

Role of trustee

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The trustee is an independent and impartial third party who can play a critical role in acting as a bridge between the borrower and the holders of its debt securities during the life of a loan capital issue.

The role of the trustee came about as a matter of common law (a term used to describe those legal systems, such as England's, where case law is a significant source of legal development). Over time, common law drew a distinction between two types of owner:

- the legal owner, who has legal title to an asset; and
- the beneficial owner, who does not have legal title to the asset but enjoys some or all of the benefits that would usually be associated with actual ownership.

The trust concept enables a trustee to act as legal owner of an asset but to hold it 'on trust' for the beneficiaries (i.e. those who receive the benefits of ownership). This means that, in corporate transactions, a trustee can, for instance:

- hold security of an issue on behalf of all of the current bondholders, whoever they may be and however much they change, without having to amend the documentation each time a bondholder buys or sells;
- provide the necessary ownership of special purpose vehicles (companies used to enable financings to be made off balance sheet), a structure often used in securitisations;
- exercise discretion on behalf of all bondholders in agreeing to non-material changes in the terms of a bond issue to accommodate subsequent changes in the borrower's circumstances or changes in the law – examples include:
 - imposition of withholding tax;
 - changes in the borrower's structure that require it to substitute a

separate entity as the principal debtor;

- non-material breaches of covenants.

The trustee is able to exercise the discretions provided in the trust deed, which is the document that constitutes the trustee's role, duties and powers. When an issue is launched, no one knows how future changes in the borrower's circumstances or the commercial environment are likely to affect the borrower. In the absence of a trustee the borrower would have to convene a meeting of the bondholders to sanction its proposed amendments to the documentation. Convening such a meeting is:

- administratively complex – most eurobonds are bearer instruments which means that there is no easily available register identifying the bondholders;
- expensive – usually such a meeting has to be convened by newspaper advertising and a suitable location has to be found and hired;
- risky – the borrower has no way of knowing in advance of such a meeting whether the meeting will be quorate or whether the bondholders will accept the borrower's proposals.

Where an amendment does not prejudice the interests of bondholders, a trustee can make such a meeting unnecessary and can play a critical role in indicating to the borrower whether or not its proposed amendments are likely to be acceptable to the bondholders.

Finally, in workouts and restructurings, the trustee can have a moderating and stabilising effect.

Law Debenture has unrivalled experience and expertise in all aspects of the trustee's role.