Preface

The International Financial Products and Services Committee ("IFPSC") publishes a newsletter on a quarterly focusing on new international and comparative legal, regulatory, and supervisory issues related to financial institutions worldwide.

The next Issue of the IFPSC’s newsletter will be issued in December 2016.

If you have any comments or are interested in taking a part of the next newsletter or any other IFPSC’s publications, please do not hesitate to contact the Publications and Year-In-Review Vice-Chair at IFPSC who is currently:

Mohamed Hashish
Partner
Soliman, Hashish & Partners, Egypt
m.hashish@shandpartners.com

NOTICE: The materials and information in this newsletter do not constitute legal advice. This newsletter is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments contained in this newsletter are expressed by the authors thereof and do not necessarily reflect any opinion of the American Bar Association, their respective firms or the editor.
Index of Contents

Financial Institutions Recovery Plans in Brazil ...................... 4
I. Introduction .............................................................................. 4
II. Recovery Plan’s Content ...................................................... 5
III. Monitoring Program ............................................................ 5
IV. Stress Scenarios ................................................................. 6
V. Recovery Strategies ............................................................. 6
VI. Communication Plan .......................................................... 6
VII. Barriers and Risks ............................................................... 6
VIII. Governance Mechanisms .................................................. 7
IX. Final Considerations .......................................................... 7

Latest amendments to the financial laws in Egypt ............... 9
I. Foreign currency shortage ...................................................... 9
II. Legislative measures to fight the parallel foreign currencies market ......................................................... 9
III. Prepayment of microfinance loan ....................................... 10
IV. Exemption from VAT Tax .................................................... 10

What’s Next for Post-Brexit Fund Management in Ireland?.. 11
I. Member State Regulated Market ........................................... 11
II. UK MiFID firms managing Irish Funds ............................. 12
III. Investment Services to Irish retail clients ......................... 12
IV. Distribution capacities for UK firms managing Irish UCITS 12
V. What about AIFs? ............................................................... 13

Secured Lending in Romania ................................................. 14
1. Trends and regulatory climate ............................................. 14
2. Structuring a lending transaction ....................................... 15
3. Cross-border lending ......................................................... 18
4. Security – general ............................................................. 19
5. Asset classes used as collateral for security ....................... 20
6. Enforcement ......................................................................... 22
Financial Institutions Recovery Plans in Brazil

By:

Walter Stuber
Walter Stuber Consultoria Jurídica
São Paulo, Brazil
walter.stuber@stuberlaw.com.br

Continuing the process of adoption in Brazil of the international standards of prudential regulation, on June 30, 2016 the Brazilian Monetary Council (Conselho Monetário Nacional – CMN) issued Resolution No. 4,502 (CMN Res. 4,502/2016), laying down minimum requirements to be observed in the preparation and implementation of recovery plans for financial institutions and other entities authorized to operate by the Central Bank of Brazil (Banco Central do Brasil – Bacen). This is an important step to incorporate to the Brazilian regulation the best international regulatory practices, in accordance to the recommendations of the Financial Stability Board (FSB).

I. Introduction

According to CMN Res. 4,502/2016, systemically important institutions must comply with minimum requirements in the preparation and implementation of recovery plans, such as the identification of critical functions for the Brazilian Financial System (Sistema Financeiro Nacional - SFN), the production of stress scenarios and robust indicators, the definition of a clear and transparent governance, assessment of possible barriers to recovery and preparation of communication plans with key stakeholders.

Systemically important institutions are multiple banks, commercial banks, investment banks and saving banks whose Total Exposure-to-Gross Domestic Product (TE/GDP) ratio defined by Bacen on December 31 of the penultimate year in relation to the current year exceeds 10%.

These institutions must develop recovery plans annually and promote independent review every three years. Top management must closely monitor the whole process of preparing and leading its implementation whenever they deem necessary.

Currently, financial institutions are obliged to draw up contingency plans of capital and liquidity, and to conduct stress tests within the capital and risk management of credit, market and liquidity. It is expected that the adopted new rules make such exercises more comprehensive and robust, enabling effective planning recovery strategies by systemically important financial institutions and, ultimately, contributing to the strength, stability and proper functioning of the SFN.

The scope of the recovery plan will include: (i) all members of the same prudential conglomerate, in accordance with the Accounting Plan of the Institutions of the SFN (Plano Contábil das Instituições do Sistema Financeiro Nacional - Cosif); and (ii) the entities that perform critical functions or essential services (as defined below) belonging to a group integrated by an institution subject to the requirements established in CMN Res. 4,502/2016.

---

1 The TE/GDP ratio is defined in accordance with Bacen Circular No. 3,768, of October 29, 2015. For determination of the TE/GDP ratio for 2016, the Total Exposure value must match the value of the total assets in the base date of December 31, 2014 registered in the individual balance sheet or in the balance sheet of the financial conglomerate, if the institution integrates a financial conglomerate, in accordance with Cosif. As of January 1st, 2017, any institution that fits the criterion set out in CMN Res. 4,502/2016 and exceeds the above-mentioned threshold (10%) shall prepare and submit to Bacen the recovery plan until December 31 of the year of the framework.
As foreseen in the timeline established by CMN Res. 4,502/2016, these institutions will have until December 31, 2017 to adapt to the new rules in a process of gradual transition, with intermediate steps which will allow Bacen to monitor closely the effective implementation of such plans.

Bacen may determine other financial institutions and similar entities not framed in the criterion established in CMN Res. 4,502/2016 to also present a recovery plan, if it deems that the institution plays a critical role. The deadline for submission of such recovery plan will be set by Bacen and may not be less than twelve months.

II. Recovery Plan’s Content

The recovery plan must contain at least a detailed description of the following items: (i) critical functions and essential services performed by any entity included in the scope of the recovery plan; (ii) monitoring program; (iii) stress scenarios; (iv) recovery strategies and criteria and procedures for its operation; (v) communication plan; (vi) barriers and risks; and (vii) governance mechanisms.

Critical functions are activities, operations or services whose interruption would endanger the financial stability and the functioning of the real economy.

Essential services are activities, operations or services not classified as critical functions whose discontinuity might compromise the viability of the systematically important institutions.

The inclusion in the recovery plan of other activities, operations or services performed by any entity included in the scope of the recovery plan may be determined when Bacen understands that the discontinuance of the activity, operation or service can compromise the financial stability and the functioning of the real economy or the viability of the financial institution.

The adoption of the recovery strategies by the institution must be associated with the achievement of critical levels defined in the monitoring program and the materialization of the potential stress situation.

III. Monitoring Program

The monitoring program will include indicators and other quantitative and qualitative information which: (i) permit the appropriate monitoring of the risks incurred by the institution; (ii) reflect the magnitude and speed of change of the economic-financial situation and liquidity of the institution; (iii) allow the timely adoption of the recovery strategies; (iv) consider the horizon required for the recovery strategies to take effect; and (v) consider the business model, the nature, complexity and risk profile of the institution. The monitoring program must establish critical levels for the most relevant indicators in order to monitor the risks and eventual implementation of the recovery plan. It shall monitor at least the following indicators: (i) those that demonstrate the actual or potential deterioration in the ability of the institution to meet its capital requirements; (ii) those that point to real or potential deterioration in the ability of the institution to meet its liquidity needs and financing; (iii) those that show the real or potential variation of result or of changes in the pattern of sources of income or expenditure; (iv) those that reflect the quality of active operations and its concentration on sectorial and geographical terms, as well as of counterparties; (v) those that reflect the concentration of funding sources, their level of stability and their costs; (vi) those that signal activities or events that may significantly affect the image and the operational or financial continuity; (vii) those that point legal risks,
contagion risks and the effectiveness of internal controls; and (viii) others determined by Bacen.

The institution will establish appropriate monitoring processes and systems of indicators, critical levels and other information included in the monitoring program and linked to the recovery plan. Bacen may request data on the indicators and other information of the monitoring program, in the form and periodicity to be defined by it.

IV. Stress Scenarios

The stress scenarios must be comprehensive and contemplate the events that could threaten business continuity and viability of the institution. They must contain at least chances of devaluation of assets, reduction of raising capacity, deteriorating the capacity to generate results, deteriorating the situation of liquidity, or resulting from instabilities of systemic or idiosyncratic nature, either domestic or foreign. In order to test the adequacy of the critical levels defined in the monitoring program, the feasibility and effectiveness of recovery strategies, the stress scenarios must include hypothesis of infeasibility of the institution's business model. Bacen may determine the inclusion of additional stress scenarios in the recovery plan and the completion of stress tests that consider these scenarios. The deadline for the inclusion of scenarios and stress tests will be set by Bacen according to the complexity of the circumstances of each case.

V. Recovery Strategies

The recovery plan must provide for a comprehensive and robust set of recovery strategies in response to different stress scenarios. The institution will evaluate the inclusion at least of the following recovery strategies: (i) strengthening of capital and liquidity situation; (ii) sale of assets; (iii) debt refinancing; (iv) restructuring of liabilities; (v) access to financial support of entities belonging to the same group, if any; (vi) access to financial assistance of liquidity lines, if any, regardless of the nature of the source; (vii) changes in corporate or organizational structures, on operational strategy or business model of the institution; and (viii) maintenance of the supply of services rendered by third parties, which are required for operational continuity of the institution.

It must also contain the grounds of feasibility and an analysis of the expected impact of adoption of each recovery strategy individually and, when appropriate, of the joint adoption of more than one strategy. The grounds of the feasibility and the impact analysis should highlight the time required for the recovery strategies to take effect and the expected costs and benefits.

VI. Communication Plan

The communication plan aims to contribute to the effectiveness of the strategies set out in the recovery plan and will have to consider the appropriateness, adequacy and timeliness of communication with stakeholders throughout the process of implementation of the recovery plan.

VII. Barriers and Risks

The recovery plan must identify any barriers to the effectiveness of the recovery strategies and the risks associated with their implementation. When the institution forwards the recovery plan to Bacen, it must indicate the actions to be implemented to eliminate or mitigate the
barriers and risks associated with their implementation. The deadlines associated with the adoption of these actions will be presented to Bacen on the occasion of the delivery of the recovery plan.

VIII. Governance Mechanisms

It is paramount to describe the necessary governance mechanisms for the implementation of the recovery plan. The drafting and review of the recovery plan must be integrated with information management processes, risk, capital and crisis management and with the institution’s contingency and capital plans. Bacen may determine to the institution that the drafting processes of the recovery plan and its revisions be evaluated by a specific report of an independent auditor.

The recovery plan must be submitted for review by an independent unit of the areas responsible for its preparation. This review will have to: (i) involve the evaluation of the critical functions and essential services, the suitability and robustness of the monitoring program and the stress scenarios, the mapping of barriers and risks to the effectiveness of the recovery strategies, and other governance criteria and procedures associated with the operation of the plan; and (ii) be held every three years, at least, or whenever there is any change in the economic and financial setting, operating strategies, business model, organizational structure or processes linked to critical functions and essential services.

Furthermore, the recovery plan must be approved and reviewed by the Board of Officers (Diretoria) and by the Board of Directors (Conselho de Administração), if any\(^2\), annually or whenever occurs a change in the economic and financial setting, operating strategies, business model, organizational structure or processes linked to critical functions and essential services.

The Board of Officers and the Board of Directors (if any) shall: (i) ensure the timely identification of those responsible for implementation of the recovery plan; (ii) have a comprehensive and integrated understanding of the critical functions and essential services, of the indicators and other information in the monitoring program, stress scenarios, recovery strategies, barriers and risks associated with the plan, ensuring their compatibility with the strategic planning of the institution; and (iii) ensure the development of feasible and effective recovery strategies, including those involving other companies of the same economic group.

In addition, the Board of Officers and the Board of Directors (if any) are responsible for the adoption of the strategies set out in the recovery plan. The specific responsibilities of each Officer and member of the Board of Directors (if any), must be detailed in the recovery plan. The Officer responsible for servicing the requirements established in CVM Res. 4,502/2016 (Officer in charge) must inform immediately to the Board of Officers and, when applicable, to the Board of Directors and the Audit Committee, whenever the above-mentioned indicators reach the critical levels established in advance.

IX. Final Considerations

The financial institutions and similar entities must: (i) indicate the Officer in charge; and (ii) send their recovery plans to Bacen annually, or whenever there is a relevant change, within 30 days after its approval by the Board of Officers and by the Board of Directors (if any).

The following must be timely communicated to Bacen: (i) the achievement of critical level established in the

\(^2\) Not all the institutions will have a Board of Directors. Some have only a Board of Officers.
monitoring program; (ii) the materialization of a stress situation; (iii) the decision for the adoption of recovery strategy; and (iv) a reasoned decision for not adopting any of the recovery strategies, whenever happens any of the situations mentioned in items (i) or (ii) above. Bacen can fix a specific term to each mode of communication contemplated herein.

Bacen may, at its option: (i) determine adjustments to the contents of the recovery plan; and (ii) determine the total or partial execution of the recovery plan, in order to maintain the solidity, stability and proper functioning of the SFN. The recovery plan must be submitted to Bacen until December 31, 2017, subject to the following schedule: (i) until October 31, 2016: indication of the Officer in charge; (ii) until December 31, 2016: presentation of the detailed description of the mechanisms of governance; (iii) until March 31, 2017: presentation of the detailed description of the critical functions and essential services; (iv) until June 30, 2017: presentation of the detailed description of the monitoring program and the stress scenarios; and (v) until December 31, 2017: presentation of the detailed description of the recovery strategies and the criteria and procedures for its operation; and of the communication plan and the barriers and risks.

From July 1 of 2018, a brief description of the recovery plan must be available in the specific section of the institution’s webpage that contains information relating to risk management, as defined by Bacen in accordance with the rules in force. The location of this information must be reported together with the published financial statements. The institution is waived to include strategic information in this brief description.

All the documents that support the servicing of the provisions of CMN Res. 4,502/2016 must be kept at the disposal of Bacen for a period of five years counted from the date of delivery of the recovery plan.

---

3 The implementation of the recovery plan does not prevent the adoption by Bacen of certain preventive prudential measures set forth in CMN Resolution No. 4,019, of September 29, 2011, concurrently or successively, which include: (i) adoption of additional operating controls and procedures; (ii) the degree of risk reduction of exposures; (iii) compliance with additional values to the Required Reference Equity (Patrimônio de Referência Exigido - PRE); (iv) compliance with more restrictive operating limits; (v) recovery of liquidity levels; (vi) limitation or suspension of: (a) increase in the directors’ remuneration; (b) payments of portions of variable remuneration of the administrators; (c) distribution of results in amount above the minimum legal limits; (vii) restriction or suspension of: (a) practice of operating modes or certain species of operations, active or passive; (b) exploring new business lines; (c) acquisition of direct or indirect participation in the capital of other financial or non-financial companies; (d) opening of new dependencies; (viii) disposal of assets.
Latest amendments to the financial laws in Egypt

By:

Mohamed Hashish
Partner
Soliman, Hashish & Partners, Egypt
m.hashish@shandpartners.com

“Egypt is a strong country with great potential but it has some problems that need to be fixed urgently”\(^4\). This is what Mr. Chris Jarvis, Mission Chief for Egypt and an Advisor at the International Monetary Fund (“IMF”)’s Middle East and Central Asia Development, said following the official announcement of reaching a staff-level agreement on a three-year Extended Fund Facility in the amount of about USD 12,000,000,000 (twelve billion United States dollars), which is a very respected and accurate statement.

I. Foreign currency shortage

I believe that one of the problems Mr. Jarvis refers to is the foreign currency shortage that Egypt has been facing for more than a year.

In my personal opinion, this foreign currency shortage is due to a number of different reasons\(^5\) including the neglected decisions that were taken by the latest ex-governor of the Central Bank of Egypt (“CBE”) that imposed limits for depositing foreign currencies in cash in any account with any bank registered with CBE, namely USD 10,000 (ten thousand United States Dollars) per day and USD 50,000 (fifty thousand United States dollars) per month (the “FCX Restrictions”).

These FCX Restrictions were into force for more than a year as of February 2015 until the current CBE’s Governor revoked them in March 2016.

As a consequence of the FCX Restrictions, a parallel foreign currencies market was created in Egypt resulting in approximately 30% gap between the exchange rates at the official and parallel markets.

According to some reliable national and international newspapers, Egypt is required to fully float the Egyptian pounds in order to get the approval of the IMF’s Executive Board on the contemplated USD 12billion Facility and, therefore, the Egyptian Government is currently overloaded with ending (or at least controlling) the parallel foreign currencies market.

II. Legislative measures to fight the parallel foreign currencies market

The Banking Law No. 88 of 2003 has recently been amended by Law No. 66 of 2016 (the “Egyptian Banking Law”) to strengthen the penalty for dealing with the parallel foreign currencies market. In this regard, the current Foreign Direct Investment in Egypt. However, this article should focus on issues related to the financial institutions in Egypt as this newsletter covers same only.

\(^4\) An official statement issued by IMF on August 11, 2016, a full text of which is available on http://www.imf.org/en/News/Articles/2016/08/11/09/49/pr16375-Egypt-IMF-Reaches-Staff-Level-Agreement-on-a-Three-Year-USD12-Billion-Extended-Fund-Facility

\(^5\) This includes also many other different reasons such as lack of exportation from Egypt, the current inactive international tourism traffic in Egypt and the total value of

9
according to the amended Article 126 of the Banking Law No. 88 of 2003, any person deals with foreign currencies outside the licensed banks or any other licensed entities (i.e. outside official market) shall be liable for imprisonment for not less than three (3) years and not more than ten (10) years in addition to a fine either (i) between EGP 1,000,000 (one million Egyptian pounds) (approx. USD 112,994.35) to EGP 5,000,000 (five million Egyptian pounds) (approx. USD 564,971.75), or (ii) equivalent to the transaction amount as well as the confiscation of such amount, whichever higher.

In general, the Egyptian Law does not recognize the criminal liability of corporation and, therefore, the natural person who is responsible for the actual management of a corporate entity shall be criminally liable for any crime that is committed as a result of his management of the said entity.

III. Prepayment of microfinance loan

The Egyptian Financial Supervisory Authority ("EFSA") has recently issued two (2) new Decrees under Nos. 15 and 16 of 2016 amending the rules and regulations for providing microfinance services in Egypt (the "Prepayment Decrees").

According to the said Prepayment Decrees, the licensed microfinance providers in Egypt are now required to accept any request from for prepaying any microfinance loan with applying a prepayment fee that does not exceed 5% of the outstanding amount of the relevant microfinance loan. In this case, the relevant microfinance provider may also deduct the finance cost of the month in which the prepayment is made.

IV. Exemption from VAT Tax

A new law under No. 67 of 2016 has just been issued and enforced in Egypt as of September 8, 2016 applying VAT Tax to all products and services, with some exceptions, (the "VAT Law").

Before the adoption of the new VAT Law, there was no VAT Tax in Egypt but only a General Sales Tax at a standard rate of 10% was levied on locally manufactured goods or imported goods and on services.

The new VAT Law revoked the General Sales Tax Law No. 1 of 1991 and applied VAT Tax at a standard rate of 13% for the financial year 2016/2017, which rate shall be increased to 14% as of the financial year 2017/2018. However, according to the VAT Law, the following financial products and services are exempted from the new VAT Tax:

- Banks transactions\(^6\).
- Currency exchange through banks and exchange entities\(^7\).
- Banking services provided by postal offices\(^8\).
- Non-banking financial services that are being provided under the supervision of EFSA.

\(^6\) It is not clear from the VAT Law whether or not this exception shall also be applied to non-resident international institutions providing services to companies in Egypt.

\(^7\) Please see the footnote above.

\(^8\) Please see the footnote above.
We now know the result of the UK’s vote but none of us - the UK included - know what the consequences are or might be. We have seen market turmoil but that has calmed down at least for now, but the fallout from the Brexit vote will remain and it may yet prove to be a messy divorce.

In the Asset Management and Investment Funds sector the impact will very much depend on where one’s target market is and what one’s longer term objectives may be. Yes, it is true that we don’t know the terms (let alone the outcome) of the exit negotiations but it would appear very strange to us if, having said all that it has, the UK would end up in the EEA. We don’t see the UK in the EEA but very little is certain at this stage other than that the UK will not be within the EU.

So what might some of the more immediate consequences of Brexit be for the Asset Management and Investment Funds sector?

I. Member State Regulated Market

An initial consequence is that the London Stock Exchange will not be an EU Member State regulated market. That will have an impact on market abuse rules as well as on admission to dealing and public offer rules and, in addition to the Market Abuse Directive, the Prospectus Directive and the Transparency Directive. Funds and their managers will need to look at the impact of Brexit on audit regulations and on so much more.

Be wary that some little things can trip you up. A UCITS, for example, can generally only invest in instruments which are listed or traded on the recognised exchanges set out in its prospectus. Those lists capture all markets and exchanges in EU Member States and also EEA members, but without naming them individually. If the UK is not in the EU and does not join Iceland, Liechtenstein and Norway in the EEA, then until the prospectus is changed to list the UK markets by name, investing on those markets is not allowed.

Check your investment policies too!
II. UK MiFID firms managing Irish Funds

What about UK asset managers managing Irish domiciled funds? At one level, there should be no immediate change.

Irish law as it currently stands allows an asset manager from outside the EU to provide asset management services to non-natural person Irish based clients without requiring a separate authorisation. So a UK firm acting as an asset manager to an Irish UCITS or AIF will still be fine but will need to go through a Central Bank approval process (under funds legislation), being treated no differently to (or no better than) for example, a US asset manager. Those already approved should not require any new approvals.

III. Investment Services to Irish retail clients

This will be a problem. Without an EU passport or a local Irish head office authorisation, selling to/servicing retail clients in Ireland may face a big problem so it is worth careful consideration with your advisers.

IV. Distribution capacities for UK firms managing Irish UCITS

Remember that fund sponsors set up funds which they seek to manage and which they seek to distribute. Where and to whom they distribute are key factors in any discussion of distribution post-Brexit.

If you are a UK manager managing an Irish UCITS which you sell mainly or exclusively in the UK, the impact on you may be minimal (although remember that to be a UCITS the fund has to be promoted for sale somewhere within the EU) as UK rules will govern your distribution activities as well as the capacity of the UCITS itself to enter the UK market.

There will likely have to be a new notification process for the UK, new arrangements entered into between the Central Bank of Ireland and the Financial Conduct Authority in the UK and, possibly a UK Supplement for the prospectus. None of that should be problematic.

However, if the fund sponsor is looking to sell into the EU the position changes. The EU distribution capacity of a UK investment manager (given its role as a promoter or sponsor of the Irish UCITS) will be negatively impacted as it will not (unless the exit negotiations provide a solution) have the benefit of any EU passport to do so. That will mean that it will either need to engage suitably authorised distributors in the local markets who have the requisite capacity or to set up its own EU based distributor (or UCITS ManCo) or look to more imaginative solutions like, for example, having board members of the UCITS represent it in cross border sales, given that it is the UCITS itself which has the passport. A UCITS may even hire its own employees to market it but remember that you will need to look at where sales charges go and the
impact of such proposals on the tax status of the UCITS, not to mention employee rights.

V. What about AIFs?

In the case of the alternative investment fund (AIF) industry, the position will also be somewhat different.

Remember, for a start, that in the AIF space the product doesn't get a passport. The two passports under AIFMD go with the AIFM. So it's quite different to UCITS.

Noting that there are two AIFM passports, one of managing and one of marketing, a UK AIFM will probably become what is known as a non-EU AIFM and so may well end up being treated just like a non-EU AIFM from the US.

It will not have the capacity to market its EU domiciled AIFs cross-border within the EU. It also will not have any passport to manage cross-border within EU but should be able to act as investment manager to Irish funds in the same way that a US manager can.

But if you want more….

All of the above might not be a problem for UK based UK centric managers.

However, a UK manager with plans to develop a business off the back of the large EU marketplace or a US manager, for example, looking to establish a European beachhead for its fund products or asset management services, might want to consider a jurisdiction which facilitates growing your business.

What might that involve? You might want to consider:

- setting up a UCITS Manco or AIFM (or Super ManCo) in Ireland.
- using a third party AIFM (but that may not solve practical distribution issues).
- putting your product on a third party platform (but that may not optimal for future growth of your business).

Other options or solutions may be available.

And even Governance needs to be considered.

So what's the upshot of all of the above. It seems to be no changes for those UK managers who are UK centric, which presumably they will be happy with. For those UK managers who see the EU as a real distribution opportunity or for non-EU managers looking to establish EU based operations, it looks like Ireland will be a pretty good home.
Secured Lending in Romania

By:
Sabin Volciuc
Partner
Volciuc-Ionescu, Bucharest, Romania
sabin.volciuc@volciucionescu.com

1. Trends and regulatory climate

1.1 Trends

What is the current state of the lending market in your jurisdiction and have any new trends emerged over the last 12 months?

The lending market picked up during the second quarter of 2016, following a slowdown at the end of 2015.

Bank debt continued to be the most common form of lending. International banks and multilateral development banks have been active alongside local banks, which have increasingly been cleaning their balance sheets (including through several deals involving large non-performing loan portfolios) following the recommendations of the National Bank of Romania and in preparation for expected growth in lending. There is generally high liquidity in the Romanian banking sector.

There has been limited lending through the capital markets (ie, by issuing bonds), but alternative lenders – including mezzanine funds, private debt funds, business development companies, insurers, asset managers and finance companies – are scouting the market and have already concluded deals.

The main sectors with significant secured lending include real estate (in particular, shopping malls, office buildings and logistics centres), agriculture, pharmaceuticals, production, retail and technology.

On the regulatory side, since May 2016 legal developments in consumer banking have kept local banks busy with impact assessments and new processes and procedures in relation to a new law regarding the transfer of mortgaged real estate in lieu of payment by consumers. Further, in late 2016 a new law on the insolvency of natural persons is expected to enter into force – the first of its kind in Romania. These developments have unfortunately shifted the focus from business development.

1.2 Regulatory activity

Is secured lending a regulated activity in your jurisdiction?

Lending is a regulated activity in Romania and may be carried out on a professional basis only by credit institutions and non-bank financial institutions licensed by the National Bank of Romania. EU licensed credit institutions may also provide lending in Romania on a professional basis by establishing a branch or being directly subject to passporting.

Lending on a professional basis without holding a proper licence constitutes a criminal offence.
Are there any specific regulatory issues which a prospective borrower should consider when arranging or entering into a secured loan facility?

As for any transaction, a prospective borrower should ensure that it has all necessary corporate approvals. The approval level should be set out under the borrower’s articles of association; in practice, this is either a shareholders’ resolution or a board decision. In case of joint stock companies, a shareholders’ resolution is mandatory if the facility exceeds:

- 50% of the book value of the assets for closed joint stock companies; or
- 20% of the total immobilised assets less receivables for listed joint stock companies

Are there any specific regulatory issues which a prospective lender should consider when arranging or entering into a secured loan facility?

Lenders that also intend to take the role of agent in connection with a facility should ensure that such business is covered by their licence.

Are there plans or proposals for reform or significant changes to the regulatory landscape in this area?

No.

2. Structuring a lending transaction

2.1 General

Who are the active providers of secured finance in your jurisdiction (eg, international banks, local banks or non-bank financial institutions)?

The usual mix of lenders is present in Romania. While international and multilateral development banks generally look for larger tickets, local banks aim to cover all segments of the market. Non-bank financial institutions are also active in secured finance and there are limited alternative lenders as well.

Is well-established market-standard facility documentation used in your jurisdiction for secured lending transactions?

There is no generally recognised Romanian law standard facility documentation (eg, similar to Loan Market Association (LMA) standards). Depending on the size and type of the transaction, lenders usually prefer either internally developed standard documents for bilateral loans and small deals or LMA-style facility agreements for syndicated or club loans.

2.2 Syndication

Are syndicated secured loan facilities typical in your jurisdiction?

Large Romanian companies have access to syndicated facilities (or club loans). However, in view of the usual size of Romanian companies, syndicated facilities are not as common as in developed or emerging markets.

How are syndicated facilities normally structured? Does the law in your jurisdiction allow a facility agent to be
appointed to act on behalf of other banking syndicate members?

For syndicated facilities, the usual agency structure is used to appoint the facility agent. With regard to the security agent, several structures are used in practice, including:

- the joint creditorship between lenders structure, which enables the lender that is designated as security agent to enforce all claims of the syndicate against the borrower and the other obligors;

- the agency structure, under which the syndicate appoints the security agent to act as its attorney in fact in relation to the guarantees and security interests (this structure in particular is recognised by Romanian law for moveable mortgage agreements); and

- the parallel debt structure for foreign law-governed facility agreements, under which the borrower and the other obligors undertake towards the security agent to make all payments due to all lenders, but without affecting the rights of the lenders (although this has sometimes been assimilated to joint creditorship in relation to Romanian law guarantees and security interests).

Does the law in your jurisdiction allow security and guarantees to be held on trust by a security trustee for the benefit of the banking syndicate?

Romanian law recently recognised a concept similar to a trust – the fiducia. Unfortunately, the creation of a fiducia is onerous (involving special forms and various registrations and raising certain tax issues) and, as such, it has rarely been used in practice for taking security. Thus, in syndicated facilities security agents are more common than security trustees.

2.3 Special purpose vehicle financing

Is it common in secured finance transactions for special purpose vehicles (SPVs) to be used to hold the assets being financed? Would security generally be given over the shares in the SPV or would lenders require direct asset security?

For real estate and project finance transactions, it is common for financed assets to be held by SPVs. Security is generally taken over the shares in the SPV and the assets being financed, together with all other assets of the SPV (eg, immovable assets, bank accounts and receivables).

For a standard acquisition financing structure, in the first stage there is a security interest over all shares in the target, created by the SPV holding the target, and a security interest over all present and future moveable assets of the same holding SPV; following a debt pushdown (by way of merger between the target and its holding SPV), there are additional security interests over all moveable and immovable assets of the merged target and holding SPV.
2.4 Interest

Is interest most commonly calculated by reference to a bank base rate or a market standard variable reference rate (eg, LIBOR, EURIBOR or HIBOR)? If the latter, which is the most commonly used reference rate in your jurisdiction?

The interest rate is generally calculated by reference to:
- the Romanian Interbank Offer Rate for leu-denominated facilities;
- EURIBOR for euro-denominated facilities; and
- LIBOR for US dollar-denominated facilities

Are there any regulatory restrictions on the rate of interest that can be charged on bank loans?

In general, there are no regulatory restrictions. However, with regard to default interest, a law intended to combat late payments in commercial transactions provides that abusive clauses – for example, whereby the parties establish a default interest lower than the legal default interest (ie, the legal interest set by the National Bank of Romania plus eight percentage points) – are penalised with absolute nullity.

2.5 Use and creation of guarantees

Are guarantees used in your jurisdiction?

Yes, guarantees are generally used in Romania.

What is the procedure for their creation?

Guarantees may be granted by means of a private deed or included in the facility agreement. No registration is necessary (with the exception of applicable corporate approvals).

Do any laws affect or restrict the granting or enforceability of guarantees in your jurisdiction (eg, upstream guarantees)?

Under Romanian law, there are several limitations that a lender should bear in mind when structuring guarantees granted by other members of the borrower’s group (and even third parties). These also apply to security interests.

First, as in other jurisdictions, financial assistance is prohibited in Romania. While the prohibition appears to be aimed at joint stock companies, it has been contended that it should also apply to limited liability companies.

Second, a guarantor should have a certain corporate benefit in relation to any guarantee granted to support liabilities of third parties. While there are no specific legal provisions setting out what constitutes an adequate corporate benefit for a company, the assessment should be undertaken by the management of the guarantor on a standalone basis, but may take into account the entire transaction and even the group relationship (although Romanian law does not recognise group benefit). In practice, a guarantee fee is often payable to the guarantor in order to mitigate corporate benefit concerns in relation to upstream or cross-guarantees to a certain extent.

Additional general company law limitations apply, including:
a prohibition against distribution of dividends in advance (if a guarantee would be deemed as such);
- a prohibition against misuse of the guarantor's assets; and
- in relation to guarantees granted by joint stock companies, a prohibition against guaranteeing loans of directors or companies where such persons (or their spouses or relatives up to the fourth degree) are directors or shareholders of more than 20% of the share capital.

Breach of these rules will render the guarantee null and void and may even trigger criminal liability in certain conditions.

Finally, under Romanian law a guarantor should hold and maintain sufficient assets in Romania to cover the secured liabilities. However, there is a carve-out to this requirement – in particular, if the lender requests that a specific person act as guarantor (which is the rule in practice).

2.6 Subordination and priority

Describe the most common methods of structuring the priority of debts and security.

Romanian law provides for both the structural priority of liabilities (secured versus unsecured) and contractual priority, which is usually established by means of a subordination or intercreditor agreement.

2.7 Documentary taxes and stamp duty

Are any taxes, stamp duty or other fees payable on the granting of a loan, guarantee or security interest, or on its enforcement?

No stamp duty, registration duty or similar charge in connection with the granting and enforcement of finance documents is payable under Romanian law, with the exception of:
- court and enforcement fees for proceedings in relation to the finance documents;
- fees payable to the Electronic Archive (including the operator of the Electronic Archive) and any other public register for registration of the security documents;
- fees payable for the authentication by a notary public of an immoveable mortgage agreement;
- fees payable to the relevant land books for registration of an immoveable mortgage agreement; and
- fees payable to a certified translator and notary public in connection with notarised translations into Romanian of the finance documents, if applicable.

3. Cross-border lending

3.1 Governing law

Is it more common for local law to govern the terms of the facility documentation or is the law of another jurisdiction often elected by the parties (eg, English law or New York law)?
For cross-border lending, English law commonly governs facility agreements (particularly for large financings). Austrian banks typically use Austrian law-governed facility agreements for deals in Romania. However, Romanian law has been increasingly used of late.

3.2 Restrictions

Are there any restrictions on the making of loans by foreign lenders or the granting of security or guarantees to foreign lenders?

Romanian-resident borrowers should notify the National Bank of Romania for statistical purposes in relation to mid and long-term cross-border loans.

With regard to the enforcement of security interests by foreign lenders, certain limitations apply to enforcement by means of appropriation of the assets subject to the security interest (eg, in relation to immovable assets).

Are there any exchange controls that restrict payments to a foreign lender under a security document, guarantee or loan agreement?

In principle, no. However, in theory, pursuant to the foreign exchange regulations the National Bank of Romania may impose certain foreign exchange control restrictions as safeguarding measures, which may restrict the borrower’s ability to make payments due under a facility agreement or the foreign lender’s ability to exercise its rights against a borrower or remit the proceeds of enforcement. These restrictions may include:

- a requirement to notify the National Bank of Romania at least 10 days before performing short-term capital foreign exchange operations;
- thresholds and other limitations on short-term capital foreign exchange operations which trigger capital inflows and outflows;
- fees or commission on foreign exchange transactions on the interbank market for the purpose of performing capital operations which envisage the purchase or sale of foreign currency;
- restrictions on the repayment term of certain short-term capital foreign exchange operations; and
- restrictions on initiating new short-term capital foreign exchange operations).

4. Security – general

4.1 Security agreements

Is it possible to create a security interest over all assets of an entity? If so, would a single security agreement suffice or is a separate agreement required for each type of asset?

In general, three security interest agreements are available in relation to a secured lending transaction:

- a general moveable mortgage agreement, under which most types of asset can be covered (eg, bank accounts, stocks, inventory, receivables, intellectual property, intangible assets and universalities) – such an agreement can be split into various agreements for each type of asset;
– an immoveable mortgage agreement, under which all real estate of the borrower is mortgaged (depending on the deal, together with rent and insurance in relation to the real estate); and
– a share mortgage agreement, under which the shareholders of the borrower mortgage their shares in the borrower.

Depending on the actual financed assets, other arrangements may be available (e.g., for aircraft, ships or financial collateral).

4.2 Release of security

What are the formalities for releasing security over the most common forms of assets?

The release of the security interests is generally straightforward: the secured lender issues a statement on the discharge of liabilities (in notarial form for immoveable mortgages), which is followed by deregistration from the relevant registers (e.g., the Electronic Archive for moveable assets, the land book for real estate and the shareholders’ register for shares).

5. Asset classes used as collateral for security

5.1 Real estate

Can security be granted over real estate? If so, what are the most common forms of security granted over real estate and what is the procedure?

Security interests may be created in relation to real estate by means of immoveable mortgage agreements authenticated by a notary public. The mortgage should be registered with the land book where the real estate is registered and, in the case of moveable assets attached to the real estate, with the Electronic Archive.

An immoveable mortgage is generally created by signing the mortgage agreement. However, with regard to real estate registered in land books for plots of land in locations where all cadastral works are finalised, registration of the mortgage agreement in the relevant land book actually creates the mortgage over the real estate (in practice, this scenario is uncommon).

From a practical perspective, the signatories of a secured lender should be appointed by means of a special power of attorney signed as a notarial deed (i.e., the most solemn form of document in the jurisdiction where that power of attorney is signed).

5.2 Machinery and equipment

Can security be granted over machinery and equipment? If so, what are the most common forms of security granted over this kind of property and what is the procedure?

The moveable mortgage is the most common form of security over moveable assets such as machinery and equipment.

A moveable mortgage is validly created by means of a moveable mortgage agreement signed as a private deed (no notarisation is necessary). The mortgaged assets should be described precisely enough under the
mortgage agreement to enable reasonable identification of the actual assets. This description can be made by:

- setting out lists of assets;
- stipulating specific classes of asset; or
- indicating criteria such as quantity or other specific formulas to this end.

In the case of universalities, the description should include the content and nature of the assets therein. A generic description of the mortgaged assets, such as "all moveable property" or "all present and future moveable property of the mortgagor", is no longer sufficient under the new security interests regime in force since 2011.

The enforcement of a moveable mortgage is subject to its perfection – that is, when:

- the mortgage becomes effective (ie, once the secured obligation is born and the mortgagor owns the mortgaged assets); and
- all publicity formalities are completed. For moveable mortgages in relation to machinery and equipment, such publicity is completed on registration with the Electronic Archive.

The ranking of a moveable mortgage is generally determined by reference to the time that the publicity formalities are performed (ie, registration with the Electronic Archive), irrespective of the time that the secured obligations are born. The registration with the Electronic Archive maintains its priority for five years and should be renewed before expiry of this period, if needed.

5.3 Receivables

Can security be granted over receivables? If so, what are the most common forms of security granted over this kind of property and what is the procedure?

Receivables may be subject to security under Romanian law, the most common type being a moveable mortgage. In practice, assignments for security purposes are also made (albeit increasingly less commonly) as an alternative to mortgages (such assignments are in any case assimilated to the legal regime governing moveable mortgages for most of their elements and characteristics).

Mortgages over receivables may be subject to additional perfection formalities, such as registration with the land book for real estate if they relate to relevant rent or insurance or notification to the mortgaged/assigned debtors if collection is transferred to the secured lender.

5.4 Financial instruments and cash

Can security be granted over financial instruments? If so, what are the most common forms of security granted over this kind of property and what is the procedure?

In general, security may be created in relation to shares in a Romanian company by means of a moveable mortgage. Mortgages over shares should be registered with the company shareholders’ register, which is maintained by the company’s directors or, in the case of listed companies, the Romanian Central Securities Depository.

For securities and collateral takers and creators that meet the eligibility criteria under the EU Financial Collateral
Directive, as implemented in Romania, security over such securities (including shares in listed companies) may be taken in the form of financial collateral; however, this is rarely used in practice.

Can security be granted over cash deposits? If so, what are the most common forms of security granted over this kind of property and what is the procedure?

The most common form of security over cash is the moveable mortgage over bank accounts. For validity purposes, the bank account should be specifically set out under the moveable mortgage agreement. With regard to perfection of a mortgage over a bank account, the secured lender should hold control over the mortgaged bank account to ensure priority – such control is deemed to be held if:

- the secured lender is the account bank;
- the borrower, the account bank and the secured lender agree that the account bank will comply with the instructions of the secured lender regarding any amounts in the mortgaged bank accounts without the consent of the borrower; or
- the secured lender becomes the bank account holder or co-holder.

5.5 Intellectual property

Can security be granted over intellectual property? If so, what are the most common forms of security granted over this kind of property and what is the procedure?

IP rights may be subject to moveable mortgages. Mortgages over registered IP rights (eg, patents, trademarks and designs) should be registered with the Romanian State Office for Inventions and Trademarks.

6. Enforcement

6.1 Criteria for enforcement

What are the common enforcement triggers for loans, guarantees and security documents?

Following an event of default (and after expiry of any applicable cure period), a secured lender may in theory accelerate the entire outstanding loan and commence enforcement. In practice, lenders mainly use non-payment events of default as triggers for enforcement. There is little or no jurisprudence on acceleration and enforcement based on events of default such as failure to meet financial covenants, breach of representations and general undertakings and material adverse changes, among others.

6.2 Process for enforcement

What are the most common procedures for enforcement? Are there any specific requirements with which lenders must comply?

As a general principle, enforcement is subject to:

- the secured obligation being certain, liquid and payable;
- to holding of writs of execution; and
- the procedures set out under the Civil Code or the Civil Procedure Code (including authorisations by relevant courts and enforcement officers,
registration of the commencement of enforcement with the Electronic Archive and notices to other creditors, if applicable).

Depending on the assets subject to the security interests, common methods of enforcement include:

- sale by public tender (with the price for the first tender being determined by a valuator, but with some price flexibility for subsequent tenders);
- sale of the mortgaged assets in a ‘commercially reasonable’ manner;
- appropriation of the mortgaged assets on account of the outstanding debt, with the consent of the borrower (and assuming no opposition by any other affected parties);
- a mere request addressed to the account bank to transfer to the secured lender any amounts existing in mortgaged bank accounts; and
- as a new but not tested method, taking over the mortgaged asset for administration purposes.

6.3 Ranking in insolvency

In what order do creditors rank in case of the insolvency of a borrower?

As a preliminary aspect, under Romanian law the opening of insolvency proceedings against a company generally suspends any enforcement against the company and its assets; enforcement can continue or re-commence only in limited cases (which are rarely seen in practice).

If an insolvent company is declared bankrupt and its assets liquidated, the secured lenders will have a general priority to the proceeds obtained from the sale of their duly perfected collateral, provided that such proceeds first satisfy:

- taxes, fees, costs and expenses arising from the sale of the assets (including operation and maintenance costs, expenses in connection with the assets that are incurred after the opening of the insolvency proceedings and judicial administrator fees); and
- claims of secured creditors which arise after the opening of the insolvency procedure (including the principal, interests and ancillary rights).

In theory, the secured lenders may even benefit from distributions performed before the sale of their collateral (such distributions being deducted from the amounts obtained following the sale of their collateral).

If the secured lenders are not fully satisfied following the sale of their collateral, the outstanding amounts will be deemed to be unsecured claims – which, as a rule, are paid in the following order:

- taxes, fees, costs and expenses of the insolvency procedure (including operation and maintenance costs and expenses, salaries for the necessary personnel and judicial administrator fees);
- claims under financings made available to the company during the insolvency proceedings;
- claims of employees;
claims arising during the insolvency proceedings for carrying out the operations of the insolvent company, claims regarding damages for the termination of contracts during the insolvency and claims of good-faith third parties that have returned the assets subject to clawback or their value;

budgetary claims;

claims of third parties relating to alimony, minors’ allocation or other regular subsistence payments;

claims arising under bank loans or the supply of products, services or works, rent, or leasing arrangements and bonds (other than such claims of the insolvent company’s group members);

other unsecured claims (other than such claims of the insolvent company’s group members); and

subordinated claims, in the following order of priority:

• claims of bad-faith third parties that have not returned the assets subject to clawback or their value and claims under shareholder loans if that creditor holds at least 10% of the insolvent company’s share capital or voting rights in the general meetings of shareholders; and

• claims under free-of-charge acts.