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*The*  
**BOOK**  
*of*  
**JARGON**<sup>®</sup>  
**European Markets**

The Latham & Watkins Glossary of  
European Capital Markets and Bank  
Finance Slang and Terminology

First Edition

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A couple of years ago, some clever members of our corporate and finance departments in the US sat down and created *The Book of Jargon*, subtitled “The Latham & Watkins Glossary of Corporate and Bank Finance Slang and Terminology”. As stated in its introduction, it was intended to be a sort of “Berlitz Course” for recent law school and business school graduates seeking initiation into the world of Wall Street, and a desktop reference for not-so-recent graduates. And what a success it has been, even now available as an app for the technology savvy amongst us. But to adapt a well known saying, the US finance community and the European finance community can often be two worlds divided by a common language (and in certain cases, even the language is different). The aim of this publication is therefore to help those of us on this side of the pond in the same way that our original US publication has become so invaluable to many, although we believe it will also be of interest to those involved in finance around the rest of the world. We aim to assist you with the slang, terminology and down-right confusing phrases used in European capital markets (including high yield), corporate and bank finance deals (and their restructuring), essentially just enough knowledge to make you dangerous and hopefully make you look smart.

Welcome to our world.

*The definitions contained here are designed to provide an introduction to the applicable terms. The terms included herein raise complex legal issues on which specific legal advice will be required. The terms are also subject to change as applicable laws and customary practice evolve. As a general matter, The Book of Jargon European Markets is (as the name suggests) drafted from a European practice perspective but we confess to having liberally plagiarized where applicable from the original Book of Jargon. Readers might also like to check out another publication in this series The Book of Project Finance Jargon, subtitled “The Latham & Watkins Glossary of Project Development, Acquisition and Finance Slang and Terminology”.*

*The information contained herein should not be construed as legal advice.*

*If you have any suggestions for additional terms or expanded or clarified definitions for the current terms, please send an e-mail to [europianglossary@lw.com](mailto:europianglossary@lw.com).*

*2.5*: used in the context of P2Ps and shorthand for the announcement required by Rule 2.5 of the Takeover Code being an announcement of a firm intention to make a takeover offer. It is very difficult to avoid making a bid once the 2.5 has been made. Also referred to as the Press Announcement but never referred to as the "two and a half".

*4(2)*: shorthand for Section 4(2).

*10b-5 Opinion*: see Negative Assurance Letter.

*10b-5 Rep*: another name for a Rule 10b-5 Representation.

*135 Day Rule*: relevant to Bond world and the Financial Statements of the Issuer. SAS 72 permits an accounting firm to give negative assurance that it is unaware of certain specified changes in Financial Statement amounts up to a date that is less than 135 days from the end of the most recent period for which the accounting firm has performed an audit or review. Accounting firms routinely refuse to give such negative assurance post 135 days from the end of the most recent reviewed or audited period (even for Reg S Only deals).

*144A for Life Offering*: a Rule 144A Financing that does not provide Registration Rights for the buyers of the Securities. Accordingly, the Issuer in a 144A for Life Offering is not required to become a Reporting Company under the US Exchange Act. In Securities offerings in Europe that include a US tranche, the US tranche is typically a 144A for Life Offering.

*144A Offering*: another name for a Rule 144A Financing.

*21 Day Rule*: a German Insolvency rule that also translates into English as "everybody panic". Management of a German company must file for Insolvency no later than three weeks after the company becomes insolvent and face criminal sanctions and personal liability if they fail to do so. In a restructuring there are often ways found to address the state of Insolvency and thus avoid the need to file. Not to be confused with Day 21.

*'33 Act*: another name for the US Securities Act.

*'34 Act*: another name for the US Exchange Act.

*'40 Act*: another name for the US Investment Company Act.

*404 Compliant*: an Issuer that is compliant with SOX Section 404.

*"A" Loan*: another name for a Facility A Loan.

*AAOIFI*: acronym for Accounting and Auditing Organisation for Islamic Financial Institutions. AAOIFI performs a review of developments in the Islamic finance sector and issues guidance papers.

*AAU*: acronym for Agreement among Underwriters.

*A/B Exchange Offer*: this is the process that allows you to flip (or exchange) the private Notes that were issued in a Rule 144A Offering with Registration Rights into SEC-registered Notes. The A/B Exchange Offer is an SEC registered Exchange Offer that takes place within a certain period of time after the Closing of a Rule 144A Offering. In order to comply with its obligations under the Registration Rights Agreement, the Issuer makes an offer to holders of the Rule 144A Notes to exchange those Notes for registered, freely tradable Notes (that otherwise have the same terms). A/B Exchange Offers can be used for Investment Grade and High Yield Notes, but not Convertible Notes. Exchange Offers are also known as Exxon Capital Exchange Offers. Recent changes to Rule 144 have had significant effects on the likelihood of A/B Exchange Offers. See Latham & Watkins Client Alert No. 669, *The Future of Registration Rights in Private Offerings of Debt Securities* (22 January 2008), available at [www.lw.com](http://www.lw.com).

*ABL*: acronym for Asset-Based Loan.

*ABS*: acronym for Asset-Backed Security.

*Absolute Priority Rule*: a term primarily used in US Bankruptcy law, being the rule which states that when a company is liquidated or reorganised, senior classes of claims and equity interests must receive full distributions on account of their claims or equity interests before junior classes may receive any distributions, unless the senior classes consent otherwise.

*Accelerated Filer*: a category of Issuer created by SEC rules. An Issuer's status as an Accelerated Filer, as opposed to a Large Accelerated Filer, a Non-Accelerated Filer or a Smaller Reporting Company, determines when its Financial Statements go Stale and when it has to comply with SOX Section 404. An Issuer qualifies as an Accelerated Filer if (i) its Public Float is between US\$75.0 and US\$700.0 million as of the last business day of the second fiscal quarter of the Issuer's preceding fiscal year and (ii) it has been subject to the requirements of Section 13(a) or 15(d) of the US Exchange Act for at least 12 months, including the requirement to file an annual report. Once an Issuer is in Accelerated Filer land, its Public Float has to fall below US\$50.0 million to get out. See Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com).

*Acceleration*: the end of the line in Bond and loan world. The definitions of Default and Event of Default describe how we get there. Following an Event of Default, the Bondholders (in accordance with the Terms and Conditions or the Indenture) or Lenders (under a Credit Agreement) have the right to "accelerate" the Due Date of their debts; in other words, they have the right to declare their Bonds or loans immediately due and payable. Note that practice in the US (and in European Indentures) is for Insolvency Events of Default to automatically lead to Acceleration, however this is uncommon in Europe bank financings. Note that

Acceleration can lead to an obligation on the officers of the Issuer/Borrower to file for Insolvency, thereby precluding the ability to agree a consensual out-of-court restructuring. See also Place on Demand.

*Accordion Feature*: so called because it resembles the expanding musical instrument whose name it shares, this is a feature in a Credit Agreement that allows the Borrower to increase the maximum commitment amount under a Revolver or to incur additional Term Loan debt under circumstances specified in the Credit Agreement. The Accordion, however, is not pre-committed financing. It is really just an advance agreement to permit the additional debt within agreed parameters and to provide for it to share in the Collateral in the future if the Borrower can find Lenders willing to provide the debt. Also known as an Incremental Facility.

*Accordo di Ristrutturazione*: a pre-Insolvency procedure for company restructuring in Italy. Filing brings about a stay on creditor action for 60 days, and the company can obtain an immediate stay preceding the agreement in certain circumstances. Must be supported by an *Esperto's* report and approved by 60 per cent of the company's creditors by value and by the bankruptcy court. Unlike the *Concordato Preventivo* this procedure is only effective as between the company and participating creditors.

*Account*: can mean many different things but in Bond world this term is a shorthand reference to the potential buyers of Securities in an offering.

*Account Control Agreement*: this is how Lenders in a secured financing Perfect their Security Interest in a Borrower's deposit and securities accounts located in the US. It is an agreement among the Borrower, the Security Agent and the bank or securities intermediary where the Borrower has its deposit or securities account.

*Accredited Investor*: defined under SEC Rule 501 of Regulation D, this refers to people and entities that are permitted to buy Securities in a Private Placement. The term covers virtually all the types of institutions that are participants in the Private Placement market, and also includes people who are either rich or sophisticated. It is, of course, better to be both rich and sophisticated, but one will do for Regulation D purposes.

*Accreted Value*: this is the original purchase price of a Zero Coupon Bond or Discount Note plus all non-cash Interest that has accrued on the Bond or Note since the date of issuance. The calculation of Accreted Value is set forth in the Terms and Conditions or the Indenture.

*Accrued Interest*: Interest that has been earned but has not yet become due and payable (or which has been due but has not been paid) by the Issuer or Borrower.

*Acquisition Facility*: a Delayed Draw Term Facility intended to be used to fund acquisitions. Often combined with a Capex Facility.

**Acquisition Proceeds Prepayment:** a specific type of Mandatory Prepayment. This provision in a Credit Agreement requires the loans to be prepaid with the net cash proceeds of claims under the SPA and against the providers of Due Diligence reports. This prepayment requirement is often subject to a Reinvestment Right.

**Acting in Concert:** European jurisdictions take into account the fact that a publicly listed company may be controlled by several minority shareholders who are Acting in Concert rather than one sole majority shareholder. The details of this concept varies from jurisdiction to jurisdiction but for example in the UK the City Code defines persons Acting in Concert as those persons who pursuant to an agreement or understanding (whether formal or informal), actively co-operate, through the acquisition by any of them in shares in a Target to obtain or consolidate control of the Target (see Concert Party). Other countries will use the term differently.

**A'd:** an Islamic finance term meaning a promise (a unilateral or mutual promise); e.g., used in the context of purchase undertakings and sale undertakings in *Ijara* lease transactions to purchase the lease asset at the end of the term of the lease.

**Additional Cost Rate:** another name for Mandatory Costs.

**Adjusted EBITDA:** EBITDA on steroids. Refers to EBITDA, adjusted to eliminate the impact of certain unusual or non-cash items that the Issuer or Borrower (or its Sponsor) believes are not indicative of the future performance of its business. In Credit Agreements, this term can also refer to EBITDA adjusted on a Pro Forma basis for acquisitions and disposals, i.e., when measuring EBITDA for a particular period, any acquisition or disposal in that period is deemed to have happened on the first day of such period so the EBITDA of the acquired/disposed of asset is gained/lost for the whole period. For Reporting Issuers, disclosure of EBITDA, Adjusted EBITDA and other "non-GAAP financial measures" must be done within the confines of Item 10 of Regulation S-K (in the case of certain public filings) and Regulation G of the SEC (in all cases). A form of Adjusted EBITDA is also a component of the Leverage Ratio and Fixed Charge Coverage Ratio definitions.

**'Adl:** an Islamic finance term meaning justice, equity or fairness in Islamic jurisprudence.

**Admin Agent:** shorthand for Administrative Agent.

**Administrador Concursal:** person appointed by a Spanish Insolvency court to either supervise or fully manage an insolvent company. In most Insolvencies there must be three administrators: (i) a lawyer; (ii) an auditor or economist; and (iii) a creditor holding an ordinary or non-secured generally privileged claim. For more information on Spanish Insolvency, see Latham & Watkins Client Alert No. 872, Spanish Insolvency Act Changes — Paving the Way for Restructurings (29 May 2009), available at [www.lw.com](http://www.lw.com).

*Administration:* a formal Insolvency process in England designed to facilitate the rescue of an insolvent company or achieve a better return to creditors than if the company immediately went into liquidation. It involves the control of the company passing from the directors to an Administrator and a Moratorium on most secured claims and unsecured claims. The procedure has gained notoriety through the use of Pre-packs.

*Administrative Agent:* another name for the Facility Agent.

*Administrator:* a licensed UK Insolvency practitioner (usually an accountant) who is appointed by the court, the company's directors or by certain qualifying Secured Parties for the purposes of Administration.

*Admission and Disclosure Rules:* the rules, published by the UKLA, containing the admission requirements and the ongoing disclosure requirements which companies with Securities admitted to trading on the markets of the LSE have to observe. The rules do not apply to companies admitted to AIM.

*ADR:* acronym for Alternative Dispute Resolution or American Depositary Receipt.

*Affiliate:* defined slightly differently in different types of agreements and jurisdictions, but generally refers to a subsidiary, corporation, partnership, or other person controlling, controlled by or under common control with another entity. For US folk, the official SEC definition is found in SEC Rule 144.

*Affiliate Transactions Covenant:* a Negative Covenant that protects against disguised dividends by preventing the Issuer or Borrower from entering into non-arm's-length transactions with its Affiliates, such as paying excessive management fees to deal Sponsors, selling assets to equityholders for less than fair market value or overpaying equityholders/employees through excessive salaries. In Bond world, the Affiliate Transactions Covenant typically does not flatly prohibit Affiliate transactions, but rather requires that they be on arm's-length terms and, at certain value thresholds, be approved by disinterested directors. Fairness Opinions are also sometimes required.

*AFME:* acronym for The Association for Financial Markets in Europe.

*AFME / EHYA:* AFME's activities in leveraged finance are conducted through the European High Yield Association, now known as AFME / EHYA.

*Agency Fee:* another name for the Facility Agent Fee.

*Agent:* generic term used to describe any of the Facility Agent, Security Agent, Documentation Agent and Syndication Agent.

*Agreed Security Principles:* used most frequently in loan world, these are typically contained in a schedule to the Credit Agreement and provide the negotiated framework for which Collateral is required to be given in respect of the relevant transaction. Agreed Security Principles



will contain a description of the secured obligations (including any limitations), guidelines with respect to how Collateral will be taken and Perfected, and what obligations the Collateral giver will be under in the relevant Security Agreement.

*Agreement among Initial Purchasers or Underwriters:* the agreement that governs the relationship among the Initial Purchasers (in a Rule 144A Financing and Regulation S offering) or Underwriters (in an SEC-Registered Offering). See EHYA Agreement among Initial Purchasers and Master Agreement among Underwriters. There is no directly comparable document among the members of a bank loan Syndicate, mostly as a matter of custom. See, however, Syndication Agreement.

*AICPA:* acronym for the American Institute of Certified Public Accountants, Inc.

*AIM:* originally known as the Alternative Investment Market and abbreviated as AIM, the market is operated by the LSE and now known simply as AIM. It provides a more flexible regulatory environment than the Main Market of the LSE. AIM does not require a particular financial track record or trading history, an established management team or any minimum market capitalisation, nor does it require minimum thresholds regarding size or number of shareholders, and so it enables smaller and growing companies to access the public market.

*AJD:* acronym for *Actos Jurídicos Documentados*, the Spanish version of Stamp Duty.

*Al-Baik:* KFC but in the Western Province of Saudi Arabia only. If you are looking up Islamic finance terms, you might be somewhere, or about to go somewhere, where this knowledge comes in useful.

*All In Cost:* the total cost to a Borrower of obtaining the Credit Facilities, including fees, OID, Interest and other charges.

*Allocation:* see Allotment.

*Allotment:* also described as Allocation, when used in Bond world, this is the amount of a new issue of Securities allotted to each Syndicate member by the Lead Manager after the final terms of the issue have been fixed. Following Allotment, the Syndicate members will sell the Securities allotted to them to their investor clients.

*Allotment Telex:* the telex from the Lead Manager to the Syndicate members offering Allotments of the relevant Securities. Unlikely to have actually been sent by telex however for the last few decades.

*Alternative Dispute Resolution:* any process of dispute resolution out of court (and, in some uses of the term, also out of arbitration). Often preferred or required in addition to or in place of standard enforcement and jurisdiction provisions in certain emerging markets.

*Alternative Transactions Language:* a provision in the Fee Letter that says that the investment bank that has committed to a Bridge Facility will still get paid all or some of its agreed fees if the Borrower ends up funding the applicable facilities through a different bank. Sometimes this is negotiated down to either giving the original bank a right to play in any new deal (but not a guarantee of payment), or giving the original bank an amount of fees equal to what the alternative bank gets. Rarely seen with respect to Senior Secured Credit Facilities.

*Amanah:* an Islamic finance term for a trust, such as a bank account deposit.

*Ameen (also spelt Amin):* an Islamic finance term for a custodian or guardian, similar to a custodian or guardianship in common law jurisprudence.

*Amend and Pretend:* slang for entering into an Amendment or Waiver of Defaults rather than fixing more fundamental problems with a Capital Structure. The Amendment or Waiver is made and everyone then pretends all is OK. Is there anything really wrong with the head in the sand approach?

*Amendment:* a change to the provisions of an existing agreement. For instance, a Borrower might agree with its Lenders to amend its Credit Agreement to allow for more indebtedness to be incurred or an Issuer may amend its Terms and Conditions or Indenture to add a Call Option. See also Technical Amendment.

*American Depository Receipt:* a negotiable certificate issued by a bank or trust company and traded in the US markets that represent ownership of Securities of a non-US company. ADRs are denominated in US dollars, with the underlying Security held by a US financial institution overseas. ADRs are US Securities and are thus subject to US Securities regulations.

*'Amil:* an Islamic finance term meaning the person performing a task as an agent, like any agent in common law jurisprudence.

*AML:* acronym for Anti-Money Laundering. Same as KYC.

*Amortisation:* the required periodic repayment in instalments of portions of the principal of a Term Loan prior to its final maturity. Facility B Loans, Facility C Loans, Revolving Facilities, Second Lien Facilities, Mezzanine Facilities and Bonds generally do not Amortise. In accounting speak, Amortisation is the same concept as Depreciation, except that intangible assets are Amortised and tangible assets are Depreciated. See Depreciation.

*Amortisation Schedule:* the schedule of regularly timed repayments of principal prior to the maturity of a Term Loan. The Amortisation Schedule may be set forth in the Commitment Papers, or instead the maximum or minimum Average Life will be stated there and the Amortisation Schedule itself will be negotiated after and set out in the Credit Agreement. See also Amortisation.

*Amortising Loan:* usually a reference to a Facility A Loan.

*Ancillary Facility:* a facility made available on a bi-lateral basis by a Lender using mechanics established under a Revolving Facility and which reduces that Lender's commitments under the Revolving Facility accordingly. Established for operational ease when a Revolving Facility has been Syndicated since Ancillary Facilities are typically of a type such that they are best made available bi-laterally — examples of such facilities include overdrafts, short term loan facilities and foreign exchange facilities. Much more common in Europe than Swing Line Loans which are however frequently seen in the US.

*Angel Investor:* an investor (usually an individual as opposed to a corporation) that provides capital for a business start-up, usually in exchange for Preference Shares or equity ownership. Think "Dragons Den", a series of reality television programmes broadcast internationally featuring entrepreneurs pitching their business ideas in order to secure investment finance from a panel of insufferably smug Angel Investors/Venture Capitalists (the eponymous "dragons").

*Anti-Layering Covenant:* a Covenant that prohibits an Issuer or Borrower from Layering in another series of debt between the Senior Debt and the Subordinated Debt. This is essentially a no-cheating rule and in Bond world is only used in Senior Subordinated deals and in loan world has become more common in transactions with Senior Debt and a Mezzanine Financing. Back in Bond world, Senior Notes include an analogous provision that requires that all debt that Subordinates itself to any Senior Secured Credit Facilities also subordinate itself to the Senior Notes. The Anti-Layering Covenant ensures that the Subordinated Debt occupies the second class slot and not the third or fourth. This clause is an important consideration when looking to add a Second Lien Facility, "sandwiched" in-between the First Lien Facilities and unsecured Bonds, as they may be prohibited by the Anti-Layering Covenant.

*Anti-Money Laundering:* see KYC.

*Apostille:* a certificate issued pursuant to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Convention), which facilitates the circulation of public documents between state parties. It does so by replacing the cumbersome and often costly formalities of a full legalisation process with the mere issuance of a certificate called an Apostille. Instead of legalisation by the appropriate embassy, the notary's certificate and seal are certified as genuine by the competent authority of the state on whose territory the document has been executed. The Convention applies to public documents (such as a notarial act or a document with notarial authentication of signatures) executed in one state party to the Convention and to be used in another state party to the Convention. So now you know.

*Applicable Margin:* the additional percentage that is added to a particular Interest Rate index to determine the Interest Rate payable on variable rate debt. Generally, the Credit Agreement will set the Interest Rate at LIBOR or EURIBOR (as applicable) plus a specified percentage plus the Mandatory Cost. The specified percentage is usually referred to as the Applicable Margin or the Margin.

*'Aqar:* an Islamic finance term for immovable property, such as real estate.

*Arbitrage:* to take advantage of a price differential between two or more markets, such as by buying an investment in one market and then immediately selling it at a higher price in another market.

*'Arbun (also urboon or arboon):* an Islamic finance term for a down payment paid in advance, for example a non-refundable deposit paid by a buyer retaining a right to complete a sale.

*Arrangement Fee:* the fee paid to the Arranger for arranging and underwriting the Credit Facilities. Calculated as a percentage of the Credit Facilities that are being provided. Also known as an Underwriting Fee or Upfront Fee.

*Arrangement Letter:* see Auditor Arrangement Letter.

*Arranger:* the bank or financial institution that "arranges" (alone or with other co-Arrangers) a Credit Facility by negotiating original terms with the Borrower and Syndicating the facility to a larger group of Lenders. An Arranger generally has no ongoing obligations under a Credit Agreement after the Closing Date. Also used to describe the bank taking the lead on arranging an EMTN or GMTN Programme.

*ARS:* acronym for Auction-Rate Security.

*Asset-Backed Security:* a generic term describing Tranched, exchanged-listed Bonds issued by Special Purpose Entities backed by financial assets as mundane as residential mortgages ("residential mortgage-backed securities" or RMBS), commercial mortgages ("commercial mortgage-backed securities" or CMBS), automobile loans and leases, and credit card obligations, or as esoteric as casualty insurance claims ("catastrophe or "cat" bonds"), life insurance claims ("viatical settlement bonds") or changes in survival rates ("longevity bonds"). CBOs, CDOs, CFOs and CLOs are all also types of Asset-Backed Securities.

*Asset-Based Loan:* a Revolving Facility where the total amount that can be borrowed fluctuates based upon the value of the Borrowing Base at a given time. Asset-based lending is a way for companies to meet their short-term cash needs by borrowing against their short-term assets at favourable rates. Asset-Based Loans are particularly popular among retailers and other businesses with large amounts of accounts receivable and inventory but can be tricky (and therefore expensive) to structure in Europe given the difficulties in some jurisdictions in taking Security over the categories of assets used for the Borrowing Base. The Asset-Based

Loan market in the US is therefore significantly more developed than that in Europe. See Borrowing Base and Borrowing Base Loan.

*Asset Sale Covenant:* the Covenant in Terms and Conditions, an Indenture or a Credit Agreement that governs the sale of assets. In the Terms and Conditions or an Indenture, the Covenant assures that the Issuer's Balance Sheet stays in balance by making sure that if assets shrink, the Issuer either replaces the assets with new assets or reduces its debt. The company is allowed to sell assets under the Covenant, but it must get fair market value and mostly cash (typically 75-85 per cent). The proceeds must be used to repay certain types of debt, reinvested in long-term assets useful in the business or used to make an offer to repurchase Bonds at Par. In a Credit Agreement, by contrast, this Covenant strictly limits the Borrower's ability to sell assets, except as may be specifically negotiated on a deal-by-deal basis with limited Carveouts and Baskets. In the Credit Agreement context, see also Asset Sale Prepayment.

*Asset Sale Prepayment:* a specific type of Mandatory Prepayment. This provision in a Credit Agreement requires the loans to be prepaid with the net cash proceeds of certain (or, in some cases, all) non-ordinary course asset sales of the Borrower and its subsidiaries. The idea is that secured loans are made partly based on the knowledge that a certain amount of asset value is held by the Borrower and pledged as Collateral. To the extent the Collateral is disposed of, the loans are prepaid with the proceeds. This prepayment requirement is often subject to a Reinvestment Right.

*Asset Stripping:* not nearly as exciting as it sounds, this is buying a business whose market value is below its asset value with the intention of breaking it up (rather than running it), selling the most profitable assets. Think Richard Gere's character in *Pretty Woman* (Touchstone Pictures 1990).

*Assignment:* a Lender's transfer of its rights and (if possible — see later) obligations under a Credit Agreement to a new Lender. Borrowers frequently like to maintain a degree of control over the Assignment process through consent rights and, in rare cases, Blacklists. Lenders prefer to limit such consent rights in order to maximise Syndication options and keep the loans more freely tradable but may provide the Borrower with prior consultation rights. It would be extremely unusual for the Borrower to retain consent or consultation rights (as applicable) with respect to transfers to existing Syndicate members or to Affiliates of existing Syndicate members or when an Event of Default is continuing. Note that a Borrower's right to consent to transfers is an important fact that helps distinguish loans from Securities. Under English law however, whilst you can assign rights, you are not able to assign obligations (see therefore Assignment and Assumption and also Novation).

*Assignment and Assumption:* when an Assignment doesn't work due to the inability under English law to assign obligations, and/or where a Novation isn't practicable due to loss of security implications, English

law uses an Assignment and Assumption — the rights are transferred and the new Lender also assumes the obligations of the old Lender which is then released from those obligations.

*Associated Costs Rate:* another name for Mandatory Costs.

*(The) Association for Financial Markets in Europe:* a trade body that represents the shared interests of a broad range of global and European participants in the wholesale financial market (their words not ours). Various affiliates have been integrated, including AFME / EHYA.

*At Par:* see Par Value.

*Auction-Rate Security:* short-term debt Securities with Interest Rates set at weekly or monthly Dutch Auctions to appeal to investors seeking short-term investments.

*Auditor Arrangement Letter:* letter that sets forth the scope of the engagement between the auditors and the Issuer and Initial Purchasers with respect to the Reg S Comfort Letter and related work, which only attaches to the Reg S portion of a deal. The letter permits the Initial Purchasers to use and rely on the Reg S Comfort Letter and other work outside the US and specifies that the letter does not apply to or affect rights or obligations in connection with the use of the 144A Comfort Letter in the US or elsewhere in the world in connection with any potential or actual proceedings or disputes under US federal or state Securities laws in connection with the US portion of the offering. Also sometimes called Auditor Engagement Letter.

*Authentication:* the signing of a Security (in global or definitive form) by the Registrar or Principal Paying Agent in order to give it legal effect.

*Authorised Person:* a person who is authorised for the purposes of FSMA to carry out Regulated Activity.

*Automatic Stay:* the rule under Bankruptcy law in the US that once a Bankruptcy case is commenced, creditors and other parties generally are not permitted to collect on claims against the debtor or otherwise obtain or exercise control or possession over property of the debtor's bankruptcy estate outside of the Bankruptcy proceedings. Creditors may seek relief from the Automatic Stay by filing a motion with the Bankruptcy court. There are also a number of exceptions to the Automatic Stay, such as governmental entities exercising their police power and the termination or liquidation of certain financial contracts. Equivalent (or similar) restrictions exist in certain European jurisdictions — consult your favourite Latham lawyer for more information.

*Availability:* this is a term used most frequently in the world of Revolving Facilities. It is a measure of the amount of additional borrowings or other extensions of credit (such as the issuance of Letters of Credit or obtaining of Ancillary Facilities) that would be permitted under the Revolver at any particular point in time. Term Loan Facilities are generally drawn once on the Closing Date, although some allow for delayed draws during a

specified period (see Delayed Draw Term Facility). Revolving Facilities are lines of credit that generally may be drawn, repaid and redrawn throughout the life of the facility, but only if there is Availability (in the case of an Asset-Based Loan, under the Borrowing Base formula). The Availability terms are found in the Senior Secured Facilities Term Sheet and then documented in full in the Credit Agreement.

*Availability Period:* the period of time from signing the Credit Agreement during which the Credit Facilities may be drawn, assuming satisfaction of CPs and absence of a Drawstop.

*Available Amounts Basket:* an extra Basket (included in some Credit Agreements but certainly far from common) that may be used for dividends, Capital Expenditures, investments or the prepayment of other (usually Subordinated) debt. This is a bank land replica of the way Restricted Payment capacity works in most High Yield Indentures. The Available Amounts Basket generally starts with 50 per cent of consolidated net income or that portion of Excess Cash Flow that is not captured by the Excess Cash Flow Sweep, and builds cumulatively over time (perhaps with the receipt of equity proceeds, in deals where no Equity Sweep is present). Though available for Capex, prepayments of other debt, dividends and investments, the Available Amounts Basket is a single Basket, so usage for one purpose reduces the amount available for other purposes.

*Average Life:* another name for the Weighted Average Life.

*'Ayn:* an Islamic finance term for a tangible (physical) asset, such as silver and gold, which would be the underlying asset in an *Ijara*.

*"B" Loan:* another name for a Facility B Loan.

*Backstop:* an agreement to purchase Bonds at an agreed upon price and coupon in the event that such Bonds are not able to be placed in the market. Such arrangement comes at a cost to the Issuer.

*Back to Back Financing:* a Credit Facility that is made available to a Borrower through another Lender and (often) where the terms of the two loans match, *i.e.*, lender A lends to lender B that lends to the Borrower.

*Bai' (or Bay):* an Islamic finance term for a sale, commonly used as a prefix in referring to different types of sales: *bai al-dayn* (sale of receivables), *bai' salam* (advance payment for goods to be sold), and *bai muajjal* or *bai 'ajel* (credit sale).

*Balance Sheet:* a financial statement on which a company reports its assets, liabilities and equity as of a given point in time. In contrast to an Income Statement, which depicts a company's situation over a period of time, a Balance Sheet provides a "snapshot" as of a moment in time. The term Balance Sheet derives from the accounting principle that a company's assets must equal (or "balance" with) its liabilities plus shareholders' equity. See Income Statement.

**Balloon Payment:** a final payment of an Amortising Loan which is substantially larger than earlier instalments. See Bullet Maturity.

**Bank Book:** shorthand for the Confidential Information Memorandum (or CIM) used to Syndicate the bank loans.

**Bank-Bridge Structure:** a set of Commitment Papers that contains terms for both a Senior Secured Credit Facility and a Bridge Facility.

**Bank Guarantee:** an undertaking from a bank to cover a debt, risk or liability on a transaction. In other words, if the debtor fails to settle a debt, the bank will cover it. Like a Letter of Credit.

**Bank Meeting:** the initial meeting of potential Lenders to whom an Arranger hopes to Syndicate a Credit Facility, at which meeting the Bank Book will be discussed.

**Bank-Only Deal:** financing consisting only of bank debt (*i.e.*, no Bridge Facility or Securities).

**Banking Monopoly:** refers to the rules whereby in a number of jurisdictions only licensed credit institutions may grant loans to Borrowers in that jurisdiction, subject to various exceptions. CDOs, CLOs and Hedge Funds get around it quite lawfully.

**Bankruptcy:** in the US this is a federal court process under the Bankruptcy Code whereby a company restructures its debt under the auspices of the Bankruptcy court. There are advantages (such as the ability to Cramdown a plan on dissenting creditors) and disadvantages (such as high costs and public disclosure requirements) to restructuring debts in a US Bankruptcy, as opposed to out of court. Restructuring debts in Europe is typically an out of court process although court-based procedures such as Schemes of Arrangement are used as implementation tools, with Insolvency being the end of the line and typically court-driven. For more information, see the series of Latham & Watkins webcasts broadcast in 2010 on global restructurings and insolvencies with spotlights on the Middle East, the UK, the US, France and Germany, all available at [www.lw.com](http://www.lw.com). See also Insolvency.

**Bankruptcy Code:** Title 11 of the United States Code.

**Bankruptcy Remote Vehicle:** a type of Special Purpose Entity.

**Base Case Model:** refers to the financial model and business plan required to be prepared and warranted by the Borrower and delivered to the Lenders under the Credit Agreement as a Condition Precedent, in particular in Leveraged Buyouts. The scheduled repayment instalments under any Amortising Loans and the levels of the Financial Covenants are set by reference to the agreed Base Case Model (in the case of Financial Covenants, through the application of the agreed Headroom to the anticipated performance of the business set out in the Base Case Model). Also referred to as the Business Plan although in certain uses of the term, the Base Case Model can be one case within the Business Plan.



**Base Currency:** typically seen in the context of Revolving Facilities. Lenders often agree that these can be drawn in multiple currencies (being Optional Currencies) but the Commitments of the Lenders will still be denominated in one currency — this is known as the Base Currency.

**Base Prospectus:** in the US, a Shelf Registration Statement contains two parts: (i) the Base Prospectus (which is in the initial filing) and (ii) the Prospectus Supplement (which is filed along with the Base Prospectus when the Issuer executes a “takedown” off the shelf). See Shelf Takedown. In Europe, a Base Prospectus describes a prospectus approved in accordance with the requirements of the Prospectus Directive by one of the European regulators.

**Base Rate:** the rate quoted by individual banks to their customers as the rate at which such banks are prepared to lend money and pay for deposits.

**Basel I:** the first of the regulatory capital accords for international banks published by the Basel Committee on Banking Supervision in 1988. What is left of this is now included in Basel II. See also Capital Adequacy.

**Basel II:** the imaginatively titled follow-up to Basel I, implemented in June 2004 and establishing a framework for defining risk capital and weightings. The main purpose of Basel II is to link capital levels to the riskiness of the assets, which was missing from Basel I. See also Capital Adequacy.

**Basel III:** the much anticipated and also imaginatively titled follow-up to Basel II. The main purpose of Basel III is to increase capital requirements for certain types of assets in order to limit certain bank behaviours that were viewed to have contributed to the Credit Crunch. See also Capital Adequacy. See Latham & Watkins Client Alert No. 1094, Making Increased Costs Claims Under Basel III — Working with the LMA provisions (25 October 2010) available at [www.lw.com](http://www.lw.com).

**Basis Point:** one one-hundredth of a percentage point (e.g., 50 Basis Points equals 0.50 per cent).

**Basket:** an exception contained in a Negative Covenant (usually expressed as a fixed amount). For example, a Negative Covenant may be: “Borrower shall not issue additional debt;” a Basket would be: “except for unsecured debt in an amount not to exceed €10.0 million”. See also Carveout and General Basket.

**BBA:** acronym for the British Bankers’ Association.

**Bear Market:** bad times. Hang in there for a Bull Market.

**Bearer Bond:** a Security where possession is the only evidence of ownership, and title is transferred by delivery. Only used in Securities Offerings that are not offered to investors in the US. If you have a Bearer Bond, please don’t lose it.

**Belgian Dentist:** an informal name for the stereotypical private purchaser of Eurobonds.

**Beneficial Owner:** Section 13(d) of the US Exchange Act and the Rules adopted thereunder (most notably Rule 13d-3) cover the gory details of this concept. The big picture is this: if you have the power to vote or dispose of a particular Security, either individually or as part of a group acting in concert, then you are probably the Beneficial Owner of that Security.

**Best Efforts Syndication:** a Syndication where the Arranger commits to provide less than the entire amount of the loans (or even none of them), but agrees to use its "best" efforts (subject to agreed conditions) to find Lenders to provide the loan. Traditionally used for risky Borrowers, complex transactions or Syndications in bad markets.

**Bible:** only a few would call this holy; this is the name given to the collection of principal deal documents which are collected together after Closing for ease of reference for the main deal participants. Traditionally prepared in paper format but now more commonly electronically on CDs. Also known as the Closing Set.

**Bid/Ask Spread:** see Bid/Offer Spread.

**Bid/Offer Spread:** the difference between the highest buying price that a purchaser is prepared to offer ("offer") and the lowest selling price that a seller is prepared to accept ("bid"). Sometimes referred to as the Bid/Ask Spread or Bid/Ask.

**Bidco:** name given to the SPV established by a Sponsor as the acquiring entity in a Leveraged Buyout or by a corporate in a takeover. Usually Bidco will be the main Borrower in acquisition-related Credit Facilities.

**Big Boy Letter:** a letter sometimes entered into in connection with a secondary trade of Securities where one party to the trade has more information about the Issuer than the other. A Big Boy Letter says something to the effect that one party may have more information than the other about the Issuer, but because they are both "big boys", they are still knowingly and willingly entering into the transaction. Big Boy Letters raise a number of interesting legal issues, including whether the letter itself is actually enforceable and whether or not the letters actually work as a defence against insider trading liability. Thus far, there is more legal authority in the US than in Europe to help answer these tricky questions.

**Bilateral Credit Facility:** a Credit Facility with just one Lender that is not intended to be Syndicated.

**Bill of Exchange:** a written, unconditional order by one party (the "drawer") to another (the "drawee") to pay a certain sum to a third party (the "payee"), either immediately or on a fixed date, for payment of goods or services received. A Bill of Exchange is not a Negotiable Instrument unless it states that payment is to be made "to order" of the payee.

*Bill of Lading:* a document issued by a carrier of goods to a shipper, acknowledging that specified goods have been received on board from the shipper as cargo for conveyance to a named place for delivery. If a Bill of Lading is issued "to order" of the recipient of the goods (the "consignee") or another party (usually the shipper), then it is a Negotiable Instrument.

*Binding Tax Ruling:* a specific issue in German restructurings where a debt write down can incur taxes for cancellation of debt income. A binding tax ruling can however be obtained confirming that a restructuring exemption to the tax will be applied. The application will be supported by a Restructuring Opinion. More generally, Binding Tax Rulings may be obtained in certain other jurisdictions to provide comfort that the tax position of the group will be as the parties assume, including as set out in any Structure Memorandum.

*Blacklist:* a list put together by the Borrower, or the Sponsor, of Lenders to whom a certain loan may not be Assigned or Novated because the Borrower or Sponsor believes the Lenders on the Blacklist will not be easy to deal with (in terms of Amendments, Waivers, consents, etc.) over the life of its loans. Not to be confused with the French Blacklist.

*Blackout Period:* in the Securities context, Blackout Period refers to a period ahead of publication of the Preliminary Prospectus. During this period analysts' research reports should not be published and previously published reports should no longer be distributed. The purpose of the Blackout Period is to impose a chronological gap between publication of research and publication of the first of the formal IPO offering documents to make it easier to deny a link between the research and any investment decision. There is no particular market practice for the duration of the Blackout Period. In the UK, common practice has been to impose a Blackout Period from four weeks before the date of the Preliminary Prospectus until 30 days after listing. However, it is recognised that such a period may not be achievable and much shorter Blackout Periods are often adopted. There should be no distribution of research reports once the Preliminary Prospectus has been published so as to avoid potentially conflicting information about the Issuer being in the market at the same time.

*Blocked Account:* a bank account where monies cannot be withdrawn without the Facility Agent/Security Agent or Lender's specific consent.

*Bloomberg Screen:* in Bond world, shortly after Pricing, the capital markets desks of the relevant investment banks will prepare Pricing Term Sheets. In order to do so, the desks use a Bloomberg data service known as the Bloomberg Screen. These Bloomberg Screens are then forwarded to the relevant sales force at such investment bank, and the sales force will in turn forward these screens via Bloomberg to Accounts that have received Allocations in the offering. Bloomberg Screens are also used for a variety of other purposes, they really are useful things.

**Blue Book:** the colloquial name given to the Takeover Code as it was published in a blue folder. Very imaginative.

**Blue Sky Laws:** US state, as opposed to federal, Securities laws.

**Board Observer Rights:** rights given to Lenders or minority investors to attend (but not vote) at board meetings of a particular Borrower or appropriate other group companies. The board observer attends but is not appointed as a director or board member. Often used in Mezzanine Financings, in particular if the deal has an Equity Kicker and/or VCOG Rights.

**Boilerplate:** general term used to describe standard clauses found in most contracts. In a Credit Agreement, Boilerplate clauses would include the notices clause, Counterparts clause, governing law clause and so on. Such clauses should be customary and standardised to an extent that only a very limited amount of negotiation is required.

**Bondholder:** exactly what you think it means — a holder of a Bond.

**Bondholders Committee (“Assemblée des obligataires”):** in France, the “third” (because the statute refers to a general meeting of the bondholders and not strictly to a bondholders committee) Creditors Committee required to approve a restructuring plan in *Sauvegarde* or *Redressement Judiciaire* proceedings. It consists of all bondholders of the debtor, irrespective of the terms and conditions of the respective bond issues. Something to think about if you are going to be a Lender subscribing for Mezzanine bonds issued by a French Bidco and the Sponsor will also be putting part of its “equity” to fund the acquisition by way of bonds — not sure that you will be happy sitting in the same Creditors Committee as the Sponsor at that time.

**Bonds:** debt instruments that represent a fixed principal amount of money and a fixed (or floating) Interest Rate. Also known as Notes or Debentures. In offerings governed by the laws of a state in the US, these puppies are almost always issued pursuant to an agreement known as an Indenture, but are issued pursuant to a Trust Deed or Fiscal Agency Agreement or other subscription agreement (in each case containing the Terms and Conditions of the Bonds) with respect to offerings under the laws of a European jurisdiction. See also Fixed Income Security.

**Bonus:** post Credit Crunch, this has become a very dirty word. Discuss yours in public at your peril.

**Book:** (i) shorthand for the Offering Memorandum, regardless of whether in draft form or final, for example, “We’ll revise the book and distribute it in the morning” or (ii) the master list of orders from Accounts, setting forth the amounts and pricing. Such orders will generally be scaled, for example, “I’ll take €5 million in Bonds at 10 per cent and €20 million at 10.5 per cent”.

**Book Entry:** a reference to the computerised ledger systems used by the Clearing Systems.

**Book Value:** the amount in the relevant currency stated for particular assets on a company's Balance Sheet.

**Bookbuilding:** the process of building the Book in a Securities offering amongst the various potential buyers who have been approached and expressed interest in the Securities. See also Accounts.

**Bookrunner:** in loan world, the Arranger who determines what portion of a Credit Facility will be allocated to each potential Lender. See Arranger. The Bookrunner should not be confused with the Syndication Agent for a particular Credit Facility. The Syndication Agent role (like the Documentation Agent role) is often driven entirely by a desire to hand out League Table Credit — these other Agents don't actually do much of anything. The Bookrunner actually runs the books during Syndication. Similarly, the Bookrunner in a Securities offering manages the Syndication efforts and determines what portion of the offering will be allocated to each potential investor. See Lead Managing Underwriter.

**Borrower:** a company that borrows under a Credit Agreement.

**Borrowing Base:** a concept in an Asset-Based Loan where the maximum amount available for borrowing under a Revolver is a moving target. A Cash Flow Revolver does not have a Borrowing Base but rather provides the Borrower with a line of credit up to a fixed Base Currency amount. When there is a Borrowing Base, the maximum amount available for borrowing moves based on the Base Currency value of certain eligible categories of Collateral (e.g., receivables, inventory, equipment) multiplied by a discount factor less a reserve reflecting priority claims, and subject to an overall Cap. For example, Lenders might agree to advance funds against 80 per cent of eligible accounts receivable and 60 per cent of eligible inventory up to a maximum amount of €100.0 million. So the amount available on any date is the lesser of the amount of the Borrowing Base and the maximum revolving commitment amount (minus amounts already borrowed and outstanding). See Asset-Based Loan and Availability.

**Borrowing Base Loan:** another name for an Asset-Based Loan.

**Bought Deal:** an offering of Securities in which one or a few Underwriters buy the entire issue at a fixed price before a formal marketing process has commenced. See Backstop.

**Box:** another name for the Summary. The Summary is surrounded by a border on all margins (hence the term "box").

**bps:** shorthand for Basis Points and generally pronounced "bips".

**Break Costs:** the losses, costs and expenses incurred by a Lender as a result of a Borrower's (i) failure to borrow or continue a loan after giving notice requesting the same; (ii) failure to make a prepayment of loans after giving notice thereof; or (iii) making of a prepayment of loans on a day that is not the last day of the applicable Interest Period (i.e., the costs of "breaking" a EURIBOR loan or a LIBOR loan in the interbank market).

*Break Funding*: another name for Break Costs.

*Breakup Fee*: in an M&A transaction, a fee the seller must pay to the original buyer if the seller ends up selling to a different buyer. Compare Reverse Breakup Fee.

*Bridge Facility*: a Credit Facility pursuant to which Lenders make Bridge Loans.

*Bridge Facility Term Sheet*: an annex or schedule to the Commitment Letter that contains a summary of the terms of the Bridge Facility. In a committed financing, each series of Notes contemplated to be part of the permanent financing structure is backed up by a bridge, so in instances where there is more than one series of Notes (for instance, senior and senior Subordinated), there will be multiple bridges. These multiple bridges may be described in one or multiple Term Sheets.

*Bridge Loan Agreement*: a Credit Agreement governing Bridge Loans.

*Bridge Loans*: short-term loans the purpose of which is to provide a bidder with committed financing in the context of an auction for a business as the acquisition financing cannot be consummated prior to the consummation of the acquisition (i.e., to "bridge" the gap in financing). Traditionally, Bridge Loans are used by Financial Buyers (Sponsors) in auction situations, but corporate buyers also sometimes use Bridge Loans to finance acquisitions. In the Commitment Papers context, Bridge Loans are sometimes referred to as the Bridge Facility. In the US, bridge loans typically are not funded as the offering of the Notes that will replace the Bridge Facility in the permanent financing structure often can be issued before the consummation of the acquisition.

*Bringdown Comfort Letter*: a second Comfort Letter, delivered at Closing, that updates the change period comfort to a date not more than three to five business days prior to the Closing Date.

*British Bankers' Association*: according to their website, the voice of the banking industry for all banks who operate within the UK, and who are we to doubt them.

*Broker-Dealers*: entities that have to register with the SEC, FSA or other applicable regulatory authority because they trade Securities for themselves or on behalf of others.

*Build-up Basket*: relevant in Bond world. It is the Basket from which the Issuer may make Restricted Payments so long as certain conditions are met, typically, that no Default has occurred and is continuing; that the Issuer could incur at least €1 of additional Ratio Debt under the Ratio Test at the time of making the payment; and that the total sum of Restricted Payments made and being made are less than the current value of the Build-up Basket. This Basket builds up over time as money comes into the Issuer. Typically, the total size of this Basket is calculated by adding up: 50% of consolidated net income after the date of the Terms and

Conditions or the Indenture, 100% of proceeds from equity offerings and capital contributions after the date of the Terms and Conditions or the Indenture, as well as certain contributions from restricted investments and from Unrestricted Subsidiaries.

*Bull Market:* good times, until a Bear Market comes along.

*Bullet Maturity:* when the entire principal of a Bond or Term Loan is due and payable on the Maturity Date (*i.e.*, there is no Amortisation prior to maturity). Typical for Facility B Loans, Facility C Loans, Second Lien Loans and Mezzanine Loans.

*Business MAC:* definitions vary, but this is a reference to the Condition Precedent in a Commitment Letter, SPA or Credit Agreement that there has been no Material Adverse Change in the operations, business or (more controversially) prospects of the Borrower or the Target company/group. This should not be confused with a Market MAC, which deals with Material Adverse Changes in market conditions which could adversely affect Syndication. See also Material Adverse Change, Company MAC and Target MAC.

*Business Plan:* see Base Case Model. Also used to refer to the annual business plan which is often required to be delivered to Lenders under Credit Agreements for Leveraged Buyouts (effectively an update of the Base Case Model).

*Buy Back:* name given to the act of a Borrower (or a member of its group or its shareholders) acquiring part of the Credit Facilities, often at a discount. Credit Agreements now typically include either an absolute prohibition on this (on the basis that all Lenders should receive the benefit of Voluntary Prepayments on a pro rata basis and to prevent affiliates of the Borrower holding debt and disrupting the workings of the Syndicate) or set out the regime that must be followed for any Buy Back (which may involve a Dutch Auction). Sponsors that Buy Back debt of a Portfolio Company are now often subject to Disenfranchisement. The LMA form Credit Agreement for LBOs provides suggested wording. Also used to describe the purchase by an Issuer of its Securities in the open market or pursuant to a more formalised Tender Offer or private agreement.

*"C" Loan:* another name for a Facility C Loan.

*C-3PO:* robot in the Star Wars films.[fin](#)

*Call Option:* a financial contract between a buyer and a seller, where the buyer has the right or Option to buy a specific quantity of a Commodity or a Security or other financial instrument from the seller at a certain time and at a certain price. Also describes the option of an Issuer to redeem its outstanding Bonds on a date earlier than the Maturity Date as described in the Terms and Conditions or the Indenture. Compare Put Option.

*Call Premium:* the Bond equivalent to a Prepayment Premium in a Credit Agreement. This term refers to the amount of premium payable,

calculated as a per centage of the principal amount of the Bonds being redeemed, upon the redemption of such Bonds prior to their maturity. See Optional Redemption.

*Call Protection:* a feature that requires an Issuer or Borrower to pay a Call Premium or Prepayment Premium, as applicable, in the Terms and Conditions or under an Indenture or Credit Agreement, as applicable. Bondholders/Lenders like this feature because it gives them a potential upside if the Issuer/Borrower repays the debt and because it compensates the Bondholders/Lenders for the risk associated with having to reinvest the money that they have been paid back. A Non-Call Period is the strongest form of Call Protection, followed by a Hard Call and then a Soft Call.

*Call Spread Overlay:* a Hedging transaction in which the Issuer simultaneously purchases a Call Option that mimics the Call Option embedded in a series of Convertible Bonds and then sells a Warrant on the same number of underlying shares at a higher strike price. The net effect is an increase in the Conversion Premium of the Convertible Bonds to the strike price of the Warrant. There may also be favourable tax benefits to the Issuer. Call Spread Overlays are a common companion to new Convertible Bond issuances.

*CAM:* acronym for Collateral Adjustment Mechanism. It is also known as a Debt Adjustment Mechanism or DAM.

*Canadian Wrapper:* a Canadian disclosure document that is wrapped around (or stapled to the front of) the Offering Memorandum or Prospectus. The Canadian Wrapper is required in certain instances where Canadian (or provincial) law requires certain statutory disclosure on the cover of the offering document for sales in Canada.

*Cancellation:* used in Credit Agreements to refer to the ability of the Borrower to terminate some or all of the Availability and therefore stop paying Commitment Fees. Also used to describe the cancellation by an Issuer of its Securities either on the Maturity Date or on an early redemption of the Bonds.

*Cap:* generally refers to a limitation expressed in the relevant currency, as in, "a cap on the amount of permitted Secured Debt". Caps are often used in Negative Covenants, financial definitions and prepayment provisions. In the Commitment Letter context, Cap refers to the maximum Interest Rate for Bridge Loans. Bridge Loans generally bear Interest at an increasing rate (meaning the Applicable Margin steps up every several months), but the rate stops increasing once the Cap is achieved. This Cap is found in the Interest Rate section of a Bridge Facility Term Sheet.

*Cap Table:* a simplified Balance Sheet generally included in a Prospectus or an Offering Memorandum that sets forth the Capital Structure (and sometimes other information such as cash holdings) of the Issuer as of a certain date, often on an historical basis and an as-adjusted for the offering



basis. A Cap Table is not necessarily required by applicable legislation, but is generally included to make the disclosure more investor-friendly.

*Capex*: shorthand for Capital Expenditures.

*Capex Facility*: a Delayed Draw Term Facility intended to be used to fund Capex. Often combined with an Acquisition Facility.

*Capital Adequacy*: a requirement of applicable legislation that specifies what capital a bank should have when compared to its business and the risks that it undertakes. See Basel I, Basel II and Basel III. For more information, see Latham & Watkins Client Alert No. 896, A Guide to Regulatory Capital Requirements for European Banks (9 July 2009) and the joint publication between Latham & Watkins and Goldman Sachs entitled Regulatory Capital Requirements for European Banks (July 2009), both available at [www.lw.com](http://www.lw.com).

*Capital Duty*: a tax charged in certain jurisdictions upon the issue of share capital or other securities. See also Stamp Duty.

*Capital Expenditure*: an expenditure by a business that is Capitalised to the Balance Sheet under applicable accounting rules and then Amortised as an Income Statement expense over a period of more than one year rather than being immediately "expensed" to the Income Statement in full in the current period. A Capital Expenditure is distinguished from a plain old current expense because it has a long-term impact that will benefit the business in future years as well as the current year. Buying vegetables for dinner is probably a current expense. Buying a vegetable farm is probably a Capital Expenditure. See Amortisation and Capitalise.

*Capital Markets*: a broad term that refers to the market for raising money through Securities offerings.

*Capital Structure*: a term referring to the overall structure of the company's debt and equity. A company's Capital Structure is generally divided into several distinct constituencies, such as Senior Debt, Subordinated Debt and common equity.

*Capitalise*: in accounting terminology, when a company Capitalises a cost, it is recognising that cost as a long-term investment rather than immediately recognising it as an expense. The company then Amortises or Depreciates the expense over time on its Income Statement — until eventually all the expense is recognised. Spreading the expense over time like this increases earnings in the short term, because the entire cost is not deducted in the first period. The term Capitalise is also used in the context of Mezzanine Facilities and PIK Debt, where it refers to adding any Accrued Interest to the principal amount of the loans or Notes on any Interest Payment Date in lieu of paying that Interest in cash. This practice is however prohibited (for example in Luxembourg, Italy and Germany) or restricted (as in France, where under French law it may not occur more often than annually) in certain countries across Europe (as it is an agreement to pay interest on interest). See also PIYW.

**Capitalised Lease:** this is a lease that accountants have decided looks more like a loan secured by the property being leased than like a true lease. Leases that are not Capitalised are called “operating leases”. Capitalised Leases are treated as debt under applicable accounting rules and are shown on the face of the lessee’s Balance Sheet as debt in an amount determined by the accountants to be the equivalent of what a loan would be if secured by the leased assets. One typical feature of a Capitalised Lease that is not typical in an operating lease is an Option on the part of the lessee to purchase the leased property upon the expiration of the lease.

**Capped Call:** a Hedging transaction in which the Issuer purchases a Call Option that mimics the Call Option embedded in a series of Convertible Bonds, subject to a Cap on the maximum share price of the shares covered by the call.

**Carried Interest:** see Carry.

**Carry:** the share of profits belonging to Sponsors from their investments. Usually the Carry (or Carried Interest) is set at around 20 per cent with the remaining 80 per cent being distributed to investors in the Sponsor.

**Carry Back:** Credit Agreements — in particular for Leveraged Buyouts — often contain an annual Cap on the amount of Capital Expenditure that a Borrower can make. A Carry Back provision enables the Borrower to ‘over-spend’ on Capex in one year in excess of the agreed limit by grabbing a portion of its limit for the following year, which is then reduced. The amount which the Borrower can grab is the subject of negotiation.

**Carry Forward:** like Carry Back, but here the Borrower can increase the amount of Capex that it makes in a particular year in excess of the agreed limit by rolling forward all (or an agreed percentage) of any unspent amount from the prior year (the unspent amount being the difference between the covenant Cap and the amount that it actually spent).

**Carveout:** an exception to a Covenant or other term. See also Basket.

**Cash Cap:** a provision in a Bridge Loan Agreement stating that to the extent the Interest payable on the Bridge Loans on any Interest Payment Date is at a rate that exceeds the Cash Cap, the company will have the option to pay such excess Interest by Capitalising it to principal on the Bridge Loans. Remember, Bridge Loans progressively increase in rate. See Total Cap.

**Cash Confirmation:** a requirement by the Takeover Code and linked to the requirement for Certain Funds. The Cash Confirmation — which is usually given by Bidco’s financial advisor — is needed wherever cash forms part of the purchase price in a P2P and/or takeover and is a statement in the 2.5/Press Announcement and in the offer document that Bidco has the required cash to pay all accepting shareholders in full.

**Cash Equivalent:** highly-rated, short-term, liquid investments that are readily convertible to cash and have short maturities. In Bond and loan world, Cash Equivalents are treated the same as cash and allow the Issuer/Borrower to make unlimited investments in them.

**Cash Flow Cover:** often used as another name for the Fixed Charge Coverage Ratio but this is actually slightly different and more common in European Credit Agreements. Cash Flow Cover is the ratio of cashflow (being EBITDA with adjustments to try to make the end product more akin to true cash for the relevant period) to debt service (being Interest expense but also other finance charges and debt service payments). Most Credit Agreements include this as one of the Financial Covenants, usually setting the ratio at 1.00:1.00 for all testing dates.

**Cash Flow Revolver:** a Revolving Facility that provides the Borrower with a line of credit up to a fixed amount, in contrast to an Asset-Based Loan, which is based on the value of certain categories of the Borrower's assets as of a given time. A Cash Flow Revolver typically contains fewer ongoing reporting requirements than an Asset-Based Loan. In a Cash Flow Revolver, the Lenders will focus on a Borrower's ability to cover debt service by generating cash flow, whereas in an Asset-Based Loan, the Lenders will focus on the value of certain categories of the Borrower's assets (in particular, the categories that are used in the Borrowing Base), especially the liquidation value of those assets, relative to the Lenders' exposure under the loans (this is known as Collateral coverage).

**Cash Flow Statement:** a financial statement in which a company reports its incoming and outgoing cash flows during a specified time period (typically monthly, quarterly or annually).

**Cash Overfunding:** in the M&A context, this is where the bidder provides a higher Equity Contribution than is required to complete the acquisition. The overfunded amount can then be used for certain purposes as agreed in the Credit Agreement, the Terms and Conditions or the Indenture.

**Cash Sweep:** another name for Excess Cash Flow Sweep.

**CBO:** acronym for Collateralised Bond Obligation.

**CDO:** acronym for Collateralised Debt Obligation.

**CDS:** acronym for Credit Default Swap.

**Centre of Main Interests:** the test used to determine in which country a company is able to file Insolvency proceedings that will be recognised as "main proceedings" under the EU Insolvency Regulation. Known colloquially as COMI. See also COMI Shift.

**CEO:** shorthand for "chief executive officer", the CEO is the highest-ranking executive officer of a company, in charge of managing the day-to-day affairs of the company.

*Certain Funds*: a requirement of the Takeover Panel and a number of comparable European regulators in a P2P. In order for the Cash Confirmation to be issued (or equivalent step taken in jurisdictions other than the UK), the financing commitments for a going private transaction need to be almost completely condition free (so the bidder can be "certain" that it will have the funds when it needs them). Although the Certain Funds requirement only applies as a matter of regulation to acquisitions of European public companies, buyers of private companies may also seek from their Lenders Certain Funds commitments to provide the required financing, in particular in LBO transactions when it is argued that this gives them a competitive advantage over other bidders who do not have Certain Funds. Compare SunGard Provisions in the US market. See also Cash Confirmation, Takeover Code and Blue Book.

*Certificate of Incorporation*: the document issued by Companies House in England and Wales (or the applicable companies' registrars in some other jurisdictions) on the registration and formation of a company as a separate legal entity.

*Certificate of Title*: a UK concept, being a written opinion of legal counsel stating that the title for the relevant real property is vested as stated in the chain of title. Where real property has a material value, Lenders may require these as a Condition Precedent. Not required in jurisdictions where title to real property is publicly registered and is therefore conclusively evidenced by an official excerpt from that register.

*Certificated*: where a share or other security is represented by a certificate.

*Cessation des Paiements*: in France a company is in a state of *Cessation des Paiements* when it is unable to pay its debts as they come due out of its available assets. The officers of a company that has not petitioned for the opening of Conciliation Proceedings are required to petition for the opening of *Redressement Judiciaire* or *Liquidation Judiciaire* within 45 days of the company becoming in a state of *Cessation des Paiements*, failing which they may be personally exposed to civil liability.

*CESR*: acronym for the independent Committee of European Securities Regulators, whose role is to improve co-ordination among European securities regulators, act as an advisory group to assist the EU Commission and work to ensure more consistent implementation of EU legislation in the Member States.

*CFC*: acronym for Chelsea Football Club, winners of the English Premier League and F.A. Cup in the 2009/10 season. Less interestingly, the acronym for a Controlled Foreign Company.

*CFO*: shorthand for "chief financial officer", the CFO is the senior officer of a company primarily responsible for managing the company's financing and (usually) accounting activities. Also an acronym for Collateralised Fund Obligation.

*Change of Control:* a material change in the ownership of a company or (in some uses of the term) the composition of its board of directors. Definitions and the consequences of a Change of Control vary between Bond world and loan world and from transaction to transaction. See Change of Control Covenant, Change of Control Prepayment and Change of Control Put.

*Change of Control Covenant:* in Bond world, this is a reference to the Change of Control Put provision. In most European Credit Agreements, the occurrence of a Change of Control is treated as a mandatory prepayment event. See Change of Control Prepayment and Change of Control Put.

*Change of Control Prepayment:* under most European Credit Agreements, a Change of Control (which will be specifically defined in the Credit Agreement) requires an immediate prepayment of the Credit Facilities and results in an immediate cancellation of undrawn commitments. Note that it is not an Event of Default (contrary to US practice in Credit Agreements where this is the case) however failure to make the prepayment on the Change of Control would trigger an Event of Default. Contrast to Change of Control Put in Bond world.

*Change of Control Put:* the provisions of the Terms and Conditions or an Indenture and some Bridge Facilities may give each Bondholder a separate Put Right, generally at 101 per cent of Par Value, if a Change of Control (which will be specifically defined in the Terms and Conditions or the Indenture) occurs. This type of clause is known as a Change of Control Put.

*Chapter 11:* part of the Bankruptcy Code in the US and the part most often discussed as it governs reorganisations of bankrupt companies in an attempt to turn them around and ensure their survival. Has been used by certain European groups as a restructuring tool.

*Charge:* Security Interest given over an asset which gives the Secured Party the right to have the particular asset and its proceeds of sale applied to the discharge of the debt in question. A Charge does not transfer ownership, it is a Lien on the asset.

*Chargee:* another named for a Secured Party.

*Chargor:* a company or person (usually a Borrower or Guarantor) who grants a Charge or other Security Interest in favour of the applicable Secured Parties pursuant to a Security Agreement. Also known as a Pledgor.

*Check the Box:* tax rules (relevant to US entities/groups) which allow the owner(s) of certain types of limited liability companies to elect that the limited liability company, instead of being treated as a taxable corporation, will instead be treated (for tax purposes) as a disregarded entity by its owner, or treated as a partnership (if more than one owner).

*Cherry Picking*: name given to the ability of an Insolvency officer to choose which obligations of the insolvent company it accepts and which it disclaims, *i.e.*, he “cherry picks” the good ones.

*Chinese Wall*: an information barrier used within a firm or business to separate and isolate persons who receive confidential information from disclosing such information to members of a different part of the firm or business. This is a way of avoiding conflict of interest problems. Also known as an Ethical Wall. Apparently there is actually a large wall in China, what a coincidence.

*Churning*: a practice used by (i) unscrupulous brokers to earn extra/superfluous commission by carrying out unnecessary and excessive trades and (ii) farmers to make butter. In the former instance, this can be unethical and illegal, in the latter case there should be no such concerns.

*CIM*: acronym for Confidential Information Memorandum. See also Bank Book.

*Circle Up*: in order to receive Ticking and Tying in a Comfort Letter, Underwriters’ counsel will send a Circle Up of the Offering Memorandum or Prospectus to the Issuer’s auditors, in which such counsel circles each number it would like to see Ticked and Tied.

*City Code*: short for the City Code on Takeovers and Mergers. See Blue Book and the Takeover Code.

*Class*: Lenders holding a particular “class” or Tranche of Term Loans or Revolving Loans.

*Class Voting*: type of voting where one or more Classes under a Credit Agreement vote separately (and normally the affirmative vote of a majority of each affected Class is required for an Amendment or other action to pass). Class Voting (common in the US) is unusual in European Credit Agreements however in certain circumstances provisions may be included whereby Amendments or Waivers that only affect a particular Class may be approved by the requisite majority of just that Class.

*Clawback*: a fundamental feature of most international Insolvency regimes, permitting the applicable trustee or Insolvency practitioner of the debtor to avoid certain transactions prejudicing the estate in the run up to Insolvency, such as transactions at undervalue and Preferences. Needs to be analysed on a jurisdiction by jurisdiction basis.

*Clean-Down*: a provision in certain Revolving Facilities which requires the Borrower to reduce its total borrowings under the Revolving Facility to below a certain level, or even to zero, for a period of consecutive days in each of the Borrower’s financial years (or other specified period). Designed to ensure that Revolving Facilities are not being used as permanent debt like Term Loan Facilities. The “clean-down” threshold is often calculated net of cash such the Borrower does not actually need to use its available cash to repay the Revolver just to satisfy the Clean-Down.

**Clean-Up Period:** the period in which the Borrower can remedy certain events, which would otherwise breach the terms of the Credit Agreement, without causing a Default, such events usually relating to a group of companies acquired pursuant to the proceeds of the Credit Facilities. Lenders usually agree to a Clean-up Period when financing a P2P or in other cases where the Borrower has only been able to carry out limited Due Diligence on the Target group, although the concept has also become more common and therefore seen in financings for acquisitions of private companies as well.

**Clear:** the formal completion of a transaction, on delivery of the Securities by the Issuer and payment by the Syndicate. If a transaction does not "clear" by the Closing Date, it is said to "fail". Also known as Settle.

**Clear Market Provision:** found in the text of the Commitment Letter or Underwriting Agreement, an agreement by the Borrower/Issuer not to issue new debt, equity or other Securities during Syndication or for an agreed period following Closing. The purpose is to protect the banks from having to compete for the same pool of investors as other financings which the Borrower might otherwise want to raise.

**Clearing System:** the large, complex computer systems that enable Securities to be traded without people handing over paper cash for paper certificates. Clearing Systems are the workhorses behind all the computer screens that facilitate all trading, payments, settlement and other back office mechanics. Also known as a Clearing House or Clearing Corporation. The primary Clearing Systems used for debt Securities offerings in Europe are DTC (for US dollar denominated offerings), Clearstream and Euroclear.

**Clearstream:** short for Clearstream Banking, société anonyme, one of the two primary Clearing Systems used in Europe, located in Luxembourg. See Clearing System.

**CLO:** acronym for Collateralised Loan Obligation.

**Closed-End(ed) Fund:** an investment entity with a fixed number of shares such as an investment trust. Compare Open-Ended Investment Company.

**Closed Flex:** Market Flex structured so that the Arranger may make only the changes that are specifically enumerated. Compare Open Flex.

**Close Out:** termination of Hedge transactions.

**Closing:** the consummation of the deal, also known as Completion, when all remaining documents are executed and the money changes hands. Plan on staying up all night working the night before (see Pre-Closing). If the Closing goes smoothly, plan on staying up all night celebrating afterwards and if you are lucky you might even get a Closing Dinner and a Tombstone.

**Closing Condition:** another name for a Condition Precedent which must be met to allow Closing.

**Closing Date:** the date on which the Closing occurs.

**Closing Dinner:** your reward. A dinner usually organised by the bankers to celebrate the Closing of the transaction. The better the deal, the better the wine.

**Closing Fee:** a fee payable to each Lender on the Closing Date. Bankers sometimes refer to the loans as having been issued with OID. The Closing Fee payable to each Lender is expressed as a percentage of the principal amount of such Lender's loan and is payable from the proceeds of such loan as and when funded on the Closing Date.

**Closing Memorandum:** a formal, detailed memorandum used in a Securities offering or in a loan financing to set forth actions taken prior to and at Closing. The Closing Memorandum exhibits can include the forms of secretary's and officers' certificates, payment instructions and Cross Receipt.

**Closing Set:** another name for a Bible.

**Club Deal:** historically, a smaller loan premarketed to a group of relationship banks which agree to Take and Hold the loans from the outset. There is no intention to reduce the commitment to lend through a subsequent Syndication. Post Credit Crunch, Club Deals have become more common as banks have not wanted to take underwriting risk. The term Club Deal can also refer to a very large Sponsor LBO transaction where multiple Sponsors pool together in order to buy a multibillion dollar company.

**CMBS:** see Asset-Backed Security.

**CNMV:** acronym for *Comisión Nacional del Mercado de Valores*, the Spanish securities regulator.

**Co-Comm:** slang for a Coordinating Committee, usually in a restructuring or workout process.

**Co-Lead Manager:** a Manager who participates in some of the obligations of the Lead Manager, but who is not a Bookrunner.

**Co-Manager:** a Manager who is not a Bookrunner and does not typically have any principal obligations in the documentation of the issue, but who is included in the Syndicate because of its ability to place the Securities.

**Collar:** a form of Hedge that limits the upside and protects the downside on the particular item being Hedged. For instance, an Interest Rate Collar on a Floating Rate Security would establish an upper and lower limit on the Floating Rate.

**Collateral:** assets of a Borrower and any Guarantors or other Chargors or Pledgors that secure the Borrower's and Guarantors' obligations under the applicable credit documents in a Secured Debt financing.



*Collateral Adjustment Mechanism:* used in US cross-border secured deals where, for tax reasons (see Deemed Dividend), debt of US companies is secured only by US assets and debt of non-US co-Borrowers is secured by both US and non-US assets. The CAM is an agreement among the Lenders intended to equalise the recovery rates of the various groups of Lenders in the case of Default and enforcement on Collateral, by deeming loans held by Lenders in each group to be automatically shared for purposes of recovery upon the occurrence of certain events, such as Hair-Triggers. Despite the name, it is not a way to spread or allocate the Collateral to loans that the Collateral was not originally intended to secure. Also known as a Debt Adjustment Mechanism or DAM.

*Collateralised Bond Obligation:* a CDO where the assets acquired by the Issuer are mostly Bonds rather than any other type of debt obligation.

*Collateralised Debt Obligation:* a generic term for a type of Asset-Backed Security in which an Issuer issues Bonds that are Tranching into Senior and Subordinated obligations that are secured by debt obligations purchased by the Issuer with the proceeds of the Bonds. The debt obligations can include Bonds, loans, fund interests or other obligations. See also CBO, CFO and CLO.

*Collateralised Fund Obligation:* a CDO involving collective investment fund interests as the underlying asset.

*Collateralised Loan Obligation:* a CDO where the assets acquired by the Issuer are mostly loans rather than any other type of debt obligation. The most typical Collateralised Loan Obligations assets are loans made for LBOs.

*Comfort Letter:* the natural enemy of both accounting firms and junior- and mid-level law firm associates. The Comfort Letter is a letter from the Issuer's auditors addressed to the Underwriters or the Initial Purchasers that provides "comfort" that the Financial Statements included in the Offering Memorandum or Prospectus are accurate. The prescribed form a Comfort Letter should take is that of the ICMA standard form (for Regulation S Offerings) or as spelled out in SAS 72 (for 144A Offerings). The Underwriters (and sometimes the board of directors) seek such a letter in order to help establish a Due Diligence Defence (in 144A Offerings) or simply as part of their diligence (in Regulation S Offerings). The Comfort Letter allows the Underwriters or the Initial Purchasers to demonstrate reliance on experts for the audited financials and an element of a "reasonable investigation" for the unaudited financials and other unaudited financial information. The Comfort Letter is delivered on the signing of the Underwriting Agreement. See also Bringdown Comfort Letter, Negative Assurance and SAS 72. The term can also be used to describe a type of Keep Well Agreement, here being where the parent undertaking provides certain "comfort" to a third party with respect to certain proposed or potential action it might or might not take with respect to a subsidiary.

*COMI*: acronym for Centre of Main Interests.

*COMI Shift*: the process used by restructuring professionals of migrating or moving a company's COMI from a jurisdiction with less favourable Insolvency laws and formal processes to a jurisdiction with more favourable conditions for restructuring or (sometimes, if acting for a Sponsor or Borrower) vice versa. COMI Shifting to the UK has been common, in particular to implement Schemes of Arrangement. Financing documentation will customarily contain a Covenant preventing COMI Shifting and countering the threat of COMI Shifting to France is one of the reasons why the Double Luxco Structure was devised.

*Commercial Letter of Credit*: a Letter of Credit the purpose of which is to provide a means of facilitating payments between parties in the normal course of business. Commercial Letters of Credit are therefore intended to be drawn on and used routinely by the parties. Compare Standby Letter of Credit.

*Commercial Paper*: an unsecured debt instrument issued by a company to finance short-term liabilities. Commercial Paper has a maturity of less than one year from the date of issue.

*Commissario*: the public officer appointed in the context of certain Italian bankruptcy procedures who is responsible for a number of functions including monitoring management, preparing a report into the circumstances of the company's distress, and verifying the execution of the pre-bankruptcy agreement.

*Commitment Fee*: an annual percentage fee that is paid on the undrawn portion of a committed Credit Facility as compensation to the Lenders for keeping money available for borrowing. The Commitment Fee is typically paid quarterly in arrears. See Undrawn Commitment and Ticking Fee. The term also refers to the fee paid to the Arranger of a Bridge Facility for the commitment provided in the Commitment Letter — similar to the Arrangement Fee payable in connection with a Senior Secured Credit Facility or a Mezzanine Facility.

*Commitment Letter*: the letter by which financial institutions commit to provide loans. In the acquisition finance context, these loans generally consist of a Senior Secured Term Loan Facility, Revolving Facility, Mezzanine Financing and/or one or more Bridge Facilities to "bridge" any Notes offering expected to be part of the permanent financing — meaning that the Bridge Loans are committed financing that will be available to fund the acquisition at Closing and will be refinanced shortly thereafter with the Notes offering. The Commitment Letter consists of the actual text of the letter, along with annexes, schedules and/or exhibits that lay out the terms of the facilities and the Conditions Precedent to funding.

*Commitment Papers*: a catch-all term referring to the Commitment Letter, Fee Letter and (if applicable) Engagement Letter (and the related annexes, schedules and/or exhibits).

*Commodity:* a good or resource that investors trade, usually through Futures. A primary characteristic of Commodities is that their prices are determined by the way the market for such Commodities functions as a whole, rather than being differentiated based on qualitative differences between products of the same type produced by different producers. This is because a Commodity produced by one producer is considered equivalent to a Commodity of the same type produced by another producer. See Trading Places (Paramount Pictures 1983).

*Common Code:* the nine-digit security identification code issued jointly by Euroclear and Clearstream that is unique to each issue of Bonds.

*Common Depository:* a bank who holds the Global Note (historically in their vault) on behalf of the Clearing Systems from the Closing Date until it is exchanged for Definitive Bonds or until the Maturity Date. The Common Depository ensures the payment of the subscription moneys for the Securities on behalf of the Clearing Systems and is appointed and paid by the Clearing Systems.

*Common Stock:* the equity slice of the capitalisation that sits at the bottom of the Capital Structure. Common Stock has no Interest payments, no principal payments and no Covenants. The only protections for common equityholders are the fiduciary duties owed to them (or the company) by the board of directors. By contrast, creditors' rights are typically entirely contractual. See, however, Zone of Insolvency. Also known as Ordinary Shares.

*Companies House:* the registry for companies incorporated in England and Wales. Its register includes the incorporation, re-registration and striking-off of companies, the registration of documents that must be filed under company, Insolvency and related legislation, and the provision of company information to the public.

*Company MAC:* another name for a Business MAC.

*Company Voluntary Arrangement:* an Insolvency procedure under English Insolvency legislation. It involves a restructuring proposal that must be approved by more than 75 per cent by value of the company's unsecured creditors present and voting. Its use is limited as it can not bind Secured Parties without their consent.

*Comparable Treasury:* when the bankers refer to the Comparable Treasury they mean the US Treasury Note having a remaining life to maturity that most nearly approximates the Bond in your deal. An example here would be: "There will be a Make-Whole call at 50 bps above the Comparable Treasury". This means that the discount rate to be used in calculating the Make-Whole redemption price will be the rate on the Comparable Treasury plus 50 Basis Points.

*Completion:* another name for Closing.

*Compliance Certificate:* Lenders want to know that the Financial Covenants are being complied with. So when the Borrower delivers

its Financial Statements for a relevant period ending on a Financial Covenant testing date (typically quarterly or semi-annually), it must also deliver a Compliance Certificate (signed by one or two directors, often one of which must be the CFO) setting out in detail the calculations which show this compliance. Lenders may also ask for the auditors to complete a similar certificate following preparation of the annual audited accounts. Compliance Certificates can also contain (among other things) confirmation of no Default, evidence of compliance with the Guarantor Coverage Test and details of Material Companies. In Bond world, Trust Deeds and Indentures also require an annual Compliance Certificate specifying Covenant compliance and no Events of Default.

*Concert Party:* a person or group of persons acting together to achieve a common or shared goal. It is used, and defined, in the City Code in relation to those persons who actively cooperate to achieve control of a company. See Acting in Concert.

*Conciliation Proceedings:* French proceedings available to companies facing legal, economic or financial difficulties (whether actual or foreseeable) that have not been in a state of *Cessation des Paiements* for more than 45 days. Upon request of the company, the president of the commercial court appoints a *conciliateur* to facilitate negotiations between a company and its creditors. Conciliation Proceedings last a maximum of 5 months and are confidential unless the parties decide to seek ratification of the restructuring by the commercial court whose decision will publicise the Conciliation Proceedings and the existence of an agreed restructuring.

*Concordato Fallimentare:* an Italian plan of reorganisation, available after commencement of *Fallimento* proceedings. The plan must be approved by a majority of creditors by value, and requires the support of the creditors' committee. If the creditors are divided into different classes, approval requires a majority of creditors by value in a majority of classes.

*Concordato Preventivo:* another Italian plan of reorganisation, known as a pre-Insolvency composition, implemented without the commencement of a *Fallimento* proceeding. Filing brings about an immediate stay on actions by all creditors which typically lasts until the end of the procedure. Must be supported by a report from an *Esperto*, and approved by a majority of creditors by value (if the creditors are divided into different classes, approval requires a majority of creditors by value in a majority of classes) and by the bankruptcy court. Once the plan is approved, the relevant agreement is binding on all creditors and therefore may be used to Cramdown on the non-consenting creditors.

*Concurso Culpable:* Spanish term for gross negligence or willful misconduct in the creation or worsening of Insolvency by, for example, the company's directors, leading to potential personal liability. There is a presumption on the existence of gross negligence or willful misconduct, among other circumstances, when the directors of the company fail to meet their obligation to file for the declaration of Insolvency within

two months from the date they become aware or should have become aware of the Insolvency of the company (i.e., when the company is not able to regularly meet its due obligations). For more information on Spanish Insolvency, see Latham & Watkins Client Alert No. 872, Spanish Insolvency Act Changes — Paving the Way for Restructurings (29 May 2009), available at [www.lw.com](http://www.lw.com).

*Conditions Precedent*: the conditions that need to be satisfied on or prior to the Closing of the relevant transaction. In the world of finance, they are sometimes called “conditions to funding”.

*Conditions Subsequent*: the conditions that need to be satisfied by the Borrower within a set time period following Closing. Failure to fulfil any such condition within the set time period will usually trigger an Event of Default.

*Conf*: shorthand for a Confidentiality Agreement.

*Confidential Information Memorandum*: the marketing book used to Syndicate Credit Facilities. Also refers to a marketing book used in a mergers and acquisitions or auction context. Often referred to as the CIM, “IM” or “Info Memo” for short, or Bank Book.

*Confidentiality Agreement*: a written agreement stating that the disclosure of certain information is only being provided for specific limited purposes, which is entered into prior to any disclosure of any confidential information and where the recipient of such information agrees to keep it confidential.

*Confidentiality Provisions*: provisions in the text of the Commitment Letter providing that the Commitment Papers and any other advice provided by the Arranger may not be disclosed without the consent of the Arranger. Some Commitment Letters also have Confidentiality Provisions that apply to the Arranger.

*Confirmation*: the document that evidences a “Transaction” under an ISDA Master Agreement. It is called a Confirmation because typically the “Transaction” is effected over the telephone, even for very large “Transactions”, and then one party follows up with the Confirmation.

*Conflicting Interest Provisions*: provisions in the text of the Commitment Letter disclosing that the Arranger (and its Affiliates) may have economic interests that conflict with those of the company.

*Conformed Copy*: the name given to a copy of an executed document in which all signatures are recorded in typed form. A Conformed Copy will also be periodically updated to include all Amendments post execution.

*Consent Solicitation*: the form of relief sought by Issuers who want to amend Bond Covenants or other terms of their Bonds. Consent Solicitations are generally less common than bank loan Amendments. Because Bond Covenants are incurrence-based, unlike Financial Covenants (which are found in Credit Agreements), Issuers are less likely to need

relief under Bond Covenants. For the same reason, Covenant Lite and Covenant Loose loan Borrowers (who also usually have liberal Baskets and other Borrower-friendly terms) are unlikely to seek Amendments to the applicable Credit Agreement. Bondholders are also likely to charge Issuers more for consents, in part because the longer and more punitive Call Protection Bondholders typically enjoy gives them greater leverage. For English law governed Bonds, a meeting of Bondholders will be required in order to amend the Terms and Conditions, which is not the case in the US. See also Non-Call Period.

*Consolidated:* used in the context of Financial Statements, refers to Financial Statements that reflect the assets, liabilities and operating accounts of a company and its subsidiaries, taken as a whole (meaning they are taken together as a single enterprise). Compare Consolidating.

*Consolidating:* used in the context of Financial Statements, refers to financial information that is broken out to show the results of different parts of a corporate structure. Compare Consolidated. For a complete discussion of when Consolidating financial information is required in US Securities offerings, see Latham & Watkins publication: Financial Statement Requirements in US Securities Offerings: What You Need to Know (25 May 2007), available at [www.lw.com](http://www.lw.com).

*Contingent Conversion:* Convertible Bonds being convertible only if certain triggers are met.

*Contingent Interest:* Interest on Convertible Bonds that is payable only if certain conditions are satisfied (usually if the market price of the Bonds exceeds a threshold (e.g., 120 per cent) of their Par Value).

*Contract for Differences:* not slang for marriage but rather a form of investment to make money by reference to fluctuations in the value or price of various things such as an index or commodity or property.

*Contractual Subordination:* Subordination provisions that are imposed by contract (i.e., typically in the Intercreditor Agreement). Such provisions (among other things) contractually require the holders of Junior Debt to “fork over” to a specified class of senior Lenders anything they get in a liquidation of the company until the senior Lenders are paid in full and include other provisions such as Payment Blockage Provisions and Standstill Periods. This is an express agreement by the holders of the Junior Debt to be Subordinated. Note that the holders of Senior Debt cannot effect this type of Subordination without the agreement of the holders of the Junior Debt. In other words, you don’t get to be Senior Debt by saying you are Senior Debt; you get to be Senior Debt by persuading the other guy to say he is Junior Debt. See Subordination and Turnover.

*Controlled Foreign Company:* Controlled Foreign Company rules apply to subsidiaries of parent entities located in certain jurisdictions, typically when the subsidiary is located in a ‘low tax’ or ‘no tax’ jurisdiction. The term is principally used in reference to the UK, although other jurisdictions (in Europe and elsewhere) have similar or corresponding

rules. Typically, part or all of the profits/unremitted profits of the CFC are attributed to the relevant parent for tax purposes.

*Convenio Anticipado*: in Spain, an advanced composition agreement which may be filed at the beginning of the Insolvency proceedings when the debtor files for Insolvency but must be filed before the expiry of the term for providing proof of claims. It must be agreed in advance by creditors holding at least 10 per cent or 20 per cent of the total debts depending on the moment of filing. For more information on Spanish Insolvency, see Latham & Watkins Client Alert No. 872, Spanish Insolvency Act Changes — Paving the Way for Restructurings (29 May 2009), available at [www.lw.com](http://www.lw.com).

*Conversion Fee*: another name for a Rollover Fee.

*Conversion Premium*: the amount by which the Conversion Price of Convertible Bonds exceeds the current market value of the underlying stock as of the Pricing date. When a Convertible Bond is priced at a 20 per cent Conversion Premium, it is said to be “up 20”.

*Conversion Price*: the price at which a given convertible Security can be converted to stock. The Conversion Price is set on the Pricing date at a premium above the current market price of the underlying stock on that date. Rule 144A requires that the premium be at least 10 per cent as of the Pricing date for Securities sold in a Rule 144A Offering when the underlying stock is an exchange listed Security.

*Conversion Rate*: the rate at which a Convertible Bond may be converted into stock, typically expressed as a share number per €1,000 in principal amount of Bonds. This is really just another way of expressing the Conversion Price.

*Conversion Value*: the value of a Convertible Bond if it were immediately converted into stock at the Conversion Rate then applicable. If the Conversion Value of a Convertible Bond is more than its principal amount, then that Convertible Bond is said to be In the Money.

*Convert Deal*: a transaction in which Convertible Bonds are issued.

*Convertible Bond*: a Bond that is convertible into another Security, typically Ordinary Shares.

*Convertible Preferred Equity Certificate*: PECs that are convertible into equity interests.

*Coordinating Committee*: used in restructurings, in particular where the Syndicate is large. The Coordinating Committee acts as the interface between the Borrower and the Lenders, looking to agree the terms of a restructuring. Members typically include the largest debt holders in the Syndicate. Their leader is known as the Coordinator. The Coordinating Committee can't bind the rest of the Lenders. Also known as a Creditors Committee or Steering Committee.

*Coordinator*: the lead institution on the Coordinating Committee.

**Corporate Benefit:** a requirement under certain legal regimes in Europe that a company must derive an actual benefit, consideration or advantage from any transaction in order for it to be lawfully entered into without its officers risking personal liability or a prison sentence or (worse) making the transaction void. This is particularly the case for decisions involving the granting of Guarantees or Security Interests with respect to the liability of a third party. The extent to which a company can take into account the benefits derived by other members of its group when assessing the existence of Corporate Benefit differs between jurisdictions. The Corporate Benefit regime applicable to each relevant jurisdiction will in particular be reflected in any Guarantee Limitation Language.

**Cost of Funds:** what it costs a Lender to borrow funds to provide to a Borrower. In Credit Facilities, a Lender's Cost of Funds is intended to be passed on to the Borrower and, on the assumption that Lenders raise their funds in the relevant interbank market, is represented by EURIBOR/LIBOR. EURIBOR/LIBOR is usually considered a fair reflection of a Lender's Cost of Funds but this is not always the case, in particular when markets are volatile and liquidity between financial institutions is scarce (although Lenders are often reluctant to admit this). See Market Disruption Clause.

**Counterparts:** under many legal systems not all signatories to a document need to sign the same hardcopy document; each separate hardcopy document that is signed is known as a Counterpart and together they create a binding agreement.

**Countersign Deadline Date:** the date by which the Borrower must countersign for the Commitment Papers to take effect. The Countersign Deadline Date is usually found at the end of the Commitment Letter and it applies to the Fee Letter and (if applicable) Engagement Letter as well. It is typically set just a few days into the future but Borrowers may be able to negotiate longer periods. If the Commitment Letter is not signed by this date, the commitment offer terminates. This is not the same as the Drop Dead Date, which is usually several months into the future.

**Coupon:** the contractual Interest Rate stated on a Bond when the Bond is issued. Note the Coupon is not the same as the Yield. Actual physical Coupons are separate bearer instruments, and are only attached to Bearer Bonds not Registered Bonds.

**Covenant:** legalese for an agreement to do something (Positive Covenants), not to do something (Negative Covenants), or to maintain something (Maintenance Covenants). Also referred to as an "undertaking".

**Covenant Defeasance:** one of two types of Defeasance found in Indentures (the other kind is Legal Defeasance). Covenant Defeasance relieves the Issuer from complying with its obligations under the substantive Indenture Covenants and waives the related Events of Default. See also Legal Defeasance.



*Covenant Lite:* a Credit Facility that contains Bond-like Covenants. A Covenant Lite Credit Agreement does not contain Maintenance Covenants. Usually only available in red-hot markets and probably one of the many casualties of the Credit Crunch.

*Covenant Loose:* like Covenant Lite but with (typically) one Financial Covenant. Again, usually only available in red-hot markets.

*Coverage Covenant:* a Maintenance Covenant that requires the Borrower to maintain a minimum level of cash flow or earnings relative to specified expenses, most often Interest, debt service (Interest and repayments) and Fixed Charges (debt service, Capital Expenditures and/or rent). See Cash Flow Cover, Interest Coverage Ratio and Fixed Charge Coverage Ratio.

*Covered Bonds:* general non-deposit obligation Bonds of the issuing bank secured by cash flows from mortgages or public sector loans that remain on the bank's Balance Sheet. This is essentially a corporate Bond with recourse to a pool of assets that "covers" the bond if the Issuer becomes insolvent; the Issuer must continuously ensure that the pool sufficiently backs the Covered Bond and, upon default, the investor has recourse to both the pool and the Issuer. If the issuing bank becomes insolvent, the assets in this pool are separated from the issuing bank's other assets solely for the benefit of the covered Bondholders. These debt Securities have been utilised in Europe for over 200 years, but are still a very new concept in the US. Covered Bonds are similar in many ways to residential mortgage Asset-Backed Securities, with the major difference being that the loans backing a Covered Bond are also guaranteed by the bank.

*Covered Call:* a situation where somebody owns shares in a company and sells a Call Option on those same shares. So, for instance, you take your bonus and buy 100 shares of Google at US\$500 a share and also sell a Call Option on those shares at US\$550 a share (for which you are paid US\$25 a share). In this situation, you then have to sell the shares to the person you sold the Call Option to if the shares rise above US\$550 a share. On these facts, your Covered Call was a good bet if the shares rise to less than US\$575, but a bad bet if they rise to more than that. The call is a "covered" call because you own the shares you need to deliver if the Option is exercised.

*CPEC:* acronym for Convertible Preferred Equity Certificate.

*CPS:* acronym for Conditions Precedent.

*CP Satisfaction Letter:* a letter required by some banks (or the Facility Agent on their behalf) in connection with the Closing of a Credit Facility. The CP Satisfaction Letter is prepared by counsel to the Lenders. It confirms the satisfaction of certain mechanical Closing Conditions set forth in the Credit Agreement that require delivery of specified legal documents and points out whether any items have been deferred for delivery after Closing as a Condition Subsequent.

*Cram:* bankers' slang for the Securities Demand. See also Put Bond.

*Cramdown:* means different things in different jurisdictions but broadly speaking is a term used to describe a process of forcing or imposing a restructuring proposal on the dissenting or non-consenting creditors or other stakeholders of that company.

*Credit Agreement:* the legal document in which one or more Lenders agrees to lend money to a Borrower. The Credit Agreement not only sets forth the mechanics for the making of loans (and, if relevant, the issuance of Letters of Credit and availability of Ancillary Facilities), but also contains Representations and Warranties of the loan parties, Positive Covenants, Financial Covenants, Negative Covenants, Events of Default and the remedies of the Lenders after the occurrence of those Events of Default, and expense reimbursement, indemnity and other Boilerplate provisions.

*Credit Bid:* the acquisition of assets by creditors from a debtor where the purchase price is paid by some form of debt forgiveness. Commonly employed in restructurings, particularly to implement Debt For Equity swaps. Issues can arise in dealing with non-participating creditors in the class of debt that will be bid, for example, amongst Lenders of Senior Debt. Non-participants can be dealt with in a number of ways, including being cashed-out, but more ideally by being subject to a Cramdown through the use of some kind of statutory plan, e.g., a Scheme of Arrangement.

*Credit Crunch:* come on, where have you been?

*Credit Default Swap:* a contract, using ISDA form documentation, whereby one party agrees to pay the other party if certain catastrophic "credit events" (such as payment default, Insolvency or restructuring) occur under a debt undertaking of an obligor.

*Credit Enhancement:* the improvement of the credit quality of a company or its Securities by employing resources, financial instruments or the credit of another entity to support such credit quality. Common methods of Credit Enhancement include Guarantees, Letters of Credit, surety bonds, reserve accounts, cash collateral accounts and Monoline Bond Insurance.

*Credit Facility:* a collective reference to the loans and commitments of the Lenders under a Credit Agreement. Examples of Credit Facilities include: Revolving Credit Facilities, Term Loan Facilities, First Lien Facilities, Second Lien Facilities, Mezzanine Facilities and Bridge Facilities. Credit Facilities can be Bilateral or Syndicated.

*Credit Group:* any party restricted by the Covenants in the Terms and Conditions or the Indenture, typically including the Issuer, Restricted Subsidiaries and Guarantors.

*Credit Rating:* designations used by Ratings Agencies to give relative indications of credit quality.

**Credit Risk:** the risk that a counterparty to a financial transaction will fail to perform its payment or other obligations typically because of Insolvency.

**Creditors Committee:** in the restructuring context, see Coordinating Committee. A quite separate Creditors Committee may also be established in formal Insolvency proceedings, as in the case of English Administration or liquidation proceedings. Here the committee is intended to be representative of the general body of creditors, with consultation and (in liquidation) certain approval rights in respect of various matters. Similarly, in French *Sauvegarde* or *Redressement Judiciaire* proceedings for large companies or upon request of the company, a restructuring plan proposal must be submitted to three separate Creditors Committees, one including the main suppliers of the debtor, another including its lenders holding bank debt and other creditors (other than major suppliers or bondholders) having extended credit to the debtor, and the last including its bondholders (see Bondholders Committee). The three Creditors Committees have six months after the opening of the *Sauvegarde* or *Redressement Judiciaire* proceedings to adopt a restructuring plan, in identical terms by a majority (for each committee) of its members representing two-thirds of the debtor's total debt. See also Term-Out.

**Creditors Voluntary Liquidation:** a type of English liquidation proceeding approved by a company's creditors. An alternative form of voluntary liquidation where a Members Voluntary Liquidation cannot apply because the company is not solvent.

**CREST:** an electronic settlement system for UK securities held in uncertificated form.

**CREST Shareholder:** a shareholder holding his shares or Securities electronically within CREST, whose name appears on the company's shareholder register as the legal owner of those Securities, with entitlement to all rights and benefits attached.

**Cross Acceleration:** an Event of Default which occurs when other indebtedness of the Borrower or in the Borrower's group above an agreed threshold is Accelerated. Seen in Bonds but not typically in loan world. Contrast to Cross Default.

**Cross Default:** an Event of Default which occurs when other indebtedness of the Borrower or in the Borrower's group above an agreed threshold is not paid when due or may be Accelerated whether or not the relevant creditors actually Accelerate, so basically the Lenders under the Credit Agreement benefit from and can rely on the occurrence of an Event of Default with respect to more stringent obligations agreed in another Credit Agreement. Contrast to Cross Acceleration.

**Cross Receipt:** a receipt signed at the Closing of an issue of Securities, whereby the Issuer confirms receipt of the net proceeds of the issue and the Managers confirm receipt of the Securities. Receipt of net proceeds and Securities is deemed to take place simultaneously.

**Cross-stream:** from a company to another company in the same group which isn't its parent company or its subsidiary (*i.e.*, its sister company). For example, a Guarantee granted by a company to support the debt of a sister company is a Cross-stream Guarantee. Compare Downstream and Upstream.

**Crystallisation:** the process whereby a Floating Charge becomes a Fixed Charge over the assets to which it relates. Crystallisation can take place as a result of a notice (*e.g.*, after an Event of Default) or, in some circumstances, may occur automatically on an Event of Default or other agreed event.

**Cum:** used to abbreviate "cum dividend", "cum rights" to indicate that the buyer of *e.g.*, an Ordinary Share is entitled to receive dividends or other benefits.

**Curatore Fallimentare:** the public officer in Italy appointed by the bankruptcy court and charged with administering a debtor's *Fallimento*.

**Cure Period:** the period provided in the Terms and Conditions, Indenture or Credit Agreement for an Issuer/Borrower to cure (*i.e.*, fix) a Default so it does not mature into an Event of Default. Also called a Grace Period. See Default, Event of Default and Acceleration.

**Currency Swap:** an arrangement entered into by a company for the purpose of Hedging foreign currency risk associated with the company's operations. For instance, a German-based company with operations in the US might use a Currency Swap to protect itself from fluctuations in the Euro-to-Dollar exchange rate.

**CUSIP:** acronym standing for Committee on Uniform Securities Identification Procedures. This is a nine character identification number unique to each issue of Bonds. Generally, this is used for US dollar denominated Bonds.

**Custodian:** a financial institution holding Securities in safekeeping for a client either as part of an issue of Securities or generally.

**Custody Agreements:** agreements signed by Selling Shareholders in IPOs or follow-on equity transactions along with Powers of Attorney. The custodian under the Custody Agreement is authorised to hold the share certificates between Pricing and Closing and deal with the transfer Agent at the Closing. One principal purpose of the Power of Attorney and Custody Agreement is to allow the Underwriters to deal solely with the custodian (rather than with each Selling Shareholder) at the Closing. This is particularly important where there are individual people who are Selling Shareholders. These folks could get hit by a bus (or, more likely, crash their Ferraris) between Pricing and Closing. The Underwriters don't want a busted trade if that happens. Also used to describe the agreement whereby a Custodian is appointed to take custody of certain Securities on behalf of a company.

**CVA:** an acronym for Company Voluntary Arrangement.

*CVL*: an acronym for Creditors Voluntary Liquidation.

*"D" Loan*: another name for a Facility D Loan.

*Dain*: an Islamic finance term for a loan or other debt.

*DAM*: acronym for Debt Adjustment Mechanism. Also known as a Collateral Adjustment Mechanism or CAM.

*Daman*: an Islamic finance term for a contract of guarantee or a liability.

*Dataroom*: the actual or virtual room established to allow Due Diligence. Not a very exciting place.

*Date Certain (data certa)*: a requirement under Italian law to make a deed enforceable against third parties and to establish priority amongst different claimants/creditors. Date Certain is achieved by: (a) Notarisation, (b) authentication of the signature by a notary public, (c) post stamp on the deed, (d) registration of the document upon payment of a registration tax and (e) service by court bailiff. So not cumbersome at all really.

*Day 21*: the first permitted closing date after a takeover offer has been made under the City Code.

*Day 60*: the last day on which a takeover offer may be declared or become unconditional as to acceptances under the City Code.

*Day Count Convention*: determines how Interest accrues across investments. Most currencies assume that each month has 30 days and therefore each year has 360 days, which mechanically slightly increases the Interest actually paid by the Borrower. Sterling is one of the few currencies that takes the actual number of days so each year has 365 or 366 days.

*Daylight Facility*: a Credit Facility which is borrowed and repaid on the same day, most commonly used to facilitate intra-group reorganisations.

*Deal-Away Fee/Deal-Away Protection*: another name for the Refinancing Fee.

*Deal Toy*: another name for a Tombstone.

*Debenture*: a Bond with a maturity of more than 10 years. Bonds with a maturity of 10 years or less are usually called Notes. It has a further meaning in the UK, also being the name given to a Security Agreement whereby a company creates Fixed Charges and/or a Floating Charge over the whole or substantially the whole of its assets and undertakings.

*Debt Adjustment Mechanism*: another name for Collateral Adjustment Mechanism or CAM.

*Debt Capacity*: used to describe the amount of debt that an entity can repay in a timely manner (from available means or resources) without jeopardising its financial viability. Also used to describe the total amount of debt that an entity can incur by virtue of being required to comply

with Negative Covenants or other restrictions such as in its constitutional documents.

*Debt For Equity:* the process whereby a debt interest is extinguished in exchange for an equity interest. Used to re-structure a company's balance sheet in a restructuring. See also Credit Bid and Loan To Own.

*Debt Prepayment:* another name for the Debt Sweep.

*Debt Pushdown:* see Pushdown.

*Debt Sweep:* a specific type of Mandatory Prepayment. This provision in a Credit Agreement requires that loans be prepaid with the net cash proceeds of certain debt issuances (generally excluding all Permitted Debt issuances). Of course, any non-Permitted Debt issuance is also an Event of Default under a Credit Agreement, so this provision is somewhat redundant. But if there is a Prepayment Premium required to be paid with all Mandatory Prepayments, this clarifies that the Prepayment Premium is expected to apply at the time of the Debt Sweep. The Debt Sweep provision will not be subject to a Reinvestment Right. It is unusual to see this in European Credit Agreements.

*Debt Test:* a reference to the Covenant restricting the incurrence of debt by the Issuer and its Restricted Subsidiaries. See also Ratio Debt.

*Declared Default:* an Event of Default that has resulted in Acceleration. Often this is used as the trigger to allow enforcement of Collateral rather than the mere occurrence of the Event of Default itself.

*Deed:* a written document under English law that must be executed in compliance with certain formalities (including those required as a result of Mercury). Certain documents must be executed as Deeds including Security Interests and powers of attorney.

*Deed Poll:* a Deed but with no counterparty. The person entering into the Deed Poll promises to do certain things for the benefit of certain third parties and the third parties can enforce this obligation even though not a party to the document itself.

*Deemed Cure:* another name for a Soft Mulligan.

*Deemed Dividend:* this tax issue is a reason to be careful when structuring subsidiary asset pledges, stock pledges and Guarantees for Borrower entities, particularly in respect of US Borrowers, but also in certain other jurisdictions. Where relevant, a Borrower whose loan receives support from its foreign subsidiaries, in the form of Security Interests, share pledges and/or Guarantees, may be deemed to receive a dividend (a Deemed Dividend) for tax purposes from its foreign subsidiaries. Depending on the relevant jurisdiction, it may be possible to structure some support appropriately, so that no Deemed Dividend issues arise, however care will need to be taken (for example, in the US, a pledge of stock of a non-US subsidiary will not result in a Deemed Dividend if the Lenders settle for a 65 per cent stock pledge from "first tier" non-US

subsidiaries only (*i.e.*, subsidiaries whose stock is held directly by the US parent or any of its domestic subsidiaries)). This issue is the reason why foreign subsidiaries generally do not provide Guarantees of US debt (although, depending on their tax status, in some instances foreign subsidiaries can provide such Guarantees). See Collateral Adjustment Mechanism.

**Default:** the beginning of trouble. Terms and Conditions, Indentures and Credit Agreements generally have three stages of trouble: the Default, the Event of Default and Acceleration. At stage one, the Default, the Issuer or Borrower has violated some provision of the Terms and Conditions, Indenture or Credit Agreement. Left uncured for a specified period of time, together (in some cases) with notice from a disgruntled Bondholder or Lender (or the requisite majority thereof), a Default will mature into an Event of Default (and the story continues in that definition). Also known as a Potential Event of Default and when adopting this term, Default can therefore be used to describe both Potential Events of Default and Events of Default just to confuse you further.

**Default Interest:** the extra Interest accruing on due but unpaid amounts under a Credit Agreement. Default Interest accrues on all such overdue amounts at the regularly applicable rate plus (typically) 100-200 Basis Points. Contrast this to practice in the US where Default Interest can accrue on all outstanding amounts (whether or not overdue) (often at the regularly applicable rate plus 200 Basis Points) following the occurrence of any Event of Default (*i.e.*, it is charged on the total loans rather than just amounts that have not been paid on their Due Date). Note that the ability of Lenders to recover Default Interest may be subject to local Insolvency restrictions in different jurisdictions.

**Defaulting Lender:** name used to describe a Lender that fails to fund, rescinds the Credit Agreement or related documentation, or becomes subject to Insolvency proceedings. The consequences of becoming a Defaulting Lender vary between Credit Agreements but can include loss of entitlement to any Commitment Fee, inability to vote on Amendments and Waivers and/or being caught by a Yank-a-Bank.

**Defeasance:** this is a way to escape the Covenants governing US-law governed Bonds even during a Non-Call Period. Defeasance is a process by which an Issuer may have the Covenants under its Indenture (and even its payment obligations in the case of Legal Defeasance) discharged if the Issuer irrevocably deposits with the Trustee enough money (or appropriate government issued Cash Equivalents) to cover all Interest and principal payments on the Notes until either maturity or the first date on which the Notes are Optionally Redeemable. This can be very, very expensive. Defeasance can take the form of Covenant Defeasance or Legal Defeasance. Legal Defeasance is not an available option under current law because no law firm can give the required tax opinion (*i.e.*, "this defeasance will not be a taxable event to Bondholders"). There is no tax problem with Covenant Defeasance under current law because it

does not let the Issuer off the hook from its payment obligations. See also Satisfaction and Discharge.

*Defective Release Clause:* a Release Clause which does not work properly in that the clause does not allow the release of all borrowing and guarantee obligations of all necessary Obligor upon a disposal of a company's group to a new purchaser. While often the result of defective drafting, the release clause may also be limited deliberately. Results in significant hold-out value for Subordinated Debt holders even if Out of the Money. You really don't want to see one of these if you are a First Lien Lender. See Latham & Watkins Client Alert No. 1093: European Directories — Court of Appeal Decision Intercreditor Release Clauses (25 October 2010) available at [www.lw.com](http://www.lw.com).

*Definitive Bond:* a physical certificate representing part of a new Securities issue and held in physical form by the Bondholder. Used for Bonds placed with retail investors (such as Belgian Dentists) who wish to hold the actual Bond (usually under their mattress).

*Delayed Draw Term Facility:* a Term Loan Facility that is available to be drawn, usually subject to a list of specified conditions, at a certain point subsequent to the Closing Date, or at various times for a period subsequent to Closing. In the Commitment Letter, the terms of any Delayed Draw Term Facility will be included in the Senior Secured Facilities Term Sheet. A Delayed Draw Term Facility is often intended to be used for acquisitions or Capital Expenditure programmes. See Acquisition Facility and Capex Facility.

*Delivery Versus Payment:* a delivery of Securities only upon receipt of payment, where delivery and payment are deemed to take place simultaneously.

*Demand Registration Rights:* another name for Demand Rights.

*Demand Rights:* a type of Registration Right that entitles the holder, subject to certain agreed upon conditions, to force the Issuer to register the Issuer's Securities with the SEC. Compare Piggy Back Registration Rights.

*Dematerialise:* the term used to describe Securities moved to a book-entry system (being "in dematerialised form").

*Demerger:* the division of a business into two or more separate organisations. Also known as a Spin-off.

*Depository Trust Company:* a member of the US Federal Reserve System and an SEC clearing agency that brings efficiency to the Securities industry by retaining custody of millions of Securities issues, effectively "dematerialising" most of them so that they exist only as electronic files rather than as countless pieces of paper. What does this mean? Basically, it's the reason real Securities trading is different than in the movies — the reason you don't have to keep actual physical Securities in the safe



in your grandmother's basement. Instead, DTC takes custody of the Security (which is placed in DTC's vault) and then keeps an electronic record of who the real owners of the Security are. See Clearing System.

*Depreciation:* in accounting, a method of allocating the acquisition cost of a tangible asset over the expected useful life of the asset by attributing portions of such cost to the periods during which the asset is being "used up" to earn revenues. Depreciation is not a method of valuation but rather of cost allocation. The Depreciation of an asset for accounting purposes is not necessarily a reflection of the asset's current market value. In accounting speak, a tangible asset Depreciates over time whereas an intangible asset Amortises. See Amortisation.

*Description of Notes:* a long-form summary of the Indenture provisions contained in the Offering Memorandum or Prospectus. For the important provisions, the Description of Notes is a verbatim recitation of what will be in the Indenture. This appears in US-law governed offerings only. See also Terms and Conditions.

*Desequilibrio Patrimonial:* in Spain, the reduction of net asset value to below half the value of a company's share capital as a result of accumulated losses. In such circumstances, the directors of the company must call for a shareholders meeting to dissolve the company or file for Insolvency, unless the share capital of the company is adequately increased or decreased. For more information on Spanish Insolvency, see Latham & Watkins Client Alert No. 872, Spanish Insolvency Act Changes — Paving the Way for Restructurings (29 May 2009), available at [www.lw.com](http://www.lw.com).

*Designated Arrangers' Counsel:* used in loan world and just another name for Designated Underwriters' Counsel.

*Designated Underwriters' Counsel:* a law firm designated by the Issuer or Borrower to serve as counsel to any investment bank or other financial institution that serves as an Underwriter (or is hoping to serve as Underwriter) on that Issuer's Securities offerings (whether public or private) or that Borrower's Credit Facilities. Hear this phrase and think of Latham.

*Dharar:* an Islamic finance term for harm or damage, such as harm to an 'Ayn subject to a *Ijara*.

*Diligence:* see Due Diligence.

*Diminishing Musharaka:* an Islamic finance term meaning a *Musharaka* structure where the share of a partner in the *Musharaka* is purchased by the other partner (or customer) periodically and in scheduled amounts.

*Ding the Basket:* refers to a member of the Credit Group making a payment or investment that is not expressly allowed by the general terms of the Restricted Payments Covenant and therefore necessitates use of the amounts provided in a Basket to complete the transaction.

*DIP Financing*: shorthand for debtor-in-possession financing, a US concept which is financing arranged for a company for the period during which it is in the Chapter 11 reorganisation process. Notably, claims for principal, interest and fees under a DIP Financing typically take Priority over all existing debt, even pre-Bankruptcy Secured Debt. As long as certain conditions are met, the Bankruptcy Code allows liens securing the DIP Financing to “prime” Liens securing the pre-Bankruptcy filing debt, in order to encourage Lenders to lend money to companies in Bankruptcy. Many other jurisdictions have looked at implementing a similar concept however it is not yet common in Europe, for example, see Latham & Watkins Client Alert No. 890, “DIP” Lending on Its Way into the United Kingdom; Other Significant Changes to UK Corporate Insolvency Laws Proposed for Consultation (30 June 2009), available at [www.lw.com](http://www.lw.com).

*Disclaimer*: a notice or statement for example in a Prospectus which is designed to limit or avoid potential legal liability and often required by Managers or Underwriters, for instance to bring to the notice of investors that the Managers or Underwriters do not take any responsibility for the information provided in the Prospectus regarding the Issuer and its business and financial position.

*Disclosure and Transparency Rules*: the rules for Issuers on the disclosure and control of inside information and transactions by PDMRs and others, as contained in the FSA's Disclosure Rules and Transparency Rules Sourcebook.

*Disclosure Letter*: in the M&A context, the letter by which the sellers disclose to the buyers certain events or circumstances which would otherwise constitute breaches of the Representations and Warranties in the SPA. Disclosure Letters are less common in the debt financing context but can be used by Borrowers to make disclosures to the Lenders against the Representations and Warranties in the Credit Agreement. This is not however usual as the Representations and Warranties have materiality thresholds in them such that Lenders do not generally want to pre-approve matters that exceed the agreed thresholds or, to the extent that they are agreed, such carve-outs should be included in the Credit Agreement itself for ease of reference.

*Discount Notes*: Notes that are issued for less than their face amount (Par Value). The important thing to remember is that although the Notes are issued below their face amount, the Issuer owes the face amount of the Notes when they mature. This means a holder of the Discount Note receives a return both off the Interest payment or Coupon (if there is one) and by having paid less than it will receive back at maturity. A Discount Note has an Accreted Value on the date it is issued equal to what was paid for it. The Accreted Value creeps up over time to equal the Par Value of the Note. This creeping is called “accreting” and is treated as Interest expense to the Issuer and Interest income to the Bondholder. If

you hold a Discount Note close to your ear, you can actually hear the accretion occurring.

*Disenfranchisement:* if an affiliate of the Borrower (including a Sponsor) enters into a Buy Back, it is likely to be subject to Disenfranchisement meaning that it does not get to vote on Amendments and Waivers, receives no information sent to Lenders, can't attend Lender meetings etc. The aim is to prevent Lenders with conflicting interests from disrupting the Syndicate. In Bond world, affiliates of the Issuer (including any Sponsor of the Issuer) are always Disenfranchised.

*Disproportionate Impact Language:* Business MAC provisions may contain Carveouts specifying that certain declines in the business will not trigger a Business MAC. Examples include Material Adverse Changes triggered by problems specific to a particular industry, poor economic conditions generally, regulatory changes or an outbreak of war. In these cases, there is then a Carveout to this Carveout known as Disproportionate Impact Language, which states that even if the Business MAC was triggered by one of the causes mentioned in the list of Carveouts (e.g., industry decline or general economic conditions), a Business MAC will nonetheless be deemed to have occurred if the event(s) had a disproportionate impact on that particular company.

*Disqualified Stock:* any stock which is or could be redeemable prior to the maturity date of the Bonds plus a number of days (typically 91 days).

*Distressed Debt:* debt which is trading (well) below Par due to concerns about the financial health of the Borrower. See Loan To Own.

*Distressed Debt Fund:* an investor that only looks to purchase Distressed Debt.

*Dividend Blocker Covenant:* see Limitation on Restrictions on Payment of Subsidiary Dividends Covenant.

*Dividend Stopper:* see Limitation on Restrictions on Payment of Subsidiary Dividends Covenant.

*Documentation Agent:* a title often granted to a Lender who takes a large portion of a loan commitment in the Syndication process. The position generally does not require any actions or entail any responsibilities (or warrant additional fees!). Essentially, it is a means for a Lender to get its name on the cover of a Credit Agreement and receive League Table Credit. Not overly common in Europe.

*Double Dip:* in the financial world, the term used to describe the circumstances when a recession quickly follows a prior recession.

*Double Luxco Structure:* a post-Credit Crunch method of structuring Credit Facilities in mid- to large-cap LBO acquisitions of French target groups in order to try to avoid the Sponsor or the Obligor group putting themselves (or threatening to put themselves) in *Sauvegarde*. Two

Luxcos are put in place above the first French company, with the top Luxco granting a Security Interest over the shares in the second Luxco which owns the French Bidco. How does this help? Well, under the EU Insolvency Regulation, the enforcement of this Security Interest is allowed notwithstanding the opening of *Sauvegarde* proceedings against the top Luxco (which might happen if its COMI is in or has been moved to France). Generates a host of Intercreditor Agreement issues with the Sponsor and the Mezz Lenders. Best to call Latham if your deal is going to involve a Double Luxco structure.

*Double Taxation Treaty:* an agreement between countries (usually bilateral) which is intended to prevent taxpayers being taxed on the same amount of profit or gains in each country. This often includes reducing the rate of Withholding Taxes that would otherwise be due in respect of payments made by a person in one of the countries to a person resident in the other country, so long as the requirements of the Double Taxation Treaty are met.

*Downstream:* from a parent company to a direct or indirect subsidiary. For example, a Guarantee granted by the parent to support the debt of a subsidiary is a Downstream Guarantee. Compare Upstream and Cross-stream.

*Drag Along Rights:* allow a majority shareholder to require that a minority shareholder participate in a sale to a third party. The idea is that a majority shareholder may not be able to recognise the full value of its shares unless it can sell the entire company to a third party by dragging along minority shareholders. Drag Along Rights would generally provide that the minority shareholder receive the same terms as the majority shareholder. Compare Tag Along Rights. In loan world, it also refers to a provision whereby if Senior Debt holders are making Amendments or giving consents, the Junior Debt holders are automatically deemed to have given the same Amendment or consent, and is therefore subject of much negotiation.

*Drawdown:* in the context of Euro Medium Term Note Programmes, the issue of a series of Notes thereunder, up to the established programme limit amount. In loan world, the borrowing of funds.

*Drawstop:* in a Credit Agreement, an event (such as a breach of a Covenant or Representation and Warranty) that gives the Lenders the right to refuse to make further loans.

*Drop Dead Date:* the date on which the commitments set forth in the Commitment Papers will terminate if the Senior Facilities, Mezzanine Facility, Notes or Bridge Loans (as applicable) have not funded pursuant to the terms and conditions in the Commitment Papers. The Drop Dead Date is usually found towards the end of the Commitment Letter — usually set at one or more months after the date of the Commitment Letter depending on the transaction. In an acquisition financing, the Drop

Dead Date is usually the same as the Drop Dead Date in the acquisition agreement (*i.e.*, the date on or prior to which the acquisition needs to be consummated). Compare Countersign Deadline Date.

*Drop Dead Fee*: a fee paid on the Drop Dead Date to the Arrangers even though the debt has not been funded.

*Drop Hands*: settlement under which the parties agree to bear their own costs.

*DTC*: acronym for the Depository Trust Company.

*Dual Currency Bond*: an issue of Securities denominated in one currency but where interest and/or principal is repayable in another currency.

*Due Date*: the anticipated end of a tough nine months and the beginning of a tougher and longer period. Also the date on which Interest and principal is due to be paid to the Lenders.

*Due Diligence*: what lawyers and bankers do to learn about a company. In the M&A context, the buyer (and its lawyers and bankers) does Due Diligence (and/or relies on Due Diligence prepared by the vendor's advisors which is provided to them with a Reliance Letter) so it can understand what it is buying. In Securities and Capital Markets transactions, the bankers and lawyers do Due Diligence in order to establish a Due Diligence Defence (in 144A Offerings) or for their general diligence purposes (in Regulation S Offerings). In the bank loan market, bankers and lawyers do Due Diligence to make sure the deal makes sense. Diligence activities are broad and range from a review of relevant documents (often in a Data Room) and Financial Statements to plant visits and interviews with management, outside accountants, counsel, and customers and suppliers. The process in Europe in the loan world typically results in the preparation of Due Diligence reports by advisors to the Borrower (or vendor) which are provided with a Reliance Letter in favour of the initial Lenders under a Credit Agreement and those institutions becoming Lenders during Syndication. In an LBO, typical Due Diligence reports may include an accountants' report, legal report, environmental report, insurance report, market report and/or pensions report.

*Due Diligence Condition*: a Condition Precedent, generally found in the text of the Commitment Letter, that the commitment is subject to the satisfactory completion of Due Diligence by the Arranger. In most cases and in particular in the Certain Funds context, the Arranger will be expected to complete its Due Diligence prior to the signing of the Commitment Letter, in which case this Condition Precedent will be removed prior to signing. In early drafts of the Commitment Letter, the Due Diligence Condition is often included in brackets with a footnote indicating that it is expected to be removed upon the satisfactory completion of Due Diligence.

*Due Diligence Defence:* the Underwriters' principal defence in Securities offerings lawsuits arising from 144A Offerings. The US Securities laws impose liability on certain persons and entities for damages resulting from any material untrue statement contained in, or omitted from, a Registration Statement. Issuers are strictly liable for the information in the Registration Statement, but other entities (including Underwriters and the board of directors) involved in the offering can avoid liability by demonstrating a Due Diligence Defence. Specifically, Underwriters and the board of directors have an affirmative defence to Section 11 and Section 12 liability if they have relied on experts for the Expertised Parts of the Prospectus and conducted a "reasonable investigation" for the other portions. Similar defences are available to Rule 10b-5 claims made with respect to 144A/Regulation S offerings.

*Dutch Auction:* an auction where each seller specifies the price at which it is willing to sell and the purchaser accepts offers to sell until it has spent the amount it intends to spend, starting with the lowest price offered and working up the pricing ladder until the money to be spent is gone. In a "modified Dutch Auction", the process is the same except that all sellers are paid the same price based on the lowest price that will allow the purchaser to spend the intended amount.

*DVP:* acronym for Delivery Versus Payment.

*E Plus:* shorthand for "EURIBOR plus", used in stating the Applicable Margin in respect of a Floating Rate of Interest that is to be tied to EURIBOR, such as "E+100 bps". See also L Plus.

*Early Bird Fee:* from the common phrase "The early bird catches the worm" and used to signify a payment or fee made to those quick off the mark. For example, in the context of an Amendment, the Borrower could structure the fees offered such that any Lender or Bondholder who agrees to the Amendment within a short period of time following the Borrower's or Issuer's request receives an additional fee compared to Lenders or Bondholders accepting later.

*Earn-out:* an adjustment to the acquisition price in the M&A context whereby the buyer has to pay more money after Closing if certain future profit targets are met.

*EBIT:* this acronym stands for earnings before Interest and taxes. See also EBITDA and Adjusted EBITDA.

*EBITDA:* this acronym stands for earnings before Interest, taxes, Depreciation and Amortisation. Because it eliminates the effects of financing and accounting decisions, EBITDA is often used to assess a company's ability to service debt. See also Adjusted EBITDA.

*EBITDAR:* a cousin of EBITDA used for property-heavy companies where some or all of rental expense is added back as well.

*ECB:* acronym for European Central Bank or the English Cricket Board depending on where your interests lie.

*ECF*: acronym for Excess Cash Flow.

*EDGAR*: acronym for the SEC's Electronic Data Gathering, Analysis and Retrieval system. This is where you can retrieve a Reporting Company's periodic and other SEC filings. It can be found at [www.sec.gov](http://www.sec.gov).

*EEA*: acronym for European Economic Area.

*EEA Legend*: disclosure in the plan of distribution or subscription and sale section of an Offering Memorandum or the underwriting section of a Prospectus that is inserted to make sure a deal complies with European securities regulations and in particular the Prospectus Directive.

*Effective Global Rate*: see TEG.

*Effective Subordination*: the situation that occurs when one Tranche of debt is effectively, but not contractually, senior to another Tranche of debt. A Senior Secured Credit Facility that sits alongside unsecured Senior Notes without an Intercreditor Agreement that subordinates the Senior Notes to the Senior Secured Credit Facility is an example of effective subordination. Even though the Senior Notes are not contractually Subordinated to the secured borrowings under the Senior Secured Credit Facility, because the Credit Facility has Security and the Senior Notes do not, the Senior Notes are effectively Subordinated. See Subordination. Compare Contractual Subordination and Structural Subordination.

*EHYA*: acronym for the European High Yield Association, now known as AFME / EHYA.

*EHYA Agreement among Initial Purchasers*: the form Agreement among Initial Purchasers drafted by the AFME / EHYA that is used in most if not all High Yield Bond offerings in Europe.

*EIB*: acronym for European Investment Bank.

*EMTN*: acronym for Euro Medium Term Notes.

*Engagement Letter*: a letter that outlines the engagement of the Underwriters or Initial Purchasers to sell Securities on behalf of an Issuer. In a Commitment Paper package that contemplates a Bridge Loan component, an Engagement Letter is typically signed along with the Commitment Letter and the Fee Letter to ensure that the Borrower has retained responsible institutions to help it place the Securities to be issued to refinance (or obviate the need for) the Bridge Loan. In a Bank-Only Deal (where there is no Securities financing contemplated), there will usually be no Engagement Letter.

*Equal and Rateable*: used in the context of Liens to mean that two Secured Parties share the same (or equal) rights in the Collateral.

*Equitable Subordination*: means different things in different places. In certain European jurisdictions such as Germany and Italy, this term is used to describe the automatic Subordination of any debt claims against an Insolvent company that are held by the equity holders of such

company unless an applicable exemption applies (for example, with respect to Germany, see Restructuring Privilege). The concept can also extend further. For example, in Italy shareholders can also be required to reimburse any repayments on such loans received in the year before the opening of the Insolvency proceedings. Whilst Equitable Subordination typically only applies to shareholders, in certain jurisdictions such as Germany it could apply to Lenders if they exercise too high a degree of corporate control over the Borrower. Contrast this to the US where the term means a power of a Bankruptcy court to subordinate a claim of a party who engaged in fraudulent or otherwise unsportsmanlike conduct, in order to provide a remedy for innocent creditors and shareholders that suffered an injury as a result of the bad conduct.

*Equity Claw:* this Bond and Optional Redemption provision allows an Issuer to redeem a percentage of the outstanding Notes (generally 35 per cent) with the proceeds of certain types of equity offerings during the Non-Call Period. The rationale for this exception to the Non-Call Period is that Bondholders will generally be happy if a portion of their Bonds is redeemed at a hefty premium (typically Par plus the Coupon) as a result of new equity coming into the Issuer.

*Equity Commitment Letter:* in a Leveraged Buyout, the agreement pursuant to which the Sponsors commit to provide the Equity Contribution.

*Equity Contribution:* think of this as the “down payment” portion of the purchase price for the Target. It is the portion of the acquisition consideration that is paid using equity money provided by the Sponsor fund (which may be ‘pure’ equity and/or Subordinated Shareholder Loans). This is generally documented in the Equity Commitment Letter, which is drafted by the M&A deal team (*i.e.*, it is not part of the Commitment, Fee and Engagement Letter package). See Rollover Equity.

*Equity Cure:* an infusion of cash from shareholders in exchange for equity of the Borrower (or by way of Subordinated Shareholder Loan) in order to cure a Financial Covenant Default. This is a negotiated feature of Credit Facilities that Sponsors often request. In the most common version of this provision (at least until the Credit Crunch), the proceeds of the Equity Cure are treated as EBITDA for purposes of determining Financial Covenant compliance. If a deal has Financial Covenants, Lenders want to be able to use those Covenants to police the Borrower’s operating performance and call Defaults as appropriate. While infusions of junior capital are generally a positive event from a Lender’s perspective, by allowing shareholders to inject equity (and/or Subordinated Shareholder Loans) into the company after a Default and treating those amounts as if they were EBITDA to cure breaches of Financial Covenants, Lenders lose the ability to call a Default and to work with the Borrower to negotiate appropriate remedies (including potential changes to the structure, pricing and Collateral provisions of the Credit Facilities). This masking of operational problems can be particularly harmful over consecutive periods. As a result, use of an Equity Cure (where it is permitted at all) is



typically limited in amount and frequency based on negotiations. Note that more conservative versions of the Equity Cure allow the shareholders to inject equity (and/or Subordinated Shareholder Loans) to pay down debt but not to count the new equity as EBITDA. This more conservative version has been customary post-Credit Crunch.

*Equity Kicker*: an equity interest offered to a debt provider (*i.e.*, a Lender under a Credit Agreement or a Bond investor), sometimes in the form of Warrants issued by the company to such debt provider or contractual equity co-investment rights, typically as an incentive for such Lender or Bondholder to buy the debt.

*Equity-Linked*: Securities either convertible into, or with warrants to purchase, Shares of the Issuer or another company.

*Equity Prepayment*: a specific type of Mandatory Prepayment. This provision in a Credit Agreement requires the loans to be prepaid with the net cash proceeds of certain equity issuances by or above the “top” entity bound by a Credit Agreement, which in some cases may be the Borrower, but in other cases may be a Holdco Guarantor. Note that sales of equity of subsidiaries will not be covered here, as such sales are covered in the Asset Sale Prepayment because that equity is an asset of the entity that owns the stock of the subsidiary in question. In a non-public deal, this provision will generally not apply to additional equity issued to the existing equity holders in return for additional capital contributions but would catch proceeds received from an IPO (which would either result in a requirement for complete prepayment or be subject to Step Downs).

*Equity Sweep*: another name for an Equity Prepayment.

*ERISA*: acronym for the Employee Retirement Income Security Act in the US, a US federal law covering private company employee benefit plans. ERISA establishes legal guidelines for pension benefit plans and welfare benefit plans, including guidelines concerning pension investments, pension loans, administration, setting standards for fiduciary conduct and making fiduciaries personally liable for breaches of responsibility. See also VCOC Rights.

*Escrow*: used colloquially to mean the holding of signed documents to prevent them becoming operative until a specified event, *e.g.*, “We will hold the documents in Escrow until the Closing Date”. Also means the holding of proceeds from an offering of Securities or a Credit Facility that are to be used for a specific purpose (usually an acquisition) until the closing of the transaction. Can be informal or governed by a written agreement, with or without a third party acting as Escrow agent. In an acquisition context, the Escrow arrangement would typically be documented pursuant to a written agreement with the Trustee or Security Agent acting as the Escrow agent.

*Esperto*: the independent professional in Italy who has to assess and validate an *Accordo di Ristrutturazione*, a *Concordato Preventivo* and a

*Piano attestato di risanamento.* The *Esperto* is usually appointed by the company itself although, in some cases, bankruptcy courts have decided to appoint the *Esperto* themselves.

*Ethical Wall:* see Chinese Wall.

*eToys:* an online retailer specialising in the sale of toys. Also a term used in US financings: eToys was the plaintiff in an important 2005 case where a US court held that the lead Underwriter in a Firm Commitment Underwriting may have a fiduciary duty to the Issuer in certain circumstances. In light of the decision, most banks now include language (now known as eToys language) in their Commitment Letters and Underwriting Agreements specifically denying the existence of any such fiduciary duty. See *EBC I, Inc. v. Goldman, Sachs & Co.*, 832 N.E.2d 26 (N.Y. 2005). European Commitment Letters also typically contain such a provision (see the LMA standard form Commitment Letter by way of example) although it doesn't have such a fun name.

*EU:* acronym for European Union.

*EU Insolvency Regulation:* Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings. The regulation sets out a regime for the determination of Insolvency jurisdiction, and the recognition of the effects of an Insolvency proceeding, throughout the EU (other than Denmark).

*EURIBID:* the equivalent of LIBID for Euros.

*EURIBOR:* the Euro Interbank Offer Rate, which refers to the rate at which major financial institutions within the EU can borrow Euros from another participant bank in the EU money market. Most Credit Facilities and Floating Rate Notes have Interest Rates that are set at certain margins above EURIBOR or LIBOR (as applicable). See Applicable Margin and LIBOR.

*EURIBOR Floor:* same as a LIBOR Floor, just for Credit Facilities denominated in Euros and therefore using EURIBOR.

*Euro:* single European currency unit used by the Participating Member States of the EU and the cause of much political debate in the UK and elsewhere.

*Euro Medium Term Note Programme:* standardised offering document, generally containing the same information as would be in an Offering Memorandum for other types of Securities offerings, but where the parties also negotiate upfront the forms of the key agreements and other documents related to future offerings of the Issuer's EMTNs. Such a programme is maintained by the Issuer and can be used repeatedly (with minimal updating) for multiple drawdowns of the EMTNs. Generally, a large proportion of sales of any given drawdown of the EMTNs will be through a syndication of pre-selected buyers. By having the programme in place prior to issuance, much of the documentation process can be avoided near the issue date, which greatly speeds up the process to issue

EMTNs. Euro Medium Term Note Programmes are typically set up to only permit offerings of Securities pursuant to Regulation S. A Global Medium Term Note Programme (GMTN Programme) will typically be set up to permit offerings of Securities both pursuant to Regulation S and Rule 144A.

*Euro Medium Term Notes:* a debt instrument issued under an Euro Medium Term Note Programme on terms that can be anything from fixed to floating, zero to dual currency, partly-paid to instalment notes with any maturities though typically above one year and in any currency. In substance a Euro Medium Term Note has the same legal effect as a stand-alone Bond. See Euro Medium Term Note Programme.

*Euro MTF:* Multilateral Trading Facility (as defined in MiFID) and the exchange-regulated market operated by the Luxembourg Stock Exchange for the listing of Securities.

*Eurobond:* generally used to describe a Bond typically issued in a currency other than the currency of the country or market of the Issuer. Typically, a Eurobond is issued in a Reg S Only offering and governed by an English law governed Trust Deed with relatively fewer Covenants compared to a High Yield Indenture. Note that the term is also used in very broad terms to describe any Securities not offered pursuant to Rule 144A. Eurobond (or quoted Eurobond) also however has an additional, separate meaning in a UK tax context, as payments of interest on a "quoted Eurobond" are not subject to UK Withholding Taxes on interest. A quoted Eurobond for these purposes is a security which is issued by a company, is listed on a "recognised stock exchange" and which carries a right to interest (there is no stipulation as to currency in this context, in contrast to the alternative meaning previously described).

*Euroclear:* short for Euroclear Bank S.A./N.V., one of the two primary European Clearing Systems, located in Brussels. See Clearing System.

*Euronext:* a pan-European stock exchange based in Paris and with subsidiaries in Belgium, France, Netherlands, Luxembourg, Portugal and the UK. Contains equities and derivatives markets, provides clearing and information services; merged in 2007 with NYSE Group, Inc. to form NYSE Euronext, the "first global stock exchange".

*European Central Bank:* the central bank for the Euro, with primary responsibility to maintain the Euro's purchasing power and therefore price stability in the Euro area. It also sets short-term interest rates. Don't mention Greece to anyone who works there.

*European Commission:* the executive arm of the European Union and the body responsible for proposing European legislation and making decisions.

*European Economic Area:* the trading area currently comprising of the member states of the European Union and, in addition, Norway, Iceland and Liechtenstein. Created in 1994.

*European Investment Bank:* the long-term lending bank of the European Union, raising funds on the capital markets, which it lends to projects that further EU policy.

*European Union:* an economic and political confederation of European nations which share a common foreign and security policy and co-operate on justice and home affairs. That is the theory anyway.

*Eurosterling Market:* the market for instruments denominated in Sterling which pay interest gross and which are generally held in accounts outside the UK.

*Event of Default:* if you are experiencing one of these, things are not going well. As discussed in the definition of Default, Bonds and Credit Agreements basically have three stages of trouble: the Default, the Event of Default and Acceleration. At stage two, the Event of Default, the Default has matured into an Event of Default because the Issuer or Borrower has failed to cure the Default (and in some cases a disgruntled Bondholder or Lender (or the requisite majority thereof) has provided a required notice) within a specified period of time (or Cure Period). So what happens now? See Acceleration.

*Evergreen:* a provision in a contract that allows for the automatic renewal after the initial term of such contract for successive terms of an agreed upon length so long as neither party gives advance notice of an intent not to renew. As an example, the contract language will look something like this: "The term of this agreement shall commence on 1 January 2010 and continue through 31 December 2010, and shall continue from year to year thereafter unless terminated pursuant to section X". Evergreen provisions are useful because they prevent you from having to renegotiate your entire agreement each year unless one party is demanding it.

*Ex:* the opposite of Cum, and indicating that, as against the seller, the buyer e.g., of Shares is not entitled to dividends, participate in any rights issue etc.

*Excess Cash Flow:* a calculation of how much extra cash the Borrower has generated during a particular period of time that can or must be used in whole or in part to pay down debt early. It is a negotiated formula that starts with Adjusted EBITDA (or sometimes net income), plus some adjustments for changes in Working Capital, minus scheduled repayments of debt, Capital Expenditures, Interest expense and provisions for current taxes (plus any other deductions that the Borrower or Sponsor can negotiate). See Excess Cash Flow Sweep.

*Excess Cash Flow Sweep:* a provision in a Credit Agreement that requires the Borrower to prepay loans in an amount equal to a specified percentage of Excess Cash Flow (often above an agreed threshold). The Excess Cash Flow Sweep percentage is often subject to Step Downs.

*Exchange Note Term Sheet:* the Term Sheet for the Exchange Notes found in the Commitment Letter. This Term Sheet is generally an exhibit to the Bridge Facility Term Sheet.

*Exchange Notes:* the first thing to know about Exchange Notes is that they are not the actual Bonds the Issuer intends to sell to finance the purchase of the Target (although the terms of the two are similar). So what are they? After the Bridge Loans mature (generally in one year), they automatically convert into Term Loans (if the Bridge Loans have not yet been taken out). These Term Loans can then be “flipped”, generally at the option of a certain percentage of the Term Loan holders, into Exchange Notes, which are High Yield Notes, generally with Call Protection. Note that in some bank forms, Bridge Loans flip automatically into Exchange Notes one year after the Bridge Loan Closing (*i.e.*, without an interim step as Term Loans). Note that Exchange Notes are not the same as Exchangeable Notes.

*Exchange Offer:* another name for an A/B Exchange Offer. In Europe, High Yield Notes aren't typically subject to Exchange Offers. Also means an offering by an Issuer of new Securities issued in exchange for existing Securities of that Issuer.

*Exchange Regulated Market:* a trading market that is not subject to the Prospectus Directive for purposes of its disclosure requirements and may therefore determine its own disclosure requirements. Exchange Regulated Markets include the Euro MTF in Luxembourg, PSM and AIM in London, and GEM in Ireland. Also know as an Unregulated Market though securities regulators are not mad about this definition.

*Exchangeable Notes:* the term used for Convertible Bonds that are convertible into the stock of an entity other than the Issuer (typically a parent or other Affiliate of the Issuer). These are not the same as Exchange Notes.

*Expertised Parts:* generally, the audited Financial Statements contained in the Registration Statement. Under Section 11, the Underwriters and board of directors can avoid liability for the expertised portion of the Registration Statement if they can show they had no reasonable grounds to believe, and no actual belief, that such statements were untrue or omitted material facts. Note that unaudited Financial Statements are not expertised.

*Extend and Pretend:* like Amend and Pretend but one of the Amendments will include a extension to the maturity of the Credit Facilities.

*Extraordinary Administration:* an Italian Insolvency procedure available to large insolvent companies and aimed at protecting the company's assets, goodwill and employees through the continuation, reactivation or conversion of business activities. During the period of Extraordinary Administration, there is a stay on actions by all creditors. The *Prodi* Law version is mainly a court driven procedure which applies to companies with more than 200 employees and who are overly-indebted. The *Marzano's* Law version applies to companies with more than 500 employees and a total indebtedness of more than Euros 300,000,000 and is mainly a government driven procedure.

*Face value:* another way to describe Principal Amount.

*Facility A:* a Senior Secured Credit Facility consisting of Facility A Loans.

*Facility A Loans:* Term Loans that are structured to appeal to the commercial bank loan market — for instance, by featuring meaningful Amortisation. Prior to the entrance of institutional investors into the loan market in the early 1990s (at which point Facility B Loans and Facility C Loans became more popular), most Syndicated Term Loans were sold to commercial banks as Facility A Loans.

*Facility Agent:* the bank that serves as the principal Agent administering the facilities in the Credit Agreement. The Facility Agent is responsible for processing Interest payments to Lenders, posting notices delivered by the Borrower and acting as the primary representative of the Lenders under a Credit Agreement in dealings with the Borrower. The Facility Agent is often also the same entity as the Security Agent, but wearing another hat. The Trustee performs an analogous role in Bond world.

*Facility Agent Fee:* the annual fee paid to the Facility Agent for administering a Credit Facility; sometimes referred to as the Agency Fee.

*Facility Agreement:* another name for the Credit Agreement.

*Facility B:* a Senior Secured Credit Facility consisting of Facility B Loans.

*Facility B Loans:* Term Loans that are structured to appeal to institutional investors (read “CLOs and hedge funds”) who are more focused on keeping their funds invested at attractive Yields than on Amortisation. Facility B Loans typically have no Amortisation, mature 12 months after the maturity of the Facility A Loans and have a higher Interest Rate than the Facility A Loans of the same Borrower.

*Facility C:* a Senior Secured Credit Facility consisting of Facility C Loans.

*Facility C Loans:* like Facility B Loans but maturing typically 12 months after and with a higher interest rate.

*Facility Change:* another name for Structural Adjustments.

*Facility D:* another name for a Second Lien Facility. So called because in Europe Second Lien Facilities were often structured as Senior Secured Credit Facilities documented in the same Credit Agreement as Facilities A, B and C (the further facility therefore became Facility D). The Subordination of Facility D to the other Senior Secured Credit Facilities is typically achieved in the Intercreditor Agreement. Popular before the Credit Crunch, not seen yet in its aftermath.

*Facility D Loans:* another name for Second Lien Loans. See also Facility D.

*Facility Office:* the name given to the branch office from which a Lender will fund, and otherwise perform its obligations, under a Credit Agreement.

**Fairness Opinion:** seen in various contexts including the Affiliate Transaction Covenant in Indentures and also in Release Clauses in High Yield deals (and now increasingly argued for in transactions with Senior Debt and Mezzanine Financing). Essentially this is an opinion from an independent internationally recognised investment bank (or, perhaps, one of the major accounting firms) that a particular transaction is fair from a financial point of view. In the context of a Release Clause, provision of this is typically one of the conditions that must be satisfied before the Senior Debt holders can exercise their rights.

**Fallen Angel:** can refer to (i) the Issuer of a Bond that was once Investment Grade but has since been reduced to Junk Bond status or (ii) a stock that has fallen substantially from its all time highs.

**Fallimento:** an Italian bankruptcy procedure akin to English liquidation. The company will be directed by a *Curatore Fallimentare* who is supervised by a judge (*giudice delegato*) and a creditors' committee (*comitato dei creditori*). There is an automatic stay on enforcement of all claims during the procedure.

**Faqih:** an Islamic finance term for an Islamic jurist specialising in the issuance of *Fiqh*.

**Fatwa:** an Islamic finance term for a legal verdict or pronouncement based on *Fiqh*, given by a *Shariah* scholar or a *Shariah* board or a *Mufti*. Each Islamic finance transaction will have one or more *Fatwas* issued on closing approving of the Islamic structure of the transaction.

**Fee Credit:** this is how companies get some of their money back under the Fee Letter if/when they end up issuing the High Yield Bonds following a funded Bridge Loan. Fee Credit refers to provisions that are sometimes agreed to in a Fee Letter (or separate Fee Credit Letter) whereby (i) a portion of the Funding Fee is refunded or credited against the Placement Fee if the High Yield Bond deal occurs after the Bridge Loans are funded and/or (ii) a portion of the Rollover Fee is refunded or credited against the Placement Fee if the High Yield Bond deal occurs after the Rollover Fee is paid (when the Bridge Loan converts to a Term Loan). Certain institutions have strong preferences for whether this should be structured as a credit or as a refund. Also known as a Fee Rebate.

**Fee Credit Letter:** some banks provide the Fee Credit in a separate letter called the Fee Credit Letter. Other banks include the Fee Credit terms in the Fee Letter itself or in the Engagement Letter.

**Fee Letter:** the part of the Commitment Papers package that sets forth the fees and contains the Market Flex provisions. This is a separate letter that outlines certain fees to be paid in connection with the various Credit Facilities contemplated by the Commitment Letter. Note that this is a separate letter from the Commitment Letter and is often not shared with the vendor or the Target (among others). Always be careful as to whom this letter is distributed.

*Fee Rebate:* see Fee Credit.

*Final:* "the Final" is a reference to the Final Offering Memorandum or Prospectus. The Final is printed after Pricing and includes all the Pricing Terms. Compare Red, and see Pricing Supplement.

*Final Terms:* the term sheet published by ICMA for use in drawdowns under Euro Medium Term Note Programmes and which contains the commercial terms of a Bond issue, e.g., interest rate, Maturity Date, Call and/or Put Options.

*Finance Subsidiary:* a company (known colloquially as "Finco") which is primarily used by a parent company to raise money, usually in the context of a Notes offering. The proceeds of the Notes are advanced to the parent or to the parent's Operating Subsidiaries.

*Financial Assistance:* rule prohibiting or restricting the grant by a company of assistance (whether in the form of a loan, a grant or a Guarantee or Security) for the acquisition or subscription of its own shares. Introduced in jurisdictions throughout the European Community by the Second Council Directive of 13 December 1976 (77/91/EEC), but in varying shades depending on the applicable legal regime, and in particular whether the jurisdiction has a strong Corporate Benefit requirement. Since 1 October 2009 in England and Wales, a private company is allowed to provide Financial Assistance other than to support the purchase of shares in a public parent company, and no financial assistance may be given by public companies save for limited exceptions. Not every other European country is however as generous and the Financial Assistance rules should be carefully considered before committing to provide Secured Debt in European financings as these rules can severely limit (or prevent) the ability to get Collateral and Guarantees. See also Corporate Benefit and Guarantee Limitation Language.

*Financial Buyer:* generally, a Sponsor that is acquiring a company as an investment rather than to achieve strategic Synergies. Compare Strategic Buyer.

*Financial Covenants:* the most famous kind of Maintenance Covenants. See Cash Flow Cover, Interest Coverage Ratio, Fixed Charge Coverage Ratio and Leverage Ratio.

*Financial Services Authority:* the current regulator for the UK financial services industry, given statutory powers by the Financial Services and Markets Act 2000. Its statutory objectives are to maintain market confidence and financial stability, promote public awareness, protect consumers and reduce financial crime. Anyone carrying out a regulated activity in the UK must be authorised by the Financial Services Authority or able to rely on an exemption. Its future has been the subject of discussion post Credit Crunch.

*Financial Statements:* the Income Statement, Balance Sheet and Cash Flow Statement of a company.



*Financing Out:* a Condition Precedent in an SPA that makes the acquisition transaction subject to financing. The consequence of a Financing Out is that the acquirer does not have to consummate the acquisition if the loan commitments do not fund. The Financing Out is a big deal and is hugely important to the overall structure of the financed acquisition transaction because a Financing Out effectively incorporates into the acquisition agreement all the Conditions Precedent in the finance documentation. Without a Financing Out, the acquirer will insist on fewer Conditions Precedent — and it is unlikely to sign an SPA before it has signed a Credit Agreement with Certain Funds and obtained confirmation that the Conditions Precedent have been satisfied or are within its control — because the acquirer knows it is contractually obliged to consummate the purchase whether or not the financing is still available on the Closing Date. Financing Outs are now not very common, not least because sellers don't like them for some reason.

*FINRA:* acronym for Financial Industry Regulatory Authority, Inc. FINRA is the result of the consolidation of what used to be the National Association of Securities Dealers, Inc. (NASD) and the New York Stock Exchange, Inc.'s (NYSE) member regulation, enforcement and arbitration operations. FINRA is responsible for regulatory oversight of Securities firms in the US. Underwriters must make FINRA filings in connection with IPOs and certain secondary equity offerings of newly public companies in the US.

*Fiqh:* a term seen in Islamic finance, being used to refer to the principles upon which Islamic finance transactions are structured.

*Firm Commitment Underwriting:* this is the type of structure we see in virtually all underwritten deals, whereby upon signing the Underwriting Agreement the Underwriters make a firm commitment to buy the Securities (rather than just agreeing to use their best efforts to find buyers for them).

*First Lien:* shorthand for "first priority Lien", this Lien has Priority over other Liens, subject to a negotiated list of exceptions for other Liens permitted under the Credit Agreement and/or Indenture.

*First Lien Facilities:* these sit at the top of the Capital Structure. First Lien Facilities are Senior Secured Credit Facilities (usually one or more Term Loan Facilities and a Revolver) that have a First Lien on the Collateral. In a Commitment Letter, the terms of the First Lien Facilities are contained in the Senior Secured Facilities Term Sheet.

*Fiscal Agency Agreement:* an agreement between the Fiscal Agent, various paying and transfer agents and, if applicable, the Registrar, whereby the Issuer and any Guarantor appoints the Fiscal Agent and such other agents as their agents in connection with an issue of Securities to conduct payments, transfers, authentication etc. in connection with the Securities.

*Fiscal Agent:* a bank appointed by the Issuer and any Guarantor to carry out payments and other duties in relation to the Securities of an administrative nature. A Fiscal Agent is used where there is no Trustee and the role is identical to that performed by a Principal Paying Agent. The Fiscal Agent is the agent of the Issuer and owes no fiduciary duties towards the Bondholders as would a Trustee.

*Fiscal Unity:* said to be the name of an underground tax lawyers' network, though it is more commonly used as another name for Tax Consolidation, particularly in a Benelux context.

*Fitch:* Fitch Ratings, a subsidiary of Fimalac, S.A. Fitch is a Ratings Agency.

*Fixed Assets:* assets that have a useful life of more than one year and are not intended to be consumed by or sold to customers. Examples include equipment, machinery, buildings and land. Under applicable accounting rules, Fixed Assets are recorded on a company's Balance Sheet at their acquisition cost minus an accumulated charge for Depreciation.

*Fixed Charge Coverage Ratio:* in bank deals, this term is often used as an alternative name for Cash Flow Cover, however a Fixed Charge Coverage Ratio is technically slightly different and less frequently seen in Europe. In Bond world, the Fixed Charge Coverage Ratio is the ratio of EBITDA (or Adjusted EBITDA) to Fixed Charges. Most High Yield Indentures permit Issuers to incur debt in instances where, Pro Forma for the incurrence of such debt and the use of the proceeds therefrom, the Issuer's Fixed Charge Coverage Ratio would be above a certain threshold. The basic idea here is that, assuming a Fixed Charge Coverage Ratio of 2.00 to 1.00, the Issuer can incur more debt if, after taking into account the newly incurred debt, the Issuer would have at least two Euros of cash flow (or EBITDA) on a trailing twelve-month basis for each one Euro of Interest expense.

*Fixed Charges:* a more comprehensive way to define Interest expense for Covenant purposes in certain transactions. Fixed Charges would be generally defined to mean the sum of consolidated interest expense plus certain dividends on Preference Shares. A portion of consolidated lease expense is also sometimes included. Note that some form Credit Agreements include scheduled principal payments and Capital Expenditure in the definition of Fixed Charges. This all goes to the Fixed Charge Coverage Ratio however in European Credit Agreements it is more common to use Cash Flow Cover which is similar but nevertheless different. Aside from this, Fixed Charge is also the name given to a Security Interest in the UK which attaches to the asset in question and gives the Chargee a degree of control over that asset. Contrast to Floating Charge.

*Fixed Income:* Bonds or Notes are (usually) a type of fixed-income Security because the Interest Rates are generally fixed. By contrast, Credit Agreements generally have Interest Rates that "float", meaning

they are a certain margin above EURIBOR or LIBOR, which is a moving target. See Applicable Margin.

*Fixed Rate:* an Interest Rate that is locked in upon issuance of the debt and does not change over the course of the life of the debt. Compare Floating Rate.

*Flex:* another name for Market Flex.

*Float:* American soft drink with ice cream floating in it, often with whipped cream and a bright red cherry on top. In the corporate world, the name given to taking a company public, "floating" its shares on the applicable stock exchange.

*Floating Charge:* a Charge taken under English law over all the assets or a class of assets owned by a company from time to time. It "floats" over the assets and allows the Chargor to continue to deal with the assets in the ordinary course of business until Crystallisation. A Floating Charge ranks behind a Fixed Charge in the order of repayment in Insolvency.

*Floating Rate:* an Interest Rate that periodically adjusts based on a market index rate, such as EURIBOR or LIBOR. Most Credit Facilities are Floating Rate debt. Compare Fixed Rate.

*Floating Rate Note:* a Note with a Floating Rate. These protect investors against a rise in interest rates (which have an inverse relationship with Bond prices), but also carry lower yields than Fixed Rate notes of the same maturity. Often secured and used as Senior Debt (often in lieu of bank financing).

*Flotation:* see Float.

*Follow-On Offering:* an offering of Common Stock/Ordinary Shares subsequent to the Initial Public Offering.

*Football Field:* last page of the OM including the names and information of the Issuer, legal counsel, auditors and related parties. Looks like two football teams lined up, although not playing 4-4-2.

*Footsie:* a slang term for the FTSE 100 index. Also inappropriate behaviour between non-married couples carried out under the dining room table.

*Forbearance:* a deal the Borrower cuts with its Lenders where the Lenders agree to refrain from accelerating the debt for a limited period of time while the Borrower endeavours to get its act together. In a typical situation, Lenders might agree not to exercise remedies while giving the Borrower time, beyond any available Cure Period, to improve performance, find a new financing source or otherwise agree upon an appropriate Amendment to the Credit Facility to reflect the new (and usually unpleasant) circumstances. The Lenders will want to make sure that other creditors (such as Bondholders) have similarly agreed not to exercise remedies during the same time period. The Lenders will

typically seek to tighten various terms, such as demanding additional Collateral, increased pricing and stricter financial reporting, in exchange for their Forbearance.

*Forbearance Agreement:* the agreement documenting a Forbearance. Also known as a Standstill Agreement.

*Force Majeure:* in the Bond world, the happening of events outside the control of the parties, for example, material adverse changes in financial markets, suspension of trading of securities on stock markets, and natural disasters or the outbreak of war. It is usual for parties to provide in an Underwriting Agreement that such events will enable the Underwriters to terminate the Underwriting Agreement.

*Foreign Private Issuers:* certain Issuers of Securities in the United States (other than a foreign government) organised in a jurisdiction outside of the United States. Foreign Private Issuers are treated differently than US domestic Issuers in several important respects, including the types of Financial Statements they are required to file with the SEC. See Latham & Watkins publication with the International Financial Law Review: Securities Offerings and Listings in the US: an Overview for Non-US Issuers (2009 Update) (September, 2009), available at [www.lw.com](http://www.lw.com). See also Latham & Watkins publication: Financial Statement Requirements in US Securities Offerings: What Non-US Issuers Need to Know (2010 Update), available at [www.lw.com](http://www.lw.com).

*Form 8-K:* form used to file current reports under Section 13 or 15(d) of the US Exchange Act for Reporting Companies. The form (which you can pull up by googling "Form 8-K") must be filed upon certain specified events (such as the appointment of a new executive officer or the entering into of a material contract).

*Form Check:* the exercise of checking to make sure that a draft SEC form (such as an S-1 or a 10-K) complies with all the requirements of that form, including all the applicable provisions of Regulation S-K.

*Forward:* a contract in which a buyer agrees to buy, and a seller agrees to sell, a given quantity of an underlying asset on a specified future date at a price agreed to at the time the contract is entered into. A Forward is an Over-the-Counter transaction. Compare Future.

*Forward Start Facility:* a Credit Facility provided by some Lenders under an existing Credit Facility and/or new Lenders (a significant amount of time before the Maturity Date of the existing Credit Facility) which may be used solely to refinance the existing Credit Facility on its Maturity Date, thereby effectively extending the maturity of the existing Credit Facility. Often used when an Amendment to the existing Maturity Date can't be obtained as that would require the approval of all of the Lenders under the existing Credit Facility.

*Fraudulent Transfer:* subject to jurisdictional differences but this is generally the term used to describe a transfer made by a party (i) that

was made with actual intent to hinder, delay or defraud that party's creditors or (ii) in which the party making the transfer received less than reasonably equivalent value in exchange and was or became insolvent. A Fraudulent Transfer can be subject to Clawback from the company under certain Fraudulent Transfer laws.

*Free Float:* another name for the Public Float.

*Free Writing Prospectus (FWP):* a type of written document that the SEC made available as part of Securities Offering Reform. FWPs are short-form written Prospectuses that are typically used to supplement previously disclosed information. FWPs are an efficient means of disclosing additional information because they are not subject to the strict form and content requirements of full statutory Prospectuses. In most but not all cases, FWPs need to be filed with the SEC concurrently with first use. See Latham & Watkins publication: Christmas in July — the SEC Improves the Securities Offering Process (August 2005), available at [www.lw.com](http://www.lw.com).

*French Blacklist:* a list of so-called "non-cooperative states and territories" published each year by the French administration. Since March 2010, a French resident Borrower may be required to deduct Withholding Tax from payments due to a Lender located in one of these states or territories. It currently includes Niue and Nauru for example: if you do not know where these islands are, you should probably keep it this way.

*FRN:* acronym for Floating Rate Note.

*Front Running:* in loan world, the practice of an Underwriter looking to sell down its loan commitments ahead of a (more orderly) Syndication in which all Underwriters participate. Often prevented by agreement between the Arrangers in the Commitment Letter.

*Fronting Bank:* the bank that issues a Letter of Credit or Bank Guarantee (often the Facility Agent but wearing a different hat) under a Revolving Facility on behalf of all of the Lenders under that Credit Facility. If the Fronting Bank is required to make a payment under the Letter of Credit or Bank Guarantee, it is entitled to be indemnified by the Lenders such that the risk is shared on a pro rata basis. The Fronting Bank receives an issuing (or fronting) fee for issuing and administering the Letter of Credit or Bank Guarantee.

*FSA:* acronym for the Financial Services Authority.

*FSA Handbook:* a publication which sets out all the rules and guidance made by the FSA.

*FSFM:* acronym for the Russian Federal Service for Financial Markets.

*FSMA:* acronym for the Financial Services and Markets Act 2000.

*FTSE 100:* the name given to the index comprising the 100 largest companies traded on the London Stock Exchange. Size here is measured

by market capitalisation. Is size everything? Well, if you want to be in the FTSE 100, yes it is.

*Fulcrum Creditors:* in a restructuring these are the Creditors whose claims are neither completely In the Money nor completely Out of the Money, *i.e.*, in a distribution of assets they would only get partially repaid.

*Full Disclosure Rep:* another name for the Representation Regarding Accuracy of Disclosed Information.

*Funded Sub-participation:* a Sub-participation where the sub-participant places with the Lender granting the Sub-participation a deposit which is repayable as and when payments are received from the Borrower. Contrast to Risk Sub-participation.

*Funding Fee:* a fee provided for in the Fee Letter that is paid to the Arranger of a Bridge Loan if and only if the Bridge Loan is funded. Also known as a Takedown Fee.

*Funds Flow Memorandum:* the Closing document that tells everybody where the money is going. In more complex transactions, the memorandum is often executed or initialled by the Issuer/Borrower, particularly when the funding bank is directed to apply the funds in some manner on the Issuer's/Borrower's behalf. Also known as a Funds Flow Statement.

*Funds Flow Statement:* another name for the Funds Flow Memorandum.

*Fungible Issue:* used to describe Securities which are identical to other Securities of the same issue but which are issued at a later date and become fungible with the original issue at some future date (typically after any mandatory lock-up period has expired). Fungible Securities are regarded by the market as being of equal commercial value and trade with the same security codes in the Clearing Systems. Also known as a Tap Issue.

*Future:* similar to a Forward, except that a Future is based on a standardised set of terms (rather than being specifically negotiated between two parties) and is traded on an exchange.

*FWP:* acronym for Free Writing Prospectus.

*GAAP:* acronym for generally accepted accounting principles. GAAP represents a set of authoritative standards for recording and reporting accounting information in a given jurisdiction. For example, UK GAAP refers to GAAP in the United Kingdom and is the standard by which many UK companies report their financial statements, although IFRS is also commonly used (and required for all European public companies).

*GDR:* acronym for Global Depository Receipt.

*Gearing:* a ratio of net worth of a company to its total level of debt. A company that is highly geared has a high proportion of debt to equity.

*GEM:* acronym for the Global Exchange Market, the Exchange Regulated Market in Ireland.

*General Basket:* a Basket that is expressed as a fixed amount, or in some cases as a percentage of asset value, that is not tied to any specific use. For example, the Indebtedness Covenant may have a specific Basket for say finance leases up to a Cap but also a General Basket for any other debt up to a further Cap.

*General Corporate Purposes:* code phrase meaning generally anything the law allows. This is the loosest way to designate the Use of Proceeds (and is often the Use of Proceeds for RCFs). Note that if dividends or acquisitions are permitted to be made from debt proceeds, this should be specifically designated as a Use of Proceeds, as reasonable minds differ on whether dividends or acquisitions are general in nature.

*Gharar:* an Islamic finance term being a fundamental principle of Islamic finance. It refers to excess uncertainty, chance, or risk, or ambiguity and uncertainty in transactions, which is *Haram* under *Shariah* principles.

*Gharim:* an Islamic finance term meaning a debtor that does not possess the funds with which to repay his debts (such as distressed debtor). You don't want to be one of these or to lend to one of these.

*Gilt-Edged Securities:* a form of long-term government Bond issued in the United Kingdom, also known as Gilts. Gilts have a set maturity and accrue Interest at a Fixed Rate. The UK government has issued rather a lot of these recently.

*Gilts:* see Gilt-Edged Securities.

*Global Depository Receipts:* like American Depository Receipts but without the US connection. For more information regarding GDRs listed in the UK, see Latham & Watkins Client Alert No. 1024, Changes to the UK Listing Regime: Reclassification of Listed Securities and Additional Continuing Obligations for Overseas Companies With GDR Listings on the London Stock Exchange (11 May 2010), available at [www.lw.com](http://www.lw.com).

*Global Note:* in Bond world, the Issuer will sign a single note (or, in a US offering, maybe two or three notes) at Closing for the entire amount of debt. These Notes will be indirectly deposited with the Clearing System. The Clearing System will then allocate Book Entry interests in this Global Note. This is how we avoid trading lots of bits of paper.

*Going-Concern Prognosis:* in Germany, a Going-Concern Prognosis is typically relevant to remedy a situation of financial Over-Indebtedness (this will only apply until 31 December 2013). A Going-Concern Prognosis is also a precondition for obtaining a Restructuring Opinion. It means a company is capable of continuing business not only in the short-term but at least until end of its next business year (which may be different from the calendar year) with reference to its ability to meet its obligations when they fall due.

*Going-Concern Value:* the value of a company, as an operating business, to the market or prospective buyer (as opposed to the value of its assets or its liquidating value). The method of valuation is crucial in restructurings

to determine who is Out of the Money — see Latham & Watkins Client Alert No. 916, *The IMO Car Wash Decision* (21 August 2009), available at [www.lw.com](http://www.lw.com).

*Grace Period*: another name for a Cure Period.

*Green Shoe*: a special type of purchase Option named in honour of the Green Shoe Company — the first Issuer to have this provision. Green Shoe is the nickname for the Over-Allotment Option granted to the Underwriters in the Underwriting Agreement. The Green Shoe is an Option, typically for up to 30 days, to allow the Underwriters to purchase up to an agreed percentage (being 15 per cent in the US, a Cap imposed by FINRA rules) more shares than the original number sold by the Issuer in the offering. The purchase price per share for exercising the Green Shoe is the same price as in the related offering. The Green Shoe provides protection that allows Underwriters to “over-allot”, meaning to sell more shares than the number being sold in the offering. The Underwriters can later use the Green Shoe to cover the Syndicate Short Position created by the Over-Allotment sales if the Option price is less than the then prevailing market price per share. Underwriters generally use the Over-Allotment Option when demand for a Security proves higher than expected and therefore it is too expensive to buy additional shares back in the open market to cover the Syndicate Short Position. Also referred to as “the Shoe”. Note the 15 per cent Cap does not apply to 144A Offerings. See *Naked Short and Refreshing the Shoe*.

*Grey Market*: the market in a new issue of Securities that begins on the announcement of the issue and ends with the formal offering of the issue. During this period the Securities are said to be traded on an “if, as and when issued” basis.

*Grid Based Pricing*: when the Applicable Margin in a Credit Agreement fluctuates based upon a certain metric set forth in a grid (usually known as the Pricing Grid or Margin Ratchet) in the Credit Agreement. Specifically, Grid Based Pricing refers to having the Applicable Margin move based either on the Credit Rating or the Leverage Ratio (or any other agreed upon metric) of the Borrower.

*Gross Physical Settlement*: see *Physical Settlement*.

*Gross-Up*: shorthand for the Tax Gross-Up.

*Group Relief*: slightly bizarre name for the tax regime under which loss-making entities (e.g., the leveraged companies) within a group of companies under common ownership/control can, in certain circumstances, surrender those losses to profitable members of the group for offsetting against profits that might otherwise be taxable, subject to restrictions. Achieves similar results, in some circumstances, to Tax Consolidation/Fiscal Unity, although the compliance aspects are usually quite different. One for the tax people.



**Guarantee:** just like when your parents “guarantee” your lease or Mortgage, a Guarantee is a promise by an entity that is not the direct obligor of the debt to be responsible for that debt. For instance, the Issuer’s/Borrower’s obligation under the Terms and Conditions/Indenture/Credit Agreement are (subject to considerations such as Corporate Benefit and Financial Assistance) frequently guaranteed by the Issuer’s/Borrower’s Subsidiaries (see Upstream) and/or certain Holding Companies (see Downstream) and/or certain sister companies (see Cross-stream). See Guarantors.

**Guarantee Limitation Language:** in certain jurisdictions unlimited Guarantees can be illegal or invalid, including because of Corporate Benefit or Financial Assistance prohibitions. Accordingly, Guarantee Limitation Language specific to Guarantors incorporated in each relevant jurisdiction is typically inserted into a Guarantee to limit the obligations of the Guarantors to the extent necessary to ensure that this doesn’t happen.

**Guarantor Coverage Test:** a requirement of many Credit Facilities (and some High Yield Indentures) that at least an agreed per centage (usually not lower than 80 per cent but often higher) of the Group’s EBITDA, net assets and (sometimes) turnover are attributable to the Guarantors. Ensures that the Lenders have recourse to the right entities in the Borrower group. Notwithstanding the Guarantor Coverage Test, all Material Subsidiaries are also typically required to be Guarantors.

**Guarantors:** subsidiaries, parent entities or sister companies that Guarantee the debt incurred by the Issuer or Borrower. See Guarantee. In Commitment Letters, both the Senior Secured Credit Facilities and the Mezzanine Facility/Bridge Facilities will usually have the same Guarantors, which will be described in the Term Sheets. Generally, at least in LBO financings, Credit Facilities are Guaranteed by all Material Subsidiaries and any other subsidiaries needed to ensure compliance with any Guarantor Coverage Test. Note that in US deals, for tax reasons, foreign subsidiaries of the Issuer or Borrower generally do not Guarantee the US Issuer/Borrower’s obligations under the Credit Facilities. This can also be required in other jurisdictions. See Deemed Dividend.

**Gun Jumping:** the impermissible offering of, or publicity for, Securities during the Prefiling Period.

**Hadith:** a term seen in Islamic finance and refers to the sayings and practices of the Prophet Mohammed. The plural is ahadith, and these form the fundamental part of the Islamic jurisprudence. .

**Haircut:** banker slang for a discount.

**Hair-Trigger:** certain Defaults under a Credit Agreement that have no Grace Period — these Defaults are automatic Events of Default upon their occurrence

*Halal*: an Islamic finance term meaning something that is permitted by the *Shariah* (and therefore the opposite of Haram).

*Half a Turn*: see Turn. This is half of it.

*Haram*: an Islamic finance term meaning something that is prohibited by the *Shariah* (and therefore the opposite of Halal), for example the prohibition of alcohol and pork.

*Hard Call*: a Prepayment Premium that has to be paid both for Voluntary Prepayments and Mandatory Prepayments. Even a Hard Call provision may include negotiated exceptions for certain Mandatory Prepayment provisions, such as the Excess Cash Flow Sweep. Compare Soft Call.

*Hard Mulligan*: another name for a Mulligan Clause (contrast to Soft Mulligan).

*Hardening Period*: the period of time during which a new Security Interest is vulnerable to being set aside in Insolvency. The relevant Hardening Period differs between jurisdictions and can also depend on whether or not the Secured Party is connected to the insolvent company or not.

*Hawalah*: a term seen in Islamic finance meaning the transfer of liability (e.g., an Assignment).

*Headroom*: with respect to any Basket, the additional amount that can currently be incurred. For example, if €20 million of a €25 million Basket has been spent, then there is a remaining €5 million of Headroom. Also the name given to the percentage above forecast EBITDA in the Base Case Model by which certain Financial Covenants are set for the purposes of the Credit Agreement.

*Heads of Terms*: another name for the Term Sheet.

*Hecho Relevante*: public announcement made by a Spanish listed company through the CNMV of information whose knowledge may reasonably influence an investor to acquire or sell securities or financial instruments and therefore susceptible to significantly impact their value in a secondary market. Listed companies are obliged to make public and communicate such information to the CNMV.

*Hedge*: an investment or strategy that attempts to reduce the impact of adverse fluctuations in the price of one asset by taking an offsetting position in another asset. For instance, many companies Hedge their foreign exchange exposure by entering into a Currency Swap and their interest rate exposure by entering into an Interest Swap. See also Hedging Strategy Letter.

*Hedge Counterparties*: the providers of the Hedges required by the Hedging Strategy Letter. The Hedge Counterparties will typically benefit from the same Collateral and Guarantees granted to the Lenders of the First Lien Facilities on a *Pari Passu* basis.

*Hedging Strategy Letter:* a letter between the Borrower and the Facility Agent in the context of the Credit Facilities setting out the required Hedging that the Borrower must implement within a set period (often up to 60 days) after the Closing Date. Whilst this might include foreign exchange hedging, it is often limited to hedging the Floating Rate on the Credit Facilities, with a minimum requirement of hedging 50 or 66.6 per cent of the exposure for 2 or 3 years. Hedging Strategy Letters often include a Right of First Refusal or a Right to Match. See also Hedge Counterparties. Will be a CP to Closing.

*Hibba:* a term seen in Islamic finance meaning a gift, for example at the end of a lease transaction the property may be returned to the lessee by way of *Hibba*.

*Hidden Contribution in Kind (verdeckte Sacheinlage):* arrangement by which a contribution into the capital of a German company (limited liability company (*GmbH*) or stock corporation (*AG*)) which is agreed and expressed to be made in cash is in fact made in kind (e.g., by way of an asset purchase transaction with a shareholder where the company pays the amount of the capital increase in cash as consideration for the asset received from the relevant shareholder). The relevant shareholder is liable for the difference in value between the re-classified contribution in kind and the nominal increase of the share capital pursuant to Section 19 paragraph 4 of the German Limited Liability Companies Act (*GmbHG*).

*Hidden Distribution (verdeckte Ausschüttung):* the disbursement of profits by a German company (limited liability company (*GmbH*) or stock corporation (*AG*)) to any of its shareholders which is not expressly made as such but for example by way of payments by the company in a business transaction with the relevant shareholder which fails the at arms' length test (such as the granting of interest-free upstream loans). For tax purposes, Hidden Distributions are treated as constructive dividends, i.e., payments made by the company to its shareholder exceeding arm's length standards are not tax deductible for the company and any value transferred in this way to the shareholder is treated as dividend income. Hidden Distributions may also trigger other legal issues. Best call a German lawyer, Latham has lots of them.

*High Yield:* the Interest Rate (and Yield) on High Yield Bonds. Also used as shorthand to refer to the universe of High Yield Bonds and High Yield Bond offerings.

*High Yield Bonds:* Bonds rated below Investment Grade by the Ratings Agencies, but note that in emerging markets where Issuers may be rated below Investment Grade, their Bonds are often not strictly speaking High Yield Bonds in that the covenant package and the structuring will be simpler.

*Highly Confident Letter:* letter from a bank or financial institution indicating that it is "highly confident" that it will be able to provide or arrange financing for a particular deal. Although this letter does not

constitute a contractual obligation to provide financing, it is commonly understood to mean that the bank or financial institution is expressing a high level of confidence that financing can and will be secured for the subject transaction. Often issued at an early state in a transaction pending receipt of more detailed Due Diligence and other information enabling the bank or financial institution to issue a Commitment Letter.

*Hold:* another name for Target Hold.

*Holdco:* another name for Holding Company.

*Holdco Debt:* debt at the Holdco level. Holdco Debt is an interesting creature. It is generally not Guaranteed by the Operating Company below it. So from the Holdco debtholders' perspective, Holdco Debt is debt. But from the lower operating company perspective, the Holdco Debt is essentially equity — because payments on the Holdco Debt can only be paid with dividends up from the Operating Company. The ability to incur new debt at a Holdco level depends on whether the Operating Company Bonds and Credit Agreements restrict Holdco Debt.

*Holdco Flex:* a type of Structure Flex that permits the Arranger to restructure a portion of the debt that was originally to be borrowed by the Operating Company and move it to debt at the Holding Company level. See Holdco Debt.

*Holdco Guarantor:* any parent entity of a Borrower or Issuer that acts as a Guarantor of the Borrower's or Issuer's debt. See also Downstream.

*Holding Company:* a company that sits on top of (or "holds" the equity of) the Subsidiary that is below it. This concept sometimes connotes a company that does nothing else (*i.e.*, has no operations). Bidcos are often Holding Companies and financing documentation will often contain a Negative Covenant preventing Bidco and other Holding Companies from doing anything other than entering into the transaction documents and otherwise providing customary holding company services. See also Holdco Debt and Holdco Guarantor.

*Hurdle Rate:* the minimum rate of return to investors necessary for an investment firm to start collecting incentive fees.

*Hybrid Security:* specifically, Securities which combine both debt and equity characteristics. They often pay a predictable (fixed or floating) rate of return or dividend until a certain date, at which point the holder has a number of options including converting the Securities into the underlying share. More broadly, any Security that combines two or more different financial instruments.

*IAASB:* acronym for International Auditing and Assurance Standards Board.

*IASB:* acronym for International Accounting Standards Board.

*IBLOR:* acronym for Italian Bank Lender of Record. A structure used in financings for Italian Borrowers to try to allow Syndication to non-

Italian banks without imposition of Withholding Tax by the Italian tax authorities. In summary, the Borrower enters into a Bi-lateral Facility with an Italian tax resident bank who then gets credit support from the third party lenders it wishes to 'sell' the debt to, thereby spreading the risk and creating the commercial effect of Syndication. Likely to be looked at closely by the Italian tax man. The risk of the structure being re-characterised, such that the tax authorities look through to the third party lenders, lies with the Borrower.

**ICMA:** acronym for International Capital Markets Association; generally pronounced "ICK-ma".

**IDB:** acronym for Islamic Development Bank, a multilateral development bank headquartered in Jeddah, Saudi Arabia.

**IFAC:** acronym for International Federation of Accountants.

**IFRS:** International Financial Reporting Standards issued by the International Accounting Standards Board. More than 100 countries permit or require use of IFRS for preparing Financial Statements of listed companies, including countries in the EU, Australia, Brazil, Canada, Chile, China, India, Israel, Mexico, South Africa and South Korea. In the US, rule amendments adopted by the SEC in December 2007 allow Foreign Private Issuers to use Financial Statements without reconciliation to US GAAP if the Financial Statements are prepared using the English language version of IFRS issued by the International Accounting Standards Board. See Latham & Watkins Client Alert No. 667, SEC Accepts Financial Statements From Foreign Private Issuers Without Reconciliation to US GAAP If Prepared Under International Financial Reporting Standards (16 January 2008), available at [www.lw.com](http://www.lw.com).

**Ijab:** an Islamic finance term meaning an offer, such as the offer in a contract.

**Ijara:** an Islamic finance term meaning a lease of property, commonly combined with an *Istisn'a* in asset finance and project finance transactions. A developer that wishes to finance the construction of asset will enter into an *Istisn'a* (i.e., a procurement agreement) for the construction of an asset and an *Ijara* (i.e., a lease) with respect to the asset constructed.

**Ijmaa:** an Islamic finance term meaning the consensus of the *Shariah* scholars.

**Impaired Agent:** similar to the Defaulting Lender concept but for Facility Agents (i.e., a Facility Agent that fails to fund, rescinds the Credit Agreement or related documentation or becomes subject to Insolvency proceedings). The concept has become more common in Credit Agreements since Lehman Brothers, among others, went bust as it allows the Facility Agent to be replaced without its consent or signature required (thereby removing the practical problems seen when Borrowers and Lenders wanted to replace Lehman Brothers or others as Facility Agent) and allows the Borrower and Lenders to make payments other

than through the Facility Agent (which you don't want to do if it is in Insolvency).

*Imposta Sostitutiva*: financing contracts executed in Italy are subject to registration tax. Medium-long term financing contracts executed in Italy, having a duration longer than 18 months plus 1 day, are subject to *Imposta Sostitutiva* (Substitute Tax) when the Credit Facility is extended by an Italian bank or by a branch of a EU bank authorised to conduct business in Italy. The applied tax rate is 0.25% calculated on the amount of the financing. If *Imposta Sostitutiva* applies then any registration tax, stamp duties, mortgage duties and other government duties which would be otherwise applicable, are not required to be paid.

*In the Money*: a stock Option is In the Money when the holder can exercise it for a profit. A Convertible Bond is In the Money when its Conversion Value exceeds its Par Value. The term is also used in restructurings to describe creditors who are not Out of the Money.

*Incidente Concursal*: special procedure set out by Spanish Insolvency legislation whereby all questions and claims arising out of an Insolvency proceeding are resolved by the Insolvency court. For more information on Spanish Insolvency, see Latham & Watkins Client Alert No. 872, Spanish Insolvency Act Changes – Paving the Way for Restructurings (29 May 2009), available at [www.lw.com](http://www.lw.com).

*Income Statement*: a financial statement on which a company reports its results of operations over a period of time (usually monthly, quarterly or annually). Also commonly referred to as a Profit and Loss Statement or P&L Statement. Think of an Income Statement as a movie and a Balance Sheet as a snapshot. See Balance Sheet.

*Inconsistent Information Out*: this Condition Precedent lets the Lenders out of their commitment if they discover any new, materially adverse information. This is a Condition Precedent to the financing commitment generally found in the text of the Commitment Letter to the effect that the Arranger has not become aware of any new or inconsistent information with respect to the Target since the date of the Commitment Letter that the Arranger deems materially adverse in relation to the information made available prior to the signing of the Commitment Letter. Also referred to as the No New Information Out.

*Increased Costs Clause*: Lenders generally expect Borrowers to pay for unexpected costs they incur after signing the Credit Agreement. Take the Increased Costs Clause as an example. This is found in all Credit Agreements and requires the Borrower to pick up the tab if, as a result of a change in law, regulation, etc. a Lender's return is reduced, it is subject to an additional cost or any amount payable to it under the Credit Facility documents is reduced.

*Incremental Facility*: a post-Closing addition to an existing Credit Facility on substantially the same terms as the existing Credit Facility. Incremental Facilities are typically used to finance acquisitions,

investments or even dividends. The existing Lenders do not pre-commit to provide the Incremental Facility, but do pre-approve the incremental leverage. At the time a Borrower desires to add on to the existing Credit Facility, it must seek new commitments (from existing or new Lenders). Incremental Facility debt is additional Secured Debt that shares Collateral with the pre-existing First or Second Lien debt. Lenders focus intently on the amount of the pre-approved incremental secured leverage because of potential implications for Credit Ratings and recovery. Further, if the loans under the Incremental Facility have terms that are more favourable to the incremental Lenders than the terms of the existing loans, then the existing loans may lose value as Lenders trade out of the existing Credit Facilities and into the Incremental Facility. This is why Incremental Facilities sometimes include an MFN Pricing provision, so that if the Incremental Facility is priced more richly than the existing loans, the margin on the existing loans is automatically increased. At the Commitment Papers stage, some terms of the Incremental Facility are set forth in the Senior Secured Facilities Term Sheet. See MFN Pricing. Also known as an Accordion Feature. Also of material relevance to Junior Debt holders as the Incremental Facility will rank ahead of them.

*Incurrence Covenants:* generic name given to Negative Covenants (such as an Indebtedness Covenant or a Restricted Payments Covenant) that prohibit a Borrower or Issuer from engaging in voluntary actions except under agreed conditions or subject to specified Caps. Compare Maintenance Covenants.

*Indebtedness Covenant:* this Incurrence Covenant restricts the incurrence of additional indebtedness. In a High Yield Indenture, this Covenant is structured to restrict the incurrence of additional debt unless either a Pro Forma Ratio Test is met or a Permitted Debt Basket is available. In a Credit Agreement, it is generally structured as a flat prohibition on all additional debt other than specific negotiated Baskets of Permitted Debt.

*Indemnification Annex:* used in US financings and is generally the first exhibit to the Commitment Letter, setting out the terms of the indemnification that must be provided by the Borrower or the Sponsor to the Arranger as a condition to the offering of the commitment. European forms typically incorporate the indemnification provisions into the text of the Commitment Letter.

*Indenture:* the governing document for a series of Bonds. Generally drafted on a punishing timeframe after the Description of Notes is finalised, the Indenture is a contract between the Issuer and the Trustee (who acts as a sort of Bondholder representative) pursuant to which Bonds are issued. Although the term has a different meaning under English law, when used in reference to High Yield Bonds, Indentures are generally governed by New York law. Individual investors hold Notes in Book Entry form through the Clearing Systems rather than actually signing this document. See Terms and Conditions.

**Independent Contractor Provisions:** provisions in the text of the Commitment Letter stating that the Arranger is an independent contractor and that nothing in the Commitment Letter will be deemed to create an advisory, fiduciary or agency relationship. Also called No Fiduciary Duty Provisions. See eToys.

**Independent Director:** directors who do not have a material relationship with the listed company — *i.e.*, they are outsiders, and certainly not employees. Sarbanes-Oxley and the rules adopted by individual regulators including the UK Corporate Governance Code have a complex set of requirements as to who qualifies as independent. In general, you know one when you see one. Some stock exchange rules or regulators require that the full board be comprised of a majority of Independent Directors.

**Index-Linked Pricing:** the concept of providing an alternative to EURIBOR/LIBOR-based pricing in a Credit Facility. Index-Linked Pricing tracks some form of alternative index that is appropriate for the Borrower in question. In deals featuring Index-Linked Pricing, the applicable Interest Rate is generally the greater of EURIBOR/LIBOR plus a given margin and the alternative index plus a given margin.

**Información Privilegiada:** all information which has not been made public relating, directly or indirectly, to one or more securities or financial instruments subject to Spanish Securities Regulation, or to one or more issuers of such securities or financial instruments and which, if made public, might have a significant effect on the price of those securities or financial instruments (and the derivative financial instruments related to them) in a regulated market or Multilateral Trading Facility. The concept of inside information also applies to securities or financial instruments with respect to which a request has been made for admission to trading on a regulated market or Multilateral Trading Facility.

**Information Memorandum:** see Confidential Information Memorandum. Also used as an alternative term to Prospectus or Offering Memorandum

**Initial Public Offering:** the first public offering of shares of Common Stock of a company. Following an Initial Public Offering (or IPO) in the US, a company becomes an SEC Reporting Company (if it wasn't already). IPOs in other jurisdictions likewise entail ongoing and periodic reporting and disclosure requirements. See also Transparency Directive.

**Initial Purchasers:** in a Rule 144A Financing and Regulation S offering, Initial Purchasers play essentially the same role that Underwriters play in a registered transaction. Rule 144A provides a resale exemption from the registration requirements of the US Securities Act, permitting the investment banks that initially purchase the Securities from the Issuer in a Rule 144A Financing to resell to big institutions (known as QIBs) without being deemed to be Underwriters under Section 2(a)(11) of the US Securities Act. Since we can't call them Underwriters, we call them Initial Purchasers.



*Insolvency:* the more common expression used in Europe for describing Bankruptcy (which in certain jurisdictions is more usually applied to the insolvency only of natural persons, although the terms are colloquially often used inter-changeably). The word describes both certain formal procedures, as well as the financial condition of being "insolvent", which is the inability to pay one's debts. This inability can be manifest in either balance sheet insolvency (liabilities exceeding assets) or cash flow insolvency (the inability to pay debts as they fall due), tests which can be expressed in different ways according to the jurisdiction (see for example Over-Indebtedness which is a formulation of what can be seen as balance sheet insolvency). In some jurisdictions, such as England, both the first two of these measures of Insolvency are in use and will determine eligibility to enter Insolvency proceedings. There is a significant amount of judicial authority on both cash-flow and balance sheet Insolvency, meaning that Insolvency is not necessarily easily proven, particularly by a creditor. As a result, and as a general precaution, European finance documents commonly include much wider situations of potential financial distress, including for example, the commencement of any security enforcement, which would be Events of Default

*Insolvency Plan:* English translation of the German *Insolvenzplan*. This is a plan of reorganisation and requires approval of a majority of creditors in number and by value, in a majority of the classes of creditors, and also sanction of the court. Increasingly popular in German restructurings including Herlitz, Ihr Platz, Senator Entertainment and Sinn Leffers.

*Institutional Investor:* organisation which is engaged in investing its own assets and assets held for others, e.g., insurance companies and pension funds.

*Institutional Term Loan:* a Term Loan Facility intended to be sold to non-bank institutional investors. Historically, Institutional Term Loans have longer maturities and back-end-loaded repayment schedules or Bullet Maturities. See Facility B Loans and Facility C Loans.

*Instructing Group:* another name given to Majority Lenders.

*Insurance Proceeds Prepayment:* a specific type of Mandatory Prepayment. This provision in a Credit Agreement requires the loans to be prepaid with the excess proceeds of certain insurance claims, beyond amounts applied to rebuild the affected asset or otherwise reinvested in the business (see Reinvestment Right).

*Integration:* a doctrine whereby purported Private Offerings are "integrated" with SEC-registered offerings, thereby blowing the Private Placement exemption. It is important to look at the applicable law and lore whenever you have a public and Private Offering close in time.

*Intercreditor Agreement:* an agreement that sets forth the rules of engagement between two (or more) groups of Lenders with respect to shared Collateral, Subordination and other intercreditor relationship matters. Think of this as a prenuptial agreement between classes of

creditors. Apart from addressing the obvious point that the First Lien Lenders get paid out first and the Second Lien Lenders or Mezzanine Lenders get paid out second in First Lien/Second Lien and First Lien/Mezzanine deals, Intercreditor Agreements also lay out a number of important provisions regarding the right of each Lender group to take action with respect to the Collateral and the Borrower generally. Intercreditor Agreements will also regulate the rights and obligations of any Hedge Counterparties and of the holders of any intra-group debt, Vendor Loans and Subordinated Shareholder Debt.

*Interest:* an amount the Borrower/Issuer pays for borrowing money under the Credit Facility/Notes, generally described as a percentage of the principal amount calculated on an annual basis.

*Interest Coverage Ratio:* often used as another name for the Fixed Charge Coverage Ratio found in most High Yield Indentures. In Credit Agreements, an Interest Coverage Ratio includes only Interest in the denominator, whereas the Fixed Charge Coverage Ratio denominator includes all sorts of other fun stuff. See Fixed Charges.

*Interest Payment Date:* the date stated in the Terms and Conditions, Indenture or Credit Agreement when an Interest payment is due. See Interest Period.

*Interest Period:* the period of time under the Terms and Conditions, Indenture or Credit Agreement during which the Interest associated with a particular Interest payment accrues. For most (but not all) Bonds, there are two Interest Periods per year. In Credit Agreements, the number of Interest Periods per year can vary widely, often allowing the Borrower to choose Interest Periods of 1, 2, 3 or 6 months (or such other periods as the Lenders may agree).

*Interest Rate:* the rate of Interest paid by the Borrower/Issuer.

*Interest Rate Swap:* an arrangement entered into by a company to Hedge its Interest Rate exposure. Companies frequently use Interest Rate Swaps to effectively convert their Floating Rate debt instruments into Fixed Rate debt instruments.

*Interim Facility:* the Credit Facility made available under an Interim Loan Agreement.

*Interim Facility Agreement:* another name for an Interim Loan Agreement.

*Interim Facility Letter:* another name for an Interim Loan Agreement.

*Interim Loan Agreement:* a short-form Credit Agreement used by Sponsors in LBOs and containing Certain Funds. The idea is that the Sponsor wants to submit a fully-financed bid – and get to the signing of the SPA without a Financing Condition — as soon as possible. It therefore doesn't want to take the time to negotiate a full Credit Agreement so signs-up an Interim Loan Agreement which typically won't include any

Representations and Warranties, Covenants or Defaults relating to the Target or its subsidiaries, and no Financial Covenants, hence it can be negotiated more quickly. The catch is that the Interim Facility has a final maturity date shortly after Closing (often no more than 30 days) so the Sponsor needs to get the full Credit Facility documentation signed up as soon as possible. The plan therefore is to do this between signing of the SPA/Interim Loan Agreement and Closing (for example when anti-trust and other conditions to Closing are being satisfied), such that the Interim Facility is never funded. Also known as an Interim Facility Agreement or Interim Facility Letter.

*International Accounting Standards Board:* IASB is the independent body that is responsible for developing and publishing IFRS and promoting the use and application of these standards.

*International Auditing and Assurance Standards Board:* section of the International Federation of Accountants which publishes the ISRE, and which is dedicated to setting ethics, education and public sector accounting standards and developing guidance for professional accountants. It also works to facilitate the convergence of international and national standards.

*International Capital Markets Association:* a self-regulatory organisation and trade association for participants in the capital markets; generally referred to as ICMA. Despite the name suggesting a global outlook, it has a European focus. It was formed in July 2005 by the merger of the International Primary Market Association and the International Securities Market Association (formerly the International Association of Bond Dealers). ICMA's stated aims are to promote high standards of market practice, appropriate regulation, trade support, education and communication. It produces standard documentation for (mainly) Reg S Only transactions, including documentation in respect of equity and debt offerings, as well as form Comfort Letters.

*International Federation of Accountants:* the global organisation for the accountancy profession, representing over 2.5 million accountants.

*International Standards on Auditing:* a set of professional standards for the performance of financial audits of financial information. These standards are issued by the International Federation of Accountants.

*International Standards on Review Engagements:* framework published by the International Auditing and Assurance Standards Board. ISRE provides guidance on the practitioner's professional responsibilities when a practitioner, who is not the auditor of an entity, undertakes an engagement to review Financial Statements and on the form and content of the report that the practitioner issues in connection with such a review.

*International Swaps and Derivatives Association:* the global trade association representing participants in the privately negotiated derivatives industry.

*Investment Company:* generally, a company whose main business is holding Securities of other companies purely for investment purposes. As defined in the Investment Company Act, an Investment Company is (i) engaged primarily in the business of investing, reinvesting or trading in securities (or holds itself out as being in that business; (ii) owns "investment securities" which constitute more than 40 per cent of the value of its assets on an unconsolidated basis (excluding US government securities and cash items) and (iii) is not entitled to any exemption from registration. A typical example of an Investment Company is a mutual fund, which is an entity organised to accept money or assets from investors, pool those assets, and invest the assets on behalf of the investors.

*Investment Grade:* a rating of Baa3 or better by Moody's, BBB- or better by S&P or BBB- or better by Fitch.

*Investment Grade Bonds:* Bonds with an Investment Grade rating that traditionally have significantly fewer Covenants than High Yield Bonds, often just a Negative Pledge.

*Invitation Telex:* a fax or e-mail used on some European new issues to prospective members of a syndicate from the Lead Manager describing the principal terms and conditions of the issue and inviting the syndicate members to participate in the underwriting and/or distribution of the issue. As the name suggests, this used to be a telex but most people now don't even know what a telex is, let alone how to send one.

*IPO:* acronym for Initial Public Offering.

*IPO Clawback:* another name for the Equity Claw.

*ISA:* acronym for International Standards on Auditing.

*ISDA:* acronym for International Swaps and Derivatives Association.

*ISDA Master Agreement:* a master agreement in the form published by ISDA. This is a form agreement used by parties to Hedges that was designed by ISDA to be a balanced and easily administered agreement. The idea was to make it so palatable to all that there would be few non-standard provisions required by any market player. The second-generation ISDA Master Agreement was published in 1992 and the third generation was published in 2002. However, the 1992 form is more commonly used than the new form. The ISDA Schedule is part of the ISDA Master Agreement — there is no such thing as an ISDA Master Agreement without an ISDA Schedule. Any two entities in the world that may want to enter into Hedges across from each other are supposed to have just one ISDA Market Agreement between them, which by itself has no economic effect until they enter into one or more transactions, which incorporate by reference their ISDA Master Agreement.

*ISDA Schedule:* the part of an ISDA Master Agreement that includes the specific choices/elections made by the counterparties, as well as notice

information and any exceptions and addenda the parties wish to make to the preprinted form.

*ISE*: acronym for the Irish Stock Exchange.

*ISIN*: an acronym for International Securities Identification Number. The ISIN is an identification number unique to each issue of Bonds with each code prefixed by the country of issue. Generally used in European markets.

*ISRE*: acronym for International Standards on Review Engagements.

*ISRE 2400*: the ISRE standard that applies to review of financial information by an auditor who is not the entity's auditor.

*ISRE 2410*: the ISRE standard that applies to review of interim financial information performed by the independent auditor of the entity.

*Issue Price*: the gross price (before deduction of commissions and expenses payable to Underwriters/Managers) that is placed on a new issue of Bonds and which is expressed as a percentage of the principal amount of the Bonds. So, for instance, a Bond with an issue price of 100 per cent is issued "at par", a Bond with an issue price greater than 100 per cent is issued "at a premium", and a Bond with an issue price lower than 100 per cent is issued "at a discount".

*Issuer*: the company that is the seller (or Issuer) of Securities.

*Issuing Bank*: another name for the Fronting Bank.

*Istisn'a*: an Islamic finance term meaning the sale of an asset to be produced (*i.e.*, a procurement agreement — commonly combined with an *Ijara*). The procurement agent will procure the construction of the asset on behalf of the Islamic investors financing the development of the asset.

*Item 10*: Item 10 of Regulation S-K, which imposes additional disclosure requirements and restrictions when a non-GAAP financial measure is included in certain formal SEC filings. See also Regulation G.

*Itemised Flex*: another name for Closed Flex.

*I-Traxx*: series of indices of Credit Default Swaps primarily referencing loans and bonds of European and Asian Issuers.

*I-Traxx Europe*: one of the I-Traxx indices, composed of the prices of the most actively traded 125 Credit Default Swaps referencing European Investment Grade companies. The composition of the index is updated every six months (in March and September).

*JLM*: acronym for Joint Lead Managers.

*Joint and Several Liability*: where two or more parties assume liability and each is treated as having assumed the obligation both collectively and individually for itself. A third party may proceed against any one or more of the co-obligors for the full performance of the obligation,

irrespective of which of them caused the breach. Guarantors will have Joint and Several Liability. See also Several Liability.

*Joint Lead Managers:* two or more Lead Managers working jointly.

*Judgment Currency:* in Indentures and Credit Agreements there are typically provisions that allow for the original currency of the loans to be converted into an alternative currency for the purpose of obtaining judgment in any court. This alternative currency is known as the Judgment Currency. The Judgment Currency provisions exist because, although Indentures and Credit Agreements generally provide for payments in a specified currency, it is important to have a conversion mechanism to deal with the possibility that a judgment may nevertheless be awarded in an alternative currency.

*Jumbo:* a very large Syndicated Credit Facility. Also an elephant.

*Junior Debt:* a general reference to a slug of debt that is "lower" in the Capital Structure than other debt. For example, if a company has both Senior Subordinated Notes and Senior Notes, the Senior Subordinated Notes are "junior", even though the word "senior" appears in the name because those holders have agreed to be Subordinated in right of payment to the Senior Notes. Compare Senior Debt.

*Junk Bonds:* another name for High Yield Bonds or Non-Investment Grade Bonds.

*Kafalah:* an Islamic finance term meaning a guarantee.

*Kafil:* an Islamic finance term meaning a guarantor.

*Keep Well Agreement:* not as strong as a Guarantee but an agreement often given by a parent company to ensure that its subsidiaries are "kept well". The extent of the obligations on the parent is a matter for negotiation.

*Keyman Policy:* life assurance policies taken out on certain key executives. May be required as a Condition Precedent to some Credit Facilities. No doubt should be called Keyperson Policy.

*KFC:* acronym for Kentucky Fried Chicken. Not to be confused with KYC.

*Kick-Off Meeting:* in a Securities offering, the initial meeting among the Issuer, the investment banks that are serving as Underwriters or Initial Purchasers, the auditors and the lawyers. This is where the agenda for the deal is set and the initial Due Diligence with management is performed.

*KYC:* acronym for "Know-Your-Customer", refers to a policy implemented to conform to a customer identification programme mandated under applicable legislation. KYC policies have become increasingly important globally to prevent identity theft, fraud, money laundering and terrorist financing. In the US, this includes compliance with Patriot Act Requirements.

*L Plus*: shorthand for “LIBOR plus”, used in stating the Applicable Margin in respect of a Floating Rate of Interest that is to be tied to LIBOR, such as “L+300 bps”. See also E Plus.

*Large Accelerated Filer*: a category of Issuer created by SEC rules. An Issuer's status as a Large Accelerated Filer, as opposed to an Accelerated Filer, a Non-Accelerated Filer or a Smaller Reporting Company, determines when its Financial Statements go Stale and when it has to comply with SOX Section 404. An Issuer qualifies as a Large Accelerated Filer if (i) its Public Float is greater than US\$700.0 million as of the last business day of the second quarter of the Issuer's preceding fiscal year and (ii) it has been subject to the requirements of Section 13(a) or 15(d) of the US Exchange Act for at least 12 months, including the requirement to file an annual report. Once an Issuer is in Large Accelerated Filer land, its Public Float has to fall to less than US\$500.0 million to get out. See Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com).

*Layering*: see Anti-Layering Covenant.

*LBO*: acronym for Leveraged Buyout.

*LBO Fund*: another name for a Sponsor.

*L/C*: shorthand for a Letter of Credit.

*Lead Arranger*: in a transaction with more than one Arranger, the primary or original Arranger engaged by a Borrower or Sponsor in connection with structuring a particular financing. There can however be multiple Lead Arrangers.

*Lead Left*: see Left Placement.

*Lead Manager*: in bank land, another name for the Lead Arranger. In Securities land, another name for the Lead Managing Underwriter.

*Lead Managing Underwriter*: the Underwriter designated by the Issuer as the Lead Managing Underwriter will generally run the show for the Underwriters, selecting counsel, actively participating in the drafting and serving as Bookrunner for the Syndication. The Lead Managing Underwriter will receive Left Placement on the cover of the Prospectus and in any tombstone advertisement. The Agreement among Underwriters authorises, among other things, the Lead Managing Underwriter to execute (and therefore negotiate) the Underwriting Agreement on behalf of all the Underwriters.

*League Table Credit*: league tables are lists kept by certain institutions and publications, such as Thomson Financial and Bloomberg, that keep track of deal volume and deal size by investment bank and law firm. League Table Credit refers to receiving credit for a specific deal for purposes of determining the rankings.

*Leakage*: term used to describe the loss of assets from the Secured Parties Collateral and Guarantee net. A transfer of assets from an Obligor to a

non-Obligor within a group for less than market value and a payment of a dividend or other distribution to the shareholders of an Issuer or Borrower are both examples of Leakage.

*Left:* see Left Placement.

*Left Placement:* in a Securities offering, the Lead Managing Underwriter receives Left Placement — meaning its name is placed on the left of the top line of the list of Underwriters on the back and front cover of the Prospectus (or for a 144A Offering, the list of Initial Purchasers on the covers of the Offering Memorandum). Getting Left Placement is a big deal because such placement means the bank will serve as Lead Managing Underwriter. Also known as Lead Left.

*Left-Side Arranger:* another name for a Lead Arranger whose name appears on the left side of all marketing materials relating to the Credit Facilities with respect to which it is the Lead Arranger.

*Legal Defeasance:* one of two types of Defeasance used in US-law governed Securities offerings. The other is Covenant Defeasance. In theory, Legal Defeasance allows an Issuer to get completely out from under its payment obligations under a series of Notes by depositing in an escrow account enough money (or government issued Cash Equivalents in the same currency as the Notes) to make all principal and Interest payments on the Notes through maturity. Practically, Legal Defeasance is not a real option because all High Yield Indentures require, as a condition to Legal Defeasance, the delivery of a tax opinion stating that holders will not suffer an acceleration of income as a result of the Legal Defeasance — and this is not possible under current tax law.

*Legal Reservations:* a concept which is often used to qualify legal Representations and Warranties and Covenants, particularly as to enforceability. The Legal Reservations are legal principles or rules which all parties accept may make such a Representation and Warranty untrue, or a Covenant incapable of being complied with, and therefore a Default should not occur if this eventuality occurs.

*Lender Liability:* an umbrella term loosely describing a wide range of potential liabilities incidental to lending, from straightforward contract claims through to Insolvency doctrines such as Equitable Subordination. In restructuring, a specific concern arises in Germany, where any Lender which makes available fresh money to a German Borrower facing imminent Insolvency in an amount that is not sufficient to ensure the turnaround, runs liability risks against other creditors of the Borrower. One of the uses of Restructuring Opinions is to mitigate these risks. We suggest that you make sure that you understand the legal regime of Lender Liability by speaking to your favourite Latham expert.

*Lenders:* the financial institutions party to a Credit Agreement as lenders (*i.e.*, the ones lending the money). Also known as Lenders of Record.

*Lenders of Record:* another name for Lenders.



*Lending Office:* another name for a Lender's Facility Office.

*Letter of Credit:* most Revolving Facilities provide that a portion of such facility may be used in the form of Letters of Credit. A Letter of Credit, or L/C, essentially acts as a Guarantee by one of the Lenders (*i.e.*, the Issuing Bank) under the Revolving Facility that kicks in if the Borrower (the "account party") does not meet an obligation to a third party (the "beneficiary"). A Borrower may post a Letter of Credit in favour of a third party as a Guarantee to that third party that it will pay out on an obligation if needed, or will fulfil a governmental requirement, etc. If the third party requires payment, the Issuing Bank must pay under the L/C, and can look to the other Revolving Lenders for reimbursement as if the payout were a Revolving Loan made by all the Revolving Lenders as a group. The two main types of Letters of Credit are Commercial Letters of Credit and Standby Letters of Credit.

*Level of Comfort:* used in Comfort Letters, this phrase refers to which Tick Mark an auditor provides with respect to a given number in an Offering Memorandum or Prospectus. For instance, one type of Tick Mark might say that the accountants had "compared the number in the disclosure to the audited financials and found them to be in agreement".

*Leverage Ratio:* an important measurement of the "leverage" of a company, which compares the company's overall debt level as of a particular date to the EBITDA the company generated over the most recently completed four-quarter period. Investors and analysts care about the Leverage Ratio because it measures the company's debt level against the company's cash performance measure. In the leveraged finance context, the Leverage Ratio is the ratio of indebtedness to EBITDA (or Adjusted EBITDA). Credit Agreements traditionally (although not always) have Maintenance Covenants requiring a Borrower to maintain a certain Leverage Ratio (see however Covenant Lite and Covenant Loose). In addition, in Bond world, this ratio is used as an alternative to Fixed Charge Coverage Ratio for incurrence of Ratio Debt with companies which are highly leveraged, for example, in the media and telecommunications industry. For such companies, the Fixed Charge Ratio often would not provide sufficient borrowing capacity.

*Leveraged Buyout:* a transaction in which a Sponsor or Leveraged Buyout Firm uses debt to buy a Target company. The secured portion of the debt is secured exclusively by the stock and assets of the Target company and any Guarantors (subject to considerations such as Corporate Benefit and Financial Assistance). The transaction allows Sponsors to finance large acquisitions while only putting up a portion of the purchase price in the form of equity capital.

*Leveraged Buyout Firm:* another name for a Sponsor.

*Lev-x:* European indices on Credit Default Swaps for loans on Leveraged Buyouts.

*LIBID*: the London Interbank Bid Rate, which refers to the rate at which major financial institutions bid to take short-term deposits from each other in the London interbank market.

*LIBOR*: the London Interbank Offered Rate, which refers to the rate at which major financial institutions can borrow from each other in the London interbank market. Most Credit Facilities have Interest Rates that are set at certain margins above LIBOR or EURIBOR (as applicable). See Applicable Margin and EURIBOR.

*LIBOR Floor*: a concept in a Credit Facility that prevents LIBOR, for purposes of that Credit Facility, from falling below a certain threshold — even if actual LIBOR does drop below that threshold. The idea is to protect Lenders under Floating Rate Credit Facilities in environments where LIBOR is abnormally low due to world events and changes in monetary policy. The equivalent for Credit Facilities denominated in Euros is a EURIBOR Floor.

*Lien*: often used interchangeably with Security Interest; however in American speak, technically a Lien is a broader term and includes non-consensual encumbrances on property such as tax Liens or Liens in favour of warehousemen or carriers as well as consensual Security Interests.

*Lien Subordination*: the Subordination of Tranches of debt which may be Pari Passu in terms of payments, and secured by the exact same Collateral, but one Tranche is Subordinated because its beneficiaries agree that in the case of the receipt of any proceeds of sales of that Collateral (but not otherwise), the Lenders under the other Tranche will be paid prior to any payouts on their debt. In the US this is the manner in which First Lien and Second Lien Credit Facilities are structured, however European practice is different (see Second Lien Facility). See generally Subordination.

*Liens Covenant*: a Covenant that restricts the incurrence of Liens and serves to protect the seniority position of debt by preventing more Secured Debt from either getting ahead (this is what unsecured Senior Notes are worried about) or becoming Pari Passu (this is what the Lenders under a secured Credit Agreement are worried about). Senior Subordinated Lenders will want protection that prevents Security over any other Subordinated Debt. See also Negative Pledge.

*Limitation Language*: another name for Guarantee Limitation Language.

*Limitation on Restrictions on Payment of Subsidiary Dividends Covenant*: a Covenant that ensures the flow of cash from a company's subsidiaries to the company by preventing subsidiaries from being subject to dividend blocking arrangements in other agreements. You need to pay particular attention to this Covenant in Holding Company deals where there is debt at the Operating Company level — because if the Operating Company debt prevents dividends to the Holding Company, the Holding Company

may not be able to meet its obligations when they come due. The ability to upstream funds may however be limited by Corporate Benefit, Financial Assistance or other restrictions.

*Limited Recourse Financing:* a type of financing in which the Lender has limited (or no) ability to make claims against the Borrower's equity holders if the Collateral for a defaulted loan is insufficient to repay the debt. Compare Non-Recourse Financing.

*Liquidation Proceedings ("Liquidation Judiciaire"):* French Insolvency proceedings of a company in a state of Cessation des Paiements where the company's reorganisation is not possible. The aim of such proceedings is to end the company's operations and to realise its assets as a business or individually.

*Liquidity:* the degree to which an asset can be converted into cash. While government issued treasuries are considered highly liquid, a 49 per cent interest in a Malaysian paper mill probably is not. The term can also be used to refer to a company's ability to meet its near term payments.

*Listado Clasificación de Creditos:* the Spanish Insolvency Act distinguishes between claims against the debtor's estate (*créditos contra la masa*) and insolvency claims (*créditos concursales*). Claims against the debtor's estate are to be paid upon becoming due and in liquidation prior to the payment of any insolvency claims. Claims against the debtor's estate cover legal costs, receiver fees or claims resulting from obligations entered into by the receivers, or the debtor under the authorisation of the receivers, during the Insolvency proceeding.

*Listed Company:* the term given to any company whose shares or Securities are traded on a regulated exchange, for example in the UK this would refer to a company admitted to the Official List and being subject to the Listing Rules.

*Listing Rules:* rules published by the FSA dealing with, among other things, the requirements for admission to listing of securities and the ongoing obligations of Listed Companies in the UK.

*LMA:* acronym for Loan Market Association. Not to be confused with the League Managers Association, the collective, representative voice for all football league managers in England.

*Loan Market Association:* the European trade association for the syndicated loan markets. The LMA provides recommended documentation for primary and secondary syndicated loan markets, establishes market practice and hosts education and training events throughout Europe. A number of these standard forms and related publications can be found at [www.loan-market-assoc.com](http://www.loan-market-assoc.com). See also LSTA.

*Loan Participation Note:* a Fixed Income Security issued by an off-shore SPV with a back-to-back loan to a Borrower (the actual credit) such that payments of interest and principal are paid from the Borrower to the SPV

and on to the end investors. The structure is limited recourse as regards the SPV and security is granted over the SPV's rights under the loan agreement with the Borrower in favour of the Trustee. LPN programmes and stand-alone issues have been a popular means of financing in Russia and other CIS countries in recent years.

*Loan To Own:* a strategy whereby a Lender purchases Distressed Debt with the aim that in a restructuring it will acquire the equity interests in the Borrower in exchange for a full or partial write-off of its debt claims.

*Lock-up:* required by the Underwriters in connection with IPOs and other equity offerings, Lock-ups "lock-up" the shares of officers, directors and other insiders as well as the Issuer so that no new shares will hit the market during a certain period following the Closing of the offering. The purpose of the Lock-up is to help stabilise the stock price following the offering by controlling supply. Also used in the context of debt restructurings when the principal creditors and debtors "lock-up" for an agreed period to allow time to implement the agreed restructuring (and during this time the creditors won't transfer their debt claims unless the transferee also agrees to adhere to the agreed restructuring terms).

*Lock-up Agreements:* the letters signed by officers, directors and other insiders (or in the restructuring context, the creditors and debtors) setting forth the terms of their Lock-ups. In the context of IPOs and other equity offerings, these are usually negotiated in connection with the Underwriting Agreement (which is where the Issuer's Lock-up can generally be found). In the context of a restructuring, this is likely to be a standalone agreement.

*Lock-up Letters:* another name for Lock-up Agreements.

*London Stock Exchange:* one of the largest stock exchanges in the world, the LSE offers a choice of four primary markets: (i) the Main Market; (ii) AIM; (iii) PSM and (iv) the Specialist Fund Market (SFM).

*Long:* the opposite of Short. You have a Long position in a particular Security if you own the Security.

*LoR:* acronym for Lender of Record.

*LPN:* acronym for Loan Participation Note.

*LSE:* acronym for the London Stock Exchange.

*LSTA:* useful for US standard forms as it is similar to the LMA but for Americans. Also useful for fighting speeding tickets in Louisiana. Why so? Well, this is an acronym for many associations, including the Loan Syndication and Trading Association and the Louisiana State Troopers Association. The former is a non-profit organisation dedicated to promoting the development of a fair, efficient, liquid and professional trading market for corporate loans originated by commercial banks and other similar private debt. A number of standard forms and market practice documents and publications can be found at [www.lsta.org](http://www.lsta.org). The latter is an association of state troopers.

*LTM*: acronym for “latest twelve months” that refers to an accounting period consisting of the latest 12 months. The term is usually used to refer to the most recently completed four-quarter period (even if that is not the latest 12 months). Financial Covenants are often referred to as being calculated on a rolling LTM basis.

*Luxco*: a company incorporated in Luxembourg, often used in European Leveraged Buyouts for tax efficiency reasons, including Luxembourg’s extensive network of Double Taxation Treaties and favourable Withholding Tax rules (attributes shared by a number of other jurisdictions in Europe), and now increasingly for Security Interest efficiency reasons under Double Luxco Structures.

*Luxembourg Stock Exchange*: the main stock exchange of Luxembourg, which specialises in the listing of international Bonds.

*M&A*: shorthand for mergers and acquisitions.

*MAC*: acronym for Material Adverse Change.

*MAD*: acronym for the Market Abuse Directive.

*MAE*: acronym for Material Adverse Effect.

*MAE Qualifier*: this is an exception to what would otherwise be an absolute assertion or representation, for example: “I have not been drinking, except to such extent as would not be likely to have a Material Adverse Effect on my drafting”. Also used to qualify Covenants, for example: “I will not drink, except to such extent as would not be likely to have a Material Adverse Effect on my drafting”. See Material Adverse Change and Material Adverse Effect.

*Main Market*: the largest of the LSE’s markets, comprising those Securities admitted to the Official List by the FSA acting as the UKLA for the purposes of FSMA. The listing of such Securities is subject to the Listing Rules and the Admission and Disclosure Standards.

*Maintenance Covenant*: a contractual provision in a Credit Agreement that requires a Borrower to maintain a certain state of affairs, for example, to meet or exceed various financial performance measures. Financial Covenants are one category of Maintenance Covenants. Financial Covenants generally require the Borrower to meet a high threshold (typically 80-90 per cent) of its projections. Credit Facilities (other than Covenant Lite Credit Facilities) generally contain Financial Covenants, while Terms and Conditions and Indentures do not. Maintenance Covenants (including Financial Covenants) are also found in Second Lien Facilities and Mezzanine Facilities and sometimes found in Bridge Loans. See also Cash Flow Cover, Fixed Charge Coverage Ratio, Interest Coverage Ratio and Leverage Ratio.

*Maisir*: an Islamic finance term being a fundamental principle of Islam. It literally means “getting something too easily” and constitutes a prohibition on acts that constitute gambling.

*Majority Lenders:* usually the Lenders holding more than 66.6 per cent (not 50 per cent as the name would suggest and as is common in the US and also in European Bridge Facilities) of the aggregate principal amount of outstanding loans and unfunded commitments under a Credit Agreement. Usually required for approval of Amendments and Waivers under a Credit Agreement, although certain Amendments require a 100 per cent vote. Also known as the Instructing Group. See also Class Voting, Structural Adjustment and Super Majority Voting.

*Make-Whole:* shorthand for a “make whole call” feature, which allows the Issuer of a series of Bonds to redeem those Bonds without the consent of the Bondholders at a “make whole price” that is the sum of the present values of each remaining payment on the Bonds (until maturity or until the date on which the Bonds otherwise become redeemable at a fixed price, if applicable). These present values are calculated using a discount rate equal to the Comparable Treasury rate plus a Spread (usually 50 Basis Points). The sum of the present values of the remaining payments on a High Yield Bond can often substantially exceed the principal amount of the High Yield Bond. A “make whole price” of 120 per cent of principal amount is not unheard of in the context of a make whole redemption of a High Yield Bond. This feature is generally available to Issuers during the Non-Call Period or in a Change of Control context. Also increasingly seen in Mezzanine Financings which are Non-Call.

*Management Buy-In:* an LBO where an outside management team acquires the Target, with or without a Sponsor.

*Management Buy-Out:* an LBO where the existing management team acquires the Target, with or without a Sponsor.

*Management's Discussion and Analysis:* shorthand for Management's Discussion and Analysis of Financial Condition and Results of Operations. This is a textual discussion in a Prospectus, Offering Memorandum or Periodic Report that provides information that the Issuer believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. The MD&A also includes a discussion of Liquidity and capital resources and segment information. The purpose of the MD&A is to provide colour and context to the Financial Statements. The MD&A is required disclosure, and for US Offerings the SEC has provided substantial guidance on how MD&A should be drafted.

*Manager:* another name for an Underwriter or Initial Purchaser.

*Mandataire ad hoc proceedings:* flexible and confidential proceedings in France available to companies that are not in a state of *Cessation des Paiements*. Upon request of the company, the president of the Insolvency court appoints a *mandataire ad hoc* to facilitate negotiations between a company and its creditors.

*Mandate Letter:* another name for a Commitment Letter.

*Mandated Lead Arranger:* another name for an Arranger.

***Mandatory Cost:*** the costs associated with banks complying with certain regulatory funding requirements. Often set out in a schedule to the Credit Agreement, following the recommended form published by the LMA. Also known as the Additional Cost Rate or Associated Costs Rate.

***Mandatory Offer to Purchase:*** provisions in Terms and Conditions and Indentures that require the Issuer to make an offer to purchase the Notes after certain designated events, generally following asset sales or a Change of Control.

***Mandatory Prepayments:*** provisions in a Credit Agreement that require the prepayment of Term Loans (and typically then the prepayment and permanent reduction of commitments under a Revolving Facility) with certain cash of the Borrower. Generally includes one or more of the following: Acquisition Proceeds Prepayment, Asset Sale Prepayment, Debt Sweep, Equity Prepayment, Excess Cash Flow Sweep and Insurance Proceeds Prepayment. Also sometimes seen in Bond offerings.

***Margin:*** see Applicable Margin.

***Margin Call:*** the requirement to deliver Collateral when the value of the existing Collateral falls below a certain agreed minimum level set out in the Margin Loan documentation.

***Margin Loan:*** a loan that involves the Borrower posting shares of a publicly listed company as Collateral to secure its obligation to repay the loan. If the value of the Collateral falls below a certain agreed minimum level, the Borrower is required to post additional Collateral pursuant to a Margin Call.

***Margin Ratchet:*** see Grid Based Pricing.

***Margining:*** the process of delivering Collateral to a Hedge Counterparty in connection with a Hedge or to a Lender in connection with a Margin Loan to cover the risk associated with the Hedge or Margin Loan.

***Market Abuse Directive:*** the Market Abuse Directive sets a common framework for tackling insider dealing and market manipulation in the EU and the proper disclosure of information to the market. The directive defines and prohibits several forms of market abuse, provides for a number of appropriate systems and controls to identify inside information and to ensure its timely disclosure, as well as obligating companies and their advisers to maintain "insider lists".

***Market Disruption Clause:*** found in Credit Agreements and meant to address situations where EURIBOR/LIBOR is for any reason not available or a group of Lenders holding an agreed minimum percentage of the aggregate loans (usually between 30 – 50 per cent) notifies the Facility Agent that their Cost of Funds would be greater than EURIBOR/LIBOR. The Facility Agent would typically then turn to ask the Reference Banks to provide the underlying rate, and in the absence of such rate would use Cost of Funds.

*Market Flex:* a powerful provision included in the Fee Letter portion of the Commitment Papers that allows the Arranger to change the terms, conditions, pricing and/or structure of the facilities provided in the Commitment Letter if the Arranger determines that the changes are advisable to enhance the prospects the Successful Syndication of the facilities the Arranger has agreed to provide to the Borrower. The exact terms of Market Flex will be heavily negotiated. See Pricing Flex, Structure Flex, Open Flex and Closed Flex.

*Market MAC:* this is a reference to a Condition Precedent that there shall not have been any disruption or adverse change to the financial, banking or Capital Markets generally, or the Syndicated loan and High Yield markets, specifically. Compare Business MAC.

*Market Maker Prospectus:* an arcane animal that is a creation of a funny provision in Section 2(11) of the US Securities Act. That section defines an Underwriter to be anyone who buys from an Issuer with a view to distribution in a public offering. It also defines Issuer (for purposes of Section 2(11) only) to include Affiliates of the Issuer. This creates a technical problem for a Broker-Dealer that wants to make a market in the Securities of one of its Affiliates. Technically, regular investors who buy from a Broker-Dealer that is Affiliated with the Issuer will be treated as Underwriters for purposes of the US Securities Act. That is major league bad news for those regular investors and doesn't really make any sense. In practice, the SEC has solved this glitch by requiring the Broker-Dealer to deliver a Prospectus in all such market making transactions involving Securities of an Affiliate of the Broker-Dealer. That Prospectus is called a Market Maker Prospectus and must be kept up-to-date by the Issuer and its Broker-Dealer Affiliate for so long as the Broker-Dealer is making a market in the Issuer's Securities. The regular investor who buys from the Broker-Dealer does not have to do anything special here, notwithstanding the literal reading of Section 2(11).

*Marketing Period:* see Minimum Marketing Period.

*Markets in Financial Instruments Directive:* the Markets in Financial Instruments Directive provides a comprehensive regulatory framework for investment firms and security markets in the EU which is harmonised and which provides for a single EU passport based on the regulation of the home Member State (*i.e.*, usually where the firm has its registered office). The directive aims to create a single financial services rule book, covering conduct of business and other matters, sets out minimum powers for regulators and establishes means of regulator cooperation.

*Mark-to-Market:* an accounting requirement to write assets down (and in some cases up) to update the value of a financial instrument to its current market price. This is required by GAAP for certain assets in certain industries.

*Marzano Law:* see Extraordinary Administration.



*Master Agreement among Underwriters:* another term used mainly in the US, it refers to a generic Agreement among Underwriters that many investment banks have signed up to. Most banks have their own master form of Agreement among Underwriters, and most banks have signed on to every other bank's master form of Agreement among Underwriters. The terms of a particular Master Agreement among Underwriters are made applicable to a specific offering by invitation of the Lead Managing Underwriter to join the Syndicate and acceptance by the underwriting Syndicate members.

*Material Adverse Change:* just like it sounds, this phrase refers to a "material adverse change" in something — generally either the business (see Business MAC) or the market (see Market MAC). This term is used in three general contexts: either (i) as a Condition Precedent (for instance, a seller would not have to close on an acquisition if there had been a Material Adverse Change to the business, see Target MAC) or (ii) as a qualifier to a Representation and Warranty (for instance, the environmental representation is limited to instances where violations of the representation could (or would) lead to a Material Adverse Change) and Covenants or (iii) as an Event of Default (although not in US Credit Agreements). However, when used as a qualifier to a Representation and Warranty/Covenants and as an Event of Default, most agreements use the term Material Adverse Effect. See MAE Qualifier.

*Material Adverse Effect:* just like it sounds, this refers to a "material adverse effect" on something and is just another way of expressing the concepts embedded in the phrase Material Adverse Change.

*Material Company:* it may be agreed that it is not appropriate for Representations and Warranties, Covenants and Defaults to apply to all subsidiaries in a Group. Hence the use of this concept where entities are only caught if they meet a certain threshold (often 5 per cent or more of the Group's EBITDA, assets and/or turnover). Credit Agreements will also typically require all Material Companies to be Guarantors, particularly in Leveraged Buyouts.

*Maturity Date:* the date on which a Bond or amounts outstanding under a Credit Facility must be repaid in full.

*Maximum Leverage Ratio Condition:* basically a bright-line version of the Company MAC, this Condition Precedent requires the company's Leverage Ratio to be below a specified maximum threshold or else the Lenders will not be required to fund. Lenders love this one. See also Minimum EBITDA Condition.

*MBI:* acronym for Management Buy-In.

*MBO:* acronym for Management Buy-Out.

*MD&A:* shorthand for Management's Discussion and Analysis of Financial Condition and Results of Operations.

*Member State*: another name for Participating Member States.

*Members Voluntary Liquidation*: a type of English liquidation proceeding approved by the members of a company. Applicable only where the company is solvent.

*Mercury*: used to describe the rules regarding execution of documents governed by English law arising from the decision in *Mercury v HMRC* [2008] EWHC 2721. These can have significant implications for the logistics of Closing. Like the element, Mercury is potentially poisonous.

*Merger Covenant*: a Bond Covenant that contains conditions to a merger of the Issuer and to the transfer of all or substantially all the Issuer's Consolidated assets. The most important condition is that the merger/sale cannot take place unless the Indenture/Bonds are novated with the new entity replacing the old entity as a party (*i.e.*, ensuring the obligations under the Bonds become the obligations of the new entity).

*Mezz*: shorthand for Mezzanine Financing.

*Mezzanine Facility*: a Credit Facility pursuant to which Lenders make Mezzanine Loans. See Mezzanine Financing.

*Mezzanine Facility Term Sheet*: an annex to the Commitment Letter that contains a summary of the terms of the Mezzanine Facility. In European deals it will usually be included as part of the Senior Secured Facilities Term Sheet.

*Mezzanine Financing*: a very different animal in Europe compared to the US. In Europe, Mezzanine Facilities are Syndicated bank loans secured on the same assets as the Senior Secured Credit Facilities but are provided on a fully Subordinated basis. In the US, mezzanine is an unsecured debt instrument with certain equity-like characteristics, often issued at the Holdco level. In both markets, Mezzanine Facilities may have equity features, frequently referred to as Equity Kickers, which may take the form of Warrants that permit the holder to purchase equity at a preset price, or conversion features upon certain events (such as a Change of Control). The combination of the debt Coupon (split between cash pay and Pay-In-Kind in European Mezzanine Financings) and the Equity Kicker gives Mezz investors a higher potential return than High Yield Bonds. See also Subordinated Debt.

*Mezz Lenders*: shorthand for the Lenders in a Mezzanine Financing.

*Mezzanine Loans*: Term Loans made available as part of a Mezzanine Financing. Mezzanine Loans typically have no Amortisation, mature 12 months after the maturity of the longest-dated Tranche of the Senior Secured Credit Facilities and have a higher Interest Rate than the Senior Secured Credit Facilities of the same Borrower. The Interest is typically a combination of cash and Pay-In-Kind.

*MFA*: acronym for Mezzanine Facility Agreement, the Credit Agreement for Mezzanine Financing.

*MFN Pricing*: acronym for Most Favoured Nation Pricing.

*MIFID*: acronym for Markets in Financial Instruments Directive.

*Mini Perm*: in the context of a construction financing, a type of short-term loan, typically three-to-five years, used by a Borrower to pay off construction financing or initial acquisition financing during the period a project is being completed or becoming stabilised as an income-producing asset. Borrowers enter into Mini Perms during this phase because long-term financing is not yet available because the project has an insufficient operating history. Mini Perms typically have Balloon Payments at the end of their terms that are intended to be Refinanced by long-term financing. In the context of coiffures, a Mini Perm is a partial perm that can be done to achieve body or curl in a particular area so that just the right amount of volume and control is obtained. See mullet.

*Minimum EBITDA Condition*: basically a bright-line version of the Company MAC, this Condition Precedent requires a minimum EBITDA level as a condition of funding. Lenders love this one. See also Maximum Leverage Ratio Condition.

*Minimum Hold*: the minimum percentage of a particular series of loans that the Arranger agrees to hold (meaning not Syndicate or otherwise sell) for some agreed upon period of time. Borrowers like a Minimum Hold in the context of Bridge Loans because it keeps the Bridge Loans in the hands of the friendly relationship banks, potentially making it easier to get a necessary vote in favour of an Amendment to the Bridge Facility should the need arise. Lenders don't love this one and it is often highly negotiated. Contrast to Target Hold.

*Minimum Marketing Period*: a Condition Precedent in the Commitment Letter that the banks will have a period of a certain number of consecutive days (generally 20 to 30, but could be substantially less, depending on the transaction and the anticipated length of the Road Show) following receipt of the Offering Memorandum to place the Notes.

*MLA*: acronym for Mandated Lead Arranger.

*Model Code*: public companies with Premium Listings in the UK must require persons discharging managerial responsibilities to comply with the Model Code in order to restrict their ability to deal in the listed company's shares.

*Model Form Note Purchase Agreement*: a form of Note Purchase Agreement drawn up by market participants, which has become the benchmark for the Private Placement market. The agreement contains detailed representations by the Issuer, certain Positive Covenants and contemplates inclusion of Financial Covenants.

*Money Market*: the global financial market for short-term borrowing and lending. Short-term paper such as Treasury bills and Commercial Paper are bought and sold in the Money Market.

**Monoline Bond Insurance:** insurance provided by a triple-A-rated insurance company that insures the payment of Interest and principal on Bonds. Companies that provide this type of insurance are commonly referred to as Monoline insurance companies because Bond insurance is their only line of business.

**Monte Carlo Simulation:** a way of valuing businesses by running a large number of simulations using random quantities for uncertain variables and then taking the distribution of results to infer which values are most likely. Relied upon rather unsuccessfully in the IMO Car Wash restructuring by the Mezzanine Lenders. For a more comprehensive summary of the IMO Car Wash case, see Latham & Watkins Client Alert No. 916, *The IMO Car Wash Decision* (21 August 2009), available at [www.lw.com](http://www.lw.com).

**Moody's:** Moody's Investors Service, Inc., a subsidiary of Moody's Corporation. Moody's is one of the two most powerful Ratings Agencies. S&P is the other big one. Fitch is hot on their heels.

**Moratorium:** the legal equivalent of a "time-out", *i.e.*, a period when a Borrower is authorised by a government or law to suspend repayment of debts owed to its creditors. Also used in restructurings to refer to the period in which creditors are not allowed to take enforcement action.

**Mortgage:** a Security Agreement that grants a particular type of ownership based Security Interest typically used for real property interests.

**Mortgage Loan (*mutuo fondiario*):** Italian medium/long term financing secured by a First Lien of real estate. Article 39 of the Italian Banking Act exempts such financings from certain of the Italian Clawback rules.

**Most Favoured Nation Pricing:** usually a condition to funding an Incremental Facility, requiring that the existing Term Loans receive "most favoured nation" treatment and receive the benefit of the better terms of the Incremental Facility (*e.g.*, if the new Incremental Facility has an Interest Rate higher than, or often more than 25-50 bps higher than, the existing Term Loans, then the existing Term Loans will be repriced upon the Closing of the Incremental Facility to receive the same (higher) Interest Rate as the incremental loans).

**MTF:** acronym for Multilateral Trading Facility.

**MTN Programme:** another word for EMTN Programme.

**MTNs:** another word for EMTNs.

**Mudaraba:** an Islamic finance term referring to an Islamic finance structure akin to a silent partnership or investment trust management, with the *Rub ul-maal* (the investors — like lending banks in a conventional financing) providing the capital of the *Mudaraba*. See also *Mudarib*.

**Mudarib:** an Islamic finance term meaning the person who provides entrepreneurship and management of a *Mudaraba*. See also *Rub ul-maal*.

**Mufti:** an Islamic finance term meaning one who passes *Fatwas*. Also used as slang for ordinary clothes (*i.e.*, not uniform), principally by those educated at English private schools.

**Mulligan Clause:** similar to a mulligan in a game of social golf, this is a clause in a Credit Agreement which provides that a breach of a Financial Covenant on a particular testing date will not be treated as an Event of Default unless that Covenant is breached again on the following test date. The product of red-hot markets. Also known as a Hard Mulligan. Compare with a Soft Mulligan.

**Multilateral Trading Facility:** an electronic communication network operated by an investment firm or a market operator, which brings together multiple third-party buyers and sellers of financial instruments in a way that results in a contract in accordance with the provisions of MiFID.

**Murabaha:** an Islamic finance term referring to an Islamic finance structure where goods desired by a purchaser (like a Borrower in a conventional asset financing) are sold at cost plus an agreed and stated profit by the Islamic finance institutions (like the Lenders in a conventional asset financing).

**Musawamah:** an Islamic finance term meaning a sale arrangement where the price of the sale is bargained between the parties (without any reference to the original price paid by the seller).

**Musharaka:** an Islamic finance term meaning a partnership or joint venture.

**MVL:** acronym for Members Voluntary Liquidation.

**Naked Short:** in the underwriting context, a Naked Short refers to the portion of a Syndicate Short Position that is not covered by the Over-Allotment Option — in other words, the Underwriter has taken orders for a number of shares in excess of all the shares the Issuer is obligated to sell to the Underwriter even once you take into account the Over-Allotment Option. Consider an example. There is an IPO for 1.0 million shares of ABC Co., where the Underwriter has an Over-Allotment Option to purchase an additional 150,000 shares of ABC from ABC at the offering price. The Underwriter, unsure of the total demand for the shares and concerned with post-offering market support, builds a book (takes orders) for 1.2 million shares. The Underwriter now owes investors 200,000 more shares than it is buying from the Issuer in the initial offering. It's as if a florist took orders for 120 bouquets of roses on Valentine's Day, but only ordered 100 from the supplier. The Underwriter is Short 200,000 shares (and the florist is Short 20 bouquets). Remember, though, that the Underwriter has an Option to purchase an additional 150,000 shares from ABC at the offering price (and the florist has on reserve an extra 15 bouquets that can be purchased from its supplier). So, the Underwriter's Naked Short is the remaining 50,000 shares (the florist's Naked Short is five bouquets), *i.e.*, the number not covered by the Shoe. Simple, right?

**NASD:** acronym for the (now former) National Association of Securities Dealers, Inc., which was consolidated with the NYSE's member resolution, enforcement and arbitration operation to create FINRA. See FINRA.

**NASDAQ:** the Nasdaq Stock Market, Inc. NASDAQ is the largest electronic screen-based equity Securities market in the United States. In August 2006, the Nasdaq Stock Market commenced operations as a registered national Securities exchange for Nasdaq-listed Securities. NYSE and NASDAQ are the two principal market centres for buying and selling equity Securities in the United States. See Latham & Watkins publication: *Selecting a Securities Exchange: NYSE, NASDAQ and Key European Exchange Listing Requirements for Equities* (18 May 2007), available at [www.lw.com](http://www.lw.com).

**NC:** acronym for Non-Call. If a Bond or loan is NC4/103/102/101, it is Non-Call for the first four years (*i.e.*, the Non-Call Period is four years from the Closing Date), and then becomes optionally redeemable in year five at a Call Premium of 3 per cent in year five, 2 per cent in year six, and 1 per cent in year seven.

**NDA:** acronym for Non-Disclosure Agreement. See Confidentiality Agreement.

**Negative Assurance:** in a Securities deal, a reference to what the auditors say in the Comfort Letter about the quarterly financials and the period since the end of the last quarter (hopefully that there have been no material changes). This is a "we didn't see anything" standard, not a promise that everything is actually okay.

**Negative Assurance Letter:** a letter provided by both Issuer's and Underwriters' counsel at the Closing of a Securities offering. The letter states that based on the lawyers' Diligence efforts, nothing has come to their attention indicating that the Prospectus or the Offering Memorandum contains any misstatements of material facts or any material omissions. This is not an opinion, but it is sometimes incorrectly referred to as a 10b-5 Opinion or Rule 10b-5 Opinion. Also known as a "10b-5 letter".

**Negative Covenant:** a contractual provision in the Terms and Conditions or an Indenture or a Credit Agreement that prohibits the Issuer or Borrower from engaging in specified activities, such as making investments, incurring new debt or Liens, selling assets or making acquisitions. Think of these as the "thou shalt not" Covenants. Negative Covenants are usually highly structured and customised to an Issuer's or Borrower's specific condition. Compare Positive Covenant.

**Negative Pledge:** in Bond world, a variant on the Liens Covenant that allows the Issuer to place Liens on its assets that would not otherwise be allowed by the Baskets so long as the Issuer gives an Equal and Rateable Lien to the Bondholders, therefore putting the "on/off" switch for the Lien in the hands of the other investors. This Covenant is typical

in Investment Grade Bond deals and is usually the only Covenant in a Eurobond. In loan world, this is the more usual name for the Liens Covenant.

*Negotiable Instrument:* a financial instrument stating that the holder thereof is entitled to receive (or direct) payment of a specified amount of money on a specified date, or on demand. A party obtains rights as the entitlement holder under a Negotiable Instrument by having possession of it. Negotiable Instruments can be transferred without the knowledge or permission of the Issuer thereof, usually by physical delivery or endorsement. Promissory Notes and bearer Bonds are common examples of Negotiable Instruments.

*Net Debt:* a measure of a company's total debt minus its cash and Cash Equivalents (or some agreed portion of it).

*Net Share Settlement:* a settlement mechanic for Convertible Bonds where the Conversion Value up to the principal amount of the Bond is settled in cash, with the remainder settled in stock (or sometimes stock or cash at the Issuer's option).

*Netting:* the concept of calculating net value across several transactions to come up with the overall risk associated with such transactions. The ISDA Master Agreement allows parties to net their exposure under all Hedges entered into under such ISDA Mater Agreement.

*NIF:* acronym for *Numero de Identificación Fiscal* or Spanish tax ID number. All legal entities, both resident and non-resident, involved in transactions having tax implications in Spain are required to obtain a NIF to identify them in front of the Spanish Tax Authorities. Spanish notaries verify the existence of such NIF in all public deeds granted before them. The mere fact that a non-resident entity applies for (and obtains) a NIF does not by itself lead to the conclusion that such entity should be regarded as a resident in Spain for tax purposes, nor give rise by itself to additional compliance requirements. Not to be confused with a NOF.

*Nil Cost Option:* a share option with nominal or zero exercise price (essentially a free share) during its exercise period.

*Nil Merger Premium:* a merger where the shareholders do not receive a premium over the market value of their shares before the transaction is announced.

*NOF:* acronym for Number of Financial Transaction.

*No Fiduciary Duty Provisions:* another name for Independent Contractor Provisions.

*No New Info:* endearing banker nickname for a No New Information Out.

*No New Information Out:* another name for the Inconsistent Information Out.

*Nominated Adviser:* an adviser for companies listed on AIM that is approved by the LSE. AIM companies must retain a Nominated Adviser at all times. Also known as a Nomad.

*Non-Accelerated Filer:* a category of Issuer created by SEC Rules. An Issuer's status as a Non-Accelerated Filer, as opposed to a Large Accelerated Filer, an Accelerated Filer or a Smaller Reporting Company, determines when its Financial Statements go Stale and when it has to comply with SOX Section 404. An Issuer qualifies as a Non-Accelerated Filer if (i) its Public Float is less than US\$50.0 million as of the last business day of the second fiscal quarter of the Issuer's preceding fiscal year or (ii) it has not otherwise qualified as an Accelerated Filer or Large Accelerated Filer. See Accelerated Filer and Large Accelerated Filer. See also Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com).

*Non-Call:* term used when describing the terms of Bonds or loans that cannot be optionally redeemed (in the case of Bonds) or voluntarily prepaid (in the case of loans) unless the Issuer or Borrower pays a Make-Whole. See NC.

*Non-Call Period:* a period during which the Non-Call provision applies. The Optional Redemption provisions (for Bonds) or Voluntary Prepayment provisions (for loans) kick in at the end of the Non-Call Period. This period generally lasts for four years on a seven-year Bond and five years on a 10-year Bond. The Non-Call Period allows Bondholders to lock in their Yield during the Non-Call Period. If a Bond is NC4/103/102/101, it is Non-Call for the first four years (*i.e.*, the Non-Call Period is four years from the Closing Date), and then becomes optionally redeemable in year five at a Call Premium of 3 per cent in year five, 2 per cent in year six and 1 per cent in year seven. In loan world, Non-Call Periods are most commonly seen in Mezzanine Financings and post Credit Crunch have started to resemble those found in Bond world (pre-Credit Crunch, such periods were uncommon although Mezzanine Financings did often have Prepayment Premiums for the first two years). See also Defeasance.

*Non-Disclosure Agreement:* another name for a Confidentiality Agreement.

*Non-Distributable Reserves:* certain reserves such as a Share Premium Account and Capital Redemption Reserve, which companies are generally prohibited or restricted in distributing to shareholders.

*Non-Investment Grade:* rated Ba1 or lower by Moody's, BB+ or lower by S&P or BB+ or lower by Fitch.

*Non-Recourse Financing:* a type of financing in which the Lender has no ability to make claims against the Borrower in excess of the value of the Collateral if such Collateral is insufficient to repay the debt. Compare Limited Recourse Financing.



*No-Shop Provision:* an agreement by one or both companies involved in a merger only to deal with its merger partner and not to solicit other bids or provide information to other possible bidders.

*Notarisation:* the act of a notary public confirming either that it has witnessed a person signing a document or that the person which it witnessed signing a document was duly authorised to sign the same on behalf of a specific entity; in certain jurisdictions, this formality is required for certain types of documents to be valid and can require signatories to initial every page of a document and possibly even have to read out the document: beware of this before agreeing to attend a Closing meeting as you could be there for some time.

*Note Purchase Agreement:* generally refers to the purchase and sale agreement for Notes in a Private Placement. The Note Purchase Agreement in a Private Placement generally will contain not only the terms relating to the purchase and sale of the Notes, but also the Covenants that will bind the Issuer during the life of the Notes.

*Notes:* another name for Bonds.

*Novation:* the name given to the process by which obligations as well as rights are transferred by one party to another or (in some civil law jurisdictions) the name given to the process by which an existing obligation is morphed into a different obligation. Contrast (in the former case) with Assignment. Novations can cause the loss of Security granted in certain European countries (if you do not phrase your Novation carefully enough) hence the use of Assignment and Assumptions in these instances.

*Number of Financial Transaction:* the English translation of *número de operaciones financieras*, this is an identification number given by the Bank of Spain to every financial transaction with a Spanish Borrower. Getting this needs to be a CP.

*NYSE:* the New York Stock Exchange — now part of NYSE Euronext, which was formed in April 2007. The NYSE dates back to the Buttonwood Agreement of 1792, which was signed when 24 prominent brokers and merchants gathered on Wall Street to create a mechanism for trading Securities. In contrast to more modern exchanges, NYSE transactions are still conducted on a trading floor located on Wall Street. See Latham & Watkins publication: *Selecting a Securities Exchange: NYSE, NASDAQ and Key European Exchange Listing Requirements for Equities* (18 May 2007), available at [www.lw.com](http://www.lw.com).

*Obligor:* the collective name for Borrowers and Guarantors.

*Obligors' Agent:* the Obligors typically appoint a spokesperson for them, e.g., to agree Amendments and Waivers on their behalf and to enter into all communications with the Facility Agent. That is the Obligors' Agent.

*Observation Period (Période d'observation):* time period after the opening of *French Sauvegarde* or *Redressement Judiciaire* proceedings available to adopt a reorganisation plan. Must be a maximum of 18 months although adoption through the Creditors Committees must occur within the first six months of the *Période d'observation*.

*OC:* acronym for Offering Circular.

*OEIC:* acronym for an Open-Ended Investment Company.

*Off Balance Sheet Arrangements:* refer to methods of financing used to keep debt or liabilities off of a company's Balance Sheet. Rules adopted in connection with SOX require that the MD&A portion of a Prospectus or Periodic Report include a distinct section listing and explaining all Off Balance Sheet Arrangements.

*Offering Circular:* another name for the Offering Memorandum. It's the same thing.

*Offering Memorandum:* the marketing and legal disclosure document in Securities offerings. Some investment banks call it an Offering Circular.

*Official List:* the FSA's list of Securities that have been admitted to listing on a UK-regulated market.

*Offshore Market:* with respect to the Prospectus Directive, this refers to a market located outside the EU and therefore not subject to the PD's disclosure requirements.

*OID:* acronym for Original Issue Discount.

*OM:* acronym for Offering Memorandum.

*OMD:* acronym for Orchestral Manoeuvres in the Dark (1980s pop music fans will know).

*One-on-One:* a meeting between a potentially large investor in a Securities offering and the Issuer. One-on-Ones usually occur during the Road Show.

*Opc:* shorthand for Operating Company.

*Open-Ended Investment Company:* a company or fund that is structured to invest in other companies with the ability to adjust its fund size according to investor demand to buy or sell its shares. Broadly speaking, it is a collective investment scheme that acquires investments such as shares, stocks, Gilts, bonds and cash with the aim of spreading investment risk and giving its investors (who hold the shares in the OEIC) the benefit of the results of the OEIC's management of those investments. The price of the OEIC's shares are based largely on the underlying assets of the fund.

*Open Flex:* Market Flex structured so that the Arranger may change all terms, conditions, pricing and/or structure as are reasonably necessary for Successful Syndication (usually subject to some limits, e.g., the total

amount of the facilities may not be changed and pricing is Capped at some level). Compare Closed Flex.

*Open Kimono:* an unfortunately graphic term used to describe the act of sharing all the previously undisclosed information about a company, structure or situation. For example, when a company gives Underwriters, Lenders or opposing counsel full access to its books, records and Diligence information, it has "opened the kimono". Also used to describe a situation or meeting where participants are expected to hold no secrets from one another, and are expected to share, well, their "private" information.

*Operating Company:* another name for an Operating Subsidiary.

*Operating Expense:* the ongoing and day-to-day costs incurred in operating a business. Unlike Capital Expenditures, which are Capitalised, Operating Expenses are "expensed", meaning that they are recorded as current expenses in the Income Statement as incurred.

*Operating Subsidiary:* a subsidiary of a Holding Company that holds assets and runs operations.

*Opinion Letter:* a legal opinion from lawyers on a discrete matter which will be relied on by another party (either the Lenders in a loan transaction or the Underwriters in a Bond transaction). A typical example of an Opinion Letter would be an opinion given as to whether a particular agreement is valid and enforceable in a particular jurisdiction or whether a particular party (typically the Issuer/Borrower) has capacity and authority to enter into certain agreements. Practice differs between the US and the different European jurisdictions, and between the Bond and loan worlds, as to whether or not Opinion Letters are provided by counsel to the Arranger or counsel to the Borrowers or by both but opining on different legal aspects of the transaction.

*Option:* a contract that gives the owner of the contract the right, but not the obligation, to purchase (in the case of a Call Option) or sell (in the case of a Put Option) an asset at a future date at an agreed price (known as the "exercise price" or "strike price"). When a Call Option's strike price is below the current market price of the underlying asset, or when a Put Option's strike price is above the current market price of the underlying asset, the Call Option or Put Option is In the Money. When a Call Option's strike price is greater than the current market price of the underlying asset, or when a Put Option's strike price is lower than the current market price of the underlying asset, the Call Option or Put Option is Out of the Money. Being In the Money is better.

*Optional Currency:* see Base Currency.

*Optional Prepayment:* another name for Voluntary Prepayment.

*Optional Redemption:* a feature built into Terms and Conditions or Indentures that allows the Issuer to redeem Bonds at the Issuer's option. The Optional Redemption provisions become available to the

Issuer at the end of the Non-Call Period. The specifics of the Optional Redemption provision are finalised at Pricing. In a typical 10-year deal, the Optional Redemption price would be Par plus half the Coupon in year six, reducing to Par at the end of year eight. The loan equivalent is a Voluntary Prepayment.

*Ordinary Shares:* see Common Stock.

*Original Issue Discount:* discount relative to Par at which Bonds or loans may be sold to an investor. OID increases the all-in Yield to investors and accordingly facilitates the Syndication of the Bonds or loans. See Closing Fee and Discount Notes.

*Orphan Company:* a company whose shareholders do not form part of the Credit Group and used for certain Securities offerings. Orphan Company Issuers may be owned for instance by a charitable trust, with the proceeds of debt offerings being on-lent to Operating Companies within the Credit Group. This structure is sometimes used to avoid having to pay Withholding Tax on the interest of a Bond but also to render remote the likelihood of the Issuer's Insolvency.

*OTC:* acronym for Over-the-Counter.

*Out of the Money:* a stock Option is Out of the Money when the holder cannot exercise it for a profit. A Convertible Bond is Out of the Money when its Conversion Value is less than its Par Value. The term is also used in restructurings to describe any creditors or shareholders where the Going-Concern Value of the Borrower group is less than the total amount due to creditors Ranking in priority to them — go *i.e.*, they are Out of the Money.

*Outs:* Conditions Precedent to the Lenders' obligation to fund a financing in a Commitment Letter. If the Borrower does not fulfil one of the Conditions Precedent, the committed Lender gets "out" of funding its commitment.

*Over-Allotment Option:* see Green Shoe.

*Over-Collateralisation:* this is a contractual requirement, which may be imposed on the grantor of a Collateral, that the value of the assets provided as Collateral is higher than the amount secured by such Collateral, in order to protect the beneficiary against the potential decrease in value of such assets. In some jurisdictions, this may be limited by statutory provisions restricting the granting of Collateral disproportionate to the obligation being secured — apparently you can have too much of a good thing. Also used more generally to describe the situation where the value of the Collateral held by a Lender is greater than the amount of its loan — *i.e.*, the Lender is said to be "Over-Collateralised".

*Over-Indebtedness:* one of the conditions describing Insolvency in Germany and triggering the 21 Day Rule. A debtor is legally over-indebted if it (i) has deficient assets and (ii) lacks a Going-Concern

Prognosis (the latter criterion will no longer apply from 2014). The other condition describing Insolvency is illiquidity. For more information, see Latham & Watkins Client Alert No. 926, German Legislation to Limit Application of Over-Indebtedness Test to be Extended Beyond 2010: More Chances for Out-Of-Court Restructurings (31 August 2009), available at [www.lw.com](http://www.lw.com).

*Over-the-Counter*: the trading of financial instruments directly between two parties pursuant to a bilateral contract rather than on an exchange or through an intermediary.

*P2P*: shorthand for public to private, *i.e.*, a transaction whereby a public company is being taken private.

*P&L Statement*: shorthand for Profit and Loss Statement.

*Pac Man Strategy*: in a hostile takeover situation, when a takeover Target company launches a tender offer for the company that is trying to acquire it.

*Pacte Commissaire*: a provision contained in French law governing Collateral documents allowing the Secured Party to foreclose on pre-agreed terms without the need to obtain a court order or go through a Public Auction. Illegal until March 2006; very popular since then.

*Par/Par Value*: in Bond land, Par Value is the stated value or face value of a Bond. So if a €1,000 Bond is redeemed at Par, it is redeemed for the full €1,000 (plus accrued Interest up to the redemption date). Bonds are said to be redeemed "above Par" or "below Par" if redeemed for more or less (as applicable) than their Par Value. The term is also used in loan world to describe the stated principal amount of a loan.

*Parallel Debt*: certain jurisdictions in Europe do not recognise a trust concept, such that granting a Security Interest to a Security Trustee for the benefit of Secured Parties is not possible (or its validity is doubtful) and the Collateral must be held directly by those owed the debt that is being secured. To get around this and avoid having all Secured Parties as signatories to the Security Agreements (with the obvious consequential practical problems on Syndication and other transfers of the debt), parties create a Parallel Debt provision pursuant to which the Security Agent obtains a parallel claim and Security Interest against the Borrower, Issuer or Credit Group. The parallel claim represents a primary obligation equalling the total amount of debt the Credit Group owes to the Secured Parties. The provision will provide that the Parallel Debt is due and payable at the same time, in the same amounts, and will be discharged at the same time and to the same extent as the underlying debt.

*Pari Passu*: equal in right of payment.

*Pari Passu Bonds*: Bonds which rank *Pari Passu* with the Credit Facilities of the same entity/ies rather than being Subordinated.

*Parity Trigger:* in Convertible Bond land, refers to a Contingent Conversion trigger based on the trading price of the Bonds.

*Participación Significativa:* ownership interest in a Spanish-listed company giving rise to voting rights reaching, exceeding or falling below various thresholds. The shareholder acquiring or selling stock giving rise to voting rights reaching, exceeding or falling below such thresholds is obliged to notify both the issuer and the CNMV of that fact. There are specific thresholds for certain regulated sectors such as the banking or the insurance sectors. In case the issuer is domiciled in a tax haven the threshold is 1 per cent.

*Participating Member State:* the member countries of the EU which have adopted the euro as their sole legal tender. At the time of writing, there are 16 Participating Member States.

*Partly Paid:* Bonds are said to be Partly Paid if their Issue Price is payable in instalments rather than in one lump sum on issue.

*Passport Rights:* term used to describe the right (granted under an EU directive) of a financial services firm located in an EEA member state to carry out activities in another member state.

*Passporting:* the facility available to Issuers to use one Base Prospectus approved by the competent authority of its home Member State for a public offer of its Securities or the admission of its Securities to trading on a Regulated Market of another Member State pursuant to the Prospectus Directive.

*Patriot Act Requirements:* general reference to the information (e.g., name, address, tax ID number) that Lenders and Agents are required to obtain under KYC and anti-money laundering rules and regulations in the US, including the USA PATRIOT Act.

*Pay If You Can:* a concept sometimes seen in Junior Debt whereby the Borrower only has to pay Interest to the Lenders if it can satisfy certain tests, e.g., that the Leverage Ratio is below an agreed level, that there is no Default, that the payment will be made from Retained Cash, etc. If payment can't be made, the Interest is Capitalised.

*Pay If You Want:* used in certain jurisdictions in order to try to achieve the commercial effect of Interest being Capitalised but where this is legally prohibited. Pay If You Want allows the Borrower to decide (in its free discretion) if it wants to pay the Interest in cash or to Capitalise it, but there is no obligation to Capitalise (however, practically the amount of required cash-pay interest can be such that Capitalising this interest is required from a cashflow perspective). See PIK Toggle.

*Paying Agency Agreement:* an agreement between the Issuer, any Guarantor, the Principal Paying Agent, the other agents required for the issue and the Trustee that is similar in substance to a Fiscal Agency Agreement but is used where a Trustee is appointed, and which set

out the obligations primarily of an administrative nature of the agents appointed thereunder.

*Pay-In-Kind*: this feature allows the Issuer to pay Interest (or dividends) in the form of additional Bonds (or Preference Shares) in lieu of paying in cash. Also another name for Capitalising Interest by a Borrower.

*Payment Blockage Provision*: a standard feature in an Intercreditor Agreement for a Mezzanine Financing and a High Yield deal (and other types of Subordinated Debt). It provides that the Borrower/Issuer of the Subordinated Debt is forbidden from making payments on the Subordinated Debt in certain circumstances (*e.g.*, when any or certain agreed Defaults have occurred with respect to the Senior Debt). Note that this is not the same as a Standstill Period. If the Subordinated Debt does not get paid when it is supposed to be paid because of a Payment Blockage Provision, the Subordinated creditors can pursue all available remedies unless they are also subject to a Standstill Period. Subordinated creditors should expect to be subject to both.

*Payment Date*: another name for an Interest Payment Date.

*PD*: acronym for Prospectus Directive.

*PD-Compliant*: refers to a Prospectus that complies with the public offering disclosure provisions of the Prospectus Directive (or, more generally, refers to an offering that complies with such provisions).

*PEC*: acronym for Preferred Equity Certificates.

*PE Form*: form to request the NOF to the Bank of Spain.

*Perfect or Perfection*: what a holder of a Security Interest (*i.e.*, the Lenders or the Security Agent on their behalf) must do to protect its interests. In certain jurisdictions, failure to Perfect a Security Interest renders it void against other creditors so Perfection is really rather important. Typically Perfection requires further acts other than simple execution of the Security Agreement, and such acts will vary between jurisdictions and depend on the nature of the asset(s) subject to the Security Interest but may include registration at relevant registries, the giving of notice to third parties and/or taking possession of the Collateral. Counsel to the Lenders will typically take responsibility for ensuring Perfection.

*Periodic Reports*: the annual report on Form 10-K and the quarterly reports on Form 10-Q required to be filed with the SEC by all US public companies and non-US companies that are subject to SEC on-going reporting rules. The US Securities laws specify precisely who is required to file these reports, but as a general matter they are filed by companies that have completed an IPO in the US, have Securities listed on a US exchange, or have a class of Securities registered under the US Exchange Act. In European High Yield Bond offerings where Issuers are not typically subject to SEC on-going reporting rules, the obligations of the Issuer to provide quarterly and annual reports, as well as information

about certain material events that may arise from time to time, are provided for in the Description of Notes/Indenture. Although such provisions do not reference Form 10-K or Form 10-Q, they are drafted to require a level of disclosure similar to that required by such forms.

*Permanent Securities:* the Securities (usually High Yield Bonds) that are intended to be issued to finance an LBO. These are the Securities that the Bridge Loans bridge in case the offering of Permanent Securities is unsuccessful or is unable to be consummated prior to Closing. Generally addressed in the Engagement Letter.

*Permitted Debt:* a concept in the High Yield version of the Indebtedness Covenant referring to a series of Carveouts for debt that can be incurred even where the Ratio Test cannot be satisfied.

*Perpetual Bonds:* Bonds that do not have a scheduled maturity date but that may be redeemable under a Call Option, with Events of Default typically being very limited and linked to Insolvency procedures.

*Physical Settlement:* in Convertible Bond land, refers to settlement of a conversion in stock. "Gross" Physical Settlement is thus settlement entirely in stock. Compare Net Share Settlement.

*Piano attestato di risanamento:* aka a Reorganisation Plan. In Italy, a rapid, confidential and almost exclusively out-of-court procedure aiming at the company's reorganisation and debt restructuring. The plan must be assessed and validated by the *Esperto* and can include all sorts of debt restructuring options. Requires the approval of all participating creditors. The use of this procedure therefore is not to Cramdown minorities, but to obtain particular relief against potential later Clawback actions.

*Piggy Back Registration Rights:* Registration Rights that permit holders of private Securities to "piggyback" into a Registration Statement originally filed by the Issuer for a separate purpose. These rights give the holder the ability to "jump onto" an offering that another party (either the Issuer itself or another Security holder) initiated. Compare Demand Registration Rights.

*PIK:* acronym for Pay-In-Kind.

*PIK Debt:* debt where Interest is only paid in PIK. See also Capitalise and Pay-In-Kind.

*PIK Loans:* loans that only pay interest by way of PIK.

*PIK Notes:* perhaps the most common form of PIK Debt, being Notes with a PIK feature. See also Capitalise and Pay-In-Kind.

*PIK Toggle:* an Interest Rate feature that gives the Issuer or Borrower the option to pay all or an agreed portion of the Interest for any period (generally in the case of Bonds during the Non-Call Period) in kind. Typically, an Interest Rate Step Up will apply to any portion of Interest that is paid in kind in these circumstances. PIK Toggles are attractive to Issuers and Borrowers because of the ability to "toggle" out of cash Interest



payments in times of a Liquidity crunch — meaning if the Borrower or Issuer is short on cash, it can stop making cash Interest payments and just let the interest PIK. Whilst PIK Toggles were also seen pre-Credit Crunch in some Credit Facilities (most commonly in Mezzanine Financings), they can really be seen as a product of red-hot markets only.

*PIK Toggle Notes:* Notes with a PIK Toggle feature.

*Pinching the Straw:* refers to attempts to protect the flow of cash out of the Operating Subsidiaries. See Dividend Stopper.

*PIPE:* acronym for “private investment in public equity”. In a PIPE transaction, a public company allots equity Securities to private investors (such as a private equity firm or mutual fund) at a discount to the current market value per share in a Private Placement and undertakes to list the Securities on a stock exchange as soon as possible after allotment. Often used by companies to raise funds without having to resort to a full blown Rights Issue.

*PIYC:* acronym for Pay If You Can.

*PIYW:* acronym for Pay If You Want.

*Place on Demand:* following an Event of Default, the creditors can typically exercise various rights including Acceleration. One such right would be to Place on Demand the underlying debt, meaning that it would become immediately due and payable as soon as a further demand is made by the creditors.

*Placement Agent:* in a Private Placement, the Placement Agent is responsible for introducing the Issuer to QIBs and Accredited Investors which may purchase Securities of the Issuer on the terms and conditions set forth in the Private Placement Memorandum and the Note Purchase Agreement.

*Placement Fee:* a fee paid to the investment bank when the Bond placement occurs (*i.e.*, when the Bond deal closes). This fee is provided for in the Engagement Letter.

*Plain English Rules:* SEC rules that require certain portions of the Prospectus be written in Plain English. The six basic SEC Plain English principles are: use short sentences; use definite, concrete, everyday words; write in an active voice; utilise bullets, tables and charts where possible; eliminate legal jargon or unnecessarily technical business terms; and avoid using double negatives. Also, don't use sentences with lots of semicolons.

*Plain Vanilla:* either an issue of Securities or a Credit Agreement with no additional features over and above the usual interest and redemption/repayment provisions, such as call options, warrants, instalments, etc. Also a much-loved flavour of ice cream.

*Plan A:* see Plan B.

*Plan B*: the colloquial name given to a restructuring plan that can be implemented coercively against some constituency of stakeholders if they do not agree to a consensual deal (that being Plan A). It is often said that “you need Plan B in order to get Plan A”. A Plan B typically will involve enforcement of Collateral or some other non-agreed disposal of assets, e.g., via English Administration proceedings.

*Plan C*: the back-up plan to your back-up Plan B which is thought of when it is realised that the Plan B doesn't work. Time to get worried.

*Pledgor*: another name for a Chargor.

*Poison Pill*: an action taken by a company to make its equity less attractive to potential acquirers in order to prevent being acquired in a hostile takeover. Two common types of Poison Pills are the “flip-in”, whereby a company allows current shareholders to purchase additional shares at a discount as a way to dilute the share ownership of the company, thereby making the acquisition of a controlling interest in the company more difficult and expensive, and the “flip-over”, whereby, in the event of a takeover, shareholders are allowed to buy the acquiring company's shares at a discount. In the UK, such actions are restricted under the City Code.

*Ponzi Scheme*: named after Charles Ponzi who gained notoriety in the 1920s, the term is used to describe investment schemes where returns are only generated by further investors parting with their cash into the scheme, and therefore the scheme is bound to fail. The founders tend to live extravagant lifestyles in the meantime and then go to jail.

*Portfolio Company*: a company that has been purchased by a Sponsor and now sits in that Sponsor's “portfolio”.

*Positive Covenant*: requires an Issuer or Borrower to affirmatively do something. These are contractual provisions contained in the Terms and Conditions, the Indenture or the Credit Agreement that itemise certain actions the Issuer or Borrower must take to be in compliance with the applicable document. Think of these as the “Thou Shalt” Covenants. Positive Covenants cover such things as a promise by the Borrower to pay Interest and fees, maintain insurance, pay taxes, provide quarterly operating reports and other information, and similar style obligations and in a Credit Agreement are typically more extensive than in Terms and Conditions or an Indenture. Compare Negative Covenant.

*Post-Effective Period*: in an SEC-Registered Offering, this period begins right after Pricing when the Registration Statement is declared effective by the SEC. The Underwriters then confirm orders using the Pricing Supplement, and then shares begin trading the next morning. Closing generally happens three business days later. See T+ Legend.

*Potential Event of Default*: see Default.

*Power of Attorney*: an instrument permitting an individual to serve as the attorney or authorised agent of the grantor. In the Secondary Offering

context, Selling Shareholders will generally grant a Power of Attorney to someone (often a company officer) authorising that person (an "attorney-in-fact") to sell to the Underwriters the number of shares listed in the Underwriting Agreement and to execute the Underwriting Agreement. Generally signed in combination with a Custody Agreement. Powers of Attorney are also typically found in Security Agreements, granted by the Chargors in favour of the Security Agent to allow the Security Agent to complete any tasks imposed on the Chargor which it has failed to complete.

*PPM*: acronym for Private Placement Memorandum.

*Precedent*: the transactions or transaction documents that are being used as an example for the new deal. Always be careful with Precedent, as every transaction is different.

*Pre-Closing*: the night before Closing when you complete all the work so you can have a smooth Closing the next day. Don't plan on getting much sleep.

*Pre-emption Rights*: the rights given to existing shareholders to have first refusal on the transfer of existing shares or the issue of new shares by a company, unless such rights are specifically disappplied.

*Preference*: a generic name given to certain potentially suspect transfers made during the Preference Period, often made to a creditor while the transferor was insolvent and that enables the creditor to receive more than it would have received in liquidation. Preferential transfers may be subject to Clawback, subject to any defences that are available in the applicable jurisdiction. One rationale behind Preference rules is that they prevent creditors from making a mad grab for assets when they learn that the debtor is becoming insolvent and prevent debtors from favouring some creditors over others as Insolvency nears. See Clawback.

*Preference Period*: see Clawback and Preference.

*Preference Shares*: Preference Shares sit in between debt and Common Stock in the Capital Structure. Preference Shares have Priority over Common Stock in a liquidation, generally pay a fixed dividend (the equivalent of the Interest paid on debt) and do not share in the upside to the same degree as Common Stock.

*Preferential Claims*: a category of debts recognised in most jurisdictions as having a preferential claim to the debtor's estate claims, typically enshrined in the Insolvency legislation. The types of claims eligible for preferential treatment and their ranking as against other claims (particularly the expenses of the procedure and secured claims) varies significantly between jurisdictions, and often reflect local cultural priorities (e.g., the treatment of employee claims).

*Preferred Equity Certificate*: hybrid instruments, usually issued by a Luxco, which are treated as debt for the issuing company and equity for the holder with the interest paid on PECs being treated as dividends in

the hands of the holder. Can also be issued as instruments convertible into equity — see CPECs.

*Prefiling Period:* in an SEC-Registered Offering, once there is agreement in principle to go forward with such an offering (generally at the Organisational Meeting), the Issuer enters the Prefiling Period. The Prefiling Period is the Quiet Period during which Gun Jumping is prohibited. Consequences of being “loud” during the Quiet Period include a cooling off period and a substantial delay in the deal timeline.

*Preliminary Insolvency Proceedings:* the English name for *vorläufiges Insolvenzverfahren* (which after all is far harder to pronounce), the phase between the filing for Insolvency with a German Insolvency court and the formal opening of Insolvency proceedings. Used by the court to analyse the company’s situation mainly to see if there are at least enough assets to satisfy the costs of the proceedings. Usually terminates within three months, with commencement of formal Insolvency proceedings.

*Preliminary Prospectus:* another name for a Red.

*Premium Listing:* companies with a Premium Listing of equity on the LSE must comply with standards of regulation and disclosure that are super-equivalent to the relevant EU Directives, including as to corporate governance. GDRs and debt cannot obtain a Premium Listing. See also Standard Listing.

*Prenda Catalana:* a Spanish law pledge having as its main distinguishing feature the ability of the Secured Party and the Pledgor to reach an agreement for the direct sale of the pledged asset without a Public Auction.

*Pre-pack:* generally, the term used to describe any Insolvency proceeding or arrangement in which the restructuring plan has been fully agreed to and the necessary approvals already obtained before filing for Insolvency. In England, it is more specifically used in relation to Administration proceedings, in which a sale of the company’s assets has been pre-agreed by the prospective Administrator, and will be implemented immediately upon his appointment.

*Prepayment Fee:* another name for Prepayment Premium.

*Prepayment Premium:* seen in certain Term Loan Facilities and customary in Mezzanine Financings, this is a fee paid by the Borrower for prepaying the loans. The fee is expressed as a percentage of the amount of the loans being prepaid. Typically, prepayment fees will be set on a sliding scale, for instance, 2 per cent in year one and 1 per cent in year two. The fee may be applied to all prepayments of Term Loans/Mezzanine Loans or only those made on a Change of Control or at the discretion of the Borrower. See Call Premium, Hard Call and Soft Call.

*Prescription Period:* the period of time that must elapse before interest and principal due under the Bonds are no longer payable by the Issuer, usually five years for interest and 10 years for principal.

*Press Announcement:* see 2.5.

*Price Talk:* near the end of the Road Show, a couple of days before Pricing, the Lead Managing Underwriter's capital markets desk will put out Price Talk to Accounts. This is the Lead Managing Underwriter's best guess range on where the deal should price. Price Talk serves to open the discussions with Accounts and also begins the Book Building process.

*Pricing:* the moment at which the Securities are priced — *i.e.*, at which the price of the shares is set in equity deals and the Coupon (Interest Rate) and any discount is set in Bond deals. In most underwritten and 144A deals, this corresponds with the time the contract for the sale of the Securities is confirmed. See Pricing Term Sheet. For a discussion of Pricing outside the range, see Latham & Watkins Client Alert No. 546, Recirculation and IPOs — Pricing Outside of the Range (14 October 2006), available at [www.lw.com](http://www.lw.com).

*Pricing Flex:* a Flex provision that allows the Arranger to change the pricing of the facilities, often subject to Caps. Pricing Flex refers to the changes that the Arranger may make to the Interest Rates, OID or other pricing terms if needed to facilitate (or enhance the prospects of) the Successful Syndication of the Credit Facilities. See Market Flex.

*Pricing Grid:* see Grid Based Pricing.

*Pricing Supplement:* a Term Sheet distributed to Accounts immediately after the Pricing of Securities. In addition to the price, the Pricing Supplement contains any other material information that has not already been disclosed to accounts. The Pricing Supplement came into fashion in response to Rule 159 adopted in connection with Securities Offering Reform. See Latham & Watkins publication: Christmas in July — the SEC Improves the Securities Offering Process (August 2005), available at [www.lw.com](http://www.lw.com).

*Pricing Term Sheet:* another name for Pricing Supplement.

*Primary Offering:* an offering of shares by the Issuer itself (rather than by Selling Shareholders).

*Priming Loan:* a secured loan that has Priority over another secured loan.

*Principal Paying Agent:* the bank that is responsible for coordinating the other agents appointed under the Paying Agency Agreement.

*Printers:* refers to the professional financial printers who specialise in printing Offering Memoranda. Once the draft Offering Memorandum is in reasonably good shape, everyone agrees to “dump it” onto the Printer's system. Further drafting sessions are then often held at the Printer's conference rooms — essentially an excuse to hang out there, eat pizza and play video games while waiting for the next Turn of the Offering Memorandum.

*Priority*: as among two or more creditors, the ranking of their Security Interests or their rights to receive payments. Generally, unless otherwise agreed, the first Secured Party to Perfect will be entitled to Priority.

*Private Lender*: see Public/Private Information Undertaking.

*Private Offering*: another name for Private Placement.

*Private Placement*: a Private Placement of Securities (rather than a public offering) done pursuant to an exemption from Section 5 of the US Securities Act. See Section 4(2) and Regulation D.

*Private Placement Memorandum*: a document that explains the details of the Securities to be offered, and information on the Issuer, in a Private Placement.

*Private Treaty Sale*: the sale of a company or business where the seller and buyer agree on the terms of sale between themselves.

*Privilège de Conciliation*: priority of payment granted to providers of new money to companies in the context of French Conciliation Proceedings subsequently ratified by the commercial court.

*Privilegio Speciale*: an Italian Security Interest created over a company's inventory to secure medium/long term financing facilities granted by banks to companies. Perfection is subject to registration of the deed creating the Privilegio Speciale, on a special register held at the place of the seat of the company or of the person having granted the Privilegio Speciale, if different from the debtor. It ranks senior against unsecured creditors and junior against judicial expenses and other Preferential Claims.

*Pro Forma*: means "for the sake of form" in Latin. In the leveraged finance and Securities offering context, Pro Forma refers to Financial Statements calculated to reflect the impact of contemplated future events as if they had already occurred. These are the "what if?" Financial Statements. For example, a company could have €1.0 million of debt on its Balance Sheet as of 31 December. If that company plans to borrow another €1.0 million of debt in January, the company's 31 December debt, Pro Forma for the January borrowing, would be €2.0 million.

*Proceeds Loan*: the inter-company loan of the proceeds of a debt offering or other capital raising. In a Bond issuance involving a Proceeds Loan, the Issuer acts as a creditor and lends the proceeds from the issuance of the Notes to an entity or entities, typically the main borrower under the Senior Facilities Agreement and the direct subsidiary of the Issuer.

*Process Agent*: if yours is ever used, you are likely to have a problem as they facilitate the commencement of legal proceedings. For example, if a Borrower is incorporated outside of England, it is harder to start legal action against it than against an English company — this can be resolved however if the overseas company appoints an agent in England to accept service of the relevant legal documents on its behalf: this is the Process

Agent. Process Agents can be other members of the group/affiliates or third-party professional agents — just make sure that, whoever it is, it tells you very promptly if it starts to receive letters on your behalf.

*Process Letter:* used in the M&A context to describe the initial letter sent out by a vendor's financial adviser to potential purchasers describing the sales process which bidders must adhere to. Typically contains a set of conditions and timetable designed to make life tough for purchasers and their advisers but which might then be ignored in practice.

*Prodi Law:* see Extraordinary Administration.

*Professional Securities Market:* an Exchange Regulated Market operated and regulated by the LSE. It is a listed market and PSM Securities are admitted to the Official List, but it is not a Regulated Market for the purposes of the Prospectus Directive.

*Profit and Loss Statement:* another name for Income Statement.

*Project Finance:* a type of Non-Recourse Financing or Limited Recourse Financing whereby debt is incurred by a project developer (known as the "project company," which is formed by a "project Sponsor"), often in combination with equity contributed by the project Sponsor, to finance the development and construction of a capital-intensive project, such as a power plant or toll road, typically by means of construction loans that later convert to Term Loans upon completion of the project. A primary feature of Project Finance is that the Lenders advance debt on the basis of their evaluation of the projected revenue-generating capability of the project, rather than the credit quality of the project Sponsor or the value of the project assets. The equity of the project company and the project assets, including the project's revenue-generating contracts and other cash flows, are pledged as Collateral for the debt. If you have liked reading this and want to know more about Project Finance, check out Latham's *Book of Project Finance Jargon*, available at [www.lw.com](http://www.lw.com).

*Propco:* shorthand for Property Company.

*Property Company:* in a Credit Group or other group of companies whose primary activity consists of holding property, this is the company in which the property assets sit.

*Prospectus:* in the US, registered or public offerings are effected through the use of a marketing document called a Prospectus that is included in the Registration Statement filed with the SEC. This document forms the core of the sales material and the liability of the participants. In Europe, a Prospectus is used to describe the offering document prepared to comply with the Prospectus Directive either to achieve a listing on a Regulated Market or to make an offer to the public. See also Base Prospectus. Plural is "prospectuses".

*Prospectus Directive:* the Prospectus Directive effectively harmonises all of the Prospectus disclosure requirements across all EEA Member States, and also introduced Passporting. The PD applies if either the Securities

are to be listed on a Regulated Market or if a public offer is made in a Member State.

*Prospectus Rules:* the FSA rules introduced to implement the Prospectus Directive in the UK. Broadly, they require the issue of a Prospectus, unless an exemption applies, whenever there is either an offer of transferable securities to the public in the UK or a request for the admission to trading of transferable securities on a Regulated Market in the UK. They set out the form, content and approval requirements for Prospectuses.

*Prospectus Supplement:* a Shelf Registration Statement contains two parts: the Base Prospectus (which is in the initial filing) and the Prospectus Supplement (which is filed when the Issuer sells Securities in a Shelf Takedown). Also used to describe a supplement to a Prospectus or Offering Memorandum for an EMTN Programme to update the disclosure.

*PSM:* acronym for the Professional Securities Market, the Exchange Regulated Market of the LSE.

*Public Auction:* a method for enforcing Collateral, in particular pledges over shares, in many continental European jurisdictions. Public Auctions are mandatory in Germany, for example, for share pledge enforcement unless the Pledgor agrees (after Acceleration) to a private sale. The public has access to the auction and any attendant can place a bid subject to certain limits. Also mandatory in Spain unless you have a *Prenda Catalana* or certain pledges that have cash or publicly traded securities as Collateral. Public Auctions are not liked by Secured Parties as they lose a degree of control over the sale process.

*Public Float:* the portion of a company's outstanding shares that is not held by company insiders or controlling-interest investors, but rather is held by public investors.

*Public Lender:* Lenders in a Credit Facility financing that are prohibited from seeing "private" (non-public) information about the Borrower (such as projections) because they want to retain freedom to trade in the Securities of the Borrower. See Public/Private Information Undertaking.

*Public/Private Information Undertaking:* a provision in the Commitment Letter that provides that the company will make two versions of the Bank Book: one for Public Lenders and one for Private Lenders. The public book will generally be the same as the private book, but will have been scrubbed of any material non-public information about the Target. Note that projections are almost always considered to be material non-public information.

*Publicity Guidelines:* a letter and set of procedures setting forth the guidelines and other requirements imposed on all of the participants in a Securities offering. The guidelines restrict communications of marketing or promotional information regarding the Issuer and the Credit Group to the press and public. The guidelines are designed to prevent Gun



Jumping in an SEC-Registered Offering, to restrict the Issuer and other parties from inadvertently making FWP's, to preserve exemptions from the registration requirements of the US Securities Act (in non SEC-Registered Offerings) and to accomplish similar goals under the provisions of the FSMA (and similar statutes in other jurisdictions).

*Purchase Accounting:* another US term, here it describes an accounting method used for all business combinations, such as mergers, consolidations and stock acquisitions, initiated after 30 June 2001. Prior to 30 June 2001, there was an alternative method of accounting called "pooling of interests", which simply added together the Balance Sheet items of the acquirer and the acquired company. Purchase Accounting treats the acquirer as having purchased the assets and assumed the liabilities of the acquired company on the date of the acquisition. The Book Values of the acquired assets and liabilities are reset to their respective fair market values as of the acquisition date, and the difference between the purchase price and the aggregate fair value of the assets acquired is attributed to goodwill. Most European accounting principles will attack the issues in a similar manner but might not use the same term as the US.

*Purchase Agreement:* the equivalent of the Underwriting Agreement in a Rule 144A Financing. Also shorthand for a Share Purchase Agreement in an M&A deal. Make sure you know which is being discussed.

*Pushdown:* a procedure where Borrowers "push down" debt into Operating Companies to ensure a tax-efficient structure as the Operating Company can seek to deduct the Interest on the debt from its taxable profits. Also helps the ability of the Lenders to take Collateral as issues such as Corporate Benefit and Financial Assistance can be eliminated or reduced. Pushdown can occur in a variety of ways including a direct borrowing by the Operating Companies, a transfer of debt from a Holding Company to an Operating Company or a merger of a Holding Company and Operating Company (see for example Section 35 LME Merger Proceeding).

*Push-Down Accounting:* an accounting method that requires the Financial Statements of a subsidiary to reflect the costs or debts incurred at a Holding Company level.

*Put Bond:* another endearing banker nickname for the Securities Demand.

*Put Bond Holiday:* another name for a Securities Demand Holiday.

*Put Option:* a financial contract between a buyer and a seller, where the seller has the right or Option to sell a specific quantity of a Commodity, Security or other financial instrument to the buyer at prices and within time periods that are stated in the contract. Compare Call Option.

*Put Right:* in the leveraged finance context, an Option giving Bondholders a right to force the Issuer to buy back its Bonds at a specified amount. High Yield and some Investment Grade Bonds generally provide Bondholders

with this right upon a Change of Control of the Issuer. See Change of Control Covenant and Change of Control Put.

*QIB*: acronym for Qualified Institutional Buyer.

*QP*: acronym for Qualified Purchaser.

*Qualified Institutional Buyer*: large institutional investors that must have at least US\$100.0 million invested in Securities or under management. Qualified Institutional Buyers are the permitted purchasers of Securities in Rule 144A Offerings. See Rule 144A.

*Qualified Purchaser*: parties the SEC has deemed to be rich and/or sophisticated enough not to need the protection of state registration when they are offered or sold Securities in an offering by an Investment Company Issuer. Section 3(c)(7) of the Investment Company Act provides an exemption from registration if all of the Security holders of the Investment Company Issuer are Qualified Purchasers. The four categories of persons who possess the minimum standards of financial sophistication to be considered a Qualified Purchaser are: (i) individuals who own US\$5 million in investments, (ii) institutional investors and other companies who own US\$25 million in investments, (iii) family-owned companies that own US\$5 million in investments and (iv) certain trusts in which the trustee and each settlor are Qualified Purchasers.

*Qualifying Lender*: typically used in a Credit Agreement to describe a Lender which as at Closing can be paid Interest gross, *i.e.*, without deduction of Withholding Tax. If the law changes such that Withholding Tax becomes payable, a Qualifying Lender will typically benefit from a Tax Gross-Up.

*Quiet Period*: in an SEC-Registered Offering, the Prefiling Period for the Issuer is a Quiet Period — so called because the Issuer must be very careful not to make any oral or written offers prior to filing the Registration Statement. Consequences of being “loud” during the Quiet Period include a cooling off period and a substantial delay in the deal timeline. See Prefiling Period and Gun Jumping.

*Quotation Day*: the date upon which the Facility Agent determines EURIBOR or LIBOR for the relevant Interest Period. The Quotation Day for sterling is typically the first day of the Interest Period, for Euros it is two TARGET Days before the start of the Interest Period and for other currencies two business days beforehand.

*Rahn*: an Islamic finance term meaning a pledge of Collateral for a debt.

*Ranking*: the level of Priority that a particular Tranche of debt occupies in the overall Capital Structure. See Subordination, Junior Debt and Senior Debt.

*Ratchet*: see Grid Based Pricing.

*Ratings Agencies*: see Fitch, Moody's and S&P. Ratings Agencies rate companies, Securities and loans on a risk spectrum. The ratings received

will directly impact the cost of borrowing. As a result, the Ratings Agencies are feared by companies and bankers alike. Didn't have the best of press during the Credit Crunch.

***Ratings-Based Flex:*** a Flex provision that gives the Arranger certain increased Market Flex rights if the Credit Facilities are not rated above a certain threshold. For example, such a provision might allow the Arranger to increase the pricing (Interest Rate) on the Credit Facilities by a greater amount if a certain level of ratings is not obtained.

***Ratings Condition:*** a Condition Precedent in the Commitment Letter that makes the commitment subject to the company either obtaining or using its commercially reasonable efforts to obtain ratings for the new Credit Facilities. Note that the term Ratings Condition does not necessarily require the Borrower/Issuer to obtain a particular rating — it may just require that some/any rating be obtained.

***Ratio Debt:*** most High Yield Indentures permit Issuers to incur debt in instances where, Pro Forma for the incurrence of such debt, the Issuer's Fixed Charge Coverage Ratio would be above a certain threshold or, alternatively (particularly in media and telecommunications deals) where the Leverage Ratio would be at or below a certain threshold. Debt so incurred is often referred to as Ratio Debt. The purpose of the Ratio Test is to allow the Issuer to incur more debt as the Issuer's credit improves in proportion to the Issuer's ability to cover Interest expense.

***Ratio Test:*** the Fixed Charge Coverage Ratio (or Leverage Ratio) based debt incurrence test in most High Yield Indentures. See Ratio Debt.

***RCF:*** acronym for Revolving Credit Facility, another name for a Revolving Facility. See also Super Senior RCF.

***Receipt:*** a bearer instrument that is attached to but detachable from a Bearer Bond and that entitles the bearer to receive instalments of principal.

***Receivership:*** a process of enforcing Collateral by appointing an independent Insolvency practitioner to take possession of, and subsequently sell, an asset or business for the benefit of the Secured Parties only. Administrative Receivership in England, involving Receivership over substantially all of the company's undertaking, has mostly been repealed in order to promote greater use of Administration.

***Recognised Investment Exchange:*** an investment exchange recognised by the FSA under FSMA. There are currently six RIEs in the UK designated by the FSA: EDX London Limited, the LSE, LIFFE Administration and Management, the London Metal Exchange, ICE Futures Europe and PLUS Markets plc.

***Record Date:*** Bonds set forth Record Dates and Interest Payment Dates. The Record Date is the date when the Trustee determines which Bondholders are entitled to receive a given Interest payment on the related Interest Payment Date. The Record Date is generally 15 calendar

days prior to the related Interest Payment Date.

*Red:* the Preliminary Prospectus or Offering Memorandum (which has the red font legend printed horizontally on the left margin of the cover page) stating that the Prospectus or Offering Memorandum is subject to completion. This is the document used for the Road Show, before the Pricing information is inserted.

*Red Herring:* another name for the Red.

*Redemption Price:* the price at which a Security is, in the case of mandatory redemption, or may be, in the case of optional redemption or a Put Option, redeemed prior to its Maturity Date. The Redemption Price is set when the Securities are issued and is usually either at Par or at some premium to Par.

*Reference Banks:* when EURIBOR or LIBOR is not available (or an agreed percentage — typically 30-50 per cent of the Syndicate by commitments — declare that EURIBOR or LIBOR is less than their Cost of Funds), the Facility Agent or Principal Paying Agent needs to be able to determine an equivalent in order to calculate the Interest Rate. It does this through the Reference Banks — an agreed list of financial institutions who provide a quote to the Facility Agent or Principal Paying Agent for the rate at which it could borrow funds in the relevant interbank market in the relevant currency for the relevant Interest Period. See also Market Disruption Clause.

*Refinanciación Protegida:* refinancing agreement excluded from the scope of Spanish Clawback actions provided certain conditions are met, including approval by creditors holding at least 3/5ths by value of the debts, and approval by an independent expert.

*Refinancing:* the repayment of existing debt with the proceeds of a new debt issuance. Any Refinancing will require a careful review of existing Terms and Conditions, Indentures and Credit Agreements to make sure the debt being Refinanced can, in fact, be repaid and to verify that any debt being left in place permits the incurrence of the new debt. Terms and Conditions, Indenture and Credit Agreement debt Baskets will generally allow the Refinancing of existing debt, but subject to certain conditions that must be read carefully. See Latham & Watkins Client Alert No. 696, Restructuring High Yield Bonds: Getting Ready for the Next Phase of the Cycle (21 April 2008), available at [www.lw.com](http://www.lw.com).

*Refinancing Fee:* a fee paid to the Lead Managing Underwriter(s) in the event that a Bridge Loan is repaid other than with the proceeds of a Bond offering for which the Lead Managing Underwriter(s) are the sole Bookrunner(s) and Initial Purchaser(s) and for which they are paid an agreed upon fee.

*Refreshing the Shoe (or Reloading):* the situation where the Underwriter has covered part or all of its Syndicate Short Position through open market repurchases and then shorts the stock again up to the full amount

of the Over-Allotment Option. Consider the example provided in the definition of Naked Short. There is an IPO for 1.0 million shares of ABC, with an Over-Allotment Option for 150,000 additional shares. This time, the Underwriter commits to provide to accounts 1.15 million shares. The stock initially drops, and so rather than exercising the Green Shoe, the Underwriter buys a portion of the 150,000 shares on the open market (because they are cheaper on the open market than through the Over-Allotment Option, which is at the offering price less the Underwriting Discount). Then the stock price rises above the initial offering price. The Underwriter then Refreshes the Shoe, meaning the Underwriter immediately sells (or Shorts) the shares it purchased at the lower price in the open market — and meaning the Underwriter is again dependent on the Over-Allotment Option to cover the extra 150,000 shares that were allocated.

*Reg Rights*: shorthand for Registration Rights.

*Reg S*: shorthand for Regulation S.

*Reg S Only*: refers to a Securities offering that takes place solely outside the United States in compliance with the requirements of Regulation S.

*Registered Bonds*: a Security where ownership is recorded by the Registrar in the name of the holder or its nominee, and which can be transferred only by an entry on the register.

*Registrar*: the agent of the Issuer whose principal task is to record ownership of the Registered Bonds in the register.

*Registration Rights*: rights of a Security holder to force an Issuer to register its Securities with the SEC. These rights enhance the Liquidity of the Securities because registered Securities are freely tradable. Registration Rights (or Reg Rights) can take several forms. Holders of equity Securities obtained in a Private Placement often have rights to demand that the Issuer register their Securities or to piggyback onto an offering in which the Issuer is already engaging. See Piggy Back Registration Rights and Demand Registration Rights. In Private Offerings of High Yield and convertible debt Securities, Issuers may provide purchasers with Registration Rights to enhance the post-Closing Liquidity of the Securities sold in the offering and, in the case of private company Issuers, agree to become Reporting Companies under the US Exchange Act. Registration Rights have rarely been included in Securities offerings in Europe in recent years.

*Registration Statement*: the document filed with the SEC in connection with a public offering of Securities in an SEC-Registered Offering. The Registration Statement contains the Prospectus.

*Regulated Market*: an exchange recognised as such by the relevant authorities who has an exchange licence and operates on a regular basis, and whose disclosure requirements are subject to the provisions of the Prospectus Directive.

*Regulation D:* spells out the rules for a valid Private Placement in the US. Under the US Securities Act, any offer to sell Securities must either be registered with the SEC or made pursuant to an exemption. Regulation D (or Reg D) provides a safe harbour for sales of Securities in transactions “not involving any public offering” within the meaning of Section 4(2) of the US Securities Act. Reg D also contains two more widely known exemptions from the registration requirements, which allow some smaller companies to offer and sell their Securities without having to register the Securities with the SEC. The primary requirements of Regulation D are (i) no general solicitation and (ii) only offering and selling to investors who are either Accredited Investors or sophisticated investors (as defined in Reg D).

*Regulation FD (or Reg FD):* the SEC fair disclosure regulation. It says that if you share material inside information with one person, you have to share it with everybody. When an Issuer discloses material non-public information to certain enumerated persons (in general, Securities market professionals and holders of the Issuer’s Securities who may well trade on the basis of the information), Regulation FD requires the Issuer to make public disclosure of that information. The timing of the required public disclosure depends on whether such Selective Disclosure (as it is known) was intentional or non-intentional: for an intentional Selective Disclosure, the Issuer must make public disclosure simultaneously; for a non-intentional disclosure, the Issuer must make public disclosure promptly.

*Regulation G:* requires specific disclosure and analysis around any non-GAAP financial measure contained in any public disclosure by an Issuer. Reg G says that non-GAAP Financial Statements generally must be reconciled to the most directly comparable GAAP financial measure. In other words, Reg G says it is okay to disclose your financial information in a non-GAAP sort of way as long as you explain (through numerical reconciliation) how what you disclosed differs from GAAP. Note that EBITDA is a non-GAAP measure. See Item 10.

*Regulation S:* provides an exemption from the registration requirements of Section 5 of the US Securities Act for certain offshore transactions. Most Rule 144A Financings also have a Regulation S component to allow for “offshore” sales (*i.e.*, outside the US) because the exemptions relied on for Rule 144A Financings are not mutually exclusive with those relied on for Regulations S. Rule 144A/Regulation S financings do not have to be registered with the SEC because the purchasers are either QIBs buying pursuant to Rule 144A or outside the US and buying pursuant to Regulation S.

*Regulation S-K:* the heart of the SEC’s integrated disclosure system, which provides the standard instructions for filing SEC forms. The SEC’s registration forms (such as Form S-1) and periodic reporting forms (such as Form 10-K) will all have cross-references to Regulation S-K. Regulation

S-K then provides an outline of all the detail that needs to go into these forms. See Form Check.

*Regulation S-X*: the SEC's accounting rules for the form and content of Financial Statements. All Financial Statements included in SEC filings must comply with Regulation S-X. Rule 144A Financings are not technically required to comply with Regulation S-X, although they generally come very close as a matter of industry custom. See Latham & Watkins publication: Financial Statement Requirements in US Securities Offerings: What You Need to Know (2010 Update), available at [www.lw.com](http://www.lw.com). See also Latham & Watkins publication: Financial Statement Requirements in US Securities Offerings: What Non-US Issuers Need to Know (2010 Update), available at [www.lw.com](http://www.lw.com).

*Reinvestment Right*: sometimes included in an Acquisition Proceeds Prepayment, Asset Sale Prepayment, Insurance Proceeds Prepayment and/or Equity Prepayment provision. This right usually gives the Borrower an option, within some specified number of days, to reinvest acquisition claims proceeds, insurance proceeds or proceeds of asset sales or equity issuances, rather than applying such proceeds to pay down loans. Such Reinvestment Right may be general, allowing reinvestment in any assets used or useful in the business, or may be specific, for example with insurance proceeds just allowing the replacement of the assets which were destroyed and resulted in the relevant claim. Reinvestment Rights on asset sales sometimes also allow the cash to be spent on acquisition and/or Capex.

*Release Clause*: one of the first provisions in an Intercreditor Agreement to look at when heading towards a restructuring with a credit group which has Senior Debt and Subordinated Debt. Should be found in the Intercreditor Agreement and allows (subject to certain conditions) the release by the Senior Debt holders of Guarantees and Collateral held by, and liabilities owed by Obligors to, the holders of Subordinated Debt thereby enabling the group to be sold free and clear of claims from the Subordinated Debt holders. See also Defective Release Clause and Fairness Opinion.

*Reliance Letter*: letter that establishes that the named recipient may rely on certain provisions of an auditor's opinion, independent expert opinion or legal opinion, or an expert's Due Diligence report, as if the original opinion/report were addressed and delivered to the named recipient. Reliance Letters with respect to Due Diligence reports are typically given to original Lenders and those becoming Lenders in initial Syndication.

*Reorganisation Proceedings ("Redressement Judiciaire")*: French Insolvency proceedings of a company in a state of *Cessation des Paiements* for which reorganisation appears possible. These proceedings are very similar to a *Sauvegarde* (although they existed before the *Sauvegarde* was introduced into French law) and may also result in a Term-Out.

*Rep*: shorthand for Representation and Warranty.

*Repeating Representations*: certain Representations and Warranties are made to Lenders post-Closing and therefore “repeat”. This often happens on Interest Payment Dates and/or when further funds are being drawn, for example under a Revolver. The extent of the Repeating Representations is open for debate but arguably there is no need to “repeat” anything which is in any event covered by a Covenant or a Default but many Credit Agreements still do it. Don’t ask us why.

*Repo*: short for Repo Agreement.

*Repo Agreement*: a sale and repurchase agreement where one party sells a Security to another party for cash and agrees to repurchase it on a date in the future for an agreed (and higher) price. Repos are classified as money-market instruments. They are usually used to raise short-term capital.

*Report on Title*: like a Certificate of Title but more detailed (and therefore more expensive).

*Report Proceeds Letter*: used in LBOs when Due Diligence reports are addressed to the Sponsor or other persons who are not party to the Intercreditor Agreement or to whom the Lenders don’t otherwise have recourse. As recoveries of claims against the providers of such reports could be paid to someone other than the Borrower (and therefore not be available for Mandatory Prepayment as required by the Credit Agreement), this letter is an agreement by the potential recipient to turnover such proceeds to be used as if received by the Borrower.

*Reporting Company*: a company that files Periodic Reports with the SEC.

*Reporting Requirements*: generic term used to describe the Covenants relating to provision of information found in the Terms and Conditions, an Indenture or a Credit Agreement.

*Representation and Warranty*: an assertion of fact and circumstance in a contract (such as an SPA, Credit Agreement or Underwriting Agreement). Representations and Warranties are the means by which one party to a contract tells the other party that something is true as of a particular date.

*Representation Regarding Accuracy of Disclosed Information*: the representation by the company in the Commitment Letter that all information (other than financial projections) provided directly or indirectly by the Sponsor, the company or the Target in connection with the contemplated acquisition is and will be, when taken as a whole, complete and correct in all material respects and does not and will not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements contained therein not misleading. Also known as a Full Disclosure Rep. See Rule 10b-5 Representation.

*Repricing Amendment*: an Amendment to a Credit Agreement only seen in improving markets, where the Interest Rate on an existing loan



is lowered. This generally requires the affirmative vote of 100 per cent of the existing Lenders (or replacement Lenders through the use of a Yank-a-Bank provision). See also Reverse Flex.

*Required Lenders:* US speak for Majority Lenders. They also say “pants” when they mean “trousers”. All very strange.

*Requisite Lenders:* another name for Majority Lenders.

*Research Guidelines:* a set of procedures setting forth the guidelines and other requirements imposed on the Underwriters in anticipation of a Securities offering when the analysts at one or more of the Underwriters intend to publish research with respect to the Issuer prior to the offering.

*Reservation of Rights Letter:* sent by creditors to an Issuer or Borrower often promptly following an Event of Default. It states that whilst the creditors are considering their options, all of their rights to Accelerate, enforce Collateral and so on are reserved and retained.

*Reservations:* see Legal Reservations.

*Restricted Junior Payment or Restricted Payment:* dividends and other distributions on account of equity interests, equity repurchases and retirements or repayments of Subordinated Debt prior to maturity. This term is designed to capture voluntary transfers of value to people lower down in the Capital Structure.

*Restricted Payments Covenant:* a Covenant that protects Bondholders’ and Lenders’ access to value by limiting undesirable Restricted Payments. Virtually all High Yield Indentures and Credit Agreements contain Covenants limiting the ability of Issuers and Borrowers to make Restricted Payments. In Bonds, certain investments in entities that are not Restricted Subsidiaries are included in the definition of Restricted Payments, whereas these investments are usually the subject of a separate investments Covenant in Credit Agreements.

*Restricted Securities:* Securities that have been issued on a private (unregistered) basis and are not yet eligible for public resale pursuant to Rule 144. See Latham & Watkins Client Alert No. 685, SEC Reduces Restrictions on Resale of Restricted Securities (25 March 2008), available at [www.lw.com](http://www.lw.com).

*Restricted Subsidiary:* a defined term in Bonds that captures the Issuer’s subsidiaries to which the Covenants apply. Some Credit Agreements also have a concept of Restricted Subsidiaries but this is unusual and the Covenants will apply to the whole group. See Covenant Lite. Compare Unrestricted Subsidiary.

*Restructuring Loan:* English for *Sanierungskredit*, a loan in Germany to a distressed company benefiting from a Restructuring Opinion as a safe-harbour to Lender Liability.

*Restructuring Opinion*: used in German restructurings being an opinion provided usually by an accounting firm confirming that a distressed company will be likely to continue its business if a restructuring plan is implemented. Sanierungsgutachten is the German term.

*Restructuring Privilege*: a defence to Equitable Subordination in Germany. *Sanierungsprivileg* (that being the German term) applies to loans from shareholders who became shareholders in the context of a restructuring (e.g., through a debt for equity swap). To make use of this, you need — no surprise — a Restructuring Opinion.

*Retained Cash*: the term given to Excess Cash Flow that is retained following the Excess Cash Flow Sweep. Credit Agreements will specify what this can be used for but Lenders may permit it to increase Baskets.

*Retained Cash Flow*: another name for Retained Cash.

*Reverse Breakup Fee*: in an M&A transaction, a fee paid by the buyer to the seller if the buyer decides not to consummate the transaction or fails to satisfy a Condition Precedent. When included in a transaction, the Reverse Breakup Fee can, in some cases, provide the buyer an option to back out of a transaction at a certain cost.

*Reverse Flex*: a Repricing Amendment made during Syndication as a result of there being sufficient interest from potential Lenders that the Arranger can still sell its commitments even if the Margin on the Credit Facilities is reduced.

*Revolver*: shorthand for a Revolving Facility.

*Revolving Facility*: a Senior Secured Credit Facility structured as a line of credit that can be borrowed, repaid and reborrowed at any time prior to maturity, at the Borrower's discretion. A Revolving Facility can also often be used for the issuance of Letters of Credit and Ancillary Facilities. See Borrowing Base and Cash Flow Revolver.

*Revolving Loans*: loans under a Revolving Facility.

*Riba*: an Islamic finance term meaning Interest or usury. Interest or usury is prohibited (*Haram*) under *Shariah* principles and Islamic finance transactions are therefore structured to avoid *Riba*.

*Right*: see Right Placement.

*Right of First Refusal*: can be used in various contexts but in loan world would refer to a provision granting the Arranger a right of first refusal to provide any required Hedging. The required Hedging will be set out in the Hedging Strategy Letter.

*Right Placement*: a managing Underwriter who has not received Left Placement is said to have Right Placement. Substantively, this means that the Underwriter is still a joint Bookrunner, but is not running the show to the same degree. From a cover perspective, it means that the name of

that Underwriter still goes on the top line (in the big font) of the back and front covers of the Prospectus, but to the right of the Underwriter with Left Placement.

*Right to Match:* like a Right of First Refusal, but rather the Arranger has a right to match the best terms offered to the Borrower by third parties for any required Hedging. If the Arranger matches that best offer, the Borrower must enter into the Hedging with it.

*Rights Issue:* an invitation to existing shareholders to purchase additional shares in the Issuer at a reduced price in proportion to their existing holding.

*Ring-fencing:* legal walling off of certain assets or liabilities within a company or Credit Group, as in a company forming a new subsidiary to protect (ring-fence) specific assets from certain creditors. The concept includes a number of measures that may be implemented to protect the economic viability and credit ratings of companies and their Affiliates within a Holding Company structure.

*Risk Factors:* a section of the Offering Memorandum which summarises the risks related to the Notes (or to owning the Issuer's shares), the Issuer and the Securities offering.

*Risk Sub-participation:* a Sub-participation where the sub-participant doesn't fund the Lender of Record but still takes the risk of the Borrower failing to pay and must pay the Lender of Record if the Borrower fails to make any payment on its Due Date. Contrast to Funded Sub-participation.

*RMBS:* see Asset-Backed Security.

*Road Show:* the trip around Europe (or around the world), often on private jets, that Issuers and bankers (but not lawyers) go on in order to meet with potential purchasers of the Securities being offered. This is the heart of the marketing process in a Securities offering. See also One-on-Ones.

*Rollover Equity:* in order to retain management or other insiders, certain acquiring companies will allow/ask management to "roll over" its equity in the Target, meaning such individuals will retain an equity stake in the Target following the acquisition.

*Rollover Fee:* a conversion fee paid on the first anniversary of the Closing of a Bridge Loan, when the Bridge Loans are converted into Term Loans. Also known as a Conversion Fee.

*Rollover Loans:* another name for Term Loans into which the Bridge Loans can convert at their maturity on the first anniversary of the Closing of a Bridge Loan. Also used to describe a Revolving Loan that is simultaneously being repaid and reborrowed at the end of the Interest Period — in these circumstances, as no further "new" funds are being advanced, these loans are often subject to reduced Drawstops compared to new money loans.

*Roundtripping*: usually allowed by a Carveout to the Restricted Payments Covenant, allowing a Sponsor or parent company to put equity into a company and then take it back out.

*Rub ul-maal*: an Islamic finance term meaning a person (such as an Islamic finance investor, like a bank in a conventional financing) who invests in *Mudaraba*.

*Rule 10b-5*: the SEC rule regarding employment of manipulative and deceptive practices. This is one of the most important SEC rules. It seeks to prohibit fraud or deceit in connection with the purchase or sale of any Security, including insider trading.

*Rule 10b-5 Opinion*: see Negative Assurance Letter.

*Rule 10b-5 Representation*: this term is generally used by US practitioners as shorthand for a Representation and Warranty by an Issuer, Target or Borrower that the Diligence information provided is complete and correct in all material respects and does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements contained therein not misleading. This is "magic" language based on Rule 10b-5.

*Rule 10b5-1 Plan*: a plan used by company insiders to sell shares in the company without running afoul of restrictions on insider trading. The title of the plan is derived from SEC Rule 10b5-1, which creates an affirmative defence to charges of insider trading when shares are sold pursuant to a qualifying plan. In general, qualifying plans must set forth in advance what shares will be sold and when. The basic idea is that the actual sales will then occur automatically irrespective of what information the seller may actually know or not know at the time of the sale.

*Rule 144*: a rule under the US Securities Act creating a safe harbour from Underwriter status for public sales of Restricted Securities. See Latham & Watkins Client Alert No. 685, SEC Reduces Restrictions on Resale of Restricted Securities (25 March 2008), available at [www.lw.com](http://www.lw.com). See also Latham & Watkins Client Alert No. 669, The Future of Registration Rights in Private Offerings of Debt Securities (22 January 2008), available at [www.lw.com](http://www.lw.com).

*Rule 144A*: provides a resale exemption from the registration requirements of the US Securities Act. The rule permits persons who purchase Securities in Private Placements to resell them freely in the secondary market if (i) the subject Security is not listed on a national Securities exchange and (ii) the sales are to Qualified Institutional Buyers. See Rule 144A Financing for why this rule is so important.

*Rule 144A Financing*: a transaction where an investment bank buys Securities from an Issuer pursuant to a Private Placement and immediately resells the Securities to QIBs in reliance on Rule 144A. Virtually all High Yield Bond deals and many Convert Deals are structured as Rule 144A Financings. Rule 144A Financings are attractive to Issuers because these

transactions can be consummated without SEC registration, allowing greater speed to market. In a Rule 144A for Life Offering, there is an added bonus — there are no post-Closing Reg Rights, so the Issuer is never required to become a Reporting Company. See Rule 144A for Life Offering and Registration Rights. Rule 144A Financings are often undertaken with a simultaneous Regulation S component. See Regulations S.

*Rule 144A for Life Offering:* refers to Securities issued in a 144A for Life Offering, or more generally to such an offering.

*Rule 159:* Rule 159 under the US Securities Act was adopted in connection with Securities Offering Reform. The key implication of Rule 159 is that Section 12(a)(2) and 17(a)(2) liability are determined by reference to the total package of information conveyed to the purchaser in a Securities offering at or before the time of sale. What this means is that investors need to have all the material information about the Issuer before orders are confirmed (which happens directly after Pricing). Investors get all this information through a combination of the Red and the Pricing Supplement. See Latham & Watkins publication: Christmas in July — the SEC Improves the Securities Offering Process (August 2005), available at [www.lw.com](http://www.lw.com). Although only applicable to SEC Registered Offerings, the general market practice in European Rule 144A for Life/Regulation S offerings has been to follow the same Rule 159 practices as if the rule applied to the offering.

*S&P:* Standard & Poor's, a Division of The McGraw-Hill Companies, Inc. S&P is one of the two most powerful Ratings Agencies. Moody's is the other big one. Fitch is hot on their heels.

*Safeguard Proceedings:* see *Sauvegarde*.

*Salam:* an Islamic finance term meaning a *Shariah*-compliant forward contract (i.e., a forward contract structured to avoid the *Gharar* or *Maisir* in a conventional forward contract).

*Sale and Leaseback:* a transaction where a company sells an asset (usually to a financial services company of some kind or to an SPV) and then immediately leases back that same asset. Companies engage in Sale and Leasebacks for a variety of reasons including to raise cash, get assets off their Balance Sheets and shift the market risk on the underlying asset. Sale and Leasebacks are very similar economically to Secured Debt, and are therefore treated very similarly under Bonds and Credit Agreements.

*Sale and Purchase Agreement:* the acquisition agreement pursuant to which the acquirer is purchasing the shares of the Target. Also known as the SPA. Not to be confused with a Purchase Agreement in the Securities offering context.

*Sales Force Presentation:* the presentation given to the Underwriters' sales force by the management and banking teams to prepare them to sell the deal in a Securities offering. Serves as a dry run for the Road Show.

*Same Day Funds*: immediately available funds (i.e., a wire transfer that lands in the recipient's account on the day it is sent).

*Sarbanes-Oxley*: in response to the wave of corporate scandal in the US that included the bankruptcies of Enron and Worldcom, in 2002 the US Congress passed, and President Bush signed into law, the Sarbanes-Oxley Act of 2002, enacting a broad range of changes to the Securities laws that govern public companies and their officers and directors. See SOX Section 404.

*SAS*: acronym for Statements on Auditing Standards.

*SAS 72*: this is the bible for Comfort Letters. SAS 72 is Statement on Auditing Standards number 72. SAS 72 was written by accountants for accountants and provides detailed instructions regarding the text of the Comfort Letter (but little guidance regarding Tick Mark procedures).

*SAS 100*: the SAS that applies to review of interim financial information, and which provides detailed instructions regarding the text of the Comfort Letter.

*Satisfaction and Discharge*: provisions that allow an Issuer to deposit a pile of cash with the Trustee equal to all amounts due under an Indenture and be immediately released from all of the Indenture's requirements, including all Covenants and payment obligations. Satisfaction and Discharge is typically only allowed if the Bonds are coming due within one year, either because they are maturing or because they have been called for Redemption. The key differences between Legal Defeasance and Satisfaction and Discharge are (i) the "due-within-one-year" provision does not apply in the context of Legal Defeasance and (ii) Legal Defeasance is not actually possible under current law because no law firm can give the required tax opinion. There is no tax opinion requirement for a Satisfaction and Discharge. See Legal Defeasance.

*Sauvegarde*: so-called "French Chapter 11". A French Insolvency proceeding to allow solvent companies to be restructured under the Insolvency court's supervision. The company must not be in a state of *Cessation des Paiements*, but must face difficulties that it is not able to overcome. The aim of *Sauvegarde* is to facilitate the reorganisation of a company in order to allow (in that order) the continuation of its business, the protection of employment and the payment of its creditors. May result in a Term-Out. See Latham & Watkins Client Alert No. 1009, *Coeur Défense* Safeguard Proceedings: Landmark Paris Court of Appeal Decision on Creditors' Rights (5 April 2010), available at [www.lw.com](http://www.lw.com). Double Luxco Structures in French LBO financings are designed to avoid the risk of an abusive use (or threat of use) of the protection of *Sauvegarde* by Borrowers and Sponsors.

*Scheme of Arrangement*: an English statutory procedure involving a compromise or arrangement between a company and a class of its creditors or members, with the sanction of a court. Approval requires

75 per cent by value of votes cast and a majority by number. A helpful tool in restructuring, allowing a Cramdown to be implemented on creditors within the same class (e.g., among Secured Parties) without the company having to commence full scale Insolvency proceedings such as Administration. Can also be used in order to effect a P2P/takeover in the UK by either the cancellation of all existing shares upon payment of consideration to the Target shareholders and the issuance of new shares to the Bidco (a "cancellation scheme") or by the transfer of all existing shares to the Bidco (a "transfer scheme").

*Screen Rate:* used to determine EURIBOR and LIBOR. The Facility Agent gets the relevant rates, published by the Banking Federation of the European Union and the British Bankers' Association respectively, from the applicable Reuters screen.

*SDLT:* acronym for Stamp Duty Land Tax.

*SDRT:* acronym for the Stamp Duty Reserve Tax.

*SEC:* acronym for the US Securities and Exchange Commission.

*SEC-Registered Offering:* just what it sounds like — a Securities offering that is registered with the SEC.

*Second Lien:* a second Priority Lien that comes behind the First Lien. See Second Lien Facilities.

*Second Lien Facility:* means different things in different markets. In the US, it is a Senior Secured Credit Facility that has a second Priority Lien on the assets that secure the First Lien Facilities. In Europe, it is also a Senior Secured Credit Facility (often under the same Credit Agreement as the other Senior Secured Credit Facilities) but is typically Subordinated in all respects to the First Lien Facilities through the Intercreditor Agreement, matures six months after the longest dated of the First Lien Facilities and carries a higher interest rate. In the Commitment Papers, the terms of the Second Lien Facility are usually (but not always) contained in a separate Term Sheet attached as an annex or schedule to the Commitment Letter. Out of favour since the Credit Crunch. With respect to US Second Lien Facilities, see Latham & Watkins Client Alert No. 382, Second Lien Financings — Answers to the Most Frequently Asked Questions (15 April 2004), available at [www.lw.com](http://www.lw.com). See also Facility D.

*Second Lien Loans:* like Facility C Loans but reflecting the features of a Second Lien Facility. Also known as Facility D Loans.

*Secondary Buyout:* an LBO of an LBO.

*Secondary Offering:* an offering of shares in a registered transaction by Selling Shareholders. Compare Primary Offering.

*Section 35 LME Merger Proceeding:* special merger proceeding in Spain which applies when any of the merger companies has incurred in debt in the three preceding years to acquire control of the other company or

to acquire assets of that company which are essential for its business activity or relevant for their patrimonial value. This proceeding is used to effect a Pushdown in Spain.

*Section 4(2):* exempts from Section 5 of the US Securities Act any offerings of Securities in "transactions by an Issuer not involving a public offering". This is the statutory origin of Private Placements. Regulation D is the safe harbour that gives definition to this statutory provision. See Regulation D.

*Secured Debt:* indebtedness that is secured by a Lien on Collateral.

*Secured Lenders:* Lenders who hold a given Security Interest. See Secured Parties.

*Secured Leverage Ratio:* the ratio of total Secured Debt of the Issuer/Borrower as of a given date to EBITDA of the Issuer/Borrower for the last four quarters. This is a Leverage Ratio that counts only the Secured Debt of the Issuer/Borrower in the numerator.

*Secured Parties:* those who hold or take the benefit of a given Security Interest. Generally defined to include the Lenders, the Administrative Agent, the Security Agent, the L/C Issuing Bank, the Arrangers and the Hedge Counterparties, this group will incorporate all parties in favour of whom a grant of Security over assets has been made.

*Securities Demand:* a negotiated right that enables the Broker-Dealer arm of the investment bank that provided the Bridge Loan to require the Borrower to market Permanent Securities, usually Bonds, to repay the Bridge Loan. The terms of the Securities Demand are documented in the bridge Commitment Papers (usually, but not always, in the Fee Letter). Sometimes the Securities Demand also contains the right to require the Borrower to market new loans rather than Securities.

*Securities Demand Holiday:* the pause period sometimes negotiated before the Securities Demand can be exercised. In some cases, this period can be as long as 180 days after the funding of the Bridge Loans.

*Securities Offering Reforms:* a series of new and amended SEC rules that took effect on 1 December 2005 and dramatically reformed the Securities offering process in the US. See Latham & Watkins publication: Christmas in July — the SEC Improves the Securities Offering Process (August 2005), available at [www.lw.com](http://www.lw.com).

*Securitisation:* a structured finance transaction in which a party owning a pool of cash-flow producing financial assets (the "originator") sells the assets to a Special Purpose Entity (the "issuer") that then sells Securities to investors that are secured by those assets. In a Securitisation transaction, the transfer of the pool of assets from the originator to the issuer is designed to be a True Sale rather than a financing so that if the originator goes Bankrupt, the assets of the Issuer will not be distributed to the originator's creditors.



**Security:** definition depends upon the context. In Bond and equity world, a Security is an investment instrument issued by a corporation, government or other organisation which offers evidence of debt or equity. In bank world, Security is a reference to the granting of a Lien on assets to secure a debt obligation. See Secured Debt, Security Interest and Collateral.

**Security Agent:** in a Secured Debt financing, the Agent to whom, on behalf of all the Secured Parties, all Security Interests in Collateral will be granted (save for certain European Security Interests which need to be granted directly to the Secured Parties). See also Parallel Debt and Security Trustee.

**Security Agreement:** a contract that creates a Security Interest in favour of the applicable Secured Parties.

**Security Interest:** a Lien created by a Security Agreement over certain assets (*i.e.*, the Collateral) to secure the payment or performance of obligations under a Credit Agreement, Indenture or other debt documents. A Security Interest gives the beneficiary of the Security Interest (*i.e.*, the Secured Parties) the right to foreclose upon the Collateral and use the proceeds thereof to repay its indebtedness. It also significantly improves the Secured Parties' rights in an Insolvency. In short, if things go wrong, it is likely to be better to be secured than unsecured!

**Security Trustee:** same as Security Agent, just used in countries such as the UK which recognise the trust concept (the Security Trustee holding the relevant Security Interests on trust for all the Secured Parties).

**SEDAR:** the Canadian equivalent of EDGAR. The website ([www.sedar.com](http://www.sedar.com)) provides access to documents filed with the Canadian Securities Administrators.

**Selecteds:** a reference to the selected financial information section of the Offering Memorandum. This section is generally identical to the financial information included in the Summary, but excludes Pro Forma financial information and, in the US, includes additional years of financial information (five years as opposed to three).

**Selective Disclosure:** see Regulation FD.

**Selling, General and Administrative Expense:** a company's selling, general and administrative expenses that are reported on the Income Statement and that do not correspond with production. These include everything from salaries to rent to utility payments. As a general matter, it is better to have low SG&A.

**Selling Shareholders:** shareholders of the Issuer that are selling their shares in a Secondary Offering, as opposed to a Primary Offering in which the Issuer is selling its own shares. See Secondary Offering. It is possible for an offering to be part Secondary Offering and part Primary Offering.

*Senior Debt:* a level of Ranking. This is not a specific type of debt, but rather a general reference to a slug of debt that is “higher” in the Capital Structure than other debt. For example, if a company has both Senior Subordinated Notes and Senior Notes, the Senior Notes are “senior”. If that company also has Secured Debt, the Secured Debt is effectively “senior” to the Senior Notes to the extent of the value of the Collateral granted in favour of the Secured Debt. Compare Junior Debt.

*Senior Facilities Agreement:* see SFA.

*Senior Headroom:* found in Intercreditor Agreements. Refers to the amount by which the debt under the Senior Facilities Agreement can be increased without needing the consent of the Mezz Lenders. Typically set at 10 per cent of the amount of the Term Loans made available at Closing (subject to adjustments).

*Senior Notes:* Bonds that are structurally senior to Senior Subordinated Notes and any other Junior Debt.

*Senior Secured Credit Facilities:* loans generally secured by the assets of the Borrower and its subsidiaries. See First Lien Facilities and Second Lien Facility. Mezzanine Facilities are also loans that share the same Collateral but they are Subordinated.

*Senior Secured Facilities Term Sheet:* an annex or exhibit to the Commitment Letter that contains the terms of the Senior Secured Credit Facilities.

*Senior Subordinated Notes:* Bonds that are Subordinated to any Senior Notes (or Senior Secured Credit Facilities), but senior to other Subordinated Debt.

*Set-off:* Set-off can be a statutory right (or right under applicable Insolvency rules or regulations) banks have to take money from the account of a depositor if the depositor is also a borrower from that bank and is in default on the loan. It can also be a contractual right agreed by the parties to allow a party which owes money to the other party under the contract to subtract anything the other party owes it first, before making payment.

*Settle:* see Clear.

*Several Liability:* the alternative to Joint and Several Liability and results in each party taking responsibility only for their own obligations and no-one else's. Multiple Arrangers and Lenders will require Several Liability as they will not commercially agree to be on the hook for the obligations of other unrelated financial institutions. It is important to ensure that each party's specific obligations are clearly defined and agreed.

*SFA:* acronym for Senior Facilities Agreement, the Credit Agreement for First Lien Facilities.

*SG&A:* acronym for Selling, General and Administrative Expense.

**Share Premium Account:** the portion of the shareholders' funds which represents the premium paid for new shares above their nominal value. It forms part of a company's Non-Distributable Reserves.

**Shari'ah:** term seen in Islamic financing (meaning literally, the way to the water). This is the principle from the Quran and Sunnah to guide Muslims in the good conduct of their lives and for the good of the community as a whole — the principles upon which Islamic finance transactions are based.

**Shelf Company:** name given to a company which is acquired "off the shelf" having no assets or liabilities at that time. Often formed by law firms and accountancy firms and then taken "off the shelf" at a later stage when needed by a client as this saves time on incorporating a new entity. Is not necessarily available in every European jurisdiction so this may need to be factored into the timetable when thinking about deadlines.

**Shelf Registration:** a registration process that lets an Issuer complete most of the SEC registration procedures (including the filing of a Registration Statement) before it is ready to go to market. The registrant can then "take Securities off the shelf" by filing a Prospectus Supplement when it is ready to launch an offering. See Shelf Takedown.

**Shelf Registration Statement:** used for a Shelf Takedown, a Shelf Registration Statement contains two principal parts: the Base Prospectus (which is in the initial filing) and the Prospectus Supplement (which is filed, along with the Base Prospectus, when the Issuer takes down the shelf).

**Shelf Takedown:** a public offering where you issue Securities off the shelf that were previously registered in a Shelf Registration. See Shelf Registration.

**Shoe:** another name for the Green Shoe.

**Short:** someone who is Short a Security makes money if the value of that Security goes down. It is the opposite of being Long — which, in the most basic sense, means you own a Security and you benefit if its value goes up. An investor can take a Short position by selling a Security she does not own — this is sometimes called a Naked Short. Short has many uses in the finance world. See Syndicate Short for how it is used in the Securities offering context. The term also means not very tall.

**Sight Draft:** a written demand for immediate payment. For example, when a beneficiary of a Letter of Credit determines to make a draw on the Letter of Credit, the beneficiary will submit a Sight Draft to the L/C Issuing Bank demanding payment under the L/C.

**Skim:** the difference between what a Sponsor has agreed to pay an Arranger as an Arrangement Fee and what the Arranger agrees to pass along to the other Lenders during Syndication. Skim is usually attributable to the Arranger having invested considerably more time

and energy into a transaction than the other Lenders or to some set of Lenders having also acted as an Underwriter.

*Smaller Reporting Company:* a category of Issuer created by SEC rules that took effect in February 2008. An Issuer that is otherwise a Reporting Company qualifies as a Smaller Reporting Company if its Public Float is below US\$75.0 million as of the last business day of the second fiscal quarter of the Issuer's preceding fiscal year. Smaller Reporting Companies have scaled down reporting requirements under Regulation S-K and later Staleness deadlines than other Issuers. See Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com).

*Snooze-you-lose:* the colloquial name given to a clause in a Credit Agreement which gives the Borrower (and indeed sometimes the other Lenders actively engaged in the management of the transaction and in finding solutions) protection against Lenders failing to respond in a reasonable time frame to a request for an Amendment or Waiver. If a Lender does not respond to such a request within a specified time frame (often between 10 and 15 business days), that Lender's vote is not taken into account when calculating whether Lenders holding the requisite percentage of the Credit Facilities have approved the Amendment or Waiver (or in certain limited cases the Lender is deemed to have consented). Also known as Use It or Lose It.

*Soft Call:* a Prepayment Premium payable only on Voluntary Prepayments and, in some cases, Voluntary Prepayments triggered by the proceeds of a Refinancing. Likely also required to be payable on a Change of Control. What is covered by a Soft Call varies from deal to deal. Compare Hard Call.

*Soft Mulligan:* a clause in a Credit Agreement which provides that a breach of a Financial Covenant is deemed cured if the Borrower re-establishes compliance with that Financial Covenant at a future test date. Also known as a Deemed Cure. Not as good for a Borrower as a Hard Mulligan but therefore more acceptable to Lenders.

*Sovereign Wealth Fund:* an investment fund owned by a country.

*SOX:* shorthand for Sarbanes-Oxley.

*SOX Section 404:* under this section of Sarbanes-Oxley and the related SEC rules, most reporting companies (subject to certain phase-in requirements) must establish and maintain "Internal Controls and Procedures" (as defined by the SEC). Compliance with Section 404 is extremely expensive, and has been a matter of considerable controversy.

*SPA:* acronym for Sale and Purchase Agreement.

*SPAC:* acronym for Special Purpose Acquisition Company.

*SPE:* acronym for Special Purpose Entity.

*Special Purpose Acquisition Company:* a company that raises money in order to pursue the acquisition of an existing company. Special Purpose Acquisition Companies are Shelf Companies that have no operations but are formed and raise capital with the intention of merging with or acquiring a company with the proceeds of the SPAC's Securities offering.

*Special Purpose Entity:* can be used in a number of different contexts. For example, a Special Purpose Entity can be a company that is set up within a corporate group in such a way so as to prevent the Insolvency of that company from affecting any other company within the group, often for a limited corporate purpose. A typical example here would be when a Special Purpose Entity is set up for the purpose of acquiring or operating a particularly risky asset or making investments. Special Purpose Entities are also used for the purposes of issuing Asset-Backed Securities, being structured to be "bankruptcy remote" from the risks of the corporate entities that transfer assets to the entity. Also known as a Special Purpose Vehicle. Special Purpose Entities are often used to accomplish Off Balance Sheet Arrangements.

*Special Purpose Vehicle:* another name for a Special Purpose Entity.

*Specified Representations Language (or Specified Reqs):* a provision found in the text of the Commitment Letter, it is the equivalent of Certain Funds but for US deals. It states that notwithstanding anything else in the Commitment Letter, the only representations relating to the Target the accuracy of which are a condition to the Availability of the facilities on the Closing Date are (i) representations made with respect to the Target (but only to the extent the Sponsor has the right to terminate the acquisition as the result of a breach of such representations) and (ii) certain Specified Representations, as defined. The list of Specified Representations is a matter of some negotiation, but generally would include representations relating to incorporation or formation; organisational power and authority to enter into the documentation relating to the facilities; due execution, delivery and enforceability of such documentation; solvency; no conflicts with laws; charter documents or (in some instances) material agreements; Federal Reserve margin regulations; the Investment Company Act; status of the Senior Facilities as First Lien Senior Debt; and Perfection of Security Interests. Also sometimes called SunGard Language.

*Spin-off:* see Demerger.

*Sponsor:* the private equity firm whose fund is the purchaser in a Leveraged Buyout, or the primary holder of the equity interests in a particular Borrower/Issuer. The Sponsor representative in a meeting will be the one asking why things can't be done faster.

*Spot Market:* a market in which Commodities are purchased and sold for cash and delivered "on the spot" or very soon after the sale. Also called a "cash market". A sale on the Spot Market is known as a "spot sale". A company sells Commodities on a "contracted" basis rather than a "spot"

basis if it enters into a contract to sell the Commodities over a period of time at a specified price or pursuant to a specified price generating formula.

*Spread*: another name for the Underwriting Discount.

*SPV*: acronym for Special Purpose Vehicle.

*Squeeze-out*: the right of the bidder in a P2P/takeover to require minority shareholders to sell their shares to it once it has reached a certain level of acceptances. In the UK, this level is set at 90 per cent but in other jurisdictions the threshold can be higher.

*Stabilisation*: the process by which a Lead Manager supports the immediate secondary market performance of a new issue of Securities. This can be done either by over-allotting Securities, or going "short", for the account of the syndicate where the shortfall is covered through secondary market purchases by the Lead Manager, or "going long" for the account of the syndicate, where the long position is subsequently either distributed to the syndicate or sold in the secondary market for the account of the syndicate.

*Stale*: see Staleness.

*Staleness*: a term referring to the dates on which Financial Statements go Stale. Once Financial Statements go Stale, they can no longer be included in an SEC filing (and the SEC will no longer declare the Issuer's Registration Statement effective) — meaning the Issuer has to wait until the Financial Statements for the next quarter are completed in order to file a Registration Statement or have the SEC declare a Registration Statement effective. See Latham & Watkins Desktop Staleness Calendar, available at [www.lw.com](http://www.lw.com). See 135 Day Rule.

*Stamp Duty*: a tax charged on certain written documents (can be a fixed or *ad valorem* charge). The term is a UK tax law term, but other jurisdictions also impose similar taxes (sometimes generically referred to, among with SDLT and SDRT and their equivalents in other jurisdictions, as Transfer Taxes). Stamp Duty is typically chargeable in respect of transfers of shares, other marketable securities and certain transactions involving partnerships. In the UK, transfers of qualifying loans/bonds are typically exempt from Stamp Duty. See also SDLT, SDRT and Capital Duty.

*Stamp Duty Land Tax*: a UK tax charged in respect of transfers of real estate. Other jurisdictions impose similar real estate transfer taxes. See also Stamp Duty.

*Stamp Duty Reserve Tax*: a UK tax charged in respect of certain agreements to transfer shares and other types of security (introduced as an anti-avoidance measure in response to attempts to avoid Stamp Duty by not formally documenting certain transfers of interests). See also Stamp Duty.

*Standard & Poor's*: another name for S&P.

*Standard Listing*: a listing that is not a Premium Listing and therefore subject to disclosure and ongoing requirements that are based on minimum EU directive standards rather than super-equivalent standards. GDRs can only obtain a Standard Listing. See also Premium Listing.

*Standby Letter of Credit*: a Letter of Credit the purpose of which is to provide credit support only in the event of a performance Default by the account party (*i.e.*, the Borrower) or some other contingent event. Compare Commercial Letter of Credit.

*Standstill Agreement*: another name for a Forbearance Agreement.

*Standstill Period*: a Standstill Period is a Subordination provision typically found in an Intercreditor Agreement which prevents the holders of the Subordinated Debt from taking certain (or possibly any) remedies during an agreed upon time-frame even if they are experiencing an Event of Default. Note that this form of Subordination is much more severe than a Payment Blockage Provision, which by itself does not prevent the junior creditors from pursuing remedies (including putting the Borrower into Insolvency) if there is an Event of Default. Subordinated Debt holders can however expect to be subjected to both Payment Blockage Provisions and Standstill Periods. Note that Standstill Periods are not permitted for SEC Registered Bond deals.

*Staple Financing*: a financing package being offered up by the investment bank that is acting as the sell-side advisor in connection with the auctioning of a Target company. Called "staple" because the financing package (the Commitment Papers) is "stapled" to the bid materials that are sent out to potential buyers. Staple Financings are a useful way for the investment bank acting as the advisor to a company that is being put on the auction block to also be involved in the financing of the acquisition by the buyer.

*Staple Papers*: Commitment Papers being used in a Staple Financing.

*State of Insolvency / State of Distress*: in Italy, the State of Insolvency refers to a particular situation where an economic entity is unable to perform its obligations regularly. State of Distress is broader in that it can be temporary and reversible. The State of Insolvency is a prerequisite for the applicability of the *Fallimento* procedure and Extraordinary Administration, while the State of Distress is a prerequisite for the *Concordato Preventivo* and *Accordo di Ristrutturazione*.

*Steering Committee*: see Coordinating Committee.

*Step Down*: a reduction in the percentage used for purposes of the Excess Cash Flow Sweep (and sometimes the Equity Sweep) if the Borrower is able to achieve an agreed upon Leverage Ratio. Also used in Bonds to describe the decrease in the Interest Rate that applies following an upgrade in the Ratings of the Issuer by one or more of the Ratings Agencies.

*Step Up:* the increase in Interest Rates on a Bridge Loan that occurs if the loan is still outstanding after certain increments of time. Also used in Bonds to describe the increase in the Interest Rate that applies following a downgrade in the Ratings of the Issuer by one or more of the Ratings Agencies.

*Straight-Line Basis:* to Amortise or Depreciate an asset on a "straight-line basis" means to Amortise or Depreciate the asset in equal amounts at regular intervals over the course of the Amortisation or Depreciation calculation period.

*Strategic Buyer:* a corporate acquirer in an acquisition that is acquiring for strategic reasons (e.g., to eliminate a competitor or expand into a new market). Strategic Buyers often have an advantage in an auction since they usually expect to benefit from Synergies if the deal goes through and can therefore pay more for the Target. Compare Financial Buyer.

*Strawman:* an outline proposal or paper. Often used to describe a preliminary summary version of the Structure Memorandum.

*Structural Adjustment:* certain Amendments in Credit Agreements have traditionally required consent from all of the Lenders which can be difficult to achieve in a large Syndicate. A Structural Adjustment provision allows certain Amendments such as the insertion of additional debt, extensions of maturity or Availability, re-denomination and reductions of amounts payable to be made with the consent only of each affected Lender (e.g., who is providing the additional debt) and the Majority Lenders.

*Structural Subordination:* non-Contractual Subordination created where a slug of debt is issued by a Holding Company or other parent entity, with no Guarantee from the Operating Subsidiary that is the Borrower/Issuer under other indebtedness, thereby becoming effectively Subordinated to the debt held closer to the operating assets (since all the Operating Subsidiary's debt gets paid in full in an Insolvency before anything is divided up to the Holding Company). See Subordination.

*Structure Flex:* the changes that the Arranger may make to the structure (i.e., the type of debt offered, or the location of the Borrower within the credit group) of the Credit Facilities provided for in the Commitment Letter if needed to facilitate (or enhance the prospects of) the Successful Syndication of the Credit Facilities. Holdco Flex is a type of Structure Flex.

*Structure Memorandum:* a memorandum prepared by the tax advisors/counsel to the bidder in an LBO which describes the transaction structure and the tax consequences thereof. Provided to the Lenders (or at least those becoming Lenders in Syndication) with a Reliance Letter.

*Subordinated Debt:* sits in-between Senior Debt and equity in the Capital Structure. Generally raised by selling High Yield Bonds or through a Mezzanine Financing. High Yield Bonds have looser Covenants than the Senior Debt. However, whilst Mezzanine Financings have Financial



Covenants set with a percentage of Headroom over those for the Senior Facilities, all other Covenants typically remain the same. Subordinated Debt is compensated for with a higher Interest Rate to reflect its Subordinated status.

*Subordinated Shareholder Loan:* a loan granted to the company by one of its shareholders or by a person who controls one of its shareholders which is subordinated to all other debts. Terms and Conditions, Indentures and Credit Agreements often will provide a Carveout to the Debt Covenant or equivalent that allows incurrence of Subordinated Shareholder Loans provided that such loans have a maturity which extends beyond the maturity over the Notes/loans and that such loans are deeply Subordinated. For tax reasons in European LBOs, the Equity Contribution is often made by way of a Subordinated Shareholder Loan.

*Subordination:* types include Contractual Subordination, Lien Subordination, Structural Subordination and Effective Subordination. See also Junior Debt and Senior Debt.

*Sub-participation:* can be Funded Sub-participations or Risk Sub-participations. Both are in essence transactions whereby the Lender of Record sells the commercial risk of a Credit Facility to a third party ("the sub-participant") without entering into an Assignment, Assignment and Assumption, or Novation. Can therefore be implemented without the knowledge of the Facility Agent, the Borrower or other Lenders as the Lender of Record does not change. Also useful (if properly structured) to avoid Banking Monopoly restrictions.

*Subrogation:* the substitution of one party in the place of another party with respect to a claim by that other party against a third party, so that the substituted party succeeds to the rights of the other party with respect to such claim. Confusing, isn't it? An example would be if an insurer pays an insurance claim to a third party payee on behalf of an insured party, and then "steps into the shoes of" the insured party to make a counterclaim against the third party payee in order to get back all or a portion of the payment.

*Subscription Agreement:* another term for Purchase Agreement or Underwriting Agreement, typically used in Eurobonds.

*Subsidiary Guarantor:* subsidiary of the Borrower that acts as a Guarantor. See also Corporate Benefit, Financial Assistance and Guarantee Limitation Language.

*Substantive Consolidation:* a US term meaning the pooling of the assets and liabilities of separate legal entities in a US Bankruptcy. Creditors of substantively consolidated entities will have a claim against the single pool of assets and guaranty claims. Whether it will be ordered in a particular case will turn on how the court chooses among and applies standards that have developed as judges made law, rather than through analysis of a statute. Historically, Substantive Consolidation has been

reserved for cases where (i) the financial affairs among Affiliates are so entangled — whether by design or sloppy business practices — that an accurate assessment of which entity is obligated to a particular creditor or group of creditors cannot be determined or could only be determined at undue cost or (ii) where creditors generally had dealt with the enterprise as a single consolidated entity (rather than separate legal entities). Courts routinely state that Substantive Consolidation is to be granted “rarely”, though courts routinely permit Substantive Consolidation when it is consensual. Over time, a variety of standards or “tests” for when Substantive Consolidation should be ordered over an objection have been articulated. See *In re Owens Corning*, 316 B.R. 168 (Bankr. D. Del. 2004), reversed by 419 F.3d 195 (3d Cir. 2005) or just give a call to Latham.

**Successful Syndication:** in Commitment Paper land, a number of things happen once the Arranger has achieved a Successful Syndication. For example, Flex rights terminate and Interest Periods are no longer set for short periods of time. The term is not always defined in Commitment Papers, but when it is, it is usually with reference to the level of remaining commitment held by the Arranger. For example, if the original commitment is €500.0 million, Successful Syndication may be defined as the point at which the Arranger has Syndicated (or assigned away) commitments such that it is only on the hook for €50.0 million.

**Sukuk:** Islamic finance term for an Islamic Bond, similar to a conventional Bond in many respects but the Bond certificate represents an undivided ownership of one or more assets forming part of the Sukuk structure — such as the assets forming part of the Islamic lease (*Ijara*) in a *Sukuk Al-Ijara*.

**Summary:** the summary section of the Offering Memorandum. It usually includes a short description of the Issuer, its strengths and strategy, a summary of the terms of the Securities and the offering and certain summary financial information. For SEC-Registered offerings, Item 503 of Regulation S-K describes the information that should be included in the Summary. For offerings to which the PD applies, PD Article 5.2 contains the guidelines for the Summary section. See also Box.

**SunGard Language:** another name for Specified Representations language, so-named because SunGard was the first deal to contain those provisions. Also includes a second part that provides that the failure to Perfect a Security Interest in any Collateral (subject to certain exceptions) will not be a Condition Precedent to Closing a financing unless the Borrower does not use some specified level of effort to Perfect.

**Sunnah:** term seen in Islamic finance meaning the practices and sayings of the Prophet Mohammed, as documented in *Hadith*, being the fundamental part of Islamic jurisprudence upon which Islamic finance transactions are structured.

*Superholdco*: a Holding Company that is the parent (or the parent's parent, etc.) of another Holding Company. It is often seen wearing a cape and tights. A Superholdco is generally not a Guarantor under any loans or Bond documents for debt incurred or issued at any of its subsidiaries. See Holding Company.

*Super Majority Lenders*: Lenders needed for Super Majority Voting.

*Super Majority Voting*: situation where a percentage of the Lenders under a Credit Agreement greater than the Majority Lenders (usually at least 85 per cent) is required for certain material Amendments, such as releases of Collateral.

*Super Senior RCF*: in Bond-only financings there may still be a need for a Revolving Facility to provide the Issuer with access to more flexible loan financing and Ancillary Facilities for its ordinary corporate activities. RCFs in these structures will share in the Collateral given to the Bonds but will often rank senior on recovery following enforcement, so both the Bonds and the RCF are "senior" in the sense of ranking *Pari Passu* in right of payment and being secured, but the RCF is "super senior" to the Bonds in the Waterfall.

*Swap*: an Over-the-Counter transaction in which the parties agree to exchange specified cash flows at specified intervals (e.g., one party agrees with the other party that it will exchange a Floating Rate for a Fixed Rate on a specified notional amount of principal at the end of each quarter). This is a tool that Borrowers use to manage their exposure to changes in Interest Rates.

*Sweet Equity*: stock issued in an LBO often to key management/employees at a discounted or nominal price. How sweet is that.

*Swing Line Loans/Swingline Loans*: not nearly as cool as they sound. This is a little, tiny short-term revolving sub-facility provided as a convenience to Borrowers as part of a Revolving Facility. It permits smaller amounts to be borrowed, often on a same-day basis. These are typically not seen in European deals where Borrowers can use Ancillary Facilities for the same purpose.

*SWX Swiss Exchange*: the SWX Swiss Exchange (SWX) operates the main stock exchange in Switzerland, based in Zurich. Because it is outside the EU, it is considered an Offshore Market for Prospectus Directive purposes.

*Syndicate*: as a verb, the process whereby an Arranger of a Credit Facility assigns (sells) the loans and commitments to other banks and funds. As a noun, the group of banks and funds that have become the Lenders under the Credit Facility. See Bookrunner and Syndication.

*Syndicate Covering Transaction*: a transaction in connection with a Securities offering whereby the managing Underwriter places a bid or effects a purchase of shares on behalf of the underwriting Syndicate in order to reduce a Syndicate Short position.

*Syndicate Short:* managing Underwriters in public equity offerings generally over-allot the shares — that is they accept orders for more shares than are being sold by the Issuer in the offering. These extra orders are referred to as the Syndicate Short because the Underwriters are Short by this number of shares. A similar practice occurs in Convert Deals. See also Naked Short, Green Shoe and Refreshing the Shoe.

*Syndication:* the process by which the Arranger sells loans and/or commitments to a number of Lenders. Remember that the Arranger is in the distribution business and not the storage business.

*Syndication Agent:* often, a title granted to a Lender during the Syndication process that carries no responsibilities (similar to a Documentation Agent), but occasionally a name for an Agent that helps the Arranger and/or Facility Agent in Syndicating loans before or after the Closing Date, or that has other specific responsibilities outlined in a Credit Agreement. Essentially, it is a means for a Lender to get its name on the cover of a Credit Agreement and receive League Table Credit.

*Syndication Agreement:* an agreement among Arrangers (in a deal with more than one of them) as to how they will sell off their unsyndicated loan exposure after a transaction has closed. Under a Syndication Agreement, the Arrangers might agree that for a limited period of time (usually one to two months) none of them will sell the loans they share without giving the other Arrangers a right to sell on a *pro rata* basis. The purpose is to bring order to the Syndication process and avoid the chaos associated with a fire sale where all the Arrangers are simultaneously selling loans at varying prices. See Front Running.

*Syndication Date:* the date upon which Syndication closes.

*Synergies:* the cost savings and other efficiencies that are projected to materialise when two companies in the same industry are merged. Examples include reduced SG&A, increased purchasing power, more efficient utilisation of factories, warehouses and distribution centres, and headcount reduction in the sales force. See Strategic Buyer. Whether or not Synergies can be taken into account in the calculation of Financial Covenants is often hotly debated, and in particular whether or not any Synergies need to be verified by someone other than the Borrower. This debate arises most frequently in two situations: (i) when an acquisition has been made during a Financial Covenant testing period — in these circumstances the question is whether or not one should assume for calculation purposes that such acquisition was made at the start of the testing period and, if so, should the Borrower get the benefit of Synergies estimated to be, but not yet, realised; and (ii) when a Carveout to a restriction on acquisitions allows an acquisition if certain tests are met including pro-forma historic and/or future financial covenant compliance — again, the question here is should the Borrower get the benefit of anticipated Synergies in these calculations?

*Synthetic Letter of Credit:* a Letter of Credit under a facility that has been "pre-funded" by the Lenders on the Closing Date (with the proceeds from such funding typically being deposited in a cash collateral account) rather than being funded on a later date upon the occurrence of a contingent event requiring payment under the L/C to the third party. See Letter of Credit.

*T+ Legend:* under Rule 15c6-1 of the US Exchange Act, trades in the secondary market are required to settle (*i.e.*, you are supposed to close) three business days after Pricing, unless the parties otherwise agree. So in any deal where the Closing is pushed out beyond the mandated three days, a T+ Legend should be included in the Prospectus or Offering Memorandum. Not relevant for Eurobonds which occasionally can close either immediately after signing or at some much later date.

*Ts & Cs:* shorthand for Terms and Conditions.

*Tag Along Rights:* the contractual rights of a minority shareholder to be included in (or to tag along in) a transaction where the majority shareholder is selling its interests to a third party. Compare Drag Along Rights.

*Takaful:* an Islamic finance term which means Islamic insurance based on the idea of mutual assistance (*Takaful* insurance is structured to avoid the *Shariah* prohibitions against interest and gambling which are ordinarily violated by conventional insurance arrangements).

*Take and Hold:* the basis on which a Lender acquires loans and/or commitments without the intention to on sell. Contrast to Syndication.

*Takedown Fee:* another name for Funding Fee.

*Takeover Code:* the set of general principles and rules which establish the framework for P2P transactions in the UK, "developed since 1968 to reflect the collective opinion of those involved in the field of takeovers as to appropriate business standards and as to how fairness to shareholders and an orderly framework for takeovers can be achieved" (according to the Takeover Panel). Also known as the City Code and the Blue Book.

*Takeover Panel:* the body that administers the Takeover Code and supervises/regulates takeovers and other matters to which the Takeover Code applies.

*Talon:* a bearer instrument that is attached to but detachable from a Bearer Bond and which entitles the bearer to receive a further sheet of Coupons and, in some cases if the Bearer Bond is very long-dated, another Talon.

*Tap Issue:* another description of a Fungible Issue.

*Target:* the company or business being purchased in a transaction.

**TARGET2:** an acronym for the Trans-European Automated Real-Time Gross Settlement Express Transfer payment system which replaced the initial TARGET system in November 2007. TARGET2 is the payment system for the settlement of Euro transactions.

**TARGET Day:** a day on which TARGET2 is open for settlement of payments. It ignores most national bank holidays. Another illustration of the adage that money never sleeps as if Gordon Gekko hadn't taught you that already.

**Target Hold:** the principal amount of a Credit Facility that a Lender wants to sell down to during Syndication. If all of the Lenders sell down to their Target Hold, it is a Successful Syndication. Contrast to Minimum Hold.

**Target MAC:** a Business MAC focused specifically on the Target.

**Tawarruq:** an Islamic finance term for the purchase of an asset (commonly a commodity) on a deferred payment basis (like a Murabaha structure) with the intent to immediately sell to a third party for cash. A *Tawarruq* is commonly used for working capital or revolving Islamic finance facilities.

**Tax Consolidation:** a tax regime available in a number of countries which a group of wholly owned or majority-owned companies located in the same jurisdiction can opt for, so that the group is treated as a single entity for income tax (and sometimes VAT) purposes (usually the head entity of a tax consolidated group is responsible for the group's income tax (and sometimes VAT) obligations). This typically enables a non-income producing but leveraged entity within the group to set off its financial interest expenses against the income of other Opcos within the same tax group. Best to speak to a tax expert. See also Group Relief.

**Tax Gross-Up:** a provision in a Credit Agreement that increases the amount of any payment by a Borrower to a Lender so that, after payment of applicable Withholding Taxes, the Lender receives what it would have received if no Withholding Taxes had been imposed. A Tax Gross-Up generally protects Lenders that are not otherwise subject to tax in the Lender's jurisdiction from the possible imposition, after the Closing Date, of Withholding Taxes by a taxing authority. See also Qualifying Lender. Indentures have a similar provision that requires the Issuer to pay "additional amounts" (*i.e.*, Withholding Taxes) on payments on the Notes. See also Tax Redemption.

**Tax Redemption:** under an Indenture, if the Issuer (and sometimes a Guarantor) is required to pay Withholding Taxes on payments on the Notes (or a Guarantee) as a result of future changes in applicable tax laws, the Issuer may redeem all but not part of the Notes at par. In loan world, this is covered by the Yank-a-Bank.

**Tax Treaty:** cunning abbreviation of Double Taxation Treaty.

**T-bills:** shorthand for Treasury Bills, Securities offered by the US Treasury.

**Technical Amendment:** an Amendment that is necessary for technical reasons, perhaps because a Credit Agreement inadvertently prohibits a certain activity that the Borrower has always engaged in. To be distinguished from a substantive Amendment that, for instance, would be entered into to allow the Borrower to incur more debt or make more investments. In many cases, the difference between a Technical Amendment and a substantive Amendment is very much in the eye of the beholder. Both types of Amendment will typically be subject to the Amendment mechanics (including a Majority Lender vote) of the Credit Agreement but occasionally you will see documentation which allows the Facility Agent and the Borrower to correct manifest errors without needing the consent of the Lenders.

**Ted Spread:** the price difference between the three-month LIBOR and the three-month T-bill interest rate. The Ted Spread can be used as an indicator of credit risk: as the Ted Spread increases, the risk of default is considered to be increasing and investors will have a preference for safe investments; as the spread decreases, the default risk is considered to be decreasing.

**TEFRA:** the US Tax Equity and Fiscal Responsibility Act 1982 which is intended to limit tax evasion by US residents through the holding of Bearer Bonds. Because of TEFRA, Bearer Bonds are not used if an issue of Securities is placed into the US or with US investors.

**TEG:** French acronym for "*taux effectif global*", meaning "all inclusive interest rate", which is the overall, actual cost of the loan to the Borrower expressed as an annual interest rate, including all expenses, fees and any costs of any nature related to the loan and which are (or should be) known to the Lender at the time of the calculation, borne by the Borrower and amortised over the actual (or supposed) duration of the financing. The calculation is horrendously complicated and failure to provide an accurate calculation of the applicable TEG to the Borrower makes the interest rate provision void. You have been warned. Fortunately, the obligation to provide the TEG does not apply to a Bond financing. See TEG Letter.

**TEG Letter:** the letter provided under French law by the Lender to the Borrower setting out the TEG applicable to the Loan.

**Tender Offer:** an offer by tender by an Issuer to purchase its own Securities typically for cash or sometimes for other Securities or a combination of cash and Securities.

**Tenor:** the length of time between the creation of a Credit Facility or Bond and its final maturity.

**Term Loan:** a loan for a specific amount that the Borrower borrows on day one and then pays back according to a predetermined Amortisation Schedule. In Bridge Loan Commitment Papers, there are generally two types of Term Loans: (i) the Term Loan component of the Senior Secured

Credit Facility and (ii) the Rollover Loans into which the Bridge Loans flip at their maturity (generally one year after the Closing Date). See Term Loan Facility. Compare Revolver.

*Term Loan A:* another name for a Facility A Loan.

*Term Loan B:* another name for a Facility B Loan.

*Term Loan C:* another name for a Facility C Loan.

*Term Loan D:* another name for a Facility D Loan or Second Lien Loan.

*Term Loan Facility:* a Senior Secured Credit Facility consisting of Term Loans, which are generally borrowed in their entirety at Closing and repaid according to an Amortisation Schedule or a Bullet Maturity. See, however, Delayed Draw Term Facility.

*Term Loan Term Sheet:* generally, the Term Sheet for the Rollover Loans (see Term Loan) provided for in a Commitment Letter. This Term Sheet is generally an exhibit to the Bridge Facility Term Sheet.

*Term-Out:* "Nuclear dissuasion" in French Insolvency proceedings and not to be confused with a Term-Out Option. This is an English term coined by Insolvency practitioners to describe the power of the French bankruptcy court in French *Sauvegarde* or *Redressement Judiciaire*, failing adoption of a restructuring plan by the Creditors Committees, to impose a rescheduling of the creditors' claims (full face value and, with respect to all loans granted for an initial term greater than one year, accrued interest) over a maximum time period of 10 years. Funnily enough, there is no equivalent French term.

*Term-Out Option:* an option of a Borrower to convert a Revolver (commonly a short-term Revolver of 364 days) to a Term Loan.

*Term Sheet:* the schedules, exhibits and annexes attached to a Commitment Letter that detail the terms of the Senior Secured Credit Facilities and the Bridge Facility.

*Terms and Conditions:* in a English law governed Bond offering, these are the detailed terms, conditions and Covenants that are contained in the Offering Memorandum or Prospectus. They are appended to the Trust Deed.

*Thin Capitalisation:* a company is thinly capitalised when its capital is made up of a much greater proportion of debt than equity, meaning its Gearing is too high. Many European tax regimes have rules to ensure that companies have a fair proportion of equity capital so that they cannot minimise taxable profits in this way. These rules typically work by restricting tax deductions in respect of the "excess" debt capital.

*Third Party Rights:* the ability to allow non-signatories to a document to enjoy the benefit of its terms in ways which differ according to the jurisdiction. Enacted in the UK through the Contracts (Rights of Third Parties) Act 1999.



**Tick Marks:** Tick Marks refer to the letters (e.g., "A," "B," "C") or symbols accountants write next to accounting books and records data that appear in the Offering Memorandum as part of the Comfort Letter. Each Tick Mark represents a negotiated procedure designed to demonstrate a "reasonable investigation" with respect to Financial Statements that are not covered by the text of a Comfort Letter. Each Tick Mark explains how the given number was verified by the accounting firm as part of the comfort process. For instance, the auditor might say that it "compared the number in the disclosure to the audited financials and found them to be in agreement".

**Ticking and Tying:** the procedure of providing Tick Marks in a Comfort Letter.

**Ticking Fee:** a fee associated with a long-term commitment to provide a Bridge Loan or other Credit Facility, which starts accruing the day the Fee Letter is signed (or a specified number of days thereafter) and terminates when the underlying transaction is either consummated or terminated (or when the Credit Facilities documents are signed, at which point the Commitment Fee starts accruing). The Ticking Fee is set forth in the Fee Letter.

**Toggle Facility:** a Credit Facility that contains a PIK Toggle.

**Tombstone:** a gift (often made of lucite) handed out to senior deal participants after the Closing to commiserate and thank them for all of the hard work of their more junior colleagues on the deal. It makes a nice decoration for your office. Will not biodegrade. Sometimes called a Deal Toy.

**Tombstone Ad:** a written advertisement for publicity purposes placed by Underwriters after Closing of a Security offering. The Tombstone Ad provides the basic details about the issue and, in order of importance, the Underwriters involved in the deal. This advertisement gets its name from its black border and heavy black print.

**Topco:** shorthand for "top company", this refers to the ultimate parent in a Credit Group or other group of companies.

**Total Cap:** see Cap.

**Trade Letter of Credit:** a Letter of Credit issued for the purpose of providing the principal payment mechanism for the purchase of goods through the presentation of documents to the Issuing Bank.

**Tranche:** this term, which means "slice" in French, refers to an individual class or series of Bonds within an offering (which may have different ratings) or to individual Credit Facilities within the same Credit Agreement (e.g., a single First Lien Credit Agreement may have a Facility A Loan, a Facility B Loan, a Facility C Loan, a Delayed Draw Term Facility and a Revolving Facility, each of which is a separate loan Tranche). "Tranching" is also a way of describing classes or series of Bonds in the same offering that are senior or subordinated to each other.

*Tranche A Term Loans:* another name for Facility A Loans.

*Tranche B Term Loans:* another name for Facility B Loans.

*Tranche C Term Loans:* another name for Facility C Loans.

*Tranche D Term Loans:* another name for Facility D Loans or Second Lien Loans.

*Transfer Agent:* an agent of the Issuer who takes care of transferring Registered Bonds.

*Transfer Tax:* see Stamp Duty.

*Transparency Directive:* an EU directive which requires Participating Member States to establish rules for the disclosure of periodic and ongoing financial and informational reports for companies whose Securities are admitted to trading on a Regulated Market.

*Trapped Cash:* cash which is "trapped" in a subsidiary of the Borrower and for Corporate Benefit, Financial Assistance, tax or other reasons can't be transferred to the Borrower for debt service purposes.

*Treaty Country:* a country that is a party to a Double Taxation Treaty.

*Treaty Passport:* an expedited process available in the UK that enables non-UK Lenders to a UK Borrower to obtain Withholding Tax protection under Double Taxation Treaties. Non-UK Lenders register their details with respect to their entitlement to protection under a particular treaty and they notify the UK tax authorities of particular loans/Borrowers as these arise. There is a publicly accessible register of Treaty Passport holders.

*Tree:* a perennial plant with a woody main stem. In the acquisition finance context, Trees are references to different bidders or financing sources. If a company puts itself up for sale (in an auction), there will be multiple bidders (generally Sponsors, but sometimes Strategic Buyers) looking at the Target, and each bidder will in turn be examining possible financing from a variety of banks. So if Sponsor A and Sponsor B were looking at the Target, and each had two possible financing sources (drafting Commitment Papers), there would be four financing Trees. Ideally, at least three of those Trees would be using Latham & Watkins.

*Treuhand:* when used in a restructuring context, this term refers to a trust arrangement under German law (also frequently structured as and called "*doppelnützige Treuhand*") relating to company shares where the shares in the relevant company (usually at the very top of the group) are held by an independent trustee for the benefit of the original shareholders (usually the Sponsor) and the financing banks at the same time. Typically, the trustee will be obliged to sell the shares if certain trigger events (e.g., Events of Default) occur or certain enterprise value thresholds are met. This structure is used mainly in restructurings to disenfranchise the Sponsors while the restructuring is going on and to

avoid certain disadvantages of the enforcement of a German law share pledge (see Public Auction). Needs to be structured carefully to avoid Equitable Subordination.

*Triple Hook:* refers to receiving a CCC rating from the Ratings Agencies.

*True Sale:* a transaction in which actual legal title to an asset is transferred, as opposed to the asset being loaned or pledged as Collateral in a financing transaction. The issue of whether a transaction is a True Sale or a financing has Bankruptcy implications, because if a transferor goes Bankrupt, unless the asset in question is deemed to have been sold in a True Sale transaction, the Bankruptcy court can determine that the asset is still owned by the transferor and can therefore be included as part of the Bankruptcy assets that are distributed to creditors.

*Trust Deed:* a reference to the contract between the Issuer and the Trustee that creates and governs the Bonds. Trust Deeds are generally governed by English law, whereas the term Indenture generally implies a New York law governed document. Individual investors hold Bonds in Book Entry form through the Clearing Systems rather than actually signing the Trust Deed.

*Trustee:* performs as the Bond equivalent of a Credit Agreement Facility Agent. The Trustee has certain assigned duties and rights under the Trust Deed or Indenture that become particularly important following Defaults or Events of Default, and acts in a fiduciary capacity in the best interests of the Bondholders.

*Turn:* (i) banker slang for a unit of measurement equal to the LTM EBITDA of a Borrower, often used with reference to leverage (e.g., a banker may ask you to draft a Closing Condition that leverage not exceed “three Turns”). If the Borrower's LTM EBITDA was €100.0 million, that condition would be that total debt not exceed €300.0 million. (ii) The process of making changes to and redistributing a document following a round of comments — usually requested in a half-time timeframe, as in “do you think we will see the next Turn by tomorrow morning our time?”

*Turnover:* the provisions in an Intercreditor Agreement which require Junior Debt holders to hand over cash received in circumstances where those senior to them had not been repaid in full.

*UCC:* the Uniform Commercial Code. The UCC is one of a number of uniform acts that have been promulgated in the US in conjunction with efforts to harmonise the law of sales and other commercial transactions in all 50 states within the United States — although each state's version of the UCC may be slightly different from another's. The UCC deals primarily with transactions involving personal property.

*UK Corporate Governance Code:* the key source of corporate governance recommendations for companies with a Premium Listing, consisting of good governance, leadership, effectiveness, accountability, remuneration and relations with shareholders.

*UKLA*: acronym for the United Kingdom Listing Authority, the competent authority for listing on the LSE. Part of the FSA.

*UNCITRAL*: acronym for the United Nations Commission on International Trade Law.

*UNCITRAL Model Law*: the model law adopted by UNCITRAL in 1997 designed to (among other things) create a framework for mutual recognition of Insolvency proceedings. Although not many countries have adopted it, those that have include Canada, Great Britain, Greece, Japan and the US.

*Underwriters*: in Bond world, the investment banks that buy Securities in the initial purchase from the Issuer and then immediately resell them to the public in a public offering. More technically, and in brief, Section 2(a)(11) of the US Securities Act defines an Underwriter as any person who has purchased a Security from an Issuer or a controlling person of an Issuer with a view to distributing the Security. In loan world, the investment banks or other financial institutions that agree to be the initial Lenders pending Syndication. Typically the same entities as the Arrangers.

*Underwriting Agreement*: the contract pursuant to which Underwriters agree to purchase Securities from an Issuer. In 144A Offerings and Regulation S offerings, the Underwriting Agreement typically is referred to as a purchase agreement.

*Underwriting Discount*: the money the Underwriters make from a Securities offering. Underwriters make their money by selling the new Securities at a markup from what they paid. For example, the Underwriters might buy each share in an IPO from the Issuer for €16.50 and sell it into the market at the offering price of €20. Here, the Underwriting Discount (or Spread) is €3.50 per share.

*Underwriting Fee*: another name for an Arrangement Fee.

*Undrawn Commitment*: in a Revolving Facility or Delayed Draw Term Facility, the loans the Lenders have agreed to make available to the Borrower, but that the Borrower either has not yet requested, or in the case of a Revolving Facility, may have requested but has paid back (and therefore has the option to reborrow in the future). Interest is not payable on undrawn committed amounts, but a Commitment Fee will be due in some amount lower than the Interest that would be payable if the loans were drawn. The Commitment Fee compensates the Lenders for keeping the funds available for the Borrower.

*Unrestricted Subsidiary*: subsidiaries to which most of the Terms and Conditions/Indenture Covenants do not apply. For this reason, the Covenants place a firewall between the Restricted Subsidiaries and the Unrestricted Subsidiaries, and transactions between an Issuer and its Unrestricted Subsidiaries will be treated similarly to transactions with unrelated parties. See Restricted Subsidiaries.

*Upfront Fee:* another name for an Arrangement Fee.

*Upstream:* from a subsidiary to a direct or indirect parent company, for example, a Guarantee granted by a subsidiary to support the debt of the parent is an Upstream Guarantee. See also Cross-stream and Downstream.

*US Exchange Act:* the US Securities Exchange Act of 1934, which governs the continuing and reporting obligations of companies with registered Securities.

*US Investment Company Act:* a regulatory measure for the Investment Companies industry, which the SEC believed to require more than the disclosure treatments of the '33 and '34 Acts. The framework includes examination, supervision and audit by the SEC and a highly inflexible federal substantive law of corporations with which almost no operating company can comply, including significant restrictions on affiliate transactions, extensive reporting requirements, regulations regarding capital structure and requirements for issuance of debt or equity, shareholder approval of certain agreements, rules relating to custody of company assets and rules on the composition and role of the board of directors. The Investment Company Act contains a number of exemptions and gives the SEC broad authority to exempt any person, security or transaction from all provisions of the Investment Company Act.

*US Securities Act:* the US Securities Act of 1933, which governs the registration of Securities.

*Use It or Lose It:* another name for Snooze-you-lose.

*Use of Proceeds:* the specification in the financing documentation of what the proceeds of the financing will be used for, and potentially a Rep and Covenant that this is in fact where proceeds will go.

*Usury Laws:* refers to the charging of an Interest Rate on a loan which is so high that it is illegal (and in certain jurisdictions criminal), irrespective of whether (for example) the Borrower was prepared to agree to it because it is a sophisticated Borrower which understands that this is the Interest Rate it is necessary to pay in the international financial markets in view of the subordinated, PIK nature of the loan, or because its thumbs are being crushed in a vice at the time. By way of example, French law disappplied usury rate limitations in 2003 for most types of loans to most French corporate entities, although the requirement formally to advise the Borrower in writing of the TEG of its loan remains; however, in contrast, Italian law restricts the Interest Rate to 150 per cent of the average Interest Rate applicable to specific credit transaction categories laid down by law and updated quarterly by the Treasury Ministry.

*Value Added Tax:* a tax on supplies of goods and services. Typically, finance transactions and transactions relating to the granting of credit are often exempt from VAT, such that VAT is not charged in respect of such supplies. As a consequence, the supplier is restricted in its ability to

reclaim VAT which it has itself incurred on supplies made to it.

**VAT:** acronym for Value Added Tax.

**VC:** Britain's highest award for gallantry introduced by Queen Victoria in the Crimean War awarded to very brave people in HM's armed forces for valour "in the face of the enemy". Eleven VCs were awarded in a single action at Rorke's Drift (think Zulu starring Michael Caine) in 1879. Also an acronym for Venture Capitalists, who display a completely different type of bravery (if indeed that is the right word) when investing their money in start-ups.

**VCOC:** acronym for Venture Capital Operating Company, a type of operating company satisfy requirements under the ERISA plan asset regulations.

**VCOC Rights:** certain Mezz Lenders are funds which have significant US pension plan investors. In order to avoid issues under ERISA for these investors, the Mezz Financing needs to qualify for an exemption from ERISA; the most commonly used exemption in these situations is to structure the Mezz Financing as an investment in a VCOC. This is achieved by giving VCOC Rights to these Mezz Lenders in a VCOC Side Letter. What are these rights? Well, they are direct contractual rights between the Mezz Lender and the Borrower/Operating Company that provide the Mezz Lender with enhanced "management rights" providing the Mezz Lender with a right to substantially participate in or substantially influence the management of the Borrower/Operating Company. In practice, this typically requires the Mezz Lender to obtain the following three rights: (i) Board Observer Rights, (ii) the right to receive more information than is required by the terms of the Credit Agreement and (iii) the right to consult with management.

**VCOC Side Letter:** a letter signed by (i) a Mezz Lender that is a VCOC fund and (ii) the Borrower/portfolio company granting the Mezz Lender VCOC Rights. Satisfies the requirement that VCOC Rights be direct contractual rights between the Mezz Lender and the Borrower/Operating Company.

**VDD:** acronym for Vendor Due Diligence.

**Vendor Due Diligence:** Due Diligence performed by a vendor on behalf of all potential purchasers and on which the ultimate buyer will be entitled to rely. Prevents each purchaser from having to do its own Due Diligence and therefore (it is claimed) ensures a smoother sales process.

**Vendor Loan:** name given to a Subordinated loan made by the seller of a Target to the Bidco, which bridges the gap between the funds available to the Bidco and the required purchase price, *i.e.*, effectively a partial reinvestment of the sales proceeds by the Vendor but as debt rather than equity thereby having Priority over the equity holders.

**Venture Capitalist (or VCs):** a person or investment firm that provides early stage funding to a company in return for an equity interest. Often

Venture Capitalists will bring technical or other expertise to the company. Irreverently sometimes referred to as vulture capitalists on the basis VCs may take a large equity position for a relatively low price.

*Voluntary Prepayments:* prepayments of a Term Loan made at the Borrower's option that are not required pursuant to the Amortisation Schedule. Compare Mandatory Prepayments.

*Waiting Period:* the period in an SEC-Registered Offering after the Registration Statement has been filed with the SEC when offers are permitted but sales are prohibited (*i.e.*, the Marketing Period). This is the period when the SEC reviews the Registration Statement. The Issuer must continue to be very careful about what it says during the Waiting Period.

*Waiver:* a waiver of a Default under a Credit Agreement or the Terms and Conditions or Indenture. In contrast to an Amendment that actually amends the text of a Credit Agreement or the Term and Conditions or Indenture going forward, a Waiver generally applies to a one-time Default and may last only for a limited period of time.

*Wakala:* an Islamic finance term for an agency relationship, similar to a conventional agency relationship.

*Wakala al Mutlaqa:* an Islamic finance term for an absolute power of attorney.

*Wakil:* an Islamic finance term for an agent (similar to an agent in a conventional financing) under an agency (Wakala) arrangement.

*Warrants:* derivative Securities setting forth a time period within which the holders may buy Securities from the Issuer at a given price (the "strike" or "exercise" price); sometimes a feature of Mezzanine Financing that provides a higher return to Mezzanine investors.

*Waterfall:* sometimes called a "payment waterfall", generally refers to the order of application of funds or proceeds. Think of the funds in question as water running down a flight of stairs with a bucket placed on each step — the water (money) flows to the top step first and fills that bucket before the overflow continues on to the second step, and fills that bucket before proceeding to the third step, etc. So, if your deal is that you get paid before someone else, your proverbial bucket will be placed higher in the waterfall. The person most likely to be left with an empty bucket (or in practice, an unpaid obligation) is of course whoever is at the bottom of the waterfall.

*Weighted Average Life:* this is shorthand for "weighted average life to maturity" which is calculated based on the average of the time remaining for the remaining principal payments on a debt obligation. In the case of most High Yield Bonds, this is easy since they do not have any Amortisation requirements — it is simply the time remaining until the Maturity Date of the Bonds. Also known just as the Average Life.

*Well Known Seasoned Issuer (WKSI):* WKISs are large-scale, seasoned Issuers that benefit from special treatment in public Securities offerings under SEC regulations. In particular, WKISs are able to make offers to sell Securities before a Registration Statement has been filed and without regard to previously applicable Gun Jumping restrictions. WKISs were introduced as part of Securities Offering Reform. See Latham & Watkins publication: Christmas in July — the SEC Improves the Securities Offering Process (August 2005), available at [www.lw.com](http://www.lw.com).

*WGL:* acronym for Working Group List.

*White Knight:* in a hostile takeover situation, a friendly bidder who makes a rival bid for the Target in an effort to prevent a hostile bidder from acquiring the Target.

*White Squire:* in a hostile takeover situation, a person who acquires a significant stake in a company either by purchasing existing shares or subscribing for new shares, gaining a stake large enough to block a hostile takeover bid.

*Whitewash:* the name given to the statutory process which private companies in England and Wales could go through in order to be able to give lawful Financial Assistance. Involved lots of pieces of paper. No longer relevant given recent changes to the Financial Assistance provisions in England and Wales.

*Winding Up:* the process of liquidating a company involving the appointment of an independent Insolvency practitioner (the liquidator) who realises the assets of a company in order to make a distribution to the creditors of that company.

*Withholding Tax:* tax levied frequently, but not exclusively, in respect of recurring payments, collected by requiring the payer to make a deduction on account of income tax before making the payment. It frequently applies to payments of dividends (although not those paid by UK companies, for example), interest and royalties. This liability is often reduced or eliminated under a Double Taxation Treaty. Essentially a method of tax collection, rather than a different tax as such.

*WKSI:* acronym for Well Known Seasoned Issuer.

*Working Capital:* a measure of a company's short-term Liquidity, calculated by subtracting current liabilities from current assets.

*Working Capital Facility:* a Revolver used by the Borrower to fund Working Capital needs.

*Working Group List:* a list containing the contact information for each banker, attorney, accountant and Issuer or Borrower representative working on a particular deal.

*Wrapped Bond:* a Bond that is insured by Monoline Bond Insurance.



*Yank-a-Bank*: a Credit Agreement provision that allows the Borrower to throw a Lender out of a Credit Facility if it won't agree to an Amendment. Certain Credit Agreement Amendments (including Amendments affecting pricing of the loans) cannot be achieved without approval of all Lenders. Yank-a-Bank provisions enable the Borrower to squeeze out dissenting Lenders in a 100 per cent vote situation so long as the Majority Lenders (or a higher threshold of the Lenders) have approved the Amendment. The "yanked" Lender is replaced with a new Lender who does approve the Amendment and is willing to purchase the outstanding loans and commitments of the yanked Lender, usually at Par. The concept has over time been further expanded in certain transactions to allow repayment of Lenders rather than replacement and/or to apply to Super Majority Lender decisions. "Yanking" can also happen to Defaulting Lenders, Lenders who make claims under Increased Cost Clauses and Lenders claiming Gross-Up.

*Yield*: the total rate of return to a Bond investor (which may include both Interest payments and accrual of Original Issue Discount or market discount). The Yield on a Bond may be higher or lower than the Coupon.

*YTD*: acronym for year-to-date.

*Zero Coupon Bond*: a Bond that is issued with substantial OID and calls for no Interest payments at all — just a single principal payment at maturity. See also Discount Notes.

*Zone of Insolvency*: no, this is not a bad TV sitcom. When a previously solvent Borrower gets close to Insolvency, the courts in certain jurisdictions (including the US and UK) have held that the board of directors' fiduciary duties morph to include (or in certain circumstances are owed exclusively to) the Borrower's creditors. Prior to entering the Zone of Insolvency, Borrowers do not owe their creditors any fiduciary duties.

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