

TRADE ALERT

May 2016, Issue 29

CZECH
REPUBLIC

The Czech Republic is one of the two successor states established in 1993 upon the dissolution of Czechoslovakia.

The [Constitution of the Czech Republic](#) ("CCR") was adopted on 16 December 1992 and defined the Czech Republic as a "sovereign, unitary, and democratic state governed by the rule of law." ([Article 1\(1\) CCR](#)).

The Czech Republic has a civil law system, whereby legal principles and legal procedures are codified and only written laws (*právní řád České republiky*) are recognised as the formal source of law, which include: (i) legal regulations (acts of parliament and delegated legislation); and (ii) international treaties.

In 2013, the [Czech National Bank](#) ("CNB") introduced a new monetary policy, whereby it started staging foreign exchange interventions to deliberately weaken the Czech currency ("Koruna" or "CZK"). On 5 May 2016, the CNB board unanimously decided to **keep interest rates unchanged**. According to the CNB's [announcement](#), the board anticipates this measure to be discontinued around mid-2017.

In this month's Trade Alert, we highlight the key legal issues for debt investors to consider **when trading loans in the Czech Republic**.

BANKING LICENCE REQUIREMENTS

A banking license is required to lend to a Czech borrower where there is an on-going obligation to lend. However, **it may be possible to rely on an exception for a transaction made on a "one-off" basis** if the lending activity will not be recurring, or **where the investor acquires a fully funded term loan by assignment**. A "one-off" basis lending activity includes the single transfer of a loan (including the transfer under a revolving credit facility) from a Czech banking entity to an entity **that is not planning on engaging in long-term business activities**.

METHODS OF LOAN TRANSFER

- (i) **Assignment:** This method allows for the transfer of the rights (but not the obligations) of a contract. For an assignment to be enforceable the assignor must **notify the borrower**, or provide the borrower with a proof of transfer. Obligations of a contract (such as the obligations to make payments) may be transferred by way of an assumption of obligations. The assigned rights and assumed obligations need to be explicitly set out in the agreement, otherwise the assignment may be deemed invalid.


[Contacts](#)
NOTABLE
TRANSACTIONS

CZECH REPUBLIC

1. OKD A.S.

On **9 May 2016**, the Czech mining company OKD a.s. ("OKD"), which operates as a subsidiary of New World Resources Plc ("NWR"), **was declared bankrupt by the Regional Court of Ostrava**. [Reuters reports](#), creditors have **two months to file their claims** ahead of the **creditors' meeting set to be held on 10 August 2016**.

Bloomberg [reported](#) that OKD is "**the largest Czech company by revenue to file for insolvency** since new legislation took effect in 2006." OKD owes to 650 creditors circa. **CZK 17.2billion** (EUR 650million), while its assets are worth no more than **CZK 7billion** (EUR 259million).

Following the announcement on 3 May 2016 regarding the filing of an insolvency petition on behalf of OKD, **shares in NWR were suspended from the London Stock Exchange, Prague Stock Exchange and Warsaw Stock Exchange**.

According to a [press release](#) issued by OKD, "As OKD is the only trading subsidiary of the NWR Group, **the likely impact of the insolvency of OKD is that the remainder of the NWR Group will be wound up**".

REPUBLIC OF AUSTRIA

2. HETA ASSET RESOLUTION AG

HETA Asset Resolution AG ("HETA"), was formed in 2014 as the "bad bank" following the collapse of the Austrian bank **Hypo-Alpe-Adria-Bank International AG**.

In early 2015, HETA was found to have a deficit of circa. **EUR 7.6 billion** following the publication of its [Annual Financial Report](#).

- (ii) **Transfer of a Contract:** Following the 2014 reforms, unless excluded by the nature of a contract, an assignor may transfer rights and obligations under a contract or part thereof to a third person (without novating or amending the contract) if: (i) the **borrower consents** to it; and (ii) **there are outstanding obligations** under the contract.
- (iii) **Participations:** This method allows a participant to enter into a derivative-like contract whereby the existing lender, as grantor, remains the lender of record and the participant funds the grantor so it can fulfil its obligations under the credit agreement. In return, the grantor pays the participant an amount equal to any capital and interest repayments received from the borrower.

SECURITY AGENTS AND TRUSTS

2014 witnessed the legal reform of the [Civil Code \(Act 89/2012\)](#) and implementation of the [Business Corporations Act \(Act 90/2012\)](#). These reforms introduced new concepts for lending and secured transactions including the concept of trusts (*svěřenský fond*).

However, whilst the new provisions recognise the trust concept, trust structures remain unpopular.

The two structures that are commonly used are: (i) trust structure with a security agent (zajišťovací agent); and (ii) parallel debt structure.

- (i) **Trust Structure with a Security Agent:** Generally, in syndicated loan agreements governed by Czech law, security and guarantees would be held by the security agent (who is usually a lender) through a "joint creditorship" structure. The security agent would usually act as a joint and several creditor with the other lenders.
- (ii) **Parallel Debt Structure:** Whereby the obligor consents to owing a separate obligation to the security agent in a sum equal to that which they owe to the lenders under the finance documentation. The security agent holds the benefit of the parallel obligations for the lenders from time to time.

ENFORCEMENT OF A LOAN

To enforce an overdue claim in the Czech Republic, a creditor must obtain an "**enforcement title**" which can be done either:

- (i) through a *direct enforceability deed* which would need to be signed by a notary or executor, whereby the debtor agrees to the direct enforcement of its debt.

The direct enforceability deed may be requested by lenders as a condition precedent to funding. If this is the case it may be possible to assign the benefit of this deed along with the assignment of the commitment under the credit agreement.

- (ii) through court or arbitration proceedings. However, it can take several years to obtain enforceability title through court proceedings.

As at 1 March 2015, the Financial Market Authority of Austria ("**FMA**") imposed upon HETA the Austrian Federal Act on the Recovery and Resolution of Banks ("**BaSAG**"). **As a result, a 15 month moratorium** was put in place on debt securities and liabilities issued by **HETA** which **is due to expire on 31 May 2016**.

The BaSAG came into effect as an Austrian implementation of the **EU Bank Recovery and Resolution Directive**. Its aim is to implement orderly resolutions of institutions and to enable creditors not to be placed in a worse position than they would have been in had the institution been in insolvency proceedings. The FMA is currently working on a new resolution plan for HETA.

Further information is available on the HETA website: [Information for Creditors and Investors publication](#).

KINGDOM OF SAUDI ARABIA

3. AHMAD HAMAD ALGOSAIBI & BROTHERS COMPANY

In an effort to resolve the circa. 7 year legal dispute, between **Ahmad Hamad Algosaibi & Brothers Company ("AHAB")** and **Maan Al Sanea's Saad Group**, the Supreme Judicial Council of the Kingdom of Saudi Arabia established a three-judge tribunal, the Joint Directorate of Enforcement at the General Court in Al-Khobar ("**JDEK**"). The JDEK will be tasked with resolving the on-going dispute.

Simon Charlton, the acting Chief Executive Officer and Chief Restructuring Officer of AHAB, stated that "The company views the appointment of the tribunal as a positive step forward that it believes will bring an end to the long-running disputes." He added that "**AHAB is confident of making recoveries through these civil and criminal claims such that the return to Claimants through a consensual settlement will be significantly greater than those that would otherwise be available.**"

Further details can be found in an [article](#) by PR Newswire.

ITALY

4. ITALIAN DEBT ENFORCEMENT AND INSOLVENCY PROCEDURES

On **4 May 2016**, the Italian Law Decree no. 59 of 2016 (the "**Decree**"), came into force following its publication on the Italian [Gazzetta Ufficiale](#). The Decree will become effective following the implementation of

Once the “enforcement title” has been obtained, creditors can then enforce against assets (including assets which are subject to security created in favour of the creditor) of the debtor or assets of a third party provided as security for such claim.

TAX AND STAMP DUTY

Interest paid on a loan by a Czech borrower to non-Czech lenders is generally subject to a **15% withholding tax (“WHT”)**. The WHT can be reduced or eliminated under the rules of the EU Interest-Royalties Directive or under an applicable double-tax treaty.

Currently, the Czech Republic has double-tax treaties with 85 countries including the US, Hong Kong and all EU states.

A **35% WHT** applies to lenders from countries which do not (i) have a double tax treaty with the Czech Republic; or (ii) have a tax information exchange agreement.

Where a funded participation is structured to give the grantor “off-balance sheet” treatment, payments made under the funded participation may be subject to WHT as these may be deemed to be distinct from interest payments.

No stamp duty or similar documentary taxes are payable under Czech law on the transfer of a loan.

POST-TRANSFER FORMALITIES

Generally, there are no post-transfer formalities for a loan agreement, other than notice of assignment to the borrower.

The transfer of security instruments might require registration of the changes in the public registers, such as the Commercial Register or the Cadastral Register.

Where a pledge agreement is made in the form of a notarial deed, **the fee is set according to the value of the secured obligation**. If however, the pledged asset’s value is lower than the value of the secured obligation, the fee shall be calculated based on the value of the pledged asset.

The rate of a notarial fee ranges from **0.05% to 2%** of the obligation and the minimum fee is **circa. CZK 1,000 (EUR 37)**.

Fees for the registration of a real estate mortgage in the cadastral register are usually small, **circa. CZK 1,000 (EUR 37)**.

There may be a duty to notify the CNB on cross-border financial transactions, however this applies to parties who have received a request from the CNB.

Special Note:

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DISCLOSURE OF INFORMATION

IS THERE A DUTY OF CARE?

IFE FUND SA v Goldman Sachs [2007]

Where sellers conduct a loan sale process through an auction, they may be required to disclose certain additional information to buyers relating to the underlying loans than is usually provided when a loan is traded through a broker on the secondary market. The IFE FUND SA v. Goldman Sachs case considered whether the information

new laws, which should occur no later than 60 days following the date of publication.

The key aims of the new decree include: (i) encouraging banks to lend to companies; and (ii) making the debt recovery and enforcement proceedings more efficient. It is anticipated that these aims would be achieved by amongst other things, introducing new categories of Italian law security interests and implementing new procedural measures.

For further information, click [here](#) for a newsletter published by law firm [Chiomenti Studio Legal](#).

UNITED KINGDOM

5. OW BUNKER TRADING A/S

On 11 May 2016, the UK Supreme Court **unanimously dismissed an appeal made by two clients of OW Bunker Malta Limited (“OWB Malta”)** (a subsidiary of OW Bunker Trading A/S). The appellants, PST Energy 7 Shipping LLC (“PST”) and Product Shipping and Trading S.A., sought to overturn the decision whereby OWB Malta was entitled to receive payments for the fuel it had delivered to PST prior to its collapse in 2014. The appellants initially argued that OWB Malta had not transferred the title of the “goods” to them and were therefore not required to make payments.

In 2014, PST entered into a contract with OWB Malta to buy bunkers (marine fuel). OWB Malta subcontracted delivery of the bunkers to PDTs vessel to Rosneft Marine (UK) Ltd (“Rosneft”). Around the time that the fuel was delivered, OW Bunker Trading A/S (along with its subsidiaries) filed for bankruptcy and the payments under both contracts were not made.

It was held that OWB Malta's failure to: (i) pay its supplier, Rosneft; and (ii) transfer title of the bunkers did not release PST from its obligation to make the payment due under the contract.

Whilst the litigation was of a relatively low value, it may have a greater impact on numerous similar disputes as it may leave buyers around the world liable to make such payments.

The full case judgement is available here: [PST Energy 7 Shipping LLC and another -v- O W Bunker Malta Limited and another \[2016\] UKSC 23](#)

SPAIN

provider (Goldman) owed any duty of care to an investor fund (IFE).

The Court of Appeal confirmed a High Court ruling on 31 July 2007 which limits the responsibilities owed by an arranger to members of a syndicate.

Goldman Sachs International ("GS") had arranged the credit syndication to provide Autidos SA ("Autidos") shares in Finelist PLC ("Finelist"). GS prepared and distributed the information memorandum to prospective investors, including IFE Fund SA ("IFE"). IFE then purchased bonds and warrants issued by Autidos. However, between the time information memorandum had been issued and IFE's investment, a report was published with information that appeared to be depart from the content provided in the information memorandum. Finelist later went into receivership and was subsequently restructured. As result, Autidos incurred significant losses. IFE brought a claim for damages against GS for the losses it incurred.

The courts rejected claims made by IFE. It was held that GS did not:

- (i) **did not owe a duty of care** to disclose additional information provided by the Finelist's auditors after the original documentation had been circulated; and
- (ii) **did not make implied representations** about Finelist's financial status.

Toulson J held that **"GS was not acting as an adviser to IFE or purporting to carry out any professional service for IFE. In general, a party involved in negotiations towards a commercial venture owes no positive duty of disclosure towards another prospective party."**

The full case is available here:

<http://www.bailii.org/ew/cases/EWCA/Civ/2007/811.html>.

CONTACTS



Shelley Kay

Associate, London

shelley.kay@cwlt.com

+44 207 170 8664

Shelley Kay is an associate in the [Financial Restructuring Group](#) in Cadwalader's London office.

Shelley specialises in distressed debt and claims trading. She represents investment funds, brokerage firms, hedge funds and other financial institutions in connection with the acquisition and sale of syndicated bank loans, debt instruments, bond claims and distressed assets, in particular insolvency claims within Europe, the United States and Asia.

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6. DEOLEO S.A.

Spanish company Deoleo S.A. ("Deoleo") reported its 2016 first quarter results in a stock exchange statement on **5 May 2016** (click [here](#) for the statement in Spanish and [here](#) for the full report in English).

Deoleo's **net financial debt is circa. EUR 548.4 million** (which is **up 4.4% from the 2015 first quarter**).

Deoleo announced that the next general shareholders meeting will be held on **28 May 2016**.

ICELANDIC UPDATE

LIBERALISATION OF CAPITAL CONTROLS

On 23 May 2016, a bill submitted by the Icelandic Minister of Finance and Economic Affairs, Bjarni Benediktsson, was passed with 47 members voting in favour of the bill.

The [Icelandic Ministry of Finance and Economics Affairs](#) (the "IMFEA") stated that "the bill is a part in the comprehensive capital account liberalisation strategy introduced by the Icelandic authorities in June 2015." The bill, amongst others, addresses the issue of "offshore krónur."

According to the IMFEA, the "offshore króna" **assets** (such deposit funds held in custodial accounts and bonds) **currently total over ISK 300 billion** and asset holders "are considered highly likely to seek an exit from the Icelandic economy with potentially negative consequences for the balance of payments and financial stability."

The Central Bank of Iceland will aim to hold a foreign currency auction in which all owners of offshore krónur will be given the option of exchanging their offshore króna assets for euros. Offshore króna assets that are not exchanged in the Central Bank auction will be subject further restrictions outlined in the new bill.

Further information is available on the [IMFEA website](#).

KAUPTHING EHF.

On **13 May 2016**, Kaupthing ehf. [published](#) the [management accounts](#) for the period from 1 January 2016 to 31 March 2016.