security, this is achieved by virtue of a trust structure. The security trustee holds the security on behalf of the lenders from time to time, which encompasses the original lenders and any transferees/assignees who become lenders of record. In the case of guarantees, the loan agreement usually provides for them to be granted in favour of “finance parties” which includes any transferees/assignees who become lenders of record.

Note that where there are non-English obligors and/or the security is not governed by English law, the security trust concept may not be recognised in the relevant jurisdictions, which can be problematic for transfers of the loan.

In the case of a funded or risk participation, since the grantor remains the lender of record, the participant has no direct entitlement to the security and guarantees.

## Confidentiality

Generally, a lender has a duty of confidentiality to its customer and disclosure by a lender of borrower confidential information requires the borrower's consent (see *Standard Contractual Restrictions/Issues* below for disclosure permissions in loan agreements).



# England



## Standard Contractual Restrictions/Issues (LMA style loan agreement)

The borrower's consent is typically required for an assignment or transfer (except in certain cases, such as where there is an event of default under the loan agreement). Such consent is usually qualified with a requirement that it is "not to be unreasonably withheld or delayed" (the principles to be applied when determining this were considered recently in *Porton Capital Technology Funds and others v 3M UK Holdings Ltd and another* [2011] EWHC 2895 (Comm)). A common alternative to a consent requirement (particularly in the context of leveraged financings) is a lesser requirement on the lender to consult with the borrower. Note that it has become common for loan agreements to expressly permit a lender to grant security over its rights under the finance documents without any requirement to consult with or obtain the borrower's consent.

The identity of the transferee/assignee is prescribed: transfers and assignments must be to a "bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets". In leveraged financings, the parties may agree upfront a list of approved transferees/assignees.

The existing lender may be subject to a minimum hold amount and there may be restrictions on transfer amounts.

The transferee/assignee is typically required to pay a fee to the facility agent once the transfer or assignment has taken effect. The secondary trading documentation usually regulates how the economic burden of this fee will be borne between the transferor/assignor and the transferee/assignee.

Lenders are under an obligation of confidentiality to the borrower which is subject to various disclosure permissions including disclosure of confidential information to potential and actual transferees and assignees (subject to a receipt of a confidentiality obligation).

Because the participant does not become a party to or acquire rights under the loan agreement, participations are not usually regulated by the loan agreement, though this is sometimes seen in leveraged financings e.g. in the context of voting.

## Tax

<p><b>Withholding Tax</b></p>	<p>A 20% withholding tax applies on certain payments of UK source interest by the borrower to the lender. If the lender is a UK bank, a UK non-bank or is resident in a jurisdiction which has entered into a double tax treaty with the UK (commonly referred to as a "Qualifying Lender" in the loan agreement), it may be exempt from withholding tax, provided that certain other conditions are satisfied. If no exemption applies, some double tax treaties provide for reduced withholding tax rates on interest payments to lenders in the relevant treaty jurisdictions. The UK tax authorities operate a passporting scheme which enables lenders to benefit from a double tax treaty by applying for a "Treaty passport" from the authorities before they receive any interest payments.</p> <p>It is usual for the loan agreement to provide for the borrower to gross up payments of interest. There are common exceptions to this, including where a transferee is not a Qualifying Lender.</p> <p>In the case of a funded participation, payments from the grantor to the participant may be subject to withholding tax as they are separate payments of interest. The above exemptions may apply, however, if they do not, the participation agreement does not usually provide for a gross-up by the grantor. In the case of a risk participation, no interest is paid so withholding tax should not apply.</p>
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<p><b>Stamp duty</b></p>	<p>This is not usually payable on loan transfers. Assignments may attract stamp duty at a rate of 0.5% unless an exemption applies such as the loan capital exemption.</p>
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## Compliance

Loan agreements and the trading of loans in the secondary loan market have generally not been regarded as regulated instruments for the purposes of UK financial regulation.

However, the market abuse regime (e.g. insider trading) and the anti-money laundering regime (e.g. KYC) are relevant and must be complied with.

# France



## Main Methods of Transferring Loans

<b>Assignment</b>	A loan may be assigned by way of (i) an assignment of rights ( <i>cession de créance</i> ), where notice of the assignment must be served on the borrower by an official server of process ( <i>huissier</i> ) to ensure that the assignment is binding on the borrower and enforceable against third parties or (ii) if the assignee is a credit institution or a financing company, a <i>Dailly</i> assignment ( <i>cession Dailly</i> ), which does not require any notice to ensure that the assignment is enforceable against third parties.
<b>Transfer</b>	Both the lender's obligations and rights (including accessory rights) are transferred. All parties to the loan agreement (including the borrower) must be parties to the transfer agreement or must agree in advance to such transfer (in practice, this is addressed in the loan agreement).
<b>Participations</b>	Funded and risk participations are also available in France (see the section on England above).
<b>Observations</b>	The method most commonly used is an assignment of rights ( <i>cession de créance</i> ). Note that other more straightforward methods of transfer may also be available e.g. in the context of securitisations (where the transferee is a French securitisation vehicle) or covered bonds (where the transferee is a <i>société de crédit foncier</i> ).

## Guarantees and Security

A transferee/assignee automatically gets the benefit of any security and guarantees (*cautionnements*). Security is usually taken for the benefit of the lenders from time to time and the other finance parties. The security agent, duly appointed pursuant to an agency arrangement (*mandat*), manages the security on behalf of the secured parties for the term of the loan agreement. If the transfer of the rights and obligations constitutes a novation under French law (which would be the case in respect of an English law novation), the security will need to be expressly preserved and maintained for the benefit of the transferee/assignee (this is usually done by way of specific wording in the transfer certificate).

Note that where a French obligor is party to a loan agreement which is not governed by French law and there is a security trust structure, French law governed security may be granted for the benefit of the security trustee provided that the security trustee is the creditor of the primary obligation. A parallel debt structure (i.e. a structure where all obligors agree to owe to the security trustee sums equal to those which they owe to the lenders from time to time thereby creating a parallel debt vis-à-vis the security trustee in respect of which security is granted) is often used in cross-border transactions and the concept of security trustee is recognised by French courts.

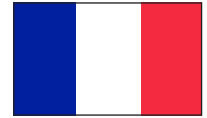
In the case of any guarantees granted by a French obligor in a loan agreement which is not governed by French law, they are usually granted in favour of "finance parties" which includes any transferees/assignees who become lenders of record.

In the case of a funded or risk participation, since the grantor remains the lender of record, the participant has no direct entitlement to the security and guarantees.

## Confidentiality

French banking secrecy rules apply. However, lenders are specifically entitled (under French law and typically under the loan agreement) to disclose confidential information to potential transferees and assignees, provided that they agree to keep such information confidential. Notwithstanding the foregoing, strict confidentiality rules will apply in the context of French non-contentious pre-insolvency proceedings (*mandat ad hoc*, *conciliation*) opened in respect of a French obligor.

# France



## Standard Contractual Restrictions/Issues

The borrower's consent is typically required for an assignment or transfer (except in certain cases, such as where there is an event of default under the loan agreement). Such consent is usually qualified with a requirement that it is "not to be unreasonably withheld or delayed". A common alternative to a consent requirement (particularly in the context of leveraged financings) is a lesser requirement on the lender to consult with the borrower. Note that it has become common for loan agreements to expressly permit a lender to grant security over its rights under the finance documents without any requirement to consult with or obtain the borrower's consent.

The identity of the transferee/assignee is prescribed in the loan agreement (see the section on England above) and the French banking monopoly rules must also be complied with (see *Compliance* below). In leveraged financings, the parties may agree upfront a list of approved transferees/assignees.

The existing lender may be subject to a minimum hold amount and there may be restrictions on transfer amounts.

The transferee/assignee is typically required to pay a fee to the facility agent once the transfer or assignment has taken effect. The secondary trading documentation usually regulates how the economic burden of this fee will be borne between the transferor/assignor and the transferee/assignee.

Lenders are under an obligation of confidentiality to the borrower which is subject to various disclosure permissions (see *Confidentiality* above).

Because the participant does not become a party to or acquire rights under the loan agreement, participations are not usually regulated by the loan agreement, though this is sometimes seen in leveraged financings e.g. in the context of voting.

## Tax

<b>Withholding tax</b>	<p>No withholding tax applies on payments of French source interest by the borrower to the lender unless such payment is made to an account (opened in the lender's name or for its benefit) held with a financial institution located in a 'non-cooperative state and territory', in which case a 75% withholding tax is due. 'Non-cooperative states and territories' are defined in a list issued by the French Ministry of Economy and updated on an annual basis. In the latest list available as at 1 January 2014, Botswana, British Virgin Islands, Brunei, Guatemala, Marshall Islands, Montserrat, Nauru and Niue are listed as non-cooperative states and territories.</p> <p>It is usual for the loan agreement to provide for the borrower to gross up payments of interest, except where the withholding tax is due as a result of the 'non-cooperative state and territory' rule.</p>
<b>Stamp Duty</b>	This is not usually payable on loan transfers.

## Compliance

Banking monopoly rules provide that only lenders which are appropriately authorised can carry out credit transactions in France and any breach of such rules constitutes a criminal offence. Assignments and transfers of loans constitute credit transactions under French law, however, originate-to-distribute structures or fronting arrangements may enable non authorised entities to take participations in loans.

The anti-money laundering regime (e.g. KYC) and market abuse regime (e.g. insider trading) must also be complied with.

## Other Issues

Lenders may be required to disclose sub-participations and credit default swaps in the context of insolvency of a French borrower.

Strict confidentiality rules apply in the context of French non-contentious pre-insolvency proceedings which may impact the trading of loans.

Temporary trading restrictions may apply to ensure the stability of the lending syndicate prior to the execution of restructuring agreements.

# Germany



## Main Methods of Transferring Loans

<b>Assignment and transfer by assumption of contract (Vertragsübernahme)</b>	This makes it possible to transfer all of an existing lender's rights and obligations under a loan agreement to a new lender. It is therefore typically the only way to transfer commitments and to fully replace the existing lender as a party to the loan agreement. The assignment and transfer by assumption of contract ( <i>Vertragsübernahme</i> ) is the usual method of transfer for syndicated lending and is also available for " <i>Schuldschein</i> " loans, but only if provided for in the relevant contract. It requires the consent of all parties to the loan agreement which is usually given in advance in the agreement.
<b>Assignment</b>	Only rights under a contract are assignable; obligations under a contract cannot be assigned. Accordingly, rights of an existing lender under a loan agreement, such as the right to receive interest and the right to repayment, can be assigned to a new lender. By contrast, the obligation of the existing lender to advance monies cannot be assigned. In practice, the assignment of rights under a loan agreement is rarely used in syndicated lending, although it is more common for " <i>Schuldschein</i> " loans. The assignment of a " <i>Schuldschein</i> " loan is usually notified to the borrower as otherwise the borrower may discharge its obligations by payment to the existing lender/assignor.
<b>Participations</b>	Funded and risk participations are also available in Germany (see the section on England above).

## Guarantees and Security

Whether a transferee/assignee automatically gets the benefit of any security or guarantee depends on the type of security and on how the guarantee is drafted. A German guarantee (*Garantie*) is usually granted in favour of the "finance parties" from time to time, which includes any new lender. German law also differentiates between accessory and non-accessory security.

Accessory security (e.g. a right of pledge) is usually made available to a new lender automatically when the secured obligations are assigned or assigned and transferred by way of assumption of contract (*Vertragsübernahme*), but not when they are transferred by way of novation. In addition, a parallel debt concept or future pledge concept could be used. Pursuant to the "parallel debt" concept, all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time, thereby creating a debt obligation (i.e. the "parallel debt") *vis-à-vis* the security agent for which accessory security is granted. The lenders (including any transferees/assignees who become lenders of record) are entitled to share in the proceeds of that security through the provisions of the intercreditor agreement. Pursuant to the "future pledge" concept, the security agent accepts the creation of any pledge as a representative (without a power of attorney) on behalf of future transferees/assignees (so-called "future pledgees") and any transferee/assignee who becomes a lender of record ratifies this arrangement by signing the transfer certificate which usually includes corresponding language. Upon such ratification, a new right of pledge is created in favour of the transferee/assignee. Note however that there is no authoritative case law on either method but they are often used in the German market.

Non-accessory security (e.g. assignment of receivables or transfer of movables for security purposes, or land charge (*Grundschuld*)) is usually held by a security trustee on behalf of all secured parties from time to time, which encompasses the original lenders and any transferees/assignees who become lenders of record.

In the case of a funded or risk participation, since the grantor remains the lender of record, the participant has no direct entitlement to the security and guarantees.

## Confidentiality

Generally, a lender has a duty of confidentiality to its customer and disclosure by a lender of borrower confidential information requires the borrower's consent (see *Standard Contractual Restrictions/Issues* below for disclosure permissions in loan agreements).

# Germany



## Standard Contractual Restrictions/Issues (LMA style loan agreement)

Standard contractual restrictions in LMA style loan agreements governed by German law correspond to those described in the section on England.

## Tax

<b>Withholding tax</b>	Generally, no German withholding tax is triggered if a German borrower pays interest on a fixed or floating rate loan. Withholding tax would in principle only fall due if the interest payable on the loan (1) corresponds to a fraction or portion of the profit or turnover of the borrower or (2) increases as the profit or turnover of the borrower increases. German tax authorities could require a borrower to withhold payments in an amount equal to income taxes otherwise due by the lender if the loan is secured by German real estate and the lender does not benefit from a full exemption from German domestic tax pursuant to a double taxation treaty. In any event, where a lender benefits from German real estate security, it is subject to German income tax (if it does not benefit from a double taxation treaty) and has to file a German tax return (this obligation applies irrespective of whether treaty protection is available). In addition, one senate of the German Federal Fiscal Court held that a loan is profit related and therefore triggers withholding tax if it contains provisions pursuant to which interest payments are subject to sufficient liquidity being available (“pay-as-you-can-provisions”).
<b>Stamp Duty</b>	There is currently no stamp duty levied in Germany.
<b>VAT</b>	From a VAT perspective, an assignment of loan claims may be more favourable than an assignment and transfer by assumption of contract ( <i>Vertragsübernahme</i> ). Assignments of loan claims at par (face value) and assignments of distressed debt should not be subject to VAT unless (in the case of loans sold at par) such transaction could qualify as a factoring service (which should not typically be the case). Following a court ruling of the Court of Justice of the European Union (called “Swiss-re”), there is a risk that an assignment and transfer by assumption of contract ( <i>Vertragsübernahme</i> ) could be subject to VAT, however, this decision related to the transfer of a portfolio of life reinsurance contracts and in our view it seems rather unlikely that VAT could be triggered in respect of an assumption of loan contracts. However, if VAT were to fall due, it would be in respect of an assignment and transfer by assumption of contract ( <i>Vertragsübernahme</i> ) (1) between German lenders or (2) from a lender resident abroad to a lender acting from Germany. In scenario (1) the transferring lender would be liable to account for the VAT to the tax authorities whereas in scenario (2) the reverse charge mechanism would apply with the consequence that the new lender is liable and has to account for VAT to the tax authorities.

## Compliance

Making a loan to a German borrower constitutes lending activities and therefore requires a bank licence (although exemptions may be available). The acquisition of a (funded) loan receivable and the holding of that loan receivable do not require a bank licence unless, following the acquisition, additional loans are extended (e.g. if the transferee has assumed an obligation under a revolving facility or is requested to enter into an extension agreement with respect to the original loan).

The market abuse regime (e.g. insider trading) and the anti-money laundering regime (e.g. KYC) are relevant and must be complied with.

# Hong Kong



## Main Methods of Transferring Loans

<b>Novation</b>	This is where both the rights and obligations of an existing lender are transferred to a new lender: a transfer by way of novation operates by extinguishing all the rights and obligations of the existing lender and substituting them with identical rights and obligations on the part of the new lender. It is typically achieved by the existing lender, the new lender and the facility agent signing a transfer certificate.
<b>Assignment</b>	Only the benefit, and not the burden, of an agreement can be assigned. Accordingly, rights of an existing lender under a loan agreement, such as the right to receive interest and the right to repayment, can be assigned to a new lender but the obligation of the existing lender to advance monies cannot be assigned. In practice, where rights under a loan agreement are assigned, it is common for there to be a corresponding assumption of obligations by the assignee. Notice of the assignment is usually given to the borrower although this is not necessary to make an assignment enforceable.
<b>Funded and Risk Participations</b>	These are forms of sub-participation which do not involve a transfer or assignment of the loan. A sub-participation can be a “funded participation” (where the participant funds the loan as well as assumes the credit risk) or a “risk participation” (where the participant only undertakes the credit risk) – see the section on England above. New rights and obligations are created between the lender (i.e. the grantor) and the participant which are usually documented in a participation agreement. The borrower does not need to be made aware of the sub-participation and it is therefore a useful method to circumvent any restrictions on transfers or assignments in the loan agreement.
<b>Observations</b>	Where debt is traded at par, novation would be the usual method of transfer. Where distressed debt is traded, assignment or participation would be the usual methods of transfer.

## Guarantees and Security

A transferee/assignee will not automatically be entitled to benefit from any security or guarantees, but normally the loan documentation will provide for the transfer of security or guarantees.

In the case of security, security trusts are used to enable the beneficiaries of the security to change. The security is held by a security trustee in trust for the benefit of the lenders from time to time, which encompasses the original lenders and any transferees/assignees who become lenders of record. The security trust structure allows for the administration and realisation of the security by one person (i.e. the security trustee) who can enforce it on behalf of the secured creditors.

In the case of guarantees, the loan agreement usually provides for them to be granted in favour of the “finance parties” which includes any transferees/assignees who become lenders of record.

In the case of a funded participation or a risk participation, the grantor will still be the lender of record and the participant will have no direct entitlement to the security and/or guarantees.

## Confidentiality

Generally, a lender has a duty of confidentiality to its customer and disclosure by a lender of a borrower’s confidential information requires the borrower’s consent. The loan documentation will usually set out specific circumstances where disclosure will be permitted, including disclosure to potential and actual transferees and assignees.

# Hong Kong



## Standard Contractual Restrictions/Issues (APLMA style loan agreement)

Loan documentation generally restricts who can be a transferee or assignee, specifically they must be a “bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets”. In contrast to an LMA style loan agreement, the borrower’s consent is not required for an assignment or transfer. This may be amended on a transaction by transaction basis so that the borrower’s consent is required (except in certain cases, such as where the assignment or transfer is to another lender or an affiliate of a lender or where there is an event of default under the loan agreement) and it is usually qualified with a requirement that it is “not to be unreasonably withheld or delayed”. A common alternative to a consent requirement is a lesser requirement on the lender to consult with the borrower. Other exceptions to the requirement of borrower consent include assignment or transfers to an agreed “white list” or assignment or transfers to any financial institution with an appropriate credit rating. It is also common for a lender to be permitted to grant security over its rights under the loan agreement without any requirement to consult with or obtain the borrower’s consent.

The transferee or assignee is typically required to pay a fee to the facility agent once the transfer or assignment has taken effect. The secondary trading documentation usually regulates how the economic burden of this fee will be borne between the transferor/assignor and the transferee/assignee.

Participants in a funded or risk participation will not become a party to, or acquire rights under, the loan documentation, so they will not usually be restricted by the terms of the loan agreement.

## Tax

<b>Withholding tax</b>	There is currently no withholding tax payable on interest payments made by a Hong Kong borrower regardless of where the payee is situated.
<b>Stamp Duty</b>	Stamp duty does not usually arise in a secondary loan trading context.

## Compliance

A person carrying on business as a money lender in Hong Kong must obtain a money lender’s licence. The licensing of money lenders and regulation of money-lending transactions are governed by the Money Lenders Ordinance (Cap 163). The Money Lenders Ordinance (Cap 163) does not apply to authorised institutions under the Banking Ordinance (Cap 155). There are certain exemptions under the Money Lenders Ordinance (Cap 163) for loans made by persons which are not authorised institutions. In general, these exemptions are based on either the status of the lender (e.g. a bank incorporated outside Hong Kong but whose supervisory authority is recognised by the Hong Kong Monetary Authority) or the nature of the loan (e.g. loans to a company whose shares are listed on the Hong Kong Stock Exchange or has a paid up share capital of not less than HK\$1 million, inter-company loans or loans with collateral which would be registrable under the Companies Ordinance (Cap 622)). Where an exemption applies, a licence is not required.

Authorised institutions have to comply with the provisions of the Banking Ordinance (Cap 155) which is regulated by the Hong Kong Monetary Authority. The Banking Ordinance (Cap 155) provides the legal framework for the supervision and regulation of banking business and the banking system in Hong Kong.

# Italy



## Main Methods of Transferring Loans

<b>Transfer/assignment of a contract</b> ( <i>cessione di contratto</i> )	This is where a contract which is still to be performed (at least partially) by the parties to it is transferred. In the context of a loan transaction, the new lender is assigned the rights and assumes the obligations of the existing lender (in their entirety or, in the case of a partial transfer, in part) under the loan agreement and the other finance documents to which the existing lender was a party. The borrower's consent is required and the transfer is usually achieved through a mechanic set out in the loan agreement. The existing lender is released from the obligations which are transferred unless the loan agreement provides otherwise. The new lender becomes party to the loan agreement and the other finance documents to which the existing lender was a party and is bound by the obligations from which the existing lender is released.
<b>Assignment of receivables</b> ( <i>cessione di crediti</i> )	This is where only rights under a loan agreement are assigned. The borrower's consent is not required for the assignment to be valid; however, to be enforceable against the borrower and third parties, the borrower must be notified of, or acknowledge, the assignment. The assignor (the existing lender) remains party to the loan agreement.
<b>Sub-participation agreement</b>	As an alternative to a direct lending structure, a bank may participate in a loan agreement by entering (without any need for the borrower's consent) into a sub-participation agreement with a lender under the loan agreement. A sub-participation operates in the same way as a funded participation (see the section on England above).

## Guarantees and Security

Because security and guarantees are accessory rights (i.e. directly connected with the claims they secure/guarantee), in principle, an assignment of receivables or a transfer of a contract automatically means a transfer of any related security and guarantees which will therefore remain effective after the occurrence of the assignment/transfer. However, there are usually mechanics in the loan agreement dealing with this. Certain perfection requirements may also need to be carried out to ensure that the transfer of security in favour of the new lender is effective *vis-à-vis* third parties.

The concept of a security trust is not recognised under Italian law and parallel debt provisions (i.e. a structure where all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time thereby creating a parallel debt *vis-à-vis* the security agent in respect of which security is granted) may also not be recognised under Italian law. Security must be granted in favour of each creditor under the loan, although a security agent is often appointed as a common representative of the secured creditors ("*mandatario con rappresentanza*") to co-ordinate the actions to be taken in relation to security.

In the case of guarantees, the loan agreement usually provides for them to be granted in favour of "finance parties" which includes any transferees/assignees who become lenders of record.

In the case of a sub-participation agreement, since the grantor remains the lender of record, the participant has no direct entitlement to the security and guarantees. On enforcement, these are enforced directly by the grantor and any proceeds will be shared with the participant in accordance with the sub-participation agreement and any related intercreditor agreement to which the participant is a party.

## Confidentiality

In general, a lender has a duty of confidentiality to its customers and disclosure of confidential information requires the borrower's consent. Typically, the loan agreement will permit lenders to disclose confidential information to potential and actual transferees subject to a receipt of a confidentiality obligation.



# Italy



## Standard Contractual Restrictions/Issues

The borrower's consent is typically required for a transfer or assignment of a loan. Such consent may be (i) obtained in advance as set out in the loan agreement or (ii) qualified with a requirement that it is "not to be unreasonably withheld or delayed". In addition, the transferee/assignee, subject to the applicable regulatory requirements (see *Compliance* below), may be required to be a bank, regulated financial institution or any subsidiary or holding company of the transferring lender.

The loan agreement may also provide for the borrower's consent for an assignment of receivables.

The existing lender may be subject to a minimum hold amount and there may be restrictions on transfer amounts. The loan agreement may include provisions permitting lenders to use loans as collateral in refinancing transactions with the European Central Bank and/or Bank of Italy.

In the case of a sub-participation, as the participant does not become a party to the loan agreement, participations are not usually regulated by the loan agreement.

## Tax

### Withholding tax

Italian-source interest paid by the borrower to a lender is subject to a 26% Italian withholding tax. However, no withholding tax is levied on interest paid by the borrower to Italian banks or other financial institutions, or foreign banks or financial institutions with permanent establishments in Italy to which the interest income is attributable. Also, the withholding tax rate can be reduced (generally to 10%) if the lender benefits from a double tax treaty in force with Italy (such a lender is referred to as a treaty lender).

It is usual for the loan agreement to provide for the borrower to gross-up payments of interest, subject to common exceptions, including where a transferee is not an Italian bank or financial institution, or a foreign bank or financial institution with a permanent establishment in Italy, or a treaty lender (commonly referred to as a "Qualifying Lender").

In the case of sub-participations, any payments of interest made by the borrower to the lender (the grantor) and passed on to the sub-participant are considered, for Italian withholding tax purposes, as paid directly by the borrower to the sub-participant. The lender (the grantor) is generally entitled to receive gross-up payments from the borrower to the same extent as it would have been if it had not entered into any sub-participation.

### Stamp Duty

In the case of a transfer/assignment of a contract, stamp duty ranging from €200.00 (where the transfer/assignment represents a supply of services for VAT purposes) to 3% applies.

For an assignment of receivables, if the assignment is performed for valuable consideration and for financial purposes (i.e. to raise funds), it represents a supply of services for VAT purposes which is taxable according to Italian VAT law. In this case there is no *ad valorem* stamp duty, but a fixed amount of €200.00 applies. Where the assignment is not performed for consideration or for financial purposes (e.g. if the purpose of the transfer is to repay existing indebtedness or to guarantee certain obligations), it is outside of the scope of the Italian VAT and stamp duty at a rate of 0.5% applies.

Where an assignment of receivables or a transfer/assignment of a contract are executed in the form of an Italian exchange of correspondence (i.e. in the form of proposal and acceptance, each document signed by a single party only), stamp duty applies only in certain limited circumstances.

## Compliance

In order for an entity to carry out the business of lending in Italy, it must be licensed and be a "bank" (being a credit institution or a financial intermediary listed at the Bank of Italy), unless an exemption applies. This also applies to any transferee if the transferee may need to make any advances under the loan agreement.

The trading of loans on the secondary loan market has generally not been regarded as financial instruments for the purposes of Italian financial regulation.

# Luxembourg



## Main Methods of Transferring Loans

<b>Assignment</b>	This operates as a transfer of the rights of an existing lender (in whole or in part) to a new lender who becomes party to the loan agreement. Only rights under a contract can be assigned: obligations under a contract cannot be assigned. Accordingly, in practice, where rights under a loan agreement are assigned, it is common for there to be a corresponding assumption (transfer) of obligations by the assignee. The assignment is valid between the assignor and the assignee as of the time the assignment agreement is entered into: the assignor is discharged from its obligations under the loan agreement and the new lender becomes responsible for the assigned obligations, provided that the new lender is capable of discharging them (e.g. from a financial perspective) and save in cases of fraud. However, to be enforceable against the obligors and third parties, the obligors must be notified of, or have accepted, the assignment. Where obligations are transferred, the obligors' consent is required. If there is a transfer mechanism in the loan agreement, then compliance with it is sufficient to satisfy the consent requirement. Following the assignment, an obligor may, unless otherwise agreed, raise the same defences against the new lender which were available to it in respect of the assignor (e.g. rights of set-off etc).
<b>Novation</b>	This creates a new contractual relationship between the new lender and the other parties to the loan agreement by substituting the existing lender (the novating lender) with the new lender. The contractual relationship between the novating lender and the other parties to the loan agreement is extinguished. All parties to the loan agreement must be party to the novation agreement.
<b>Sub-Participations</b>	Funded and risk participations are also available in Luxembourg (see the section on England above), however are not particularly common. No issues particular to Luxembourg law arise.

## Guarantees and Security

<b>Assignment of secured obligations governed by Luxembourg law</b>	In principle, any accessory security follows an assignment of the secured obligations since it is directly connected with the obligations it secures. Non-accessory security does not automatically transfer to the assignee: it would have to be separately transferred or express provision made in the security documentation that the benefit of it inures to the assignees, transferees or successors of its beneficiaries.
<b>Assignment of secured obligations governed by foreign law</b>	In the case of accessory security, the question of whether it is possible to agree to preserve it in the event of an assignment (and under what conditions) will need to be analysed both under the relevant foreign law and Luxembourg law. The Luxembourg law of 5 August 2005 on financial collateral arrangements, as amended, expressly recognises the possibility of a third party (who itself is not necessarily a lender) holding the benefit of financial collateral (e.g. a pledge over financial instruments or receivables) for the lenders and other secured parties. The same possibility is also recognised for mortgages on aircraft and engines. For any other security interests (e.g. mortgages on real estate or pledges over business as a going concern), a parallel debt structure (i.e. a structure where all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time thereby creating a parallel debt vis-à-vis the security agent in respect of which security is granted) may be necessary if a security agent or security trustee is appointed. Although the parallel debt structure has not yet been tested in the Luxembourg courts, it is generally used in the Luxembourg market. In the case of non-accessory security, it is usually granted in favour of a security agent or security trustee, which encompasses original lenders and any assignees.
<b>Novation of principal obligations</b>	The extinction of the existing obligations and creation of new obligations does, in principle, result in the termination of any accessory security, unless expressly agreed otherwise. In practice, the security is expressly preserved for the benefit of the transferee/assignee (this is usually done by way of specific wording in the security documents). In the case of non-accessory security, it creates principal payment obligations which therefore remain independent of the payment obligations under the loan agreement. It is usually granted in favour of a security agent or security trustee, which encompasses original lenders and any transferees.
<b>Guarantees:</b>	The loan agreement usually provides for guarantees to be granted in favour of "finance parties" which includes any transferees/assignees who become lenders of record.

# Luxembourg



## Confidentiality

If the transferor is a Luxembourg regulated entity (e.g. a bank, professional in the financial sector or an investment fund), then confidentiality issues may arise, however, the obligors' consent is usually sufficient to permit disclosure. Where the transferor is not a Luxembourg regulated entity, the existence and treatment of any confidentiality issues is a question of the relevant law to which the transferor is subject. In each case, specific advice should be sought.

## Standard Contractual Restrictions/Issues

There are no Luxembourg law specific standard contractual restrictions or issues. See the section on England above.

## Tax

<b>Withholding tax</b>	<p>Luxembourg tax law does not provide for any withholding tax on interest paid by a Luxembourg borrower except in certain circumstances, such as where:</p> <ul style="list-style-type: none"> <li>■ the loan has profit participating features or breaches certain Luxembourg thin capitalisation rules where the lender is a related party (15% withholding tax unless there is a reduction under an applicable double tax treaty)</li> <li>■ Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (the “<b>EU Savings Directive</b>”) and related agreements applies (35% withholding tax). Pursuant to an announcement by the Luxembourg government on 10 April 2013, no withholding tax under the EU Savings Directive will apply as from 1 January 2015</li> <li>■ the Luxembourg law of 23 December 2005 for interest payments made to Luxembourg resident individuals applies (10% withholding tax).</li> </ul> <p>It is usual for the loan agreement to provide for the borrower to gross up payments of interest. There are common exceptions to the gross-up obligation, such as where the withholding tax is based on the EU Savings Directive or the law of 23 December 2005.</p>
<b>Stamp Duty</b>	<p>Pursuant to Luxembourg tax law and administrative practice, it is not necessary that a loan transfer document be filed, recorded or enrolled with any court or other authority in Luxembourg or that any stamp, registration or similar tax be paid in respect of it.</p> <p>If there are any proceedings in a Luxembourg court or the loan agreement is presented to an <i>autorité constituée</i> in Luxembourg, the court or <i>autorité constituée</i> may require the loan agreement (and any agreement referred to therein) to be registered. If registration is required, registration duties may be payable by the party which is required to register the agreements. Depending on the nature of the agreements, registration duties could be <i>ad valorem</i> (e.g. a registration duty of 0.24% calculated on the amounts set out in the agreements) or fixed (e.g. a fixed duty of €12 for a pledge).</p>

## Compliance

Unless an exemption applies, lending for one's own account to the public on a professional basis is a regulated activity in Luxembourg and requires in principle a professional lending licence (if the lending activities are coupled with taking deposits or other repayable funds from the public, a credit institution licence is required under the financial sector law of 5 April 1993 (as amended) (“**FSL**”). Exemptions include intra-group lending, cross-border lending where the lender is not incorporated in Luxembourg and does not have any physical presence in Luxembourg (including through agents or other representatives), or where the lending activity is covered by an EU passport in accordance with the relevant EU directives. Secondary loan trading should not trigger an FSL licence requirement, provided that the transferred loans are fully drawn and non-revolving, and that the transfer was not entered into simultaneously with, or immediately after, the loans were granted by a credit institution. Otherwise, an FSL license may be required.

The market abuse regime (e.g. insider trading) and the anti-money laundering regime (e.g. KYC) may be applicable and, if so, must be complied with.

# The Netherlands



## Main Methods of Transferring Loans

<b>Assignment</b>	Only rights under a contract can be assigned by way of assignment ( <i>cessie</i> ) under Dutch law. Assignments are therefore rarely used as a method of transferring loans.
<b>Transfer and assumption</b>	Loans are usually transferred by way of a transfer of rights and an assumption of obligations ( <i>contractoverneming</i> ) if well established principles are followed. The consent of all parties is required for a transfer and assumption (but is usually given in advance in the loan agreement) and it is achieved by way of a transfer certificate scheduled to the loan agreement which is signed by the original lender, the new lender and the facility agent.
<b>Participations</b>	Funded and risk participations are both forms of funding arrangements between the grantor (the lender under the loan agreement) and the participant and no actual transfer of the loan occurs. Please refer to the section on England above.

## Guarantees and Security

Because a security right is an accessory right i.e. directly connected with the claim it secures, in principle, an assignment or transfer of the claim automatically means a transfer of the security right. However, this may not be the case if a security right is granted in connection with more than one claim of more than one creditor, as in the case of a syndicated loan. In such a case, a parallel debt structure (where the obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time thereby creating a parallel debt *vis-à-vis* the security agent in respect of which security is granted) can be used to preserve security rights in the event that one of the creditors is replaced. Although the parallel debt structure has not yet been tested in the Dutch courts, it is generally used in the Dutch market.

If there is a novation under an English law governed loan agreement, the extinction of the existing lender's rights and obligations and the creation of new rights and obligations on the part of the new lender could result in the extinction of any Dutch security securing the loan due to its accessory nature. However, the parallel debt structure also avoids this consequence since the "parallel debt" as between the obligors on the one hand and the security agent on the other, remains unaffected by the transfer between the existing lender and new lender.

In the case of guarantees, the loan agreement usually provides for them to be granted in favour of "finance parties" which includes any transferees/assignees who become lenders of record.

In the case of a funded participation or a risk participation, the grantor will still be the lender of record and the participant will have no direct entitlement to the security and/or guarantees.

# The Netherlands



## Confidentiality

Generally, a lender has a duty of confidentiality to its customer and disclosure by a lender of borrower confidential information requires the borrower's consent (see *Standard Contractual Restrictions/Issues* in the section on England).

## Standard Contractual Restrictions/Issues (LMA style loan agreement)

Please refer to the section on England above.

## Tax

<b>Withholding Tax</b>	No withholding tax is levied on interest payments unless such payments are treated as dividends for Dutch withholding tax purposes. To avoid treatment as dividends, the interest payments must be at arm's length and the debt instrument should not be deemed to function as equity for Dutch tax purposes. Withholding tax is generally charged on dividends paid by a Dutch resident company at a rate of 15%. The EU Parent-Subsidiary Directive and double tax treaties typically provide for either an exemption from dividend withholding tax or a reduction of the rate.
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<b>Transfer Tax</b>	No stamp duties or transfer taxes are payable on loan transfers.
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## Compliance

Pursuant to the Dutch Financial Supervision Act, Dutch borrowers may only borrow from parties who are "professional market parties" ("PMPs") or intra-group. Otherwise, they need a banking license from the Dutch Central Bank if they qualify as a bank under Dutch law. If they do not qualify as a bank under Dutch law, they cannot obtain a banking license and are always subject to the requirement to only borrow from PMPs or intra-group (an exception is available if borrowings are made through an issuance of securities in accordance with Dutch securities law). As a result, loan documentation often contains restrictions on transfers to, and sub-participations by, entities who are neither PMPs nor group companies. Since January 2012, if a lender lends an amount of at least €100,000 (or equivalent) to a borrower, it is automatically deemed to be a PMP vis-à-vis the borrower for the duration of the loan. Likewise, any transferee of a participation in a loan to a Dutch borrower is also automatically deemed to be a PMP if the minimum transfer amount under the loan agreement is at least €100,000 (or equivalent).

## Other Issues

The rules on compliance may change due to the introduction of the Capital Requirements Regulation ("CRR") in the EU. However, since it is presently unclear how certain terms introduced by the CRR should be interpreted, the Dutch Central Bank has indicated that the rules set out above relating to PMPs remain in force.

# New York



## Main Methods of Transferring Loans

<b>Assignment</b>	<p>Rights under a contract can be assigned and obligations under a contract can be transferred by way of a delegation and assumption, allowing the assignee to rely on a contractual right to enforce the rights assigned to it and for the borrower to receive enforceable rights directly against the assignee. The term 'assignment' is most typically used to refer to both an assignment of rights and a delegation and assumption of obligations.</p> <p>The consent of each party to whom obligations are owed is required. The assignment of an existing right to future payment is permitted without the requirement of consent from any other party except where it: materially impairs a third party's rights under the credit agreement; is prohibited by statute; increases the risk upon the obligor; or materially changes the duty of the obligor (e.g. where the assignment may result in increased costs to the borrower); or, where there is an express contractual prohibition on assignment. Credit agreements typically contain the mechanism to be followed in order to effect an assignment and usually require assignments to be documented by way of a specific form of assignment set out as an exhibit in the agreement.</p>
<b>Participations</b>	<p>Participations are mechanisms by which a lender transfers the benefit and the risk of all or part of a loan to a participant without the involvement of any other party to the credit agreement, including the borrower. A beneficial interest in the underlying loan is transferred to the participant. Since participations generally give the participant no contractual, statutory or common law rights of action against the borrower, the participant must be cautious in protecting itself from any adverse consequences with respect to the bankruptcy of the lender, including set-off of the loan revenues against deposit obligations of the insolvent lender to the borrower. This is achieved by tailoring the participation agreement to act as a "true-sale" rather than a loan. The LSTA-style Participation Agreement was recently modified to ensure the documentation achieves a "true-sale" of an interest in the underlying asset. Once established, the selling lender may then remove the participated piece of the loan from its balance sheet. The two most prominent types of participations are funded participations and risk participations. In a risk participation, funds are only disbursed by the participant for the purchase of a loan or reimbursement of a letter of credit in the event of a borrower default. They are mostly used in the context of letters of credit issued by agent banks, but overall are not seen very often.</p>

## Guarantees and Security

As long as it was pledged to an agent for the benefit of the lenders, security is generally available to a new lender executing the assignment agreement. Typically no additional document is needed.

In the case of guarantees, the loan agreement usually provides for them to be granted in favour of lenders, which includes any transferees/assignees who become lenders of record.

In the case of a participation, the selling lender will still be the lender of record and the participant will have no direct entitlement to the security and/or guarantees.

## Confidentiality

A common law duty of confidentiality may exist between lenders and their borrowers. Loan market participants have recognised the need to establish procedures to keep borrower information confidential. Accordingly, in practice, most credit agreements now contain confidentiality clauses with various disclosure permissions including to assignees/participants.

# New York



## Standard Contractual Restrictions/Issues (LSTA-style credit agreements)

Credit agreements may provide for minimum transfer amounts/hold amounts, permitted transferees (banks or other financial institutions whose ordinary business includes participating in banking facilities), that transfers will only be effected by means of an assignment agreement and will only be effective upon the consent of the borrower (not to be unreasonably withheld or delayed) and the agent. The LSTA has also sought to standardise borrower’s consent provisions by introducing deemed consent wording in the assignment provisions in its model credit agreement to facilitate faster settlements. Borrower consent will often not be required when a default has occurred and is continuing under the credit agreement. The agent usually receives a transfer fee if there is an assignment (this is subject to some exceptions).

Where terms in promissory notes or in agreements relating to payment intangibles (e.g. the right to mere payment under a credit agreement) restrict the sale of such assets, Section 9-408 of Article 9 of the Uniform Commercial Code broadly provides, in part, that such contractual prohibitions on assignment are ineffective subject to certain limitations.

A lender must be able to pledge or assign a security interest in all or any portion of its rights under the credit agreement to any Federal Reserve Bank in accordance with Regulation A of the Federal Reserve Board with the qualification that no pledge relieves the pledgor of any obligations under the credit agreement.

## Tax

**Withholding tax**

In general, U.S. source payments of interest by U.S. borrowers to non-U.S. lenders are subject to gross basis U.S. withholding tax at a rate of 30%. However, a non-U.S. lender may be entitled to a reduction or exemption from withholding if it benefits from a double tax treaty with the United States, provided that certain other conditions are satisfied. A non-U.S. lender may also qualify for an exemption from such withholding tax if it is eligible for the **portfolio interest** exemption in respect of loans to U.S. borrowers.

In addition, the Foreign Account Tax Compliance provisions of the U.S. Hiring Incentives to Restore Employment Act (“**FATCA**”) generally would apply a 30% withholding tax to certain U.S. source payments (including interest) beginning July 1, 2014 and to principal and disposition proceeds beginning July 1, 2017 with respect to loans issued after June 30, 2014 (and loans issued before June 30, 2014 that are materially modified after June 30, 2014) to non-US financial entities unless the recipient complies with certain reporting requirements. A portion of payments made by non-U.S. borrowers that have entered into an agreement with the IRS to report their account holders under FATCA may also be subject to a 30% withholding tax beginning January 1, 2017. This new withholding tax will apply irrespective of any statutory or treaty exemption. Generally, a lender agrees to bear U.S. withholding taxes imposed at the time it acquires its interest in the loan and the borrower bears withholding taxes arising from changes in law. However, lenders generally bear the risk of FATCA withholding even if FATCA withholding arises as a result of a change in law.

**Stamp Duty**

There is no U.S. federal stamp or transfer tax applicable to the transfer of a loan. Generally, there are no U.S. state or local stamp or transfer taxes applicable to the transfer of a loan; however, this should be confirmed on a case by case basis.

## Compliance

Loans are currently not classified as securities and therefore market participants do not need to register them under securities laws or seek applicable registration exemptions.

# Poland



## Main Methods of Transferring Loans

<b>Assignment</b>	Only rights under a contract are assignable: obligations under a contract cannot be assigned. Accordingly, where rights under a loan agreement are assigned, it is common for there to be a corresponding assumption of obligations by the assignee. This would be the more usual method of transfer in respect of loans governed by Polish law.
<b>Funded participation</b>	See the section on England above. This type of arrangement is mainly used in transactions between affiliated banks belonging to the same group. Additionally, an arrangement of this type (defined in the Polish Investment Funds Law as “sub-participation”) is available in relation to the securitisation of loans originated by Polish banks, however only if the sub-participant is a Polish securitisation fund.
<b>Risk participation</b>	See the section on England above. Note that the participant does not have to be a securitisation fund.

## Guarantees and Security

In general, unless stipulated otherwise, an assignee is automatically entitled to any security and guarantees, but, in practice this is addressed in the loan agreement and related documentation. However, the transfer of a registered pledge or mortgage will not be effective until it has been perfected by way of registration which is carried out by the relevant court. In relation to certain mortgages (i.e. those originally created in favour of banks and not documented by way of a notarial deed), the courts may require the borrower’s consent as a condition to register the transfer of the mortgage. If the loan is secured with a security assignment, no additional requirements apply to the transfer of this security interest, however for practical purposes it is recommended that notification is given to the underlying debtor.

In the case of syndicated loans, the loan agreement and related documentation may stipulate that certain security interests (e.g. a registered pledge, mortgage or security assignment) are created in favour of a security administrator. The security administrator holds the security on behalf of the lenders from time to time, which encompasses the original lenders and any assignees who become lenders of record. In the case of guarantees, the loan agreement usually provides for them to be granted in favour of “finance parties” and they will pass to assignees together with the underlying loan.

If the loan agreement is governed by English law and there is a novation, the extinction of the existing lender’s rights and obligations and the creation of new rights and obligations on the part of the new lender could result in the extinction of Polish security securing the loan. In this case, it may be recommended to use the assignment (as opposed to the novation), unless a parallel debt structure (where all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time thereby creating a parallel debt vis-à-vis the security agent in respect of which Polish security is granted) is included in the loan documents (the parallel debt between the obligors and the security agent should remain unaffected by the novation between the existing lender and the new lender).

In the case of a funded or risk participation, since the grantor remains the lender of record, the participant has no direct entitlement to the security and guarantees.

## Confidentiality

The disclosure of documents and information relating to loan receivables originated by banks (and, as a consequence, the assignment of such receivables) may be restricted by bank secrecy rules and personal data protection laws. In general, banks are not allowed to disclose any information concerning a customer without the customer’s consent. There are limited statutory exceptions applicable to the transfer of loans between banks and to securitisations under the Polish Investment Funds Law and the Banking Law.



# Poland



## Standard Contractual Restrictions/Issues

See the section on England, subject to comments under *Guarantees and Security* above.

## Tax

<b>Withholding tax</b>	<p>Interest paid by Polish debtors to lenders located abroad will, in principle, be subject to withholding tax at the standard 20% withholding tax rate, subject to the relevant double tax treaty. Double tax treaties usually provide for a reduced rate of 5% or 10% or, in some cases, a full exemption. Jurisdictions which currently benefit from a full withholding tax exemption on interest are France, Spain and Sweden (these treaties may be subject to amendment).</p>
<b>Transfer tax and VAT</b>	<p>Following a ruling of the Polish Supreme Administrative Court dated 19 March 2012 (I FPS 5/11), (which was largely based on a judgment of the Court of Justice of the European Union dated 27 October 2011 (C-93/11)) a purchase of a receivables transaction (being a debt collection service for these purposes) will be within the charge to VAT if “remuneration attributable to the service” can be identified. In such case the “remuneration” is taxed at standard 23% VAT. If the purchaser is located outside of Poland, the Polish seller will be obliged to self-charge VAT based on the reverse charge mechanism. However, if no remuneration can be identified and the price of the receivables is merely “a reflection of the actual economic value of the debts at the time of their assignment” the transaction will be outside of the charge to VAT, which means that it is instead subject to 1% transfer tax (“tax on civil transactions”) paid on the market value of the purchased loans.</p> <p>As a rule, transfer tax at 1% of the loan value or VAT at 23% of the “remuneration” (as explained above) will be payable in connection with loan trades. However, in some cases exemptions from VAT and transfer tax may apply. In particular, loan trades between licensed banks should be exempt from VAT and transfer tax (although there are certain controversies relating to the scope and applicability of exemptions).</p>

## Compliance

The origination of loans is regulated in Poland and requires a banking licence (except for loans funded with the lender’s own funds), but the trading of loans in the secondary loan market should not trigger a Polish licence requirement.

The market abuse regime (e.g. insider trading) and the anti-money laundering regime (e.g. KYC) are relevant and must be complied with.

# Romania



## Main Methods of Transferring Loans

There are several methods for transferring rights and obligations. The methods most used in relation to loans are assignment of receivables and novation.

<b>Assignment of receivables</b>	This allows a lender to transfer its rights (including any security granted in respect of the assigned rights) but not its obligations under the loan agreement. The borrower's consent is not necessary for the assignment to be valid; however, in order for the assignment to be enforceable against third parties, certain registration formalities apply (see <i>Other Issues</i> below). Also, if the borrower is not notified of, or has not accepted, the assignment, the borrower may continue to discharge its payment obligations under the loan agreement by paying the assignor.
<b>Novation</b>	This extinguishes the original contractual relationship (i.e. the rights and obligations of the transferor) and triggers the creation of a new contractual relationship, with new rights and obligations held by the transferee which are identical to the rights and obligations held by the transferor. The consent of the borrower is required.
<b>Subrogation</b>	This operates where a third party pays a lender the amount of a debt (in whole or in part) owed by a borrower to that lender. The third party is then subrogated to the lender's rights against the borrower (which includes the right to any security and guarantees) and is entitled to recover from the borrower the amount it has paid to the lender.
<b>Assignment of debt</b>	This can be used to transfer obligations to advance further funds to a borrower e.g. where there is a partially-funded loan or a revolving credit facility. It cannot be used to transfer rights under a loan agreement.
<b>Assignment of contract</b>	This is a new civil law construct which has not yet been used much in practice. It operates by allowing one party to a contract (e.g. a lender) to be substituted by a third party who acquires its rights and obligations under the contract. The consent of the other party to the contract (i.e. the borrower) is required and there must be obligations outstanding under the contract. The law does not expressly deal with the effect of the assignment on any security securing the contract.

## Guarantees and Security (as regards assignment of receivables and novation)

Please see *Standard Contractual Restrictions/Issues* and *Other Issues* below.

## Confidentiality

Lenders are under an obligation to keep all facts, data and information relating to their customers confidential. This obligation applies to Romanian credit institutions and credit institutions in other EU member states or third party states to the extent of any lending activity in Romania. Confidential information may only be used for the purpose for which it has been requested and/or provided, except where a lender's legitimate interest justifies a different use.

## Standard Contractual Restrictions/Issues

The borrower's consent is typically required for an assignment or transfer (except in certain cases, such as where there is an event of default under the loan agreement). Such consent is usually qualified with a requirement that it is "not to be unreasonably withheld or delayed". A common alternative to a consent requirement (particularly in the context of leveraged financings) is a lesser requirement on the lender to consult with the borrower. The identity of the transferee/assignee is generally limited to a "bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets". As mentioned above, lenders are under an obligation of confidentiality to the borrower. This is usually subject to various disclosure permissions in the loan agreement, including disclosure of confidential information to potential and actual transferees and assignees.

In the case of an assignment of receivables, the loan is transferred to the assignee with all accessory rights, including any existing guarantees and security which, in the case of the security, retains its priority ranking. In the case of a novation, any existing security and guarantees will not automatically collateralise the new obligations and the loan agreement must expressly provide that the parties agree that the security and guarantees will be transferred to the new lender on the same terms and, in the case of the security, retain its priority ranking.

# Romania



## Tax

<p><b>Withholding tax</b></p>	<p>The Romanian Fiscal Code provides for withholding tax on interest paid by a Romanian borrower to a non-Romanian lender, levied at the rate of 16% (which may be reduced by any applicable double tax treaty). It is usual for a loan agreement to provide for a Romanian borrower to gross-up payments of interest. The standard LMA gross-up provisions may be used for this purpose (where the loan agreement is drafted in an LMA-style or similar). However, due to certain particularities and the interpretation of Romanian tax laws, in the case of treaty lenders, it is not uncommon to see an addition to the standard LMA gross-up provision to clarify that the borrower is making an increased income payment under the gross-up provision and that the lender remains the tax payer and bears the cost of the tax according to the relevant tax treaty and that the borrower will withhold and pay such tax pursuant to the relevant tax laws.</p>
<p><b>Stamp Duty; Other taxes</b></p>	<p>No stamp duty is payable in connection with a loan transfer. Taxes are payable to register a new lender in the special registers (see <i>Other Issues</i> below): the taxes payable for registrations relating to immovable mortgages (i.e. mortgages over real estate assets) may be considerable.</p>

## Compliance

The provision of loans to borrowers in Romania constitutes a “credit activity” under Romanian regulatory law. Credit activities may be performed in Romania on a professional basis only by credit institutions and other financial institutions (e.g. Romanian non-banking financial institutions, payment services providers) in compliance with certain requirements. “Credit activity” is not defined under Romanian law, and the National Bank of Romania (the “NBR”) is the only entity authorised to decide the “professional nature” of a credit activity, based upon certain criteria provided by the law. If there is any doubt as to this, the NBR’s view could be sought to eliminate any regulatory risk.

## Other Issues

<p><b>Registration at special registries</b></p>	<p>Special formalities are required in relation to the assignment of receivables or the novation of loans, where they are secured with a mortgage over real estate or a movable mortgage. Where there is a mortgage over real estate, the assignment or novation agreement must be in a form authenticated by a notary public and the new lender must be registered in a special register. Where there is a moveable mortgage, a statement may need to be given in front of a notary public and the new lender must be registered in a special register. These formalities are necessary to make the mortgages enforceable against third parties and to establish their ranking for the purposes of any enforcement procedure.</p>
<p><b>Trusts, parallel debt and joint creditorship</b></p>	<p>The Romanian civil law system is not familiar with the concepts of “trust” and “trustee”. A Romanian court might therefore view a security agent as an independent person, acting on its own behalf and account. Two structures are used to address this: parallel debt and joint creditorship. A parallel debt structure (where all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time thereby creating a parallel debt <i>vis-à-vis</i> the security agent in respect of which security is granted) is not recognised by Romanian law and has not been tested in court, although it is used in the Romanian market in loan agreements governed by English law. Joint creditorship is a Romanian law structure: each lender is a joint creditor with the security agent but not with the other lenders. Security is granted in favour of the joint creditors and only the security agent (as joint creditor with all the lenders) can claim the whole amount in the case of enforcement: the lenders can only claim their respective portions.</p>

However, only persons registered as secured creditors in the special register can claim the priority conferred by such registration in the event of the enforcement of the relevant security interest, or in the event of insolvency of the mortgagor. Therefore, if the security agent is the only finance party that is registered with the special register, the lenders might not be able to claim priority in lieu of the security agent against third parties (e.g. if the security agent was unable or unwilling to enforce) and they would rank as unsecured creditors against such third parties. There are certain ways though for new lenders to be protected against this risk or at least to some degree mitigate it.

# Russian Federation



## Main Methods of Transferring Loans

<b>Transfer of Russian law loans</b>	The main method is an assignment of rights and a transfer of obligations (in the latter case, when such transfer is made before the transferring lender's commitments are reduced to zero). As a general rule: (i) an assignment of rights does not require the borrower's consent, unless such consent is expressly required under the assigned contract (i.e. the loan agreement) and (ii) obligations (e.g. an obligation to advance funds) can only be transferred with the borrower's consent.
<b>Transfer of foreign law loans:</b>	In cross-border financings with Russian borrowers, Russian law is not usually used. The transferability of loans is therefore determined by reference to the law expressed to govern the loan agreement (usually English law). However, Russian law governed security is accessory security which means that it terminates upon a termination of the secured obligations. Therefore, in the absence of a parallel debt structure or a joint and several creditors structure (see <i>Guarantees and Security</i> below), English law novations are problematic because the existing lenders' original rights and obligations are terminated and substituted with identical ones on the part of the new lender.
<b>Participations</b>	See the section on England above. Although it is possible for credit risk to be shared by way of a funded or risk participation, it has not commonly been used for secured loans as Russian law does not regulate such types of arrangements.

## Guarantees and Security

In cross-border financings governed by foreign (usually English) law, Russian suretyships are rarely used and instead, a guarantee governed by the relevant foreign law is granted by the Russian borrower in favour of the foreign creditor. Any issues of transferability are then addressed under such foreign law.

As accessory security, Russian law governed security will automatically follow any transfer of the secured obligations, unless the transfer is expressly prohibited by the security documentation. Furthermore, Russian security interests can only be transferred to the transferee/assignee of the secured obligations, otherwise they are terminated. To avoid these issues, Russian security documents usually contain an advance consent for transfers of security to the transferee/assignee of the secured obligations. However, in the case of registrable security (e.g. a mortgage over real estate or a pledge of shares), the transferee/assignee needs to appear in the relevant register to have an enforceable security interest which may cause practical issues. Also, prior to 1 July 2014, a partial transfer of the loan caused practical issues (from the perspective of enforcement of the security and distribution of proceeds) because it had the effect of creating *pari passu* security in favour of several lenders which was not possible under Russian law.

Historically, two structures have been used in cross-border financings to address the foregoing issues: (i) a parallel debt structure (i.e. a structure where all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time thereby creating a parallel debt vis-à-vis the security agent in respect of which security is granted); and (ii) a joint and several creditors structure where all lenders are made joint and several creditors of the borrower (the lenders can be joint and several creditors either (a) with only one lender which is appointed to hold security, but not with each other or (b) with each other, with one lender appointed to hold security). A lender can claim an amount from the borrower which represents the indebtedness owed to that lender and any other lender with which that lender is joint and several. Security is granted in favour of one of the joint and several lenders which can enforce the security which secures the full indebtedness. The recovering lender would then share the proceeds among itself and the other joint and several lenders on a pro rata basis.

From 1 July 2014, two new concepts have been introduced as part of the reform of the Russian Civil Code on pledge: (a) a concept of equal (*pari passu*) ranking of security over a single asset in favour of multiple creditors to secure different debts owed to such creditors and (b) a concept of a security manager which can hold security in the name and on behalf of several lenders. In practice, security will be created on a *pari passu* basis in favour of the lenders, but can be enforced only through a security manager. However, these new concepts do not address the practical issues which arise from the requirement to register security interests in favour of each new lender nor the risk of termination of Russian security in the event of an English law novation of English law governed secured obligations. Due to this and other risks inherent in the new concepts, their use may be limited to Russian law governed financings.

In the case of a funded or risk participation, since the grantor remains the lender of record, the participant does not have a direct secured claim against the security provider.

# Russian Federation



## Confidentiality

In cross-border financings, any issues arising as a result of disclosure by a lender of borrower confidential information are determined by reference to the loan agreement and its governing law. Compliance with the loan agreement and the relevant governing law should be sufficient to ensure compliance with any relevant Russian law rules on confidentiality, provided that any transferee/assignee is subject to the same confidentiality obligations as the original lenders.

## Standard Contractual Restrictions/Issues

The loan agreement often requires the borrower's consent to assignments. Without such consent, any assignments are invalid. However, from 1 July 2014, an assignment in respect of monetary claims under a contract where the parties are involved in commercial activity (e.g. a loan agreement) will be valid even if prohibited by that contract (the assignor will be liable for any damages suffered by its counterparty as a result of such breach). In the case of a transfer of obligations, if the borrower does not consent, the transfer is invalid. Therefore, the parties usually provide in the loan agreement for the advance consent of the borrower to assignments and transfers.

## Tax

<b>Withholding tax</b>	<p>A 20% withholding tax applies on payments of Russian source interest by the borrower to the lender. Where the lender is a Russian bank or is resident in a jurisdiction which has entered into a double tax treaty with Russia (commonly referred to as a "Qualifying Lender" in the loan agreement), it may be exempt from withholding tax according to such treaty, provided that certain other conditions are satisfied. In particular, the lender would need to provide the Russian borrower with a tax residency confirmation certified by the competent authorities, confirming its tax residency in the relevant jurisdiction for the purposes of the treaty. This confirmation must be renewed annually. The general rule and usually a requirement of the loan agreement is that a tax residency confirmation also needs to be apostilled or legalised (if applicable).</p> <p>It is usual for the loan agreement to provide for the borrower to gross up payments of interest. There are common exceptions to this, including where a transferee is not a Qualifying Lender. There is also a possibility that any gross-up or similar undertaking given in respect of another person's tax liability payable in the Russian Federation would be unenforceable.</p> <p>In the case of a funded participation or risk participation, in the absence of clear regulations, Russian withholding tax analysis will depend on the way such participation is structured.</p>
<b>Tax on transfers</b>	<p>Tax at a rate of 20% may be due in very limited circumstances in the case of a transfer by a Russian lender to a foreign lender or a transfer by a foreign or Russian lender to a Russian lender where the loan is transferred with premium/discount (depending on the circumstances). The tax may arise on the difference between the face value of the debt and the amount received/paid for this debt. Thus, if a Russian lender receives a greater amount (premium), it would be required to pay tax. Alternatively, where a Russian lender pays less (acquires debt with a discount), a 20% tax may be due when the Russian lender receives a greater amount from the borrower or upon a further on-sale of the debt. No tax arises when the loan is transferred at face value.</p>
<b>Stamp Duty</b>	<p>There is no stamp duty in Russia.</p>

## Compliance

Loan agreements and the trading of loans in the secondary loan market are not regarded as regulated activities under Russian financial regulation. Credit facilities can only be granted by Russian banks (for which a banking licence is required) but a transfer can be made to a non-licensed entity. In order to receive loans from and make repayments to foreign lenders, Russian borrowers must open a loan passport with a Russian authorised bank and have an account with that bank through which the loan is received and repaid. If the loan is transferred, the loan passport needs to be amended to reflect the information about the new lender.

# Singapore



## Main Methods of Transferring Loans

<b>Novation</b>	This operates by extinguishing all the rights and obligations of an existing lender and substituting them with identical rights and obligations on the part of a new lender. It requires the consent of all parties to the loan agreement and is usually achieved through a mechanic set out in the loan agreement involving the existing lender, the new lender and the facility agent signing a transfer certificate. The consent of all other parties is obtained in advance in the loan agreement.
<b>Assignment</b>	Only rights under a contract are assignable: obligations under a contract cannot be assigned. Accordingly, rights of an existing lender under a loan agreement, such as the right to receive interest and the right to repayment, can be assigned to a new lender but the obligation of the existing lender to advance monies cannot be assigned. In practice, where rights under a loan agreement are assigned, it is common for there to be a corresponding assumption of obligations by the assignee. Notice of the assignment is usually given to the borrower although this is not necessary to make an assignment enforceable.
<b>Participations</b>	Funded and risk participations are also available in Singapore (see the section on England above).
<b>Observations</b>	The method most commonly used in the Singapore market is novation.

## Guarantees and Security

A transferee/assignee does not automatically get the benefit of any security and guarantees. However, in practice, this is addressed in the loan agreement and related documentation. In the case of security, this is achieved by virtue of a trust structure which enables the beneficiaries of the security to change from time to time. The security trustee holds the security on behalf of the lenders from time to time, which encompasses the original lenders and any transferees/assignees who become lenders of record. In the case of guarantees, the loan agreement usually provides for them to be granted in favour of "finance parties" which includes any transferees/assignees who become lenders of record.

In the case of a funded or risk participation, since the grantor remains the lender of record, the participant has no direct entitlement to the security and guarantees.

## Confidentiality

Singapore bank secrecy rules apply to a lender which is a Singapore bank. However, such a lender would be entitled to disclose the borrower's information to potential transferees and assignees with the borrower's written consent (which is typically provided for in the loan agreement – see *Standard Contractual Restrictions/Issues* below).

# Singapore



## Standard Contractual Restrictions/Issues (LMA style loan agreement)

The borrower’s consent is often required for an assignment or transfer (except in certain cases, such as where there is an event of default under the loan agreement). Such consent may be qualified with a requirement that it is “not to be unreasonably withheld or delayed”. A common alternative to a consent requirement (particularly in the context of leveraged financings) is a lesser requirement on the lender to consult with the borrower. Note that it has become common for loan agreements to expressly permit a lender to grant security over its rights under the finance documents without any requirement to consult with or obtain the borrower’s consent.

The identity of the transferee/assignee is usually prescribed: transfers and assignments must be to a “bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets”. In leveraged financings, the parties may agree upfront a list of approved transferees/assignees.

The existing lender may be subject to a minimum hold amount and there may be restrictions on transfer amounts.

It is common for a fee to be paid by the transferee/assignee to the facility agent on a transfer or assignment. The secondary trading documentation usually regulates how the economic burden of this fee will be borne between the transferor/assignor and the transferee/assignee.

Where a lender is a Singapore bank (and Singapore bank secrecy rules apply), the borrower will typically provide written consent to disclosure of its information in the loan agreement. Lenders which are not Singapore banks (and not subject to Singapore bank secrecy rules) may be subject to an obligation of confidentiality to the borrower which is provided in the loan agreement. This, however, is usually subject to various disclosure permissions including disclosure of confidential information to potential and actual transferees and assignees.

## Tax

<b>Withholding tax</b>	<p>Tax is required to be withheld from payments of, or in the nature of, income by the Company (including interest) if made to any person not resident in Singapore within the meaning of the Income Tax Act, Chapter 134 of Singapore, subject to any waiver granted by the Singapore tax authorities and to any concession or relief from such withholding tax available under any applicable tax treaty between Singapore and the country of residence or incorporation of such other person.</p> <p>It is usual for the loan agreement to provide for the borrower to gross up payments of interest.</p>
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<b>Stamp Duty</b>	This is not usually payable on loan transfers.
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## Compliance

Making a loan constitutes moneylending activity and requires a moneylender’s licence although exclusions apply, such as where a loan is only made to certain non-individual borrowers. The acquisition of a (funded) loan receivable and the holding of that loan receivable does not constitute moneylending unless, following the acquisition, additional loans are extended.

The market abuse regime (e.g. insider trading) and the anti-money laundering regime (e.g. KYC) are relevant and must be complied with.

# Slovak Republic



## Main Methods of Transferring Loans

<b>Assignment of receivables</b>	<p>Receivables (rights) are generally assignable, subject to any restrictions contained in the Slovak Civil Code. The restrictions are unlikely to be relevant in the context of a secondary loan trade, except that a receivable may not be validly assigned if the assignment would be contrary to the terms agreed with the borrower (e.g. the borrower's consent is required under the loan agreement for an assignment and it is not obtained). The obligations of a lender under a loan agreement cannot be assigned but can only be transferred by way of an assumption of debt (see below).</p> <p>In order to be binding and enforceable against the borrower, an assignment must either be (i) notified to the borrower by the assignor; or (ii) proven to the borrower by the assignee by, for example, presenting the assignment agreement to them. The borrower's consent is not required unless the loan agreement provides otherwise (see <i>Standard Contractual Restrictions/Issues</i> below). The assignment is usually effected by way of an assignment agreement between the assignee and the assignor and is then notified to the borrowers/guarantors. The assigned rights need to be precisely specified; otherwise the assignment may be invalid.</p>
<b>Assumption (transfer) of debt</b>	<p>An assumption (transfer) of debt by a new lender (e.g. the obligation of a lender to advance a loan) is only permitted with the consent of the borrower (which is usually provided in the loan agreement). In practice, it is common to agree in a loan agreement that receivables can only be assigned if there is a corresponding assumption of obligations by the new lender. This is achieved by way of a mechanism set out in the loan agreement involving the transferring lender, the new lender, the facility agent and the borrower signing a transfer certificate. The transferred debts need to be precisely specified; otherwise the transfer may be invalid.</p>
<b>Participations</b>	<p>Funded and risk participations are also used in the Slovak Republic (see the section on England). An express permission is usually granted in the loan agreement or in some cases participations are made subject to the borrower's consent.</p>
<b>Observations</b>	<p>The methods usually used in the Slovak market are an assignment of loan receivables or a combination of an assignment of receivables and an assumption (transfer) of obligations.</p>

## Guarantees and Security

Generally, if rights under a loan agreement are assigned to a new lender, any security and guarantees automatically pass to the new lender. If the security is provided by a third party, the existing lender is obliged to give notice of the assignment to the third party security provider. Failure to give notice does not invalidate the security, however, the third party security provider may validly discharge its obligations by performing to the existing lender until notified of the assignment. If there is any *in rem* security (i.e. mortgage, pledge), the change of secured creditor requires registration with the relevant security registry (i.e. Land Register, Notarial central register of pledges). Registration does not legally confer the relevant security interest on the assignee, but merely serves as evidence of the assignment to third parties. If the existing lender and/or the new lender do not register the change of secured creditor, then they may be liable for any damage caused to third parties by such failure.

Trusts or other concepts of divided ownership are not recognised under Slovak law. Two structures are commonly used to address this: joint and several creditorship and parallel debt.

In syndicated or club loan agreements governed by Slovak law, the security and guarantees are typically granted in favour of the security agent (who is one of the lenders) on the basis of a joint and several creditorship structure. As a joint creditor with each other lender, the security agent has a receivable against each borrower/guarantor corresponding to the aggregate receivables of all lenders *vis-à-vis* such borrower/guarantor. The debts owed to the security agent are secured by the security interests and guarantees to which the security agent is a party. Other lenders (and their assignees) benefit from the security and guarantees held by the security agent through the relevant security agency provisions.

A "parallel debt" structure (i.e. a structure where all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time thereby creating a parallel debt *vis-à-vis* the security agent in respect of which security is granted) has not been tested in the Slovak courts however it is commonly used where English law governed loan agreements are secured by assets owned by Slovak entities or guaranteed by Slovak entities. In the case of guarantees in English law governed loan agreements, they are usually granted in favour of "finance parties" which includes any transferees/assignees who become lenders of record.



# Slovak Republic



In the case of a funded or risk participation, the grantor will still be the lender of record and the participant will have no direct entitlement to the security and/or guarantees.

## Confidentiality

Generally, a bank has a duty of confidentiality (bank secrecy) to its customers and any disclosure by a lender of confidential information requires the prior written consent of the borrower. A lender's confidentiality obligations and disclosure permissions are usually agreed by the parties in the loan agreement (see *Standard Contractual Restrictions/Issues* below).

## Standard Contractual Restrictions/Issues

The borrower's consent is typically required for an assignment of receivables to, or assumption of obligations by, a third party (except in certain cases, such as where there is an event of default under the loan agreement or where the assignment/assumption is to another lender or to an affiliate of a Lender). Such consent is usually qualified with a requirement that it is "not to be unreasonably withheld or delayed".

It has become common for loan agreements to expressly permit a lender to grant security over its receivables without any requirement to consult with or obtain the borrower's consent, in particular with respect to transactions in the interbank market.

The identity of the transferee/assignee is sometimes limited to banks or financial institutions and, in some cases such banks or financial institutions are required to have their registered office in the European Union.

Lenders are usually under an obligation of confidentiality to the borrower, which is subject to various disclosure permissions, including disclosure of confidential information to potential and actual assignees/transferees.

## Tax

<p><b>Withholding tax</b></p>	<p>A 19% withholding tax applies on interest payments by Slovak borrowers to non-Slovak lenders. If the lender is a tax resident in a jurisdiction which has entered into a double tax treaty with the Slovak Republic (commonly referred to as a "Qualifying Lender" in the loan agreement), it may be exempt from Slovak withholding tax, provided that certain other conditions are satisfied. The Slovak borrower would be entitled to apply the withholding tax exemption under the double tax treaty automatically. For this purpose, the Slovak borrower should request from the non-Slovak lender a copy of its tax residency certificate and a declaration of the beneficial ownership of the interest. Interest payments made to lenders resident in certain "tax havens" are subject to a 35% withholding tax rate. Tax haven is defined as any jurisdiction with which the Slovak Republic have not entered into either a double tax treaty or a tax information exchange agreement.</p> <p>It is usual for the loan agreement to provide for the borrower to gross up payments of interest. There are common exceptions to this, including where a transferee is not a Qualifying Lender.</p> <p>In the case of a funded participation, payments from the grantor to the participant may be subject to withholding tax as they are separate payments of interest (subject to any exemptions under an applicable double tax treaty). In the case of a risk participation, no interest is paid so withholding tax should not apply.</p>
<p><b>Stamp Duty</b></p>	<p>No stamp duties or other similar documentary taxes are payable under Slovak tax law in respect of assignments or transfers of loans.</p>

## Compliance

Loan agreements and the trading of loans in the secondary loan market have generally not been regarded as regulated instruments for the purposes of Slovak financial regulation.

However, the market abuse regime (e.g. insider trading) and the anti-money laundering regime (e.g. KYC) are relevant and must be complied with.

# Spain



## Main Methods of Transferring Loans

<b>Transfer of contractual position (<i>cesión de posición contractual</i>)</b>	This is the more common method of transfer. It entails the replacement of an existing lender with a new lender that will hold the rights and obligations previously held by the transferor. Rights and obligations are not extinguished but the holder is replaced. It requires the consent of the borrower: the transfer clause in the loan agreement may include an advance consent to the transfer by the borrower provided that certain conditions are met.
<b>Assignment (<i>cesión de créditos</i>)</b>	This entails only the assignment of the existing credit rights of an existing lender under a loan agreement, such as the right to receive interest and principal, but the obligations of the existing lender are not assigned.  Both transfers and assignments can be made on a silent basis ( <i>cesión silenciosa</i> ) in which case no notice is given to the borrower. This means that the transferor remains lender of record for all purposes vis-à-vis the borrower and the transferee / assignee takes credit risk on the borrower and the lender of record.
<b>Participations</b>	Funded participations ( <i>participación en riesgo y tesorería</i> ) and risk participations ( <i>participación en riesgo</i> ) are also available in Spain (see the section on England above).

## Guarantees and Security

Since guarantees and security are ancillary to the loan, a transferee or assignee will automatically get the benefit of any security and guarantees. However, certain formalities may be required to ensure the enforceability of the security and guarantees vis-à-vis third parties and the availability of enforcement procedures (e.g. registration of the assignment or transfer of mortgage security at the Land Registry).

Spanish law does not recognise the trust concept and security must be granted in favour of each creditor under the loan, although a security agent may be appointed as a common representative of the creditors to co-ordinate the actions to be taken in relation to security.

In the case of a funded or risk participation, since there is no actual transfer of the loan, the participant has no direct entitlement to the security and guarantees.

Creation of security over loans is possible (unless the parties to the loan agreement have agreed otherwise, which is not standard practice). In any case, where the loan is to be used as collateral for financing provided by the Bank of Spain, the Law on the Autonomy of the Bank of Spain allows the creation of security over loans even if assignment or transfer of such loans is limited or prohibited or where confidentiality duties apply.

## Confidentiality

Generally, a lender has a duty of confidentiality to its customer except where the law requires or allows disclosure, or the customer consents to it. Disclosure of information for the purposes of an assignment is permitted because it is ancillary to the assignment and the borrower's consent is not required for an assignment. In any case, specific authorisation is usually given in the loan agreement.

Where consent to transfer is given in the loan agreement (see *Standard Contractual Restrictions/Issues* below), it is usually understood to encompass consent to disclosure of information.

# Spain



## Standard Contractual Restrictions/Issues

It is common practice that loan agreements permit a lender to transfer its contractual position or assign its rights under the loan agreement without the need of obtaining consent of the borrower or any other parties, provided that certain requirements are met (e.g. the new lender must be a bank, securitisation fund or financial institution; the transfer/assignment must take effect at an interest payment date, the transferred/assigned participation must be for a minimum amount). If the transfer does not comply with all such requirements, consent of the borrower is required.

Consent to transfer or assign is understood to include consent to disclose information. Often disclosure is made after the prospective assignee or transferee has signed a confidentiality agreement.

Under Spanish law, creation of security over any loans is possible (unless the parties under the relevant loan agreement have agreed otherwise, which it is not standard practice). In any case, where the loan is to be used as collateral for the financing by Bank of Spain, the Law on the Autonomy of the Bank of Spain allows the creation of the security over any loans notwithstanding if assignment or transfer are limited or prohibited or where confidentiality duties are established.

Because the participant does not become a party or acquire rights under the loan agreement, participations are not usually regulated by the loan agreement.

## Tax

**Withholding tax** Interest payments from Spanish source are subject to withholding tax at the current rate of 21%. If the lender is (i) a Spanish credit entity, (ii) a Spanish permanent establishment of a foreign credit entity, (iii) an entity resident in a EU Member State or (iv) an entity resident in a jurisdiction which has entered into a double tax treaty with Spain which contains an exemption for interest payments (referred to as a treaty lender), it will be exempt from withholding tax. These four categories of lenders are commonly referred to as “Qualifying Lenders” in the loan agreement. In the case of EU residents and treaty lenders, a certificate of tax residence issued by the competent tax authorities of the country of residence of the lender must be submitted to the borrower prior to any payment. Such certificates have to be renewed annually.

It is usual for the loan agreement to provide for the borrower to gross up payments of interest. There are common exceptions to this, including where a transferee is not a Qualifying Lender.

**Stamp Duty** Stamp duty is not payable on loan transfers unless the loan is secured by an *in rem* security interest which requires registration in a Spanish public registry (i.e., mortgages over real estate assets). In that case, the transfer or assignment would attract stamp duty at a rate ranging from 0.75% to 1.5% (depending on the region where the real estate asset is located) of the secured amount to be transferred or assigned. The tax payer is the assignee of the loan.

## Compliance

Generally, lending in Spain does not require a banking licence (with certain exceptions, such as margin loans carried out by entities intermediating in the purchase of securities, mortgage or financing to consumers). Therefore, the trading of loans in the secondary market has not generally been regarded as subject to financial regulations.

However, certain regulatory provisions such as the anti-money laundering regime will apply.

## Other Issues

It should be noted that certain specific Spanish law regimes relating to floating mortgages or the financial collateral directive, for example, only apply to financial entities and therefore would not apply to entities not considered as financial entities (i.e. non-bank investors) for these purposes.

Additionally, where the transfer or assignment is carried out after the declaration of insolvency of the borrower, the transferee will not be entitled to vote in the arrangement of creditors (*convenio*) to be agreed within the insolvency procedure unless the transferee is an entity subject to financial supervision.

# Turkey



## Main Methods of Transferring Loans

<b>Transfer (assignment) of agreement</b>	This method is used where all of an existing lender's rights and obligations under a loan agreement are transferred to a new lender. The parties to the loan agreement change as the existing lender is replaced by the new lender. It is effected by way of a transfer agreement entered into by either (i) the existing lender, the new lender and the other parties to the loan agreement or (ii) the existing and the new lender (the transfer agreement is then accepted and acknowledged by the other parties).
<b>Participation in an agreement</b>	This method is used for partial transfers of rights and obligations under a loan agreement. The parties to the loan agreement change however, instead of the existing lender being replaced by the new lender, the new lender is added as a party. It is effected by way of a participation agreement entered into by either (i) the existing lender, the new lender and the other parties to the loan agreement or (ii) the existing lender and the new lender (the participation agreement is then accepted and acknowledged by the other parties).
<b>Transfer (assignment) of receivables</b>	This method is commonly used in the market to effect a transfer of loan receivables together with the related interest and fees. Only rights of the existing lender under the loan agreement (e.g. the right to receive interest and fees) are transferred to the new lender, not obligations. It is effected by way of a written agreement between the existing lender and the new lender. The borrower's consent is not required for the transfer to be effective, however, if the borrower is not notified of the assignment, the borrower may continue to discharge its payment obligations under the loan agreement by paying the existing lender. Therefore, in practice, the borrower is usually notified of, and acknowledges the transfer. The borrower is entitled to raise the same objections against the new lender as were available to it in respect of the existing lender.
<b>Novation</b>	This operates by extinguishing all the rights and obligations of the existing lender and substituting them with identical rights and obligations on the part of the new lender. It is usually achieved pursuant to a mechanic set out in the loan agreement involving the borrower, the existing lender, the new lender and the facility agent signing a transfer certificate. However, due to the negative effect this method has on security (see <i>Guarantees and Security</i> below for more detail), it is mainly used for non-Turkish law governed loan agreements provided that the loan agreement contains a parallel debt provision (see <i>Guarantees and Security</i> below for more detail).
<b>Participations</b>	Funded and risk participations are also available in Turkey (see the section on England above).

## Guarantees and Security

Turkish law security is accessory security and is linked to the original debt. Therefore, when a loan is transferred by way of a transfer (assignment) of receivables or a transfer (assignment) of agreement, any security is automatically transferred to the transferee/assignee (accessorium sequitur principale). When a loan is transferred by way of participation in an agreement, the new lender automatically benefits from any security in proportion to its participation in the loan.

In the case of novation, because it has the effect of extinguishing the original debt, any Turkish law security will also be extinguished and new security would need to be granted in favour of the new lender. To address this, a parallel debt structure is used (which is recognised under Turkish law) pursuant to which all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time, thereby creating a parallel debt vis-à-vis the security agent for which accessory security is granted.

Note that under Turkish law, it is possible for a security agent or a security trustee to hold the security package on behalf of a pool of lenders but the role of a security "trustee" cannot be undertaken by a Turkish entity because Turkish law does not recognise a trust concept. However, Turkish law would (under its conflict of laws principles) recognise the capacity of a foreign entity as a security trustee if the jurisdiction of incorporation of such entity recognises the concept of trust and the entity's capacity to act as trustee.

In the case of guarantees, the loan agreement usually provides for them to be granted in favour of "finance parties" which includes any transferees/assignees who become lenders of record.

In the case of a funded or risk participation, since the grantor of the participation remains the lender of record, the participant has no direct entitlement to the security and guarantees.

# Turkey



## Compliance

Pursuant to Turkish banking legislation, banks have a duty of confidentiality to their customers and disclosure by a lender of a borrower's confidential information requires the borrower's consent. In addition, persons who by virtue of their positions or in the course of performance of their duties have access to confidential information pertaining to banks or their clients are not permitted to disclose such confidential information to any person or entity unless expressly authorised by law.

## Standard Contractual Restrictions/Issues

In the case of a transfer of loan receivables, the borrower's consent is generally not required as a matter of Turkish market practice. However, loan agreements provide for the lender to consult with the borrower or merely notify the borrower prior to making such a transfer.

Loan agreements usually limit permitted transferees/assignees to banks or regulated financial institutions in order to avoid adverse tax consequences. These limitations do not apply to funded or risk participations since the lender of record remains the same.

## Tax

<b>Withholding tax</b>	<p>A borrower in Turkey is required to withhold Turkish tax at a rate of 15% from all payments of interest and fees under a loan agreement to any person whose principal office or facility office is outside Turkey. However, the rate is reduced to zero in respect of interest and fees paid to a bank or regulated financial institution whose principal office or facility office is outside Turkey. If the original lender makes a transfer to an institution which is not a bank or regulated financial institution under Turkish tax law (i.e. not an institution authorised in its country of origin by the financial sector regulator to extend loans), the loan will be considered to be granted by a non-financial institution and withholding tax at a rate of 10% will arise on any interest and fee payments to be made to such lender.</p> <p>It is usual for the loan agreement to provide for the borrower to gross up any tax deductions. There are common exceptions to this, including where a transferee/assignee is not a bank or regulated financial institution whose principal office or facility office is outside Turkey (i.e. "Qualifying Lender" provisions).</p>
<b>Stamp Duty</b>	<p>Stamp tax is imposed at a rate of 0.948% of the highest amount stated in the relevant agreement. However, loans granted by banks and financial institutions are exempt from stamp tax. Therefore, any transfer of a loan granted by a bank or financial institution is also exempt from stamp tax. In the case of a transfer of a loan granted by any other entity, stamp tax on transfer is calculated at a rate of 25% of the stamp tax amount originally paid by the relevant entity on granting the loan.</p>
<b>Banking and insurance transaction tax ("BITT")</b>	<p>Income taxes of general application and BITT at a rate of 5% of each payment of interest and fees may be imposed on any bank or regulated financial institution if it books the loan in Turkey, or receives any amount payable at any facility office located, incorporated or organised in Turkey or if it has its principal office or a permanent representative in Turkey.</p>
<b>Resource Utilisation Support Fund ("RUSF")</b>	<p>If there is a transfer of a loan to a foreign lender, RUSF may apply. It is calculated in respect of the whole loan (regardless if the whole or part of a loan is transferred) at the following rates: if the average repayment term of the loan is (i) two to three years; or (ii) one to two years; or (iii) less than one year, it is subject to RUSF at a rate of 0.5%, 1% and 3% respectively. If the loan has an average repayment term of three years or more, it is subject to RUSF at a rate of 0%.</p>
<b>VAT</b>	<p>Interest on loans advanced to Turkish borrowers are subject to VAT at the rate of 18% if the lender is not a financial institution.</p>

# Turkey



## Confidentiality

The anti-money laundering regime should be complied with (e.g. KYC).

## Other Issues

The following restrictions must be taken into account when transferring a loan to a Turkish entity.

An existing lender cannot assign or transfer to a Turkish bank a foreign currency loan made to an individual or legal entity resident in Turkey if the remaining term of the loan is one year or less and the amount of the loan to be assigned or transferred is less than USD 5 million (or its equivalent in any other foreign currency). This restriction does not apply where the borrower is a Turkish bank.

Pursuant to the Capital Movements Circular issued by the Central Bank of Turkey, a Turkish borrower cannot obtain a revolving loan from a bank outside Turkey. Therefore, revolving loans granted by Turkish banks to Turkish borrowers cannot be assigned or transferred to foreign banks (including offshore branches of Turkish banks).

Pursuant to Turkish legislation, only banks and financial institutions are permitted to extend loans to third parties. A non-financial institution is permitted to extend loans only to its group companies. An asset management company may only become a transferee of a loan for the purposes of collecting loan receivables or restructuring. Any lending from Turkey by a non-financial institution with the purpose of gaining profit is not allowed and is punishable by imprisonment under the Turkish Commercial Code (Law No. 6102).

# Ukraine



## Main Methods of Transferring Loans

Note that all loan agreements between a Ukrainian borrower and a foreign lender must (unless the government of Ukraine is the borrower or guarantees the loan) be registered with the National Bank of Ukraine (the “NBU”), which issues a registration certificate. Without registration, the Ukrainian borrower cannot transfer any money abroad to service a loan. If a registered loan is transferred and the transferee is not a Ukrainian lender, the registration certificate must be amended. The registration certificate will also need to be amended if any other terms of the loan change e.g. the interest rate, the amount or maturity of the loan. If an unregistered loan is transferred (e.g. from a Ukrainian lender to a foreign lender), the loan agreement must be registered. Only the borrower can apply for the issue or amendment of a registration certificate. See *Other Issues* below.

<b>Assignment</b>	Only rights under a contract are assignable: obligations under a contract cannot be assigned. In practice, in light of the NBU requirements, where rights under a loan agreement with a Ukrainian borrower are assigned, it is common for the loan agreement to be amended to introduce the new lender as a party with the rights and obligations of the existing lender.
<b>Participations</b>	Ukrainian law does not expressly regulate funded or risk participations. As a result, they are not used in pure domestic deals but are occasionally used in cross-border transactions. An offshore participation agreement between two non-Ukrainian entities does not trigger any requirement to amend the registration certificate and no actions need to be performed under Ukrainian law. Ukrainian banks can enter into participation agreements in respect of loan agreements with Ukrainian borrowers. However, if a Ukrainian lender wants to enter into a participation in respect of a loan agreement with a foreign borrower, the participation agreement must be structured carefully to avoid breaching the NBU’s prohibition on Ukrainian banks providing loans to foreign entities. They are therefore rare in practice.

## Guarantees and Security

Because Ukrainian law governed security is accessory security, if a lender assigns its rights under the loan agreement to a new lender, it must also assign its rights under the security documents. If there is an English law novation, there is a risk that Ukrainian law governed security, as accessory security, would terminate upon a termination of the secured obligations. It may be possible to contractually disapply this effect. In practice, novations are used in unsecured transactions.

Security trust structures are not effective in Ukraine because the concept of trust is not recognised: security must be granted to a creditor. Two structures are currently used to address these issues: (i) a parallel debt structure (i.e. a structure where all obligors agree to owe to the security agent sums equal to those which they owe to the lenders from time to time thereby creating a parallel debt vis-à-vis the security agent in respect of which security is granted); and (ii) a joint and several creditors structure where all lenders are made joint and several creditors of the borrower. A lender can claim an amount from the borrower which represents the indebtedness owed to that lender and any other lender with which that lender is joint and several. Security is granted in favour of one of the joint and several lenders which can enforce the security which secures the full indebtedness. The recovering lender would then share the proceeds among itself and the other joint and several lenders on a pro rata basis.

Ukrainian companies (other than banks or financial institutions) lack the capacity to enter into what Ukrainian law calls *garantiya*, the English law equivalent of which is the “indemnity” in a “guarantee and indemnity”. However, Ukrainian companies have the capacity to enter into what are called *poruka*, the English law equivalent of which is a “suretyship” or “guarantee”. The principal difference between these two instruments is that a *poruka* is contingent on the continuing validity and existence of the underlying obligation under the loan agreement, whereas a *garantiya* is not. The loan agreement usually provides for *poruka* to be granted in favour of “finance parties” which includes any transferees/assignees who become lenders of record.

# Ukraine



## Confidentiality

Generally, a lender has a duty of confidentiality to its customer and disclosure by a lender of the borrower's confidential information requires the borrower's consent. Such confidentiality is usually subject to various disclosure permissions set out in the finance documents, including disclosure of confidential information to potential and actual transferees and assignees (subject to a receipt of a confidentiality obligation).

## Standard Contractual Restrictions/Issues

<b>Role of the Ukrainian account bank</b>	The borrower must have a local account bank which acts as a "currency control agent" and ensures that the borrower complies with the registration certificate and its payment obligations under the loan agreement. The account bank can be a third party bank or the agent or one of the other finance parties. If it is one of the finance parties, this may facilitate enforcement of the borrower's payment obligations under the loan agreement.
<b>The borrower's consent</b>	The borrower's consent may be required for an assignment or transfer.
<b>Replacement of facility agent</b>	A change to the facility agent may require the registration certificate to be updated. In addition, the operation of clauses in standard English law governed loan agreements which, for example, provide alternative payment arrangements should the facility agent become insolvent need to be considered carefully in the context of the NBU registration requirements.

## Tax

<b>Withholding tax</b>	<p>Interest on loans paid by Ukrainian borrowers to foreign lenders is classified as Ukrainian source income and is subject to 15% withholding tax. However, if a lender benefits from a double tax treaty with Ukraine, it may be fully or partially exempted from Ukrainian withholding tax treaty, provided that certain conditions are satisfied. In particular, a Ukrainian resident entity must obtain a residency certificate from a non-resident entity confirming its residency and a beneficial ownership test must also be met. Ukraine is currently a party to 67 double tax treaties, including with the UK, US, Spain and Switzerland.</p> <p>It is usual for loan agreements to provide for the borrower to gross up payments of interest. There are common exceptions to this, including where a transferee is not a "Qualifying Lender" e.g. it does not benefit from a double tax treaty with Ukraine. Note that Ukrainian law prohibits the inclusion of provisions in contracts where one party undertakes to pay the taxes of another party. As a result, there is uncertainty about the enforceability of tax gross-up and tax indemnity clauses. While tax gross-up provisions are normally drafted as payments of an increased amount rather than as payments of tax, there is a risk that these provisions could be characterised as a payment of tax of another person and held invalid on those grounds. In some recent cases the NBU has refused to register loan agreements containing tax gross-up language.</p> <p>In the case of a funded participation, payments from the grantor to the participant may be subject to withholding tax as they are separate payments of interest. The above exemptions may apply, however, if they do not, the participation agreement does not usually provide for a gross-up by the grantor.</p> <p>In the case of a risk participation, no interest is paid so withholding tax should not apply.</p>
<b>Stamp Duty</b>	Ukraine does not have stamp duty.
<b>Notarial fees</b>	Notarial fees may be payable in certain circumstances e.g. in order to enforce the finance documents in Ukraine. Some finance and security documents also require to be notarised.



# Ukraine



## Compliance

Loan agreements and the trading of loans in the secondary loan market have generally not been regarded as regulated instruments for the purposes of the Ukrainian financial regulation. However, the anti-money laundering regime (e.g. “KYC”) is relevant and must be complied with.

## Other Issues

<b>Transfers</b>	Because transfers to foreign lenders require the borrower’s co-operation in order to amend the registration certificate, it is problematic if this is absent (which may be the case if the borrower is in default or insolvent): without amendment of the registration certificate, the transferee cannot receive payments under the loan agreement. In practice, this may not be such an issue if payments are made through the facility agent. However, if payments are made through the facility agent and the registration certificate is not always updated due to there being no change to the payee, a subsequent lender must produce all the documents evidencing the chain of transfers if it wants to have the registration certificate updated e.g. the facility agent has become insolvent and the lender wants to obtain payments directly from the borrower.
<b>Licence to make payments</b>	A Ukrainian borrower or guarantor under a loan agreement requires a license from the NBU to make payments to a foreign entity. Certain exemptions apply e.g. payments of principal and interest under a cross-border loan agreement, provided that the loan agreement is registered with the NBU. However, the exemption does not cover all payments under a loan agreement e.g. payment of costs and expenses. Therefore, a license is likely to be required for a Ukrainian borrower to make all payments under the loan agreement. The Ukrainian borrower and/or guarantor are responsible for obtaining the licenses. They cannot be obtained in advance and are granted at the discretion of the NBU which does not always grant them. Where the NBU decides to grant a license, it can take several months to be issued.
<b>Foreign currency and borrowing to make payment under guarantees</b>	The NBU regulates the purchase of foreign currency in Ukraine which can be problematic for borrowers and guarantors making payments to foreign lenders in foreign currencies. Even if a guarantor (a surety) has a NBU license, it may not be permitted to purchase foreign currency to make a cross-border payment under a guarantee and may need to use its own foreign currency reserves. In addition, Ukrainian entities are not permitted to use the proceeds of a loan to make payments under a guarantee (suretyship).
<b>Cost of funding cap</b>	The NBU has in place a “cost of funding cap” on all cross-border loans, except for cross-border loans granted by certain international financial organisations (e.g. the EBRD and the IFC). Borrowers are not permitted to make payments under a loan agreement to the extent that the total cost of funding the loan exceeds the cap. The current cap rates for term loans are 9.8% to 11% per annum depending on their term and for floating rate loans are LIBOR for three months USD deposits plus 7.5%. In determining the cost of funding, all costs, including interest, default interest, fees, costs and expenses are included in the calculation, irrespective whether it is an actual payment, such as interest, or a contingent payment, such as a default interest or a commitment fee. How the NBU calculates the cost of funds is not clearly regulated and the practice of the NBU can be inconsistent. Borrowers should therefore clarify the cost of funds with their Ukrainian account bank before signing a loan agreement to avoid having to make subsequent amendments.
<b>Ukrainian language</b>	Ukrainian law requires that a Ukrainian language version of any contract be signed. The parties can also agree to sign the document in multi languages. To the extent of any inconsistency, the parties can agree which language will be the determinative language for the purposes of interpretation. As a practical matter, in light of the NBU registration requirements, the documents reflecting the transfer of the loan would in most cases require execution in the Ukrainian language.
<b>Signing in counterparts</b>	Pursuant to Ukrainian law, a Ukrainian law agreement must be executed as a single document. Foreign law governed documents signed by a Ukrainian entity can be signed in counterparts.

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