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THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW
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As I write the preface to this third edition of The International Capital Markets Review, my morning newspaper reports that one of the major global banks, having shrunk its workforce by more than 40,000 employees over the past two years, will now embark on a hiring spree to add at least 3,000 additional compliance officers.

It would be nice if the creation of these new jobs evidenced new confidence that capital markets activity is on the rise in a way that will justify more hands on deck. In other words, capital markets lawyers will have something to celebrate if this bolstering of the ranks was thought necessary to ensure that requisite regulatory approvals and transactional paperwork would be in place for a projected expansion in deal flow.

And, indeed, my morning newspaper also reports a new transaction of some significance, namely, Twitter's filing for a multi-billion dollar international public offering, accompanied by a tweet, of course – but with a true sign-of-the-times disclosure: ‘This Tweet does not constitute an offer of any securities for sale’!

Yes, confirmation of an uptick in deal flow – especially ‘big deals’ flow – would be nice. In the preface to the last edition of this work, I speculated that there were ‘signs that any ‘big freeze’ on post-crisis capital markets transactional work may be thawing’. All the better if the current newspaper reports provide continued and further support for that inference. After all, when our first edition appeared a little over two years ago, the newspapers were saying terrible things about the capital markets.

What is more likely, however, is that this increased staffing aims to cope with regulatory complexity that will now impact the financial markets regardless of any growth and perhaps may even have been designed to slow down the business being done there. That complexity, but also just the scale of recently promulgated new regulation and the practitioner’s resulting challenge in ‘keeping up’ have all encouraged this new third edition. The 8,843 pages of Dodd-Frank rule-making that I reported in my preface to the last edition have now grown to more than 14,000 pages at this time of writing – and approximately 60 per cent of the job remains unfinished. Other key jurisdictions have been catching up. Plus the rules are purposive and aim to change the way things have been done. If compliance and even ethics in the capital markets were ever instinctual, rather than matters to be taught and studied, that is probably a thing of the past.
The thickness of this volume has grown as well because of the increased number of pages and coverage in it. Nine new contributors (Finland, Indonesia, Italy, the Netherlands, the Philippines, Spain, Switzerland, Tanzania and the UAE) and an overview of EU Directives have been added. Banks are lending less to corporates, which in turn are having to issue more to meet liquidity needs. Moreover, with the low interest rate environment of quantitative easing, central banks are encouraging risk-taking rather than hoarding. For investors, risk-free assets have become very expensive. So we see a growing willingness to get off the traditional highway in search of yield. Investment banks are, as a result, often taking their clients (and their clients’ regular outside counsel) to difficult, or at least less well-known, geographies.

Having a pool of country experts and jurisdictional surveys that facilitate comparative law analysis can be very helpful in this instance. That is exactly what this volume aims to provide: a ‘virtual’ legal network and global road map to help the reader navigate varying, and increasingly difficult, terrain to arrive at right places.

There has been much relevant change in the legal landscape surveyed in the pages that follow. However, what has not changed is our criteria for authors. The invitation to contribute continues to go to ‘first in class’ capital market specialists from leading law firms. I shall be glad if, as a result, the biographical notes and contact details of the contributing firms prove a useful resource as well.

*The International Capital Markets Review* is not a novel. Impressed I might be, but I would certainly also be surprised by anyone picking up and reading this volume from cover to cover. What I expect instead, and what is certainly the publisher’s intention, is that this work will prove a valuable resource on your shelf. And I hope that you will have plenty of opportunities to take it off the shelf and lots of excuses to draw on the comparative jurisdictional wisdom it offers.

Let me again express my sincere gratitude to our authors for their commitment to the task and their contributions. It remains a privilege to serve as their editor and a source of great pride to keep their company in the pages of this book.

**Jeffrey Golden**
P.R.I.M.E. Finance Foundation
The Hague
October 2013
It was my thought that we should also include in this second edition of *The International Capital Markets Review* my preface to the first edition. Written less than a year ago, it captures relevant background and sets out the rationale for this volume in the series. The contemporary importance of the global capital marketplace (and indeed you must again admire its resilience), the staggering volume of trading and the complexity of the products offered in it, and the increased scrutiny being given to such activity by the courts all continue. And, of course, so does the role of the individual – the difference that an informed practitioner can make in the mix, and the risk that follows from not staying up to date.

However, I was delighted, following the interest generated by our first edition, by the publisher’s decision to bring out a second edition so quickly and to expand it. There were several reasons for this. The picture on the regulatory front is much clearer for practitioners than it was a year ago – but no less daunting. According to one recent commentary, in the United States alone, rule-making under the Dodd-Frank report has seen 848 pages of statutory text (which we had before us when the first edition appeared) expand to 8,843 pages of regulation, with only 30 per cent of the required regulation thus far achieved. Incomplete though the picture may look, the timing seems right to take a gulp of what we have got rather than wait for what may be a very long time and perhaps then only to choke on what may be more than any one person can swallow in one go! Regulatory debate and reform in Europe and affecting other key financial centres has been similarly dramatic. Moreover, these are no longer matters of interest to local law practitioners only. Indeed, the extraterritorial reach of the new financial rules in the United States has risen to a global level of attention and has been the stuff of newspaper headlines at the time of writing.

There are also signs that any ‘big freeze’ on post-crisis capital markets transactional work may be thawing. In the debt markets, the search for yield continues. Equities are seen as a potential form of protection in the face of growing concerns about inflation. Participants are coming off the sidelines. Parties can be found to be taking risks. They are not oblivious to risk. They are taking risks grudgingly. But they are taking them. And derivatives (also covered in this volume) are seen as a relevant tool for managing that risk.
Most importantly, it is a big world, and international capital markets work hugs a bigger chunk of it than do most practice areas. By expanding our coverage in this second edition to include six new jurisdictions, we also, by virtue of three of them, complete our coverage of the important BRIC countries with the addition of reporting from Brazil, Russia and China. Three other important pieces to the international capital markets puzzle – Belgium, the Czech Republic and New Zealand – also fall into place.

The picture now on offer in these pages is therefore more complete. None of the 24 jurisdictions now surveyed has a monopoly on market innovation, the risks associated with it or the attempts to regulate it. In light of this, international practitioners benefit from this access to a comparative view of relevant law and practice. Providing that benefit – offering sophisticated business-focused analysis of key legal issues in the most significant jurisdictions – remains the inspiration for this volume.

As part of the wider regulatory debate, there have been calls to curtail risk-taking and even innovation itself. This wishful thinking seems to miss the point that, if they are not human rights, risk-taking and innovation are hardwired into human nature. More logical would be to keep up, think laterally from the collective experience of others, learn from the attention given to key issues by the courts (and from our mistakes) and ‘cherry-pick’ best practices wherever these can be identified and demonstrated to be effective.

Once again, I want to thank sincerely and congratulate our authors. They have been selected to contribute to this work based on their professional standing and peer approvals. Their willingness to share with us the benefits of their knowledge and experience is a true professional courtesy. Of course, it is an honour and a privilege to continue to serve as their editor in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2012
Since the recent financial markets crisis (or crises, depending on your point of view), international capital markets (ICM) law and practice are no longer the esoteric topics that arguably they once were.

It used to be that there was no greater ‘show-stopper’ to a cocktail party or dinner conversation than to announce oneself to be an ICM lawyer. Nowadays, however, it is not unusual for such conversations to focus – at the initiation of others and in an animated way – on matters such as derivatives or sovereign debt. Indeed, even taxi drivers seem to have a strong view on the way the global capital markets function (or at least on the compensation of investment bankers). ICM lawyers, as a result, can stand tall in more social settings. Their views are thought to be particularly relevant, and so we should not be surprised if they are suddenly seen as the centre of attention – ‘holding court’, so to speak. This edition is designed to help ICM lawyers speak authoritatively on such occasions.

In part, the interest in what ICM lawyers have to say stems from the fact that the amounts represented by current ICM activities are staggering. The volume of outstanding over-the-counter derivatives contracts alone was last reported by the Bank for International Settlements (BIS) as exceeding $700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than $180 trillion for derivative financial instruments (futures and options) traded on organised exchanges. Crisis or crises notwithstanding, ICM transactions continue apace: one has to admire the resilience. At the time of writing, it is reported that the ‘IPO machine is set to roar back into life’, with 11 flotations due in the United States in the space of a single week. As Gandhi said: ‘Capital in some form or another will always be needed.’

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely ‘preventive medicine’. To continue the analogy, the courts are our ‘hospitals’. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to
Editor's Preface to the First Edition

facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

ICM lawyers are receiving greater attention because there is no denying that many capital market products that are being offered are complex, and some would argue that the trend is towards increasing complexity. These changing financing practices, combined with technological, regulatory and political changes, account for the considerable challenge that the ICM lawyer faces.

ICM activity by definition shows little respect for national or jurisdictional boundaries. The complete ICM lawyer needs familiarity with comparative law and practice. It would not be surprising if many ICM practitioners felt a measure of insecurity given the pace of change; things are complex and the rules of the game are changing fast – and the transactions can be highly technical. This volume aims to assuage that concern by gathering in one place the insights of leading practitioners on relevant capital market developments in the jurisdictions in which they practise.

The book’s scope on capital markets takes in debt and equity, derivatives, high-yield products, structured finance, repackaging and securitisation. There is a particular focus on international capital markets, with coverage of topics of particular relevance to those carrying out cross-border transactions and practising in global financial markets.

Of course, ICM transactions, technical though they may be, do not take place in a purely mechanical fashion – a human element is involved: someone makes the decision to structure and market the product and someone makes the decision to invest. The thought leadership and experience of individuals makes a difference; this is why we selected the leading practitioners from the jurisdictions surveyed in this volume and gave them this platform to share their insights. The collective experience and reputation of our authors is the hallmark of this work.

The International Capital Markets Review is a guide to current practice in the international capital markets in the most significant jurisdictions worldwide, and it attempts to put relevant law and practice into context. It is designed to help practitioners navigate the complexities of foreign or transnational capital markets matters. With all the pressure – both professional and social – to be up to date and knowledgeable about context and to get things right, we think that there is a space to be filled for an analytical review of the key issues faced by ICM lawyers in each of the important capital market jurisdictions, capturing recent developments but putting them in the context of the jurisdiction’s legal and regulatory structure and selecting the most important matters for comment. This volume, to which leading capital markets practitioners around the world have made valuable contributions, seeks to fill that space.

We hope that lawyers in private practice, in-house counsel and academics will all find it helpful, and I would be remiss if I did not sincerely thank our talented group of authors for their dedicated efforts and excellent work in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2011
I INTRODUCTION

i Overview

During the first half of 2013, the reforms implemented by the government (mainly restructuring of the financial institutions, reduction of the budget deficit and labour market reform) seem to have steered Spain in the right direction. The risk premium of Spanish bonds, compared with German bonds, has dropped back to pre-crisis levels, even reaching levels lower than those of Italian bonds in September 2013. Of 45 savings banks, banks and other credit institutions, 43 have participated, or are participating, in the consolidation of the financial sector. In addition, credit institutions have been recapitalised (in part with the support of €41 billion from the European bailout fund) and impaired real estate assets and loans worth €51 billion have been transferred to Sareb (popularly known as the ‘bad bank’). Furthermore, Spain has gained competitiveness with a sharp decrease in unit labour costs and, for the first time, a foreign current account surplus.

Nevertheless, the Spanish economy continues to be mired in recession with the budget deficit at close to 7 per cent and unemployment at a record 27 per cent; the level of public and private debt is unsustainable in the medium term, and many (in particular small and medium-sized) Spanish companies still suffer the consequences of a severe credit crunch.

As a consequence, Spanish companies and banks must continue the deleveraging and recapitalisation process started in 2011 and 2012, which has greatly influenced capital markets activity over the last 12 months.

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1 David García-Ochoa Mayor is a partner and Daniel Pedro Valcarce Fernández is an associate at Uría Menéndez Abogados, SLP.
Structure of the law
The most important piece of legislation regarding the securities market in Spain is Law 24/1988, of 28 July, on the securities market (LMV), which has been amended on numerous occasions.2

The LMV contains the principles governing all securities markets in Spain, and is the law in which most of the EU directives on securities markets have been incorporated. As such, capital market regulations in Spain are significantly aligned with those of other EU countries. The LMV establishes which securities are tradable and the way they should be represented (in particular, by book entries, and how such book entries should be made). It also created the supervisory body for the securities markets, the National Securities Market Commission (CNMV), introduced the distinction between primary and secondary markets and determined what are to be considered official secondary markets (‘regulated markets’ in EU regulations). Moreover, the LMV sets out the principles for the clearing, settlement and central counterparty houses and investment services companies. It regulates cross-border activities and provided for the creation of the Investment Guarantee Fund and the principles of the rules of conduct in the securities markets. It also provides the legal regime of supervision, inspection and penalties for those entities that operate in the securities markets, both primary and secondary, the tax regime of securities transactions, the regime applicable to trading companies and, finally, the regulatory framework of the multilateral trading facilities and of systematic internalisers.

Another important piece of legislation is Law 41/1999, of 12 November, on clearing and settlement of securities systems, which transposed into Spanish law Directive 98/26/EC of the European Parliament and of the Council, of 19 May 1998, on settlement finality in payment and securities settlement systems. Also of relevance is Law 26/2003, of 17 July, amending the public limited companies law and the LMV to increase the transparency of listed companies.

The LMV has been developed by a number of regulations. The most important of these are (if applicable, as amended):

a Royal Decree 726/1989, of 23 June, on the governing bodies and members of stock exchange companies, Sociedad de Bolsas and collateral requirements;

b Royal Decree 1416/1991, of 27 September, on special transactions and off-market transfers of listed securities and average weighted prices;

c Royal Decree 116/1992, of 14 February, on representation of securities by means of book entries and clearing and settlement of exchange transactions;

d Royal Decree 948/2001, of 3 August, on systems of investor indemnification;

2 The most important amendments to the LMV have been introduced by Law 37/1998, of 16 November, on the reform of the securities market law and the introduction of other amendments to the Spanish financial system; Law 44/2002, of 22 November, on the reform of the financial system; Law 47/2007, of 19 December, which implemented EU Directive 2004/39 (MiFID) in Spain and, partially, EU Directives 2006/73 and 2006/49; and Law 32/2011, of 4 October, which reforms the clearing, settlement and registry system of securities held in book-entry form.
Royal Decree 1310/2005, of 16 November, on admission to trading in official secondary markets, public offers for the sale of securities and the prospectus required for such operations;

Royal Decree 1066/2007, of 27 July, on the rules applicable to takeover bids for securities;

Royal Decree 217/2008, of 15 February, on the legal framework for investment services companies;

Royal Decree 1282/2010, of 16 October, on the official market of options, futures and other derivative financial instruments; and

Royal Decree 1082/2012, of 20 July, on collective investment schemes.

iii Structure of the courts

The commercial courts are the specialist first-instance courts generally entrusted with hearing civil claims lodged with regard to corporate and insolvency law. Other matters (among others, those related to civil liability arising from inadequate commercialisation and placement of financial instruments) are normally heard by generalist first-instance courts.

iv Regulatory authorities

The most important regulatory authority in the Spanish capital markets is the CNMV. However, the Bank of Spain, in respect of the public debt market, the Ministry of Economy and Competitiveness (regarding certain approvals and the imposition of penalties) and the departments of economy of some autonomous regions also have certain supervisory powers.

The CNMV is an entity with its own legal personality, separate from that of the central government or the autonomous regions. The CNMV is governed by a board of directors made up of a chairman and a vice chairman (both appointed by the Council of Ministers), the Director General of the Treasury and Financial Policy, the Deputy Governor of the Bank of Spain and three other directors appointed by the Minister of Economy and Competitiveness.

The main functions of the CNMV are to supervise and inspect the securities markets and the activity of all individuals or legal entities related thereto, as well as to impose any penalties for infringements of securities market legislation. It must ensure the transparency and efficiency of the securities markets, protect investors and disseminate any information that may be necessary for these purposes. Likewise, when so empowered by law on a case-by-case basis, it can also issue circulars containing mandatory rules for the implementation and enforcement of the regulations issued by the Council of Ministers or the Minister of Economy and Competitiveness.

The Bank of Spain, apart from its functions as the Spanish central bank, is the managing body of the Market for Public Debt Represented by Book Entries and may issue circulars to develop the regulations governing that market (among other matters).
II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

The Alternative Fixed-Income Market

The Alternative Fixed-Income Market (MARF) is a multilateral trading facility operated by AIAF Mercado de Renta Fija, SAU pursuant to its regulations approved in May 2013 by the CNMV.

The MARF aims to provide an alternative source of funding to medium-sized companies with good business prospects, and usually unlisted. To facilitate funding, the access requirements to the MARF are more flexible than those stipulated for the official regulated markets and will entail the speeding up of the processing of issuances.

Investors in the MARF are mainly expected to be Spanish and foreign institutional investors that wish to diversify their portfolios with fixed-income securities from the aforementioned issuers.

Because of the importance of providing an alternative to banking funding, the Spanish government has been amending regulations to allow the MARF to work smoothly, with a view to the first issuances taking place in the autumn of 2013.

Restrictions on commercialisation and placement to retail investors of certain hybrid securities and instruments

Royal Decree-Law 24/2012 (subsequently validated by Law 9/2012) has restricted the commercialisation and placement among retail clients or investors of issuances of preferred shares, convertible debt instruments or subordinated financing eligible as own funds pursuant to credit institution solvency regulations. This commercialisation and placement now requires that the following conditions are met:

a the issuance must have a tranche targeted exclusively at professional clients or investors of at least 50 per cent of the total of the issuance, with the total number of such investors not being lower than 50 (for which purposes a retail investor meeting certain requirements may not relinquish this condition to be considered a professional investor); and

b in the event of issuances of preferred shares or convertible debt instruments of entities that are not listed companies, the minimum denomination per unit will be €100,000 and €25,000 for other issuances.

Prospectus regime


3 See Section II.v, infra, on secondary markets and multilateral trading facilities.
Increasing activity in the high-yield market
Unlike previous years, 2013 has seen activity pick up in the high-yield bond market. Not only have listed companies issued high-yield bonds (e.g., ENCE Energía y Celulosa, SA), but unlisted companies have also tapped the market as first-time issuers (including Gestamp Automoción, SA and Atento Inversiones y Teleservicios, SAU). Many of these issuances have been carried out through Luxembourg or Dutch special purpose vehicles (SPVs).

Issuance of hybrid securities by Spanish blue chips
On 21 February 2013 Iberdrola, SA announced that a Dutch SPV was to launch an issuance of undated deeply subordinated reset rate guaranteed securities, with the subordinated guarantee from Iberdrola, SA, for a total nominal amount of €525 million. The securities were targeted at qualified investors and subject to English law. Furthermore, they were to be traded on the Luxembourg Euro MTF Market.

Similarly, on 11 September 2013 Telefónica, SA announced that a Dutch SPV was to launch two issuances of undated deeply subordinated reset rate guaranteed securities, with the subordinated guarantee from Telefónica, SA, for a total nominal amount of €1.75 billion. The securities were targeted at qualified investors and subject to English law. Furthermore, they were to be traded on the London Stock Exchange.

Issuance of contingent convertible perpetual securities (CoCos) by BBVA
On 30 April 2013 Banco Bilbao Vizcaya Argentaria, SA announced the first issuance by a Spanish credit institution of CoCos, convertible into ordinary shares and with exclusion of pre-emptive subscription rights, for an amount of $1.5 billion. It also announced that it would request that they be considered as additional Tier 1 under Capital Requirements Directive IV (CRD IV) rules (Basel III), as core capital pursuant to Bank of Spain Circular 7/2012 and as buffer convertible capital securities in accordance with the European Banking Authority EBA/REC/2011/1 recommendation.

The issuance was targeted exclusively at qualified and sophisticated foreign investors and was not to be placed or subscribed in Spain or among Spanish-resident investors. The securities were subject to Spanish law and were to be traded on the Singapore Exchange (SGX).

ii Developments affecting derivatives, securitisations and other structured products
Banking asset funds
One of the most important commitments of the MoU, addressed by Law 9/2012, is the creation of a partially state-owned company to manage real estate assets, Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria, SA (Sareb, or the ‘bad bank’). The purpose of Sareb is to acquire real estate-related assets held by credit entities under the control of, or that have received financial assistance from, the fund for orderly

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4 See Section II.vi, infra, on structural reforms and credit entities.
bank restructuring (FROB), namely: foreclosed assets and loans or credits granted to real estate developers and controlling corporate holdings linked to the real estate sector.

One of the ways in which Sareb may divest such assets is by incorporating a banking asset fund (FAB), a securitisation-like fund in which, basically, one or several investors buy securities or loan funds. Law 9/2012 provides for FAB structure flexibility and a favourable tax regime to investors and the FAB itself, provided that Sareb or the FROB retain an interest. The management and representation of FABs is entrusted to management companies of asset securitisation funds (for which purposes they must comply with certain additional requirements).

After conducting a competitive bidding process among several investors, on 6 August 2013, Sareb announced that it would divest a portfolio of almost 1,000 residential real estate properties, valued at €100 million, by means of a FAB, the first to be incorporated in Spain. At least five other divestment processes have already been launched and are expected to close in the next few months.

iii Cases and dispute settlement

In the aftermath of the financial crisis, there has been an increase in litigation in Spain with regard to securities (whether issued in Spain or abroad) distributed to Spanish-resident clients, in particular, litigation regarding issuers then declared insolvent or securities the value of which was impaired. Many of these claims challenge the correct application of MiFID and other banking regulations.

Litigation with regard to inadequate commercialisation and placement of financial instruments is influencing new regulation: certain court judgments deciding in favour of clients have led the CNMV to stipulate (in Circular 3/2013, of 12 June, on the development of certain information obligations vis-à-vis clients to whom investment services are rendered in connection with the assessment of the suitability and convenience of financial instruments) that when a transaction is made over a complex security and the entity considers that such product is not appropriate for the client, the client must be informed of this fact in writing by means of a boilerplate statement established in the circular, which the client must sign after writing out the following by hand: ‘This product is complex and is considered unsuitable for me.’

iv Relevant tax and insolvency law

Although significant tax reforms were passed in 2011 and 2012, Royal Decree-Law 5/2004, of 5 March, which approved the revised text of the currently in force Non-Resident Income Tax Law (NRIT), has not been significantly amended (except for a temporary increase of applicable rates in 2012 and 2013). Therefore, short-term amendments to the NRIT rules are not expected, even though certain tax increases expected to expire as from 1 January 2014, and mentioned below, may be extended (as announced by the Spanish government).

Generally, non-resident taxpayers are subject to NRIT on Spanish-source income, and must declare and pay NRIT during the first 20 days of April, July, October and January: NRIT is paid on income obtained during the calendar quarter immediately preceding these payment periods.
Spanish-source income would include, among others, interest paid by a Spanish-resident taxpayer or with respect to financing used in Spain; gains on the disposition of bonds issued by Spanish-resident persons; dividends distributed by Spanish-resident entities; and capital gains on the disposition of shares and units issued by Spanish-resident entities.

Income deemed to be obtained in Spain is generally subject to NRIT at a rate of 24.75 per cent (24 per cent as from 1 January 2014). However, a reduced tax rate of 21 per cent (19 per cent as from 1 January 2014) is applied on dividends, interest and capital gains. Each income is subject to taxation separately on a gross basis (with certain exceptions, no expenses are deductible). Normally, a withholding tax generally equal to the non-resident’s final tax liability is levied on interest, dividends and capital gains on undertakings for collective investments (UCIs).

A brief overview of the Spanish taxation applicable to non-resident investors is provided below. Please note that this refers to individuals or entities not resident in Spain for tax purposes, and not acting through a permanent establishment located in Spain.

**Capital gains**

In general, capital gains obtained in Spain by a non-resident taxpayer will be taxed under NRIT at a rate of 21 per cent (19 per cent as from 1 January 2014). No withholding tax is levied on capital gains, except for those related to an investment in a Spanish UCI.

Domestic legislation provides for an exemption from tax for the benefit of residents of countries that have entered into a treaty for the avoidance of double taxation (CDT) with Spain, and that includes an exchange-of-information clause, in the case of transfers of shares or reimbursements of units in a UCI in a Spanish official secondary securities market.

In addition, EU residents are entitled to an exemption on capital gains obtained upon disposal of shares, provided that the assets of the company to which the shares belong do not consist mainly (directly or indirectly) of real estate located in Spain; and further provided that the non-resident has not held a participation of at least 25 per cent in the share capital of the Spanish company during the 12 months prior to the transfer of the shares, and that the capital gain is not obtained through a tax haven jurisdiction or a permanent establishment located outside the EU.

Finally, most CDTs provide for an exemption from capital gains tax, except when the assets are allocated to a Spanish permanent establishment or when the assets are Spanish real property. In some cases, when the assets consist of shares in a Spanish-resident entity, the exemption is conditional on the fact that the holding is below significant participation thresholds (below 15 per cent or 25 per cent).

**Interest and dividends**

In general, interest and dividends obtained in Spain by a non-resident taxpayer will be taxed under NRIT at a rate of 21 per cent (19 per cent as from 1 January 2014) and will be subject to withholding tax.

Domestic rules provide certain tax exemptions on income obtained by non-residents (e.g., income derived from Spanish public debt or preference participations and debt instruments meeting certain requirements, or interest accrued on non-residents’ bank accounts). In particular, in the case of preference participations and debt securities
issued under the second additional provision of Law 13/1985, of 25 May (i.e., by Spanish banks and listed companies), non-resident taxpayers will not be subject to taxation or withholding in Spain.

In addition, EU residents are entitled to an exemption on interest obtained in Spain, provided that interest is not obtained through a tax haven jurisdiction or a permanent establishment located outside the EU.

Regarding dividends, under the Parent-Subsidiary Directive no Spanish withholding taxes should be levied on the dividends distributed by a Spanish subsidiary to its EU parent company, to the extent that:

- the EU parent company maintains a direct holding in the capital of the Spanish subsidiary of at least 5 per cent uninterruptedly during the year prior to the date on which the distributed profit is due;
- the EU parent company is incorporated under the laws of an EU Member State and is subject to corporate income tax in a Member State, without the possibility of being exempt; and
- the distributed dividends do not derive from the subsidiary’s liquidation.

The Spanish implementation of the Parent-Subsidiary Directive includes an anti-abuse provision, by virtue of which the withholding tax exemption will not be applicable where the majority of the voting rights of the parent company are held directly or indirectly by individuals or entities not resident in the EU, except where certain requirements apply (certain bona fide situations). It is worth mentioning that the application of this anti-abuse provision by the Spanish tax authorities and courts has been quite restrictive.

Finally, non-residents that are resident in a country that has entered into a CDT with Spain will be entitled to apply the reduced tax rates or exemption provided in the relevant CDT (CDTs usually establish rates ranging from 0 per cent to 15 per cent on interest and dividends).

**Insolvency law**

The most important piece of legislation on the matter in Spain is Law 22/2003, of 9 July, on insolvency.

One of the main particularities of this law is that, in the case of issuers of securities or derivative instruments traded in an official secondary market, the insolvency trustee will either be a CNMV staff expert or a person designated by it fulfilling certain requirements (basically, an economist or auditor with a certain specialisation and experience, a Big Four firm or other audit companies).

However, other pieces of legislation may also be relevant in an insolvency context. Article 33 of the LMV allows the CNMV to suspend trading of a financial instrument in Spanish official secondary markets when special circumstances occur that may disrupt the usual course of transactions over said financial instrument or when such a measure is advisable to protect investors. The CNMV generally resorts to this faculty to suspend trading of a listed company when a petition for insolvency is filed.
v  Role of exchanges and central counterparties (CCPs)

Secondary markets and multilateral trading facilities

Under Spanish law, in the area of securities markets, an initial and basic distinction must be made between the primary and secondary markets. In the primary market (also known as the issuance market), issuers put into circulation (i.e., issue) securities, which are subscribed by investors, either directly or through financial intermediaries. Conversely, in the secondary markets securities that have been previously issued are traded. Secondary markets offer liquidity to those securities that have already been issued in the primary market and facilitate their subscription, since the existence of the secondary market allows the investors to sell the relevant securities in an uncomplicated manner. The official secondary markets mainly include:

- the stock exchanges;
- the Market for Public Debt Represented by Book Entries;
- futures and options and other derivative markets, notwithstanding the underlying assets (either financial or non-financial); and
- the AIAF Fixed Income Market.

There are currently four stock exchanges in Spain, all subject to the supervision of the CNMV. These are established in Madrid, Barcelona, Bilbao and Valencia; there is also the ‘interconnection system between stock exchanges’ (SIBE). Only those securities previously admitted to listing on at least two of the Spanish stock exchanges are traded on the SIBE, provided that the prior authorisation of the CNMV is obtained.

In addition to the official secondary markets, multilateral trading facilities are increasingly relevant. A multilateral trading facility (MTF) is a multilateral system operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in an agreement in accordance with the LMV. Examples of Spanish multilateral trading facilities are the MARF\(^5\) and the Alternative Stock Market (MAB), implemented in 2006 as a less regulated market for SICAVs (open-ended collective investment companies) and stocks with small market capitalisation.

Central counterparties

The only Spanish markets that provided central counterparty services were the futures and options markets. After the amendments to LMV introduced by Law 44/2002, it was possible to incorporate central counterparty companies to provide a counterparty to one or more securities traded in the different securities markets, but no such company has been incorporated yet, in such way that for now only the Spanish Financial Futures and Options Exchange (MEFF) continues to provide that service (although it has extended it to securities not traded at MEFF but at other markets, such as public debt securities).

With respect to futures and options, MEFF must act as central counterparty to all contracts traded in the derivative markets managed by it. Thus, by means of a subjective

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\(^5\) See Section II.i, supra, on the Alternative Fixed-Income Market.
novation’, it intervenes as a party to all the contracts traded in its market (as purchaser vis-à-vis the selling party and as seller vis-à-vis the purchasing party), guaranteeing full compliance with the relevant contract.

vi Other strategic considerations

Structural reforms: credit entities

Three key milestones of the reforms introduced by the Spanish government since mid-2012 have been the Memorandum of Understanding on Financial-Sector Policy Conditionality signed by the Kingdom of Spain, the Bank of Spain and the European Commission on 23 July 2012 (MoU); the Master Financial Assistance Facility Agreement signed by the Kingdom of Spain, the Bank of Spain, the FROB and the European Financial Stability Facility (subsequently assigned to the European Stability Mechanism) on 24 July 2012 to make up to €100 billion available to rescue Spain’s ailing credit institutions; and the 2013–2016 Stability Programme and the National Reform Programme, both approved in April 2013, for submission to the EU.

The MoU laid the foundations of the policies to be implemented by the Spanish government as a condition for Spanish credit entities to have access to the financial assistance scheme for their restructuring and recapitalisation. The MoU has resulted in several pieces of legislation affecting various areas of the Spanish legal system, in particular financial and banking regulations.

One of the pieces of legislation deriving from the MoU is the above-mentioned Royal Decree-Law 24/2012 (subsequently validated by Law 9/2012), which includes early action measures for entities that breach, or are likely to breach, solvency, liquidity, organisational structural or internal control requirements, provided that it is foreseeable that such institutions will be able to overcome the situation themselves (i.e., through exceptional and temporary financial assistance); restructuring actions for those entities that require public financial support to ensure their viability but are objectively considered as being able to repay the amount of the assistance within the term granted; and the orderly dissolution of entities that are unable to pay back the funds received within a reasonable term and thus do not comply with solvency requirements but the insolvency of which is considered detrimental to the general interest.

In the case of orderly dissolutions, Law 9/2012 provides for the sale of the relevant entity’s business, along with the transfer of some or all of its assets and liabilities either to a ‘bridge bank’ or to an asset management company.

As discussed, one of the most important commitments of the MoU, addressed by Law 9/2012, is the creation of a partially state-owned company to manage real estate assets, Sareb.

One forthcoming piece of regulation to be enacted to comply with the commitments contained in the MoU is the law addressing the future of the savings banks sector. A Draft Bill on Savings Banks and Bank Foundations has been submitted by the Spanish government to Parliament, which sets out the new legal framework for savings banks that maintain their status as such (focused on the traditional model and aimed at savers and SMEs) and the conversion of those savings banks that hold a stake in a bank into bank foundations to be run in a professional manner pursuant to strict corporate governance requirements.
The main novelty of this draft bill is the introduction – in a similar fashion to the Italian model of the *fondazioni di origine bancaria* – of a new type of financial institution into the Spanish legal system: the bank foundation. During the first stage of the Spanish financial sector consolidation process, the financial businesses of most savings banks were segregated into new banks, and the savings banks became shareholders of the new banks. Under the draft bill, those savings banks meeting certain conditions would have to convert into bank foundations.

To increase the independence of those banks owned by bank foundations and to clearly separate the social work of the savings banks from the financial business of the new banks, bank foundations that control a bank will be obliged to relinquish control; and the bank foundations’ board trustees will be prevented from holding office on the board of directors of the participating bank.

**Privatisations**
The Spanish government intends to reduce its budget deficit and sovereign debts through, among other means, privatisations. The Minister of Economy and Competitiveness has announced an ambitious €30 billion privatisation plan that is expected to include the total or partial sale (through the sale of shares on the stock exchange or otherwise) of some of the most important state-owned enterprises, including Aena Aeropuertos, SA (the owner and manager of Spanish airports), Paradores de Turismo de España, SA (a hotel chain) and Sociedad Estatal Loterías y Apuestas del Estado, SA (the Spanish lottery operator). The Ministry of Economy and Competitiveness also intends to dispose of its shareholdings in listed companies such as the European Aeronautic Defence and Space Company NV (EADS) (the aircraft constructor), International Consolidated Airlines Group, SA (IAG, the company resulting from the merger of Iberia and British Airways) and Red Eléctrica Corporación, SA (the operator of the national electricity transmission system and electricity grid).

Nevertheless, for now the government has slowed down its privatisation projects given that market conditions, allegedly, would not allow it to maximise its return on divestments in companies such as Aena Aeropuertos, SA or Sociedad Estatal Loterías y Apuestas del Estado, SA.

### III OUTLOOK AND CONCLUSIONS
Taking into account the increasingly upbeat environment, the outlook for capital markets transactions in the fourth quarter of 2013 and especially in 2014 continues to be promising.

Recent increasing levels of activity in the debt capital markets are likely to persist, as Spanish issuers continue to seek to diversify their sources of funding away from banking institutions.

It is likely that Spanish regulators will maintain their focus on investor protection, and particularly the protection of retail investors.

Spanish credit institutions and corporations are under increased pressure to reduce their balance sheets and repay debt. Banking regulatory changes will also force credit institutions to sell their shareholdings in industrial companies and insurance businesses.
The Spanish energy sector will probably undergo significant restructuring and market consolidation due to regulatory changes.

Finally, it is also probable that the Spanish government and autonomous regions will accelerate their privatisation programmes to meet the budget deficit target (which has been extended for two years).
Appendix 1

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